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JURISDICTIONAL LIMITS OF THE ENERGY CHARTER TREATY AND ITS INTERPLAY WITH RELATED TREATIES AND ARBITRATION RULES: THE NOTION OF INVESTOR

by

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ABSTRACT

The boom of bilateral investment treaties and trade agreements came with an increasing number of disputes between investors and states related to actions and omissions of states in respect of the protection of investors and their investments. These instruments made a significant contribution to the development and implementation of an economic and legal framework for the promotion and safeguard of investors and investments. They also played an important part in and improved the access of investors to dispute resolution mechanisms – and, in particular, to arbitration – for the protection of their investments.

In this vast network of treaties and agreements aspiring to offer investors proper conditions for a stable and predictable investment environment, the Energy Charter Treaty (ECT) stands out as a unique multilateral treaty aimed at facilitating transactions and investments in the energy field. The ECT came to life soon after the fall of the communist regimes across Europe and the dissolution of the Soviet Union, and it was motivated by the desire of the Western European states to secure their access to the much needed natural resources of the Eastern countries.

This Thesis undertakes the challenging task of clarifying the notion of 'Investor' within the ECT's framework and its related treaties and arbitration rules. The notion of 'Investor' is essential for the substantive and procedural protection of Investors and their Investments. Although the ECT provides for a definition of Investor, the notion of 'Investor' goes beyond this definition: it is shaped not only by the provisions of the ECT, but also by the related treaties and rules under the Investor–Contracting Party dispute resolution mechanism. It is also fundamental for the understanding of the notion of 'Investor' to consider it as it naturally interacts with the concepts of 'Contracting Party' and 'Investment'. The notion of 'Investor' has two essential characteristics: it is challenging to assign it with a precise definition – any attempt to define this notion will not comprehensively encompass all its features; and it is a flexible notion, tailored to suit the treaties and rules interacting with the ECT. The intrinsic complexity of the notion of 'Investor' is amplified by web of provisions of the ECT, not always comprehensible and straightforward. The speed of the ECT's negotiation was the determinant factor that contributed to the entry into force of the ECT, but also led to a compromise treaty. In this context, it is mandatory that the proper interpretation and analysis of the notion of 'Investor' be made in the light of the rules of treaty interpretation of the Vienna Convention on the Law of Treaties.

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LIST OF ABBREVIATIONS

ICSID Additional Facility Rules (also, AF)	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID
Am. J. Int'l L.	American Journal of International Law
Am. Rev. Int'l Arb.	American Review of International Arbitration
Am. Soc'y Int'l L. Proc.	American Society of International Law Proceedings
approx.	approximately
ARB	Arbitration
Arb. Int'l	Arbitration International
ASEAN	Association of Southeast Asian Nations
BASREC	Baltic Sea Region Energy Co–Operation
BIT (pl. BITs)	Bilateral Investment Treaty
Brit. Y.B. Int'l L.	British Yearbook of International Law
BSEC	Black Sea Economic Cooperation
Chi. J. Int'l L.	Chicago Journal of International Law
CIS	Commonwealth of Independent States
Colum. L. Rev.	Columbia Law Review
Cornell L. Q.	Cornell Law Quarterly
EBRD	European Bank for Reconstruction and Development
EC	European Community
EC Treaty	European Community Treaty
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECSC Treaty	Treaty establishing the European Coal and Steel Community
ECT	Energy Charter Treaty
ed. (pl. eds.)	editor
EEC	European Economic Community
EEC Treaty	Treaty establishing the European Economic Community
e.g.	*exempli gratia* (for example)
EJIL	European Journal of International Law
et seq.	*et sequentes* (and the following)
EU	European Union
EURATOM	European Atomic Energy Community
EURATOM Treaty	Treaty establishing the European Atomic Energy Community
Final Act	Final Act of the European Energy Charter Conference, Lisbon, 16–17 December 1994
FTA (pl. FTAs)	Free Trade Agreement
GAR	Global Arbitration Review
GATT	General Agreement on Tariffs and Trade
Harv. Int'l L.J.	Harvard International Law Journal
HMG	Her Majesty's Government
ibid.	*ibidem* (the same place)
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention for the Settlement of Investment Disputes between States and Nationals of Other States
ICSID Rep.	ICSID Reports

ICSID Rev.–FILJ	ICSID Review – Foreign Investment Law Journal
id.	*idem* (the same)
IEA	International Energy Agency
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
IMF	International Monetary Fund
Int. A.L.R.	International Arbitration Law Review
ICLQ	International and Comparative Law Quarterly
I.U.S.C.T.R.	Iran – United States Claims Tribunal Reports
J. Int'l Arb.	Journal of International Arbitration
GBP / £	Pound sterling / British pound
LON	League of Nations
LSG	Legal Sub–Group
Me. L. Rev.	Maine Law Review
Minn. L.Rev.	Minnesota Law Review
NGO (pl. NGOs)	Non–Governmental Organization
no. (pl. nos)	number
Nordic J. Int'l L.	Nordic Journal of International Law
OECD	Organisation for Economic Co–operation and Development
OGEL	Oil, Gas & Energy Law Intelligence Journal
OGEMID	Oil, Gas, Energy, Mining, Infrastructure and Investment Disputes
OJ	Official Journal of the European Union
OPEC	Organization of the Petroleum Exporting Countries
p. (pl. pp.)	page
para. (pl. paras)	paragraph
pl.	plural
PCIJ	Permanent Court of International Justice
PCA	Permanent Court of Arbitration
REIO (pl. REIOs)	Regional Economic Integration Organization
s.	section
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SIAR	Stockholm International Arbitration Review
Suffolk Transnat'l L. Rev.	Suffolk Transnational Law Review
TDM	Transnational Dispute Management Journal
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Trade L. & Dev.	Trade, Law & Development
United Kingdom (also, UK)	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UN–ECE	United Nations Economic Commission for Europe
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
United States (also, U.S.)	United States of America
USD / $	United States dollar
Soviet Union (also, USSR)	Union of Soviet Socialist Republics
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
v.	versus
vol.	volume
WTO	World Trade Organization
Yale J. Int'l L.	Yale Journal of International Law
Y.B. Com. Arb.	Yearbook Commercial Arbitration

INTRODUCTION

1. INVESTORS AND INVESTMENTS IN THE ENERGY FIELD

Energy resources are the driving force of the economic development, although their ownership lies, most often, in the hands of states.[1] The world's confirmed reserves of oil and gas have increased since 1980 with an average annual rate of 2.4% and 3.4% respectively.[2] More than half of the oil reserves are concentrated in the Middle East,[3] while over 70% of the world's gas reserves are in the fields located in Russia and the Middle East.[4] Over 80% of the coal deposits are found in six countries, amongst which, the United States (28.9%), Russia (19%), and China (13.9%).[5] In spite of the increase in the reserves of oil and gas, the global production in 2009 registered record drops.[6] For the European Union (EU), the data of 2008 shows imports exceeding exports, while in 2006 the import reliance was of 54%.[7] However, the European Commission considers that "import dependency is not a problem as such but requires appropriate policies."[8]

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[1] Energy is "one of the most important sources of "hard" foreign currency earnings and a major source of tax revenue". *See,* Energy Charter Secretariat, *The Energy Charter Treaty. A Reader's Guide*, p. 7, <http://www.encharter.org/fileadmin/user_upload/document/ECT_Guide_ENG.pdf> (last visited, 16 February 2011).

[2] Commission of the European Communities; *Second Strategic Energy Review. An EU Energy Security and Solidarity Action Plan; Europe's current and future energy position. Demand – resources – investments,* pp. 33–34, Brussels, 13 November 2008, SEC(2008) 2871, vol. 1. According to the *BP Statistical Review of World Energy 2010*, the proved oil reserves at the end of 2008 increased with more than 20% compared with the 1999 figure. *See*, *BP Statistical Review of World Energy 2010*, p. 6, <http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2008/STAGING/local_assets/2010_downloads/statistical_review_of_world_energy_full_report_2010.pdf> (last visited, 16 February 2011).

[3] *BP Statistical Review; supra* at FN 2, p. 6.

[4] *Ibid.*, p. 22. In 2009, the Middle East countries had a share of 40.6%, while Russia, 23.7%. (*id.*)

[5] *BP Statistical Review; supra* at FN 2, p. 32. The United States, Russia and China are followed by Australia (9.2%), India (7.1%) and Ukraine (4.1%).

[6] *Ibid.*, pp. 3–4.

[7] *Second Strategic Energy Review*; *supra* at FN 2, p. 8. Denmark is the only EU Member State that is completely energy independent, while Poland and United Kingdom have low import dependency (approx.

The limited nature of energy resources triggers significant trade that transcends national borders. By essence, the uneven distribution of oil, gas and coal supplies generates a range of worldwide relations that are complex and challenging: from exploration to production, distribution and consumption and other related activities without which the energy products would not reach their final destination.[9] Energy economy is no longer limited to the making of profit; environmental issues, for example, became the concern of the major players in the field, for energy companies and regulators alike.[10] Energy is going beyond conventional resources and expanding towards clean and renewable sources, such as wind and sunlight.[11]

Energy investments distinguish themselves from other forms of investment essentially by their large size and the lengthy period between the initial commitment and the first returns. Energy investments concerning exploration and development must materialize where resources are located, be it inland or off–shore. States, usually through their national companies, play an important role in energy investments, since they have the ownership rights over energy–related resources.[12] The sovereignty over natural resources places states in a comfortable position as it is the state that decides the energy

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20%). On the other hand, several EU Member States such as Ireland, Italy, Portugal and Spain are forced to import more than 80% of their energy demand, while Malta, Cyprus and Luxembourg are fully reliant on energy imports. *See, Second Strategic Energy Review*; *supra* at FN 2, p. 9.

[8] *Id.* But the EU's energy production has been declining since 2004. *See, Second Strategic Energy Review*; *supra* at FN 2, p. 9.

[9] For a presentation of the energy field, its players and mechanisms, *see,* Waelde, Thomas W.; *International Energy Law: Concepts, Context and Players*, 1(4) OGEL (2003).

[10] *See,* the BP Deepwater Horizon spill in the Gulf of Mexico, which commenced on 20 April 2010 with the explosion of the Deepwater Horizon rig and caused the leak of 5.2 million barrels into the Gulf of Mexico. The costs were estimated at over USD 6 billion. *See,* Pfeifer, Sylvia; *Costs of BP oil spill increase to $6bn*; Financial Times, 9 August 2010. Up to 10 February 2011, BP made payments of over USD 5 billion to individuals, businesses and government entities in connection with the spill. *See*, BP; *Claims and government payments Gulf of Mexico oil spill*, *Public report – data as of 10 February 2011*, <http://www.bp.com/sectiongenericarticle.do?categoryId=9034722&contentId=7064398> (last visited, 16 February 2011).

[11] Wind power generated in 2008 more than 1.5% of the world's electricity. *See*, Sawin, Janet L.; *Wind Power Increase in 2008 Exceeds 10–Year Average*, <http://vitalsigns.worldwatch.org/vs-trend/wind-power-increase-2008-exceeds-10-year-average> (last visited, 16 February 2011).

[12] But *see* the example of the United States, where the private ownership over minerals is significant. According to LOWE, the federal government owns 30% of United States mineral rights. *See,* Lowe, John S.; Oil and Gas Law in a Nutshell; 5th edition, St. Paul: Thomson West, 2009, p. 8.

policies and the resources that can be shared with foreign investors.[13] The risk associated with energy investments is significant given the size of the commitments and the duration of investments. The life span of energy investments often forces the modification of the terms of the agreements between investors and governments.[14]

Investors in the energy field range from small to large companies. Natural persons usually emerge as shareholders in these companies and rarely become visible in energy transactions. The energy sector is still dominated by major players,[15] multinational or international private companies, such as British Petroleum, ExxonMobil, EDF and E.ON, and national companies, for example, Petrobras (Brazil), Gazprom (Russia) and

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[13] *See,* the UN General Assembly Resolution 626, that

> "[…] *recommends* all Member States to refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources." (*UN General Assembly Resolution 626(VIII) of 21 December 1952*, emphasis original)

Also, the UN General Assembly Resolution 1803 refers to the "right of peoples and nationals to permanent sovereignty over their natural wealth and resources" and to the "exploration, development and disposition of such resources" that "should be in conformity with the rules and conditions which the peoples and nations freely consider". *See*, *UN General Assembly Resolution 1803(XVII) of 14 December 1962*, paras 1 and 2. The Resolution 1803, para. 4 also provides that "[n]ationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest".
See also, Yergin, Daniel; *The Prize: The Epic Quest for Oil, Money and Power,* New York: Free Press, 2009, p. 212:

> "If oil was power, it was also a symbol of sovereignty. That inevitably meant a collision between the objectives of oil companies and the interests of nation–states, a clash that was to become a lasting characteristic of international politics."

[14] For the types of contracts used in the energy field, *see,* Cameron, Peter; *International Energy Investment Law. The Pursuit of Stability*; New York: Oxford University Press, 2010, p. 36 *et seq.*; Lowe, J.S.; *supra* at FN 12, pp. 386 *et seq.;* Hollis Slocum, Sheila; Berresford, John W.; *Structuring Legal Relationships in Oil and Gas Exploration and Development in 'Frontier' Countries*, p. 37 *et seq.*, in Waelde, Thomas W.; Ndi, George K. (eds.); *International Oil and Gas Investment. Moving Eastward?,* London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff, 1994.

[15] *See,* Tomain, Joseph P.; Cudahy, Richard D.; *Energy Law in a Nutshell*; reprinted, St. Paul: Thomson West, 2004, p. 153: "In short, the story of oil is a story of multinational corporations and global politics." *See* also, Waelde, T.W.; *supra* at FN 9, pp. 43–48. But *see* also, the increasing role of international agencies and organizations. The International Energy Agency (IEA), which was initially established to co–ordinate the measures to be taken during oil supply emergency situations, is now acting as energy policy advisor for its twenty–eight member countries, amongst which, Member States of the EU, the United States and Canada. *See* further information at <http://www.iea.org/> (last visited, 16 February 2011). The Organization of the Petroleum Exporting Countries (OPEC) was created in 1960 by Iraq, Kuwait, Saudi Arabia and Venezuela with the objective to co–ordinate the petroleum policies of the member states. The OPEC has currently twelve members that account for more than 79% of the world's oil reserves. *See* further information at <http://www.opec.org/opec_web/en/data_graphs/330.htm> (last visited, 16 February 2011). Also important is the growing presence of the Energy Community founded by the *Treaty establishing the Energy Community*, 1 July 2006, between the European Union, Albania, Bosnia and Herzegovina, Croatia, former Yugoslav Republic of Macedonia, Montenegro, Serbia, the United Nations Interim Administration Mission in Kosovo, Moldova and Ukraine. *See*, <http://www.energy-community.org/portal/page/portal/ENC_HOME> (last visited, 16 February 2011).

Pemex (Mexico). The last decades of fluctuating prices for barrel of oil triggered some surprising mergers and market adjustments, for instance, the BP and Amoco merger of 1998 and the Exxon and Mobil merger of 1999.

Disputes involving energy companies are numerous and submitted for resolution to various venues, from mediation to domestic and international courts and commercial and investment arbitration. They are based on various binding instruments, from agreements between governments and private companies to bilateral and multilateral treaties. In 1950, the International Court of Justice (ICJ) dismissed the case between the United Kingdom and Iran concerning the termination of petroleum concessions in Iran of the Anglo–Iranian Oil Company for lack of jurisdiction.[16] In the *Lena Goldfields Case* of 1930,[17] the arbitral tribunal held the Soviet government liable to pay over GBP 8 million to Lena Goldfields Ltd., a British corporation, which was granted a concession with the exclusive right to mine gold and other minerals in the Ural Mountains and parts of Siberia. The energy disputes in *Aramco* and *Sapphire Cases* were both submitted to arbitration and remain notorious for the stabilization clauses contained in the concession agreement and in the petroleum agreement, respectively.[18] In 1971, the Government of Libya enacted a decree that nationalized the interests and properties in Libya of BP Exploration Company Ltd., and in 1973 continued applying these measures to other international oil companies in Libya. As a result of this policy, three arbitration proceedings had been initiated against Libya: by BP Exploration Company (*BP Case*),[19]

[16] *Anglo–Iranian Oil Co. Case,* Preliminary Objection, Judgment of 22 July 1952.
[17] *Lena Goldfields Ltd v. USSR,* Award of 3 September 1930. *See* also, Veeder, V.V.; *The* Lena Goldfields *Arbitration: The Historical Roots of Three Ideas*, 47 ICLQ 747 (1998); Nussbaum, Arthur; *The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government,* 36 Cornell L. Q. 31 (1950–1951).
[18] *Saudi Arabia v. Arabian American Oil Company*, Award of 23 August 1958, and *Sapphire International Petroleum Co v. National Iranian Oil Company*, Award of 15 March 1963.
[19] *British Petroleum Exploration (Libya) Company Ltd. v. Government of the Libyan Arab Republic*, Award of 10 October 1973.

Texaco Overseas Petroleum and California Asiatic Oil Company (*Texaco Case*),[20] and the third arbitration by the Libyan American Oil Company (*LIAMCO Case*).[21] Also important is the *Aminoil Case*,[22] where the dispute concerned a sixty–year concession contract between the government of Kuwait and the American Independent Oil Company.

With the growing number of investment treaties,[23] investors in the energy field began to look for alternative venues to national courts and commercial arbitration.[24] The International Centre for Settlement of Investment Disputes (ICSID), created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),[25] received more than 330 disputes based on BITs and other treaties offering protection to investors and their investments, or on the domestic law of the host state or on contracts between the disputing parties.[26] 39% of the cases submitted to the ICSID concern energy–related disputes,[27] while 4% of them are relying on the provisions of the Energy Charter Treaty (ECT).[28] If the disputes between states and energy investors mainly concerned direct expropriation claims, nowadays, the cases brought under treaties for the protection and promotion of investments also rely on

[20] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of the Libyan Arab Republic*, Award of 19 January 1977.
[21] *Libyan American Oil Company v. Government of the Libyan Arab Republic*, Award of 12 April 1977.
[22] *The Government of the State of Kuwait v. American Independent Oil Company,* Award of 24 March 1982. For further comments on the arbitration of petroleum disputes, *see,* Bishop, Doak R.; *International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea*, in Van den Berg, Albert Jan (ed.); XXIII Y.B. Com. Arb 1131 (1998).
[23] Bilateral Investment Treaties (BITs) are estimated today to be over 2,600, accompanied by numerous Free Trade Agreements (FTAs). *See*, UNCTAD; *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development,* p. xxii.
[24] *See,* Bowman, John P.; *Dispute Resolution Planning for the Oil and Gas Industry*, 16 ICSID Rev.–FILJ 332 (2001); Dundas, Hew R.; *Dispute Resolution in the Oil & Gas Industry: an Oilman's Perspective*, 1(3) TDM (2004).
[25] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 14 October 1966. The references are made to the version reprinted in 1 ICSID Reports 3 (1993).
[26] ICSID, *The ICSID Caseload – Statistics*, Issue 2011–1, pp. 7 and 10. The statistics take into consideration the cases submitted by 30 December 2010. *See* also, ICSID, *The ICSID Caseload – Statistics*, Issue 2010–2 and Issue 2010–1.
[27] *The ICSID Caseload – Statistics*, Issue 2011–1, *supra* at FN 26*,* p. 12.
[28] *Ibid.,* p. 10. The *Energy Charter Treaty* was signed on 17 December 1994 and entered into force on 16 April 1998. The references in this Thesis are made to the version printed in 34 ILM 373 (1995).

indirect expropriations through regulatory or administrative policies, such as the setting of tariffs or granting of licenses.[29]

The expansion of international instruments for the protection and promotion of investments brought visibility and complexity to investor–state disputes.[30] The substantive protection of investments, ranging from fair and equitable treatment standard to protection against unlawful expropriation, along with the procedural protection granted to investors and their investments are intended to strengthen the legal framework in which investments are made, and enhance transparency and stability.

2. THE EUROPEAN ENERGY CHARTER AND THE ENERGY CHARTER TREATY

Around 500 B.C., Heraclitus stated that "everything flows and nothing stands still".[31] This statement cannot be more accurate when referring to investments, investors and their protection. Evolving from customary law, and in particular from the rules concerning expropriation of aliens' property, to a body of law based on treaties and other agreements, investment law is concerned with investors and their investments. The notions of 'investor' and 'investment' are developing concepts. If decades ago lawyers and economists had in mind only foreign direct investments, currently,

[29] *See*, for example, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* etc.

[30] For the particularities of the disputes between investors and states, *see,* UNCTAD; *Investor–State Disputes. Prevention and Alternatives to Arbitration*, p. 10 *et seq.* According to this study, the investor–state disputes are mainly characterized by the following: they involve a sovereign as respondent; the investor challenges acts and measures or omissions of the state; they are governed by international law and concern violations of an international instrument; the relationship between the parties involves a long–term engagement; the claim of investor is often very high.

[31] Also, "*There is nothing permanent except change*".

investments include all kinds of rights and interests.[32] Also, the flux of investments is no longer restricted to flows from developed countries to developing countries.

Natural resources–related investments have always been a sensitive field with particular consequences: from exploitation to intervention measures, to ownership rights and exhaustibility, regulation and excessive risks. As explained by scholars, "foreign investors in these sectors have been particular targets of nationalistic actions on the part of host authorities."[33] The repositioning of the national economies after the fall of the communist regimes in Eurasia in 1989–1991 brought significant changes in the distribution of natural resources and economic wealth, along with the entrance of new players and the opening of investment opportunities. For the Eastern European states and the former Soviet countries, the freedom from the communist regime came with political and civil unrest and economic decline. Their industries and, in particular, the energy sector encountered problems in performance, with outdated technologies and products, and capital shortages. The dissolution of the Soviet Union in 1991 and the independence of the former Soviet republics increased the investment prospects for Western investors. However, this came along with a high investment risk, triggered by excessive bureaucracy, uncertainties in policies and procedures, inadequate infrastructure, political instability etc.[34] At the same time, the Western European states were going through unprecedented energy crisis. The security supply was the main

[32] Loibl, Gerhard; *International Economic Law*, p. 709, in Evans D., Malcom (ed.); *International Law*, 2nd edition, New York: Oxford University Press, 2006.
[33] Moran H., Theodore; *Foreign Direct Investment and development: The New Policy Agenda for Developing Countries and Economies in Transition,* Washington DC: Institute for International Economics, 1998, p. 141.
[34] *See,* Dorian, James P.; Khartukov, Eugene M.; *International Oil and Gas Investment in the CIS States*, p. 63, in Waelde, Thomas W. (ed.); *The Energy Charter Treaty. An East–West Gateway for Investment & Trade,* London: Kluwer Law International, 1996.

concern of the Member States of the EU, with consumption exceeding production with over 50% in 1990 and amounting to 12.5% of the world energy consumption.[35]

In this economic, political and social context, the idea of a multilateral energy treaty came to life. The Western European states foresaw the potential of the opening up of the former Soviet Union energy market and envisaged their role in securing the necessary energy resources and reducing their reliance on the OPEC supplies. The idea of a multilateral treaty in the energy field was launched at the meeting of the European Council in Dublin of 25–26 June 1990, where the Dutch Prime Minister LUBBERS, suggested the establishment of a European Energy Network.[36] The first step in achieving this objective was the signature of the European Energy Charter (European Charter) on 17 December 1991 by a large number of states, including Russia, the United States and the European Communities. The European Charter is no more than a political declaration, setting the objectives for the negotiation and implementation of a multilateral treaty in the energy field. The notion of 'energy', as employed by the European Charter, and later by the ECT, has a broad meaning, "embracing the whole course of handling energy; from geological prospecting to final consumption in different sectors of the economy",[37] including the activities linked to the energy industry. The European Charter sees the co–operation in the energy field as a crucial element in the social and economic development and the security of energy supply and

[35] European Communities; *Energy Yearly Statistics 1991*, Bruxelles: CECA–CEE–CEEA, 1993, pp. 2 and 4. In the first quarter of 1991, the net imports exceeded the production, and registered constant increase of over 2%. *See,* International Energy Agency; *Quarterly Oil Statistics and Energy Balances*, Third Quarter 1991; Paris: OECD/IEA, 1992, pp. 9–10.

[36] European Council*; Presidency Conclusions, Dublin 25 and 26 June 1990*, p. 10; Final Act of the European Energy Charter Conference, Lisbon, 16–17 December 1994 (Final Act), 34 ILM 373 (1995), p. 373, para. II. At the Ministerial Conference held in the Hague for the signature of the European Charter, CARDOSO E CUNHA, the European Energy Commissioner, stated that the European Charter

> "[…] represents an international undertaking of unprecedented proportions and highlights the importance of the energy sector for the development of our economies and societies." (*Speech by Mr Cardoso E Cunha at the Ministerial Conference for the signing of the European Energy Charter*, The Hague, 16 December 1991)

[37] Konoplyanik, Andrei A. with von Halem, Friedrich; *The Energy Charter Treaty: A Russian Perspective*, p. 165, in Waelde, T.W (ed.); *supra* at FN 34.

it refers to the promotion of international flow of investments, while signatories will "provide for a stable, transparent legal framework for foreign investments",[38] and commit to negotiate binding documents for the efficient implementation of the European Charter.[39]

Almost three years after the birth of the European Charter, the ECT was put forward for signature and ratification and came into force on 16 April 1998. The close relation between the European Charter and the ECT is not limited to the drafting history of the ECT. Article 2 of the ECT refers to the purpose of the ECT to "establish a legal framework in order to promote long–term cooperation in the energy field, […] in accordance with the objectives and principles of the Charter", while Article 41 confines the accession to the ECT only to signatories of the European Charter.[40]

Twenty years after the signature of the European Charter, there are still controversies regarding the original purpose and the reasons behind its creation. Almost unanimously, the literature considers that the main factor generating the idea of an energy treaty connecting East and West was the desire of Western countries to secure energy supply from the "beleaguered economies in transition".[41] The real expectations of the

[38] European Charter, Title II, point 4(1).

[39] *See* also, *Note for the attention of Mr Jones and Mr Guibal, Articles on the European Energy Charter from RH Greenwood*, where GREENWOOD discusses the necessity of legally binding texts for the implementation of the European Charter:

> "[…] it can be seen that the Charter is a wide ranging declaration of key importance for establishing a renewed energy industry and energy community across Europe and beyond. Nevertheless it was recognised from the beginning that these political declarations alone would not be sufficient to promote industrial investment and trade and would therefore need to be translated into legally binding texts, that is into international treaty." (Commission of the European Communities; *Note for the attention of Mr Jones and Mr Guibal, Articles on the European Energy Charter from RH Greenwood*, 09.04.92/XVII/04804)

[40] Art. 41 of the ECT provides that the ECT "shall be open for accession […] by states and Regional Economic Integration Organizations which have signed the Charter […]."

[41] Brazell, Lorna; *Draft Energy Charter Treaty: Trade, Competition, Investment and Environment*, 12 (3) Journal of Energy and Natural Resources Law 299 (1994), p. 302. Other authors agree with this: "[t]hrough the proposed energy co–operation, West European countries saw the chance to secure access to Eastern markets for their energy industries". *See,* Doré, Julia; *Negotiating the Energy Charter Treaty,* p. 139, in Waelde, T.W. (ed.); *supra* at FN 34.

signatories of the European Charter in 1991 were highly motivated by political and economic reasons. The Russian delegation believed that an Energy Charter would encourage investments in the energy sectors, but that there was also the danger that opening markets to Western companies would weaken the control of Russia over its strategic industries.[42] The aim of the Central and Eastern European states was to reduce their dependence on the former Soviet Union, as most of them fully relied on the former Soviet Union for their oil and gas supplies. The United States allegedly entered into negotiations hoping to prevent the Western European countries from monopolizing the energy markets and resources of Russia and the former Soviet republics.[43] The other non–European OECD countries – Australia, Canada and Japan – wanted to ensure their participation in the Eurasian energy market and to secure their membership in a multilateral trade and investment agreement to which Russia was a party.[44] By the time the European Charter was concluded, several other purposes had been taken into consideration: the economic reconstruction of the former communist states and the removal of barriers in the trade and investment relations with these countries,[45] the improvement of the economic relations between East and West, the efficient use and exploitation of natural resources, the protection of the environment, technological development and innovation in the energy field etc. The ECT appears to move to more balanced provisions than the European Charter, by encouraging the flow of investments

[42] *See,* Doré, Julia; De Bauw, Robert; *The Energy Charter Treaty. Origins, Aims and Prospects,* London: Royal Institute of International Affairs, 1995, p. 23.
[43] *Ibid*, p. 25. *See* also, the *U.S. Government Statement, European Energy Charter Meeting, Lisbon, Portugal, 15–16 December 1994*; 34 ILM 557 (1995).
[44] Doré, J.; De Bauw, R.; *supra* at FN 42, p. 25. The authors refer to Japan who, at the time of the of negotiation of the European Charter, was unable to enter into bilateral agreements with the Russian Federation due to the continuing dispute over the Kurile Islands.
[45] The main barriers to investment and trade in the former Communist countries "arise from legal and administrative complexities and uncertainties, such as absent or confusing legislation and unclear legal authority over resources". *See,* Doré, J.; De Bauw, R.; *supra* at FN 42, p. xiv. Besides these legal and administrative complexities and uncertainties, the political instability in these countries played an important role in preventing the establishment of investments and the development of trade and transit.

not only from West to East, but also from East to West,[46] and, thus, creating the potential for one of the world's largest energy markets.

The ECT is sometimes referred to as a "free trade agreement",[47] or as a "post–Cold War miracle".[48] Negotiated between July 1991 and December 1994, the ECT is the only multilateral document for the protection of investments (in the energy field) that succeeded in being negotiated, signed and entered into force in such a short period.[49] The fact that the ECT, by creating a multilateral regime for the protection and promotion of foreign investments in the energy field, entered into force is, in itself, a success.[50] The ECT was signed at the Final Plenary Session of the European Energy Charter Conference in Lisbon on 16–17 December 1994 and it was open for signature from 17 December 1994 to 16 June 1995.[51] Up to date, the following states and Regional Economic Integration Organizations consented to be bound by the ECT:[52]

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[46] The ECT's symmetry also encourages the East–East and West–West investments. Russian energy companies – *see* for example, Lukoil, Gazprom – have proved successful in investing in the Eastern European and former Soviet states. One author referred to this and spotted a "distinct advantage [of the Russian companies] over the Western newcomers". *See,* Andrews–Speed, Philip; *The Energy Charter Treaty: Its Importance to Western European Energy Companies*, 9 Oil and Gas Law and Taxation Review 373 (1996), p. 377. This distinct advantage lies in Russia's political, economic and cultural influence exercised for over fifty years.

[47] Herman, Lawrence L.; *NAFTA and the ECT: Divergent Approaches with a Core of Harmony*, 15 Journal of Energy and Natural Resources Law 129 (1997), p. 130.

[48] Samuels, David; *Power Surge*, 2(2) GAR April/May 2007, p. 10.

[49] It is often seen that the success of the conclusion of the ECT lies in the speed of its negotiation, also referred to as "the ethos of negotiation" of the ECT. *See,* Samuels, D.; *supra* at FN 48, p. 10.

[50] For unsuccessful attempts to create a multilateral framework for investments, *see,* Wendrich, Claudia; *The World Bank Guidelines as a Foundation for a Global Investment Treaty: A Problem–Oriented Approach;* 2(5) TDM (2005); Tschofen, Franziska; *Multilateral Approaches to Treatment of Foreign Investments;* 7 ICSID Rev.—FILJ 384 (1992).

Initially, the ECT was planned to be negotiated in one year, but various factors prevented the completion of the negotiations according to the original timetable. *See;* Doré, J.; *supra* at FN 41, p. 137. DORÉ gives several reasons for the delay in reaching the final draft of the ECT. First, the timetable reflected "strong political ambitions". It was thought that the short negotiation period will result in a speedy agreement and will maintain the high level of enthusiasm. However, it turned out that agreeing on legal provisions was not that easy as dealing with political statements. Second, the complexity of the issues came to surface only after the negotiations begun. Third, the ECT drafters had to implement free trade concepts that were completely new to the former Soviet bloc. Needles to say that the negotiations had been challenged by the disputes between the Western delegations. For further discussions, *see,* Doré, J.; *supra* at FN 41, pp. 137–138.

[51] *See,* Final Act; *supra* at FN 36.

[52] The status of Contracting Party to the ECT should not be mistaken for the membership or observership standing to the Energy Charter Process. The members of the Energy Charter Process are either signatories

a. Contracting Parties to the ECT: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, the European Communities, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, the Former, Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom and Uzbekistan.[53]

b. Signatories of the ECT: Australia, Belarus, Iceland, Norway.[54]

The scope of the ECT is not to regulate in detail all issues concerning the energy field, but to provide a "framework" based on which the Contracting Parties can further

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or Contracting Parties to the ECT. Observership is considered to be "a "light" form of participation in the Charter Process". *See, The Energy Charter Treaty. A Reader's Guide*; *supra* at FN 1, p. 66. There are two categories of observers: (i) observers who have signed the European Charter (Afghanistan, Canada, Indonesia, Jordan, Pakistan, Serbia, Syria, United States); and (ii) observers who have not signed the European Charter (Algeria, Bahrain, China, Egypt, Iran, Korea, Kuwait, Morocco, Nigeria, Oman, Palestinian National Authority, Qatar, Saudi Arabia, Tunisia, United Arab Emirates, Venezuela, the Association of Southeast Asian Nations (ASEAN) and the Baltic Sea Region Energy Co–Operation (BASREC), the Black Sea Economic Cooperation (BSEC), the CIS Electric Power Council, the European Bank for Reconstruction and Development (EBRD), the IEA, the OECD, the UN Economic Commission for Europe (UN–ECE), the World Bank, the World Trade Organization (WTO)). The status of observer to the Energy Charter Process may be a transitional step towards full membership. *See, The Energy Charter Treaty. A Reader's Guide*; *supra* at FN 1, p. 67.

[53] Major producers of energy have not signed or ratified the ECT, while major consumers of energy are regarding the ECT in a favourable light. The ECT is sometimes viewed as a club for rich countries, as no African, Asian or Latin American states are part of it. This situation is frequently blamed on the demanding conditions for the accession to the ECT. *See,* Doré, J.; De Bauw, R.; *supra* at FN 42, p. 88.

[54] Relying on the provisions of Art. 49 of the ECT, on 20 August 2009, the Russian Federation informed the Depository, the Government of the Portuguese Republic, that it did not intend to become a Contracting Party to the ECT and the Protocol on Energy Efficiency and Related Environmental Aspects. *See* further, <http://www.encharter.org/index.php?id=414&L=0.#c1338> (last visited, 16 February 2011). Pursuant to Art. 45(3)(a) of the ECT, this notification results in the termination of the provisional application of the ECT upon the expiration of sixty days from the date on which the notification is received by the Depository. *See* also, the plans of the Russian Federation to negotiate a new energy treaty (Presidency of Russia; *Conceptual Approach to the New Legal Framework for Energy Cooperation (Goals and Principles)*, 21 April 2009; *Draft Convention on Ensuring International Energy Security*, <http://ua-energy.org/upload/files/Convention-engl1.pdf> (last visited, 16 February 2011)) and the comments on Russia's decision to terminate the provisional application in Konoplyanik, Andrei A.; *Why is Russia Opting Out of the Energy Charter?*, 56(2) International Affairs 84 (2010).

negotiate various sets of rules applicable in the energy area.[55] Article 2 of the ECT refers to the purpose of the ECT to establish

> "[…] a legal framework in order to promote long–term co–operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."

The purpose of the ECT is also reaffirmed in its Preamble, which refers to the desire of the drafters to "catalyse economic growth by means of measures to liberalize investment and trade in energy".[56] Besides the core provisions in the Preamble and the eight Parts, totalling fifty articles,[57] the ECT includes a number of other instruments that are part of the ECT. There are fourteen annexes and five decisions with respect to the ECT,[58] twenty–two understandings,[59] seven declarations of the signatories,[60] and, according to the Energy Charter Secretariat, "few declarations that have been made outside the Final Act".[61] The ECT is also supplemented by the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects,[62] and amended by the Trade Amendment.[63]

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[55] Art. 33(1) of the ECT provides for the negotiation of "Energy Charter Protocols or Declarations in order to pursue the objectives and principles of the Charter".
The early draft Art. 2 of the ECT also referred to the realization of the scope of the ECT through "the principles for the development and implementation of an economic and legal framework based on market principles and state sovereignty over energy resources", which would "encourage investment", "the development of trade and security of supply" and the protection of the environment, among others. *See*, Art. 2(2) of the *Basic Agreement of 20 January 1992,* 4/92 BA 6.
[56] Preamble of the ECT, para. 5.
[57] It is relevant to note here the provisions regarding the institutions established by the ECT: the Energy Charter Conference, which is the decision–making body of the ECT, formed out of the representatives of the Contracting Parties (Art. 34 of the ECT); and the Energy Charter Secretariat, which is assisting the Energy Charter Conference in carrying out the functions set forth in the ECT (Art. 35 of the ECT).
[58] *See*, Annex 2 to the Final Act; *supra* at FN 36, p. 443.
[59] Understandings are binding on the Contracting Parties who consented to them. *See,* Final Act, para. IV; *supra* at FN 36, p. 374.
[60] Art. 1(13)(b) of the ECT defines 'declaration' as a non–binding instrument authorized and approved by the Charter Conference, which is entered into by two or more Contracting Parties to complement or supplement the provisions of the ECT.
[61] *The Energy Charter Treaty. A Reader's Guide; supra* at FN 1, p. 62.
[62] The Protocol entered into force at the same time as the ECT. Art. 1(13)(a) of the ECT identifies the 'protocol' as a treaty entered into by two or more Contracting Parties in order to complement, supplement, extend or amplify the provisions of the ECT.
[63] The Trade Amendment entered into force on 21 January 2010 and replaced the trading regime based on the General Agreement on Tariffs and Trade (GATT) with the one of the WTO.

The ECT is limited in application to the energy field and it is structured on three main pillars: trade, transit and investment, but also contains important provisions on competition, transfer of technology, access to capital, environmental protection, energy efficiency and taxation in the energy field. The trade–related provisions of the ECT are aimed to assist economies in transition towards membership of the WTO system. The transit provisions underline the necessity for each Contracting Party to take the appropriate measures to facilitate transit in accordance with the principle of freedom of transit and without distinction as to the origin, destination, ownership or pricing, and without imposing unreasonable delays, restrictions and charges.[64] Probably the most important feature of the ECT lies in its provisions on the promotion and protection of Investments under Part III. The ECT also provides for the resolution of disputes between Investors and Contracting Parties concerning alleged breaches of the obligations for the promotion and protection of Investments by the Contracting Parties.

The role of the ECT is to facilitate transactions and investments in the energy field by reducing political and regulatory risks, as a natural response to the increasing globalization of the economy. It provides for comprehensive provisions for the promotion and protection of Investors and their Investments in the energy field. Nevertheless, the short negotiation period of the ECT and the conflicting interests of the

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The negotiations on the ECT Transit Protocol began in 2000 and resulted in a draft Protocol of 31 October 2003, which is still under discussion. *See,* <http://www.encharter.org/index.php?id=37&L=0> (last visited, 16 February 2011), and Energy Charter Secretariat; *Road Map for the Modernisation of the Energy Charter Process*, 24 November 2010.

[64] The transit provisions under the ECT have been extensively debated, but little used, during the gas disputes between Ukraine and Russia. There were a number of disputes between Gazprom (the Russian state–controlled gas supplier) and Naftogaz Ukrainy (the Ukrainian national oil and gas company) over natural gas supplies, prices and debts. A major dispute occurred at the end of December 2008 and culminated with the cut off of the delivery of gas to Ukraine on 1 January 2009. The dispute affected eighteen European states with significant cut offs of their gas supply from Russia through Ukraine. On 9 January 2009, ANDRÉ MERNIER, the Secretary General of the Energy Charter Secretariat, stressed the importance of the principle of uninterrupted transit, which is one of the core principles of the Energy Charter Treaty. *See*, Energy Charter Secretariat; *Statement of the Secretary General on the Recent Developments in the Russia–Ukraine Gas Dispute*. *See* also, Konoplyanik, Andrei A.; *Breaking with the past,* 4(4) OGEL (2006); Riley, Alan; *The Coming of the Russian Gas Deficit: Consequences and Solutions,* 5(2) OGEL (2007); Cameron, P.; *supra* at FN 14, pp. 343–347.

negotiating parties required some concessions to be made. The result is a treaty of extraordinary profile, interacting in a unique way with other international instruments, but which was left with ambiguous provisions. It is argued, however, that "despite its shortcomings the ECT offers significant and in some cases groundbreaking legal protections for trade and investment."[65]

3. THE NOTION OF INVESTOR IN CONTEXT

The ECT, as pointed out by an author, "did not come out of the blue".[66] It forms part of a vast network of bilateral and multilateral instruments currently in force and other numerous failed draft instruments, aiming at encouraging the flow of foreign investments into the contracting parties.[67] This objective is accomplished by providing investors and their investments a minimum standard of treatment and procedural remedies for enforcing this treatment. While these instruments are concluded between states and/or other regional or international organizations, the beneficiaries of their provisions are the investors of the contracting parties. For acquiring the benefits of these investment instruments, the quality of investor alone is not sufficient. As the purpose is to protect and promote investments into the contracting parties, investor must have an

[65] Bamberger, Craig S.; *An Overview of the Energy Charter Treaty*, p. 3, in Waelde, T.W. (ed.); *supra* at FN 34.

[66] Waelde, Thomas W.; *International Investment under the 1994 Energy Charter Treaty. Legal, Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, p. 257, in Waelde, T. W. (ed.); *supra* at FN 34.

[67] Referring to the advantage of multilateral treaties over bilateral treaties in the field of investment protection, LAUTERPACHT concluded that

> "[…] it enables a potential recipient State to participate in the system of property protection without the attendant political complications involved in the conclusion of a bilateral treaty of friendship, commerce and navigation; though it should perhaps be recognised that this political advantage may to some extent be offset in those cases where the provenance of a multilateral convention is a geographically circumscribed group of States". (Lauterpacht, Eli; *The Drafting of Treaties for the Protection of Investment,* 3 ICLQ Supplementary Publication 18 (1962), p. 24)

investment and it is the investment treaty that lays down the requirements for investor and investments.[68]

Although the ECT is not limited to providing safeguards for Investors and their Investments, these provisions are probably the most used in practice.[69] Arbitration, in particular, proved to be an efficient mechanism for enforcing the obligations of the Contracting Parties toward Investors. There are currently over twenty–five arbitration cases submitted by ECT Investors concerning alleged breaches of the obligations of the Contracting Parties to provide protection to Investments of Investors.[70]

The obligations of the Contracting Parties to promote and protect Investments of Investors are found in Part III of the ECT. Under these provisions, Contracting Parties shall commit to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment and most constant protection and security; shall not in any way impair by unreasonable measures the management, maintenance, use, enjoyment or disposal of such Investments;[71] and shall accord to Investments and their related activities treatment no less favourable than that which it accords to Investments of own Investors or of the Investors of any other Contracting Party or third state, whichever is the most favourable. Article 12 of the ECT provides for the compensation

[68] There is no standard definition of the notions of 'investor' or 'investment', although some common features emerge from the investment treaties and instruments.

[69] For simplicity, the term 'investment treaty' includes the ECT, although the protection and promotion of investments is one of the areas covered by the provisions of the ECT.
As pointed out by scholars, the ECT has "languished in relative obscurity for several years" until it became "a vitally important multilateral instrument for the promotion and protection of foreign investment in the energy sector." *See,* Gaillard, Emmanuel; McNeill, Mark; *The Energy Charter Treaty*, p. 37, in Yannaca–Small, Katia (ed.); *Arbitration under International Investment Agreements: A guide to the Key Issues*, New York: Oxford University Press, 2010.

[70] The Energy Charter Secretariat records twenty–seven arbitration cases submitted by 16 February 2011, at <http://www.encharter.org/index.php?id=213&L=1%252F> (last visited, 16 February 2011). Besides these twenty–seven cases, other three ECT cases are reported by internet sources: *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. and the Government of Mongolia and Monatom Co. Ltd.*; *Mohammad Ammar Al–Bahloul v. Republic of Tajikistan*; and *Türkiye Petrolleri Anonim Ortaklığı v. Republic of Kazakhstan*.

[71] Art. 10(1) of the ECT.

of Investors for losses caused by war or other armed conflict, state of national emergency, civil disturbance or other similar event in the Area of a Contracting Party. Pursuant to Article 13 of the ECT, Investments shall not be unlawfully nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation. Contracting Parties guarantee the freedom of transfer of funds, without delay and in free convertible currency.[72] These treaty obligations are enforceable against the Contracting Parties under the procedural remedies provided for in Article 26 of the ECT.[73]

The ECT is not a self–contained treaty. The disputes between Investors and Contracting Parties concerning alleged breaches of the obligations for the promotion and protection of Investments must be submitted to institutions or structures outside the ECT.[74]

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[72] Art. 14 of the ECT.

[73] Art. 26 of the ECT provides, among others, for the following:

> "(1) 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 shall, if possible, be settled amicably.
> (2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
> (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
> (c) in accordance with the following paragraphs of this Article. […]
> (4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:
> (a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or
> (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;
> (b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or
> (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce."

[74] Disputes between Contracting Parties to the ECT concerning the application and interpretation of the ECT shall be resolved through *ad hoc* arbitration in accordance with the provisions of Art. 27 of the ECT. In respect to the disputes between Investors and Contracting Parties, the early drafts of the ECT provided for conciliation with the Energy Charter Secretariat and international arbitration under the UNCITRAL Rules. *See*, Art. 32 of the *Basic Protocol of 11 September 1992,* 8/91 BP 2. Following the proposal of the United States delegation, supported by Switzerland, the draft ECT included the ICSID option (ICSID Convention and the ICSID Additional Facility Rules), mandatory if after a period of nine months there was no agreement on the resolution mechanism to be followed:

Investors may choose to present their claims against Contracting Parties to courts or administrative tribunals, to arbitration or conciliation or to a dispute resolution mechanism previously agreed with the respondent Contracting Party.[75] Where Investors opt for arbitration,[76] they have the choice between the ICSID, under the provisions of the ICSID Convention or of the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID (ICSID Additional Facility Rules),[77] the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) or arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules).[78]

The notion of 'Investor' is essential for both substantive and procedural protections granted by the ECT. Only Investors within the meaning of the ECT may claim protection of their Investments in accordance with Part III of the ECT, and only these Investors have access to the remedies offered by the ECT in case of breaches by Contracting Parties of their obligations to protect these Investments of Investors. The definition of Investor under Article 1(7)(a) of the ECT refers to:

> "[…] (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
> (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party."

Thus, the definition of the term 'Investor' concerns natural persons and legal entities and it essentially connects Investors to the Contracting Parties to the ECT. Nationality is

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"If after nine month from written notification of the claim there is no agreement to any of the alternative procedures described above, the parties to the dispute shall be bound to submit it to the International Centre for the Settlement of Investment Disputes (sic!)." (Art. 32(3) of the *Basic Agreement of 31 October 1991*, 21/91 BA 4)

[75] Art. 26(2) of the ECT.

[76] *See,* Art. 26(4) of the ECT.

[77] *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID*, as amended on 10 April 2006.

[78] *UNCITRAL Arbitration Rules*, amended and effective as of 15 August 2010.

not the only bond between an Investor and a Contracting Party accepted by the ECT. Permanent residents can also avail themselves of the protection of the ECT. Similarly, not only companies may qualify as Investors under the ECT, but also any other organization organized in accordance with the laws of a Contracting Party to the ECT. While the provisions of Article 1(7)(a) allow natural persons and legal entities to be covered by the ECT, they are not, however, sufficient for granting the protection of Part III of the ECT and allowing access to the Investor–Contracting Party dispute resolution mechanisms. First, the commitment of the Contracting Parties is to protect and promote Investments of Investors, and only in a few cases to protect Investors alone. Article 10(1) of the ECT refers to "commitment to accord […] Investments of Investors", that "Investments shall also enjoy the most constant protection and security", while the Contracting Parties "shall observe any obligations […] with an Investor or an Investment of an Investor". Secondly, Article 26(1) of the ECT, which provides for the consent of the Contracting Parties over the disputes with Investors,[79] refers to:

> "[d]isputes 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 […]."[80]

The procedural protection of the ECT is, thus, granted where the dispute between the Investor and the Contracting Party is related to an Investment. Consequently, the

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[79] Art. 26 represents the offer of consent of the Contracting Parties to the ECT on the disputes to be submitted to the Investor–Contracting Party dispute resolution mechanism.

[80] The first draft of this provision limited the disputes to be submitted to Investor–Contracting Party dispute resolution mechanism to

> "[…] legal disputes between an investor of one Contracting Party and another Contracting Party in relation to an investment of the former concerning:
> (a) the amount or payment of compensation under Articles 22 [current Art. 12, Compensation for Losses] or 23 [current Art. 13, Expropriation] of this Agreement, or
> (b) any other matter consequential upon an act of expropriation in accordance with Article 23 of this Agreement, or
> (c) the consequences of the non–implementation, or of the incorrect implementation, of Article 24 [current Art. 14, Transfers Related to Investments] of this Agreement." (Art. 32(1) of the *Basic Protocol of 11 September 1991*, 8/91 BP 2)

The following drafts referred to

> "[d]isputes between an investor of one Contracting Party and any other Contracting Party concerning an obligation of the latter under Part III of this Agreement in relation to an investment of the former […]." (Art. 32(1) of the *Basic Agreement of 31 October 1991*, 21/91 BA 4)

jurisdiction over a dispute between an Investor and a Contracting Party concerning alleged breaches of the obligations of the latter under Part III of the ECT exist only when personal jurisdiction (*ratione personae*), i.e. the existence of an Investor, and the material jurisdiction (*ratione materiae*), i.e. an Investment in the Area of the respondent Contracting Party coexist. A strong case of unlawful expropriation, for example, may collapse at the jurisdictional stage in the absence of these two key elements.

4. SCOPE OF THE THESIS

This Thesis provides an inclusive analysis of the notion of 'Investor' within the meaning of the ECT, starting from the definition of Investor under Article 1(7) of the ECT and the consent expressed in Article 26(1) of the ECT in respect to the types of disputes that can be submitted to the Investor–Contracting Party resolution mechanism. The research reveals that the notion of 'Investor' is influenced by whether the discussion is confined to the substantive protection under Part III of the ECT, or it is expanded to incorporate the procedural remedies under Article 26. This latter case includes the interplay between the ECT and the related treaties and rules. Several key issues are raised throughout the Thesis, thus revealing the broad and, sometimes, ambiguous wording of the provisions of the ECT in respect of the notion of 'Investor'. These issues are revisited in the 'Conclusions' to the Thesis and some solutions are suggested.

The analysis of the notion of 'Investor' commences with the concept of 'Contracting Party' to the ECT.[81] Investor is essentially connected to a Contracting Party, and from

[81] The analysis is thus limited to the notion of 'Contracting Party' as this is connected with the status of Investor under the ECT. Consequently, the Thesis is not discussing the situation where Contracting

this point of view, the clarification of the notion of 'Contracting Party' to the ECT is required. The examination of the notion of 'Investor' is not complete without a brief look into the concept of 'Investment'. The notions of 'Investor' and 'Investment' are indissolubly connected. The substantive and procedural protection offered by the ECT to Investor cannot be present in the absence of an Investment. As the procedural remedies are not accomplished by the ECT alone, but together with related treaties and arbitration rules, the notions of 'Investor', 'Contracting Party' and 'Investment' must be clarified not only within the meaning of the ECT, but also with a view of the interplay between the ECT and these related treaties and rules. For the substantive protection of the ECT, the interaction with these treaties and rules presents little relevance; however, for the enforcement of Investor's rights under the provisions for the protection of Investments, Investors must observe the limitations imposed by these instruments. At the same time, the relationship between the ECT and the related treaties and rules is relevant for arbitral tribunals constituted under Article 26 of the ECT. These tribunals must have jurisdiction under both the ECT and the relevant treaty or arbitration rules.[82] In the ECT case of *Kardassopoulos v. Georgia*,[83] the arbitral tribunal referred to this in the context of its jurisdiction *ratione materiae,* and concluded that

> "[i]n order for the Tribunal to have jurisdiction *ratione materiae* over the present dispute, it must be found to have jurisdiction under the ICSID Convention, and under the ECT […]."[84]

Parties are respondents under Art. 26 of the ECT, although some of the issues analysed here apply irrespective of the procedural position of the Contracting Parties.

[82] I.e., jurisdiction *ratione materiae, ratione personae, ratione voluntatis and ratione temporis.*

[83] *Ioannis Kardassopoulos v. Georgia*, Decision on Jurisdiction of 6 July 2007. The dispute between Mr Ioannis Kardassopoulos and Georgia relates to the interests held by the claimant, together with Mr Ron Fuchs, an Israeli citizen, in the development of an oil pipeline for the transport of oil from Azerbaijan to the Black Sea, through Georgia. *See*, *Kardassopoulos v. Georgia; supra*, para. 13 *et seq.* As Israel is not a signatory of the ECT, Mr Fuchs submitted his claims to the ICSID separately, relying on the provisions of the Israel–Georgia BIT. The same tribunal heard both cases and in 2010 issued a joint award for both claimants. *See*, *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, Award of 3 March 2010.

[84] *Kardassopoulos v. Georgia, supra* at FN 83*,* para. 113, emphasis original.

The main research objective of this Thesis is the clarification of the meaning of Investor by highlighting the problems and suggesting solutions for the proper understanding of this notion, while keeping the integrity of the provisions of the ECT as they interact with related treaties and arbitration rules. Several secondary questions arise from the main research question.

The first one refers to the meaning of the term of 'Contracting Party' to the ECT, relevant in the context of the notion of 'Investor'. From this perspective, the consent to be bound by the ECT, the entry into force and withdrawal from the ECT, the temporal and territorial application of the ECT and the consequences of the participation of the European Communities and the EU in the ECT are issues that clarify the notion of 'Contracting Party' to the ECT. The analysis reveals that specific issues are raised by the provisional and territorial application of the ECT, with significant consequences for the notion of 'Investor'. As it will be explained, Investors of a signatory may avail themselves of the protection of the ECT if the signatory applies the ECT on a provisional basis. Further, the question whether a territory of a Contracting Party is covered by the ECT may determine the quality of Investor, as well as the competence of an arbitral tribunal over a dispute of an Investor that made an Investment in that territory of the Contracting Party. However, as it will be discussed in Chapter I, these issues are controversial.

The second research question concerns the notion of 'Investor' *per se* and attempts to examine the various links between Investor and Contracting Parties that are relevant in the context of the ECT. The Thesis examines natural persons and legal entities as 'Investors' under the ECT and identifies the main problems triggered by the broad language of the provisions of the ECT. The first issue, although not yet considered by

arbitral tribunals, concerns dual nationality of natural persons and brings into attention not only the uncertainty of the provisions of the ECT – also highlighted in the documents of negotiation of the ECT -, but also the role of diplomatic protection rules in the context of investment law and arbitration. The second and probably the most unsettled problem in investment law in general refers to the relation between shareholders/beneficiaries and companies when the conduct of Contracting Parties causes prejudices to these companies and, indirectly, to their shareholders or beneficiaries. The analysis of the notion of 'Investor' identifies issues of parallel proceedings – when the conduct of a Contracting Party may be exploited by both companies and shareholders or other beneficiaries - and treaty shopping – for example when nationals of a third state set up shell companies in Contracting Parties in order to get access to the protection of the ECT. Chapter II of the Thesis also discusses whether the limitations inserted in the ECT to counteract the abuse of its provisions concerning the notion of 'Investor' – such as the 'denial of benefits' clause – are functional or properly interpreted by arbitral tribunals. Other important issues in connection with the second research question concern state-owned companies and non-governmental organisations and the requirement of legal personality of organizations.

The third subsidiary question arising out of the main research question refers to the meaning of the notion of 'Investment'. As with the concept of 'Contracting Party', the notion of 'Investor' is essentially connected to the one of 'Investment', and the explanation of this latter concept is necessary for a complete examination of the notion of 'Investor' under the ECT. The definition of 'Investment' in Article 1(6) of the ECT was seen by arbitral tribunals as broad and encompassing any kind of asset, which lead to the conclusion in Petrobart v. Kyrgyzstan that even ordinary commercial transactions can be included in the notion of 'Investment', thus broadening the circle of Investors

under the ECT. Other issues directly affecting the notion of 'Investor', such as the origin of Investment or of the invested capital, are also scrutinized.

The issues spotlighted by these research questions are essential for the clarification of the notion of 'Investor' since they raise the question as to whether they are the result of the ambiguous or broad wording of the provisions of the ECT or of the misinterpretation of these provisions by arbitral tribunals. They are also crucial for Investors in their decision to submit their disputes to one or other dispute resolution mechanisms provided for in Article 26 of the ECT.

Although designed as a comprehensive analysis of the notion of 'Investor' under the ECT, this Thesis suffers important limitations, most of them due to the limited size of a research of this nature. The research is restricted to the notion of 'Investor' under the ECT, as it interacts with four main instruments: the ICSID Convention, the ICSID Additional Facility Rules, the SCC Rules,[85] and the UNCITRAL Rules. Even though practice shows that there are significant arbitration cases these instruments,[86] the lack of substantive provisions under the SCC and UNCITRAL Rules limit their relevance for the purpose of this research. The ICSID Additional Facility Rules are contingent upon the ICSID Convention, and the notions of 'investment' and 'nationality' employed in the Rules are essentially the ones under the ICSID Convention.[87] Consequently, the

[85] *SCC Arbitration Rules*, 1 January 2010.
[86] Out of the thirty known arbitration cases under the ECT, eighteen were submitted to the ICSID, seven to the SCC and five under the UNCITRAL Rules. *See* also, <http://www.encharter.org/index.php?id=213&L=1%252F> (last visited, 16 February 2011).
[87] *See*, Toriello, Pierluigi; *The Additional Facility of the International Centre for Settlement of Investment Disputes*, 4 Italian Yearbook of International Law 59 (1978–1979), pp. 72-76. Art. 2 of the ICSID Additional Facility Rules refers to the following:

> "The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories:
> (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State;

reference to the ICSID Additional Facility Rules is made when the Rules diverge from the provisions of the ICSID Convention.[88] Thus, the focus will be first, on the notion of 'Investor' under the ECT and second, on the particularization of this notion in the context of the ICSID Convention. The Thesis does not address procedural issues related to the notion of 'Investor', such as the burden of proof; the relevance of time for the notion of 'Investor', including issues of continuous nationality; the authority of arbitral tribunals to assess the fulfilment of the Investor requirement; parallel proceedings etc. While the Thesis does not address these procedural issues, few comments are made in order to preserve the inclusive analysis when they become relevant for the clarification of the notion of 'Investor'.

The resources on which the Thesis relies are, to a great extent, confined to sources in English language, although from time to time, reference is made to resources in French, Portuguese, Spanish and Romanian languages. In the context of the notion of 'Investor', the research is restricted to the resolution by arbitration of disputes between Investors and Contracting Parties, mainly because of the public availability of the cases. The Thesis is based on material available on or before 16 February 2011.

5. PREVIOUS WRITINGS

More than ten years have passed since the ECT came to life, during which an important number of disputes between Investor and Contracting Parties have been submitted to the arbitration mechanism under Article 26 of the ECT. In spite of this, the analysis of the

(b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; and
(c) fact-finding proceedings.
The administration of proceedings authorized by these Rules is hereinafter referred to as the Additional Facility."

[88] *See* for example, with respect to the Contracting parties to the ECT in Chapter I.2.2.1 below.

notion of 'Investor' in the scholarly writings remains inadequate to the complexity of issues raised by the ECT.

There has not been done a comprehensive research on the notion of 'Investor' under the ECT, although several issues, such as the dual nationality of Investors, the legal standing of non–profit organisations or the relevance of the EU citizenship and permanent residence, even though not yet tested in practice, raise numerous controversies. The main publication concerning the ECT was published in 1996 and brought together various papers regarding the history of the ECT, the energy framework in which the idea of the ECT developed, and the trade, transit and investment regimes under the ECT. This collection of essays, edited by THOMAS WAELDE is a valuable resource for understanding the context in which the ECT came to life and the general features and provisions of the ECT. It does not offer, however, a thorough analysis of the investment provisions, as it essentially provides for an overview of the ECT. Notable publications have resulted from two conferences organized by the Energy Charter Secretariat in 2005 and 2007: *Investment Arbitration and the Energy Charter Treaty*,[89] and *Investment Protection and the Energy Charter Treaty*.[90] They gather essays on the substantive and procedural protection of Investors and their Investments under the ECT and raise challenging debates over various subjects concerning the investment protection of the ECT, but they do not, however, offer an in depth analysis, as they are essentially collections of conference papers. Besides these publications, various other essays discuss the investment provisions of the ECT, some of which are

[89] Ribeiro, Clarisse (ed.); *Investment Arbitration and the Energy Charter Treaty*, New York: JurisNet, LLC, 2006.
[90] Coop, Graham; Ribeiro, Clarisse (eds.), *Investment Protection and the Energy Charter Treaty*, New York: JurisNet, LLC, 2008.

focused on the notions of 'Investor' and 'Investment'.[91] Although they examine interesting issues, these papers do not offer a comprehensive analysis.

Thus, the originality of this Thesis comes not only from the comprehensive manner in which the notion of 'Investor' is approached, but also from the lack of previous writings on the issues analysed here. Nevertheless, the earlier publications dealing with the investment regime of the ECT offer a valuable source of debate, and are considered whenever they become relevant.

6. METHODOLOGY

The ECT is an international treaty and the analysis of the notion of 'Investor' has to commence with the interpretation of the provisions of the ECT in accordance with the rules of treaty interpretation laid down in the Vienna Convention on the Law of Treaties (Vienna Convention).[92] The relevant provisions of the Vienna Convention are provided for in Articles 31 and 32:

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[91] *See* for example, D'Allaire, Dominique; *The Nationality Rules under the Energy Charter Treaty: Practical Considerations*, 10(1) Journal of World Investment and Trade 39 (2009); Hobér, Kaj; *Arbitrating Disputes under the Energy Charter Treaty,* 7(2) OGEL (2009) etc.

[92] *Vienna Convention on the Law of Treaties* entered into force on 27 January 1980. The references are made to the version printed in 1115 UNTS 331. Several Contracting Parties to the ECT are not parties to the Vienna Convention, and, thus, the Convention is not directly applicable to them. *See,* <http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en> (last visited, 16 February 2011). However, the rules of treaty interpretation of the Vienna Convention are recognized as codifying the existing customary international law and, therefore, applicable to the interpretation of the provisions of the ECT. *See*, *Case Concerning Avena and Other Mexican Nationals*, Judgment of 31 March 2004, para. 83; *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, para. 41. *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, which restates the rules of treaty interpretation under the Vienna Convention and is relevant in the context of the ECT, was opened for signature on 21 March 1986 but has not yet entered into force. *See,* <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&lang=en#1> (last visited, 16 February 2011).
The interpretation of a treaty is "[o]ne of the enduring problems facing courts and tribunals and lawyers." *See,* Shaw, Malcolm N.; *International Law,* 5th edition, Cambridge: Cambridge University Press, 2003, p. 838.

"*Article 31*

General rule of interpretation

1.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.

2.The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3.There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4.A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) leaves the meaning ambiguous or obscure; or

(*b*) leads to a result which is manifestly absurd or unreasonable."

The interpretation of the ECT's provisions must rely first on their actual text (textual interpretation) and precedence must be given to the ordinary meaning of the terms in their context and in the light of the object and purpose of the ECT, as expressed in Article 2 of the ECT. The interpretation of the ECT must also take into consideration any instrument related to its conclusion. This includes, besides the preamble and annexes, any instrument related to the conclusion of the ECT, done by all the Contracting Parties or by some of them, and accepted by the other Contracting Parties.[93]

[93] WAELDE pointed out that

"[a]n application of the ECT's investment disciplines is not complete without consideration of the "Decisions", "Understandings" and "Declarations" included in the "Final Act" of the Conference. Their interpretative value is often not clear; in main, one should view them as constituting the legal context – with

Consequently, the documents of the Final Act, such as the declarations and understandings, are relevant for the proper interpretation of the ECT's provisions.[94]

Together with the context, any subsequent practice of the Contracting Parties in the application of the ECT and any relevant rules of international law applicable in the relations between the parties must be taken into consideration.[95] Article 32 of the Vienna Convention provides for the possibility to rely on the preparatory works of the ECT when there is a need to confirm the interpretation made pursuant to Article 31 of the Vienna Convention or when such interpretation leaves ambiguity or leads to unreasonable results.[96] But unlike the ICSID Convention, for example, there are no official preparatory works of the ECT. There are only fragmented documents of the negotiation of the ECT held by the Energy Charter Secretariat, the IEA and by the states and the European Communities participating in the negotiation of the ECT. The documents held by the Energy Charter Secretariat have been considered for this research when relevant for clarifying the drafting history of the ECT's provisions or for

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varying shades of legal weight – for interpretation." (Waelde, Thomas W.; *Arbitration in the Oil, Gas and Energy Field: Emerging Energy Charter Treaty Practice*, 1(4) OGEL (2003), p. 7)

The understanding of the overall structure (formal and substantive) of the ECT is essential for the interpretation on the terms of the ECT. Art. 31(1) of the VCLT refers to the meaning of the terms of a treaty "in their context and in the light of its object and purpose". Accordingly, the titles, headings and chapeaux are also relevant for the interpretation of a treaty. In one of the ECT arbitration cases, the tribunal resorted to the interpretation of the ECT relying on the headings of its Parts. *See, Plama Consortium Limited (Cyprus) v. Republic of Bulgaria,* Decision on Jurisdiction of 8 February 2005, para. 147. *See* also, the Individual Opinion of Jan Paulsson in *Hrvatska v. Slovenia*, where he refers to "the context *of the terms* of the Treaty, i.e. the internal consistency of the text as one whole". *See, Hrvatska Elektroprivreda D.D. v. Republic of Slovenia,* Individual Opinion of Jan Paulsson of 8 June 2009, para. 44, emphasis original.

[94] AUST sees these agreements and instruments not only as an aid to interpretation, "but also as a valuable tool for the treaty maker". *See,* Aust, Anthony; *Modern Treaty Law and Practice,* Cambridge: Cambridge University Press, 2007, p. 237.

[95] Article 26(6) of the ECT also expressly provides for the direct application of the rules and principles of international law:

"A tribunal […] shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

[96] As explained by LINDERFALK, the notion of 'preparatory works' "is an expression not very easily grasped", mainly because of its "vagueness". *See*, Linderfalk, Ulf; *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Dordrecht: Springer, 2007, p. 240. As mentioned by LINDERFALK, preparatory works normally include "the correspondence (letters, notes, memoranda) between two or more negotiating states", "preliminary drafts or proposals", "minutes, summary records", "reports, declarations, statements" etc. (*id.*)

shedding light on the understanding of the negotiating parties on particular issues dealt with by the ECT.[97] The documents of the negotiation of the ECT have been extensively relied on by the parties in the *Yukos Cases*,[98] but the arbitral tribunal saw no need to resort to them, leaving unexplained their nature, relevance and legitimacy.[99] CRAWFORD, in his testimony in the *Yukos Cases*, referred to the weight of the preparatory works put forward by the parties and concluded that:

> "[*t*]*ravaux préparatoires* include evidence of the conference or other meetings where the treaty text was discussed, including proposals communicated, but not private statements or recollections. […] the following evidence [is] based upon false *travaux* […]."[100]

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[97] For this Thesis, the author was granted access by the Energy Charter Secretariat, between 20 and 22 September 2010, to study the documents of the ECT's negotiation. The references to these documents are based on the notes taken by the author. The Thesis prefers the terms 'documents of negotiation', rather than the expression 'preparatory works', since the legal value of these incomplete documents as preparatory works, within the meaning of the Vienna Convention, is rather arguable.
The documents of the negotiation of the ECT explain that five Working Groups were nominated to accomplish the task of delivering a binding multilateral treaty in the energy field. Working Group I was entrusted with the negotiation of the European Charter, while the other Working Groups had the mission to negotiate the ECT: Working Group II to prepare the core text of the ECT, while Working Groups III, IV and V to negotiate the protocols for energy efficiency, hydrocarbons and nuclear energy. The European Energy Charter Conference Secretariat was established, with CLIVE JONES as Secretary General responsible for the running of the Conference. A Legal Sub–Group was also nominated and chaired by CRAIG BAMBERGER. The preliminary drafts of the ECT are divided in three categories: Basic Protocols, Basic Agreements, and ECT Drafts. The first ECT Draft was presented on 15 March 1993. *See* also, Commission of the European Communities; *Note for the attention of Mr Jones and Mr Guibal, Articles on the European Energy Charter from RH Greenwood; supra* at FN 39.
[98] *Yukos Universal Ltd. v. Russian Federation*; *Hulley Enterprises Ltd. v. Russian Federation*; and *Veteran Petroleum Trust v. Russian Federation*, Interim Award on Jurisdiction and Admissibility of 30 November 2009 (the awards are similar in reasoning, and the references in this Thesis are made to the Interim Award on Jurisdiction and Admissibility in the *Yukos Universal Ltd. v. Russian Federation* (*Yukos Cases*)). The tribunals in these three arbitrations have identical compositions and the arbitrations are discussed "as a single set of proceedings, except where circumstances distinct to particular Claimants necessitate separate treatment". *See, Yukos Cases, supra,* para. 2.
Yukos was created in 1993 and was one of the world's largest private–owned oil companies, producing more than 20% of Russian oil. After Yukos was charged with tax evasion for an amount of over USD 7 billion, in 2004, the Russian Government sold Yukos' main production unit, Yuganskneftgas, to Rosneft, a Russian state–owned oil company. Eventually, in 2007, Yukos went bankrupt. In 2008, the Yukos' shareholders brought their claims against Russia under the ECT (the UNCITRAL Arbitration Rules option). On 30 November 2009, the arbitral tribunal ruled that it has jurisdiction to hear the claims of Yukos' shareholders. Several other cases have been initiated by Yukos' shareholders against the Russian Federation (*see, RosInvestCo UK Ltd. v. Russian Federation*; Final Award of 12 September 2010; Niebruegge, A.M.; *Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law*, 8 Chi. J. Int'l L. 355 (2007)), including before the European Court of Human Rights (*see,* Peterson, Luke Eric; *European Court of Human Rights publishes decision upholding admissibility of some Yukos claims against Russia; shareholders in Yukos continue to pursue separate investment treaty claims,* 2(5) Investment Arbitration Reporter (2009)).
[99] *Yukos Cases; supra* at FN 98, para. 268.
[100] Witness' Testimony of James CRAWFORD, *Yukos Cases; supra* at FN 98, para. 227, emphasis original.

In the context of the interpretation of the ECT's provisions, the decisions rendered by the Permanent Court of International Justice (PCIJ) and the ICJ are relevant for the proper understanding and application of the rules of interpretation under the Vienna Convention.[101]

As secondary sources, the Thesis considers the arbitral awards and decisions rendered under Article 26 of the ECT and the relevant scholarly writings and other resources. Although arbitral tribunals are not bound by the previous decisions of the ECT tribunals, since the ECT does not incorporate the *stare decisis* doctrine in respect to the decisions and awards rendered under Article 26 of the ECT, the review of ECT case law is relevant for assessing the application of the ECT's provisions.[102] The 'Conclusions' of the Thesis will further address the relevance of the decisions and awards of arbitral tribunals and whether it can be considered that they became *de facto* precedents.

The scope of this Thesis is to analyse the notion of 'Investor' under the ECT and its related treaties and rules, with particular emphasis on the provisions of the ICSID Convention. Consequently, the same research techniques are applicable when examining the relevant provisions under these instruments: the text of the treaties and

[101] For the role played by the PCIJ and, later, by the ICJ in the development of the customary international law rules of interpretation and their codification in the Vienna Convention, *see,* Gardiner, Richard; *Treaty Interpretation,* New York: Oxford University Press, 2008, p. 13 *et seq.*

[102] The tribunal in *Saipem v. Bangladesh* noted that, although

> "it is not bound by previous decisions […] it must pay due consideration to earlier decisions of international tribunals." (*Saipem S.p.A. v. People's Republic of Bangladesh,* Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, para. 67, footnote omitted)

See also, the statement of the tribunal in *Jan de Nul v. Egypt*:

> "The Tribunal considers that it is not bound by earlier decisions, but will certainly carefully consider such decisions whenever appropriate." (*Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, Decision on Jurisdiction of 16 June 2006, para. 64, footnote omitted)

See also, Paulsson, Jan; *The Role of Precedent in Investment Arbitration*, pp. 699–718, in Yannaca–Small, K. (ed.); *supra* at FN 69; Kessedjian, Catherine; *To Give or Not to Give Precedential Value to Investment Arbitration Awards?*, pp. 43–68, in Rogers, Catherine A.; Alford, Roger P. (eds.); *The Future of Investment Arbitration,* New York: Oxford University Press, 2009, p. 43 *et seq.*

rules are the primary source, while the decisions and scholarly writings are taken into consideration as secondary sources.

The provisions of the ECT are the result of a compromise. The desire to have the ECT ready in a short time and the aspiration to have a comprehensive treaty in the energy field, signed by a large number of participants, meant that the drafters had to make concessions on the content of ECT's provisions.[103] One author, referring to the provisions of the ECT, pointed out that "[w]hole sections lack binding clauses, and are hedged about with compromises and vague wording".[104] Other authors see the ECT as having "unusually generous phrasing".[105] The ECT is not the perfect treaty, but it is the best compromise treaty that could be achieved under the circumstances. This is the premise on which this Thesis rests.

7. STRUCTURE OF THE THESIS

The Thesis is divided into three chapters. Chapter One analyses the notion of 'Contracting Party' to the ECT in the context of the notion of 'Investor'. Thus, the research is centred on the requisites laid down in the ECT for Contracting Parties, proceeding from the definition of this notion under Article 1(2) of the ECT:

> ""Contracting Party" means a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force."

[103] As DESCARTES pointed out in his *Discourse on the Method*,
"[…] things made up of different elements and produced by the hands of several master craftsmen are often less perfect than those on which only one person has worked." (Descartes, René; A Discourse on the Method, translated by Ian Maclean, New York: Oxford University Press, 2006, p. 12)
[104] Andrews–Speed, P.; *supra* at FN 46, p. 374.
[105] Samuels, D.; *supra* at FN 48, p. 10.

In this context, the issues pertaining to the consent to be bound by the ECT, the entry into force and withdrawal from the ECT, as well as to the application of the ECT to territories for which the Contracting Parties are responsible, are relevant. As the analysis reveals, the signatories of the ECT, and not only the Contracting Parties, play a significant role for the notion of 'Investor', when such signatories are bound by the ECT on a provisional basis. The participation of the European Communities and the EU in the ECT also raises interesting issues that require clarification. Consequently, it is necessary to examine who are the proper Contracting Parties to the ECT, and in which capacity and with what legal consequences the European Communities and the EU are bound by the ECT. The interplay between the ECT and the relevant treaties and arbitration rules in respect to the notion of 'Contracting Party' is analysed in the last part of Chapter One.

Chapter Two examines the core issues raised by the notion of 'Investor' under the ECT and the related treaties and rules. The aim of this Chapter is to analyse the notion of 'Investor' starting with the definition in Article 1(7) of the ECT, under which an Investor is a natural person having the citizenship or nationality of or who is permanently residing in a Contracting Party in accordance with its applicable law; or a company or other organization organized in accordance with the law applicable in a Contracting Party. Chapter Two is thus structured in two parts. The first part deals with natural persons as Investors under the ECT, and examines the nationality, citizenship and permanent residence of natural persons and their relevance in establishing the notion of 'Investor'. Particular emphasis is put on the relevance and legal effects of the concept of 'EU citizenship' and on the dual nationality *lato sensu* of Investors. In respect to the latter issue, the Thesis attempts to clarify whether the ECT imposes any limitations on the coexistence of multiple nationalities or citizenships and permanent

residences of an Investor, relevant for the procedural protection offered by the ECT. The second part of Chapter Two considers legal entities as Investors under the ECT. Since Article 1(7)(a)(ii) of the ECT refers to "company or other organization", the approach on legal entities is divided into two sections. The first section examines the concept of company and the link with the Contracting Parties for the purpose of the notion of 'Investor'. It also looks into the notion of '*Societas Europaea*' in the context of the ECT, as well as into the issues pertaining to the legal standing of the shareholders of a company and of the state–owned or controlled companies. The second section discusses the concept of 'other organization', with particular emphasis on non–governmental organizations. The analysis of the legal entities concludes with a brief analysis of dual nationality of legal entities, and with an overview of the 'denial of benefits' clause under Article 17 of the ECT and its effects on the notion of 'Investor'.

In Chapter Three, the concept of 'Investment' and its relevance for the notion of 'Investor' is analysed. The Chapter is framed as an overview of the notion of 'Investment', from the broad definition under Article 1(6) paragraph 1 of the ECT, which deals with "any kind of asset, owned or controlled directly or indirectly by an Investor", to the limitation placed on this definition by paragraph 3 of Article 1(6), which refers to Investment as "any investment associated with an Economic Activity in the Energy Sector". Thus, not any asset listed in paragraph 1 of Article 1(6) of the ECT constitutes an Investment within the meaning of the ECT, but only assets that are investments associated with an Economic Activity in the Energy Sector. Other related issues, such as the lawfulness, approval and origin of Investment, the requirement for Investment to be in the Area of a Contracting Party, the relevance of the Making of Investments, as well as the limitations placed by the ICSID Convention on the notion of 'Investment' under the ECT are approached in the last part of Chapter Three.

Finally, a conclusion to the research undertaken in this Thesis is drawn. The notion of 'Investor' envisaged by the ECT is not limited to the definition set forth in Article 1(7), but it is a complex and interactive notion, which is shaped by other elements of the ECT and its related treaties and rules. The key issues identified in the Thesis in respect of the notion of 'Investor' are revisited and general solutions which concern the manner in which the provisions of the ECT are to be interpreted by arbitral tribunals, the need to clarify these provisions through the mechanisms of the ECT and the relevance of the highlighted issues in the decision of Investors to solve their disputes with the Contracting Parties through one or other methods available under Article 26 of the ECT are suggested in the 'Conclusions' to this Thesis.

CHAPTER I – INVESTOR AND CONTRACTING PARTIES TO THE ENERGY CHARTER TREATY

The notion of 'Investor' is indissolubly connected to that of 'Contracting Party': only Investors of Contracting Parties can avail themselves of the provisions of the ECT. It is only within this framework that an analysis of the notion of 'Investor' can begin. While the European Charter initially started as a European initiative, the ECT emerged as multilateral treaty with international participation. Traditionally, contracting parties to treaties are states that possess an inherent capacity to conclude these binding instruments,[106] but entities, other than states, may also participate. In respect to the ECT, states and Regional Economic Integration Organizations (REIOs) may be bound by the provisions of the ECT.

This Chapter analyses the concept of 'Contracting Party' to the ECT as this becomes relevant in the context of the notion of 'Investor', starting with the definition laid down in Article 1(2) of the ECT. For this purpose, the consent to be bound by the ECT, the entry into force and withdrawal from the ECT, as well as the relevance of the provisional and territorial application of the ECT are examined. The Chapter concludes with a look into the participation of the European Communities and the EU in the ECT and with an overview of the provisions of the related treaties and rules relevant for the notion of 'Contracting Party' to the ECT.

[106] For the capacity of states to be bound by treaties, *see*, Reuter, Paul; *Introduction to the Law of Treaties*, London and New York: Kegan Paul International, 1995, p. 72 *et seq.*, para. 118 *et seq.*

1. THE ENERGY CHARTER TREATY AND ITS CONTRACTING PARTIES

Under Article 1(2) of the ECT, a Contracting Party is defined as

> "[…] a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force."[107]

Thus, an important feature of the ECT is that not only states may become Contracting Parties to the ECT, but also REIOs. The definition of 'Contracting Party' under Article 1(2) of the ECT provides for two cumulative conditions: the consent to be bound by and the entry into force of the ECT. From the Investor's perspective, these two conditions are of vital importance, as together they define the status of Contracting Party on which the Investor relies in claiming the protection of the ECT. In addition to the typical case under Article 1(2), the ECT provides for an exceptional situation when the ECT applies to signatories, without the entry into force.[108]

The ECT does not contain a definition of 'state',[109] but Article 1(3) of the ECT defines REIO as:

> "[…] an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters."

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[107] The first drafts of the ECT defined the notion of 'Contracting Party' as "a party to this Agreement". *See* for example, Art. 1(b) of the *Basic Protocol of 11 September 1991,* 8/91 BP 2 and Art. 1(2) of the *Basic Agreement of 31 October 1991*, 21/91 BA 4. The reference to states and REIOs was introduced following the Meeting of the Legal Sub–Group of 7–11 September 1992 and the suggested definition provided for

> "[…] a State or a Regional Economic Integration Organization which has consented to be bound by the Agreement and for which the Agreement is in force." (*Note for C. Bamberger*, Legal Sub–Group, 7–11 September 1992 meetings)

[108] Art. 45 of the ECT.

[109] *See, infra* FN 324.

1.1. Consent to be Bound by the Energy Charter Treaty

The consent to be bound by a treaty is fundamental. As one author explains,

> "[t]reaties are in this sense contracts between states and if they do not receive the consent of the various states, their provisions will not be binding upon them."[110]

Article 11 of the Vienna Convention provides that the consent to be bound by a treaty may be expressed in various forms: "by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."[111] Treaties usually refer to signature followed by the deposit of instruments of ratification, acceptance or approval.[112] The options laid down for the parties are justified by the specific provisions provided for by municipal laws or, in case of international and regional organizations, by their constitutive instruments. Consequently, it is not upon the provisions of a treaty to determine how the treaty shall be implemented in the municipal law or in the legal order of an international organization, but it is upon the parties to a treaty to ensure that such treaty is effectively implemented.

Under the ECT, the consent to be bound may take the form of (i) signature with ratification, acceptance or approval of the ECT, under Articles 38 and 39; [113] or of (ii) accession to the ECT, under Article 41. [114]

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[110] Shaw, M.N.; *supra* at FN 92, p. 817.

[111] Art. 2(1)(b) of the Vienna Convention provides for the following definition of ratification, acceptance, approval and accession:

> "[…] "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty".

There is no substantive difference between ratification, acceptance or approval. *See,* Aust, A.; *supra* at FN 94, p. 109.

[112] Art. 39 of the ECT reads as follows:

> "This Treaty shall be subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Depository."

[113] Art. 38 of the ECT provides for the following:

> "This Treaty shall be open for signature at Lisbon from 17 December 1994 to 16 June 1995 by the states and Regional Economic Integration Organizations which have signed the Charter."

SHAW observes that

The consent to be bound by the ECT through signature with ratification, acceptance or approval was reserved to states and REIOs while the ECT was open for signature between 17 December 1994 and 16 June 1995.[115] The signature of the ECT, not followed by ratification, acceptance or approval, has particular importance in the context of the provisional application of the ECT under Article 45.[116] Starting with 16 June 1995, the date on which the ECT was closed for signature, the consent to be bound by the ECT can only take the form of accession through the deposit of instruments of accession with the Depository.[117] Article 41 of the ECT provides as a precondition for accession the prior signature of the European Charter.

1.2 Entry into Force and Withdrawal from the Energy Charter Treaty

The second condition set forth under Article 1(2) of the ECT refers to the entry into force of the ECT for the states and REIOs.

The ECT entered into force on 16 April 1998 for the states and REIOs that became signatories of the ECT and have deposited instruments of ratification, acceptance or

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> "[…] where the convention is subject to acceptance, approval or ratification, signature will in principle be a formality and will mean no more than that state representatives have agreed upon an acceptable text, which will be forwarded to their particular governments for the necessary decision as to acceptance or rejection." (Shaw, M.N.; *supra* at FN 92, p. 818, footnote omitted)

[114] Art. 41; *supra* at FN 40.

[115] *See,* Art. 38 of the ECT; *supra* at FN 113.

[116] The signature is essential for the application of ECT, as signatories have the obligation not to defeat the object and purpose of the ECT prior to its entry into force, in accordance with Art. 18 of the Vienna Convention:

> "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

See also, Klabbers, Jan; *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent,* 34 Vand. J. Transnat'l L. 283 (2001).

[117] *See,* Art. 41 of the ECT; *supra* at FN 40. According to SHAW, accession

> […] is the normal method by which a state becomes a party to a treaty it has not signed either because the treaty provides that signature is limited to certain states, and it is not such a state, or because a particular deadline for signature has passed." (Shaw, M.N.; *supra* at FN 92, p. 820)

approval before this date. For states and REIOs acceding to, ratifying, accepting or approving the ECT after 16 April 1998, the ECT enters into force on the ninetieth day after the date of deposit of the instrument of ratification, acceptance, approval or accession.[118]

The status of Contracting Party to the ECT ceases to exist with the withdrawal from the ECT.[119] Under Article 47 of the ECT, any Contracting Party may request the withdrawal from the ECT. The withdrawal takes effect upon the expiry of one year after the date of the receipt of the notification of withdrawal or after a later period specified in the notification.[120] Article 47(3) of the ECT contains an important provision for Investors as it expressly refers to the application of the ECT for a period of twenty years to Investments made by Investors of the denouncing Contracting Party in the Areas of other Contracting Parties and to Investments made by Investors of other Contracting Parties in the Area of the denouncing Contracting Party.[121] This means that the ECT continues to apply, but only to the Investments made before the withdrawal takes effect, i.e. one year after the date of notification or a later period, if specified in the

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[118] Art. 44(2) of the ECT reads as follows:

> "For each state or Regional Economic Integration Organization which ratifies, accepts or approves this Treaty or accedes thereto after the deposit of the thirtieth instrument of ratification, acceptance or approval, it shall enter into force on the ninetieth day after the date of deposit by such state or Regional Economic Integration Organization of its instrument of ratification, acceptance, approval or accession."

[119] The ECT was concluded for an indefinite time. The status of Contracting Party to the ECT may as well end with the termination of the ECT, under the provisions of Section 3 of the Vienna Convention.

[120] Art. 47(1) provides that such withdrawal may only be requested after five years from the date on which the ECT has entered into force, i.e. after April 2003. No such requests have been registered until now.

[121] Art. 47(3) of the ECT reads as follows:

> "The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date."

Art. 47 of the ECT refers to the application of "this Treaty" and not to specific parts of the ECT. A similar provision can be found under the termination of the provisional application of the ECT.

Art. 70(2) of the Vienna Convention provides that unless the treaty provides otherwise, from the date when the withdrawal takes effect, the withdrawal releases the party from any further obligation to perform the treaty, and does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to the withdrawal. Art. 47 of the ECT provides otherwise, i.e. the ECT shall apply to Investments made by the Contracting parties for a period of twenty years after the withdrawal becomes effective.

notification.[122] In the latter situation, Investors may avail themselves of the provisions of the ECT for a period of twenty years.

1.3 Signatories and the Provisional Application of the Energy Charter Treaty

Article 45 of the ECT contains a provision of unique and significant practical consequences which refers to the provisional application of the ECT to signatories.[123] Under the provisional application rule, the ECT also applies to signatories, transforming the obligations under the ECT into binding obligations before its entry into force. The provisional application grants Investors of states and REIOs that are not yet Contracting Parties to the ECT access to the protection of the ECT.

Article 45 of the ECT contains complex and interrelated provisions, some of which have already been tested in practice in *Kardassopoulos v. Georgia, Petrobart v. Kyrgyzstan*,[124] and in the cases brought against the Russian Federation by the Yukos' shareholders.

The analysis of the provisional application of the ECT first deals with the nature of the provisional application rule in the light of the provisions of the Vienna Convention and

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[122] Art. 47(2) of the ECT. Art. 47 of the ECT stands out against the provisions of Articles 71 and 72 of the ICSID Convention. For a commentary of Articles 71 and 72 regarding the denunciation of the ICSID Convention, *see,* Castro de Figueiredo, Roberto; *Euro Telecom v. Bolivia: The Denunciation of the ICSID Convention and ICSID Arbitration under BITs,* 6(1) TDM (2009); Garibaldi, Oscar M.; *On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy;* pp. 251–277, in Binder, Christina; Kriebaum, Ursula; Reinisch, August; Wittich, Stephan (eds.); International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer, New York: Oxford University Press, 2009 etc.

[123] There was a proposal to define the notion of 'signatory' as "a state or Regional Economic Integration Organisation which has signed this Agreement and for which the Agreement has not yet entered into force", but it was not included in any of the ECT's drafts. *See*, *Note from the Legal Sub–Group Chairman*, Subject: Agenda for the Legal Sub–Group Meeting of 1–5 March 1993, 18/93 LEG–8, 24 February 1993.

[124] *Petrobart Ltd. v. Kyrgyz Republic,* Arbitral Award of 29 March 2005.

continues with the conditions laid down in Article 45, highlighting the controversial issues in relation to these requirements. The analysis concludes with the termination and the effects of the provisional application, and their relevance for the notion of 'Investor'.

1.3.1 Provisional Application of the Energy Charter Treaty and the Vienna Convention on the Law of Treaties

Article 45 contains an innovative provision allowing for the provisional application of the ECT to signatories:

> "(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 Depository 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 declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.
> (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) not 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 Depository 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 Depository.
> (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 provided in subparagraph (c).
> (c) Subparagraph (b) shall not apply to any signatory listed in Annex PA.[1] A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor. […]

> (7) A state or a 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."[125]

For the original signatories, the ECT applied provisionally between the signing date, 17 December 1994, and the date it entered into force, 16 April 1998, save for those signatories that excluded the provisional application. After the ECT entered into force, the ECT continued to apply provisionally to signatories that signed the ECT, but did not ratify it, except where the signatories opted out of the provisional application. According to the Energy Charter Secretariat, only Belarus applies the ECT on a provisional basis under Article 45, while Australia, Iceland and Norway opted out of the provisional application.[126] The Russian Federation applied the ECT provisionally until to 18 October 2009, inclusive.[127]

The provisional application is the exception to the rule that treaties do not create rights and do not impose obligation upon parties prior to their entry into force. Article 26 of the Vienna Convention recognizes the rule that only treaties in force are binding upon parties, by providing that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."

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[125] The initial provision referring to the provisional application of the ECT provided that
> "[s]ubject to Article 2 above the Contracting Parties agrees to apply this Agreement provisionally pending its entry into force in accordance with Article 40 above." (*Note from the Chairman of Working Group II*, Subject: Basic Protocol, 8/91 BP2, 12 September 1991)

The *Basic Agreement of 31 October 1991* referred to the following:
> "The Signatories agree to apply this Agreement provisionally following signature, to the extent that such provisional application is not inconsistent with their national laws pending its entry into force in accordance with Article 40 above." (Art. 41 of the *Basic Agreement of 31 October 1991*, 21/91 BA 4)

[126] Energy Charter Treaty Members of the Energy Charter Conference, <http://www.encharter.org/index.php?id=61&L=0> (last visited, 16 February 2011). Signatories may exclude the provisional application under Art. 45(2)(a) of the ECT. *See*, Chapter I.1.3.2 below.

[127] On 20 August 2009, the Russian Federation informed that it did not intend to become a Contracting Party to the ECT. *See, supra* at FN 54. Nevertheless, in accordance with Art. 45(3)(b) of the ECT, for the investments made up to 18 October 2009 inclusive, the Russian Federation is still bound by the obligations under Parts III and V (Investment Promotion and Protection, and Dispute Settlement) for a period of twenty years as of the termination of the provisional application. *See* also, the tribunal's reasoning in the *Yukos Cases; supra* at FN 98.

Article 25 of the Vienna Convention generically allows for the provisional application of treaties:

> "1. 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.
> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to that treaty."

Article 25(1)(a) of the Vienna Convention refers to the provisional application of a treaty, pending its entry into force, if such application is provided for by the treaty itself. The ECT is a case falling under this rule. Article 45 of the ECT expressly provides for the provisional application to signatories of the ECT. The Vienna Convention and the ECT do not offer a definition of 'provisional application'; however, the wordings of Article 25 of the Vienna Convention and of Article 45 of the ECT indicate that the provisional application does not trigger the entry into force of a treaty.[128]

There are various reasons that motivate signatories to a treaty to exercise the provisional application rule. Usually, there is

> "[…] a pressing need for the immediate application of the provisions of a signed but unratified treaty […]. For instance, there may be an immediate need to settle the location of a particular maritime boundary, or to put into effect the provisions of an international commodity or trade agreement, or to commence the preparatory work for a new international organization, or to create uniformity in newly–developed substantive rules of international law."[129]

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[128] According to AUST,

> "[t]he subject of Article 25 is sometimes described loosely as provisional *entry into force.* This may be because the draft article prepared by the International Law Commission so describe it, but, as Article 25 makes clear, it is concerned only with the *application* of a treaty on a provisional basis." (Aust, A.*; supra* at FN 94, p. 172, emphasis original)

[129] *See,* Rogoff, Martin A.,Gauditz, Barbara E.; *The Provisional Application of International Agreements*, 39 Me. L. Rev. 29 (1987), pp. 35–36, footnotes omitted. One of the most cited cases is the provisional application of the *General Agreement on Tariffs and Trade*, 1 January 1948, through the *Protocol of Provisional Application*. Other examples of provisional application include the *Open Skies Treaty*, 1 January 2002; *United Nations Convention on the Law of the Sea*, 16 November 1994, (UNCLOS); and

Some authors refer to the provisional application as "responding to some form of international crisis".[130] This includes cases of "treaties for which rapid, broad–based participation and implementation is essential to ensure the effectiveness of the treaty regime".[131] In the Note from the Chairman of the Working Group II for the drafting of the ECT, it is mentioned that the provisional application provision

> "[…] would enable the institutional framework to be put into place and import a momentum to the Charter System to proceed with work on the production of Core and Supplementary Protocols and other information exchanges."[132]

As revealed by the documents of the ECT's negotiation,[133] the rapid implementation was the reason that determined the drafters to insert the provisional application rule in the final draft of the ECT.

1.3.2 Conditions for the Provisional Application

Under Article 45, the ECT applies on a provisional basis subject to two cumulative conditions. First, the provisional application should not be inconsistent with the constitution, laws and regulations of the signatory. Article 45(1) of the ECT provides that signatories agree to apply the ECT provisionally "to the extent that such provisional

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the *Antarctic Treaty Environmental Protocol*, 14 January 1998. For further commentary on these conventions, *see,* Aust, A.; *supra* at FN 94, p. 172–175.

[130] Niebruegge, A. M.; *supra* at FN 98, p. 358.

[131] Niebruegge, A.M.; *supra* at FN 98, p. 358. According to NIEBRUEGGE,

> "[p]articularly within the context of international trade and investment treaties, the rapid, uniform, and broad–based implementation of treaty protections and obligations is crucial to the efficacy of the treaty regime". (Niebruegge, A.M.; *supra*, p. 359)

[132] *Note from the Chairman of Working Group II*; *supra* at FN 125. *See* also, the *Speech by Ambassador Charles Rutten*:

> "It is clear, and generally accepted, that the full realisation of the economic and political objectives of the Charter require a rapid implementation of the general principles and the specific obligations that will be agreed upon in the Basic Agreement. The continuing deterioration of the economic and political climate, particularly in the CIS, has only further increased the urgency of reaching agreement and producing practical and tangible effects as soon as possible." (*Speech by Ambassador Charles Rutten, Chairman of the Preparatory Conference on the European Energy Charter*, 4th International Energy Forum, Hamburg, 19–20 November 1992, p. 8)

[133] *See,* the testimony of FREMANTLE in the *Yukos Cases*:

> "[…] there was a sense of urgency in finalizing the ECT, in the belief that it would help overcome the Russian energy crisis. Urgency was also the motivation behind splitting the treaty into the present ECT, dealing with investments, and a later document (never completed) covering the pre–investment stage." (Witness' Testimony of Sydney FREMANTLE, *Yukos Cases; supra* at FN 98, para. 98)

application is not inconsistent with its constitution, laws or regulations." Second, the signatory should not have submitted a declaration with the Depository excluding the provisional application. Article 45(2)(a) of the ECT allows signatories to opt out of the provisional application by making a declaration, upon signature, that they are not able to accept the provisional application of the ECT.

Before discussing these two conditions, a few comments must be made on the correlation between Article 45(1) and Article 45(2)(a) of the ECT. The debate in the practice of the ECT concerned two questions: first, whether the declaration made under Article 45(2)(a) is limited to the reasons stated under Article 45(1); and second, whether the situation envisaged by Article 45(1) automatically triggers the inapplicability of the provisional application rule or there is a need for a declaration to be submitted by the signatory in this respect.

In *Kardassopoulos v. Georgia*, Georgia objected to the jurisdiction of the tribunal, claiming, among other grounds, that the dispute occurred prior to the entry into force of the ECT. When examining whether the ECT applied provisionally to Georgia and Greece, the tribunal held that there is "no necessary link between paragraphs (1) and (2) of Article 45".[134] Turning to the question as to whether a signatory must submit the declaration under Article 45(2)(a) should there be an inconsistency between the provisional application of the ECT and the constitution, laws and regulations of the signatory, as provided for by Article 45(1), the tribunal in *Kardassopoulos v. Georgia* stated that the signatory "is entitled to rely on the proviso to paragraph (1) without the need to make, in addition, a declaration under paragraph (2)."[135]

[134] *Kardassopoulos v. Georgia; supra* at FN 83, para. 228.
[135] *Id.*

The wording of Article 45(2)(a) distinguishes between the case where the provisional application is not possible due to inconsistency with the laws of the signatory under Article 45(1) and the case when the signatory decides to avoid provisional application by making the declaration to the Depositary. The insertion of the word "notwithstanding" at the beginning of the provision of Article 45(2)(a) suggests the distinct situations under Articles 45(1) and 45(2)(a).[136] Article 31(1) of the Vienna Convention requires for treaties to be interpreted in accordance with the ordinary meaning of the terms in their context. Where the terms of a treaty "make sense in their natural and ordinary meaning", then there is no need to resort to other methods of interpretation.[137] The tribunal in the *Yukos Cases* stated that

> "[…] the ordinary meaning to be given to the terms of Articles 45(1) and 45(2), when read together, demonstrates […] that the *declaration* which is referred to in Article 45(2) is a declaration which is not necessarily linked to the Limitation Clause of Article 45(1)."[138]

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[136] According to *The New Oxford American Dictionary,* 'notwithstanding' means 'in spite of'. *See, The New Oxford American Dictionary,* 2nd edition, New York: Oxford University Press, 2005, p. 1165. Consequently, Art. 45(2)(a) may be read as follows: 'In spite of (regardless of) paragraph 1 any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. […]'. *See* also, the conclusion of the tribunal in the *Yukos Cases:*

> "[…] the use of the word "[n]otwithstanding" to introduce Article 45(2) plainly suggests that the declaration in Article 45(2)(a) can be made whether or not there in fact exists any inconsistency between "such provisional application" of the ECT and a signatory's constitution, laws or regulations." (*Yukos Cases; supra* at FN 98, para. 262)

[137] *Advisory Opinion regarding the Competence of the General Assembly for the Admission of a State to the United Nations of 3 March 1950* (*Second Admissions*), p. 8. *See* also, the statement of the PCIJ in the *Polish Postal Service in Danzig*:

> "It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd." (*Advisory Opinion in the Polish Postal Service in Danzig of 16 May 1925*, p. 39)

[138] *Yukos Cases; supra* at FN 98, para. 264, emphasis original. The tribunal added that support for this conclusion is found in the practice of the ECT's signatories:

> "[…] while twelve States did make a formal declaration under Article 45(2) opting out of provisional application, six States (Austria, Luxembourg, Italy, Romania, Portugal and Turkey) relied on the Limitation Clause in Article 45(1), or the ability to opt out of provisional application for inconsistency with the domestic regime, *without delivering a formal declaration* to the Depository under Article 45(2). While the Tribunal accepts Claimant's point that four of these countries made some form of declaration prior to signing the Treaty (Austria, Italy, Romania and Portugal), both Luxembourg and Turkey relied on Article 45(1) when they signed the ECT without submitting any kind of declaration." (*Yukos Cases; supra* at FN 98, para. 265, emphasis original)

Likewise, the tribunal in *Kardassopoulos v. Georgia* referred to the declaration under Article 45(2)(a) and concluded that this declaration

> "[…] may be, but does not have to be, motivated by an inconsistency between provisional application and something in the State's domestic law; there may be other reasons which prompt a State to make such a declaration."[139]

The wording of Article 45(2)(a) indicates that a signatory may opt out of the provisional application if it is "not able" to apply the ECT on a provisional basis. Such ability is not restricted to the inconsistency of its laws with the provisional application of the ECT. But contrary to the statements of the arbitral tribunals in *Kardassopoulos v. Georgia* and the *Yukos Cases,* some authors argue that the words "not able to accept provisional application" indicate an inability to apply the ECT provisionally that comes from the inconsistency between the provisional application regime and the laws of the signatory.[140] This argument, however, makes Article 45(2)(a) of the ECT superfluous, given that the situation is already covered by Article 45(1).[141] While it is true that Article 45(2)(a) refers to "not be able to", there is no limitation placed on the reasons preventing a signatory from being able to apply the ECT on a provisional basis.[142]

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[139] *Kardassopoulos v. Georgia; supra* at FN 83, para. 228.

[140] *See* for example, Reisman, Michael W.; *Part III – The Provisional application of the Energy Charter Treaty*, pp. 47–61, in Coop, G.; Ribeiro, C. (eds.); *supra* at FN 90. The author emphasizes that

> "Article 45(2) does not say "that it [the signatory State] does *not wish* to accept provisional application". Nor does it say "that it [the signatory State] finds it *politically inconvenient* to accept provisional application". Nor does the provision use any other verb indicating or implying a facultative power." (Reisman, M.W.; *supra*, p. 56, emphasis original)

REISMAN also argues that a signatory

> "[…] which had not exercised the option of making a declaration at the critical date, which is the moment of signing [cannot] *subsequently* […] invoke "its constitution, laws or regulations," on the ground that it is not able to comply, as a justification for and defense of dishonoring all or some part of its commitment to apply the Treaty provisionally." (Reisman, M.W.; *supra,* p. 54, emphasis original)

[141] The rule of non–surplus in treaty interpretation suggests that the terms of a treaty must have a meaning. In the case concerning the *Constitution of the Maritime Safety Committee*, the ICJ rejected the interpretation of the Convention for the Establishment of the Inter–Governmental Maritime Consultative Organization in a manner in which some terms "would be left without significance". *See, Case concerning the Constitution of the Maritime Safety Committee of the Inter–Governmental Maritime Consultative Organization,* Advisory Opinion of 8 June 1960, p. 166.

[142] But *see,* in the drafting documents of the ECT, the suggestion that there is no option for the signatories to escape the provisional application without making the declaration under Art. 45(2)(a):

> "In relation to Article 50, provisional Application, it has been argued that the Article might be interpreted to allow:
> […] 3) CP's [Contracting Parties] who will not apply the Treaty provisionally but will not submit a declaration to that effect.

A. Provisional Application not Excluded by the Signatory's Declaration

The ECT applies provisionally as long as signatories did not submit the declaration under Article 45(2)(a) stating that they are not able to accept the provisional application.[143] The declaration excluding the provisional application of the ECT prevents a signatory and Investors of the signatory making this declaration from taking advantage of the rights conferred upon them by the ECT.[144]

Should a signatory make the declaration avoiding the provisional application, Article 45(2)(c) provides that the provisions of Part VII of the ECT regarding the structure and institutions of the ECT, including the contribution to the budget of the Energy Charter Secretariat and the Energy Charter Conference, shall apply.[145] Article 45(2)(a) also provides that where a signatory opted out of the provisional application of the ECT by submitting the declaration mentioned above, the signatory may, at any time, withdraw this declaration, thus commencing the provisional application of the ECT.

B. Provisional Application not Inconsistent with the Constitution, Laws or Regulations of the Signatory

Article 45(1) of the ECT states that the provisional application of the ECT is valid as long as "such provisional application is not inconsistent with [signatory's] constitution,

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> I personally don't see any room for the third interpretation which might stem from the use of the word "may" in paragraph 2(a)." (*Facsimile from Lise Weis, Energy Charter Secretariat, to Ted Borek, 25 August 1994*)

The European Communities suggested replacing the first sentence of Article 45(2)(a) with the following provision:

> "Those signatories whose laws, regulations and constitutional requirements do not so permit shall, on signature, make a declaration that they are not able to accept provisional application." (*ECT Draft of 17 March 1994,* seventh version, 17/94 CONF 96)

Nevertheless, below the comment of the European Communities it is mentioned that "several delegations entered reserves on this EC proposal".

[143] In *Plama v. Bulgaria*, the tribunal held that since Bulgaria made no declaration under Art. 45(2)(a) of the ECT, the ECT applied provisionally from the date of signature. *See, Plama v. Bulgaria; supra* at FN 93, para. 140.

[144] Art. 45(2)(b) of the ECT.

[145] Art. 45(2)(c) of the ECT allows for the provisional application of Part VII only if such application is not inconsistent with the laws and regulations of the signatory which submitted the declaration.

laws or regulations". This provision suggests that the power to assess whether there is such inconsistency belongs to the signatory applying the ECT on a provisional basis. Where the provisional application of the ECT is inconsistent with the laws of the signatory, arguably, the ECT does not require the signatory to submit the declaration provided for by Article 45(2)(a).[146]

Article 45(1) does not provide for an explanation of the terms 'inconsistent with'. In the ordinary meaning, the terms 'inconsistent with' refer to an incompatibility with something.[147] It follows that Article 45(1) becomes effective only if there is an incompatibility between the provisional application of the ECT and the laws of the signatory relying on this provision. The moment when the inconsistency of the provisional application with the laws of the signatory should be assessed is the date of signature of the ECT. The principles of public international law prevent signatories from adopting legislation, at a later stage, which would defeat the provisions and the object and purpose of the ECT. This was also the approach taken by the tribunals in *Kardassopoulos v. Georgia* and in the *Yukos Cases.*[148] In *Kardassopoulos v. Georgia*, the tribunal took into consideration the laws applicable at the time of signature of the ECT and excluded the laws dealing with this aspect enacted after that date.[149]

The debate on Article 45(1) of the ECT is focused on the meaning of the expression "to the extent that such provisional application is not inconsistent with its constitution, laws

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[146] *See* also, *Yukos Cases; supra* at FN 98, paras 270–285.

[147] As explained by the New Oxford American Dictionary, they mean "not compatible" with something. *See,* The New Oxford American Dictionary*; supra* at FN 136, p. 855.

[148] *Yukos Cases; supra* at FN 98, paras 343-344:

> "The Tribunal is of the view that the determination as to whether or not the principle of provisional application is consistent with the constitution, the laws or the regulations of the host State in which the Investment is made must be made in the light of the constitution, laws and regulations *at the time of signature* of the ECT.
>
> Any other interpretation would allow a State to modify its laws after having signed the ECT in order to evade an obligation that it has assumed by agreeing to provisional application of the Treaty. The Tribunal cannot accept such an interpretation."

[149] *Kardassopoulos v. Georgia; supra* at FN 83, paras 229–246.

or regulations [of the signatory]". It was suggested that this phrase may be read in two distinct ways: (i) Article 45 applies as long as the provisional application *per se* is not inconsistent with the constitution, laws and regulations of the signatory;[150] or (ii) Article 45 applies only if the ECT as a whole and each of its provisions are not inconsistent with the law of the signatory.[151] Some scholars consider the above expression should be understood as referring to both: the compatibility of the provisional application *per se* and of the ECT with the laws of the signatory.[152]

a. Article 45 applies as long as the provisional application per se *is not inconsistent with the constitution, laws and regulations of the signatory*

For the first interpretation of the expression "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations [of the signatory]", several arguments may be put forward.

The documents included in the negotiation of Article 45 of the ECT suggest that the provision referring to the inconsistency of the provisional application with the constitution, laws and regulations of the signatory was inserted following concerns of the participating states in respect of the prohibition of the provisional application by their laws. The Comments of the United States on the Basic Protocol Draft of 11 September 1991 show this concern:

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[150] This was the interpretation held by the tribunal in the *Yukos Cases*. *See, Yukos Cases; supra* at FN 98, para. 329. For example, in Romanian legislation, Art. 26(1) of the Law on Treaties no. 590 of 2003 provides for the provisional application of only certain categories of treaties (for example, treaties signed by governments of states, treaties providing for financial assistance from the EU, etc.; the ECT is excluded from this category).

[151] For more on this opinion, *see,* Hafner, Gerhard; *The 'Provisional Application' of the Energy Charter Treaty*, pp. 593–607, in Binder, C.; Kriebaum, U.; Reinisch, A.; Wittich, S. (eds.); *supra* at FN 122.

[152] For example, HOBÉR is of the opinion that both interpretations of this second condition are valid. *See,* Hobér, Kaj; *Arbitrating Disputes under the Energy Charter Treaty,* 7(2) OGEL (2009, pp. 17–18; Hobér, Kaj; *The Role of the Energy Charter Treaty in the Context of the European Union and Russia*, p. 279, in Coop, G.; Ribeiro, C. (eds.); *supra* at FN 90.

> "Article 41 (Provisional Application): "Provisional" application of the Protocol is not possible in the U.S., where a treaty or legislation is required before such a document can come into force.
> This can be fixed with: "to the extent that their laws allow" or some similar language."[153]

The language of the ECT suggests that the inconsistency refers to the *per se* provisional application of the ECT and not to the inconsistency of some or all the provisions of the ECT with the laws of the signatory. The word "such" inserted in the expression "such provisional application is not inconsistent" makes reference to the first part of the paragraph 1, "[e]ach signatory agrees to apply this Treaty provisionally".[154] Where the terms of a treaty are clear within their ordinary meaning, there is no need to resort to other methods of interpretation.[155] In the *Iranian Oil Case*, the ICJ reaffirmed the principle of textuality in Article 31(1) of the Vienna Convention and concluded that the "[d]eclaration must be interpreted as it stands, having regard to the words actually used."[156] Moreover, terms are to be given their natural meaning, unless there is evidence

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[153] *Comments of the United States on the Basic Protocol Draft of 11 September 1991,* 8/91 BP 2. *See* also, the comments of the Austrian representatives:

> "In Austria the provisional application of international agreements is possible only in specific cases provided for expressly under Constitutional law or in cases where the contents of the relevant agreement is already embodied in pre–existent national legislation. Since neither of this applies here, an obligation on provisional application would be acceptable for Austria only "subject to Constitutional law" or "subject to a reservation upon signature"." (*Telefax from H. Steinhäusl, Austrian Mission to the E.C., Brussels, to European Energy Charter Conference Secretariat*, 7 January 1994)

But *see,* the comments of the Japanese delegation, who understood that Japan will weigh each provision of the ECT against its laws and regulations:

> "[…] When we consider provisional application, it is our legal practice to scrutinise the extent to which each provision is applicable according to our domestic legislation." (*Japanese Comments on Provisional Application*, 20 January 1994)

[154] The tribunal in the *Yukos Cases* held this to be the solution for the correct interpretation of Art. 45(1) of the ECT:

> "For the Tribunal, the key to the interpretation of the Limitation Clause rests in the use of the adjective "such" in the phrase "such provisional application." "Such," according to Black's Law Dictionary (Seventh Edition), means "that or those; having just been mentioned." The Merriam–Webster Collegiate Dictionary (Tenth Edition) defines "such" as "of the character, quality, or extent previously indicated or implied." The phrase "such provisional application," as used in Article 45(1), therefore refers to the provisional application previously mentioned in that Article, namely the provisional application of "this Treaty."" (*Yukos Cases; supra* at FN 98, para. 304, emphasis original)

[155] *See,* Vattel, Emmerich; *The Law of Nations or Principles of the Law of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns,* London: G.G. and J. Robinson, Paternoster–Row, 1797, p. 244: "The first general maxim of interpretation is, that *It is not allowable to interpret what has no need of interpretation.*" (emphasis original) *See,* Advisory Opinions in *Polish Postal Service in Danzig* and *Second Admissions; supra* at FN 137, p. 39.

[156] *Anglo–Iranian Oil Co. Case,* Preliminary Objection, Judgment of 22 July 1952, p. 105. Art. 31(1) of the Vienna Convention retains two principles of interpretation, referred to by FITZMAURICE as the

that they are to be understood in another sense or where the natural meaning leads to an absurd result:[157]

> "That will was expressed in the words used, and in order to determine it, the first principle must be applied. It is necessary to give effect to the words used in their natural and ordinary meaning in the context in which they occur. The second principle is equally important. It is my duty to interpret the Declaration and not to revise it. In other words, I cannot, in seeking to find the meaning of these words, disregard the words as actually used, give to them a meaning different from their ordinary and natural meaning, or add words or ideas which were not used in the making of the Declaration."[158]

The terms must be interpreted in accordance with their ordinary meaning in their context.[159] Furthermore, the context in which the terms of a treaty must be interpreted includes the immediate context, which refers to the "grammatical construction of the provision or phrase within which a word in issue is located."[160] The term 'such' used in Article 45(1) of the ECT particularizes the inconsistency to the provisional application of the ECT.

'principle of actuality or textuality' and the 'principle of natural and ordinary meaning'. *See,* Fitzmaurice, Gerald; *The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points*, 33 Brit. Y.B. Int'l L. 203 (1957), p. 211. Accordingly, Art. 31(1) of the Vienna Convention refers to the textual approach in the interpretation of treaties pursuant to which, treaties should be interpreted based on their actual text, in accordance with the natural and ordinary meaning of its terms. *See, Iranian Oil Case; supra*; *Ambatielos Case,* Merits: Obligation to Arbitrate, Dissenting Opinion by Sir Arnold McNair, President, and Judges Basdevant, Klaestad and Read to the Judgment of 15 May 1953, p. 30: "These words should be construed in their natural and ordinary meaning, as has been said over and over again […]".

[157] Fitzmaurice, G.; *supra* at FN 156, p. 211. *See* also, Vattel, E.; *supra* at FN 155, p. 248: "*In the interpretation of treaties* […] *we ought not to deviate from the common use of the language, unless we have very strong reasons for it.*" (emphasis original)

[158] *Dissenting Opinion of Judge Read* in the *Iran Oil Case; supra* at FN 156, p. 145. Art. 32 of the Vienna Convention provides that

> "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (*a*) leaves the meaning ambiguous or obscure; or
> (*b*) leads to a result which is manifestly absurd or unreasonable."

[159] Art. 31(1) of the Vienna Convention. As stated in the *Iranian Oil Case,* the interpretation of the terms according to their ordinary meaning cannot

> "[…] base itself on purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with the natural and reasonable way of reading the text […]." (*Iranian Oil Case; supra* at FN 156, p. 104)

[160] Gardiner, R.; *supra* at FN 101, p. 178. As pointed out by GARDINER, "syntax [is] very much allied to construing phrases and thus fixing the ordinary meaning of terms in their context". (*ibid.,* p. 180) *See* also, the *Case Concerning the Land, Island and Maritime Frontier Dispute*, where the ICJ referred to the fact that "the word must be read in its context" and that the conclusion of the ICJ is also "confirmed if the phrase is considered in the wider context". *See, Case Concerning the Land, Island and Maritime Frontier Dispute,* Judgement of 11 September 1992, p. 583.

If the drafters intended to allow signatories to escape the provisional application without making the declaration under Article 45(2)(a), by granting them the freedom to test the provisions of the ECT against any of their laws or regulations, then, such intention must have been clear and construed as a valid exception to the principles of public international law. The principle of good faith, as stated in Article 26 of the Vienna Convention, prevents a signatory from entering into a treaty knowing that it will not be able to comply with the obligations assumed under that treaty.[161] It also prevents a signatory party to take any action or measure that would breach the purpose and the obligations provided for by the respective treaty. Referring to the formation of treaties and the principle of good faith, REUTERS points out that

> "[t]he negotiating States or international organizations owe each other a duty of loyalty in their conduct with respect to the proposed treaty. They should not embark on a treaty commitment and at the same time defeat its purpose"[162]

In the *Megalidis Case,* the Greco–Turkish Arbitral Tribunal expressly stated that, already with the signature of the treaty, there exists an obligation having the value of a principle of law, to do nothing which may harm the treaty.[163] This was seen by the Greco–Turkish Arbitral Tribunal as the expression of the principle of good faith applicable to all treaties.[164] Based on the principle of good faith, parties are expected to carry out the substance of the treaty "honestly and loyally".[165] Between the signature and the entry into force of a treaty, parties have a duty to refrain from acts that would

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[161] Art. 26 of the Vienna Convention refers to "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." The Greco–Turkish Arbitral Tribunal in the *Megalidis Case* considered that the principle of good faith is the foundation of all law and all conventions ("la base de toute loi et de toute convention"). *See, Aristoteles A. Megalidis v. Turkey*, Award of 1928, p. 395.

[162] Reuter, P.; *supra* at FN 106, p. 67, para. 110.

[163] *Megalidis Case*; *supra* at FN 161, p. 395:
"[q]u´il est de principe que déjà avec la signature d´un Traité et avant sa mise en vigueur, il existe pour les parties contractantes une obligation de ne rien faire qui puisse nuire au Traité en diminuant la portée de ses clauses."

[164] *Megalidis Case*; *supra* at FN 161, p. 395.

[165] Cheng, B.; *supra* at FN 161, p. 115.

breach the object and purpose of that treaty, unless it made clear its intention not to become a party to the treaty.[166] The provisional application of the ECT means more than refraining from acts that would defeat the ECT; it means that the ECT applies to the signatories as it would be in force.

When a signatory assumes treaty obligations through the entry into force or the provisional application, the rights that are in conflict with these treaty obligations are "restricted or renounced".[167] Article 27 of the Vienna Convention codifies the principle of supremacy of international law over internal law:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. […]"[168]

Usually referred to in justifying the state responsibility for internationally wrongful acts,[169] the principle of supremacy of international law over internal law provides that a state may not rely on the provisions or deficiencies of its own law to justify a breach or

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[166] *See,* Art. 18 of the Vienna Convention; *supra* at FN 116.

[167] Cheng, B.; *supra* at FN 161, p. 123. *See* also, the *North Atlantic Coast Fisheries Case (Great Britain v. U.S.),* Award of 7 September 1910, p.15, para. (c):

> "[…] the line in question is drawn according to the principle of international law that treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate *at will* concerning the subject-matter of the Treaty, and limiting the exercise of sovereignty of the States bound by a treaty with respect to that subject-matter to such acts as are consistent with the treaty." (emphasis original)

[168] Art. 27 adds that "[t]his rule is without prejudice to article 46", where Art. 46 of the Vienna Convention reads as follows:

> "1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

The Vienna Convention provides for limited grounds for the invalidity, termination and suspension of treaties. The singular case when the internal law affects the validity of a treaty is laid down in Art. 46 of the Vienna Convention. In any other cases, when there is a conflict between the treaty and the internal law, the treaty shall prevail, in accordance with Art. 27 of the Vienna Convention.

[169] *See,* Art. 3 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts:

> "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law." (International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Yearbook of the International Law Commission, 2001, vol. II)

Art. 3 of the Draft Articles on Responsibility of States provides therefore that states cannot use their internal law as a means of escaping international responsibility. For a comprehensive explanation of Art. 3, *see,* Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries; *supra,* p. 7 *et seq*.

a failure to perform its duties under international law.[170] In the *Greco–Bulgarian "Communities" Case*, the PCIJ referred to the

> "[…] generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."[171]

Writing about the principle of supremacy of international law, SHAW underlines that

> "[…] the presence or absence of a particular provision within the internal legal structure of a state, including its constitution if there is one, cannot be applied to evade an international obligation. Any other solution would render the operations of international law rather precarious".[172]

In the *Yukos Cases*, the tribunal considered this principle and concluded that

> "[u]nder the *pacta sunt servanda* rule and Article 27 of the VCLT, a State is prohibited from invoking its internal legislation as a justification for failure to perform a treaty. In the Tribunal's opinion, this cardinal principle of international law [supremacy of international law over municipal law] strongly militates against an interpretation of Article 45(1) that would open the door to a signatory, whose domestic regime recognizes the concept of provisional application, to avoid the provisional application of a treaty (to which it has agreed) on the basis that one or more provisions of the treaty is contrary to its internal law. Such an interpretation would undermine the fundamental reason why States agree to apply a treaty provisionally."[173]

The parties to a treaty must unequivocally and mutually agree an exception to this principle;[174] otherwise, the parties to a treaty would be allowed to defeat the object and purpose of the treaty.

Article 45(1) provides that each signatory agree to apply "this Treaty" provisionally, meaning as a whole, in its entirety. The wording of Article 45 of the ECT reveals the

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[170] *See,* Brownlie, Ian; *Principles of Public International Law,* 6th edition, New York: Oxford University Press, 2003, p. 34; Shaw, M.N.; *supra* at FN 92, p. 124.
[171] *Greco–Bulgarian "Communities" Case,* Advisory Opinion of 31 July 1930, p. 32.
[172] Shaw, M.N.; *supra* at FN 92, p. 127.
[173] *Yukos Cases; supra* at FN 98, para. 313, emphasis original.
[174] In the application of the principle *generalia specialibus non derogant,* which means that a matter shall be governed by a specific provision, rather than the general rule. *See*, Fitzmaurice, G.; *supra* at FN 156, p. 236–238.

provisional application as a "singular concept, a take–it–or–leave–it approach",[175] that speaks against the idea that Contracting Parties are allowed to test the provisions of the ECT against their constitution, laws and regulations. In *Kardassopoulos v. Georgia*, the tribunal considered that:

> "[i]t is "this Treaty" which is to be provisionally applied, *i.e.* the Treaty as a whole and in its entirety and not just a part of it […]"."[176]

In the *Yukos Cases,* the tribunal agreed with the position taken by the tribunal in *Kardassopoulos v. Georgia*:

> "The Tribunal finds that, in context, the former interpretation accords better with the ordinary meaning that should be given to the terms, as required by Article 31(1) of the VCLT. Indeed, without any further qualification, it is to be presumed that a reference to "this Treaty" is meant to refer to the Treaty as a whole, and not only part of the Treaty.[177]

A treaty is to be considered a whole and any application of parts of a treaty must be expressly provided for, allowed and agreed to by the parties. This principle of unity is recognized by the Vienna Convention, in particular under Article 44(1), which refers to the separability of treaty provisions:

> "A right of a party [...] to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree."

Where the drafters of the ECT allowed for the applicability of only some parts of the ECT, this is clearly provided for in the ECT.[178] For example, Article 45(2)(c) allows for the provisional application of Part VII independently of the declaration submitted by a signatory under Article 45()2(a), and Article 45(3)(b) provides for the applicability of Parts III and V even after the termination of the provisional application of the ECT. While Article 25 of the Vienna Convention on provisional application recognizes the

[175] *Yukos Cases; supra* at FN 98, para. 369.
[176] *Kardassopoulos v. Georgia; supra* at FN 83, para. 210, emphasis original.
[177] *Yukos Cases; supra* at FN 98, para. 308.
[178] For similar opinion, *see, Yukos Cases; supra* at FN 98, para. 311.

possibility to apply provisionally the whole or a part of a treaty, this concession must be read in consideration of the principle of unity. The permission to apply provisionally only some parts of a treaty should be expressly and unambiguously provided for in the treaty.

b. Article 45 applies only if the ECT as a whole and each of its provisions are not inconsistent with the law of the signatory

Scholars and the tribunal in the *Yukos Cases* have considered and discussed the second interpretation of the expression "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations [of the signatory]", which allows for signatories to weigh the provisions of the ECT against their laws and regulations.[179] Although the analysis above showed that the provision of Article 45(1) of the ECT refers to the provisional application *per se* not inconsistent with the laws of the signatory, it is pertinent to highlight here the main arguments put forward for the interpretation of Article 45(1) as allowing signatories to evaluate the ECT and its provisions against their laws and regulations.

It is undisputed that such power granted to signatories must be, in any case, referred to the time of the signature of the ECT. Any laws or regulations adopted after the signature of the ECT will not affect the provision of Article 45(1). Based on the principle of good faith, parties are expected to carry out the obligations under the treaty and may not escape them by enforcing internal laws defeating the object and purpose of such treaty.[180]

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[179] The tribunal in the *Yukos Cases* rejected this interpretation of Art. 45(1) of the ECT. *See, Yukos Cases; supra* at FN 98, para. 311 *et seq.*

[180] As pointed out by the tribunal in the *Yukos Cases,*

> "[a]llowing a State to modulate (or, as the case may be, eliminate) the obligation of provisional application, depending on the content of its internal law in relation to the specific provisions found in the Treaty, would

One argument used for justifying the second interpretation of Article 45(1) of the ECT refers to the wording of the expression "to the extent that such provisional application is not inconsistent". It was suggested that the terms 'to the extent that' may trigger "a partial provisional application of the ECT, namely to the extent the provisions of the ECT are not inconsistent with the signatory's constitution, laws or regulations."[181] The tribunal in the *Yukos Cases* considered this argument, but rejected it and instead gave weight to the phrase "such provisional application":

> "[…] the Tribunal agrees that the phrase "to the extent that" is often the language used when drafters of a clause in a treaty or a statute wish to make clear that a provision is to be applied only insofar as what then follows is the case. Far from being determinative of the meaning of the Limitation Clause, however, the use of the introductory words "to the extent that" requires the Tribunal to examine carefully the words that follow, namely "that such provisional application is not inconsistent with [each signatory's] constitution, laws or regulations."[182]

In upholding the second interpretation of Article 45(1) of the ECT, some authors rely on a statement made by the European Communities on the provisional application rule under Article 45 of the ECT.[183] This joint Statement by the Council, the Commission, and the Member States on Article 45 of the European Energy Charter Treaty refers to

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undermine the principle that provisional application of a treaty creates binding obligations." (*Yukos Cases; supra* at FN 98, para. 314)

[181] Hafner, G.; *supra* at FN 151, p. 601. *See* also, the position of the Russian Federation in the *Yukos Cases*:

> "[…] "to the extent that" refers to the "scope" or the "width" of provisional application. "To the extent that" is precisely the language used when drafters of a clause in a treaty or a statute wish to make clear that a provision is to be applied only insofar as what then follows is the case. If the drafters had intended that the Treaty would be provisionally applied in whole or not at all, Article 45(1) would have instead provided for the Treaty's provisional application "if" such provisional application is not inconsistent with a signatory's domestic laws." (*Yukos Cases; supra* at FN 98, para. 294, emphasis original)

[182] *Yukos Cases; supra* at FN 98, para. 303, emphasis original. The tribunal understands by the Limitation Clause, the provisions of Art. 45(1) of the ECT.

[183] *See,* Hafner, G.; *supra* at FN 151, pp. 604–605. *See* also, the position of the Russian Federation in the *Yukos Cases; supra* at FN 98, para. 294.

Article 45(1) and provides that this provision "(a) […] does not create any commitment beyond what is compatible with the existing internal order of the Signatories".[184]

The documents of the ECT's negotiation suggest that the European Communities expressed the opposite point of view to the one advocated by the scholars relying on Statement by the Council to justify the article–by–article application of the ECT. In the Opinion of the Legal Service of the European Communities it is stated that

> "[t]here is no provision in the EC Treaty which might rule out provisional application by the Community. Moreover, the Community has in the past provisionally applied Treaties on several occasions."[185]

The concern of the Communities, which determined the Statement by the Council to refer to no "commitment beyond what is compatible with the existing internal order of the Signatories", rather derived from the provisional application of the ECT by some and not all of the EU Member States and the European Communities. This concern is discussed in the Opinion of the Legal Service of the European Communities:

> "The Legal Service is of the opinion that […] the provisional application by the Community alone or accompanied by some Member States would not be possible. […]
> It could also be argued that, in the absence of a clear statement on the division of competences, notified to the other Contracting Parties, the Community could be held responsible for infringements caused by Member States which have not accepted provisional application.
> The same problem would arise if only some Member Sates signed the ECT without declaring that they are not accepting provisional application, because they will not be able to apply the ECT's provisions on trade, as the Community is exclusively competent for them."[186]

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[184] Council of the European Union; *Statement by the Council, the Commission, and the Member States on Article 45 of the European Energy Charter Treaty,* "A" Item Note, Brussels, 14 December 1994, Document 12165/94, Annex I. *See* also, Council of the European Union; *Council Decision 94/998/EC on the provisional application of the Energy Charter Treaty by the European Community,* 15 December 1994. Art. 1 of the Decision provides for the following:

> "The European Community shall apply on a provisional basis from the time of signature the Energy Charter Treaty to the extent that it has competence for the matters governed by the Treaty."

[185] European Communities, the Council; *Opinion of the Legal Service*, *Concerns: Provisional application of the European Energy Charter Treaty by the Community*, 10473/94, 27 October 1994, para. 1. Footnote three of the quoted paragraph refers to the following:

> "See for instance Council Decision 94/562/EC (OJ L 215, 20.8.1994, p. 9) on the provisional application of the agreement on part XI of the United Nations Convention on the Law of the Sea and Council Regulation n°. 500/94 (OJ L 64, 8.3.1994, p.1) on the Protocol on provisional application of the Agreement Establishing an International Science and Technology Center."

[186] *Opinion of the Legal Service; supra* at FN 185, para. 2.2.

The tribunal in the *Yukos Cases* acknowledged this situation:

> "The 1994 EU Joint Statement does not say, and cannot be read as meaning, that certain elements of the ECT will not be provisionally applied by the European Community because they are inconsistent with the Community's internal legal order. The 1994 EU Joint Statement, rather, says that Article 45(1) "does not create any commitment beyond what is compatible with the existing internal legal order of the Signatories." On this basis, the 1994 EU Joint Statement concludes that the European Community can safely sign the ECT, and accept the obligation of provisional application, without taking on any obligation to do anything that is beyond its competence."[187]

Nevertheless, the value of the Statement by the Council in the light of the rules of treaty interpretation of the Vienna Convention is at least debatable. If seen as an interpretative declaration, such statement may be used in interpreting Article 45(1) of the ECT only "if made in connection with the conclusion of a treaty, and accepted as such by other parties".[188] Apparently, the absence of this declaration from the Final Act suggests that such declaration was not agreed to by all signatories of the ECT. However, if seen as a reservation made to the ECT, it would contradict Article 46 of the ECT, which expressly prohibits any reservation. In the *Yukos Cases*, the tribunal considered that this Statement by the Council cannot be construed as meaning that a signatory may apply

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[187] *Yukos Cases; supra* at FN 98, para. 327, emphasis original. The *Council Decision 94/998/EC; supra* at FN 184, adopted one day after the *Statement by the Council, the Commission, and the Member States on Article 45 of the European Energy Charter Treaty*; *supra* at FN 184, appears to confirm that the phrase used by the European Communities, "does not create any commitment beyond what is compatible with the existing internal order of the Signatories", was intended to highlight the relationship between the Member States and the European Communities and their shared competences and not the possibility to opt out from the provisional application by invoking incompatibilities between the provisions of the ECT and the laws of a signatory.

[188] *See,* Gardiner, R.; *supra* at FN 101, p. 94. Art. 31(2)(b) of the Vienna Convention provides that the context of a treaty for the purpose of the interpretation, referred to in Art. 31(1), shall also comprise

> "[…] any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

An example of such declaration can be found in points V and VI of the Final Act; *supra* at FN 36, p. 378. In the *Yukos Cases,* the tribunal found that

> "[…] the 1994 EU Joint Statement entered into the minutes has no legal or binding value, as opposed to the Council decisions themselves." (*Yukos Cases; supra* at FN 98, para. 327)

provisionally only some parts of the ECT,[189] and, moreover, that it has no legal or binding value.[190]

The analysis of the arguments for supporting the second interpretation of the condition laid down in Article 45(1) of the ECT reveals that there cannot be a valid understanding of the terms "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations [of the signatory]", as allowing signatories to weigh each provision of the ECT and the ECT as a whole against their laws and regulations.

1.3.3 Effects of the Provisional Application

The provisional application of a treaty does not trigger its entry into force. Article 25(1) of the Vienna Convention provides that a treaty is applied provisionally pending its entry into force. Similarly, Article 45(1) of the ECT refers to the provisional application of the ECT pending its entry into force. The tribunal in *Kardassopoulos v. Georgia* reached the same conclusion:

> "Applying the ECT provisionally is used in contradistinction to its entry into force […]. Provisional application is therefore <u>not the same as</u> entry into force."[191]

Nevertheless, during the provisional application, a signatory is bound by and must comply with the obligations under the ECT. In other words, although not entered into force, the provisional application of the ECT bears similar effects. It follows that Investors of signatories applying the ECT on a provisional basis may take advantage of the ECT's provisions as any other Investor of a Contracting Party to the ECT. As explained by the tribunal in *Kardassopoulos v. Georgia*,

[189] *Yukos Cases; supra* at FN 98, para. 327.
[190] *Id.*
[191] *Kardassopoulos v. Georgia; supra* at FN 83, para. 209, emphasis original.

> "[…] the ECT's provisional application is a course to which each signatory "agrees" in Article 45(1): it is (subject to other provisions of the paragraph) thus a matter of legal obligation.[192]
> […] It follows that the language used in Article 45(1) is to be interpreted as meaning 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."[193]

In relation to the effect of the provisional application, a difficulty may arise in practice as some provisions of the ECT refer to the date of the entry into force of the ECT and not to the date when the ECT starts to apply provisionally. The provisions of a treaty must be interpreted in their context and in the light of the object and purpose of the treaty or, as FITZMAURICE suggested, "as a whole, and with reference to their declared or apparent objects, purposes, and principles".[194] Additionally, the principle of effectiveness calls for the interpretation of particular provisions "so as to give them the fullest weight and effect consistent with the normal meaning of the words and with other parts of the text".[195] It follows that the provisions of the ECT that refer to the entry into force of the ECT must not be restricted to their literal meaning, but they must also be considered in the light of the provisions of Article 45. As the tribunal in *Kardassopoulos v. Georgia* suggested,

> "[s]o long as the intention of the negotiating States clearly shows that they intended the treaty to be provisionally applied, it cannot be accepted that that clear intention could be undermined by an insistence on applying the terms of the treaty in their strictly literal form."[196]

In other words, when the drafters of the ECT linked the obligations of the Contracting Parties to the date of the entry into force of the ECT, such provisions must be understood as also referring to signatories, for which the ECT is applied provisionally.

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[192] *Id.*
[193] *Kardassopoulos v. Georgia; supra* at FN 83, para. 211.
[194] Fitzmaurice, Gerald G.; *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points,* 28 Brit. Y. B. Int'l L. 1 (1951), para. 3.(A), p. 9. The principle of integration is also provided for in Art. 31(1) of the Vienna Convention.
[195] Fitzmaurice, G.G.; *supra* at FN 194, para. 3.(A), p. 9.
[196] *Kardassopoulos v. Georgia; supra* at FN 83, para. 221.

More specifically, and relevant in the context of the notion of 'Investor', Article 1(6) of the ECT referring to the notion of 'Investment', which "includes all investments, whether existing at or made after the later of the date of entry into force", must be read as also implicitly referring to the date of the beginning of the provisional application.[197] This was also the conclusion of the tribunal in *Kardassopoulos v. Georgia*:

> "[…] the language used in Article 45(1) is to be interpreted as meaning 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, and that the language used in Article 1(6), particularly its use of the term "entry into force", is to be interpreted as meaning the date on which the ECT became provisionally applicable […]."[198]

1.3.4 Termination of the Provisional Application

Article 45 provides for two cases when the provisional application of the ECT terminates. The provisional application may terminate (a) with the entry into force of the ECT for the signatory applying the ECT provisionally under Article 45(1), or (b)

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[197] The ECT Secretariat was made aware during the negotiations on the ECT that there "might be an ambiguity stemming from the reference to an Effective Date in the definition of Investment" (*Fax Consultations, Message No. 272L,* 28 October 1994), which could have been removed by inserting an understanding in respect to Art. 45(1) of the ECT:

> "With regard to matters affecting Investments, it is intended, notwithstanding the provisions of Article 1(6) with respect to the Effective Date, that the Treaty apply provisionally under Article 45(1) for a signatory which has not made a declaration in accordance with Article 45(2)(a), as if that signatory and the other signatories were Contracting Parties and the dates of their respective signatures were the dates of the Treaty's entry into force for them." (*Memorandum from C. Bamberger, Chairman of the Legal Sub–Group,* 8 November 1994)

[198] *Ibid.*, para. 223. The Tribunal also made a pertinent remark as to the structure and wording of a treaty such as the ECT and its provisional application:

> "An inevitable consequence of a provisional application clause in a complex treaty is that some of the treaty's language, which will have been drafted with the intention of providing for the permanent situation which would exist upon and after the treaty's definitive entry into force, may not fit precisely with the situation created by its provisional application. One remedy is for the treaty to say that in the context of its provisional application certain provisions of the treaty are to be read in such and such a way: particularly with treaties of some complexity this is not the usual practice, which is hardly surprising given that the situation of provisional application which is being addressed is by definition expected to be only temporary. The other remedy is to leave the treaty as it stands and to rely on an implicit acceptance of the need to apply it (provisionally) on a *mutatis mutandis* basis." (*Kardassopoulos v. Georgia; supra* at FN 83, para. 220, emphasis original)

See also, Dugan, Christopher F.; Wallace Jr., Don; Rubins, Noah; Sabahi, Borzu; *Investor–State Arbitration,* New York: Oxford University Press, 2008, p. 64.

with notification from the signatory that it does not intend to become a Contracting Party to the ECT under Article 45(3)(a).[199]

a. Termination of the provisional application with the entry into force of the ECT

In the first situation, Article 45(1) provides that the ECT applies provisionally pending its entry into force.[200] As a result, the rule is that on the date of the entry into force, the ECT ceases to apply provisionally.

Although this situation does not apparently create problems in practice, it did raise some controversial issues in the case of *Petrobart v. Kyrgyzstan.* Kyrgyzstan objected to the jurisdiction of the ECT tribunal contending that the claimant is not an Investor of a Contracting Party, as the ECT did not apply to Gibraltar, Petrobart's place of registration. According to Kyrgyzstan, upon the signature of the ECT on 17 December 1994, the United Kingdom stated that it intended to apply the ECT provisionally to the Great Britain and Northern Ireland and to the Overseas Territory of Gibraltar.[201] On 13 December 1996, the United Kingdom ratified the ECT in respect of the Great Britain and Northern Ireland, and the Crown Dependencies of the Bailiwick of Jersey and the Isle of Man.[202] The tribunal considered that the ECT still applies provisionally to Gibraltar, since the United Kingdom did not include Gibraltar in the ratifying document of the ECT.[203] In the Tribunal's view, the United Kingdom, if it wished to terminate the

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[199] The second case of termination was suggested by the Canadian delegation. *See, Canadian suggestion on draft Article 40 – Provisional Application*, Room Document 11, Working Group II, 2 February 1993.

[200] In the case of *Petrobart v. Kyrgyzstan,* the tribunal regarded Article 45(1) as envisaging

> "[…] the simple case where a signatory first accepts provisional application and subsequently ratifies the Treaty in respect of the same territory with the effect that upon its entry into force the provisional application ceases and is succeeded and replaced by the direct application resulting from the ratification". (*Petrobart v. Kyrgyzstan; supra* at FN 124, p. 62)

The language of the ECT appears to suggest that the provisional application applies without limitation in time. *See*, Hobér, K.; *supra* at FN 152, p. 283.

[201] *Petrobart v. Kyrgyzstan; supra* at FN 124, p. 42.

[202] *Id.*

[203] *Petrobart v. Kyrgyzstan; supra* at FN 124, p. 63.

provisional application of the ECT for Gibraltar, was required to submit a notification pursuant to Article 45(3)(a) excluding Gibraltar from the application of the ECT. In justifying its decision, the tribunal considered that

> "[i]t 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. It may be observed that what is at issue here is not only the rights of investors from Gibraltar in other states but also the protection of foreign investors in Gibraltar."[204]

The decision of the tribunal in *Petrobart v. Kyrgyzstan* remains controversial. Gibraltar is an Overseas Territory of the United Kingdom with no power to enter into a treaty in its own name.[205] The power to sign treaties on behalf of Gibraltar or to extend the application of a treaty to Gibraltar belongs to the United Kingdom. Because of this particularity, Article 45 must be read in its context, and in particular, in the light of the provisions of Article 40 dealing with the application of the ECT to territories for which the Contracting Parties are responsible.[206] Article 40 of the ECT restates the principle of

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[204] *Ibid.*, pp. 62–63. The award in *Petrobart v. Kyrgyzstan* was confirmed by the Svea Court of Appeal in the application of Kyrgyzstan for setting aside of the award. The Court of Appeal held that that the ECT still applies on a provisional basis to Gibraltar. *See, Republic of Kyrgyzstan v. Petrobart Ltd*., Svea Court of Appeal, Judgment of 19 January 2007 in Case no. T5208–05, Rotel 1602).

[205] The Guidelines on the Extension of Treaties to Overseas Territories provides that

> "[u]nless expressly authorised to do so by HMG [i.e. Her Majesty's Government] in the UK, Overseas Territories (OTs) do not have the authority to become party to treaties in their own right. The UK must extend treaties to them. This is normally done either at the time of the UK's ratification, or at some later date." (Foreign & Commonwealth Office, *Guidelines on Extension of Treaties to Overseas Territories,* p. 1)

[206] Art. 40 of the ECT reads as follows:

> "(1) Any state or Regional Economic Integration Organisation may at the time of signature, ratification, acceptance, approval or accession, by a declaration deposited with the Depository, declare that the Treaty shall be binding upon it with respect to all territories for the international relations of which it is responsible, or to one or more of them. Such declaration shall take effect at the time the Treaty enters into force for that Contracting Party.
>
> (2) Any Contracting Party may at a later date, by a declaration deposited with the Depository, bind itself under this Treaty with respect to other territory specified in the declaration. In respect of such territory the Treaty shall enter into force on the ninetieth day following the receipt by the Depositary of such declaration.
>
> (3) Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification to the Depository. The withdrawal shall, subject to the applicability of Article 47(3), become effective upon the expiry of one year after the date of receipt of such notification by the Depositary.

territorial unity provided for by Article 29 of the Vienna Convention. This provision refers to the application of a treaty to the entire territory of a party, "[u]nless a different intention appears from the treaty or is otherwise established".[207] Similarly, Article 40(1) of the ECT allows signatories or Contracting Parties to exclude one or more territories for which they are responsible and this declaration, made upon signature, ratification, acceptance, approval or accession, takes effect at the time of the entry into force of the ECT. In the light of the rules of provisional application of the ECT, a declaration made upon signature enters into force with the provisional application of the ECT for that signatory.[208] Consequently, in accordance with Article 40(1), the declaration made by the United Kingdom in respect of Gibraltar had effects upon the commencement of the provisional application of the ECT and resulted in the provisional application of the ECT to Gibraltar, as well as to the United Kingdom. This issue was not disputed by the parties in *Petrobart v. Kyrgyzstan*; the controversy referred to whether the provisional application to Gibraltar ended with the entry into force of the ECT for the United Kingdom, or continued to have effects after this date.

Article 40(3) of the ECT provides that any declaration made by a signatory or Contracting Party in respect of a territory must be withdrawn by a notification made to the Depository, and such notification becomes effective upon the expiry of one year. When the United Kingdom ratified the ECT and included only the Crown Dependencies of the Bailiwick of Jersey and the Isle of Man, it excluded the other territories, including Gibraltar, from the territorial scope of the ECT.[209] Article 40(3) of the ECT sets no

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(4) The definition of "Area" in Article 1(10) shall be construed having regard to any declaration deposited under this Article."

[207] Art. 29 of the Vienna Convention provides for the following:
"Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

[208] *See*, Chapter I.1.3.3 above.

[209] According to Kyrgyzstan's statement, the United Kingdom chose not to include Gibraltar in the ratification document because of a dispute with Spain. *See, Petrobart v. Kyrgyzstan; supra* at FN 124, p.

requirements as to the manner in which a Contracting Party must deliver the notification to the Depository. Moreover, the United Kingdom used similar notification when including as well as when excluding Gibraltar from the ECT. The declaration made by the United Kingdom on 13 December 1996, upon the ratification of the ECT, was an effective notification for the exclusion of Gibraltar from the ECT's coverage under Article 40(3).[210] Therefore, the proper issue to be considered by the *Petrobart v. Kyrgyzstan* tribunal concerned the effects of the termination of the provisional application of the ECT for Gibraltar and its jurisdiction in this case submitted seven years after the declaration of ratification.[211]

Where the provisional application terminates without the entry into force of the ECT, the former signatory is still bound for a period of twenty years by the provisions on the protection and promotion of Investments with respect to Investments made by Investors of other Contracting Parties in its Area.[212] In the case of *Petrobart v. Kyrgyzstan*, Petrobart was a company incorporated in Gibraltar that claimed an Investment made in Kyrgyzstan. This situation is not the one envisaged by Article 45(3)(b) of the ECT and,

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42. The information available on the website of the Foreign and Commonwealth Office shows that the United Kingdom extended the ECT to the Bailiwick of Guernsey on 11 August 1998. The same website also refers to a 'notification' in respect to Gibraltar made on 27 July 2004, without any further details. *See*, <http://www.fco.gov.uk/en/treaties/treaties-landing/records/03600/03609?pagetype=actions> (last visited, 16 February 2010). From the information received from the Foreign and Commonwealth Office, Treaty Enquiry Service, this notification records the request made by the Government of Gibraltar to the United Kingdom not to extend the ECT to this territory.

[210] Art. 45(3), to which the *Petrobart v. Kyrgyzstan* tribunal refers, envisages the termination of the provisional application where the signatory declares that it does not intend to become a Contracting Party to the ECT, and it is not applicable to the facts of the case. The signatory of the ECT is the United Kingdom, and not the Overseas Territory of Gibraltar; the United Kingdom became a Contracting Party to the ECT and, as a result, the provisional application for the United Kingdom terminated with the entry into force of the ECT. The *Petrobart v. Kyrgyzstan* tribunal also erroneously ignored the provisions of Art. 40 when it concluded that the ECT has no rule for the "unusual situation where the territory accepted for provisional application and for application upon ratification does not coincide". *See*, *Petrobart v. Kyrgyzstan; supra* at FN 124, p. 62.

[211] *Petrobart v. Kyrgyzstan; supra* at FN 124, p. 15.

[212] *See*, Art. 45(3) of the ECT.

thus, it was outside the jurisdiction of the arbitral tribunal.[213] The award in *Petrobart v. Kyrgyzstan* reflects the strong interconnection between the provisions of the ECT and highlights the need of proper interpretation of the terms of the ECT in their context, in accordance with the rules of treaty interpretation.[214]

b. Termination of the provisional application without the entry into force of the ECT

The provisional application of the ECT may also terminate by notification from the signatory, without the entry into force of the ECT for that signatory. Article 45(3) allows a signatory to end the provisional application by a written notification made to the Depository stating it does not want to become a Contracting Party to the ECT. The termination takes effect upon the expiration of sixty days from the date on which the Depository receives the notification. An example of this termination of the provisional application of the ECT is the case of the Russian Federation. The Russian Federation applied the ECT provisionally up to 18 October 2009, inclusive,, when the sixty–day period after the notification of the Depository has lapsed.[215]

Even if a signatory terminates the provisional application by submitting the notification under Article 45(3), the ECT provides that after the expiry of the sixty–day period, the obligation under Parts III (Investment Promotion and Protection) and V (Dispute

[213] Where a Contracting Party excludes a territory for the international relations of which it is responsible by later withdrawing the notification made under Art. 40(1), Art. 40(3) of the ECT sends to the provisions of Art. 47(3), "subject to the applicability" of this provision. *See* also, Chapter I.1.2 above. On the other hand, Art. 45(3)(b) refers to the effects of the termination of the provisional application for signatories. While in both cases the ECT continues to apply for a period of twenty years, the effects of the termination of the provisional application are restricted to Investments in the Area of the signatory. Only when a Contracting Party withdraws from the ECT, the protection is extended to cover Investments of Investors of the withdrawing Contracting Party. Nevertheless, the provisions of Art. 47(3) – as highlighted by Art. 40(3) – must be applicable; however, in the case of the termination of the provisional application, the ECT contains specific provisions.

[214] As acknowledged by the tribunal in *Petrobart v. Kyrgyzstan*, "a problem of interpretation therefore arises". *See, Petrobart v. Kyrgyzstan; supra* at FN 124, p. 62.

[215] *See, supra* FN 127.

Settlement) of the ECT remain in effect for a period of twenty years for Investments made until the expiry of the sixty–day period.[216] Different from the provisions of Article 47(3) of the ECT regarding the withdrawal from the ECT of the Contracting Parties, Article 45(3) maintains the protection of the ECT only for Investors of other Contracting Parties or signatories that made Investments in the Area of the signatory notifying the termination of the provisional application. Investors of the signatory that terminated the application of the ECT are not covered by this twenty–year period.

Through the provisional application rule under Article 45, Investors of signatories that apply the ECT on a provisional basis gain access to the ECT. Therefore, not only Investors of Contracting Parties are protected by the ECT's provisions, but also Investors of signatories for which the provisional application is in force.

1.4 Contracting Parties and the Application of the Energy Charter Treaty to Territories

As an expression of their sovereignty, states may exclude one or more territories for which they are internationally responsible from the applicability of a treaty. This sets further hurdles for Investors,[217] as the case may be that, for example, the territory in which an Investor is incorporated is not covered by the ECT. Investors must be aware of this additional limitation imposed on the concept of Contracting Party or signatory of the ECT.

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[216] This is valid except for the signatories listed in Annex PA to the ECT: the Czech Republic, Germany, Hungary, Lithuania, Poland and Slovakia. However, these signatories are now Contracting Parties to the ECT and, therefore, Annex PA is no longer effective.
The application of certain provisions of the ECT for a period of twenty years was the proposal of the Canadian delegation. *See, Canadian suggestion on draft Article 40 – Provisional Application; supra* at FN 199.

[217] This is rather a situation of concern for Investors legal persons who are organized in a territory of a Contracting Party that might be excluded from the ECT's application.

Article 29 of the Vienna Convention provides for the possibility to restrict the territorial application of a treaty:

> "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."[218]

Article 29 of the Vienna Convention establishes the rule of territorial unity, but also acknowledges the right of the contracting parties to provide exceptions to this rule. Article 40(1) of the ECT contains the same principle referred to in Article 29 of the Vienna Convention. As a rule, the ECT applies to all territories for which Contracting Parties or signatories are internationally responsible, but allows the exclusion of one or more territories from the application of the ECT. According to Article 40(1) of the ECT:

> "Any state or Regional Economic Integration Organisation may at the time of signature, ratification, acceptance, approval or accession, by a declaration deposited with the Depository, declare that the Treaty shall be binding upon it with respect to all territories for the international relations of which it is responsible, or to one or more of them. Such declaration shall take effect at the time the Treaty enters into force for that Contracting Party."[219]

The Contracting Parties may submit a declaration at a later stage extending the applicability of the ECT to other territories or may withdraw the initial declaration in respect to the territories to which the ECT was applicable.[220] The application to

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[218] According to the International Law Commission, the "Commission preferred this term ["the entire territory of each party"] to the term "all the territory or territories for which the parties are internationally responsible"", in order "to avoid the association of the latter term with the so–called "colonial clause"". *See*, International Law Commission; *Draft Articles on the Law of Treaties with commentaries*, 1966, p. 213, Yearbook of the International Law Commission, 1966, vol. II. On the drafting history of Art. 29 of the Vienna Convention, *see,* Sinclair, Ian; *The Vienna Convention on the Law of Treaties,* 2nd edition, Manchester: Manchester University Press, 1984, pp. 87–92; for further comments on overseas territories, *see,* Aust, A.; *supra* at FN 94, p. 71.

[219] The chapeau of the first draft of Art. 40 referred to the "Application to Overseas Territories". *See*, Art. 35 of the *Basic Agreement of 20 January 1992,* 4/92 BA 6.

[220] Art. 40(2) and (3) of the ECT. *See*, *supra* FN 206.

territories under Article 40 of the ECT must be read in conjunction with Article 1(10), which defines the notion of 'Area'.[221] Article 40(4) of the ECT expressly provides that

> "[t]he definition of "Area" in Article 1(10) shall be construed having regard to any declaration deposited under this Article."

It follows that only territories that are not excluded by a Contracting Party from the application of the ECT are included in the Area of that Contracting Party. The definition of 'Area' is relevant in the context of the definition of 'Investment' under Articles 1(6) and 26 of the ECT. Pursuant to Article 26 of the ECT, only disputes concerning Investments in the Area of another Contracting Party may be covered by the dispute resolution mechanism of the ECT. Consequently, an Investor may resort to the resolution mechanism under Article 26, and, thus, benefit from the procedural protection of the ECT, only if the Investment is in the Area of the respondent Contracting Party.[222]

When pursuing arbitration against another Contracting Party or signatory to the ECT, the fact the territory on which an Investor relies for the application of the ECT is not covered by the ECT may affect the jurisdiction of arbitral tribunals.[223] This situation has practical consequences, as shown by the case of *Petrobart v. Kyrgyzstan*.[224]

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[221] According to Art. 1(10) of the ECT,

> ""Area" means with respect to a state that is a Contracting Party:
> (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and
> (b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.
> With respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation."

[222] This limitation is further discussed in Chapter III.3 below.

[223] *See,* Art. 26 of the ECT. The Energy Charter Secretariat does not keep a public list of the territories that are excluded for the application of the ECT. This is an additional obstacle for Investors relying on the fact that the ECT applies to certain territories.

[224] *See*, Chapter I.1.3.4 above.

1.5 Regional Economic Integration Organizations as Contracting Parties to the Energy Charter Treaty

The concept of Contracting Party under the ECT includes not only states, but also REIOs. From this perspective, the ECT is a treaty with a unique profile. Article 1(3) of the ECT defines a REIO as

> "[…] an organization constituted by states to which they transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect to those matters." [225]

1.5.1 The European Communities, the European Union and the Energy Charter Treaty

When the European Charter was concluded in 1991 there were three European Communities: the European Coal and Steel Community (ECSC), the European Atomic Energy Community (EURATOM) and the European Economic Community (EEC). The ECSC was created by the Treaty establishing the European Coal and Steel Community (ECSC Treaty),[226] which provided that the ECSC shall have legal personality to enter

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[225] According to the documents of the negotiation of the ECT, the idea of including international organizations in the ECT process was advanced by the EBRD in 1991:

> "[…] the definition of investor does not appear to us to be sufficiently broad to capture the full range of actors to be involved in Central and Eastern Europe. We recommend that the definition in the Protocol to be amended to recognise the de facto role of the Bank as an investor in Central and Eastern Europe. […]
> We recommend the draft in 1(f) to be amended to include:
> 1(f) "(iii) international organisations such as the European Bank for Reconstruction and Development."" (*Comments of the EBRD on the Basic Protocol Draft,* 14/91 BP3 Annex II, 7–8 October 1991)

The definition of REIO was suggested by the European Communities and it initially referred to

> "[…] an organisation constituted by Sovereign States to which its member States have transferred competences over a range of matters governed by this Agreement and Protocols, including the authority to take decisions binding on its Member States in respect to those matters." (*EC proposal on the definition of Regional Economic Integration Organization,* Room Document 20, Working Group II, 1–6 February 1993)

See for example, a similar definition of REIOs in Art. 27 of the *Convention on the Transboundary Effects of Industrial Accidents,* 19 April 2000:

> "This Convention shall be open for signature […] by States […] and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence in respect of matters governed by this Convention, including the competence to enter into treaties in respect of these matters."

[226] *Treaty establishing the European Coal and Steel Community,* 23 July 1952.

into international relations.[227] After the establishment of the ECSC, the Treaty establishing the European Economic Community (EEC Treaty) set up the EEC in view of a common economic market.[228] The EEC Treaty provided that the EEC shall have legal personality,[229] while the competence to negotiate and enter into international agreements on behalf of the EEC belonged to the Commission.[230] At the same time, the six founding states of the ECSC and the EEC entered into the Treaty establishing the European Atomic Energy Community (EURATOM Treaty).[231] The EURATOM Treaty provided that the EURATOM shall have legal personality,[232] and may enter into international agreements with other states or international organizations.[233]

Between the conclusion of the European Charter in 1991 and the signature of the ECT in 1994, the Member States of the European Communities created the EU. The Treaty on European Union (TEU) established the EU, a new form of cooperation between the Member States of the European Communities.[234] The TEU provided that

> "[t]he [European] Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organize, in a manner demonstrating consistency

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[227] Art. 6 of the ECSC Treaty provides that
"[i]n international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives."

[228] *Treaty establishing the European Economic Community*, 1 January 1958.

[229] Art. 210 of the EEC Treaty.

[230] Art. 228 of the EEC Treaty provides, among others, the following:
"Where this Treaty provides for the conclusion of agreements between the Community and one or more states or an international organisation, such agreements shall be negotiated by the Commission. […]
Agreements concluded under these conditions shall be binding on the institutions of the Community and on Member States."

[231] *Treaty establishing the European Atomic Energy Community*, 1 January 1958.

[232] Art. 184 of the EURATOM Treaty.

[233] *See,* Art. 101 of the EURATOM Treaty that reads as follows:
"The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organisation or a national of a third State."
As provided for by Art. 2 of the EURATOM Treaty, the main function of EURATOM is to promote research and regulations in the atomic energy field. Initially, the purpose of the EURATOM was "to develop nuclear energy, distribute it within the Community and sell the surplus to the outside world". *See,* Fairhurst, John; Law of the European Union, 8th edition, Gosport: Pearson Eduation Limited, 2010, p. 8.

[234] *Treaty on European Union,* 1 November 1993.

and solidarity, relations between the Member States and between their peoples."[235]

With the establishment of the EU, the TEU changed the name of the EEC to the European Community (EC). The TEU also established the concept of citizenship of the EU for persons holding the nationality of the Member States. The TEU amended the provisions of the European Community Treaty (EC Treaty) and provided for the exclusive competence of the EC in certain areas.[236]

In 1994, the ECT was signed by the European Communities: the ECSC, the EURATOM and the EC. Given their institutional identity, the three communities acted jointly and were referred to as the European Communities. At the time of the signature of the ECT, the European Communities had the following Member States: Belgium, Denmark, France, Germany, Greece, Italy, Ireland, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.[237] The twelve Member States of the European Communities also signed the ECT in their own name.

This situation has only changed on 23 July 2002, when the ECSC Treaty expired, leaving two out of the three European Communities: EC and EURATOM.[238] Consequently, in 2002, the Contracting Party to the ECT was the EC and EURATOM. With the entry into force of the Treaty on the Functioning of the EU in December 2009

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[235] Art. A(3) of the TEU. According to the same provision, the EC is competent to act in areas that are not in its exclusive competence

> "[…] only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, […], be better achieved by the Community."

[236] Art. 3b of the TEU.

[237] Information available at <http://europa.eu/abc/history/index_en.htm> (last visited, 16 February 2011).

[238] The TEU and the Treaties establishing the European Communities were subsequently amended by the *Treaty of Amsterdam*, 1 May 1999, and the *Treaty of Nice*, 1 February 2003. A first attempt to implement a Constitution of the European Union was made by the *Treaty establishing a Constitution for Europe*, signed on 29 October 2004, not in force.

For the purpose of this Thesis, the reference to the Community Law and, subsequently, to the EU Law, is understood to include the Treaties establishing the European Communities and the EU, and the legislation implemented based on these Treaties.

(TFEU), EU replaced and succeeded the EC.[239] Out of the three Communities that signed the ECT in 1994, only the EURATOM is still active. Therefore, as of 1 December 2009, the REIO Contracting Party to the ECT is the EU and EURATOM.[240] The EU has currently twenty–seven Member States: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the United Kingdom. All twenty–seven Member States are Contracting Parties to the ECT.

1.5.2 The European Union and its Member States as Contracting Parties to the Energy Charter Treaty

At the time of the signature of the ECT, the European Communities – ECSC, EEC and EURATOM – had legal personality and capacity to enter into international agreements with other states or international organizations in areas expressly provided for under Community Law,[241] or where such competence was implied.[242] In addition, in some

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[239] *Treaty on the Functioning of the European Union*, 1 December 2009. *See* also, Art. 1(3) of the TEU, as amended by the TFEU: "[…] The Union shall replace and succeed the European Community." The TFEU also provides that the EU may conclude agreements with one or more States or international organisations (Art. 37 of the TEU). Before, the legal personality of the EU was under debate, and the EU was relying on the provisions of Art. 24 of the TEU as the legal basis to conclude treaties, although there was no provision in the TEU expressly providing for the legal personality of the EU. For the legal standing of the EU before the TFEU, *see,* Klabbers, Jan; *Presumptive Personality: The European Union in International Law*, pp. 231–253, in Koskenniemi, Martti (ed.), International Law Aspects of the European Union, The Hague: Kluwer Law International, 1998.

[240] As explained by FAIRHURST, with the entry into force of the TFEU, the references to 'European Communities' and the 'Community Law' are no longer used. *See,* Fairhurst, J.; *supra* at FN 233, p. 87. As the powers of the EURATOM are restricted to research activities in the nuclear energy field, for the purpose of this Thesis, the analysis of the notion of 'Investor' in the light of the participation of the EU and EURATOM in the ECT is restricted to the EU, unless the context requires otherwise.
Currently there are no disputes under the ECT in which the EU is involved as respondent or Contracting Party of an Investor. On the other hand, the European Commission submitted petitions for *amicus curiae* participation in ECT disputes under Art. 32(2) of the *ICSID Rules of Procedure for Arbitration Proceedings*, as amended on 10 April 2006. *See* for example, the participation of the European Commission in *AES v. Hungary*. See, *AES Summit Generation Limited and AES–Tisza Erömü Kft. v. Republic of Hungary*, Award of 23 September 2010, para. 3.22.

[241] *See,* Verwey, Delano; The European Community, the European Union and the International Law of Treaties, The Hague: TMC Asser Press, 2004, p. 20–21. See also, Articles 2-6 of the TFEU.

subject areas, such as customs union, monetary policy and common commercial policy, the Member States had transferred to the European Communities the exclusive competence to enter into international agreements.[243] However, in most areas, there was a shared competence with the Member States: internal market, environment, energy, transport etc.[244] The shared competence between the Member States and the European Communities resulted in the conclusion of so–called "mixed agreements". Mixed agreements are defined as agreements to which the Member States and the Communities are parties, along with other states and/or international organizations,[245] and are binding on both the Member States and the European Communities.[246] The ECT is such a mixed

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[242] *See* for example, Art. 101 of the EURATOM Treaty; *supra* at FN 233. *See* also, Art. 216(1) of the TFEU which provides that

> "[t]he Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."

Under the EC Treaty, there was no similar provision, but based on the AETR Doctrine developed by the European Court of Justice (ECJ) in the *AETR Case*, the EC had an implied authority to enter into international agreements:

> "16. […] ARISES NOT ONLY FROM AN EXPRESS CONFERMENT BY THE TREATY - AS IS THE CASE WITH ARTICLES 113 AND 114 FOR TARIFF AND TRADE AGREEMENTS AND WITH ARTICLE 238 FOR ASSOCIATION AGREEMENTS - BUT MAY EQUALLY FLOW FROM OTHER PROVISIONS OF THE TREATY AND FROM MEASURES ADOPTED, WITHIN THE FRAMEWORK OF THOSE PROVISIONS, BY THE COMMUNITY INSTITUTIONS." (Judgment of the Court of 31 March 1971, Case 22-70, *Commission of the European Communities v Council of the European Communities, regarding the European Agreement on Road Transport*, European Court Reports 1971, p. 00263)

[243] *See,* Art. 3 of the TFEU. This means that the Member States can no longer enter into international agreements in areas reserved to the exclusive competence of the EU. *See*, Craig, Paul; De Búrca, Gráinne; *EU Law. Text, Cases, and Materials*, 4th edition, New York: Oxford University Press, 2008, p. 176.

[244] Art. 4 of the TFEU. *See* also, Craig, P.; De Búrca, G.; *supra* at FN 243, p. 181. There is also the supplementary competence of the EU in the fields of industry, culture, tourism etc., as provided for by Art. 6 of the TFEU, according to which, the EU shall have competence to carry out actions to supplement the actions of the Member States.

[245] Verwey, D.; *supra* at FN 241, p. 38.

[246] Craig, P.; De Búrca, G.; *supra* at FN 243, p. 198. The creation of this category of agreements is the result of the jurisprudence of the ECJ, which stated, although not expressly using the terms 'mixed agreements', that in certain cases it is possible that Members States enter into an agreement alongside the European Community. *See*, Opinion of the Court 1/78 of 4 October 1979, *Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty, International Agreement on Natural Rubber*, European Court Reports 1979, p. 02871.

When entering into mixed agreements, the Member States and the European Communities are under the obligation to cooperate closely in the negotiation, conclusion and implementation of these agreements. Under the EC Treaty, this obligation derived from the provisions of Art. 10 of the EC Treaty, which provided that

> "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which would jeopardise the attainment of the objectives of this Treaty."

See also, Ruling 1/78 of the ECJ of 14 November 1978, *Ruling delivered pursuant to the third paragraph of Article 103 of the EAEC Treaty regarding the Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports*, European Court

agreement.[247] The mixed nature of the ECT was also recognized by the European Communities in the Decision 98/181/EC, ECSC, EURATOM, where the final paragraph of the Preamble states that

> "[…] where the decisions to be taken by the Energy Charter Conference concern areas of mixed competence, the European Communities and the Member States are to cooperate with a view to achieving a common position, in accordance with the jurisprudence of the Court of Justice of the European Communities".[248]

The European Communities – now the EU and EURATOM – and the Member States retain their competences in the fields covered by the ECT.[249] The Member States signed the ECT in their capacity as subjects of international law, but the presence of the European Communities was essential, given their exclusive competence in certain areas of the ECT, such as trade. As stated in one of the documents of the ECT's negotiation,

> "[t]he ECT deals with a variety of matters for which competences are shared between the Community and its Member States. It will therefore be signed and ratified by the Community and the Member States."[250]

Reports 1978, p. 02151; Opinion 1/94 of the ECJ of 15 November 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, Article 228 (6) of the EC Treaty*, European Court Reports 1994, p. I–05267.
Under the TFEU, the principle of cooperation between the EU and its Member States transpires in several provisions. *See* for example, Articles 4 and 5 of the TEU. *See* also, Art. 2 of the *Council and Commission Decision 98/181/EC, ECSC, EURATOM of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects*.

[247] *See* also, Coop, Graham; *European Energy Charter and the European Union: Is Conflict Inevitable?*, 27(3) Journal of Energy & Natural Resources Law 404 (2009), p. 406.

[248] *Council and Commission Decision 98/181 /EC, ECSC, EURATOM of 23 September; supra* at FN 246, p. 2.

[249] In reality, the ECT is a unique blend of competencies, which has slightly changed with the TFEU. For example, in the investment area, Art. 57(2) of the EC Treaty provided for the express competence of the EC with regard to the admission of investments from third–states. With regard to the protection of investments, it was understood that the competence was on the Member States. *See*, Tietje, Christian; *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States,* 6(1) TDM (2009), p. 14; Burgstaller, Markus; *European Law and Investment Treaties,* 26(2) Journal of International Law 181 (2009); Söderlund, Christer; *Intra–EU BIT Investment Protection and the EC Treaty,* 24(5) J. Int'l Arb. 455 (2007). Currently, under Art. 207 of the TFEU, the EU has exclusive competence in respect to the conclusion of agreements concerning foreign direct investments. In the energy field, the competence is also shared between the EU and the Member States (Articles 4 and 194 of the TFEU), but in the trade area, the EU has exclusive competence (Art. 4 of the TFEU).

[250] *Opinion of the Legal Service; supra* at FN 185, footnote omitted.

Nevertheless, in respect to the Contracting Parties to the ECT, the Member States, on one hand, and the EU and EURATOM, on the other, have separate legal standing.[251]

2. CONTRACTING PARTIES TO THE ENERGY CHARTER TREATY AND THE RELATED TREATIES AND ARBITRATION RULES

Investors may submit disputes with Contracting Parties to the ECT to arbitration under one of the following options: the ICSID, under the provisions of the ICSID Convention or the ICSID Additional Facility Rules; the UNCITRAL Rules; or the SCC.[252] The fact that the ECT provides Investors with various options and *fora,* for which they have the right to select, does not necessarily mean that this will put them in an advantageous position.[253] To the contrary, Article 26(4) of the ECT "means that there are a number of threshold and procedural issues which an Investor will need to consider when choosing where a dispute should be submitted".[254] Relevant here are the provisions of the treaties and arbitration rules restricting access of Investors to the *fora* under Article 26(4) of the ECT because of the limitations on the notion of 'Contracting Party' to the ECT.

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[251] *See* also, European Communities; *Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty*.

[252] Art. 26(4) of the ECT.

[253] The first drafts of the ECT provided for "[d]isputes [to] be submitted to international arbitration if either Party to the dispute so wishes" (Art. 32(1) of the *Basic Agreement of 31 October*, 21/91 BA 4), and "the Investor […] may agree to refer the dispute" (Art. 32(3) of the *Basic Agreement of 31 October*, 21/91 BA 4). The right of Investor to choose the dispute resolution mechanism was inserted, following the proposal of the Dutch delegation, in the *Basic Agreement of 20 January 1992*, 4/92 BA 6. Art. 23(3) of the *Basic Agreement of 9 April 1992,* 22/92 BA 12, also provided that Investors are barred from submitting a dispute to international arbitration or conciliation if they previously resorted to an agreed dispute resolution mechanism or to the courts or administrative tribunals of the Contracting Party party to the dispute.

[254] Blanch, Juliet; Moody, Andy; Lawn, Nicholas; *Investment Dispute Resolution and the Energy Charter Treaty,* p. 8, in Coop, G.; Ribeiro, C. (eds.); *supra* at FN 90.

2.1 Contracting Parties and the Requirements of the ICSID Convention and the ICSID Additional Facility Rules

Article 25 of the ICSID Convention provides for the following requirements in respect to investors and Contracting States of the ICSID Convention:

> "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. […]
> (2) "National of another Contracting State" means:
> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute […]; and
> (b) any juridical person which had the nationality of a Contracting State […]"

Article 25 of the ICSID Convention refers to investors that are nationals of Contracting States of the ICSID Convention. In accordance with Article 67 of the ICSID Convention, the ICSID Convention is opened for signature to state members of the International Bank for Reconstruction and Development (IBRD) or, by invitation, to states that are not members of the IBRD, but are parties to the Statute of the ICJ. [255] The ICSID Convention is open to states only and not to international organizations.[256] Additionally, in the ICSID Convention system, the accession to the Convention is not

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[255] Art. 93(1) of the Charter of the United Nations (UN Charter) provides that
> "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." (*Charter of the United Nations*, 24 October 1945, emphasis original)

A state that is not member of the UN may become a party to the Statue of the ICJ in accordance with Art. 93(2) of the UN Charter.

[256] *See*, as well, *Statement submitted by the European Communities to the Secretariat of the Energy Charter; supra* at FN 251:
> "As far as international arbitration is concerned, it should be stated that the provisions of the ICSID Convention do not allow the European Communities to become parties to it. The provisions of the ICSID Additional Facility also do not allow the Communities to make use of them."

Also, the EU and EURATOM cannot appear as respondent in front of ICSID tribunals. In addition, the ICSID Convention recognizes the concept of nationality only. In respect to Investors of REIOs, it is controversial if in practice there can be a situation where Investors may rely on their link with such organizations. For the implications of the EU citizenship, *see,* Chapter II.1.3 below; for *Societas Europaea, see*, Chapter II.2.1.2 below.

possible without prior signature.[257] The date to assess the status of a state as Contracting State of the ICSID Convention is the date of the institution of the proceedings in front of the ICSID.[258] Currently, there are 157 signatory states, out of which 147 states have ratified the ICSID Convention. [259]

An Investor of a Contracting Party to the ECT that chooses to submit to ICSID his dispute against another Contracting Party must observe a two–fold test: the Contracting Party of the Investor as well as the respondent Contracting Party must be Contracting States of the ICSID Convention.[260] It may be the case, when multiple nationalities or permanent residences overlap, that Investor satisfies the requirement of being both an Investor of a Contracting Party to the ECT and of a Contracting State of the ICSID Convention with reference to two different states.[261] Out of the forty–seven Contracting Parties and the signatory deemed to apply the ECT provisionally, four are not Contracting States of the ICSID Convention: Kyrgyzstan,[262] Lichtenstein, Poland and Tajikistan.[263]

The second option under Article 26(4) of the ECT refers to the resolution of disputes under the ICSID Additional Facility Rules. The ICSID Additional Facility Rules, adopted by the Administrative Council of the ICSID, authorize the ICSID Secretariat to

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[257] Art. 68(1) of the ICSID Convention. *See* also, Schreuer, Christoph H.; *The ICSID Convention: A Commentary*, Cambridge: Cambridge University Press, 2001, p. 1270, para. 7.
[258] Schreuer, C. H.; *supra* at FN 257, p. 163, para. 177; Dolzer, Rudolf; Schreuer, Christoph; *Principles of International Investment Law,* New York: Oxford University Press, 2008, p. 42.
[259] For an up–to–date list of the signatories and Contracting States of the ICSID Convention, *see* <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English > (last visited, 16 February 2011).
[260] For the territorial application of the ICSID Convention, *see* Art. 70 of the ICSID Convention and Schreuer, C. H.; *supra* at FN 257, pp. 1281–1283, paras 1–10.
[261] *See*, *infra* Chapter II.1.5.
[262] Kyrgyzstan signed the ICSID Convention on 9 June 1995, but has not yet ratified it.
[263] Kyrgyzstan, Moldova, Poland and Tajikistan are members of the IBRD; while Lichtenstein is party to the Statute of the ICJ only and may become a signatory of the ICSID Convention upon invitation. The Russian Federation is not a Contracting State of the ICSID Convention.

administer disputes that do not fall under the scope of the ICSID Convention.[264] Article 2(1) of the ICSID Additional Facility Rules provides for three circumstances in which the Rules are applicable. First, when a legal dispute arising directly out of an investment is not within the jurisdiction of the ICSID because "either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State".[265] The case envisaged by Article 2(1)(a) of the ICSID Additional Facility Rules provides that at least one of the Contracting States – the Contracting State of the investor or the respondent Contracting State – must not be a Contracting State of the ICSID Convention; a dispute where both Contracting States are Contracting States of the ICSID Convention cannot be settled under Article 2(1)(a) of the ICSID Additional Facility Rules. The second case of application of the ICSID Additional Facility Rules concerns legal disputes that are not within the ICSID's jurisdiction because they do not arise out directly of an investment, "provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State." In other words, Article 2(1)(b) of the ICSID Additional Facility Rules covers disputes where either the state of the investor or the respondent state, or both states are Contracting States of the ICSID Convention, but the investment requirement of the ICSID Convention is not met.[266] The third case of application of the ICSID Additional Facility Rules refers to fact–finding proceedings. Article 1(1) of the Fact–Finding Additional Facility Rules allows any "State or national of a State" to resort to the fact–finding proceedings.[267]

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[264] *See*, Art. 2 of the ICSID Additional Facility Rules, *supra* at FN 87. Art. 3 of the ICSID Additional Facility Rules provides that "[s]ince the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein."

[265] Art. 1(4) of the ICSID Additional Facility Rules provides that ""Contracting State" means a State for which the Convention has entered into force."

[266] *See* also, Toriello, P; *supra* at FN 87, p. 76.

[267] *Fact–Finding (Additional Facility) Rules*, Schedule A of the ICSID Additional Facility Rules, *supra* at FN 77. The existence of a dispute is not a condition for resorting to the fact–finding proceedings.

Article 26(4)(a)(ii) of the ECT provides for the consent of the Contracting Parties with respect to disputes submitted under the ICSID Additional Facility Rules, where at least one Contracting Party – the Contracting Party of the Investor or the respondent Contracting Party –, but not both, are Contracting States of the ICSID Convention. For example, a dispute based on the ECT, between an Investor of Poland and Kyrgyzstan – not Contracting States of the ICSID Convention – cannot be submitted for resolution under the ICSID Additional Facility Rules; likewise, a dispute between an Investor of Romania and Sweden – both Contracting States of the ICSID Convention – cannot be brought under the ICSID Additional Facility Rules. Consequently, when a dispute is not arising directly out of an investment, an ECT Investor may resort to Article 2(1)(b) of the ICSID Additional Facility Rules only when one of the Contracting Parties, but not both, is a Contracting State of the ICSID Convention.

2.2 Contracting Parties and the SCC and UNCITRAL Rules

The concepts of signatories or contracting parties are unknown for the UNCITRAL Rules and the SCC Rules. These two instruments are procedural rules applied in *ad hoc* and institutional arbitrations, respectively, and, therefore, states or international organizations are not parties to these instruments. Investors that wish to submit their claims against Contracting Parties to the ECT with the SCC or under the UNCITRAL Rules will have to make sure that they fulfil only the requirements of the ECT. No additional hurdles are imposed under these arbitration options, which make SCC and UNCITRAL safe alternatives to the rigorous conditions of the ICSID Convention and the ICSID Additional Facility Rules.

3. CONCLUSIONS

The aim of this Chapter was to clarify the notion of 'Contracting Party' to the ECT, in the light of the notion of 'Investor', focusing on the possible limitations or extensions of the concept under the provisions of the ECT and its related treaties and rules. The proper interpretation of the notion of 'Investor' gives efficiency to the provisions of the ECT and ensures that its scope and purpose are accomplished. The protection of the ECT is afforded to Investors of Contracting Parties or, as revealed in this Chapter, of signatories that apply the ECT on a provisional basis.

The analysis of the notion of 'Contracting Party' to the ECT commenced with the definition laid down in Article 1(2) of the ECT, which refers to states or REIOs bound by and for which the ECT is in force. From the outset of the Chapter, two conclusions were drawn: (a) the ECT is open to states and REIO (b) that become Contracting Parties to the ECT upon the fulfilment of two cumulative conditions: consent to be bound by and the entry into force of the ECT for that respective state or REIO. To this general rule, Article 45 of the ECT provides for an exception. The ECT also covers signatories that apply the ECT on a provisional basis. Consequently, the coverage of the ECT extends not only to Investors of Contracting Parties, but also to Investors of signatories that apply provisionally the ECT. The provisional application of the ECT has proved to be a controversial issue in ECT case law. The ECT applies provisionally if, according to Article 45 of the ECT, the provisional application was not excluded by a notification of the signatory, upon the signature of the ECT, and if the provisional application is not inconsistent with the constitution, laws and regulations of the signatory. The ordinary meaning of the terms of Article 45, in their context and in accordance with the object and purpose of the ECT, suggests that the second condition refers to the compatibility

between the provisional application *per se* and the constitutions and laws of the signatory. This view has been recently confirmed by the tribunal in the *Yukos Cases.* Regarding the application of the ECT to territories of the Contracting Parties, practice confirmed its significance for the notion of 'Investor'. The ECT allows Contracting Parties to exclude from the coverage of the ECT one or more territories for which they are internationally responsible. For legal entities, this might affect their access to the protection of the ECT, as the territory in which they are incorporated might be excluded from the ECT's application. The territorial application of the ECT also becomes relevant in the context of the notion of 'Investment' and the access of Investors to the dispute resolution mechanism under Article 26 of the ECT.

In respect to the participation of REIOs in the ECT, the research revealed that the Contracting Party to the ECT is the EU and EURATOM. The analysis also showed that all Member States of the EU are Contracting Parties to the ECT, but that they have separate legal standing, due to the mixed nature of the ECT and the competences shared between the Member States and the EU in the matters covered by the ECT.

The final part of the Chapter discussed the interplay between the ECT and the ICSID Convention, the ICSID Additional Facility Rules and the SCC and UNCITRAL Rules, with respect to the notion of 'Contracting Party'. There are no practical difficulties when Investors of Contracting Parties to the ECT bring their disputes against other Contracting Parties to arbitration under the SCC or UNCITRAL Rules. However, there are issues raised by the interaction between the ECT and the ICSID Convention and the ICSID Additional Facility Rules. Some of the Contracting Parties to the ECT are not Contracting States of the ICSID Convention, while regional and international organizations are excluded from the ICSID Convention and the ICSID Additional

Facility Rules. The consent of the Contracting Parties with respect to the ICSID Additional Facility Rules is given only for disputes where at least one Contracting Party – the Contracting Party of the Investor or the respondent Contracting Party –, but not both, is a Contracting State of the ICSID Convention.

CHAPTER II – NATURAL PERSONS AND LEGAL ENTITIES AS INVESTORS UNDER THE ENERGY CHARTER TREATY

The notion of 'Investor' determines the coverage of the substantive protection afforded by the ECT and the jurisdiction of ECT arbitral tribunals.[268] Nationality, citizenship, permanent residence,[269] incorporation or organization in accordance with the laws of a Contracting Party to the ECT are key elements that establish the link between a Contracting Party and a natural person or a legal entity claiming the status of Investor.

The analysis of the notion of 'Investor' under the ECT begins with the provisions of Article 1(7)(a) of the ECT. For natural persons, Article 1(7)(a)(i) provides that they must have the citizenship or nationality of or reside permanently in a Contracting Party in accordance with its applicable law.[270] For legal entities, Article 1(7)(a)(ii) briefly refers to "a company or other organization organized in accordance with the law applicable in that Contracting Party". This Chapter follows the elements of Article 1(7)(a).[271]

The first part of this Chapter discusses natural persons as Investors under the ECT and focuses on the concepts of 'nationality', 'citizenship', and 'permanent residence', as

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[268] Dolzer, R.; Schreuer, C.; *supra* at FN 258, p. 47.

[269] This Thesis uses the term 'nationality *lato sensu*' to jointly refer to the links of nationality, citizenship and permanent residence.

[270] Stateless persons are excluded from the protection of the ECT, as well as from the ICSID Convention and the ICSID Additional facility Rules.

[271] As explained by VANDEVELDE,

> "[t]he term "investor" raises two broad issues. The first is the type of person who may be considered an investor. The second is the method by which the nationality of the investor is to be determined." (Vandevelde, Kenneth J.; *Bilateral Investment Treaties: History, Policy and Interpretation*, New York: Oxford University Press, 2010, p. 157)

well as on potential controversial issues, such as the EU citizenship and dual nationality *lato sensu* of Investors. This latter analysis considers not only traditional cases of Investors having at the same time the nationality of a Contracting Party and the nationality of the respondent Contracting Party to the ECT, but also cases where, for example, Investors are nationals of a Contracting Party and permanent residents of the respondent Contracting Party. Throughout the first part of this Chapter, the provisions of the ECT with respect to natural persons are weighted against the provisions of the ICSID Convention. The second part examines the Investor legal entity and discusses the concepts of 'company' and 'other organization' organized in accordance with the law applicable in that Contracting Party, as well as other important elements contributing to the notion of 'Investor', such as the denial of benefits clause under Article 17 of the ECT.

1. NATURAL PERSONS AND THE NOTION OF INVESTOR

Only two of the disputes submitted to arbitration under Article 26 of the ECT were initiated by natural persons.[272] In arbitrations submitted to the ICSID, around twenty out of the one hundred and twenty–two pending disputes have been brought by natural persons, alone or with judicial persons.[273] Undoubtedly, the majority of investments are channelled through legal entities, and corporations mostly appear as claimant in investment arbitration cases.[274] Nevertheless, the existence and importance of natural

[272] *Ioannis Kardassopoulos v. Georgia* and *Al–Bahloul v. Tajikistan*.

[273] The number of ICSID pending cases on 16 February 2011. *See*, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last visited, 16 February 2011). The numbers include *Ioannis Kardassopoulos v. Georgia.*

[274] As SCHREUER points out,

> "[i]n the vast majority of cases investors are companies. Although we often speak of the protection of the individual in international law, in international investment cases the relevant actors usually appear in the form of juridical persons. Corporations are owned by shareholders who may themselves be companies. A shareholder may own the company entirely, may own a majority of its shares or may just own a minority of

persons in investment law cannot be diminished by statistics. Leaving aside the fact that they are the ultimate beneficiaries of investments, they often resort, in their own name, to the protection afforded by investment treaties. When individuals emerge as claimants in investment arbitration cases, the issues raised by their nationality often appear to be highly controversial.[275]

One essential prerequisite for investors to gain access to the protection of investment treaties and, ultimately, to resort to arbitration in the event of a dispute with the host state of the investment, is to hold the nationality of a foreign state or, in some cases, to permanently reside in that foreign state. The challenges of the globalized society, the complexity of the corporate structures through which investments are channelled and the reality that one person possesses more than one nationality or permanently lives in a state other than his state of nationality,[276] brings novel hurdles in assessing the nationality, and consequently, in establishing the jurisdiction of arbitral tribunals.[277]

Although extensively relied on by international and investment law and representing one of the fundamental rights of a person,[278] nationality remains one of the debatable

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shares." (Schreuer, Christoph; *Shareholder Protection in International Investment Law*, 2(3) TDM (2005), p. 1)

[275] Example of notorious arbitrations involving natural persons include *Waguih Elie George Siag and Clorinda Vecci v. Arab Republic of Egypt*; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*; *Ioan Micula, Viorel Micula and others v. Romania* etc.

[276] *See* also, Wisner, Robert; Gallus, Nick; *Nationality Requirements in Investor–State Arbitration,* 5(6) Journal of World Investment & Trade 937 (2004), p. 927.

[277] As SLOANE resumes it,

"[…] the foreign investor tends to be cosmopolitan: he carries more than one passport; has business interests in several states; often has cultural ties and associations in the host state; travels frequently; and may reside in different states at different times." (Sloane, Robert D.; *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality,* 50 Harv. Int'l L.J. 1 (2009), p. 54)

[278] It is undisputed that nowadays individuals are subjects of international law. *See,* Jennings, Robert; Watts, Arthur (eds.), *Oppenheim's International Law*, vol. I *Peace*, 9th edition, Harlow: Longman, 1992, pp. 505 and 846–847 (also, 'Oppenheim's International Law'). As early as 1895, LAWRENCE recognized the status of individuals as distinct subjects of international law:

"Sometimes, however, one state is empowered to deal directly with citizens of another in their individual capacity; and when this occurs they are, for the time and as far as the question extends, subjects of International Law." (Lawrence, T.J.; *The Principles of International Law*, London: Macmillan & Co, 1895, p. 83)

concepts of law that has no universally agreed definition.[279] The Universal Declaration of Human Rights recognizes that it is the right of any person to possess a nationality and that any person has the fundamental right not to be arbitrarily deprived of his nationality nor denied the right to change his nationality.[280] In the context of diplomatic protection, scholars and tribunals attempted to find a definition of nationality. Oppenheim's International Law defines nationality of an individual as "his quality of being subject of a certain state",[281] while Article 1(a) of the Harvard Draft Convention on Nationality sees nationality as "the status of a natural person who is attached to a state by the tie of allegiance".[282] In the *Robert Lynch Case,* nationality was considered to be

> "[…] a continuing legal relationship between the sovereign State on the one hand and the citizen on the other. The fundamental basis of a man's nationality is his membership of an independent political community. This legal relationship involves rights and corresponding duties upon both–on the part of the citizen no less than on the part of the State."[283]

These definitions suggest that nationality is the expression of a link between a state and an individual and that no additional requirements are placed on the nature of this bond. However, in the *Nottebohm Case,* the ICJ emphasised that this link between a state and an individual must be genuine. As the ICJ stressed, nationality is

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[279] It is not the adherence of a person to a nation or a race that presents interest to international law, but the bond between a person and a state. Article 2(a) of the European Convention on Nationality, referring to nationality, specifies that the term "does not indicate the person's ethnic origin". *See*, *European Convention on Nationality*, 1 March 2000.

[280] Art. 15 of the *Universal Declaration of Human* Rights, 10 December 1948.

[281] Jennings, R.; Watts, A.; *supra* at FN 278, p. 851. WEIS, one of the prolific scholars on nationality, saw nationality as

> "[…] a specific relationship between individual and State conferring mutual rights and duties as distinct from the relationship of the alien to the State of sojourn." (Weis, P.; *Nationality and Statelessness in International Law;* 2nd edition, Alphen aan den Rijn: Sijthoff & Noordhoff International Publishers B.V., 1979, p. 29, footnote omitted)

[282] Harvard Law School, *Research in International Law*. I. *Nationality*, 23 Special Number Am. J. Int'l L. 13 (1929). The Harvard Draft Convention on Nationality was the main source of inspiration for the Convention on Conflict of Nationality Laws (*see, infra* FN 286). The commentary of Art. 1(a) clarifies that no attempt is made to define the term 'allegiance', but this term is "in general use to denote the sum of the obligations of a natural person to the state to which he belongs". *See,* Harvard Law School; *supra*, p. 23.

[283] *Robert John Lynch (Great Britain) v. United Mexican States*, Decision of 8 November 1929, p. 18.

> "[…] a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[284]

The power of a state to decide who its nationals are, as well as to determine their rights and duties, is an element of state sovereignty that is uncontested in international law. This principle was accepted in the *Nationality Decrees Issued in Tunis and Morocco Case,* where the PCIJ concluded that

> "[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain."[285]

However, when nationality becomes a question of jurisdiction for international tribunals, the reference to domestic law suffers two significant limitations: the principles of international law and the power of arbitrators or judges to assess nationality. In the same case of the *Decrees Issued in Tunis and Morocco*, the PCIJ inserted a caveat to the general rule that nationality is within the exclusive jurisdiction of a state and reasoned that "jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law."[286] Besides the rules of international law, international tribunals have the power to examine whether the nationality requirement is

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[284] *Nottebohm Case (Liechtenstein v. Guatemala),* second phase, Judgment of 6 April 1955, p. 23.

[285] *The Nationality Decrees Issued in Tunis and Morocco Case,* Advisory Opinion no. 4 of 7 February 1923, p. 24.

[286] *The Nationality Decrees Issued in Tunis and Morocco Case; supra* at FN 285, p. 24. The PCIJ concluded as follows:

> "The question whether the exclusive jurisdiction possessed by a protecting State in regard to nationality questions in regard to nationality questions […] depends upon an examination of the whole situation as it appears from the standpoint of international law. The question therefore is no longer solely one of domestic jurisdiction […]." (*The Nationality Decrees Issued in Tunis and Morocco Case; supra,* p. 28)

See also, Art. 1 of the Convention on Conflict of Nationality Laws, which provides that

> "[i]t is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality." (*Convention on Certain Questions Relating to the Conflict of Nationality Laws*, 1 July 1937)

met.[287] Referring to this principle, the tribunal in *Soufraki v. United Arab Emirates* concluded that

> "[…] when, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge. It will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities. But it will in the end decide for itself whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question and when, and what follows from that finding. Where, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue."[288]

In investment law, the investor's nationality, or in some cases, his residence in a state, is one of the elements ensuring the access to the protection granted by investment treaties and it also determines the jurisdiction of arbitral tribunals.[289] Where an investor is seeking protection from investment instruments, he must comply with the nationality or other requirements set forth therein. However, these treaties do not provide for a

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[287] *See,* Dugan, C.; Wallace jr., D.; Rubins, N. D.; Sabahi, B.; *supra* at FN 198, p. 298. In the *Salem Case* the tribunal stated that

> "[…] is not impeded by the principle of international law that every sovereign State is […] sovereign in deciding the question as to which persons he will regard as his subjects […]. In fact, as soon as the question of nationality is in dispute between two sovereign powers, it cannot be exclusively decided in accordance with the national law of one of these powers." (*Salem Case (Egypt v. U.S.),* Award of 8 June 1932, p. 1184)

As noted by AGHAHOSSEINI,

> "[t]he nationality of a person may come up for examination by an international tribunal for three different purposes: (i) for the purpose of determining its status at the domestic level; (ii) for the purpose of determining its status at the international level; and (iii) in the case of a dual national, for the purpose of determining its status *vis–à–vis* the national's second nationality." (Aghahosseini, Mohsen; *Claims of Dual Nationals and the Development of Customary International Law. Issues Before the Iran–United States Claims Tribunal*, Leiden: Martinus Nijhoff Publishers, 2007, p. 70, emphasis original)

[288] *Hussein Nouman Soufraki v. the United Arab Emirates*, Decision on Jurisdiction of 7 July 2004, para. 55. *See* also, *Siag v. Egypt; supra* at FN 275, Decision on Jurisdiction of 11 April 2007, para. 145, citing Schreuer, C.H.; *supra* at FN 257, p. 267. *See*, AGHAHOSSEINI, who concludes that

> "[…] it is equally well–settled that, although there is strong presumption in favour of the regularity of a confirmed nationality, an international tribunal is not only entitled but duty bound to determine, when so requested, the legal status of a nationality both at the domestic and at the international levels." (Aghahosseini, M.; *supra* at FN 287, p. 72, footnotes omitted)

[289] LEGUM refers to the definitions of 'investor' and 'investment' as "the key to making the most of international investment agreements". *See,* Legum, Barton; *Defining Investment and Investor: Who is Entitled to Claim?*, 22(4) Arb. Int'l 521 (2006), p. 521. The author adds that these definitions "are essential at the stage where the investor delineates who has standing to bring a claim against the state under the treaty." (*ibid*., p. 525)

definition of nationality, but they offer guidance in assessing the nationality of investors, usually by reference to the laws of the contracting parties.[290]

The practice on nationality in investment law was shaped by the rules of diplomatic protection developed in the practice of international courts and tribunals.[291] This is more visible where investors possess more than one nationality or when they renounce their nationality or acquire a new nationality. However, scholars and tribunals raised the question as to whether the rules of diplomatic protection can be simply imported into investment law. Some scholars consider that the rules of diplomatic protection regarding nationality cannot be automatically applied in cases involving the protection of investors under international investment treaties. The main argument for supporting this opinion appears to be based on a teleological interpretation of investment treaties. It is therefore argued that there is a striking difference between diplomatic protection and investment law that lies in the fact that, under the protection regime offered by investment law, investors no longer need their state of nationality to espouse their claims.[292] Others are of the opinion that, to the extent that there are no specific rules in

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[290] For example, Article 1(2)(a) of the Sweden–Romania BIT defines the notion of 'investor' with respect to natural persons as "any natural person who is a citizen of a Contracting Party in accordance with its laws". *See, Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments*, 1 April 2003. Other treaties do not contain a reference to the laws of the contracting parties in determining the nationality of investors. For example, Art. 1(2)(a) of the *Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments*, 1 November 1999, refers to investors as "nationals of a Contracting Party who make an investment in the other Contracting Party's territory".

[291] The right to diplomatic protection was first stated by VATTEL in 1758:

> "Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation […]." (Vattel, E.; *supra* at FN 155, p. 162)

[292] KRIEBAUM sees investment law as the

> "[…] first area of international law that allows for direct complaints by individuals […]. Diplomatic protection cases and human rights complaints can only to a limited extent serve as precedent." (Kriebaum, Ursula; *Local Remedies and the Standards for the Protection of Foreign Investment*, p. 420, in Binder, C.; Kriebaum, U.; Reinisch, A.; Wittich, S.(eds.); *supra* at FN 122)

In *Olguín v. Paraguay* the tribunal stated that

> "[..] internal rules of this nature, pertaining to the grant of diplomatic protection to individuals, and therefore, to something that under international law is a prerogative of the mother country, could not, by analogy, be applied to the case of access to the ICSID forum, one of whose most important and unique objectives is to effectively give the individual the right of action, excluding the mother country's endorsement of his claim or any other initiatives from the mother country, the only requirement being that it be a party to the 1965

investment treaties, there is nothing that prevents the reliance on the "established principles developed in the context of diplomatic protection".[293] The proliferation of the BITs and of the right of individuals to bring claims against states, without relying on the willingness of their state of nationality, diminished the importance of the rules developed in diplomatic protection. While their direct application in investment disputes is still controversial, in the light of the rules of treaty interpretation of the Vienna Convention,[294] these rules may emerge as relevant.

In order to gain access to the protection of the ECT and to be able to bring a dispute against the Contracting Party hosting their Investments, natural persons must meet certain prerequisites. Article 1(7) of the ECT provides that natural persons may qualify as Investors if they have "the citizenship or nationality of or [are] permanently residing in that Contracting Party in accordance with its applicable law".[295] Article 1(7) of the ECT employs three notions for designating the link between natural persons and Contracting Parties for the purpose of the notion of 'Investor': nationality, citizenship

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Convention and the relevant BIT." (*Eudoro Armando Olguín v. Paraguay,* Award of 26 July 2001, para. 62, unofficial translation)

DOUGLAS considers that there is no reason to apply by default the rules of diplomatic protection where an investment treaty is silent on issues of nationality. *See,* Douglas, Zachary; *The International Law of Investment Claims*, Cambridge: Cambridge University Press, 2009, pp. 321–322, para. 600. For further comments, *see* also, Sinclair, Anthony C.; *ICSID's Nationality Requirements*, 23(1) ICSID Rev.–FILJ 55 (2008), pp. 61–62.

[293] Dolzer, R.; Schreuer, C.; *supra* at FN 258, p. 47. *See* also, Schreuer, Christoph H.; with Malintoppi, Loretta; Reinisch, August and Sinclair, Anthony; *The ICSID Convention. A Commentary*, 2nd edition, Cambridge: Cambridge University Press, 2009, p. 267, para. 646. The authors conclude that

> "[u]ntil international practice develops new criteria [...], the rules as developed in the context of diplomatic protection remain the only reliable guidance." (Schreuer, C. with Malintoppi, L., Reinisch, A. and Sinclair, A.; *supra,* p. 267, para. 647)

PERKAMS considers that

> "[t]he modern international law of foreign investment can be described as a '*spin-off*' of international law of aliens and the rules governing diplomatic protection, both of which form a part of customary international law. Accordingly, even if today's investment law might deviate from these sources, it cannot be fully understood without recourse to its roots." (Perkams, Markus; *Piercing the Corporate Veil in International Investment Agreements*, p. 96, emphasis original, in Reinisch, August; Knahr, Christina (eds.); *International Investment Law in Context*, Utrecht: Eleven International Publishing, 2008)

[294] *See,* Art. 31(3)(c) of the Vienna Convention.

[295] The original provision referred to "natural persons having the citizenship or nationality of that Contracting Party in accordance with its laws". *See,* Art. 1(f)(i) of the *Basic Protocol of 11 September 1991,* 8/91 BP 2.

and permanent residence. The ECT, however, does not provide for a definition of these notions.

1.1 Nationality of Investor Natural Person

While Article 1(7) of the ECT is essential in determining the natural persons who may qualify for the protection offered by the ECT, the provisions of Article 26(1) of the ECT, which refer to the consent of the Contracting Parties on the disputes that may be submitted for resolution under the ECT's provisions, must also be observed. An arbitral tribunal has jurisdiction over a dispute if such dispute is between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter, which concerns an alleged breach of an obligation of the respondent Contracting Party under Part III of the ECT.[296] Thus, only disputes between a Contracting Party to the ECT and an Investor of another Contracting Party may qualify for resolution under Article 26 of the ECT; disputes between Contracting Parties and their nationals can be settled under the municipal law.[297]

Article 1(7) of the ECT provides that Investors are the natural persons who have the nationality of a Contracting Party in accordance with its applicable laws. As mentioned before, the power of states to determine the nationality of individuals is not unlimited. While a Contracting Party has the right to regulate the access to its nationality, such prerogative is restricted by the rules of international law and the power of tribunals to assess the nationality of a natural person as a jurisdictional requirement, as it is indicated by the consent of the Contracting Parties under Article 26 of the ECT.

[296] Art. 26(1) of the ECT.
[297] *See,* for the ICSID Convention, Amerasinghe, C.F.; *Jurisdiction* Ratione Personae *Under The Convention On The Settlement Of Investment Disputes Between States and Nationals Of Other States*, 47 Brit. Y.B. Int'l L. 227 (1974–1975), p. 229.

Where investment treaties only provide for investors to be nationals of a state in accordance with the law,[298] tribunals have been reluctant to apply other requisites in addition to the plain language of the treaties, such as the rule of 'genuine link' adopted in the *Nottebohm Case*.[299] This view is supported by scholars,[300] and retained by arbitral tribunals. In *Micula v. Romania,* the tribunal rejected the genuine link test based on the language of the Romania–Sweden BIT and the requirements of the Swedish law for acquiring Swedish nationality. As summarized by the tribunal,

> "[t]he Contracting Parties to the BIT are free to agree whether any additional standards must be applied to the determination of nationality. Sweden and Romania agreed in the BIT that the Swedish nationality of an individual would be determined under Swedish law and included no additional requirements for the determination of Swedish nationality. The Tribunal concurs with the *Siag* tribunal that the clear definition and the specific regime established by the terms of the BIT should prevail and that to hold otherwise would result in an illegitimate revision of the BIT"[301]

In *Saba Fakes v. Turkey,* the tribunal denied the existence of a 'genuine link' requirement and explained that the clear language of the Netherlands–Turkey BIT cannot be disregarded:

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[298] There are few BITs that provide for other requirements than nationality. Art. 1(3) of the Germany–Israel BIT provides for Israeli investors the supplementary condition of permanent residence:

> "The term 'nationals' shall mean
> (a) in respect of the Federal Republic of Germany: Germany within the meaning of the Basic Law for the Federal Republic of Germany;
> (b) in respect of the State of Israel: Israeli nationals being permanent residents of the State of Israel." (*Treaty between the Federal Republic of Germany and the State of Israel concerning the Encouragement and Reciprocal Protection of Investments*, signed on 24 June 1976, not in force)

[299] For the distinction between valid, effective and dominant nationality, *see, infra* FN 349. In the *Nottebohm Case*, the ICJ discussed the issue of effectiveness of the single nationality of Mr Nottebohm, and retained the condition of genuine link between the national and the granting state for such nationality to be effective. The genuine link, thus, was held to be applicable only when nationality is acquired, and not when nationality is by virtue of birth.

[300] *See,* KRISHAN who concludes that

> "[i]f the particular treaty rule says '*national of a contracting State in accordance with laws'*–full stop–that is all that is required. There is no need for further proof that nationality was effective […]. All the individual has to prove is that he or she holds the fact of that nationality." (Krishan, Devashish; *Nationality of Physical Persons*, p. 65, emphasis original, in Ortino, Federico; Liberti, Laura; Sheppard, Audley; Warner, Hugo (eds.); *Investment Treaty Law. Current Issues II. Nationality and Investment Treaty Claims. Fair and Equitable Treatment in Investment Treaty Law*, London: British Institute of International and Comparative Law, 2007)

[301] *Micula v. Romania; supra* at FN 275, Decision on Jurisdiction and Admissibility of 24 September 2008, para. 101, emphasis original, footnote omitted. The tribunal added that

> "[…] *Nottebohm* cannot be read to allow or require that a State disregard an individual's single nationality on the basis of the fact that this individual has not resided in the country of his nationality for a period of time." (*Micula v. Romania; supra,* para. 103, emphasis original)

> "Had the Contracting Parties intended to set additional limitations as regards jurisdiction *ratione personae*, no doubt they would have expressly stated such limitation in the text of the BIT."[302]

The language of the ECT is unambiguous as to the assessment of natural persons' nationality. Article 1(7) of the ECT requires only for nationality of individuals to be in accordance with the laws of the Contracting Parties. Reading other implied requirements would be inconsistent with the rules of treaty interpretation that call for treaties to be interpreted as they are, on the basis of their actual text.[303] As explained by the ICJ in the *Morocco* Case, "[t]he Court can not, by way of interpretation, derive from the Act a general rule […] which it does not contain".[304] Since the sole requirement under Article 1(7) is for nationality to be in accordance with the laws of the Contracting Party, a 'genuine link' requirement, for example, can only be upheld when provided as a condition under the municipal laws of the Contracting Parties regulating nationality.

1.2 Citizenship and the Energy Charter Treaty

The review of various investment treaties reveals that nationality and citizenship are seen in some cases as different notions and are employed separately or together in the

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[302] *Saba Fakes v. Republic of Turkey,* Award of 14 July 2010, para. 70, emphasis original. Art. 1(a)(i) of the Netherlands–Turkey BIT provides that "'investor' means: (i) a natural person who is a national of a Contracting Party under its applicable law". *See, Saba Fakes v. Turkey; supra*, para. 64.

[303] Fitzmaurice, G.G.; *supra* at FN 194, p. 9. *See* also, the similar discussion in the context of legal entities, in Chapter II.2.4 below.

[304] *Case Concerning Rights of Nationals of the United States of America in Morocco*, Judgment of 27 August 1952, p. 199. *See* also, *Saba Fakes v. Turkey,* where the tribunal concluded the following:

> "The language of Article 25(2)(a) of the ICSID Convention is clear and does not require any further clarification. Pursuant to the generally accepted rules of treaty interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties, the Tribunal is precluded from elaborating any interpretation that would run counter to this clear language, in particular any interpretation that would result in establishing additional limitations to the Centre-s jurisdiction where no such limitations were provided by the Contracting Parties." (*Saba Fakes v. Turkey; supra* at FN 302, para. 76)

definition of the notion of 'investor'.[305] The question whether nationality is a synonym for citizenship is not new in international law.

Determining whether citizenship is a substitute for nationality is difficult in the absence of generally accepted definitions of these two concepts and, consequently, one must resort to municipal laws for taking a grip of this problem.[306] Some states refer to either nationality or citizenship to designate their legal relationship with an individual, while some states use both terms. An important difference is the fact that, while the term 'nationality' is used for natural persons and legal entities, the term 'citizenship' refers to natural persons only. The Spanish Constitution refers to 'nationality',[307] while the Romanian Constitution refers to 'citizenship'.[308] No differences seem to appear in the meaning of the two notions. However, unlike the Spanish and Romanian laws, there are states where the notions of 'nationality' and 'citizenship' do not converge and are used to designate different bonds between states and individuals. The Mexican legislation provides support for this argument, as 'nationality' retains a broader meaning than the notion of 'citizenship'. The Mexican Constitution uses both 'nationality' and 'citizenship', where citizenship is bestowed to Mexican nationals that are over eighteen

[305] *See* for example, Article I(g) of the Canada–Thailand BIT, which refers to citizenship and permanent residence for Canadian investors, and to nationality and permanent residence for investors of Thailand:

> "[…] "investor" means
> in case of Canada:
> (i) any natural person possessing the citizenship of or permanently residing in Canada in accordance with its laws; or […]
> in the case of the Kingdom of Thailand:
> (i) any natural person possessing the nationality of or permanently residing in the Kingdom of Thailand in accordance with its laws; […]" (*Agreement between the Government of Canada and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments*, 24 September 1998)

[306] Even ARISTOTLE, referring to citizenship, wrote in his *Politics* that "there is no unanimity, no agreement as to what constitutes a citizen". *See,* Aristotle, *The Politics,* translated by T.A. Sinclair, Penguin, 1981, p. 168.

[307] Art. 11 of the *Constitution of Spain of 1978*. *See* also, Chapter III "Da Nacionalidade" (*"On Nationality"*) of the *Constitution of the Federative Republic of Brazil of 1988*.

[308] Article 5 of the *Constitution of Romania of 1991,* amended by Law no. 429 of 23 October 2003. Under Romanian law, the term 'nationality' is used with respect to the ethnicity of a person, as a Romanian citizen may be of Hungarian nationality.

years of age and have honest means of livelihood.[309] Only Mexican citizens enjoy the political rights conferred by the Constitution and municipal laws.[310] The Harvard Draft Convention on Nationality sees nationality and citizenship as different notions, since "nationality has a broader meaning than "citizenship", for which it is frequently used as a synonym".[311] This meaning is the result of the fact that nationality "does not necessarily involve the right or privilege of exercising civil or political functions".[312]

It is generally agreed that nationality and citizenship are or must be viewed as synonyms,[313] where public international law uses the term 'nationality' and municipal law the one of 'citizenship' and/or 'nationality':

> "Conceptually and linguistically, the terms "nationality" and "citizenship" emphasize two different aspects of the same notion: State membership. "Nationality" stresses the international, "citizenship" the national, municipal aspect."[314]

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[309] *See,* Art. 34 of the *Constitution of United Mexican States of 1917* (the Mexican Constitution), with subsequent amendments. Art. 30 of the Mexican Constitution defines the notion of 'nationals', while Art. 35 provides for the rights of Mexican citizens.

[310] *See* also, s. 325 of the *U.S. Immigration and Nationality Act of 1952*. The United States, in an explanatory note to the United States–Georgia BIT clarifies that

> "[t]he Treaty [BIT] defines "national" as a natural person who is a national of a Party under its own laws. Under U.S. law, the term "national" is broader than the term "citizen". For example, a native of American Samoa is a national of the United States, but not a citizen." (*The Treaty between the Government of the United States of America and the Government of the Republic of Georgia concerning the Encouragement and Reciprocal Protection of Investment*, 17 August 1997, and Letter of Submittal of 22 June 1995)

The *British Nationality Act of 1981* (the British Nationality Act) refers to British citizens, British Overseas citizens, British subjects and British protected persons. British citizens are defined under Part I, while British subject under Part IV of the British Nationality Act. A British citizen is considered to be a citizen of the United Kingdom, while the term 'British subject' encompasses both citizens of the United Kingdom and its former colonies (today, the Commonwealth). *See* also, the *British Nationality Act of 1948,* referred to by the British Nationality Act.

[311] For similar opinion, *see,* Nelson, Timothy G.; *Passport, s'il Vous Plaît?: Investment Treaty Protection and the Individual Investor's Citizenship*, 32 Suffolk Transnat'l L. Rev. 451 (2008–2009), p. 463.

[312] Harvard Law School; *supra* at FN 282, p. 23. For the same opinion, *see,* McGarvey–Rosendahl, Patricia; *A New Approach to Dual Nationality*; 8 Houston Journal of International Law 305 (1985–1986), p. 305

[313] *See,* Aghahosseini, M.; *supra* at FN 287, p. 15, note 1.

[314] Weis, P.; *supra* at FN 281, pp. 4–5. Similarly, GUILD concludes that "the national is the citizen viewed from outside the state". *See,* Guild, Elspeth; *The Legal Elements of European Identity. EU Citizenship and Migration Law,* The Hague: Kluwer Law International, 2004, pp. 20–21, footnote omitted.
HALL concludes that citizenship,

> "[…] as opposed to nationality, is a concept ordinarily associated with the possession of civil and political rights and obligations by natural persons". (Hall, Stephen; *Nationality, Migration Rights and Citizenship of the Union,* Dordrecht: Martinus Nijhoff Publishers, 1995, p. 14)

The tribunal in *Feldman Karpa v. Mexico* used the terms 'nationality' and 'citizenship' interchangeably, relying on the fact that

Where both terms are used, one must confirm the term which has the meaning employed to the notion of 'nationality' under international law.[315] Where a person is vested with full political and personal rights attesting the legal relationship with a specific state, the fact that the municipal law employs the term 'nationality' or 'citizenship' does not change the effect of the legal bond between state and its nationals in international law. In this context, perhaps the ECT drafters preferred to use both terms in Article 1(7) in order to reconcile the different approaches taken by the laws of the Contracting Parties.

1.3 EU Citizenship and the Energy Charter Treaty

One of the peculiarities of the ECT refers to the capacity of REIOs to become Contracting Parties to the ECT. Currently, the EU and EURATOM are the only REIO Contracting Party to the ECT. The existence of the citizenship of the EU (EU citizenship) raises questions as to its effectiveness for the purpose of international law and of the ECT.[316]

"[…] citizenship may pertain more to domestic aspects, and nationality rather to international aspects of the legal bond between a state and an individual […]." (*Marvin Roy Feldman Karpa v. United Mexican States*, Interim Decision on Preliminary Jurisdictional Issues of 6 December 2000, para 31)

[315] *See* also, Amerasinghe, C.F.; *supra* at FN 297, p. 246.

[316] The EU citizenship also becomes relevant in the context of dual nationality of Investors. *See*, *infra* Chapter II.1.5.

Before the entry into force of the TFEU, the citizenship was of the EU; however, the EU was not formally a Contracting Party to the ECT. *See* further, Ortino, Federico; *L'Importance de la Nationalité des Personnes et des Entreprises dans le Droit de L'Investissement*, p. 65, in Kessedjian, Catherine; Leben, Charles (eds.); *Le Droit Européen et L'Investissement*, Paris: Èditions Panthéon–Assas, 2009.

Until the adoption of the TFEU, the EU citizenship was actually a *de facto* citizenship of the European Communities. The provisions dealing with the EU citizenship were included in the EC Treaty, while EU citizens had the rights and duties provided for by the EC Treaty. Moreover, until the ratification of the TFEU, the concepts of EU and EC were not coincident. This determined some scholars to conclude that "the qualification "of the Union" is either inaccurate or reflects an aspiration not borne by positive law." *See,* Condinanzi, Massimo; Lang, Allessandra; Nascimbene, Bruno; *Citizenship of the Union and Free Movement of Persons,* Leiden: Martinus Nijhoff Publishers, 2008, p. 3.

The concept of EU citizenship was introduced with the adoption of the TEU.[317] The original provision of the TEU provided that the citizenship of the EU is established for every natural person holding the nationality of a Member State.[318] In 1992, the European Council adopted a decision that sought to clarify the notion of 'EU citizenship' and its position in relation to the nationality of a Member State. The European Council stressed that

> "[t]he provisions […] relating to citizenship of the Union give nationals of the Member States additional rights and protection […]. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of the Member State will be settled solely by reference to the national law of the Member State concerned."[319]

The current provisions on the EU citizenship are contained in Article 20 of the TFEU, which states the following:

> "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

The opinions of scholars on the issue of EU citizenship and the ECT are divided. Some authors consider that nationals of Member States of the EU also have a lawful citizenship of the EU and consequently they are dual nationals.[320] The question, therefore, is whether the EU citizenship can be recognized as such in international law or, put it differently, whether EU citizenship values nationality of a state.[321]

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[317] *See, supra* at FN 234.
[318] Art. G(9) of the TEU.
[319] Conclusions of the Presidency: Edinburgh 12 December 1992*, Annex I: Decision of the Heads of State and Government, Meeting within the European Council, Concerning Certain Problems Raised by Denmark on the Treaty on European Union,* Section A.
[320] For example, *see,* Burgstaller, M.; *supra* at FN 249, pp. 207–208; Pinsolle, Philippe; *The Dispute Resolution provisions of the Energy Charter Treaty,* 10(3) Int. A.L.R. 82 (2007), p. 87–88; Pinsolle, Philippe; *Selected Nationality Issues in ECT Arbitration*, p. 970, in Fernández–Ballesteros, M.Á.; Arias, David (eds.); *Liber Amicorum Bernardo Cremades*, Las Rozas (Madrid): La Ley, 2010.
[321] Any discussion on the EU citizenship and its relation with the ECT must consider the evolution of the European Communities and the EU. Initially, the Contracting Party to the ECT was the ECSC, the EURATOM and the EEC. Also, before the TFEU came into force, the EU had no legal personality.

The EU citizenship is often seen as expressing "the idea of belonging to a community"[322] or as a "*de jure* category of Union citizenship which is created by Community law".[323] At least two arguments rejecting the idea of an EU citizenship, in the sense of nationality under international law, can be put forward. If nationality expresses the link between an individual and a state, then the element 'state' of this definition is missing in the case of the EU citizenship. Although having the appearance of a state, the EU is not a state within the meaning of international law.[324] Secondly, the EU citizenship is not a stand–alone citizenship, as the EU citizenship can exist only where an individual has the nationality of a Member State. Also, the rights and obligations bestowed in the EU citizens are not exclusive, as some of them are extended to non–national residents in the Member States.[325] With a view of these particularities, it is debatable whether the EU citizenship can produce effects at international level.[326]

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[322] Condinanzi, M.; Lang, A.; Nascimbene, B.; *supra* at FN 316, p. 10. Other authors argue that the EU citizenship was introduced "as part of an effort to move from a mainly economic community to a political union." *See,* Craig, P.; De Búrca, G.; *supra* at FN 243, p. 847.

[323] Hall, S.; *supra* at FN 314, p. 9, emphasis original. The author also refers to the EU citizenship as "an essentially political concept". (*ibid.*, p. 10)

[324] Art. 1 of the Montevideo Convention on Rights and Duties of States provides for that

> "[t]he state as a person of international law should possess the following qualifications:
> a. a permanent population;
> b. a defined territory;
> c. government; and
> d. capacity to enter into relations with the other states." (*Montevideo Convention on Rights and Duties of States*, 26 December 1934)

See also, Hirsch, Moshe; *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes*, Dordrecht: Martinus Nijhoff Publishers, 1993, p. 62; Crawford, James; *The Creation of States in International Law*, 2nd edition, New York: Oxford University Press, 2006, p. 28 *et seq.*

The EU possesses the capacity to enter into relations with other states (as of 1 December 2009, with the entry into force of the TFEU); and has governing bodies (the EU Parliament, the Commission etc.). However, the territory and the population of the EU are of the Member States who retain their sovereignty over these elements. Similarly, the Member States retain their governments. BROWNLIE sees the EU as an association of states "which has a certain federal element, albeit on a treaty basis." *See,* Brownlie, I.; *supra* at FN 170, p. 75. Such associations of states do not constitute states, but they have "a certain effect upon international law". *See,* Shaw, M.N.; *supra* at FN 92, p. 214. SHAW shares the opinion of BROWNLIE, considering the EU to be an association of states (pp. 216–217). For other examples of associations of states, *see,* the Commonwealth of Nations (the British Commonwealth) and the Commonwealth of Independent States (of the former USSR republics), in Shaw, M. N; *supra* at FN 92, pp. 214–217.

[325] *See* for example, Art. 48(1)(b) of the TFEU.

[326] In the absence of the legal effects of the EU citizenship under the rules of international law, it is debatable whether in practice there can be envisaged a dispute brought by Investors of the EU against the ECT Contracting Parties. For the case of *Societas Europaea, see,* Chapter II. 2.1.1 below.

1.4 Permanent Residence and the Energy Charter Treaty

The ECT covers not only nationals and citizens of Contracting Parties, but also natural persons who are permanently residing in a Contracting Party, in accordance with its applicable law.

It is not unusual for a treaty to extend its protection to permanent residents. The NAFTA,[327] encompasses under the definition of 'national', citizens or permanent residents of a NAFTA Party.[328] Similarly, BITs extend their treatment to permanent residents. The Germany–Russia BIT, for instance, protects only permanent residents:

> "The term "investor" means an individual having a permanent place of residence in the area covered by this Agreement […]."[329]

In order to be covered by the provisions of Article 1(7) of the ECT, individuals must be permanent residents in accordance with the law of a Contracting Party to the ECT.[330] Again, as with nationality, the freedom of a Contracting Party in deciding who its permanent residents are, is limited by the principles of international law and the competence of tribunals to assess the jurisdictional requirements set forth under the ECT. The rules of permanent residence differ from legislation to legislation and may impose on individuals onerous or more permissible conditions. The requisites for

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[327] *North American Free Trade Agreement*, 1 January 1994. The references to NAFTA refer to the version published in 32 ILM 296/612 (1993).
For the similarities between the NAFTA and the ECT, *see*, Omalu, Mirian Kene; *NAFTA and the Energy Charter Treaty. Compliance with, Implementation and Effectiveness of International Investment Agreements*, The Hague/London/Boston: Kluwer Law International, 1999.

[328] Art. 201 of the NAFTA:
"[…] **national** means a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1"

[329] Art. 1(1)(c) of the *Agreement between the federal Republic of Germany and the Union of Soviet Socialist Republics concerning the Promotion and Reciprocal Protection of Investments,* 5 August 1991. This definition was discussed in the case of *Franz Sedelmayer v. the Russian Federation*, Award of 7 July 1998.

[330] The proposal to include permanent residents in the definition of Investor was advanced by the representatives of Australia. *See, Note from the Chairman of the Working Group II,* 14/91 BP 3, 11 October 1991. There are no permanent residents of the EU, but permanent residents of EU Member States.

acquiring the status of permanent resident depend upon various circumstances: whether the person is married to a national of the host state, has children who are nationals of the host state, or is residing in the host state as refugee;[331] or it requires a minimum period during which the individual resides in the territory of the host state etc.[332] What is relevant, however, is that permanent residence only, and not any residence, has legal effect under the ECT.

In investment law, few cases deal with permanent residents as investors. In *Sedelmayer v. Russia*, the tribunal had to decide whether the claimant, Mr Franz Sedelmayer, was a permanent resident in Germany in accordance with the provisions of the Germany–Russia BIT.[333] The Germany–Russia BIT adopts the rule of permanent residence rather than nationality for covered investors. In *Feldman Karpa v. Mexico*, a case brought under the NAFTA, the claimant, a United States citizen by birth, moved to Mexico and obtained the status of permanent resident.[334] The tribunal here gave preference to the nationality of the claimant and rejected the allegations of a dual nationality *lato sensu* because of the permanent resident status.[335]

1.5 Dual Nationality *Lato Sensu* and the Energy Charter Treaty

The fact that a person may have one or more nationalities is recognized in international law, although several attempts have been made to restrict the right of a person to hold

[331] *See* for example, the *Normative Resolution no. 36/99* of the Brazilian National Council for Immigration, which provides that the spouse of a Brazilian national acquires permanent residence in Brazil.
[332] *See* for example, Art. 71 of the *Emergency Government Ordinance no.194/2002 on the Regime of foreigners in Romania*, with subsequent amendments, which provides, *inter alia*, that a foreigner will be granted the right to permanently reside in Romania if he resided in the territory of Romania for a period of at least 5 years. Art. 71 adds the condition for the foreigner to have basic knowledge of Romanian language.
[333] *Sedelmayer v. Russia, supra* at FN 329, section 2.1.5, p. 56 *et seq.*
[334] *Feldman Karpa v. Mexico; supra* at FN 314, paras 27–28.
[335] *Ibid.,* para. 36. The case is further discussed below, in Chapter II.1.5.

more than one nationality.[336] Today, however, the focus is not anymore on eliminating the cases of dual or multiple nationalities, but on accommodating and regulating this particular situation,[337] in order to offer dual or multiple nationals the protection granted to any national.[338] The issue of dual nationality is not new to international law and far from being settled.

Article 1(7) of the ECT is silent on whether natural persons having dual or multiple nationalities may qualify as Investors. Article 26(1) of the ECT refers, nonetheless, to claims brought against a Contracting Party by Investors of 'another' Contracting Party. The central point of this analysis revolves around the provision of Article 26(1).[339] The following situations are discussed below: (a) where a national of a Contracting Party is also a national of the respondent Contracting Party; (b) where a national of a Contracting Party is also a national of the respondent Contracting Party and the dispute is submitted under the provisions of the ICSID Convention; (c) where a national of a Contracting Party is also a national of another Contracting Party, other than the respondent Contracting Party, or of a third state; (d) where a national of a Contracting Party is also a permanent resident of the respondent Contracting Party or of another Contracting Party or third state, and the vice versa. It is important to point out from the outset of this analysis that Article 26 (1) of the ECT refers to 'Investor of another Contracting Party', which means that the language of the provision is not restricted to

[336] These attempts were unsuccessful for various reasons, but one in particular appears to be decisive. One cannot eliminate dual or multiple nationalities without the risk of rendering a person stateless. *See,* McGarvey–Rosendahl, P.; *supra* at FN 312, p. 312.

[337] As explained by AGHAHOSSEINI,

> "[t]his general distaste for dual nationality has slowly but distinctly changed, not because of any doctrinal conversion on the part of its opponents, but because of the practicalities of human life. […] [T]he appropriate policy towards the phenomenon should be, not to regard it as an evil to be avoided or eliminated, but as a fact of life the impact of which must be regulated." (Aghahosseini, M.; *supra* at FN 287, p. 255)

[338] For example, the bilateral taxation treaties resolving the conflicts between different taxation regimes.

[339] While the discussion can be extended to cases of multiple nationalities, the limited space compels to the analysis of cases of dual nationality only.

nationals or citizens of another Contracting Party, but it also encompasses permanent residents.

a. Where a National of a Contracting Party is also a National of the Respondent Contracting Party

The first situation refers to individuals who are nationals or citizens of a Contracting Party, but who, at the same time, hold the nationality or citizenship of the respondent Contracting Party. It was suggested that the ECT does not expressly exclude these dual nationals from its coverage, but it is simply silent on this matter.[340] Article 1(7)(a)(i) briefly refers to natural persons possessing the nationality or citizenship of a Contracting Party in accordance with its applicable law.[341] On the other hand, Article 26(1) of the ECT refers to disputes between a Contracting Party and an Investor of another Contracting Party. The wording of this provision, which employs the term 'another', is suggested to have two interpretations in the context of dual nationality. On one hand, the ECT may only allow for disputes between an Investor of a Contracting Party that is not an Investor of the respondent Contracting Party, since the term 'another' may suggest the exclusion of such dual nationals.[342] In contrast, the wording of Article 26(1) can be construed as requiring an Investor to be a national, citizen or permanent resident of another Contracting Party, but does not exclude Investors that are

[340] *See,* D'Allaire, Dominique; *The Nationality Rules under the Energy Charter Treaty: Practical Considerations*, 10(1) Journal of World Investment and Trade 39 (2009), p. 41. PINSOLLE concludes that the ECT does not exclude dual nationals from the definition of 'Investor'. *See*, Pinsolle, P., in Fernández–Ballesteros, M.Á.; Arias, D. (eds.); *supra* at FN 320, p. 969.

[341] *See,* the reasoning of the tribunal in *Saba Fakes v. Turkey*:

> "Pursuant to Article 1(a)(i) of the Netherlands–Turkey BIT, for the purposes of this BIT, *"'investor' means: (i) a natural person who is a national of a Contracting Party under its applicable law."* […]
> The Netherlands–Turkey BIT therefore does not exclude dual nationals from the protection extended by the BIT, to the effect that Mr. Fakes may file a claim against the Republic of Turkey as a Dutch national regardless of the fact that he also holds Jordanian nationality." (*Saba Fakes v. Turkey; supra* at FN 302, paras 64 and 65, emphasis original, footnote omitted)

[342] The adjective "another" has the meaning of 'different', 'something or somebody different than the person or object already mentioned'. *See,* The New Oxford American Dictionary; *supra* at FN 136, p. 64.

also nationals, citizens or permanent residents of other Contracting Parties, including the respondent Party.[343]

The interpretation of Article 26(1) of the ECT must be made within the rules ascribed in the Vienna Convention.[344] In accordance with Article 31(1) of the Vienna Convention, which sets forth the general rule of treaty interpretation, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The Vienna Convention, accordingly, gives precedence to the ordinary meaning of the terms of the treaty, which, however, must be understood within the context where they are employed. The provisions of Article 1(7) and 26(1) of the ECT do not expressly exclude dual nationals from the protection of the ECT, when one of the states of nationality is the respondent in the dispute.[345] Such situation was not envisaged, nor considered during the negotiation of the ECT or elsewhere in the final text of the ECT.[346] Moreover, ECT tribunals constantly rejected to read in the ECT something

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[343] Support may also be found in the early drafts of the ECT. Art. 32(1) of the *Basic Agreement of 31 October 1991,* 21/91 BA 4 provided for "[d]isputes between an investor of one Contracting Party and any other Contracting Party" (emphasis added). Similar phrasing is employed by Art. 10(1) of the ECT, which provides that each Contracting Party shall "encourage and create stable, equitable, favourable and transparent conditions for investors of other Contracting Parties", and by Art. 13(1) of the ECT, which refers to "Investments of Investors of a Contracting Party in the Area of any other Contracting Party".

[344] There is no doubt that treaties are *lex specialis* and their clauses must be strictly followed. However, "to produce such a result, the treaty rules need to be clearly formulated". *See,* Gazzini, Tarcisio; *The Role of Customary International Law in the Field of Foreign Investment,* 8(5) Journal of World Investment & Trade 691 (2007), p. 706.

[345] The drafters of the ECT made use of at least three wordings: 'other', 'any other' and 'another' Contracting Party/Parties throughout the ECT's provisions. *See*, *supra* at FN 343.

[346] The issue of dual nationality was of no concern and it was easily dismissed during the drafting of the ECT. As results from the available documents, the Canadian delegation asked whether "Investors with dual nationality of two Contracting Parties be able to choose international arbitration to challenge measures of one or the other of those Contracting Parties." *See, Comments of the Canadian delegation regarding the Basic Agreement of 19 June 1992,* 31/92 BA 13. The only available reply to this question came from the representative of Australia who considered that, unless the dispute is submitted under the ICSID option, there is nothing in the ECT against dual nationals bringing a dispute against one of the state of nationality:

> "As to the ICSID Convention procedures – generally the answer is no. Dual nationals who are natural persons would be unable to take action against either of the States […].
> […] where the other means of dispute settlement are relied on, there [sic!] currently no such limitation on a dual national taking action against a state of its nationality," (*Letter from Michael Lennard, Principal*

which is not expressly provided, in particular in respect to the prerequisites imposed on Investors and Investment.[347] In the light of the textual interpretation principle, this argument should be sufficient for establishing the jurisdiction of an ECT arbitral tribunal dealing with this issue. However, if it is accepted that the terms of Article 26(1) of the ECT within their ordinary meaning are ambiguous, then further consideration must be paid to other methods of treaty interpretation. Article 31(3)(c) of the Vienna Convention provides that there shall be taken into account "any relevant rules of international law applicable in the relations between the parties" where the ordinary meaning of the terms still leaves ambiguity.[348]

In resolving issues of dual nationality, international tribunals resorted to the application of two rules: the rule of non–responsibility and the rule of effective or dominant nationality.[349] The rule of non–responsibility, as developed under the rules of diplomatic protection, prevents a state from espousing the claims of a national, when the individual also holds the nationality of the respondent state. This rule, which was adopted by some

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Lawyer, International Trade Law, Attorney General's Department Australia, to Mr Leif Ervik, European Energy Charter Conference Secretariat, 1 December 1992)

The proposal of the representative of Australia either to explain that dual nationals submitting claims against their state of nationality are not covered when the dispute is brought under the ICSID Convention, either to explicitly exclude such dual nationals from the dispute settlement provisions, except where the respondent Contracting Party agreed to treat the Investor as a national of another Contracting Party, generated no debate. *See, Letter from Michael Lennard to Mr Leif Ervik; supra.*

[347] *See* for example, Chapter II. 2.4 below.

[348] *See, Lotus Case,* where the PCIJ stated that the terms of a treaty must be interpreted within their ordinary meaning, unless there is an express stipulation to the contrary. *See*, *The Case of the SS "Lotus",* Judgment no. 9 of 7 September 1927, pp. 16–17.

Article 26(6) of the ECT also provides for the direct application of the rules and principles of international law by the ECT tribunals.

[349] From the outset of this analysis it is useful to clarify the terminology used here. While scholars and tribunals refer to the 'effective nationality' rule, it is submitted that using the wording 'dominant nationality' satisfies better the purpose of this rule. The use of the terms 'dominant nationality' indicates the existence of at least two nationalities that are both valid and effective at international level. The term 'effective', on the other hand, may suggest that out of two nationalities one is ineffective. Such latter approach would be inaccurate, while the first would correctly describe the concept of prevalence on which the dominant nationality rule relies. The effective nationality answers the question whether a nationality granted at national level can have international effects. The *Nottebohm Case* retained as a condition for the effectiveness of nationality the existence of a genuine link between the national and the state of nationality which he acquired. For the distinction between valid, effective and dominant nationality, *see,* Aghahosseini, M; *supra* at FN 287, pp. 72–80.

modern investment instruments, prevents an individual to bring a claim against one of his states of nationality. For example, Article 25 of the ICSID Convention confines the jurisdiction of the ICSID to claims submitted by individuals who are nationals of a Contracting State, but are not nationals of the respondent Contracting State.[350] The rule of dominant nationality allows states to take up claims of an individual who also possesses the nationality of the respondent state, as long as the dominant nationality is not the one of the respondent state.[351]

The Convention on Conflict of Nationality Laws retains the principle of non–responsibility by providing that a state is prevented to afford diplomatic protection to one of its nationals against a state whose nationality such person also possesses.[352] The prohibition is absolute and irrespective of whether the dominant nationality is that of the claimant state, and it is based on the principle of sovereign equality of states. The

[350] Art. 25(2)(b) of the ICSID Convention refers to national of another Contracting State as "any natural person who had the nationality of a Contracting State […], but does not include any person who […] had the nationality of the Contracting State party to the dispute".

[351] The nature of these two rules is not yet settled in international law. While there appears to be strong support for the rule of non–responsibly as customary international law, there is still debate on whether the dominant nationality rule can be considered as such. *See* also, Aghahosseini, M.; *supra* at FN 287. AGHAHOSSEINI considers both rules to be part of customary international law (p. 1). Oppenheim's International Law refers to the provisions of Articles 4 and 5 of the Hague Convention as rules "which are probably to be regarded as rules of customary international law" (Jennings, R.; Watts, A.; *supra* at FN 278, p. 516.). In the *Reparation for Injuries Case*, the ICJ saw as "ordinary" the "practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national". *See, Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, p. 186. ORREGO VICUÑA argues that, "[a]lthough it has been suggested that these rules probably reflect customary international law, the situation does not appear today to be quite consolidated." *See,* Orrego Vicuña, Francisco; *Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement,* <http://www.arbitration-icca.org/media/0/12224294674510/changing_approaches_to_the_nationality_of_claims_in_the_context_of_diplomatic_protection_and_international_dispute_settlement.pdf> (last visited, 16 February 2011), p. 16, footnote omitted. VANDEVELDE is of the opinion that the rule of dominant or effective nationality constitutes customary international law:

> "The rule under customary international law is that such a person shall be treated as a national of the country of his or her "dominant or effective" nationality." (Vandevelde, K.J.; *supra* at FN 271, p. 158, footnote omitted)

The analysis here is not intended to be an analysis of the two rules and whether or not they would constitute customary international law rules, but whether, at least in the light of the recent developments of investment law, dual nationals would have access to the dispute settlement mechanism of the ECT.

[352] Art. 4 of the Convention on Conflict of Nationality Laws, *supra* at FN 286, reads as follows:

> "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."

See also, Peake, Jessica; *Diplomatic Protection for Dual Nationals: Effective Nationality or Non–Responsibility?*, 10 Trinity College Law Review 98 (2007), p. 102.

Convention on Conflict of Nationality Laws retains the dominant nationality test only for cases where a third state is concerned, namely that such state will recognize the effective nationality of an individual possessing more than one nationality.[353]

The Institute of International Law, at its 1965 session held in Warsaw, adopted a Resolution that confirmed the rule of non–responsibility. Article 4(a) of the Warsaw Resolution provided that

> "[a]n international claim presented by a State for injury suffered by an individual who possesses at the same time the nationalities of both claimant and respondent States may be rejected by the latter and is inadmissible before the court (jurisdiction) seised of the claim."[354]

However, similar to the Convention on Conflict of Nationality Laws, the Warsaw Resolution recognises the rule of dominant nationality when the nationality of a third state, and not of the respondent state, is involved.[355]

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[353] Art. 5 of the Convention on Conflict of Nationality Laws, *supra* at FN 286, notes that

> "[w]ithin a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected."

The drafting history of the Convention on Conflict of Nationality Laws reveals a lack of consensus on the rules of non–responsibility in case of dual nationality. The Draft Conventions prepared for the 1930 Hague Conference on the Codification of International Law, show that the states rather disagreed with the rule under Article 4 of the Convention on Conflict of Nationality Laws. The *Bases of Discussion drawn up for the Conference by the Preparatory Committee* reveals that

> "[w]hile some replies claim to exclude any exercise of diplomatic protection in the case in question […]; other replies, on the contrary, admit the right of protection." (*Official Documents. Conference for the Codification of International Law, The Hague, March 13, 1930; Bases of Discussion drawn up for the Conference by the Preparatory Committee, I. Nationality*; 24 Am. J. Int'l L. 1 (1930), p. 11)

The conclusion was based upon the replies received from the governments of South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Estonia, United States, Finland, France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Romania, Siam, Sweden, Switzerland and Czechoslovakia (*id.*).

[354] The *Warsaw Resolution* was adopted on the basis of the Report of Herbert W. Briggs. *See,* Institute of International Law, *The National Character of an International Claim Presented by a State for Injury Suffered by an Individual*, Warsaw, 1965.

[355] Art. 4(b) of the *Warsaw Resolution* provides that

> "[a]n international claim presented by a State for injury suffered by an individual who, in addition to possessing the nationality of the claimant State, also possesses the nationality of a State other than the respondent State may be rejected by the latter and is inadmissible before the court (jurisdiction) seised of the claim unless it can be established that the interested person possesses a closer (prépondérant) link of attachment with the claimant State."

The practice before 1930 and after this date shows that the rule of dominant nationality has been extensively used in case of dual nationals, thus disregarding the rule of non–responsibility advocated by the Convention on Conflict of Nationality Laws.[356] A dual national has full nationality of two states. As pointed out by an author, "a dual national is not a half–national of each of his two countries of nationality",[357] and, consequently, each of these countries has the right to treat him as national.[358] The dominant nationality test considers the strength of two links between the national and the two states concerned and gives preference to the nationality that shows stronger ties.[359] The ILC Draft Articles on Diplomatic Protection restate the principle of non–responsibility under Article 4 of the Convention on Conflict of Nationality Laws, but maintain the exception of the dominant nationality rule: the state may exercise diplomatic protection in respect of a national, against a state of which that person is also a national, if the nationality of the former state is predominant.[360] The ILC Report on Multiple Nationalities considered the dominant nationality rule as follows:

The drafting history of the Warsaw Resolution indicates that the dominant nationality rule was suggested by BRIGGS as an exception to the rule of non–responsibility under Art. 4(a). *See,* Aghahosseini, M.; *supra* at FN 287, p. 47, at note 48.

[356] *See, Canevaro Claim* (*Italy v. Peru*), Award of 3 May 1912; *Alexander Tellech (United States v. Austria and Hungary*), Award of 25 May 1928.

[357] Aghahosseini, M; *supra* at FN 287, p. 23.

[358] *See,* Art. 3 of the Convention on Conflict of Nationality Laws, *supra* at FN 286, that provides for the following:

> "Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."

[359] One author refers to the "*relative* strength of two sets of links". *See,* Kerley, Ernest L.; *Nationality of Claims – A Vista*; 63 American Society of International Law Proceedings 35 (1969), p. 39, emphasis original.

[360] Art. 7 of the ILC Draft Articles on Diplomatic Protection refers to the following:

> "A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim." (International Law Commission, *Draft Articles on Diplomatic Protection with commentaries*, Yearbook of the International Law Commission, 2006, vol. II, p. 43)

The ILC Report on Multiple Nationality suggested several connecting factors for determining the dominant nationality of a person:

> "(a) Residence in the territory of one of the States of which the individual concerned is a national;
> (b) In case of residence in the territory of a State of which he is not a national, whether or not this State is a party, the previous and habitual residence in the territory of one of the States of which he is a national;
> (c) If the criteria mentioned in the above sub-paragraphs do not apply, any other circumstances showing a closer link de facto to one of the States of which he is a national, such as:
> (i) Military service;
> (ii) Exercise of civil and political rights or of political office;

> "If, by application of the nationality laws of the Parties, a person has two or more nationalities, such person shall be deprived of all but the effective nationality that he possesses […]."[361]

Support for the dominant nationality rule can also be found in the practice of tribunals dealing with diplomatic protection. In the *Mergé Claim* the Italian–United States Conciliation Commission stated that

> "[t]he principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State."[362]

The dominant nationality rule was also held by the Iran–United States Claims Tribunal. In the *Esphahnian v. Bank Tejerat*, Chamber Two of the Iran–United States Claims Tribunal stated that

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(iii) Language;
(iv) His previous request of diplomatic protection from such State;
(v) Ownership of immovable property." (International Law Commission, *Nationality Including Statelessness – Report on Multiple Nationality by Mr Roberto Cordova Special Raporteur,* Yearbook of the International Law Commission, 1954, vol. II, p. 50)

Residence is an important factor as it mirrors not only the choice of the individual for one state, but also because it triggers other relevant factors, such as social life, education, employment etc. However, as suggested by an author, whether or not an individual is more attached to a state "is as much a personal and emotional phenomenon as it is a physical one." *See,* Aghahosseini, M.; *supra* at FN 287, p. 258.

For the relevance of the ILC Draft Articles on Diplomatic Protection in the context of investment law, Art. 17 provides that

> "[t]he present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments." (ILC Draft Articles on Diplomatic Protection; *supra,* p. 89)

Treaties dealing with the protection of foreign investment contain special rules

> "[…] which exclude or depart substantially from the rules governing diplomatic protection. Such treaties abandon or relax the conditions relating to the exercise of diplomatic protection, particularly the rules relating to the nationality of claims and the exhaustion of local remedies." (ILC Draft Articles on Diplomatic Protection; *supra,* p. 89)

Art. 17 provides that the ILC Draft Articles on Diplomatic Protection do not apply to the alternative special regime for the protection of foreign investors. However, Art. 17 states that the ILC Draft Articles on Diplomatic Protection do not apply to the extent that they are inconsistent with the provisions of a treaty for the protection of investments. Consequently, "[t]o the extent that the draft articles remain consistent with the BIT in question, they continue to apply." *See,* ILC Draft Articles on Diplomatic Protection; *supra,* p. 90. Leaving aside the non–binding character of the ILC Draft Articles on Diplomatic Protection, their relevance for the purpose of this analysis is retained. For the nature of the ILC Draft Articles on Diplomatic Protection*, see,* Perkams, M; *supra* at FN 293, p. 100.

[361] ILC Report on Multiple Nationality; *supra* at FN 360, p. 49.

[362] *Mergé Claim*, Decision of 10 June 1955, p. 455. The commentary to the ILC Draft Articles on Diplomatic Protection suggests that following the *Mergé Claim*, the Italian–United States Conciliation Commission applied the effective nationality test in over fifty subsequent cases. *See,* ILC Draft Articles on Diplomatic Protection; *supra* at FN 360, p. 45.

> "[i]n applying international law, the Tribunal finds itself in a position similar to that of a court of a third State faced with the claim of a dual national against one of the States of his nationality. […] Thus, by construing Articles 4 and 5 of the Hague Convention together the Tribunal is led to adopt the notion of effective or dominant nationality." [363]

In the *A/18 Case*, the Full Tribunal of the Iran–United States Claims Tribunal restated the decision of Chamber Two in *Esphahnian v. Bank Tejerat* and upheld the dominant nationality rule.[364] As concluded by the majority in the *A/18 Case*,

> "[t]here is a considerable body of law and legal literature […], which leads the Tribunal to the conclusion that the applicable rule of international law is that of dominant and effective nationality"[365]

The drafting history of the ICSID Convention reveals that the Preliminary Draft allowed dual nationals within the jurisdiction of the ICSID, without imposing the condition of dominant nationality. Article X.2 of the Preliminary Draft of the ICSID Convention of 15 October 1963 provided that

> ""National of another Contracting State" means any national of a Contracting State other than the State party to the dispute, notwithstanding that such

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[363] *Nasser Esphahanian v. Bank Tejarat*, Award No. 31–157–2 of 29 March 1983. The tribunal also concluded that Article 4 of the Convention on Conflict of Nationality Laws

> "[…] must be interpreted very cautiously. Not only is it more than 50 years old, but great changes have occurred since then in the concept of diplomatic protection, which has been expanded. […]This concept continues to be in a process of transformation, and it is necessary to distinguish between different types of protection, whether consular or claims-related."

[364] The Full Tribunal considered that another reason for rejecting the rule under Article 4 of the Convention on Conflict of Nationality Laws rested on the fact that this provision

> "[…] applies by its own terms solely to "diplomatic protection" by a State. While this Tribunal is clearly an international tribunal established by treaty and while some of its cases involve disputes between the two Governments and involve the interpretation and application of public international law, most disputes (including all of those brought by dual nationals) involve a private party on one side and a Government or Government-controlled entity on the other, and many involve primarily issues of municipal law and general principles of law. In such cases it is the rights of the claimant, not of his nation, that are to be determined by the Tribunal." (*A/18* Case (*Islamic Republic of Iran v. United States (Case A/18)*(Dual Nationality), Decision No. DEC 32-A18-FT)

[365] *A/18 Case; supra* at FN 364, p. 265. *See* also, Aghahosseini, M.; *supra* at FN 287, p. 85. *See* also, the *Drummond Case*, which appears to support both non–responsibility and dominant nationality rule, cited in Aghahosseini, M.; *supra* at FN 287, pp. 89–91. In the *A/18 Case* the decision of the majority was largely influenced by the desire to support the rights of individuals vis–à–vis states. As stated in the decision,

> "[t]his trend toward modification of the Hague Convention rule of non-responsibility by search for the dominant and effective nationality is scarcely surprising as it is consistent with the contemporaneous development of international law to accord legal protections to individuals, even against the State of which they are nationals." (*A/18 Case; supra* at FN 364, p. 261)

person may possess concurrently the nationality of a State not party to this Convention or of the State party to the dispute."[366]

While the practice of the Iran–United States Claims Tribunal and the view adopted by the drafters of the ICSID Convention in the Preliminary Draft are to be considered cautiously, given the *lex specialis* nature of the instruments on which they are based,[367] the codification retained by the ILC is significant. The Draft Articles on Diplomatic Protection adopts the general rule of non–responsibility of states for dual nationals, but allow, as an exception, the dominant nationality rule.[368]

If the dominant nationality rule is to be considered under Article 31(3)(c) of the Vienna Convention, and consequently, directly applicable to investment law, where an investor is at the same time a dual national of a contracting state and of the respondent contracting state, then a tribunal has jurisdiction *ratione personae* as long as the dominant nationality is not of the respondent state.[369] It cannot be denied that the rule of

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[366] International Centre for Settlement of Investment Disputes; *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Analysis of Documents,* Washington D.C.: International Centre for Settlement of Investment Disputes, 1970, vol. II–1, p. 230.
Art. 1 of the 2004 United States Model BIT adopted the dominant nationality rule in cases of dual nationality:

> "[…] **"investor of a Party"** means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality." (*2004 United States Model BIT*, in Dolzer, R.; Schreuer, C.; *supra* at FN 258, pp. 385–419)

But *see* also, Article 1(2)(a) of the Sri Lanka–Iran BIT, which provides that

> "[…] natural persons who, according to the laws of one Contracting Party, having its nationality and are not nationals of the other Contracting Party" (*Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Islamic Republic of Iran*, signed on 25 July 2000, not in force)

[367] In *Saba Fakes v. Turkey,* the tribunal rejected the dominant nationality test in the *A/18 Case*, which was brought up by the respondent in order to restrict the jurisdiction of the ICSID tribunal. The tribunal observed that the clear language of the Netherlands–Turkey BIT cannot be superseded by the decision of the Iran–United States Claims Tribunal. *See, Saba Fakes v. Turkey; supra* at FN 302, para. 70. The tribunal held the specific nature of the Iran–United States Claims Tribunal, established on the basis of the *Algiers Declarations*. (*ibid.*, para. 71)

[368] *See,* Art. 7 of the ILC Draft Articles on Diplomatic Protection; *supra* at FN 360, p. 43.

[369] DOUGLAS is of the opinion that

> "[w]here the investment treaty is silent on the question of the standing of dual nationals, there is no reason to imply the default rule of diplomatic protection to the effect that dual nationals must be excluded from the tribunal's jurisdiction *ratione personae*. To the contrary, such an inflexible rule would hardly serve the treaty's purpose of encouraging foreign investment because an entire class of potential investors would be

dominant nationality has gained large support after the decision in the *A/18 Case*. However, the matter is not settled in international and investment law,[370] and, in practice, parties can successfully argue the applicability of both rules of non–responsibility and dominant nationality in the context of the ECT.[371] As pointed out by a scholar, it is possible to assume

> "[…] *that* those States that are unwilling to face their nationals before international tribunals will in future make sure that their unwillingness is reflected in the dispute settlement agreements to which they adhere, and *that* where this is not done, the rule of dominant nationality will likely be upheld."[372]

The ECT is not expressly excluding dual or multiple nationals from the ECT's protection. This interpretation may be confirmed by the definition of Investor, which includes nationals, citizens and permanent residents. Article 26(1) of the ECT, which refers to 'Investor of another Contracting Party', and not to 'national of another Contracting Party', seems to suggest that there is no restriction imposed on individuals with dual or multiple nationalities or who are nationals and permanent residents at the

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> denied the opportunity to rely upon the investment protection of the treaty. […] So long as the nationality of the adopted country is the dominant of the two in the sense that the individual maintains stronger personal links to that country rather than to the country of birth, then there is no overriding consideration of principle that should prevent such an individual from investing in the country of birth with reliance upon a relevant investment treaty." (Douglas, Z.; *supra* at FN 292, pp. 321–322, para. 600, emphasis original, footnote omitted)

KRISHAN agrees with this point of view:

> "[…] the effective link, or the effective nationality theory […] should only apply in multiple nationality cases where the effective link is *with* the defendant State." (Krishan, D.; *supra* at FN 300, p. 66)

[370] It can be argued that, at least in investment arbitration, tribunals did not have a chance to properly discuss the applicability of the dominant nationality rule, as under the ICSID Convention, dual nationality is an absolute bar to jurisdiction. This will be explained below.

[371] *See,* the discussion at the first annual Juris Conference on Investment Treaty Arbitration and International Law in Grierson Weiler, Todd J. (ed.); *Investment Treaty Arbitration and International Law*, New York: JurisNet, LLC, 2008, pp. 130–131.

[372] Aghahosseini, M.; *supra* at FN 287, p. 265, emphasis original. Further, with reference to the Decision in the *A/18 Case*, AGHAHOSSEINI explains that

> "[…] the Tribunal's support for the rule of dominant nationality was both a legitimate exercise of judicial function and, prompted primarily by a desire to accord the individual greater access to international justice, a theoretically laudable choice. It was also in line with the modern trend of promoting the international interests of the individual *vis-à-vis* the State." (Aghahosseini, M.; *supra,* p. 257, emphasis original)

See also, the conclusion of the tribunal in *Champion Trading v. Egypt:*

> "The Tribunal notes that the above cited A/18 decision contained an important reservation that the real and effective nationality was indeed relevant "*unless an exception is clearly stated*". The Tribunal is faced here with such a clear exception.[Art. 25(2)(a) of the ICSID Convention]" (*Champion Trading Company, Ameritrade International, Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba v. Arab Republic of Egypt*, Decision on Jurisdiction of 14 March 2003, p. 297, emphasis original)

same time. Admitting, however, that Article 26(1) of the ECT is ambiguous in dealing with dual nationals, further attention must be given to further methods of treaty interpretation. If considering the status of dual nationals in international law and whether they are eligible to bring their claims against one of the states of nationality, the solutions adopted by tribunals appear to be divided between the rule of non–responsibility and the dominant nationality rule. While the rule of non-responsibility has lost its relevance, there is a tendency nowadays to allow dual nationals to bring a dispute against one of the states of nationality when the dominant nationality is not that of the respondent Contracting Party.[373] Even though the rule of dominant nationality has received generous support, especially from the new model BITs, it is still debatable whether it can be construed as customary international law or subsequent practice under Article 31(3)(b) of the Vienna Convention. However, this does not exclude it from being taken into consideration by the ECT tribunals.[374]

b. Where a National of a Contracting Party is also a National of the Respondent Contracting Party and the Dispute is submitted under the ICSID Convention

When an ECT dispute is submitted for resolution under the ICSID Convention, the jurisdiction of the arbitral tribunal must satisfy a double threshold.[375] The tribunal must

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[373] And the investor did not rely on the nationality of the respondent Contracting Party to make the investment. For similar opinion, *see,* Pinsolle, P.; *supra* at FN 320, pp. 82–91. For the exclusion of dual nationals from the dispute resolution provision of the ECT, *see,* Burgstaller, M.; *supra* at FN 249, pp. 207–208. But *see,* the opinion of the tribunal in *Víctor Pey Casado v. Chile:*

> "Un double-national n'est pas exclu du champ d'application de l'API [BIT], même si sa nationalité «*effective et dominante*» est celle de l'Etat de l'investissement […]. La considération du but même de l'API et sa rédaction excluent au contraire l'idée d'une condition de nationalité effective et dominante. [...] De l'avis du Tribunal arbitral, il ne se justifierait pas d'ajouter (sur la base de ce qui a été prétendu être des règles de droit coutumier international) une condition d'application qui ne résulte ni de sa lettre ni de son esprit." (*Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, Award of 8 May 2008, para. 415, emphasis original, footnote omitted)

[374] As suggested by MCLACHLAN,

> "[w]here the investment treaty poses new questions not previously answered by custom […], reference to general international law may still illuminate the rule to the extent that it reveals general principles which guide the application of the rule." (McLachlan, Campbell; *Investment Treaties and General International Law*, 57(2) ICLQ 361 (2008), p. 400)

[375] *See,* Parra, Antonio; *Investments and Investors Covered by the ECT and other Investment Protection Treaties. Introduction*, p. 51, in Ribeiro, C. (ed.); *supra* at FN 89. When an ECT dispute is submitted

have jurisdiction in accordance with the provisions of the ECT and with the requirements of Article 25 of the ICSID Convention. Article 25(1) of the ICSID Convention provides that the jurisdiction of the ICSID exists for

> "[…] any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."

Article 25(2)(a) of the ICSID Convention defines 'national of another Contracting States' as

> "[…] any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to […] arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute"[376]

Article 25(2)(a) of the ICSID Convention contains an absolute prohibition for an individual who possesses, at the same time, the nationality of a Contracting State of the ICSID Convention and of the respondent Contracting State to bring a claim under the ICSID Convention. No exception to this rule was allowed by the ICSID tribunals.[377] The tribunals confronted with the situation envisaged by Article 25(2)(a) of the ICSID Convention found dual nationality to be an unconditional bar to the jurisdiction of the ICSID. In *Champion Trading v. Egypt*, the tribunal rejected the application of the dominant nationality rule in case of individuals with the nationality of the respondent Contracting State, as the rule under Article 25 of the ICSID Convention contains an absolute prohibition and any other interpretation would go contrary to the rules of treaty

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under the ICSID Additional Facility Rules, the notion of 'national' employed in Art. 2(1) has the meaning under Art. 25 of the ICSID Convention.

[376] Under the ICSID Convention only nationality, and not permanent residence, has legal effects. *See* also, Schlemmer, Engela C.; *Investment, Investor, Nationality and Shareholders*, p. 70, in Muchlinski, Peter; Ortino, Federico; Schreuer, Christoph (eds.); *The Oxford Handbook of International Investment Law*, New York: Oxford University Press, 2008. An investor in this situation should rather choose to arbitrate under the other options provided for by Article 26(4) of the ECT.

[377] If such investor relies on a BIT or other investment treaty, then he can take advantage of the provisions of the treaty, but cannot bring a claim under the ICSID Convention. *See,* Schreuer, C. with Malintoppi, L., Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 272, para. 668.

interpretation.[378] In *Siag v. Egypt*, the tribunal concurred with the decision in *Champion Trading v. Egypt* and held that the interdiction under Article 25 is unconditional and does not leave room for the dominant nationality test.[379]

Although it may be accepted that an individual who has the nationalities of a Contracting Party and of the respondent Contracting Party may benefit from the dispute resolution provisions of the ECT, given that his dominant nationality is not of the respondent Contracting Party, this situation would fall under the interdiction provided for by Article 25(2)(a) of the ICSID Convention. Such dual nationality would be an absolute bar for a dispute to be submitted under the ICSID Convention and the investors should opt for arbitration under the UNCITRAL or the SCC.[380]

c. Where a National of a Contracting Party is also a National of another Contracting Party, not Party to the Dispute, or of a Third State

The nationality of another Contracting Party not party to the dispute and of a third state, in addition to the nationality of a Contracting Party, would apparently not create hurdles for the jurisdiction of ECT tribunals. In the context of the ICSID Convention, scholars are of the opinion that

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[378] *Champion Trading v. Egypt; supra* at FN 372, pp. 287–288. The tribunal rejected the jurisdiction over the three Wahba claimants, but upheld the jurisdiction over the two corporations.

[379] *Siag v. Egypt*; *supra* at FN 288, para. 198. If the dominant nationality is the rule, allowing for an individual to submit a claim against a state, which is not the state of its dominant nationality, then Art. 25(2)(a) is the exception to this rule. In *Soufraki v. United Arab Emirates,* although Mr Soufraki was found not to be a dual national, the tribunal surprisingly noted that

> "[…] had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise." (*Soufraki v. United Arab Emirates*; *supra* at FN 288, para. 83)

See also, the conclusion of the tribunal in *Víctor Pey Casado v. Chile*:

> "Il suffirait pour la défenderesse de montrer que la partie demanderesse possédait la nationalité de l'Etat d'accueil aux moments critiques, que cette nationalité soit effective ou non pour exclure, la compétence du Centre.194 En d'autres termes, pour que les conditions de la compétence requises par l'article 25 de la Convention CIRDI soient remplies, il ne suffirait pas que la nationalité dominante du demandeur soit celle d'un autre Etat que l'Etat défendeur mais il faudrait encore qu'il ne possède pas la nationalité de cet Etat défendeur." (*Víctor Pey Casado v. Chile; supra* at FN 373, para. 241)

[380] Natural persons who qualify as dual nationals under Art. 25(2)(a) of the ICSID Convention are also barred from taking advantage of the ICSID Additional Facility Rules, since the notion of 'nationality' used in these Rules has the meaning ascribed by Art. 25 of the ICSID Convention.

> "[n]o particular problem arises if an investor has the nationality of more than one Contracting State. The possession of the nationality of a non–Contracting State in addition to that of a Contracting State would not be a bar to becoming a party to ICSID proceedings."[381]

The Preliminary Draft of the ICSID Convention expressly allowed for nationals of a Contracting State also possessing the nationality of a non–Contracting State to be covered by the provisions of the ICSID Convention.[382] In *Olguín v. Paraguay*, Mr Olguín was a national of Peru and of the United States and both nationalities were effective.[383] The ICSID tribunal held that the United States nationality was not an impediment for Mr Olguín, since the BIT's sole requirement was for the claimant to have an effective Peruvian nationality:

> "What is important in this case in order to determine whether the Claimant has access to the arbitral jurisdiction based on the BIT, is only whether he has Peruvian nationality and if that nationality is effective. There is no doubt on this point. There was no dispute regarding the fact that Mr. Olguín has dual nationality, and that both are effective. […] To this Tribunal, the effectiveness of his Peruvian nationality is enough to determine that he cannot be excluded from the provisions for protection under the BIT."[384]

In *Saba Fakes v. Turkey*, the tribunal held that

> "[…] the Contracting Parties to the ICSID Convention did not exclude claims of dual nationals *per se*, in circumstances when such dual nationals (i) hold the nationality of at least one Contracting State and (ii) do not hold the nationality of the host State."[385]

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[381] Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 270, para. 661, footnote omitted.

[382] Preliminary Draft of 15 October 1963, *History of the ICSID Convention; supra* at FN 366, vol. II–1, p. 230. As pointed out by SCHREUER, although the provision was not retained in the later drafts of the ICSID Convention, "no concern was expressed about situations of this kind." *See,* Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 270, para. 662, footnote omitted.

[383] *Olguín v. Paraguay; supra* at FN 292, para. 61.

[384] *Id*. *See, Agreement between the Republic of Peru and the Republic of Paraguay regarding the Promotion and Reciprocal Protection on Investments*, 18 December 1994.

[385] *Saba Fakes v. Turkey; supra* at FN 302, para. 62, emphasis original.

The tribunal in *Víctor Pey Casado v. Chile* also held that

> "[...] il suffit pour la partie demanderesse de démontrer qu'elle possède la nationalité de l'autre Etat contractant. Contrairement à ce qui a été soutenu par la défenderesse, le fait que la demanderesse ait une double nationalité, comprenant la nationalité de la défenderesse, ne l'exclut pas du champ de protection de l'API [BIT]." (*Víctor Pey Casado v. Chile; supra* at FN 373, para. 415)

However, where the claimant has the nationality of a Contracting State of the ICSID Convention and of a non–Contracting State, and the dominant nationality is of the non–Contracting State, scholars are of the opinion that the respondent Contracting State might be successful in challenging claimant's standing. In this case only, and not when the claimant also possesses the nationality of another Contracting State, other than the respondent, the dominant nationality rule may become applicable.[386]

In *Saba Fakes v. Turkey,* the claimant held both Jordanian and Dutch nationalities.[387] Respondent did not dispute claimant's dual nationality, but objected to the jurisdiction of the ICSID tribunal arguing that the Dutch nationality was not sufficient, but that such nationality "must be effective".[388] The tribunal rejected respondent's contentions by concluding that

> "[…] as regards dual nationals who do not hold the nationality of the host State (for example, a dual national who holds the nationality of two Contracting States other than the host State, or the nationality of a Contracting State other than the host State and a non–Contracting State), the ICSID drafters did not subject their access to ICSID jurisdiction to the effective nationality test."[389]

In the Iran–United States Claims Tribunal jurisprudence, the issue of the application of the dominant nationality rule where claimant also had the nationality of a third state was not debated. The matter was raised in several cases, but it was not decided by the

[386] *See,* Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 270, para. 662. *See* also, Amerasinghe, C.F.; *supra* at FN 297, p. 251. Also, the conclusion of the tribunal in *Saba Fakes v. Turkey* referring to the fact that the 'dominant nationality' rule might become applicable where the investor also holds the nationality of a third state, only when there is a case of "a nationality of convenience, acquired "*in exceptional circumstances of speed and accommodation*", for the purpose of bringing a claim" or when "a person [is] deemed to have a nationality merely because such nationality has passed over several generations". *See, Saba Fakes v. Turkey; supra* at FN 302, para. 78, emphasis original.
[387] *Saba Fakes v. Turkey; supra* at FN 302, paras 3 and 54.
[388] *Ibid.*, para. 54.
[389] *Ibid.,* para. 63, footnote omitted.

tribunals as they reached the conclusion that the third state nationality was renounced,[390] or implicitly lost.[391] However, scholars discussing the notion of 'nationality' in the Iran–United States Claims Tribunal practice are of the view that

> "[t]he weight of evidence in international case law seems to be against the application of the rule of dominant nationality in such instances, suggesting instead that the mere proof of the nationality of the claimant State would suffice."[392]

The ordinary meaning of terms of the ECT's provisions appears to uphold the opinion that the nationality of a third state in addition to that of a Contracting Party would not be an obstacle to the tribunals' jurisdiction. Nevertheless, whether the dominant nationality rule applies where the Investor possesses the nationality of a Contracting Party and of a third state is an issue not settled yet in the literature and, even less, in the ECT's practice.

d. Where a National of a Contracting Party is also a Permanent Resident of the Respondent Contracting Party or of another Contracting Party or of a Third State and vice versa

Article 26(1) of the ECT records the consent of the Contracting Parties in respect of disputes which may be submitted for resolution under the mechanisms provided in Article 26(2) of the ECT. Pursuant to this provision, only disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment and that concerns alleged breaches by the Contracting Party of the obligations for the promotion and protection of investments under Part III of the ECT

[390] *See, Ali Asghar, claim presented by the United States of America v. Islamic Republic of Iran,* Award No. 475–11491–1 of 1990.
[391] *See*, *Uiterwyk Corporation, Jan C. Uiterwyk, Maria Uiterwyk, Robert Uiterwyk, Hendrik Uiterwyk, Jan D. Uiterwyk v. Government of the Islamic Republic of Iran, Ministry of Roads and Transportation, Ports and Shipping Organization, Iran Express Lines, Sea–Man–Pak*, Partial Award No. 375–381–1 of 6 July 1988.
[392] Aghahosseini, M.; *supra* at FN 287, p. 169.

may be solved under Article 26 of the ECT. The term 'Investor', as defined by Article 1(7)(a)(i) of the ECT encompasses nationals, citizens and permanent residents of a Contracting Party. In practice, situations may occur where a national of a Contracting Party, who, at the same time, is a permanent resident of another Contracting Party – party to the dispute or not – or of a third state, submits a dispute to resolution under Article 26 of the ECT. For example, a French national commences arbitration under Article 26 of the ECT against Italy, the state of its permanent residence. It can also be a case where an Investor has the permanent residence in a Contracting Party and the nationality of another Contracting Party to the ECT or of a third state, and, for the purpose of Article 26 of the ECT, he relies on his permanent residence against the Contracting Party or the third state of nationality. For example, an Investor, permanent resident of Germany, submits his claims under the ECT against Ukraine, the state of his nationality. These situations, although theoretical in this context, may occur in practice, given the growing relocation of individuals between states, and in particular within the EU.[393]

In investment law practice, the issue of concurrent nationality and permanent residence has been discussed in the context of the NAFTA, under the ICSID Additional Facility Rules. The case of *Feldman Karpa v. Mexico* raised the question whether a United States citizen, also a permanent resident of Mexico, could submit a claim against Mexico based on the NAFTA.[394] Mr Feldman Karpa was a United States citizen by birth who lived in the United States for 33 years,[395] and later acquired the permanent residence in Mexico and continuously resided there for 27 years.[396] In reaching its

[393] Some authors even consider that the protection of permanent residents can sometimes create "potential anomalies". *See,* Nelson, T.G.; *supra* at FN 311, p. 462.
[394] *Feldman Karpa v. Mexico;* supra at FN 314, para. 24 *et seq.*
[395] *Ibid.,* para. 27.
[396] *Ibid.,* paras 27 and 28.

decision, the tribunal also recalled that the United States Embassy had intervened with Mexican officials on behalf of claimant on several occasions in respect to the dispute.[397] The tribunal dismissed Mexico's objections regarding the lack of standing of the claimant concluding that claimant, a United States citizen, "should not be barred from the protection provided by Chapter Eleven just because he is also a permanent resident of Mexico".[398] In deciding so, the tribunal first considered the distinction between nationality and permanent residence and the fact that residence "only fulfils a subsidiary function" and "does not amount to, or compete with, citizenship".[399] In this context, the tribunal asserted that the dominant nationality rule cannot be applied *mutatis mutandis* where permanent residence and nationality meet, as this rule requires "the existence of a double citizenship, connecting the same individual to two states with the legal bond of citizenship".[400] Clarifying these aspects, the tribunal then turned to the definitions of 'investor' and 'national' under the NAFTA. Article 201 of the NAFTA defines 'national' as a citizen or permanent resident of a Party,[401] while Article 1139 refers to 'investor of a Party', which means, among other persons, a national of a Party that seeks to make, is making or has made an investment.[402] Reading these provisions together, the tribunal came to the conclusion that the inclusion of permanent residents in the definition of 'national' was meant to expand the circle of investors covered by the NAFTA, and not to limit the jurisdiction of tribunals. As explained by the tribunal,

> "[…] an investor of a Party, entitled to seek arbitration under Chapter Eleven can be not only a U.S. citizen but a French citizen as well, provided he is a permanent resident of the United States."[403]

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[397] *Ibid.,* para. 29.
[398] *Ibid.,* para. 36.
[399] *Ibid.,* para. 30.
[400] *Ibid.,* para. 31.
[401] Art. 201 of the NAFTA; *supra* at FN 328.
[402] Art. 1139 of the NAFTA reads as follows:
"[…] **investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment".
[403] *Feldman Karpa v. Mexico;* supra at FN 314, para. 35. The tribunal explained the extensive interpretation of the NAFTA's provisions as follows:

The tribunal found this extensive interpretation consistent with the purpose of NAFTA to "increase substantially investment opportunities in the territories of the Parties" and to "create effective procedures for the implementation and application of this Agreement".[404] As concluded by the tribunal, "enlarging the circle of investors to be protected" can only lead to the increase of both investment opportunities and the effective protection of investments.[405]

The conclusion of the tribunal in *Feldman Karpa v. Mexico* appears to give more weight to nationality, rather than to permanent residence of investors, based on the theory that the jurisdiction of arbitral tribunals must be extended and not restricted, in accordance with the object and purpose of investment treaties to promote and protect investors and their investments.[406] Such interpretation cannot be upheld neither in the context of the NAFTA, nor in the context of Article 1(7) of the ECT. The definition of the notion of 'Investor' under the ECT gives the same weight to nationality, citizenship and permanent residence for Investors of a Contracting Party. Nor is it substantiated the preference for nationality simply because this link is considered to deliver "the relevant connection" in international adjudication.[407] The conclusions of tribunals must always rely on the text of the treaties and the interpretation of their terms in accordance with the rules of treaty interpretation of the Vienna Convention.

> "[…] the definition of "national" as "a natural person who is a citizen or permanent resident of a Party" is needed in this context to complement the definition in Article 1139 of the "investor of a Party" which, in the scope of application of Article 1117(1), refers to an investor of a Party other than the one in which the investment is made. Such contextual interpretation of an equal treatment of nationals and permanent residents leads to the result that permanent residents are treated like nationals in a given State Party only if that State is different from the State where the investment is made." (*Feldman Karpa v. Mexico;* supra at FN 314, para. 34)

[404] *Feldman Karpa v. Mexico;* supra at FN 314, para. 35.

[405] *Id.*

[406] For this theory, *see*, for example, Amerasinghe, C.F.; *supra* at FN 297, p. 229. The theory is based on a teleological interpretation of treaties, which relies on the object and purpose of a treaty. This interpretation was not retained by the Vienna Convention, which adopted the textual interpretation approach. For the teleological interpretation of treaties, *see*, Fitzmaurice, G.G.; *supra* at FN 156, pp. 204–209.

[407] *Feldman Karpa v. Mexico; supra* at FN 314, para. 30.

While Article 1(7) of the ECT gives equal rights to nationals, citizens and permanent residents of Contracting Parties to benefit from the provisions of the ECT, Article 26(1) of the ECT, as discussed above, does not – at least explicitly – exclude concurrent nationality and permanent residence, not even when one of these connections is with the responding Contracting Party. In theory, the consent of the Contracting Parties to the ECT on the types of disputes to be submitted to resolution under Article 26 would extend to situations when, for example, a national of a Contracting Party relies on the ECT in his claims against the Contracting Party of his permanent residence, or when a permanent resident of a Contracting Party to the ECT submits a claim under Article 26 against the Contracting Party of his nationality.[408] However, if ECT tribunals decide to follow the interpretation given to nationality and permanent residence of the tribunal in *Feldman Karpa v. Mexico*, a permanent resident having the nationality of the respondent Contracting Party and relying on his residence, will be absolutely barred from arbitrating under Article 26 of the ECT, because the bond of nationality is the "relevant" one for the jurisdiction *ratione personae* of the tribunals.[409]

In the context of the ECT disputes submitted for resolution under the ICSID Convention, an Investor relying on his permanent residence must consider this option with caution. While Article 1(7) allows permanent residents to benefit from the protection of the ECT, Article 25 of the ICSID Convention foresees ICSID's

[408] The argument is even stronger when an Investor, permanent resident of a Contracting Party, is also a national or a permanent resident of a non–disputing Contracting Party or of a third state, or when an Investor, national of a Contracting Party, is also a permanent resident of a non–disputing Contracting Party or of a third state. Nevertheless, as indicated by the tribunal in *Feldman Karpa v. Mexico*, Investors should not have used their permanent residence, when relying on nationality, or the nationality, when relying on the permanent residence, in making the Investment. *See, Feldman Karpa v. Mexico*; *supra* at FN 314, para. 29.

[409] *See* also, D'ALLAIRE who considers that, under the ECT, permanent residents may enforce their rights in relation to Investments made in any state, except for the state of nationality. *See,* D'Allaire, D.; *supra* at FN 340, p. 41.

jurisdiction with respect to nationals of a Contracting State only. Consequently, the jurisdiction of the ICSID cannot be extended to ECT Investors that are relying solely on their permanent residence.[410] The situation is different when, for example, an Investor has the permanent residence of France, a Contracting Party to the ECT, and the citizenship of the United States, non–Contracting Party to the ECT, and makes an investment in Germany relying on the provisions of the ECT, as a French resident, and submits a claim to the ICSID, relying on his United States citizenship. For the purpose of the ECT, this Investor fulfils the requirements of Articles 1(7)(a)(i) and 26(1) of the ECT, as a French permanent resident, and, for the purposes of the ICSID Convention, the conditions set forth under Article 25, under his United States nationality.

e. ECT Investors and the EU Citizenship: Compulsory Dual Nationality?

The question whether nationals of the EU Member States have dual EU–Member States citizenship becomes relevant when these individuals bring a dispute against the EU, as a Contracting Party to the ECT.[411]

As discussed before, however, the nature of the EU citizenship cannot be construed in order to produce effects in international law. Individuals who are nationals of the EU

[410] *See* also, Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 270, para. 659.

[411] A dispute against the EU cannot be submitted to the ICSID under provisions of the ICSID Convention, as international or regional organizations are not and may not be Contracting States of the ICSID Convention.
With the entry into force of the TFEU, the possibility of an Investor of an EU Member State bringing a dispute against another EU Member State based on intra–EU BITs is questioned. However, the ECT differs from such intra–EU BITs, given the direct participation of the EU and its Member States. For further comments, *see,* Coop, G.; *supra* at FN 247, p. 415 *et seq. See* also, *R. & V. Haegeman v Belgian State*, Case 181–73; Judgment of the Court of 30 April 1974, according to which, the agreements entered into by the institutions of the EU are binding and form an integral part of the EU Law.
On the competence of EU member States to enter into BITs with third states, *see,* European Commission; *Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries*, Brussels, 7.7.2010, COM(2010)344 final; Council of the European Union; *Conclusions on a comprehensive European international investment policy*, 3041st FOREIGN AFFAIRS Council meeting, Luxembourg, 25 October 2010. *See* also, *supra* at FN 249.

Member States and are automatically bestowed with EU citizenship cannot be considered dual nationals for the purpose of international law.[412] Within the ECT framework, the EU citizenship may not be regarded as imposing a compulsory dual nationality on the nationals of the EU Member States.

2. LEGAL ENTITIES AND THE NOTION OF INVESTOR

Investment treaties generally include legal entities as investors in various forms, such as companies, enterprises, corporations, firms, business associations, partnerships and other organizations.[413] Article 1(7)(a)(ii) of the ECT refers to companies and other organizations, thus generously comprising any entity organized in accordance with the laws of a Contracting Party to the ECT.[414] The wording of this provision ensures that new forms of organizations are protected irrespective of the form they take. The rules governing the establishment, organization and functioning of these legal entities, as well as their link with the Contracting Parties to the ECT are found in the municipal laws of the respective Contracting Parties.[415]

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[412] *See*, Chapter II.1.3 above.

[413] But *see,* Art. 10 of the *Accord relatif à l'encouragement et la protection des investissements entre le Royaume des Pays–Bas et la République du Sénégal*, 5 May 1981, which refers to the disputes between natural persons (ressortissants) and a Contracting State, thus excluding companies (sociétés), although the substantive protection covers both categories of investors. This provision has been discussed by the tribunal in the *Millicom v. Senegal*. *See, Millicom International Operations B.V. and Sentel GSM SA v. Republic of Senegal*, Decision on Jurisdiction of the Arbitral Tribunal of 16 July 2010. The tribunal did not accept that the provisions of Art. 10 are clear and proceeded to interpret them in accordance with the rules of interpretation of the Vienna Convention. (*Millicom v. Senegal*, para. 70) Reading the terms of Art. 10 in their context, the tribunal concluded that the substantive protection offered by the Accord is granted equally to both natural persons and companies and the exclusion of companies from the procedural remedies is not justified. *See, Millicom v. Senegal*, *supra*, paras 71(b) and 71(c).

[414] The wording of Art. 1(7)(a)(ii) suffered numerous amendments during the negotiation of the ECT. The first draft referred to:

> "[…] any corporations, companies, firms, enterprises, organisations and associations incorporated or constituted under the law in force in the Territory of that Contracting Party" (Art. 1(f)(ii) of the *Basic Protocol of 11 September 1991,* 8/91 BP 2)

There were also requests from the participating delegations to find "a more precise definition of "investors" in Article 1(f), in order to include traders or international investors." *See, Note from the Chairman of Working Group II*, 14/91 BP 3, 11 October 1991, and the *Comments of the EBRD on the Basic Protocol Draft*, 7–8 October 1991.

[415] As explained by the ILC Draft Articles on Diplomatic Protection,

The analysis of Investor legal entity under the ECT begins with the notion of 'company' and discusses the relevance of the *Societas Europaea* in the context of the ECT, the protection of entities incorporated in the respondent Contracting Party, the legal standing and the protection of the shareholders of a company, and the particular case of state–owned or controlled companies. The focus is then shifted to the notion of 'organization' and the forms in which it emerges, with emphasis on the non–governmental organizations as potential Investors under the ECT. The analysis concludes with a discussion of the dual nationality of legal entities in the light of the provisions of Article 26(1) of the ECT.

2.1 'Company' as Investor under the Energy Charter Treaty

The company has proved to be the most powerful and revolutionary organization, influencing behaviours, changing cultures, or rather building their own, breaking language barriers, shaping economies, politics and legal systems.[416] In spite of these achievements, the company remains a fiction of the law, remarkable by all means.

Attempts to define the concept of company are few, given the diversity of the forms in which they may appear.[417] However, a relatively simple definition would regard the

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"[a]lthough international law has no rules of its own for the creation, management and dissolution of a corporation or for the rights of shareholders and their relationship with the corporation, and must consequently turn to municipal law for guidance on this subject, it is for international law to determine the circumstances in which a State may exercise diplomatic protection on behalf of a corporation or its shareholders." (ILC Draft Articles on Diplomatic Protection; *supra* at FN 360, p. 53)

[416] Some authors metaphorically refer to companies as being more powerful than individuals: "they are not condemned to die of old age and they can create progeny pretty much at will." *See,* Micklethwait, John; Wooldridge, Adrian; *The Company. A Short History of a Revolutionary Idea*, reprinted, London: Phoenix, 2005, p. 4.

[417] As suggested by VANDEVELDE, "[a] broad definition of companies also complements the broad definition of investment […]." *See,* Vandevelde, K. J.; *supra* at FN 271, p. 159.

company as "an organization engaged in business".[418] Some investment treaties provide for illustrative forms of legal entities considered to be encompassed by the notion of 'company'. Article 1(d) of the Australia–Peru BIT provides that ""company" means any corporation, association, partnership, trust or other legally recognized entity".[419] The notion of 'company' is not explained by the ECT, but the language of Article 1(7) suggests that the Contracting Parties have broad discretion in deciding on the forms a company may take.[420]

Investment treaties usually retain three links between companies and states: the place of incorporation or establishment of the company,[421] the place of the company's seat

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[418] Micklethwait, J.; Wooldridge, A.; *supra* at FN 416, p. 4. The authors also refer to a second, more specific definition of the company:

> "[…] the limited-liability joint-stock company is a distinct legal entity […], endowed by government with certain collective rights and responsibilities." (Micklethwait, J.; Wooldridge, A.; *supra,* p. 4)

Similarly, *The New Oxford American Dictionary* defines the company as "a commercial business". *See, The New Oxford American Dictionary; supra* at FN 136, p. 345. The ILC Draft Articles on Diplomatic Protection employ the term 'corporations', rather than companies, as "profit–making enterprises with limited liability whose capital is generally represented by shares". *See*, Art. 9 and its commentaries; ILC Draft Articles on Diplomatic Protection; *supra* at FN 360, p. 52.

[419] Art. 1(d) of the *Agreement between Australia and the Government of the Republic of Peru on the Promotion and Protection of Investments,* 2 February 1997. Likewise, Art. 1(2) of the *Agreement between the Government of Hong Kong and the Belgo–Luxemburg Economic Union for the Promotion and Protection of Investments*, 18 June 2001, provides that

> ""companies" means:
> (a) in respect of Hong Kong: corporations, partnerships and associations incorporated or constituted under the law in force in its area […]".

[420] The approach taken by the drafters of the ECT is in agreement with the principles of international law, as confirmed by the ICJ in the *Barcelona Traction Case*:

> "[…] international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law." (*Barcelona Traction, Light and Power Company, Limited,* Judgment of 5 February 1970 (second phase), para. 38)

On this issue, *see* also, Gaillard, Emmanuel; *Investments and Investors Covered by the Energy Charter Treaty*, p. 67–68, in Ribeiro, C. (ed.); *supra* at FN 89:

> "[…] legal entities are defined by reference to the domestic laws of each Contracting State, as regards the organization of legal entities."

[421] *See,* Art. 1(d) of the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Jamaica for the Promotion and Protection of Investments*, 14 May 1987: "corporations, firms or associations incorporated or constituted under the law in force […]."
The Convention concerning the Recognition of the Legal Personality refers to the recognition of a company, association or institution that acquired legal personality in accordance with the law of the state where the formalities of registration or publicity have been met and where the registered office is located. *See,* Art. 1 of the *Hague Convention concerning the Recognition of the Legal Personality of Foreign Companies, Associations and Institutions*, signed on 1 June 1956, not in force.

(siège social) or management,[422] and the nationality of the controlling shareholders.[423] These connecting factors determine the nationality of the company.[424] Some instruments take a mixed approach, by requiring both the place of incorporation and the place of the central administration or the place of incorporation and the nationality of the controlling shareholders to establish the nationality of a company.[425] Under the rules of customary international law, the ICJ, in the landmark case of *Barcelona Traction*, recognized the test of incorporation together with the seat theory:

> "In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments."[426]

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[422] *See* for example, Art. 1(3)(b) of the *Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Venezuela on the Promotion and Reciprocal Protection of Investments*, 5 January 1998: "legal person having its seat in the territory of either Contracting Party".

[423] *See,* Art. 1(b)(iii) of the *Agreement on Encouragement and Reciprocal Protection of Investments between Georgia and the Kingdom of the Netherlands*, 1 April 1999: "legal persons […] controlled, directly or indirectly, by natural persons […] or by legal persons […]."

[424] Authors discuss the advantages and disadvantages of these criteria for determining the nationality of a company. *See,* Dolzer, Rudolf; Stevens, Margrete; *Bilateral Investment Treaties,* The Hague: Martinus Nijhoff Publishers, 1995, p. 36. VANDEVELDE refers to the incorporation test as being "the most easily administered because rarely will there be doubt about the place where a company is organized." *See,* Vandevelde, K.J.; *supra* at FN 271, p. 159.

It is also considered that the necessity to establish the nationality of a company was triggered by the obstacles occurred when solving conflict of laws problems. *See,* Kronstein, Heinrich; *The Nationality of International Enterprises*, 52 Colum. L. Rev. 983 (1952).

[425] Art. 1.3(b) of the Switzerland–Kuwait BIT, provides, in respect of Switzerland, that juridical persons must be organized in accordance with the Swiss law and have their place of management located in Switzerland, and, moreover, perform their genuine economic activities in Switzerland:

> "les entités juridiques, y compris les sociétés, les sociétés enregistrées, les sociétés de personnes et autres organisations, qui sont constituées ou organisées de toute autre manière conformément à la législation suisse et qui ont leur siège, en même temps que des activités économiques réelles, sur le territoire de la Suisse" (*Accord entre la Confédération Suisse et l'Etat du Koweït concernant la promotion et la protection réciproque des investissements*, 17 December 2000)

[426] *Barcelona Traction Case; supra* at FN 420, para. 70. The ICJ further rejected the application of the genuine link test, as held in the *Nottebohm Case*:

> "However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the "genuine connection" has found general acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one State have had to be weighed against those with another. In this connection reference has been made to the *Nottebohm* case. […] However, given both the legal and factual aspects of protection in the present case the Court is of the opinion that there can be no analogy with the issues raised or the decision given in that case." (*Barcelona Traction Case; supra* at FN 420, para. 70, emphasis original)

The early drafts of the ECT also provided for the control test. Following a proposal from the Swiss delegation, the drafters inserted in the definition of Investor legal entity the following wording:

> "[…] any corporations, companies, firms, enterprises, organisations and associations controlled by nationals of that Contracting Party or by corporations, companies, firms, enterprises, organisations and associations incorporated or constituted under the law in force in the Territory of that Contracting Party." (*Proposal of the Delegation of Switzerland of 12 March 1992*, and Art. 1(6)(c) of the *Basic Agreement of 19 March 1992*, 17/92 BA 10)

Article 1(7) of the ECT retains the test of incorporation for determining the nationality of a company,[427] and, consequently, its access to the protection of the ECT. The test of incorporation indicates that the company is viewed as possessing the nationality of the state of incorporation and the laws of this state are governing the company.[428] The law of the place of incorporation does not only determine the nationality of the company, but it also regulates issues related to the legal personality of the company, its management, the relations between shareholders, between shareholders and the company etc.

For the purpose of Article 26 of the ECT, Investors will have to satisfy the requirements of Article 1(7) and also the requisites of the ICSID Convention when the dispute is submitted to the ICSID. The ICSID Convention does not expressly provide for the criteria by which to identify the nationality of juridical persons. By reference to the provisions of Article 25(2)(b) of the ICSID Convention, it is accepted that the tests of incorporation or seat must be considered for juridical persons.[429] However, ICSID

The European Communities submitted a proposal to give effect to the seat of business. *See,* the comments of the European Communities to the *Basic Agreement of 19 March 1992,* 17/92 BA 10, which suggested adding the following wording to the incorporation requirement under the definition of Investor: "and having their principal place of business within the Territory of that Contracting Party." The *Basic Agreement of 12 August 1992* retained this proposal and provided that Investors are

> "[…] companies or firms constituted under […]in the territory of that Contracting Party in accordance with its laws and having its registered office, central administration or principal place of business within the territory of a Contracting Party" (Art. 1(5)(b) of the *Basic Agreement of 12 August 1992,*37/92 BA 15)

[427] *See* also, Douglas, Z.; *supra* at FN 292, p. 22, note 96; Castro de Figueiredo, Roberto; *ICSID and Non–Foreign Investment Disputes*, 4(5) TDM (2007).

[428] *See,* Hirsch, M.; *supra* at FN 324, p. 82.

[429] Delaume, D.R.; *ICSID Arbitration and the Courts,* 77 Am. J. Int'l L. 784 (1983), pp. 793–794; Stanimir, A.; *supra* at FN, p. 399; Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, pp. 280–281, paras 698–699. *See* also, *Société Ouest Africaine des Bétons Industriels v. Senegal*, Decision on Jurisdiction of 1 August 1984, para. 29; *Lanco International, Inc. v. Argentine Republic*, Decision on Jurisdiction of 8 December 1998, para. 46, citing the *SOABI v. Senegal* tribunal. BROCHES is of the opinion that the text of Art. 25 of the ICSID Convention "implicitly assumes that incorporation is a criterion of nationality." *See*, Broches, Aron; *The Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 136 Recueil des Cours 331 (1972–II), Hague Academy of International Law, p. 360.

The Preliminary Draft of the ICSID Convention of 15 October 1963 held both control and incorporation tests:

tribunals also understood the absence of the reference to a nationality test as allowing the consent of the parties to prevail. In *Mobil v. Venezuela,* the tribunal concluded that

> "[…] Article 25 (b) (i) does not impose any particular criteria of nationality (whether place of incorporation, *siège social* or control) in the case of juridical persons not having the nationality of the Host State. Thus the parties to the Dutch–Venezuela BIT were free to consider as nationals both the legal persons constituted under the law of one of the Parties and those constituted under another law, but controlled by such legal persons."[430]

ECT Investors must carefully consider the uncertainty generated by the absence of specific provisions under the ICSID Convention in respect to the nationality of juridical persons.

2.1.1 Societas Europaea and the Energy Charter Treaty

A separate comment must be made to the rather atypical company *Societas Europaea* (SE). Starting from 8 October 2004, it is possible to set up an SE under the provisions of the Regulation No. 2157/2001 on the Statute for a European company (Regulation on SE).[431] The main characteristic of the SE is the ability to transfer its registered office from one EU Member State to another without the creation of a new juridical person and without the winding up of the SE.[432] Apart from this, the SE acts as any other public limited–liability company, with certain requirements imposed by its chameleonic nature: the registered office and the head office of the SE must be located in the same EU Member State and the SE may not be formed through the traditional injection of

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> ""National of a Contracting State" […] includes (a) any company which under domestic law of that State is its national, and (b) any company in which the nationals of that State have a controlling interest." (*History of the ICSID Convention; supra* at FN 366, vol. II–1, p. 230)

[430] *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction of 10 June 2010*,* para. 157, emphasis original.

[431] European Commission Regulation No. 2157/2001 of 8 October 2001.

[432] Art. 8(1) of the Regulation on SE. On the results of the Regulation on SE, *see,* Storm, Paul; *The SE in its Sixth Year: Some Early Impressions*, pp. 3–14, in Van Gerven, Dirk; Storm, Paul (eds.); *The European Company*; New York: Cambridge University Press, 2008.

capital resulting in a limited company.[433] A SE does not exist in the abstract universe of the EU, but it must be registered in the Member State in which it has its registered office.[434] Furthermore, the Regulation on SE unambiguously states that a SE shall be treated as a public limited–liability company formed in accordance with the law of the EU Member State in which it has its registered office.[435] For the purpose of Article 1(7) of the ECT, a SE shall be treated as a company organized in accordance with the law of the EU Member State where it is registered, thus following the test of incorporation.[436]

2.1.2 Investors of a Contracting Party controlled by Investors of another Contracting Party

Investors are frequently required to carry out their investments through locally incorporated companies. This can be a condition imposed by the host state,[437] or a convenient option for structuring the investment.[438] Where the nationality of the company is determined by the place of incorporation, the locally incorporated company will be considered a national of the host state, unless adopting the control test for

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[433] The SE may only be formed as follows: by merger of companies from different EU Member States (Title II, Section 2 of the Regulation on SE); by allowing companies from different Member States to form a holding or a joint subsidiary (Title II, Sections 3 and 4 of the Regulation on SE); and by allowing existing public limited companies whose registered seat and head office are within the EU to be restructured as an SE (Title II, Section 5 of the Regulation on SE). *See* also, on the formation of the SE, Werlauff, Erik; *The SE Company – A New Common European Company from 8 October 2004;* 14(1) European Business Law Review 85 (2003); Hodt Dickens, Christine; *Establishment of the SE Company: An Overview over the Provisions Governing the Formation of the European Company*; 18(6) European Business Law Review 1423 (2007); Werlauff, Erik; SE – The Law of the European Company, Copenhagen: DJØF Publishing, 2003.

[434] Art. 12(1) of the Regulation on SE.

[435] Art. 10 of the Regulation on SE.

[436] As the SE has the nationality of the Member State of incorporation, and in the absence of the legal effects of the EU citizenship, it is debatable whether there can exist disputes of Investors of the EU against the ECT Contracting Parties. Some authors are of the opinion that SE holds the EU citizenship and it must be considered to be organized in accordance with the EU law. *See* for example, Happ, Richard; *The Legal Status of the Investor Vis–a–Vis the European Communities: Some Salient Thoughts,* 10(3) Int. A.L.R. 74 (2007), p. 5; Pinsolle, P.; *supra* at FN 320, p. 89. For the nationality of SE under other investment treaties, *see,* Ortino, F.; *supra* at FN 316, pp. 66–68.

[437] SCHREUER observes that, "[i]n fact, many States require the establishment of a local company as a precondition for foreign investment." *See*, Schreuer, C.; *supra* at FN 274, p. 4.

[438] PERKAMS suggests that investors prefer to act through locally incorporated companies for tax saving reasons. *See,* Perkams, M.; *supra* at FN 293, p. 96.

determining the actual nationality.[439] This would be the case under the ECT, as the jurisdiction of the ECT tribunals extends only to disputes between a Contracting Party and Investors of another Contracting Party.[440] Such treatment, nevertheless, would be inequitable, in particular for Investors forced to channel their investments through local companies, and would deny access to the investment protection of the ECT to a large number of Investors.

Under the ICSID Convention, this situation is covered by Article 25(2)(b), which provides that

> "[…] any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."[441]

Pursuant to this provision, a juridical person is treated as a national of another Contracting State because of the foreign control.[442] Nevertheless, Article 25(2)(b) stresses that the parties must have agreed to treat the juridical person as a national of

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[439] *See,* Sornarajah, M., *The International Law on Foreign Investment,* Cambridge: Cambridge University Press, 2004, pp. 230–231; Castro de Figueiredo, R.; *supra* at FN 427, pp. 7–9.

[440] Art. 26(1) of the ECT.

[441] As HIRSCH explains,

> "[t]he [ICSID] Convention lays down a sophisticated, flexible mechanism, combining a number of criteria for identifying the nationality of a corporation. The innovation contained in the provisions of the Convention gave rise to a great number of debates as to the significance and exact interpretation of these provisions." (Hirsch, M.; *supra* at FN 324, p. 80)

[442] The First Draft of the ICSID Convention simply provided for "any juridical person which the parties have agreed shall be treated as a "national of another Contracting State"". There was no reference to the requirement of foreign control. *See,* Article 30 of the First Draft of the ICSID Convention, *History of the ICSID Convention; supra* at FN 366, vol. I, p. 124. As one author explains,

> "[…] Article 25(2)(b) is the single provision of the ICSID Convention which tries to establish a link between the nationality of the investor and the effective origin of the investment." (Castro de Figueiredo, R.; *supra* at FN 427, p. 12)

another Contracting State.[443] As one author observes, in interpreting this provision, ICSID tribunals showed "some flexibility".[444]

The possibility to consider a local company as a national of another Contracting State, as articulated by Article 25(2)(b) of the ICSID Convention, was extensively discussed by the ICSID tribunals. In *Aucoven v. Venezuela,* the claimant, Autopista Concesionada de Venezuela, C.A. (Aucoven), was a company incorporated in Venezuela, with 99% of its shares held by ICA, a Mexican engineering and construction firm and 1% of shares held by Baninsa, a Venezuelan investment bank. ICA, in turn, was a subsidiary of Empresas ICA Sociedad Controladora, S.A. de C.V., the parent company of a Mexican conglomerate of over 140 corporations.[445] 75% of Aucoven's shares were later transferred to Icateh Corporation, a company organized under the laws of the state of Florida, United States.[446] As Venezuela claimed that, despite the transfer of the majority of Aucoven's shares to an American company, "the true control over Aucoven has always been exerted by ICA Holding", the Mexican corporation,[447] the tribunal proceeded to verify whether the requirements set forth by Article 25 of the ICSID Convention are met. The tribunal upheld the unequivocal and express provisions of the concession agreement between the parties to treat Aucoven as a national of another

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[443] The ICSID Convention fails to develop on the particularities of such agreement. As SCHREUER explains,

> "[t]he Convention does not require any specific form for an agreement to treat a juridical person that has the host State's nationality as a national of another Contracting State because of foreign control. An agreement is essential, however. Without it, the Centre will not have jurisdiction." (Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 299, para. 768)

On the other hand, the ICSID Convention does not require this agreement to be in writing. Or, as SCHREUER points out, "the standard of formality is somewhat lower" than for consent to the ICSID's jurisdiction. *See,* Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 301, para. 776.

[444] Schreuer, C.; *supra* at FN 274, p. 5.

[445] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction of 27 September 2001, paras 8–10. Mexico is not a Contracting State of the ICSID Convention and accepting the Mexican nationality as the 'real' nationality of Aucoven would have obliged the tribunal to deny jurisdiction.

[446] *Ibid.,* paras 18–26.

[447] *Ibid.*, para. 41.

Contracting State,[448] and saw no justification for departing from the agreement of the parties.[449]

The tribunal in *Amco v. Indonesia* found that Article 25 does not provide for a formal requirement to be fulfilled by the agreement of the parties and the full knowledge of the host Contracting State is sufficient to acknowledge that parties agreed to treat the local company as a foreign juridical person.[450] In *LETCO v. Liberia,* the tribunal considered the existence of an ICSID arbitration clause as an indicator that the parties agreed on bringing into effect Article 25(2)(b) of the ICSID Convention.[451]

In *Alex Genin v. Estonia*, the agreement of the parties to treat a local corporation as a national of another Contracting State because of foreign control was contained in the United States–Estonia BIT, on which claimants relied.[452] The tribunal found no

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[448] Clause 64 of the Concession Agreement between Aucoven and the Venezuelan Ministry of Infrastructure provided that

> "[b]*oth The Republic of Venezuela, acting by means of THE MINISTRY, and THE CONCESSIONAIRE, agree to attribute to THE CONCESSIONAIRE, a legal person of Venezuela subject to foreign control for the date when this clause enters into force, the character of "National of another Contracting state" for the purpose of applying this Clause and the provisions of the Convention.*" (*Aucoven v. Venezuela; supra* at FN 445, para. 79)

[449] *Aucoven v. Venezuela; supra* at FN 445, para. 87.

[450] *Amco Asia Corp. and others v. Republic of Indonesia*, Award on Jurisdiction of 25 September, 1983, para. 14(ii):

> "Nothing in the Convention, and in particular in article 25, provides for a formal requisit of an express clause stating that the parties have decided to treat a company having legally the nationality of the Contracting State, which is a party to the dispute, as a foreign company of another contracting State, because of the control to which it is submitted.
>
> What is needed, for the final provision of article 25-2(b) to be applicable, is 1^0 that the juridical person, party to the dispute be legally a national of the Contracting State which is the other party and 2^0 that this juridical person being under foreign control, to the knowledge of the contracting state, the parties agree to treat it as a foreign juridical person."

In *Cable TV v. St. Kitts and Nevis*, the tribunal considered that the recognition of a local company as a foreign investor may be found in the privileges granted by the host State, which are normally retained by foreign investors. *See Cable Television of Nevis Ltd. and Cable Television of Nevis Holdings, Ltd. v. the Federation of St. Christopher (St. Kitts) and Nevis*, Award of 13 January 1997, para. 5.18.

[451] *Liberian Eastern Timber Corporation v. Republic of Liberia*, Award of 31 March 1986 and Rectification of 17 June 1986, p. 8:

> "Though it is not necessary to go so far in the case at hand, it could be argued that the mere fact that Liberia and LETCO included an ICSID arbitration clause in the Concession Agreement constitutes an agreement to treat LETCO as a 'national of another Contracting State'. To conclude otherwise would be tantamount to stating that Liberia never intended to honour this part of the Concession Agreement; that Liberia, by agreeing to the ICSID clause, acted in bad faith and contrary to the tenor and purpose of the ICSID Convention."

[452] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, Award of 25 June 2001, para. 328. Art. VI(8) of the United States–Estonia BIT provides that

difficulty in considering the claimant, Eastern Credit, a company having the nationality of the United States, wholly owned by Mr Genin, a United States national.[453] The tribunal had to deal with the case of the agreement to treat a local company as foreign investor expressed in a treaty.[454] The agreement required by Article 25 of the ICSID Convention can be found in many BITs. One such example is the above mentioned United States–Estonia BIT. Similarly, Article 7(4) of the Chile–United Kingdom BIT provides that

> "[…] any legal person which is constituted in accordance with the legislation of one Contracting Party, and in which, before a dispute arises, the majority of shares are owned by investors of the other Contracting Party, shall be treated, in accordance with Article 25(2)(b) of said Washington Convention, as a legal person of the other Contracting Party."[455]

Article 26(7) of the ECT contains the agreement of the Contracting Parties to treat a legal entity, "which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing […] and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party", as a national of another Contracting State, for the purpose of Article 25(2)(b) of the ICSID Convention.[456] This provision allows the control test to be applied in determining the

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> "[f]or purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention." (Art. VI(8) of the *Treaty between the Government of the United States of America and the Government of the Republic of Estonia for the Encouragement and Reciprocal Protection of Investment*, 16 February 1997)

[453] *Alex Genin v. Estonia; supra* at FN 452, para. 328.

[454] *See* also, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile***,** Award of 25 May 2004, para. 94; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, Award of 7 February 2005, para. 15.

[455] *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Chile for the Promotion and Protection of Investments*, 21 April 1997. Nevertheless, other BITs do not provide for such agreement. *See, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments*, 19 February 1993.

[456] Art. 26(7) of the ECT reads as follows:

> "An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State"."

nationality of a legal entity in the context of an arbitration submitted under the ICSID Convention, in addition to the incorporation test in Article 1(7) of the ECT. Consequently, legal entities that would normally be treated as nationals of the host Contracting Party and, thus, barred from bringing a dispute against this Contracting Party under Article 26 of the ECT, are allowed to do so if they are controlled by Investors of another Contracting Party.

Article 26(7) of the ECT does not provide for an explanation of 'foreign control'. The provisions of the Understanding no. 3 of the Final Act clarify the notion of 'control' in the context of the definition of 'Investment' in Article 1(6) of the ECT.[457] The explanation of 'control' in Understanding no. 3 suggests that the notion of 'control' has an objective meaning.[458] The test for determining the existence of control may be quantitative, where investors own a certain percentage of the shares, or qualitative, underlined by the ability of investors to decisively influence the management of investments. The ECT does not explicitly adopt one of these tests, and this rather suggests that any kind of control qualifies for the purpose of Article 26(7).

Referring to Article 25(2)(b) of the ICSID Convention, SCHREUER explains that "control is an objective requirement that cannot be replaced by an agreement."[459] Other commentators of the ICSID Convention also agree that control is a factual element, which can be objectively examined by arbitral tribunals.[460] AMERASINGHE explains that

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Art. 26(7) is also relevant in the context of the ICSID Additional Facility Rules. *See*, *supra* at FN 380.

[457] *See* infra, FN 524. There are scholars who consider Understanding no. 3 to be applicable throughout the provisions of the ECT. *See*, for example, Waelde, T.W.; *supra* at FN 66, p. 274.

[458] *See* infra, FN 524.

[459] Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 312, para. 813. *See* also, the argument of the Argentine Republic in *TSA Spectrum de Argentina, S.A. v. Argentine Republic*, Award of 19 December 2008, para. 114: "The "control" required is an objective requirement that shall not be replaced by an agreement."

[460] *See*, for example, Hirsch, M.; *supra* at FN 324, p. 102:

> "[…] there is no reason to suppose that in deciding the question whether a reasonable criterion forms the basis for an agreement on foreign control, a tribunal or commission will necessary be bound by a single definition based on a majority shareholding or any other particular test. […] On the contrary, a tribunal or commission may regard any criterion based on management, voting rights, shareholding or any other reasonable theory as being reasonable for the purpose."[461]

In *Vacuum Salt v. Ghana,* the tribunal found that the control of the claimant was in fact in the hands of Ghanaian nationals.[462] 20% of claimant's shares were under Greek control, while the remaining 80% were held by Ghanaian nationals.[463] While the tribunal attached some weight to the shareholding of the claimant, it looked further into the circumstances of the case and held in this respect that

> "[…] "foreign control" within the meaning of the second clause of Article 25(2)(b) does not require, or imply, any particular percentage of share ownership. Each case arising under that clause must be viewed in its own particular context, on the basis of all of the facts and circumstances. There is no "formula." It stands to reason, of course, that 100 percent foreign ownership almost certainly would result in foreign control, by whatever standard, and that a total absence of foreign shareholding would virtually preclude the existence of such control. How much is "enough," however, cannot be determined abstractly."[464]

However, the tribunal found that there was no material evidence that the Greek shareholder "either acted or was materially influential in a truly managerial rather than technical or supervisory vein".[465] These findings led the tribunal in *Vacuum Salt v.*

> "The very term 'control' indicates that the tribunal must look into all the factual and juridical circumstances, in order to determine who really controls a corporation."

See also, Masood, Arshad; *Jurisdiction of International Centre for Settlement of Investment Disputes*, 14 Journal of the Indian Law Institute 119 (1972), p. 139:

> "Control is a question of fact and may differ from case to case. Any attempt to find a single formula to cover every manifestation of control might, therefore, have proved unsuccessful."

[461] Amerasinghe, C.F.; *supra* at FN 297, p. 264. Although referring to the notion of 'control' in the definition of investment, Understanding no. 3 provide a useful list of elements to be considered when assessing foreign control over a local company:

> "(a) financial interest, including equity interest, in the Investment;
> (b) ability to exercise substantial influence over the management and operation of the Investment; and
> (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body." (*infra* at FN 525)

[462] *Vacuum Salt Products Ltd. v. Republic of Ghana*, Award of 16 February 1994, paras 41–42 and 54.
[463] *Ibid.,* paras 41–42.
[464] *Ibid.,* para. 43.
[465] *Ibid.,* para. 53.

Ghana to the conclusion that the claimant was not under foreign control, as required by Article 25(2)(b) of the ICSID Convention.[466]

In *Thunderbird v. Mexico*, the tribunal explained that in the context of NAFTA,[467] there is no express requirement that control must be of legal nature and a *de facto* control, "established beyond any reasonable doubt", would be sufficient.[468] The *Thunderbird v. Mexico* tribunal held that

> "[c]ontrol can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation."[469]

Article 26(7) of the ECT does not restrict the foreign control to a single controller. It can be the case where the arbitral tribunal's inquiry reveals that the foreign control is equally exercised by two or more foreign nationals. As long as the nationals are of Contracting Parties to the ECT, there is nothing to prevent arbitral tribunal to uphold the applicability of Article 26(7) of the ECT.

Under the ICSID Convention, the tribunal in *Amco v. Indonesia* was confronted with a similar situation. The debate whether the true controller was an American company or a Dutch national that controlled the American company through a Hong Kong company

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[466] *Ibid.,* para. 54.

[467] Art. 1117(1) of the NAFTA, which provides for the following:
"An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation […]."

[468] *International Thunderbird Gaming Corporation v. the United Mexican States*, Award of 26 January 2006, para. 106.

[469] *Ibid.,* para. 108. *See* also, the conclusion of the tribunal in *Aguas del Tunari, S.A. v. Republic of Bolivia*, Decision on Respondent's Objections to Jurisdiction of 21 October 2005, para. 264. The tribunal here observed that the Netherlands–Bolivia BIT, on which Claimant relied, did not require "actual day–to–day" control. *See, Aguas del Tunari v. Bolivia; supra,* para. 264.

did not affect the reasoning of the tribunal, as the foreign control belonged to nationals of Contracting States of the ICSID Convention.[470]

The existence of foreign control leads to the piercing of the corporate veil in order to find the actual controllers of the company. Article 26(7) of the ECT does not offer guidance as to how tribunals should proceed in discovering the 'foreign control' of the locally incorporated company.[471]

Under the similar provision in Article 25(2)(b) of the ICSID Convention, some tribunals limited their inquiries to the first layer of controllers,[472] while other tribunals continued their investigation until they found the real source of control.[473] As to the nationality of the controllers, the expression 'foreign control' is self–explanatory and excludes nationals of the host state. In *TSA v. Argentina,* the claimant, Thales Spectrum de Argentina S.A., was a company incorporated in Argentina and wholly owned by TSI Spectrum International N.V, a company registered in the Netherlands.[474] Looking at the first layer of claimant's control, the tribunal in *TSA v. Argentina* could have been satisfied that the foreign control required by Article 25(2)(b) of the ICSID Convention exists. However, the tribunal decided to investigate further in order to reach the real source of control of TSA.[475] Based on the evidence submitted in the case, the tribunal

[470] *Amco v. Indonesia, supra* at FN 450*,* para. 14(iii). *See* also, Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 318, para. 833.

[471] The tribunal in *AES v. Hungary* briefly concluded that

> "AES Summit owns 99% of, and exercises ownership and control over, AES Tisza. Therefore, pursuant to Article 26(7) of the ECT, AES Tisza shall be treated as a national of "another contracting state" for purposes of Article 25(2)(b) of the Convention." (*AES v. Hungary; supra* at FN 240, para. 6.1.6, footnote omitted)

[472] *See,* for example, *Amco v. Indonesia; supra* at FN 450; *Aucoven v. Venezuela; supra* at FN 445; etc.

[473] *See, African Holding Company of America and Société Africaine de Construction au Congo S.A.R.L. v. Republic of Congo,* Award of 29 July 2008; *Noble Energy, Inc. and Machalapower Cia. Ltda. v. Republic of Ecuador and Consejo Nacional de Electricidad,* Decision on Jurisdiction of 5 March 2008.

[474] *TSA v. Argentina; supra* at FN 459*,* para. 1.

[475] *See* also, *SOABI v. Senegal, supra* at FN 429, where the tribunal looked at the effective controller, rather than at the direct one.

found that that the ultimate owner of the claimant was an Argentinean citizen,[476] and, therefore, claimant could not be treated, for the purpose of Article 25(2)(b), as a juridical person under foreign control.[477]

On the other hand, the foreign control can only be exercised by nationals of a Contracting Party to the ECT. Under the ICSID Convention, the tribunal in *SOABI v. Senegal* stressed that the foreign interests, which could serve as a basis for the foreign status of a locally incorporated company, should belong to nationals of Contracting States:

> "Le Tribunal est d'avis qu'il résulte de la structure et de l'objet de la Convention, que les intérêts étrangers qui pourraient servir de base pour donner "extranéité" à une société de droit local, doivent être ceux de ressortissants d'Etats contractants."[478]

As to the relevance of Article 26(7) of the ECT when Investors opt for arbitration under the SCC or UNCITRAL Rules, this provision appears to be inapplicable.[479] In this case, the owners or shareholders of a locally incorporated company might consider submitting the dispute in their own name, relying instead on the provisions of Article 1(6) of the ECT on the definition of 'Investment'.

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[476] *TSA v. Argentina; supra* at FN 459*,* para. 162.
[477] *Id.*
[478] *SOABI v. Senegal, supra* at FN 429*,* para. 33. In *SOABI v. Senegal*, the tribunal upheld jurisdiction although the immediate controller of the locally incorporate company was a Panamanian company, while Panama is not a Contracting State of the ICSID Convention (*SOABI v. Senegal; supra,* para. 32). The tribunal was not satisfied to look at the first layer of control and found that the Panamanian company was in turn controlled by a Belgian national, while Belgium is a Contracting State of the ICSID Convention (*SOABI v. Senegal; supra,* para. 39). This case, as well as *TSA v. Argentina,* raises the question whether a tribunal must look into the layers of control of a local company until it finds that it has jurisdiction. As SCHREUER points out, the real questions are the following:

> "Could this search for the true controller go on indefinitely beyond the first controller? Or was it the Tribunal's intention to search until it could find a foreign control that had the nationality of a Contracting State? Put differently, how would a tribunal decide if the situation in *SOABI* were to be reversed? If the immediate controller is a national of a Contracting State which is, in turn, controlled by nationals of non-Contracting States or even by nationals of the host State?" (Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 321, para. 844, emphasis original)

[479] Some authors consider that there might be some room for SCC or UNCITRAL tribunals to apply the provision under Art. 26(7) of the ECT. *See,* Perkams, M.; *supra* at FN 293, p. 106.

2.1.3 Shareholders of a Company and the Energy Charter Treaty

Most often, investments are made through acquisition of shares or other forms of participation in a company. As numerous disputes under investment law are brought by shareholders of companies, tribunals have to decide whether these shareholders meet the requirements ascribed by a treaty. Shareholders frequently argue that the interest they hold in a company gives them legal standing to ask damages not only related to their direct rights, such as the right to vote or to attend meetings of the general assembly, but also for their indirect rights, such as those in connection with the devaluation of their shares as a result of the actions of the state.[480]

In the context of the ECT, several questions relate to the legal standing of shareholders.[481] The first one debates whether shareholders, independently from the company, have legal standing in relying on the provisions of the ECT, when a Contracting Party's actions caused injury to the company. Related to this, it is discussed

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[480] The Annulment Committee in *Azurix Corp. v. Argentina* concluded that investors may bring an action for indirect damages:

> "[…] where a foreign investor is not the actual legal owner of the assets constituting an investment, or not an actual party to the contract giving rise to the contractual rights constituting an investment, that foreign investor may nonetheless have a financial or other commercial interest in that investment. This is so, irrespective of whether the actual legal owner of the assets or contractual rights constituting the investment is a wholly or partly owned subsidiary of the investor, or whether the actual legal owner is an unrelated third party. The Committee sees no reason in principle why an investment protection treaty cannot protect such an interest of a foreign investor, and enable the foreign investor to bring arbitration proceedings in respect of alleged violations of the treaty with respect to that interest." (*Azurix Corp. v. Argentine Republic*, Decision on Application for Annulment of 1 November 2009, para. 108)

For the right of shareholders to claim indirect damages, *see* further, Bentolila, Dolores; *Shareholders' Action to Claim for Indirect Damages in ICSID Arbitration*, 2(1) Trade L. & Dev. 87 (2010).

During the ECT's negotiations, Canada suggested, though in the context of Investments carried out through locally incorporated companies, that the scope of the Investor–Contracting Party dispute resolution mechanism should expressly cover the situation where indirect damages are claimed by the Investor:

> "Where an Investor of one Contracting Party has established a company […] and a breach of an obligation under Part IV [currently, Part III] by that other Contracting Party affects the company, the investor's injury will be measured by the effect that the breach has upon the value of the investor's shares in the company. This effect will not always be readily ascertainable or an accurate measure of the injury suffered by the investor." (*Canadian comments to the Basic Agreement of 19 January 1993*, 3/93 BA 32)

[481] The term 'shareholder' does not appear as such in the ECT. Nevertheless, the indirect reference can be traced in Art. 1(6) of the ECT, which refers to shares as possible Investments, and Art. 26(7) of the ECT, which refers to legal entities controlled by Investors. This conclusion is also valid in the context of the ICSID Convention.

whether an ECT tribunal would reach different conclusion when faced with minority or majority shareholding, or with direct or indirect shareholding. The practical significance of these issues has been highlighted by tribunals and scholars:

> "[t]he extent to which shareholders can present a claim against the host State of the investment therefore is a critical question in the area of international investment law."[482]

In the seminal case of *Barcelona Traction*, decided under the rules of customary international law, the ICJ found that Belgium, the state of nationality of the majority shareholders, had no legal standing in the dispute against Spain, for damages caused to the company. Barcelona Traction, Light and Power Company Limited was incorporated in Canada, but the majority of its shareholders were Belgian nationals. The ICJ ruled that, unless the injured company ceased to exist or the state of nationality of the company is prevented from protecting it, the state or states of nationality of shareholders may not bring an action at international level for damages suffered by the company.[483] While emphasising the legal distinction between the corporation and its shareholders, the Court stressed that

> "[…] a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. […] In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate

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[482] Cohen Smutny, Abby; *Claims of Shareholders in International Investment Law*, p. 363, in Binder, C.; Kriebaum, U.; Reinisch, A.; Wittich, S. (eds.); *supra* at FN 122.

[483] The Court concluded that

> "[…] where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim." (*Barcelona Traction Case; supra* at FN 420*,* para. 88)

The Court also recognized the distinction between situations when the prejudice is cause to the company and those when the harm is caused to the shareholders:

> "The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company in liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action." (*Barcelona Traction Case; supra* at FN 420, para. 47)

> action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed."[484]

Acknowledging the increased importance of treaty–based claims in international law, the Court concluded that

> "[…] the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements."[485]

In the *ELSI Case,* the ICJ apparently departed from the dictum of the *Barcelona Traction Case* and allowed a claim by the United States on behalf of the two American shareholders of Elettronica Sicula S.p.A. However, the conclusion of the ICJ in the *ELSI Case* was not based on the rules of customary international law, but on the provisions of the Treaty of Friendship, Commerce and Navigation between the United States and Italy.[486] Most recently, in the *Diallo Case,* the ICJ had the opportunity to review whether the customary international law rules for the protection of shareholders have evolved since the *Barcelona Traction Case*. Noting that the role of diplomatic protection has somehow faded with the development of bilateral and multilateral agreements for the protection of foreign investments,[487] the ICJ held that there is no sufficient evidence to show that there has been a change in the customary international

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[484] *Barcelona Traction Case; supra* at FN 420, para. 44. The ICJ stressed the distinction between the rights and the interests of shareholders:

> "Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected." (*Barcelona Traction Case; supra* at FN , para. 46)

[485] *Barcelona Traction Case; supra* at FN 420, para. 90. The ICJ admitted that

> "[c]onsidering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane." (*Barcelona Traction Case; supra*, para. 89)

[486] *Elettronica Sicula S.P.A. (ELSI)*, Judgment of 20 July 1989, paras 68–69. *See* further, Murphy, Sean D.; *The ELSI Case: An Investment Dispute at the International Court of Justice*, 16 Yale J. Int'l L. 391 (1991).

[487] *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 24 May 2007, para. 88.

law regarding the protection of shareholders.[488] It follows that, still, under customary international law, shareholders cannot justify a claim for damages caused to the company, while their state of nationality has a restricted standing to espouse shareholders' claims in such circumstances.

The ILC Draft Articles on Diplomatic Protection maintain the rule stated in the *Barcelona Traction Case* and provide in Article 9 that, when a company suffers harm, the state of incorporation is the one entitled to exercise diplomatic protection on that company's behalf.[489] The ILC Draft Articles on Diplomatic Protection accept two exceptions from this rule: first, when the company ceased to exist for a reason unrelated to the harm, and, second, when the company has the nationality of the state alleged to be responsible for causing the harm, and incorporation in that state was required by it as a precondition for doing business there.[490] These exceptional circumstances allow the state of nationality of shareholders to exercise diplomatic protection on behalf of the company.[491] The ILC Draft Articles on Diplomatic Protection also recognize the right of

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[488] The ICJ stated that

> "[t]he fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary." (*Diallo Case; supra* at FN 487, para. 90)

[489] Art. 9 of the ILC Draft Articles on Diplomatic Protection; *supra* at FN 360, p. 52:

> "For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality."

However, Art. 9 provides that if the circumstances show that a company has a closer connection with another state, in which the seat of management and financial control are located, that state shall be the state of nationality of the company, having the right to exercise diplomatic protection.

[490] Art. 11 of the ILC Draft Articles on Diplomatic Protection; *supra* at FN 360, p. 58:

> "The State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:
> (a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or
> (b) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there."

[491] *Id.*

a state to provide diplomatic protection to shareholders of a company, when a state causes direct injury to the rights of shareholders.[492]

In the practice of investment law, however, arbitral tribunals have consistently recognized the standing of shareholders to claim compensation for damages incurred by the company.[493] Such decisions rely on investment treaties that either directly refer to this right of shareholders or, based on the definition of covered investments, allow shareholders to claim compensation for injuries caused to the company. An example of the first situation is Article 1117(1) of the NAFTA, which provides that

> "[…] an investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation."[494]

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[492] Art. 12 of the ILC Draft Articles on Diplomatic Protection; *supra* at FN 360, p. 66:
"To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals."

[493] *See, American Manufacturing & Trading, Inc. v. Zaire*, Award of 21 February 1997; *Lanco. v. Argentina; supra* at FN 429; *CMS Gas Transmission Company v. Argentine Republic*, Decision on Jurisdiction of 17 July 2003; *Azurix Corp. v. Argentina; supra* at 480, Decision on Jurisdiction of 8 December 2003; *Enron v. Argentina; supra* at FN 29, Decision on Jurisdiction of 14 January 2004; *LG&E v. Argentina; supra* at FN 29, Decision on Jurisdiction of 30 April 2004; *Siemens A.G. v. Argentine Republic*, Decision on Jurisdiction of 3 August 2004; *Impreglio S.p.A. v. Pakistan*, Decision on Jurisdiction of 22 April 2005; *Pan American Energy LLC and BP Argentina Exploration Company v. Argentina* and *BP America Production Company and others v. Argentine Republic*, Decision on Preliminary Objections of 27 July 2006 etc. *See* also, Alexandrov, Stanimir; *The "Baby Boom" of Treaty–Based Arbitrations and the Jurisdiction of ICSID Tribunals–Shareholders as "Investors" under Investment Treaties*, 6 J. of World Investment & Trade 387 (2005); Schreuer, Christoph; *Shareholder Protection in International Investment Law*, 2(3) TDM (2005); Cohen Smutny, A.; *supra* at FN 482.

[494] Similar provision is contained in Art. 24(1)(b) of the 2004 United States Model BIT:
"1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: […]
(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim
(i) that the respondent has breached
(A) an obligation under Articles 3 through 10,
(B) an investment authorization, or
(C) an investment agreement;
and
(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,
provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement."

This provision of the NAFTA confers legal standing on direct and indirect shareholders that own or control the company to claim on behalf of the company. Article 1117(3) of the NAFTA sets forth the possibility of non–controlling shareholders to submit to arbitration a claim, "arising out of the same events that gave rise to the claim under this Article."[495]

Claims by shareholders are most often relying on the broad definition of 'investment' contained in investment instruments. For example, Article 1139(e) of the NAFTA includes in the definition of 'investment' "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise". Similarly, Article I(1)(a)(ii) of the Argentina–United States BIT provides that

> "[…] 'investment' means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation […] a company or shares of stock or other interests in a company or interests in the assets thereof."[496]

In *Lanco v. Argentina*, which was based on the Argentina–United States BIT, the Tribunal concluded that

> "[…] the definition of this term [investment] in the ARGENTINA–U.S. Treaty is very broad and allows for many meanings. For example, as regards shareholder equity, the ARGENTINA–U.S. Treaty says nothing indicating that the investor in the capital stock has to have control over the administration of the company, or a majority share; thus the fact that LANCO holds an equity

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[495] Art. 1117(3) of the NAFTA provides that
> "[w]here an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby."

[496] *Treaty between the Argentine Republic and the United States of America Concerning the Reciprocal Encouragement and Protection of Investment*, 20 October 1994. Similar provision is found in numerous other BITs. For example, Art. 1(1) of the Romania–Australia BIT provides for the following definition of investment:
> ""investment" means every kind of asset, owned or controlled by investors of one Contracting Party and admitted by the other Contracting Party subject to its laws and investment policies and includes: […]
> (ii) shares, stocks, bonds and debentures and any other form of participation in a company". (*Agreement between the Government of Australia and the Government of Romania on the Reciprocal Promotion and Protection of Investments,* 22 April 1994)

> share of 18.3% in the capital stock of the Grantee allows one to conclude that it is an investor in the meaning of Article I of the ARGENTINA–U.S. Treaty."[497]

The tribunal in *Lanco v. Argentina* saw no impediment in allowing minority shareholders to benefit from the protection of the BIT, since the definition of 'investment' places no requirements on the number of shares to be owned by an investor in order to have a covered investment.

The approach adopted in *Lanco v. Argentina* was followed by subsequent tribunals. In *CMS v. Argentina*, also based on the Argentina–United States BIT, the claimant was a minority shareholder in an Argentinean incorporated company, Transportadora de Gas del Norte. Argentina objected to the jurisdiction of the tribunal on the ground that CMS is a minority shareholder of the locally incorporated company and the alleged damages caused by the respondent are only indirectly affecting CMS.[498] The tribunal considered the objections raised by Argentina, including those based on the principles laid down in the *Barcelona Traction Case*, and concluded that there is

> "[…] no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non–controlling shareholders."[499]

The *CMS* tribunal admitted, however, that such conclusion rests on the provisions of the BIT, as a *lex specialis*.[500] The decision in *CMS v. Argentina* also confirms the possibility for a covered investor–shareholder to claim damages not only in respect to

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[497] *Lanco v. Argentina; supra* at FN 429, para. 10.
[498] *CMS v. Argentina; supra* at FN 493, para. 36.
[499] *Ibid.*, para. 48.
[500] *Ibid.,* para. 48. The tribunal went further and contended that "*lex specialis* in this respect is so prevalent that it can now be considered the general rule". *See, CMS v. Argentina; supra* at FN 493, para. 48 emphasis original.

the shares of a company, but also for the indirectly owned investments, such as the assets of the company.[501] In *Enron v. Argentina*, the Tribunal concluded that

> "[…]under the provisions of the [Argentina–U.S.] Bilateral Investment Treaty, broad as they are, claims made by investors that are not in the majority or in the control of the affected corporation when claiming for violations of their rights under such treaty are admissible."[502]

In *Siemens v. Argentina,* the claimant owned shares in a local Argentinean company through an affiliated company.[503] The claims were based on the provisions of the Germany–Argentina BIT, which did not include a reference to investments owned or controlled directly or indirectly by the investor.[504] Even so, the tribunal reasoned as follows:

> "The definition of "investment" is very broad. An investment is any kind of asset considered to be such under the law of the Contracting Party where the investment has been made. The specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. The drafters were careful to use the words "not exclusively" before listing the categories of "particularly" included investments. One of the categories consists of "shares, rights of participation in companies and other types of participation in companies". The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments."[505]

Unless expressly excluded by the relevant investment instruments, tribunals often held that a covered investor may indirectly own shares in a company incorporated in the host

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[501] *CMS v. Argentina; supra* at FN 493, para. 65. *See* also, the opinion expressed by the Annulment Committee in *CMS v. Argentina*:

> "One must add that whether the locally incorporated company may itself claim for the violation of its rights under contracts, licenses or other instruments, in particular under Article 25(2)(b) of the ICSID Convention, does not affect the right of action of foreign shareholders under the BIT in order to protect their own interests in a qualifying investment, as recognized again in many ICSID awards." (*CMS Gas Transmission Company v. Argentine Republic*, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic of 25 September 2007, para. 74)

[502] *Enron v. Argentina, supra* at FN 493, para. 49.

[503] *Siemens v. Argentina, supra* at FN 493, para. 23:

> "The bidding terms required that a local company be established by bidders in order to participate in the bidding process. The Claimant established, through its wholly-owned affiliate Siemens Nixdorf Informationssysteme AG ("SNI"), a local corporation, Siemens IT Services S.A. ("SITS")."

[504] *Siemens v. Argentina, supra* at FN 493, para. 137.

[505] *Id.*, footnote omitted.

state.[506] However, allowing indirect and direct shareholders to pursue claims on behalf of a company may lead to a duplication of claims and, sometimes, to conflicting awards. For instance, a company, on one hand, and its shareholders, on the other, may submit their claims arising out of the same conduct of a state to different arbitral tribunals, within the same treaty or using the protection of different treaties.[507] In *CME v. Czech Republic*, the claimant held 99% equity interest in CNTS, a company registered in the Czech Republic.[508] The case was based on the Netherlands–Czech Republic BIT and concerned the alleged failure of the Czech authorities to protect CNTS.[509] The tribunal held that the claimant is an investor based on the provisions of the BIT, which comprise in the definition of 'investment' shares and other kind of interests in a company.[510] *Lauder v. Czech Republic* dealt with the same facts as *CME v. Czech Republic*. The claimant was a United States national who controlled CME and brought the dispute under the United States–Czech Republic BIT.[511] Although initially disputed, respondent agreed that, for the purpose of jurisdiction, claimant controlled the investment.[512] The parties could not agree on the consolidation or coordination of the two proceedings,

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[506] In *Enron v. Argentina*, the claimant's shareholding involved several layers of companies and ownership. Nevertheless, the tribunal, by considering the facts of the case, accepted the legal standing of the claimant:

> "The conclusion that follows is that in the present case the participation of the Claimants was specifically sought and that they are thus included within the consent to arbitration given by the Argentine Republic. The Claimants cannot be considered to be only remotely connected to the legal arrangements governing the privatization, they are beyond any doubt the owners of the investment made and their rights are protected under the Treaty as clearly established treaty–rights and not merely contractual rights related to some intermediary. The fact that the investment was made through CIESA and related companies does not in any way alter this conclusion." (*Enron v. Argentina; supra* at FN 493, para. 56)

In *Aguas del Tunari v. Bolivia*, the tribunal, discussing the meaning of the terms 'controlled directly or indirectly', reached the following conclusion:

> "[…] the phrase "controlled directly or indirectly" means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity." (*Aguas del Tunari v. Bolivia; supra* at FN 469, para. 264)

[507] It must be mentioned here the multiplication of claims based on contracts and treaties, usually referred to as contract claims and treaty claims.

[508] *CME Czech Republic B.V. v. Czech Republic*, Partial Award of 13 September 2001, para. 4.

[509] *Ibid.,* para. 3.

[510] *Ibid.,* para. 375.

[511] *Ronald S. Lauder v. Czech Republic,* Final Award of 3 September 2001*,* paras 77 and 154.

[512] *Ibid.,* paras 153–155.

although they run in parallel.[513] The tribunal in *Lauder v. Czech Republic* held that the principle of *lis pendens* is not applicable to the case, as the case of *CME v. Czech Republic* was not between the same parties and it relied on a different investment treaty.[514] The tribunal also rejected Czech Republic's contentions of abuse of process in the multiplicity of proceedings initiated by Mr Lauder and concluded that the "present proceedings are the only place where the Parties' rights under the Treaty can be protected".[515] The *CME* tribunal also rejected the "abuse of process" claim noting that jurisdiction is not affected when "[…] two different Treaties grant remedies to the respective claimants deriving from the same facts and circumstances […]",[516] and rejected respondent's contentions that the *Lauder* award constitutes *res judicata*, since the claimants in the two cases were different, as well as the treaties on which the claims were based.[517]

Investment instruments recognize the possibility for indirect and direct shareholders to claim damages on behalf of a company and this certainly added further complexity to the disputes between investors and states. This is an important issue, as the right granted to shareholders to pursue the reparation of damages resulting from actions directed to the company should not result in double recovery of damages or generate irreconcilable awards[518] It is suggested that this problem can be easily resolved by consolidating the

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[513] *CME v. Czech Republic; supra* at FN 508, paras. 40-41; *Lauder v. Czech Republic; supra* at FN 511, para. 16. The *Lauder* tribunal even concludes that it was the respondent who did not agree on the *de facto* consolidation of claims and insisted on a different tribunal to hear the *CME* claim. *See*, *Lauder v. Czech Republic; supra*, para. 173.

[514] *Ibid.,* paras 162 and 165:

> "The parallel UNCITRAL arbitration proceeding (hereinafter: "the Stockholm Proceedings") is between CME and the Czech Republic, and is based on the bilateral investment treaty between the Netherlands and the Czech Republic." (*Lauder v. Czech Republic, supra* at FN 511, para. 165)

[515] *Lauder v. Czech Republic; supra* at FN 511, para. 174.

[516] *CME v. Czech Republic; supra* at FN 508, para. 412.

[517] *CME Czech Republic B.V. v. Czech Republic*, Final Award of 14 March 2003, para.432. The tribunal added that it "[…] cannot judge whether the facts submitted to the two tribunals for decision are identical […]". (*id.*)

[518] Double recovery is not allowed in international law. In *Chorzów Factory*, the PCIJ referred to compensation that will "wipe out all the consequences of the illegal act and re-establish the situation

cases[519] or by applying the principles of *lis pendens* and *res judicata*,[520] or, where possible, as in the *Yukos* cases, at least addressed by the same tribunal.[521]

The investment arbitration practice confirms that shareholders, including minority shareholders, have legal standing in arbitration, within the limits of the relevant investment treaty. Such shares or other form of participation in a company, even only indirectly owned by the investor, are most often seen as a covered investment. Thus, shareholders of a company are allowed to claim compensation for damages resulting from measures adopted by the host State against the company, although such measures affect indirectly the shareholders through the devaluation of profits and of the price of the shares.[522]

The definition of 'Investment' under the ECT is broad and covers "every kind of asset, owned or controlled directly or indirectly by an Investor and includes […] a company

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which would, in all probability, have existed if that act had not been committed", thus excluding any possibility for a party to receive undue compensation. *See*, *Case Concerning the Factory at Chorzów*, Judgment of 13 September 1928, 47. *See* also, Arts 34-39 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 95-110.

[519] Although, only pending cases may be consolidated. *See*, Art. 1117(3) of the NAFTA:

> Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

[520] *See*, Schreuer, C; *supra* at FN 274, p. 14. *See* also, the *Yukos Cases; supra* at FN 98, and *Ioannis Kardassopoulos and Ron Fuchs v. Georgia,* Award.*; supra* at FN 83.

In the ICSID system, the principles of *lis pendens* and *res judicata* were recognized and deemed to be applicable to ICSID tribunals. For *res judicata, see*, *Waste Management, Inc. v. United Mexican States,* Decision on Mexico's Preliminary Objection Concerning the Previous Proceedings of 26 June 2002, paras. 38 *et seq.* For *lis pendens*, *see*, *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, Award of 8 August 1980. para. 1.14.

For further comments on *res judicata* and *lis pendens* doctrines, *see*, International Law Association; *Interim Report: "*Res Judicata*" and Arbitration*, 2004 and *Final Report on* Lis Pendens *and Arbitration*, 2006.

[521] For other solutions, *see*, August Reinisch, 'The Issues Raised by Parallel Proceedings and Possible Solutions', in *The Backlash against Investment Arbitration*, eds Michael Waibel, Asha Kaushal, Kyo-Hwa Chung & Claire Balchin (Alphen aan den Rijn: Kluwer Law International, 2010), 118-126.

[522] LEGUM points out that irrespective of whether investment treaties cover indirectly controlled investments through the definition of 'investor' or through the definition of 'investment',

> "[…] the effect is clear: investment treaty protection is not lost when multinationals use the common corporate devices of intermediate holding companies and special investment holding companies organized under the laws of a third country." (Legum, B.; *supra* at FN 289, p. 524)

or business enterprise, or shares, stock or other forms of equity participation in a company or business enterprise".[523] Understanding no. 3 of the Final Act explains that the notion of 'control' under Article 1(6) of the ECT refers to "control in fact, determined after an examination of the actual circumstances in each situation".[524] The ECT, therefore, not only recognizes as an Investment the ownership or control of a company or enterprise, but also the ownership or control of shares, stock or other forms

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[523] The requirement for Investments to be owned or controlled by Investors of a Contracting Party was suggested by the Australian delegation. *See*, *Basic Agreement of 31 October 1991,* 21/91 BA 4. In April 1992, the representatives of the United States, Australia and Switzerland requested inserting the following wording: "owned or controlled, directly or indirectly, by investors of one Contracting Party in the territory of another Contracting Party." *See, Basic Agreement of 9 April 1992*, 22/92 BA 12. Canada suggested, in June 1992, to introduce an explanation of the notion of 'indirect ownership and control', as follows:

> "For the purpose of paragraph (1), an investor owns or controls an investment indirectly when he has a determining influence on the management of such investment." (*Basic Agreement of 19 June 1992,* 31/92 BA 13)

Scholars are of the opinion that even where investment treaties do not explicitly provide for indirect ownership or control, "the principle that investment may be owned or controlled indirectly is usually presumed to be implicit." *See,* Vandevelde, K.J.; *supra* at FN 271, p. 160.

WAELDE sees the concept of shares under Art. 1(6) of the ECT as

> "[…] intended for situations where the act of the respondent State affects the shareholder's legal rights, e.g. where foreign shareholders in Russian corporations are deprived of their rights in the corporation, but it is not intended to break through the corporate veil and identify the rights in the company embodied by shares with the rights of the company affected by government action." (Waelde, T.W.; *supra* at FN 66, p. 275, footnote omitted)

[524] Understanding no. 3 of the Final Act provides for the following:

> "For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's
> (a) financial interest, including equity interest, in the Investment;
> (b) ability to exercise substantial influence over the management and operation of the Investment; and
> (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.
> Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists." (Final Act; *supra* at FN 36, p. 375)

The notion of 'control' posed significant difficulties to the drafters of the ECT. In a letter from Tobias Müller–Dekn, Bundesminister für Wirtschaft, the challenges raised by the search of a proper definition of the notion of 'control' are explained:

> "From the material available it is clear that no uniform definition of control exists and the frequency of the expression "inter alia" suggests that there is a certain reluctance to draft a closed, exhaustive definition. […] Therefore, the chances of agreeing on a closed definition within the framework of the Charter negotiations are very small indeed." (*Letter from Tobias Müller–Dekn, Bundesminister für Wirtschaft,* 16 June 1993)

From the representative of Sweden, it was stated that

> "[…] it would probably be quite impossible to produce a generally acceptable list of criteria, especially an exhaustive one […]." (*Letter from Hans Olawaeus, Ministry of Foreign Affairs Sweden*, 1993)

The Japanese delegation understood that

> "[…] the Sub–Group could not establish a general definition of "controlled", and, therefore, interpretation of the meaning of "controlled" will be left to the discretion of each Contracting Party in which the investment is made and each Contracting Party will be able to decide the meaning of "controlled" in accordance with its national legislation." (*ECT Draft of 17 March 1994,* seventh version, 17/94 CONF 96)

The solution adopted in the end was in a form of an understanding that would serve as "guidance for international arbitration in the case of a dispute arising over the question of control." *See, Message No. 163*, 13 June 1993.

of equity participation in a company or enterprise. Ownership and control can be either direct or indirect.[525]

The ECT places no restriction on the number of shares to be owned or controlled by an Investor.[526] This allows minority shareholding to qualify as an Investment for the purpose of Article 1(6) of the ECT. As REISMAN sees it,

> "[m]odern investment law, with which the ECT is consistent, does not require the ownership of majority of the shares, but allows minority and non–controlling shareholders to bring a claim to an international tribunal."[527]

The practice of the ECT tribunals is settled on the issue as to whether shareholding gives legal standing to Investors under the ECT.[528] In *Amto v. Ukraine,* the ECT tribunal saw no impediment in upholding the standing of the claimant as the owner of

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[525] While the earlier drafts of the ECT referred to "owned or controlled, directly or indirectly", the final version of the ECT provided for "owned or controlled directly or indirectly". The absence of the punctuation might create confusions as to whether it is only the control that can be direct or indirect or also the ownership. During the negotiation, this aspect was discussed by the Russian Federation with the Chairman of the Legal Sub–Group:

> "It is my understanding that the words "directly or indirectly" in para. 6 of Art. 1 are related with the word "controlled" but not with "owned"." (*Letter from Anatoly Martynov, Russian Federation, to C. Bamberger*, 21 April 1994)
>
> "Concerning "directly or indirectly", I don't see how "indirectly" can be read as referring only to "controlled"." (*Letter of C. Bamberger to Anatoly Martynov,* 22 April 1994)

It is not clear, however, whether shareholders, Investors of a Contracting Party, in a company that is not incorporated in a Contracting Party to the ECT may benefit from the ECT's protection. Scholars advocate against the protection of these Investors. WAELDE, for example, was of the opinion that "Member–State shareholders in a non–Member company cannot rely on the Treaty, even if they exercise a controlling influence over the corporation." *See,* Waelde, T.W.; *supra* at FN 66, p. 275, footnote omitted. Nevertheless, this situation is, as explained by the same scholar, "unlikely to arise" since

> "[…] a company incorporated in a Member State (e.g. Russia) controlled by an investor from another Member State (e.g. an EU country), in accordance with Article 1(6) falls under the Treaty's protection." (Waelde, T.W.; *supra* at FN 66, p. 275, footnote omitted)

[526] The European Communities suggested adding the following wording to Art. 1(6)(b) of the ECT: "including minority forms". *See, Basic Agreement of 19 March 1992,* 17/92 BA 10. This proposal was included in the subsequent drafts, but later eliminated. Interesting to note is that the representative of Japan requested the clarification and examples of "minority forms". *See, Basic Agreement of 24 June 1992*, 32/92 BA 14.

[527] Witness' Testimony of W. Michael REISMAN, *Yukos Cases; supra* at FN 98, para. 241.

[528] Apparently, the issue whether investors may claim indirect damages is also settled in the ECT case law. Even so, the language of the ECT seems to implicitly confirm the admissibility of indirect claims. Art. 13(3) of the ECT provides that

> "For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares."

For similar opinion and detailed analysis of indirect claims in investment law, *see*, Perkams, M.; *supra* at FN 293, p. 110 *et seq.*

67.2% of the shares in EYUM–10,[529] a company incorporated in Ukraine. The tribunal briefly noted that it

> "[…] accepts that the Claimant owns 204,165 shares in EYUM–10. These shares constitute a kind of asset owned by the Claimant within the definition of the first part of Article 1(6) ECT, and in particular constitute 'shares ...in a company or business enterprise' identified in Article **1(6)(b).**"[530]

In *Nykomb v. Latvia,* the claimant owned 100% of the shares of Windau, a company incorporated in Latvia.[531] The tribunal concluded that Nykomb's "acquisition of shares in and its giving of credits to Windau constitute investments within the meaning of the Treaty."[532] The tribunal in the *Yukos Cases*, while observing the breadth of the definition of 'Investment' in the ECT, held that

> "[…] an "Investment" includes "every kind of asset" owned *or* controlled, directly or indirectly, and extends not only to shares of a company but to its debt (Article 1(6)(b) of the ECT) […] The Tribunal reads Article 1(6)(b) of the ECT as containing the widest possible definition of an interest in a company, including shares (as in the case at hand), with no indication whatsoever that the drafters of the Treaty intended to limit ownership to "beneficial" ownership."[533]

In *Kardassopoulos v. Georgia*, claimant based his claims on both the ECT and Greece–Georgia BIT.[534] While the definition of 'Investment' under the ECT covers "asset, owned or controlled directly or indirectly by an Investor", the Greece–Georgia BIT is silent whether the indirect ownership of shares may qualify as an investment.[535] Relying on the decision of the tribunal in *Siemens v. Argentina*,[536] the tribunal in

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[529] *Limited Liability Company AMTO v. Ukraine*, Final Award of 26 March 2008, para. 19.
[530] *Ibid.*, para. 39, emphasis original.
[531] *Nykomb Synergetics Technology Holding AB v. Latvia,* Award of 16 December 2003, para. 1.1, p. 1.
[532] *Nykomb v. Latvia; supra* at FN 531*,* para. 1.1, p. 8.
[533] *Yukos Cases; supra* at FN 98*,* para. 430, emphasis original.
[534] *Kardassopoulos v. Georgia*; *supra* at FN 83, para. 2.
[535] *Ibid.*, para. 123. *Agreement between the Government of the Hellenic Republic and the Government of the Republic of Georgia on the Promotion and Reciprocal Protection of Investments*, 3 August 1996.
[536] The tribunal in *Kardassopoulos v. Georgia* expressly referred to para. 137 of the Decision on Jurisdiction in *Siemens v. Argentina; supra* at FN 505. *See, Kardassopoulos v. Georgia,* para. 123.

Kardassopoulos v. Georgia held that indirect ownership of shares constitutes an Investment under both Greece–Georgia BIT and the ECT.[537]

2.1.4 State–Owned Companies and the Energy Charter Treaty

Article 1(7) of the ECT is silent on whether companies that are wholly or partially owned or controlled by a Contracting Party may qualify as ECT investors.[538]

International investment instruments sometimes expressly include state owned or controlled companies in the definition of 'investor'. The 2004 United States Model BIT provides for "governmentally owned or controlled" enterprises in the definition of 'enterprise', as an investor under the BIT.[539] Article 1139 of the NAFTA also covers "privately–owned or governmentally–owned" enterprises in the notion of 'investor'.[540] The Commentary to the Preliminary Draft of the ICSID Convention stated the following with reference to the definition of 'national of a Contracting State':

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[537] *Kardassopoulos v. Georgia*; *supra* at FN 83, para. 124:
"The Tribunal is of the view that, in the present case, the indirect ownership of shares by Claimant constitutes an "investment" under the BIT and the ECT."
Also, as concluded by the tribunal,
"[…] Claimant was, at all relevant times (and remains now), the beneficial holder of 50% of the share capital in Tramex Panama and indirectly owned a 25% interest in the joint venture vehicle GTI which carried out an investment in Georgia." (*Kardassopoulos v. Georgia*; *supra* at FN 83, para. 141)

[538] States have various reasons for setting up companies. As one author explains,
"[i]t may do so for simple reasons of accounting, […] or to facilitate participation in international trade." (Seidl–Hohenveldern, Ignaz; Corporations in and under International Law, Llandysul: Cambridge/Grotius Publications Limited, 1987, p. 55)
On the other hand, it is clear that Contracting Parties are excluded from the definition of 'Investor' under Art. 1(7) of the ECT.

[539] Art. 1 of the 2004 United States Model BIT:
"[…] any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, sole partnership, joint venture, association, or similar organization; and a branch of an enterprise."
See also, Art. I(1)(a) of the United States–Nicaragua BIT:
"[…] "company" means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled […]" (*Treaty between the Government of the United States of America and the Government of the Republic of Nicaragua concerning the Encouragement and Reciprocal Protection of Investment*, signed on 1 July 1995, not in force)

[540] *See,* Art. 1139 of NAFTA, with reference to Art. 201, which provides for the following:
"[…] **enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association"

> "It will be noted that the term "national" is not restricted to privately–owned companies, thus permitting a wholly or partially government–owned company to be a party to proceedings brought by or against a foreign State."[541]

Under the ICSID Convention, which does not explicitly cover or exclude state owned or controlled companies, the matter is somehow settled. Authors and tribunals agree that state companies are allowed to ICSID's jurisdiction as long as they act in their commercial capacity and not in the governmental one.[542] BROCHES summarized this as follows:

> "[…] the classical distinction between private and public investment, based on the source of the capital, is no longer meaningful, if not outdated. There are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities. It would seem, therefore, that for purposes of the [ICSID] Convention a mixed economy company or government–owned corporation should not be disqualified as a "national of another Contracting State" unless it is acting as an agent for the government or is discharging an essentially governmental function."[543]

As long as state owned or controlled companies do not act as "agent for the government" or are not fulfilling "an essential governmental function", as BROCHES explains, tribunals have jurisdiction *ratione personae* where such companies claim the

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[541] Preliminary Draft of 15 October 1963, *History of the ICSID Convention; supra* at FN 366, vol. II–1, p. 230. This comment, as SCHREUER points out, was never rebutted in subsequent deliberations, nor reiterated in the *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States* (Report of the Executive Directors), 1 ICSID Reports 25 (1993). *See*, Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 161, para. 271.

[542] HIRSCH, however, suggests that

> "[t]he appropriate test […] should take into account all the existing links between a particular corporation and a state, and the decision must be made on the basis of the dominant character of that corporation, as a private entity or as an organ of the state." (Hirsch, M.; *supra* at FN 324, p. 65)

The author recommends tribunals to adopt a narrow interpretation and to examine

> "[…] the structure of the capital, the structure of the corporation, share ownership, and the various means of control and supervision by governmental bodies over the current activities of the corporation." (Hirsch, M.; *supra* at FN 324, p. 65)

[543] Broches, A.; *supra* at FN 429, pp. 354–355. It is not less true that at the time when the ICSID Convention was drafted, a large number of enterprises were stated owned or controlled due to political reasons. For example, the monopolistic industries or the communist prototype, where the international trade transactions were carried out through state companies only. *See* also, Dolzer, R.; Schreuer, C.; *supra* at FN 258, p. 46.

status of investor. In *CSOB v. Slovakia*, Slovakia contested jurisdiction on the basis that the claimant, Československa obchodní banka (CSOB), was "merely an agent of the Czech Republic".[544] The tribunal, relying on the drafting history of the ICSID Convention and, in agreement with the scholarly writings, found that

> "[…] the concept of "national," was not intended to be limited to privately–owned companies, but to embrace also wholly or partially government–owned companies."[545]

The tribunal in *CSOB v. Slovakia* rested its decision on the fact that the decisive test was whether the claimant was discharging an essential governmental function, as suggested by BROCHES,[546] rather than the ownership or control exercised by the state.[547] In this respect, the tribunal relied on the nature of the claimant's activities, as opposed to their purpose,[548] and concluded that CSOB's activities in the context of the dispute were commercial, rather than governmental.[549]

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[544] *Československa obchodní banka, a.s. v. Slovak Republic,* Decision on Jurisdiction of 24 May 1999, para. 10.

[545] *Ibid.,* para. 16.

[546] *Ibid.,* para, 17.

[547] *Ibid.,* para. 18:

> "[…] such ownership or control alone will not disqualify a company under the here relevant test from filing a claim with the Centre as "a national of a another (sic!) Contracting State"."

[548] *CSOB v. Slovakia; supra* at FN 544, para. 20:

> "But in determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on the nature of these activities and not their purpose. While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental policies or purposes of the State, the activities themselves were essentially commercial rather than governmental in nature."

[549] *Ibid.,* paras 21–26. In *Rumeli v. Kazakhstan,* the respondent contended that the Turkish Savings Deposit Insurance Fund, an agency of the Turkish state, was in fact the proper claimant in the dispute (*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, Award of 29 July 2008, para. 241), as this agency seized control over the claimants before the commencement of the arbitration. (*ibid.,* para. 241) The tribunal rejected respondent's allegations and noted that although the companies were managed by the Turkish agency, the role of this agency was comparable to the role of a liquidator or receiver and any amounts awarded subsequent to this arbitration would not be kept by the Turkish agency, but distributed to claimants' creditors. (*ibid.,* para. 327) The extent of control by the Turkish state over the claimants did not affect the legal standing of the claimants in the ICSID proceedings. (*ibid.*, paras 327–331) *See* also, *Telenor Mobile Communications AS v. Republic of Hungary*, Award of 13 September 2006, para. 16, where Norway held 75% of the shares of Telenor, but no objection was raised as to the legal standing of the claimant.

The permissive language of Article 1(7) of the ECT,[550] and the absence of an explicit exclusion of state owned or controlled companies from the definition of investor suggest that such entities may benefit from the protection of the ECT.[551] It is to be seen whether the test adopted by the ECT tribunals will follow the criteria suggested by BROCHES and retained by the ICSID tribunals.

2.2 'Other Organization' as Investor under the Energy Charter Treaty

Article 1(7) of the ECT refers to companies or other organizations organized in accordance with the law of a Contracting Party. The ECT drafters did not include a definition of 'company', as they did not explain the meaning of 'organization'. The term 'organization' refers to "an organized body of people with a particular purpose, […] a

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[550] *See,* VANDEVELDE who, referring to BITs in general, concludes that where the language of a BIT does not explicitly include governmentally owned entities,

> "[…] the definition nevertheless may be phrased in terms broad enough to include implicitly both governmental and private entities. Some BITs, rather than listing types of entities included, adopt a different approach. They use a generic term, such as "legal person" or "juridical person"." (Vandevelde, K.J.; *supra* at FN 271, p. 158, footnote omitted)

[551] Art. 22 of the ECT refers to state and privileged enterprises of a Contracting Party, but in relation to their conduct in compliance with the obligations of the Contracting Party under the ECT:

> "(1) Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty.
> (2) No Contracting Party shall encourage or require such a state enterprise to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under other provisions of this Treaty.
> (3) Each Contracting Party shall ensure that if it establishes or maintains an entity and entrusts the entity with regulatory, administrative or other governmental authority, such entity shall exercise that authority in a manner consistent with the Contracting Party's obligations under this Treaty. 35
> (4) No Contracting Party shall encourage or require any entity to which it grants exclusive or special privileges to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under this Treaty.
> (5) For the purposes of this Article, "entity" includes any enterprise, agency or other organization or individual."

The early draft Art. 22 required Contracting Parties to ensure that government–controlled Investors, with or without exclusive or special privileges, conduct their activities in a manner consistent with the provisions of the ECT. *See*, Art. 15 of the *Basic Protocol of 21 September* 1991, 8/91 BP2. The chapeau of this provision referred to "Government Controlled Entities". *See* for example, Art. 15 of the *Basic Agreement of 31 October 1991*, 21/91 BA 4. A proposal from the delegation of Norway suggested adding to the text of Art. 22 a provision according to which any Contracting Party would have been "free to participate in energy activities through direct participation by the Government or through government–controlled investors." *See, Basic Agreement. Article 25*, Room Document 8, 13 November 1992. The proposal also appears in a subsequent document and reads as follows:

> "Any Contracting Party shall be free to participate in energy activities through, inter alia, direct participation by the government or through State Enterprises." (Art. 25(5), *Article 25 – State and Privileged Enterprises*, Room Document 11, 16 December 1993)

business, society, association etc."[552] At first glance, the freedom given to the Contracting Parties to determine the organizations protected by the ECT is limited by the provisions of their internal laws. Any organization established in accordance with the laws of a Contracting Party can be, at least in theory, covered by the provisions of the ECT. The open ended definition of 'Investor' ensures that new types of organizations, unknown at the time of the drafting of the ECT, but now recognized by the laws of the Contracting Parties, are protected by the ECT.[553]

The first issue deriving from the broad definition of 'Investor' concerns the question of legal personality. The ECT, as most of the investment instruments, is silent with respect to the requirement of legal personality of organizations.[554] Article 1(7)(a)(ii) of the ECT broadly refers to "a company or other organization organized in accordance with the law".[555] While it is inherent for a company to have legal personality, an organization may or may not have legal personality. Consortiums, joint ventures and other types of associations without legal personality would be included in the broad definition of 'Investor' under the ECT.[556]

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[552] *The New Oxford American Dictionary; supra* at FN 136, p. 1199.
[553] *See* also, Vandevelde, K. J.; *supra* at FN 271, p. 158.
[554] On the other hand, the jurisdiction of the ICSID covers "any juridical person which had the nationality of a Contracting State". *See*, Art. 25(2)(b) of the ICSID Convention, emphasis added.
[555] Art. 1(f) of the *Basic Protocol of 11 September 1991,* 8/91 BP 2, refers to "corporations, companies, firms, enterprises, organisations or associations […] competent, in accordance with the laws of that Contracting Party" to "make investments in the Territory of another Contracting Party". The United States delegation suggested amending this provision and replacing the term 'competent' with the wording "is not prohibited by the laws of that Contracting party from making investments." In the opinion of the United States representatives, the wording of the provision implied "a need to be governmentally licensed in order to make investments." *See, U.S. Proposal of 19 March 1992* and Art. 1(6) of the *Basic Agreement of 9 April 1992,* 22/92 BA 12.
[556] In the Iran–United States Claims Tribunal jurisprudence, the question raised by these partnerships concerned the cases where one or more holder in the partnership had an ineligible nationality. Apparently, a compromise solution was adopted and allowed partners to submit *pro rata* claims, in accordance with their participation in the joint venture. This was the approach in various cases, including in *Housing and Urban Services International Inc. v. Iran* that concerned the claims of an American corporation, Housing and Urban Services International Inc (HAUS) against the Iranian government, related to a partnership formed between HAUS, Teheran Redevelopment Corporation, an Iranian company, and Meaplan A.G., a German company The tribunal allowed claimant to claim only 85% of the amounts owed by the Iranian government and excluded the share of the German corporation. *See, Housing and Urban Services*

The requirement for legal personality is not essential for qualifying a legal entity to the protection of an investment instrument.[557] Some BITs expressly include in the definition of 'investor' organizations without legal personality. The Germany–Chile BIT refers to associations with or without legal personality.[558] The Romania–Hungary BIT demands legal personality for Romanian investors, while it includes investors without legal personality with respect to Hungary.[559]

However, when an ECT dispute is brought under the provisions of the ICSID Convention, entities without legal personality, although supposedly covered by the broad definition of Article 1(7)(a)(ii), might not have access to the dispute resolution mechanism of the ICSID. The ICSID literature and case law is constant in affirming that Article 25 of the ICSID Convention does not cover associations without legal personality.[560] As SCHREUER explains, "legal personality is a requirement for the application of Art. 25(2)(b) and […] a mere association of individuals or of juridical persons would not qualify."[561] In *Impregilo v. Pakistan*, the claimant, together with two Pakistani companies and a German company, set up an unincorporated joint venture

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International Inc. v. Government of the Islamic Republic of Iran, Tehran Redevelopment Corporation, Award No. 201–174–1 of 1985.

[557] DOLZER and SCHREUER conclude that "[n]ationality normally presupposes legal personality." *See*, Dolzer, R.; Schreuer, C.; *supra* at FN 258, p. 49.

[558] Art. 1(4)(a) of the Germany–Chile BIT reads as follows:

> "[...] con referencia a la República Federal de Alemania: todas las personas jurídicas, así como sociedades comerciales y demás sociedades o asociaciones con o sin personalidad jurídica [...]" (*Agreement between the Government of Chile and the Federal Republic of Germany concerning Mutual Promotion and Protection of Investments*, 8 May 1999)

Similar provision can be found in Art. 1(3)(b) of the *Agreement between the Government of the Republic of Bulgaria and the Government of Romania on Mutual Promotion and Protection of Investments*, 23 May 1995.

[559] Art. 1(2)(b) of the Romania–Hungary BIT provides that:

> "[t]he term "legal person" shall mean with respect to either Contracting Party, any entity incorporated or constituted in accordance with, and recognized as legal person by its laws, having their seat together with real economic activities in the territory of that Contracting Party. In the case of the Republic of Hungary, this term also includes any body of persons having no legal personality but considered as a company by its laws." (*Agreement between the Republic of Hungary and Romania for the Promotion and Reciprocal Protection of Investments*, 6 May 1996)

[560] *See,* the wording of Art. 25(2)(b) of the ICSID Convention, *supra* FN 554.

[561] Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 278, para. 690, also cited in *Impregilo v. Pakistan, infra* at FN 562, para. 133.

called Ghazi–Barotha Contractors (GBC),[562] and claimed, on behalf of the joint venture and the other partners, compensation for the entirety of the damages suffered by the joint venture.[563] The tribunal found that the joint venture had no legal personality under the law applicable to it,[564] and did not fall under the definition on 'investor' provided by the ICSID Convention because it was not a juridical person.[565] Consequently, the tribunal held that the consent given by Pakistan in the BIT may not cover this particular case:

> "In so far as this is a claim in respect of GBC's alleged losses, it remains a claim by an unincorporated grouping that fails to meet the requirements of the BIT and the ICSID Convention, and lies beyond the scope of Pakistan's consent to arbitration."[566]

In *LESI–DIPENTA v. Algeria,* the tribunal rejected a claim brought by a consortium of companies. Two Italian corporations formed the consortium LESI–DIPENTA under the Italian law, which was granted a concession for the construction of the Koudiat Acerdoun dam in Algeria.[567] The tribunal held that the consortium could not qualify as an investor within the meaning of Article 25 of the ICSID Convention and suggested that a new request for arbitration be submitted by the two Italian companies in their own names.[568]

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[562] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, Decision on Jurisdiction of 22 April 2005, paras 8, 10 and 115. The initial structure of the joint venture included a French company. *See, Impregilo v. Pakistan; supra,* para. 10.

[563] *Impregilo v. Pakistan; supra* at FN 562, para. 35.

[564] *Ibid.,* para. 119:

> "Swiss law does not provide for a specific legal regime for joint ventures. Such joint ventures must therefore follow the rules applicable to corporations ("*sociétés*"). According to Article 530(2) of the Swiss "*Code des Obligations*", GBC is classified as a "*société simple*". As such, it is common ground that GBC has no legal personality under Swiss law. It does not constitute a partnership or other form of permanent or corporate body, and it has no capacity to act in legal proceedings in its own right." (emphasis original)

[565] *Impregilo v. Pakistan; supra* at FN 562, para. 134.

[566] *Ibid.,* para. 137, emphasis original.

[567] *Consortium Groupement L.E.S.I. – DIPENTA v. People's Democratic Republic of Algeria ,* Award of 10 January 2005, part I.A, paras 3–4, pp. 427–428.

[568] *Ibid.,* part 3.2, para. 40, p. 481. For the reasoning behind this conclusion, *see, LESI–DIPENTA v. Algeria; supra* at FN 567, part 3.2, para 37, pp. 477–480. The case was resubmitted in March 2005 by the two companies that formed the LESI–DIPENTA consortium. *See, LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*.

The second issue refers to the types of organizations covered by the ECT. As mentioned before, it appears that there is no limitation imposed on the types of organizations allowed under the ECT. The wording of Article 1(7) of the ECT reinforces this conclusion, as it refers to "company or other organization". The term 'other' suggests the inclusion of any organization, besides companies, and that no similarity test is put forward.[569] While other organizations may include joint ventures, partnerships and other associations engaged in business activities, a pertinent question concerns the legal standing of non–profit organizations, also known as non–governmental organizations (NGOs). NGOs play an important role in the host states, acting at different levels of the economic and social development:

> "They may rent offices, build facilities (for example, clinics, schools, community centres, food relief centres), purchase or import vehicles and other supplies and enter into contracts with local actors."[570]

Although the purpose of NGOs is not the making of profit, they do have an economic component of their activities. Besides this, NGOs, probably more often than companies, are subject to discriminatory measures or expropriations from the host state.[571]

A review of the investment instruments shows that some treaties explicitly include NGOs in the definition of 'investor', while others require investors to carry out economic activities. The 2004 United States Model BIT refers to "any entity constituted

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[569] *See,* for example, Art. 1 of the 2004 United States Model BIT, which includes in the definition of 'enterprise' "a corporation, trust, sole partnership, joint venture, association, or similar organization". The term 'similar' suggests here that similar organizations to the ones listed in the definition are covered by the BIT. For further comments, *see*, Vandevelde, Kenneth J.; *U.S. International Investment Agreements*, New York: Oxford University Press, 2009, p. 156.

[570] Gallus, Nick; Peterson, Luke Eric; *International Investment Treaty Protection and NGOs*, 22(4) Arb. Int'l 527(2006), pp. 529–530.

[571] *See* for example, the harassment of Sudanese NGOs in Amnesty International, *Continued harassment of Sudanese NGO and curtailment to freedom of expression and association in Sudan*, AFR 54/009/2006, 16 March 2006; or the repressive measures adopted in 2009 by Ethiopia, in Amnesty International, *Ethiopian parliament adopts repressive new NGO law.*

or organized under applicable law, whether or not for profit".[572] Similarly, the United States–Morocco BIT speaks about companies, "regardless of whether or not […] organized for pecuniary gain",[573] while the Chile–Denmark BIT covers "[a]ny entity […] such as corporations, firms, associations, development finance institutions, foundations or similar entities whether or not their activities are directed at profit."[574] Article 1139 of the NAFTA refers to "any entity constituted or organized under applicable law, whether or not for profit".[575] On the other hand, there are BITs imposing an economic requirement on legal entities. The Romania–China BIT defines Chinese investors as "economic entities established in accordance with the laws of the People's Republic of China".[576] Likewise, the Peru–Romania BIT refers to Peruvian juridical persons engaged in economic activities.[577] Where BITs impose no requirement of profit–making and, at the same time, contain a wide definition of 'investor' so as to

[572] *See*, for example, Art. 1 of the 2004 United States Model BIT. Besides investment instruments, international conventions extend the protection to NGO's. Art. 44 of the American Convention on Human Rights recognizes the right of the NGOs to complain to the Inter–American Commission on Human Rights of violations of the Convention:

> "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." (Art. 44 of the *American Convention on Human Rights,* 18 July 1978)

See also, the *European Convention on the Recognition of the Legal Personality of International Non–Governmental Organisations* of 24 April 1986. Although the scope of this Convention is important in the context of the recognition of legal personality to NGOs, only eleven European Countries have ratified it. The central provisions of the Convention are found in Art. 2(1), which provides that

> "[t]he legal personality and capacity, as acquired by an NGO in the Party in which it has its statutory office, shall be recognised as of right in the other Parties."

[573] Art. I.2 of the *Treaty between the United States of America and the Kingdom of Morocco concerning the Encouragement and Reciprocal Protection of Investments,* 29 May 1991.

[574] Art. 1(3)(b) of the *Agreement between the Government of the Republic of Chile and the Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments*, 3 November 1995.

[575] Art. 1139 of the NAFTA makes reference to Art. 201. *See*, *supra* at FN 540.

[576] Art. 1(2) of the *Agreement between the Government of the People's Republic of China and the Government of Romania concerning the Encouragement and Reciprocal Protection of Investments*, 1 September 1995.

[577] Art. 1(2)(i)(b) of the Peru–Romania BIT provides as follows:

> "Todas la personas jurídicas, incluidas las sociedades civiles y comerciales y demás asociaciones con o sin personería jurídica que ejerzan una actividad económica comprendida en el ámbito del presente convenio […]" (*Agreement between the Government of the Republic of Peru and the Government of Romania for the Reciprocal Promotion and Protection of Investments,*1 January 1995)

encompass any association or organization, scholars argue in favour of the inclusion of NGOs.[578]

While the definition of 'Investor' under the ECT appears to be broad enough to support the inclusion of NGOs,[579] this is not sufficient. To have jurisdiction over a claim submitted by NGOs, ECT tribunals must also confirm their jurisdiction *ratione materiae*. This means that NGOs must have an Investment within the meaning of the ECT. This is probably the hurdle likely to defeat the claims of NGOs at the jurisdictional stage. However, NGOs may engage in activities that

> "[…] may produce desirable forms of investment, such as a research facility. Further, non–profit entities often acquire portfolio investment in commercial enterprises in order to earn revenue to support their charitable or educational activities. In that capacity, non–profit entities are likely to act in the same way as any other portfolio investor and their distinct status as non–profit entities would seem of little significance."[580]

The definition of 'Investment' under Article 1(6) of the ECT is wide enough to encompass any property and property rights, shares and claims to money, but which are restricted to investments in the energy sector. As long as, for example, an NGO owns or controls shares in an electricity company, arguably, there is an Investment and the NGO may benefit from the substantive protection of the ECT.[581] Nevertheless, for the

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[578] *See,* Gallus, N.; Peterson, L.E.; *supra* at FN 570, p. 535 et seq.

[579] Several proposals to include non–profit organizations have been made during the negotiation of the ECT. *See* for example, the United States proposal in respect to the *Basic Agreement of 20 January 1992,* 4/92 BA 6, to include legal entities "whether or not organised for pecuniary gain". *See* also, the *Proposal of the Romanian Delegation,* 18 December 1992. This proposal made its way into the Basic Agreement, but was removed from the final draft of the ECT with no explanation. *See* for example, Art. 1(6)(b) of the *Basic Agreement of 9 April 1992*, 22/92 BA 12.

[580] UNCTAD; *Scope and Definition,* UNCTAD Series on issues in international investment agreements, 1999, p. 34.

[581] In general about definition of 'investment' in investment instruments and NGOs, *see* Gallus, N.; Peterson, L.E.; *supra* at FN 570, pp. 537–538. While the definition of 'Investor' under Article 1(7) of the ECT may not impose the requirement of profit–making for organizations, the making of profit is part of the ordinary meaning of the term 'investment'. *See*, *Joy Mining v. Egypt,* where the ICSID tribunal stated that in order to qualify as an investment, an activity must have "regularity of profit and return" (*Joy Mining Machinery Limited v. Arab Republic of Egypt*, Award of 6 August 2004, para. 53); *CME v. Czech Republic*, where the dissenting arbitrator affirmed that an investment is "a form of expenditure or transfer of funds for the precise purpose of obtaining return" (*CME Czech Republic B.V. v. Czech Republic*,

procedural protection of the NGOs, Article 26(1) of the ECT provides that the dispute with a Contracting Party must be related to an Investment. However, as suggested by scholars, few NGOs would actually see an advantage in submitting their claims under investment treaties:

> "[…] they could not accept the damage to their relationship with the host country that suing the country is likely to bring. NGOs exist to help the countries in which they operate."[582]

2.3 Dual Nationality of Legal Entities

Legal entities may have dual or multiple nationalities when states adopt different standards of nationality.[583] A classical example is of a company incorporated in state A and having its seat of business in state B. The company may be considered to have both nationality of state A and state B, if state A adopts the incorporation test, while state B the seat test for determining the nationality of the company.[584] In a globalized society where corporations expand in various forms, in the furthest corners of the world, the case of multinational corporations is no longer atypical.

Under the provisions of the ECT, legal entities claiming the status of Investor must be organized in accordance with the laws of a Contracting Party.[585] Article 26(1) of the ECT refers to disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment. The case of legal entities is not different than the ones of individuals possessing more than one nationality, and it can be argued

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Separate Opinion of Ian Brownlie on the Final Award of 14 March 2003, para. 34); also, Chapter III.1 below.

[582] Gallus, N.; Peterson, L.E.; *supra* at FN 570, p. 547.

[583] *See,* Hirsch, M.; *supra* at FN 324, p. 92.

[584] And the example can be extended with the case where states adopt the control test for the nationality of a corporation. *See* also, Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 292, para. 742.

[585] Art. 1(7)(a)(ii) of the ECT.

that those principles would apply *mutatis mutandis* to legal entities. Nevertheless, perhaps dissimilarity still exists when looking at the degree to which international law sources deal with multiple nationalities of individuals in contrast with legal entities. Except for the particular case when a treaty, including the ECT, allows a legal entity that has the nationality of a Contracting Party party to the dispute and it is controlled by investors of another Contracting Party to be considered as having the nationality of the controlling investors,[586] treaties are rather silent on this matter.

The practice of investment law concerning cases of multiple nationalities of legal entities is scarce and, at the maximum, tribunals had to deal with tangential situations concerning multiple interests in a corporation.[587] Referring to the ICSID Convention, scholars generally agree that the multiple nationalities of a juridical person should not pose difficulties, as the ICSID Convention only requires juridical persons to

> "[…] have the nationality of a Contracting State other than the host State; or, if it initially has the nationality of the host State, that it be agreed because of foreign control that it has the nationality of another Contracting State."[588]

Where possible nationalities belong to Contracting States of the ICSID Convention, except for the host state, scholars see no jurisdictional obstacle.[589] However, when one of the nationalities is of the Contracting State party to the dispute, the commentators of the ICSID Convention have different views. AMERASINGHE, for example, suggests that where one of the nationalities of the juridical person belongs to the host state, tribunals

[586] Art. 26(7) of the ECT. The ECT adopted this provision in consideration of Art. 25(2)(b) of the ICSID Convention.
[587] *See*, for example, *Aucoven v. Venezuela; supra* at FN 445.
[588] Amerasinghe, C.F.; *supra* at FN 297, p. 259.
[589] Hirsch, M.; *supra* at FN 324, p. 92; Amerasinghe, C.F.; *supra* at FN 297, p. 259.

might search for the effective nationality.[590] Others reject this interpretation, as being incompatible with the provisions of the ICSID Convention.[591]

2.4 Implied Requirements for Legal Entities

The plain wording of Article 1(7)(a)(ii) of the ECT suggests that the sole requirement for a company or other organization to be deemed as an ECT Investor is the organization in accordance with the law of a Contracting Party. Since the place of incorporation is the only criteria adopted by the ECT, tribunals are precluded from looking past the first layer of shareholders or owners in order to determine the real nationality of a legal entity, except when applying the rule under Article 26(7) of the ECT or where the 'denial of benefits' clause is invoked. This approach is often challenged as it is suggested to allow foreign investors to choose the protection of a particular investment treaty – also known as 'treaty shopping'.[592]

ECT tribunals were faced with the question whether any other additional condition to be fulfilled by Investors can be read in Article 1(7). The issue was extensively discussed in the *Yukos Cases*, as the Russian Federation contended that it is not sufficient for an alleged Investor to be organized in accordance with the laws of a Contracting Party, but also that the beneficial owners of the Investor should not be nationals of the respondent Contracting Party.

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[590] Amerasinghe, C.F.; *supra* at FN 297, p. 260. AMERASINGHE suggests that "[i]t is not necessary to establish an hierarchy within the applicable tests for this purpose." *See,* Amerasinghe, C.F.; *supra,* p. 260. Oppenheim's International Law reasonably concludes that

> "[…] any attempt to assess with which of those states the company has sufficient links to be able to be treated as a national of that state for a particular purpose will involve a balancing of the various factors." (Jennings, R.; Watts, A.; *supra* at FN 278, pp. 863–864)

[591] *See*, for example, Hirsch, M.; *supra* at FN 324, pp. 93–94. With respect to the application of the principle of dominant nationality, HIRSCH suggests that

> "[…] a broad principle of interpretation under which the arbitration tribunal ought to be given jurisdiction wherever reasonably possible should not be adopted." (Hirsch, M.; *supra* at FN 324, p. 93)

[592] The issue is further discussed in the 'Conclusions' to this Thesis.

This discussion in not strange to cases brought under investment law. Examples of companies incorporated in a state and having the majority of their shares owned by nationals of the same state are ideal, but this is not always the case. Any other situation is likely to raise difficulties for determining the jurisdiction *ratione personae* of tribunals. Tribunals dealing with the issue of piercing the corporate veil have been generally reluctant to do so when the relevant treaty provided for incorporation as the single requirement for the nationality of a company.[593] In *Saluka v. Czech Republic*, the respondent argued that Saluka Investments BV was a shell company controlled by its Japanese owners.[594] The tribunal found that

> "[it] cannot in effect impose upon the parties a definition of "investor" other than that which they themselves agreed. That agreed definition required only that the claimant–investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add."[595]

In *Tokios Tokelès v. Ukraine*, the Respondent argued that although the Claimant was legally established under the laws of Lithuania, it was in fact owned and controlled by nationals of the Respondent, making it an "a Ukrainian investor in Lithuania, not a Lithuanian investor in Ukraine".[596] The majority of the tribunal held that the Claimant

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[593] As pointed out by scholars,

> "[…] ICSID practice repeatedly confirms that in the absence of a definition of nationality in a treaty or law imposing further, more substantial connections than mere incorporation or seat, it is both permissible and to be expected that investors will structure their investments in order to avail themselves of treaty protection […]." (Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 292, para. 740).

Tribunals pierce the corporate veil when the investment instrument gives effect to the control test. *See*, for example, Article 26(7) of the ECT and 25(2)(b) of the ICSID Convention.

[594] *Saluka Investments BV v. Czech Republic*, Partial Award of 17 March 2006, paras 183(c) and 184(c).

[595] *Ibid.*, para. 241. The tribunal, however, considered the argument of the Respondent for lifting the corporate veil in the present case and concluded the following:

> "The Tribunal has some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty. Such a possibility lends itself to abuses of the arbitral procedure, and to practices of "treaty shopping" which can share many of the disadvantages of the widely criticised practice of "forum shopping." (*Saluka v. Czech Republic*, para. 240)

[596] *Tokios Tokelès v. Ukraine*, Decision on Jurisdiction of 29 April 200*,* para 21. The Decision is accompanied by the Dissenting Opinion of the president of the tribunal, PROSPER WEIL.

is a Lithuanian company based on the provisions of Article 1(2)(b) of the Lithuania–Ukraine BIT, which defines the term 'investor' as "any *entity established* in the territory of the Republic of Lithuania".[597] The tribunal found that the relevant criterion for determining if the Claimant qualifies as a Lithuanian investor is whether the Claimant is established under the laws of Lithuania.[598]

The tribunal in *Rompetrol v. Romania* had to deal with Romania's objection to the nationality of the Claimant. The Respondent argued that, while the Claimant satisfied the formal requirements of the ICSID Convention and the Netherlands–Romania BIT,[599] the "ownership and control, effective seat, or source of the funds used for the relevant investment" showed "that the Claimant's 'real and effective' nationality is that of the Respondent".[600] The tribunal rejected the Respondent's objections and held that the valid test for Claimant's nationality is the incorporation test, as set forth in the Netherlands–Romania BIT.[601] The tribunal rejected Respondent's arguments that there is, in international law, a general rule of "'real and effective nationality' for determining the status of corporate entities".[602]

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[597] *Ibid.*, para. 28, emphasis original.

[598] *Ibid.,* para. 38. In deciding so, the majority considered that

> "[…] Contracting Parties are free to define their consent to jurisdiction in terms that are broad or narrow; they may employ a control–test or reserve the right to deny treaty protection to claimants who otherwise would have recourse under the BIT. Once that consent is defined, however, tribunals should give effect to it, unless doing so would allow the Convention to be used for purposes for which it clearly was not intended." (*Tokios Tokelès v. Ukraine*, *supra* at 596, para. 39)

[599] *The Rompetrol Group N.V. v. Romania*, Decision on Jurisdiction of 18 April 2008, para. 78. Art. 1(8) of the Netherlands–Romania BIT provides that

> "[…] the term 'investors' shall comprise with regard to either Contracting Party:
> i. natural persons having the citizenship or the nationality of that Contracting Party in accordance with its laws;
> ii. legal persons constituted under the law of that Contracting Party;
> iii. legal persons owned or controlled, directly or indirectly, by natural persons as defined in i. or by legal persons as defined in ii. above." (*Rompetrol v. Romania; supra*, para. 98)

[600] *Rompetrol v. Romania; supra* at FN 599, para. 78.

[601] *Ibid.,* paras 83, 99 and 110.

[602] *Ibid.*, para. 92. The tribunal further added that the definition of investor under the Netherlands–Romania BIT

> "[…] contains a straightforward, one might say lapidary, criterion for the case of legal persons, including companies; the criterion refers simply and exclusively to the place of incorporation – or, to be more exact, to the legal system under which the company was incorporated." (*Rompetrol v. Romania; supra* at FN 599, para. 99)

In *ADC v. Hungary*, the tribunal found that states are free to insert in their investment treaties other requirements in addition to the incorporation test. Where they chose not to do so, tribunals cannot read into the treaties requisites, such as a 'genuine link' test, which have not been agreed to by the states:

> "The Tribunal cannot find a "*genuine link*" requirement in the Cyprus–Hungary BIT either. While the Tribunal acknowledges that such requirement has been applied to some preceding international law cases, it concludes that such a requirement does not exist in the current case. When negotiating the BIT, the Government of Hungary could have inserted this requirement as it did in other BITs concluded both before and after the conclusion of the BIT in this case. However, it did not do so. Thus such a requirement is absent in this case. The Tribunal cannot read more into the BIT than one can discern from its plain text."[603]

The *Yukos* tribunal saw Article 1(7)(a)(ii) of the ECT as only requiring legal entities to be organized in accordance with the laws of a Contracting Party. To consider otherwise, the tribunal noted, would mean to interpret the terms of Article 1(7) not as they are, but "as they might have been written".[604] Even accepting an ambiguous meaning of the

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The tribunal also held that the Contracting States of the ICSID are the ones having

> "[…] the sole power to determine national status under their own law, who decide by mutual and reciprocal agreement which persons or entities will be treated as their 'nationals' for the purposes of enjoying the benefits the BIT is intended to confer." (*Rompetrol v. Romania; supra* at FN 599, para. 81)

[603] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, Award of 2 October 2006, para. 359, emphasis original. The tribunal in the *ADC v. Hungary* also concluded that "the origin of capital is not a relevant factor" in determining the nationality of the claimant (*ADC v. Hungary; supra*, para. 360) and that the principle of 'piercing the corporate veil' does exist, but it "only applies to situations where the real beneficiary of the business misused corporate formalities in order to disguise its true identity and therefore to avoid liability" (*ADC v. Hungary*, *supra*, para. 358).

[604] The *Yukos* tribunal stressed that it

> "[…] is bound to interpret the terms of the ECT not as they might have been written so as exclusively to apply to foreign investment but as they were actually written. […]" (*Yukos Cases; supra* at FN 98, para. 435

Similarly, in the opinion of CRAWFORD,

> "[t]he Treaty [ECT] imposes no further requirements with respect to shareholding, management, *siège social,* or location of its business activities (…). Companies incorporated in Contracting Parties are embraced by the definition, regardless of the nationality of shareholders, the origin of investment capital or the nationality of directors or management." (*Yukos Cases; supra* at FN 98, para. 411, emphasis original, footnote omitted)

In a review of several investment cases, WEINIGER reaches the following conclusions regarding the interpretation of the BITs' provisions by arbitral tribunals:

> "• Far-reaching effects arising out of the text of BITs must be confirmed by clear and convincing evidence of the State parties' intent;
> • BIT terms should be read in such a way to enhance mutuality and balance of benefits; […]
> • A tribunal cannot read into a BIT words of limitation that are not found in the text; […]
> • Tribunals should not read into BITs limitations not found in the text nor evident from the negotiating history sources […]" (Weiniger, Matthew; *Jurisdictional Challenges in BIT Arbitrations – Do You Read a BIT by Reading a BIT or by Reading Into a BIT?*, pp. 254–255, footnote omitted, in Mistelis, Loukas A.;

terms of Article 1(7) and relying on the rules of interpretation of the Vienna Convention, the *Yukos* tribunal held that it is not aware of

> "[…] general principles of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party. The principles of international law […] do not allow an arbitral tribunal to write new, additional requirements–which the drafters did not include–into a treaty, no matter how auspicious or appropriate they may appear."[605]

The ECT provides for the incorporation test as the sole relevant requirement for the nationality of legal entities.[606] Accordingly, tribunals are prevented from looking

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Lew, Julian D.M. (eds.); Pervasive Problems in International Arbitration, Alphen aan den Rijn: Kluwer Law International, 2006)

[605] *Yukos Cases; supra* at FN 98, para. 415, footnote omitted. In the *Acquisition of Polish Nationality Case,* the PCIJ came to the conclusion that

> "[t]he Minorities Treaty (Article 4, paragraph I) admits and declares to be Polish nationals, *ipso facto,* persons who were born in the territory of the new State "of parents habitually resident there". […] It is necessary, but on the other hand sufficient, that on the date of birth the parents should have been habitually resident, that is to say should have been established in a permanent manner, with the intention of remaining, in the territory which subsequently became incorporated in Poland. To impose an additional condition for the acquisition of Polish nationality, a condition not provided in the Treaty of June 28th, 1919, would be equivalent; not interpreting the Treaty, but to reconstructing it." (*The Acquisition of Polish Nationality*, Advisory Opinion no. 7 of 15 September 1923, p. 20, emphasis original)

See, in comparison, the provisions of the Algiers Declaration referring to the Iranian nationality of a legal entity:

> "[…] a corporation or other legal entity which is organized under the laws of Iran or the United States […], if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock." (Art. VII.1 of the *Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran,* p. 232–233)

Nevertheless, the Iran–United States Claims Tribunal held sufficient the 49.8% of the shares owned by a United States company in a corporation organized in Iran. *See SEDCO, Inc., for itself and on behalf of SEDCO INTERNATIONAL, S.A., and SEDIRAN DRILLING COMPANY v. National Iranian Oil Co. and the Islamic Republic of Iran*, Award No. ITL 55–129–3 of 24 October 1985.

As DOUGLAS points out,

> "[i]nvestment treaties do not […] reveal a fundamental preoccupation with the origin of that capital. It would not, therefore, be consistent with the object and purpose of investment treaties for tribunals to develop stringent requirements for the quality of the link of nationality between the claimant investor and the relevant contracting state party." (Douglas, Z.; *supra* at FN 292, p. 290, para. 541)

[606] During the negotiations of the ECT, the Canadian delegation suggested that Investors "should have a more substantive connection to a Contracting Party than required by the current definition", since legal entities that are "controlled directly or indirectly by nationals of states not signatory to the Basic Agreement" should be excluded from the definition of Investor. *See, Comments of the Canadian delegation regarding the Basic Agreement of 19 June 1992*; *supra* at FN 346. Norway also suggested strengthening the link between Investors and the Contracting Parties:

> "This Agreement shall apply to:
> […] (b) companies or other organisations under the law and regulations applicable in a Contracting Party and whose ultimate parent company is located in the area of a Contracting Party or which are controlled directly or indirectly by such natural persons or legal entities." (*Proposal of the Delegation of Norway*, Room Document 11, Plenary Session, 25–28 May 1993)

None of these proposals were retained for the final draft of the ECT. In fact, in a *Note from the Chairman of the Working Group II*, it is pointed out that "[t]here is no requirement as to the origin of the company", but that the sole requirement for a company to be considered Investor under Art. 1(7) of the ECT is to be

beyond what is required and give effect to other criteria that are not foreseen in the ECT, such as the nationality of the owners, the seat of business, or the origin of the invested capital.[607]

Tribunals and scholars, however, argue the necessity of lifting the corporate veil when juridical persons misuse the privileges in a treaty.[608] Usually, this can be prevented by inserting in the treaty a 'denial of benefits' clause, which excludes investors from taking advantage of the provisions of a treaty. For counteracting these situations, Article 17 of the ECT provides for the denial of benefits to certain legal entities and Investments.

"registered in a country being a Contracting Party". *See*, *Note from the Chairman of the Working Group II*, BUR 14, 24 February 1992. As explained in this *Note*,

> "[…] a company originating from a country not being a party to the Basic Agreement and related documents, could, by registering a daughter company in a country being a Contracting Party in this respect, get access to the energy resources of all the Contracting Parties on the same conditions as companies originating from a Contracting Party […]." (*Note from the Chairman of the Working Group II; supra*)

[607] For the origin of the invested capital, *see, infra* Chapter III.5. Oppenheim's International Law admits that while "it is permissible to look behind the formal nationality of a company, as evidence primarily by its place of incorporation and registered office, so as to determine the reality of its relationship to a state", "such inquiries usually have as their purpose the need to support a claim to nationality based on incorporation, rather than to elevate some alternative criterion". *See*, Jennings, R.; Watts, A.; *supra* at FN 278, pp. 861–862.

In international law, piercing the corporate veil attained its recognition in cases of flags of convenience. In the much debated case of the *I'm Alone*, the Commissioners pierced the veil of the ship's Canadian registration and of the Canadian company owning the ship *I'm Alone* and exposed the United States beneficial ownership (*S.S. "I'm Alone" (Canada, United States)*, Award of 30 June 1933 and 5 January 1935). *See* further, Goldie, L.F.E.; *Recognition and Dual Nationality – A Problem of Flags of Convenience*, 39 British Yearbook of International Law 220 (1963); Fitzmaurice, Gerald G.; *The Case of the* I'm Alone, 17 Brit. Y.B. Int'l L. 82 (1936).

[608] In the *Barcelona Traction Case,* the ICJ held:

> "The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations." (*Barcelona Traction Case; supra* at FN, para. 56)

In the same line, *see,* Art. 9 of the ILC Draft Articles on Diplomatic Protection; *supra* at FN 360, p. 52. In the context of the ICSID Convention, AMERASINGHE is the opinion that a tribunal must go beyond the test of incorporation and look into other criteria, such as control or place of administration, until it finds that jurisdiction can be uphold. *See,* Amerasinghe, C.F.; *Interpretation of Article 25(2)(B) of the ICSID Convention*, p. 241, in Lillich, Richard B.; Brower, Charles N. (eds.); *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?*, Irvington, New York: Transnational Publishers, Inc., 1994.

3. INVESTORS AND THE 'DENIAL OF BENEFITS' CLAUSE UNDER THE ENERGY CHARTER TREATY

The broad definition of 'Investor' in Article 1(7) of the ECT is balanced by the provisions of Article 17 of the ECT, which restricts the benefits of the provisions concerning the promotion and protection of Investments to certain categories of legal entities or Investments of Investors under the so–called denial of benefits clause. Article 17 of the ECT provides for the following

> "Each Contracting Party reserves the right to deny the advantages of this Part to:
> (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; or
> (2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:
> (a) does not maintain a diplomatic relationship; or
> (b) adopts or maintains measures that:
> (i) prohibit transactions with Investors of that state; or
> (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments."[609]

The denial of benefits clause is often seen as a safeguard against free riders,[610] or as a method to counteract nationality planning,[611] or to preserve reciprocity in the

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[609] The denial of benefits clause was inserted in the ECT following the proposal from the United States delegation, which read as follows:

> "Each Contracting Party reserves the right to deny the advantages of this agreement to a company, firm, enterprise, organization or association if nationals of non–signatories control such entity and if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized." (*U.S. Proposal of 19 March 1992*)

The *ECT Draft of 15 March 1993*, first version, records the denial of benefits clause:

> "Each Contracting Party reserves the right to deny the advantages of this Part to a legal entity if citizens or nationals of a non–signatory control such entity and if that entity has no substantive business activities in the Domain of the Contracting Party in which it is organised or the denying Contracting Party does not maintain diplomatic relationship with the non–signatory that prohibit transactions with the investor of that non–signatory or that would be violated or circumvented if the advantages in this Part were accorded to the investor of that non–signatory or to its investments." (Art. 19 of the *ECT Draft of 15 March 1993, first version*, 23/93 CONF 50)

There was also a proposal to include the denial of benefits clause in Art. 46, dealing with the reservations to the ECT.

[610] In 1956, WALKER JR., while discussing the provision on companies in the United States treaties, explained the 'denial of benefits' provision as a safeguard against "free riders" – nationals of third countries – who would gain rights or interests despite the fact that the contracting parties to the treaty did

relationship between two states.[612] Irrespective of what it is called, the purpose of the clause is to exclude from the protection offered by treaties investors or investments that, under normal circumstances, would not benefit from host state's protection.[613] As explained by the tribunal in *Amto v. Ukraine*,

> "[a]s the purpose of the ECT is to establish a legal framework 'in order to promote long–term cooperation in the energy field, based on complementarities and mutual benefits...' then the potential exclusion of foreign owned entities from ECT investment protection under Article 17 is readily comprehensible. 'Long term economic cooperation', 'complementarities' or 'mutual benefits' are unlikely to materialise for the host State with a State that serves as a nationality of convenience devoid of economic substance for an investment vehicle, or a State with which it does not enjoy normal diplomatic or economic relations."[614]

The right conferred on Contracting Parties by Article 17 of the ECT is in line with clauses found in modern bilateral and multilateral investment and trade treaties.[615] For example, Article 1113(1) of the NAFTA provides for the following:

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not whish to accord them. *See,* Walker Jr., H; *Provisions on Companies in United States Commercial Treaties*, 50(2) Am. J. Int'l L. 373 (1956), p. 388.

[611] DOLZER and SCHREUER consider the denial of benefits right as a "method to counteract nationality planning" and explain the 'denial of benefits' clause as follows:

> "Under such a clause the states reserve the right to deny the benefits of the treaty to a company that does not have an economic connection to the state on whose nationality it relies. The economic connection would consist in control by nationals of the state of nationality or in substantial business activities in that state." (Dolzer, R.; Schreuer, C.; *supra* at FN 258, p. 55)

VANDEVELDE sees the denial of benefits clause as a tool for limiting the practice of treaty shopping. *See,* Vandevelde, K.J.; *supra* at FN 271, p. 163.

[612] According to SALACUSE, allowing the benefits of the BITs to nationals of thirds countries or who are "primarily associated" with these countries and with which the denying country has no relationship, would be "to abandon […] right to negotiate corresponding privileges and obligations from those countries." *See,* Salacuse, J.W.; *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact of Foreign Investment in Developing Countries*, 24(3) International Lawyer 665 (1990).

[613] The denial of benefits clause under Article 1113 of the NAFTA was seen by the tribunal in *Waste Management v. Mexico II* as addressing

> "[…] situations where the investor is simply an intermediary for interests substantially foreign, and it allows NAFTA protections to be withdrawn in such cases […]." (*Waste Management, Inc. v. United Mexican States*, Award of 30 April 2004, para. 80)

[614] *Amto v. Ukraine*; *supra* at FN 529, para. 61.

[615] Article 17 of the 2004 United States Model BIT provides that

> "1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:
>
> a) does not maintain diplomatic relations with the non-Party; or
>
> b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.
>
> 2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the

> "A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non–Party own or control the enterprise and the denying Party:
> (a) does not maintain diplomatic relations with the non–Party; or
> (b) adopts or maintains measures with respect to the non–Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments."

The denial of benefits clause raised several controversial issues in some of the arbitrations submitted under the ECT and, most recently, in the *Yukos Cases.*[616]

3.1 Nature of the 'Denial of Benefits' Clause

Article 17 of the ECT denies legal entities and Investments the right to benefit from the provisions on the promotion and protection of Investments.[617] However, as the denial of benefits clause limits the benefits of investment protection to a class of Investors and Investments, the analysis of this provision is relevant in the context of the notion of 'Investor'.[618] The tribunal in *Amto v. Ukraine* took the following approach in examining the denial of benefits clause:

> "Article 17 can be read together with the definition of 'Investor' in Article 1(7) as establishing two classes of Investors of a Contracting Party for the purposes of the ECT. The first class comprises Investors with an indefeasible right to investment protection under the ECT. […]

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territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise."

[616] Besides the cases discussed here below, the tribunal in *Petrobart v. Kyrgyzstan* also touched upon the denial of benefits clause under Art. 17 of the ECT, but rejected its applicability. In doing so, the tribunal held that the information about the claimant

> "[…] contradicts the view that Petrobart is a company owned or controlled by citizens or nationals of a state other than the United Kingdom and that Petrobart has no substantial business in the United Kingdom." (*Petrobart v. Kyrgyzstan; supra* at FN 124, p. 63)

[617] The denial of benefits clause is seen as an objection of admissibility of claims, rather than an objection to the jurisdiction *ratione personae* of an ECT tribunal. *See,* Douglas, Z.; *supra* at FN 292, p. 468 *et seq.*, para. 874 *et seq*. *See* also, the explanation of the ICSID tribunal in *Generation Ukraine v. Ukraine:*

> "[…] This is not, as the Respondent appears to have assumed, a jurisdictional hurdle for the Claimant to overcome in the presentation of its case; instead it is a potential filter on the admissibility of claims which can be invoked by the respondent State." (*Generation Ukraine, Inc. v. Ukraine,* Award of 16 September 2003, para. 15.7, p. 433)

But *see,* for the contrary, Legum, B.; *supra* at FN 289, p. 524.

[618] *See* also, Sinclair, A.; *supra* at FN 292, pp. 378–387.

> The second class comprises Investors that have a defeasible right to investment protection under the ECT, because the host State of the investment has the power to divest the Investor of this right."[619]

Article 17 denies the benefits included in Part III of the ECT, which refers to the protection and promotion of Investments. Additionally, the title of Article 17 is restricted to "Non–application of Part III in certain circumstances". The wording of the denial of benefits clause suggests that other rights provided to Investors and not covered in Part III of the ECT, for example the dispute resolution rights under Article 26 of Part V of the ECT, are not excluded by the application of the denial of benefits clause.[620] In *Plama v. Bulgaria*,[621] the tribunal considered the wording of Article 17 and its exclusive reference to the provisions of Part III on the promotion and protection of Investments:

> "The express terms of Article 17 refer to a denial of the advantages "of this Part", thereby referring to the substantive advantages conferred upon an investor by Part III of the ECT. The language is unambiguous; but it is confirmed by the title to Article 17: "Non–Application of *Part III* in Certain Circumstances" (emphasis supplied). All authentic texts in the other five languages are to the same effect. From these terms, interpreted in good faith in accordance with their ordinary contextual meaning, the denial applies only to advantages under Part III. It would therefore require a gross manipulation of the language to make it refer to Article 26 in Part V of the ECT."[622]

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[619] *Amto v. Ukraine*; *supra* at FN 529, para. 61.

[620] The documents of the ECT's negotiation record a proposal from the Chairman of the Legal Sub–Group to exclude the disputes related to the denial of benefits under Art. 17(2), from the dispute resolution mechanism under Articles 26 and 27 of the ECT:

> "Disputes between a Contracting Party and another Contracting Party or Investor thereof arising out of the denial by the first Contracting Party of the advantages of this Part to citizens or nationals of a state that is not a Contracting Party and with which the first Contracting Party does not maintain diplomatic relations shall not be subject to dispute settlement under Article 30 or 31." (*Letter from C. Bamberger to Lise Weis and Leif Ervik*, 21 March 1994)

[621] In *Plama v. Bulgaria,* the dispute related to a refinery owned by Nova Plama AD, a company controlled by the claimant, a Cypriot company. Respondent contended that Article 17(1) of the ECT applies in this case since claimant had no substantial activities in Cyprus and it was controlled by nationals of a third state. (*Plama v Bulgaria; supra* at FN 93, paras 31, 55 *et seq*.). While claimant conceded during the hearings that it had no substantial business in Cyprus (*Plama v Bulgaria; supra,* para. 74 *et seq*.), it maintained that at all time it was controlled by a French national (*ibid.,* para. 168). The tribunal accepted the ownership and control of the claimant by the French national (*Plama Consortium Limited v. Republic of Bulgaria*, Award of 27 August 2008, para. 95), but it found that the claimant's investment was not made in accordance with the laws of Bulgaria (*Plama v. Bulgaria,* Award*,* para. 140 *et seq*.).

[622] *Plama v. Bulgaria; supra* at FN 93, para. 147, emphasis original.

The tribunal made it clear that Article 17 of the ECT restricts the application of the protection of Investors and their Investments under Part III, but the procedural remedies under Article 26 of the ECT remain unaffected:

> "Article 26 provides a procedural remedy for a covered investor's claims; and it is not physically or juridically part of the ECT's substantive advantages enjoyed by that investor under Part III. […] This limited exclusion from Part III for a covered investor, dependent on certain specific criteria, requires a procedure to resolve a dispute as to whether that exclusion applies in any particular case; and the object and purpose of the ECT, in the Tribunal's view, clearly requires Article 26 to be unaffected by the operation of Article 17(1)."[623]

The *Yukos* tribunal accepted the view taken in *Plama v. Bulgaria:*

> "[…] Article 17 specifies–as does the title of the Article–that it concerns denial of the advantages of "this Part," *i.e.*, Part III of the ECT. Provision for dispute settlement under the ECT is not found in "this Part" but in Part V of the Treaty. Whether or not Claimant is entitled to the advantages of Part III is a question not of jurisdiction but of the merits. Since Article 17 relates not to the ECT as a whole, or to Part V, but exclusively to Part III, its interpretation for that reason cannot determine whether the Tribunal has jurisdiction to entertain the claims of Claimant."[624]

Nevertheless, Article 17 of the ECT must be read in the light of the provisions of Article 26(1) of the ECT that is restricted to disputes "which concern an alleged breach of an obligation […] under Part III". The substantive protection of Investors cannot be

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[623] *Ibid.*, para. 148. Bulgaria argued that the intention of the ECT's drafters was to confer on Contracting State "a direct and unconditional right of denial which may be exercised at any time and in any manner". *See, Plama v. Bulgaria; supra* at FN 93, para. 144. The tribunal rejected this view considering that it is crucial for the investor to be able to address to a forum that would be able to determine whether Article 17(1) of the ECT is applicable. The tribunal in *Plama v. Bulgaria* noted that

> "[i]n the absence of Article 26 as a remedy available to the covered investor (as the Respondent contends), how are such disputes to be determined between the host state and the covered investor, given that such determination is crucial to both? […] Towards the covered investor, under the Respondent's case, the Contracting State invoking the application of Article 17(1) is the judge in its own cause. That is a license for injustice; and it treats a covered investor as if it were not covered under the ECT at all." (*Plama v. Bulgaria; supra* at FN 93, para. 149)

See also, *supra* at FN 620, the proposal of the Chairman of the Legal Sub–Group to exclude the disputes arising out of the denial of benefits clause from the Investor–Contracting Party dispute resolution mechanism, which was not retained in the text of the ECT.

[624] *Yukos Cases; supra* at FN 98, para. 441. *See* also, the conclusion of the tribunal in *Amto v. Ukraine:*

> "A dispute regarding an obligation includes a dispute relating to the existence of an obligation. […] The State might assert 'rights', 'powers,' 'privileges' or 'immunities' to deny, annul or evade an obligation, but the legal description of the objection does not detach it from the Claimant's assertion of the existence and breach of an obligation. The Respondent's exercise of its 'right' to deny advantages is an aspect of the dispute submitted to arbitration by the Claimant, and within the jurisdiction of this Arbitral Tribunal." (*Amto v. Ukraine; supra* at FN 529, para. 60, emphasis original)

effective without the remedies contained in the dispute resolution mechanism under Article 26 of the ECT:

> "[…] the Tribunal finds that the Treaty itself, together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments […]."[625]

Thus, Article 17 of the ECT denies not only the benefits of Part III, but also the procedural remedies under Part V of the ECT. As one author observes,

> "[h]iding behind Article 31 (1) VCLT, the [*Plama v. Bulgaria*] tribunal never answered the basic question of how there can be Article 26 ECT jurisdiction, which it recognizes as limited to Part III, if a respondent properly invokes Article 17 (1), which denies to the investor any Part III protections."[626]

The exclusion of Article 26 of the ECT from the benefits denied by Article 17 has little practical consequences to the outcome of a dispute. By considering that Article 17 does not deny the right to resort to the dispute resolution mechanism under Article 26, tribunals are called to decide on the denial of benefits at the merits stage; alternatively, by interpreting the provisions of Article 17 with a view of the ECT as a whole and, thus, excluding the benefits of Part III and Article 26, tribunals would still have to decide whether they have jurisdiction hear the case, based on the principle of competence–competence, and, therefore, ensure the access of Investors to the procedural protection of the ECT.[627]

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[625] *Siemens v. Argentina, supra* at FN 493, para. 102.

[626] Chalker, James; *Making the Energy Charter Treaty Too Investor Friendly: Plama Consortium Limited v. the Republic of Bulgaria*, 3(5) TDM (2006), p. 7. SHORE concludes that

> "[i]t is undeniable that Art.17 appears in Pt III and only refers to Pt III. […] It is a perfectly plausible reading of ECT Arts 1(7), 17 and 26, pursuant to Art.31 of the Vienna Convention, to find that as Art.17(1) relates so centrally to the Art.26(1) requirements of investor status ("Investor of another Contracting Party") and a breach of a Pt III obligation, that it constitutes a jurisdictional consideration for an arbitral tribunal." (Shore, Laurence; *The jurisdiction problem in Energy Charter Treaty claims*, 10(3) International Arbitration Law Review 58 (2007), p. 63)

[627] On the competence-competence doctrine, *see* in general, Carbonneau, Thomas E.; *The Law and Practice of Arbitration*, 3rd edition, Huntington: JurisNet, LLC, 2009, pp. 48-49.

3.2 Application and Effects of the 'Denial of Benefits' Clause

Because of the way Investments are structured nowadays, Contracting Parties usually become aware of the circumstances justifying the application of Article 17 of the ECT only after Investor files the claim.[628] As noted by SINCLAIR and JAGUSCH,

> "[t]he host State may not even be aware of the establishment of a new investment in its territory, let alone the nationality of that investor, the extent of its business activities in its home State, and the nationality of its underlying owners or controllers. […] The host State may only learn of the conditions that would justify invoking its right to deny at such time as an investor notifies it that a dispute under the ECT has arisen and possibly not even then"[629]

Article 17 provides that each Contracting Party "reserves the right to deny the advantages" of Part III of the ECT. Several questions in connection with this introductory part of the denial of benefits clause have been raised in practice. They mainly concern the moment when a Contracting Party may invoke the denial of benefits right; whether there are special requirements for the exercise of this right; and what are the effects of the denial of benefits clause.

The wording of Article 17 suggests that the right to deny the benefits of Part III of the ECT to certain Investors or Investments must be exercised by a Contracting Party. A Contracting Party may choose to exercise this right or not. The tribunal in *Plama v. Bulgaria* explained this as follows:

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[628] For example, in the application of Art. 17(1) of the ECT, denying Contracting Parties must be aware not only of the ownership and control of the Investor, but also whether it conducts substantial business activities in the Contracting Party where it is organized. While the ownership or control could be exposed prior to arbitration, Contracting Parties will most probably not engage in finding out whether or not Investor has substantial business activities in another Contracting Party.

[629] Jagusch, Stephen; Sinclair, Anthony; *The Limits of Protection for Investments and Investors under the Energy Charter Treaty*, p. 101, in Ribeiro, C. (ed.); *supra* at FN 89. LEGUM supports this opinion by referring to the obligations under a bilateral investment treaty as being *de facto* obligations *erga omnes* :

> "[…] although each investment treaty is drafted as a bilateral set of obligations, to comply with those obligations the host state must treat them as obligations *erga omnes*: obligations owed to every state and every company.
> This conclusion flows from the fact that, under normal circumstances, host state officials will *never know* at the time they must take action whether a given company is covered by a given treaty." (Legum, B.; *supra* at FN 289, pp. 524–525, emphasis original, footnote omitted)

> "In the Tribunal's view, the existence of a "right" is distinct from the exercise of that right. For example, a party may have a contractual right to refer a claim to arbitration; but there can be no arbitration unless and until that right is exercised. In the same way, a Contracting Party has a right under Article 17(1) ECT to deny a covered investor the advantages under Part III; but it is not required to exercise that right; and it may never do so. The language of Article 17(1) is unambiguous; and that meaning is consistent with the different state practices of the ECT's Contracting States under different bilateral investment treaties […]."[630]

The same argument was noted by the *Yukos* tribunal:

> "Article 17(1) does not deny *simpliciter* the advantages of Part III of the ECT– as it easily could have been worded to do […]. It rather "reserves the right" of each Contracting Party to deny the advantages of that Part to such entity. This imports that, to effect denial, the Contracting Party must exercise the right."[631]

ECT tribunals were confronted with practical issues of the exercise of the denial of benefits right.[632] The main question concerned the manner in which the Contracting

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[630] *Plama v. Bulgaria; supra* at FN 93, para. 155. The tribunal further stated that
> "[…] the interpretation of Article 17(1) ECT under Article 31(1) of the Vienna Convention requires the right of denial to be exercised by the Contracting State." (*ibid.*, para. 158)

[631] *Yukos Cases; supra* at FN 98, para. 456, emphasis original. In the *Yukos Cases,* the claimants' argument relied on the wording of Art. 17(1) of the ECT:
> "Article 17(1) could have been otherwise drafted, as is Article VI of the ASEAN Framework Agreement on Services, to state that the advantages of Part III "shall be denied" to "a juridical person owned or controlled by persons of a non-Member State constituted under the laws of a Member State, but not engaged in substantive business operations in the territory of Member States. But the drafters of the ECT […] deliberately chose to provide for a reserved, optional right in Article 17(1), a right that must be exercised to take effect, and only prospectively." (*Yukos Cases; supra* at FN 98, para. 454)

[632] Also controversial is whether investor or the denying Contracting Party has the burden of proof under Art. 17(1) of the ECT. While Art. 17(2) of the ECT, which provides that "the denying Contracting Party establishes", appears to suggest that the burden of proof is upon the denying Contracting Party, Art. 17(1) is silent on this issue. Although procedural aspects are not covered by this Thesis, it is, however, useful to summarize here the main conclusions of the jurisprudence.
In *Amto v. Ukraine,* the tribunal held that the burden to prove that the Investor falls under Art. 17(1) of the ECT lies on the respondent Contracting Party:
> "The burden of proof of an allegation in international arbitration rests on the party advancing the allegation, in accordance with the maxim *onus probandi actori incumbit.* In application of this principle, a claimant has the burden to prove that it satisfies the definition of an Investor so as to be entitled to the Part III protections and the right to arbitrate disputes in Article 26. On the same basis, the claimant would be expected to have the burden of proof that it controls, directly or indirectly, an Investment for which protection is sought, and this is a fact explicitly stated in Understanding 3 to the Final Act. However, when a respondent alleges that the claimant is of the class of Investors only entitled to defeasible protection, so that the respondent can exercise its power to deny, then the burden passes to the respondent to prove the factual prerequisites of Article 17 on which it relies. Article 17(2) adopts exactly this approach but, as already mentioned, Article 17(1) is neutral on the question of burden of proof." (*Amto v. Ukraine; supra* at FN 529, para. 64)

In *Plama v. Bulgaria*, the tribunal held that "[…] the burden of proof to establish ownership and control is on Claimant." *See, Plama v. Bulgaria,* Award; *supra* at FN 621, para. 89. The ICSID tribunal in *Generation Ukraine v. Ukraine* held that the burden of proof that a legal entity is denied the benefits of the BIT's protection falls upon the denying state:
> "[…] the burden of proof to establish the factual basis of the "third country control", together with the other conditions, falls upon the State as the party invoking the "right to deny" conferred by Article 1(2)." (*Generation Ukraine v. Ukraine; supra* at FN 617, para. 15.7, p. 433)

Parties should carry out such right. In *Plama v. Bulgaria*, the tribunal concluded that the denying Contracting Party must exercise the denial of benefits right in a public manner that must be reasonably made available to Investors:

> "The exercise would necessarily be associated with publicity or other notice so as to become reasonably available to investors and their advisers. To this end, a general declaration in a Contracting State's official gazette could suffice; or a statutory provision in a Contracting State's investment or other laws; or even an exchange of letters with a particular investor or class of investors."[633]

The *Plama v. Bulgaria* tribunal further explained that

> "[b]y itself, Article 17(1) ECT is at best only half a notice; without further reasonable notice of its exercise by the host state, its terms tell the investor little; and for all practical purposes, something more is needed."[634]

However, the conclusion of the *Plama v. Bulgaria* tribunal regarding the notice to be given to Investors is not based on the ordinary meaning of the terms of Article 17. Article 17 of the ECT does not provide for any requisites which should be complied with by the Contracting Party in denying the benefits of Part III to an ECT Investor.[635] Unlike Article 17 of the ECT, Article 1113 of the NAFTA expressly provides that the application of the denial of benefits clause is subject to prior notification and

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In *CCL v. Kazakhstan*, the tribunal concluded that

> "[…] a Claimant party, requesting arbitration on the basis of the Treaty, provides the necessary information and evidence concerning the circumstances of ownership and control, directly or indirectly, over [Claimant-investor] at all times. This is especially the case when reasonable doubt has been raised as to the actual ownership of and control over the company seeking protection." (*CCL Oil v. Kazakhstan*, Decision on Jurisdiction of 2003, p. 152)

For further comments on the burden of proof and Art. 17(1) of the ECT, *see,* Essig, H.; *Balancing Investors' Interests and State Sovereignty: The ICSID–Decision on Jurisdiction Plama Consortium Ltd. v. Republic of Bulgaria*, 5(2) OGEL 2007; Chalker, J.; *supra* at FN 626, pp. 11–15; Shore, L; *supra* at FN 626, pp. 60–62.

[633] *Plama v. Bulgaria; supra* at FN 93*,* para. 157.

[634] *Id.*

[635] Article 1113 of the NAFTA provides the following:

> "1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non–Party own or control the enterprise and the denying Party:
>
> a. does not maintain diplomatic relations with the non–Party; or
>
> b. adopts or maintains measures with respect to the non–Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.
>
> 2. Subject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non–Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized."

consultation where the legal entity is owned or controlled by nationals of a third state and has no substantial business in the Contracting Party where it is organized. The state denying the benefits of Chapter XI of the NAFTA must give prior notice to the state which the entity in question is asserting to be a national of, and consultations must be conducted in accordance with Article 2006 of the NAFTA. The commentators of the NAFTA see the consultation requirement as "a safeguard preventing a too–hasty decision on the real nationality of an enterprise by permitting the other Party to provide information about the alleged "sham" corporation […]."[636] Similarly, the 2004 Canadian Model BIT allows the denial of benefits to companies with no substantial business activity subject to prior notification and consultation.[637] However, the *Plama v. Bulgaria* tribunal saw in Article 1113 of the NAFTA the justification for an implied prior notice in the application of the denial of benefits clause under the ECT:

> "The Tribunal was referred to Article 1113(2) NAFTA as an example of a term providing for the denial of benefits which provides for a form of prior notification and consultation; and whilst the wording is materially different

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[636] Kinnear, Meg; Bjorklund, Andrea; Hannaford, John F.G.; *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, Alphen aan den Rijn: Kluwer Law International, 2006, para. 1113–6. Nevertheless, the commentators acknowledge that the requirement of such prior notification is "somehow unclear" and it "most likely means that, before asserting Article 1113 as a defense before a tribunal, the respondent Party must notify, and commence consultations with, the Party in which the claimant is located". (*id.*)

[637] Art. 18 of the 2004 Canadian Model BIT. Art. 18 makes reference to "notification and consultation in accordance with Art. 19 of the Canadian Model BIT, which does not provide *per se* for such procedure, as it mainly regulates transparency issues. Nevertheless, Art. 19(2) reads as follows:

> "To the extent possible, each Party shall:
> (a) publish in advance any such measure that it proposes to adopt; and
> (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures."

See also, Art. 18(2) of the Canada–Peru BIT, which refers to the following:

> "Subject to Article 19(3), a Party may deny the benefits of this Agreement to an investor of the other Party that is an enterprise of such Party and to investments of such investors if investors of a non–Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized." (*Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments*, signed on 14 November 2006, not in force)

Art. 19(3) of the Canada–Peru BIT provides that

> "[u]pon request by a Party, information shall be exchanged on the measures of the other Party that may have an impact on covered investments."

Art. 70(2) of the Mexico–Japan Free Trade Agreement reads as follows:

> "Subject to prior notification and consultation, a Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the Area of the Party under whose law it is constituted or organized." (*Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership*, 1 April 1995)

> from Article 17(1) ECT, this term does suggest that the Tribunal's interpretation is not unreasonable as a practical matter."[638]

Such an implied requirement conflicts with the provisions of Article 31 of the Vienna Convention. The ordinary meaning of the terms used by Article 17 does not validate an implied requirement for a prior notification of investors by the Contracting Parties before exercising the denial of benefits right.[639] Scholars agree with this:

> "A natural and ordinary reading of the words in Article 17(1) yields no express or necessary condition that the denying State must first give prior notification for the denial of advantages to be effective."[640]

The plain wording of the introductory part of Article 17 of the ECT justifies the right of a Contracting Party to deny, at any time and without any formality, the advantages of Part III of the ECT.[641]

In *Plama v. Bulgaria,* the tribunal also found that when a Contracting Party exercises the right to deny the benefits of the promotion and protection of Investments, it can only do so with prospective effect. The tribunal rejected the retrospective effects of Article 17 of the ECT, relying on the legitimate expectations of Investors and on the purpose of the ECT:

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[638] *Plama v. Bulgaria; supra* at FN 93, para. 157. As noted by CHALKER,
> "[t]he tribunal did not address why the absence of a prior-notification provision, like NAFTA's, in Article 17(1)ECT did not indicate that such notification was not required to deny an investor the Treaty's investment protections." (Chalker, J.; *supra* at FN 626, p. 9)

[639] *See, Morocco Case; supra* at FN 304, p. 199.

[640] Jagusch, Stephen; Sinclair, Anthony; *Part II–Denial of advantages under Article 17(1)*, p. 35, footnote omitted, in Coop, G; Ribeiro, C. (eds.); *supra* at FN 90. Other authors, however, suggested that states should enact "a law containing an abstract and general denial of benefits provision" (Essig, H.; *supra* at FN 632, p. 10), or that prudent states will make a declaration in its official gazette regarding the exercise of the rights under Article 17 of the ECT (Shore, L.; *supra* at FN 626, p. 63).

[641] *See* also, JAGUSCH and SINCLAIR who refer to the negotiations of the ECT and the rejection of the proposal to include a notification procedure for bringing into effect the denial of benefits clause under Art. 17. (Jagusch, S.; Sinclair, A.; *supra* at FN 640, p. 38). The authors are of the opinion that
> "[…] the *Plama* decision also appears to engender in States a perverse incentive to publish blanket denials or attempt to screen inward investment, neither of which would seem to be in accord with one of the overall purposes of the ECT to promote foreign investments in the energy sector." (Jagusch, S.; Sinclair, A.; *supra* at FN 640, p. 40, emphasis original)

> "The ECT's express "purpose" under Article 2 ECT is the establishment of "... *a legal framework in order to promote long–term co–operation in the energy field ... in accordance with the objectives and principles of the Charter*" (emphasis supplied). It is not easy to see how any retrospective effect is consistent with this "long–term" purpose."[642]

The tribunal in the *Yukos Cases* concluded, in line with the decision of the *Plama v. Bulgaria* tribunal, that the application of the Article 17 of the ECT may only have prospective effects:

> "To treat denial as retrospective, would, in the light of the ECT's "Purpose," as set out in Article 2 of the Treaty […] be incompatible "with the objectives and principles of the Charter." Paramount among those objectives and principles is "Promotion, Protection and Treatment of Investments" as specified by the terms of Article 10 of the Treaty. Retrospective application of a denial of rights would be inconsistent with such promotion and protection and constitute treatment at odds with those terms.[643]

Article 2 provides that the purpose of the ECT is to develop a legal framework for the promotion of "long–term cooperation in the energy field", which should be based on "complementarities and mutual benefits". As the *Amto v. Ukraine* tribunal suggested, the denial of benefits clause is intended to strengthen long–term cooperation based on mutual benefits:

> "As the purpose of the ECT is to establish a legal framework 'in order to promote long–term cooperation in the energy field, based on complementarities and mutual benefits...' then the potential exclusion of foreign owned entities from ECT investment protection under Article 17 is readily comprehensible. 'Long term economic cooperation', 'complementarities' or 'mutual benefits' are unlikely to materialise for the host State with a State that serves as a nationality of convenience devoid of

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[642] *Plama v. Bulgaria; supra* at FN 93, para. 161, emphasis original. The tribunal also noted that "[t]he covered investor enjoys the advantages of Part III unless the host state exercises its right under Article 17(1) ECT; and a putative covered investor has legitimate expectations of such advantages until that right's exercise. A putative investor therefore requires reasonable notice before making any investment in the host state whether or not that host state has exercised its right under Article 17(1) ECT. At that stage, the putative investor can so plan its business affairs to come within or without the criteria there specified, as it chooses. It can also plan not to make any investment at all or to make it elsewhere. After an investment is made in the host state, the "hostage-factor" is introduced; the covered investor's choices are accordingly more limited; and the investor is correspondingly more vulnerable to the host state's exercise of its right under Article 17(1) ECT. At this time, therefore, the covered investor needs at least the same protection as it enjoyed as a putative investor able to plan its investment." (*Plama v. Bulgaria; supra* at FN 93, para. 161)

[643] *See, Yukos Cases; supra* at FN 98, para. 458.

> economic substance for an investment vehicle, or a State with which it does not enjoy normal diplomatic or economic relations."[644]

However, the tribunals in *Plama v. Bulgaria* and the *Yukos Cases* considered that to give retrospective effect to the denial of benefits clause would breach Investor's legitimate expectations and would contradict the object and purpose of the ECT. Nevertheless, the purpose of the ECT for the long–term cooperation in the energy field, based on mutual benefits, does not automatically exclude a retrospective refusal of benefits for Investors and Investments which under normal circumstances would not be protected by the provisions of the ECT. Access to the protection granted by the ECT may only be based on reciprocal privileges and, as suggested by one author,

> "[o]ne could argue that the retrospective effect of Article 17(1) would benefit "long–term cooperation" by encouraging investors to be upfront about ownership, nationality and citizenship".[645]

Article 17 of the ECT provides for the circumstances under which the benefits of Part III on the promotion and protection of Investments may be denied to legal entities and Investments. The clause is not, therefore, excluding Investors from the ECT's coverage, but it denies their access to some of the ECT's provisions. The right to deny the advantages offered by Part III of the ECT must be exercised by the denying Contracting Party. The issue of whether there is an implied requirement under Article 17 of the ECT to exercise the denial of benefits right by way of prior notification,[646] or whether the

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[644] *Amto v. Ukraine; supra* at FN 529, para. 61.

[645] Chalker, J.; *supra* at FN 626, p. 17.

[646] As DOUGLAS explains,

> "[…] the Contracting Party need not exercise [the denial of benefits] right in relation to a specific legal entity until it is expedient to do so; viz. when the Contracting Party is on notice of the existence of the specific foreign investor and its particular circumstances. Unless the Contracting State be under an obligation to seek out foreign investors in its territory and conduct a full investigation of their ultimate owners or controllers and the extent of their business activities in various states, then the Contracting Party is on notice when arbitration proceedings are commenced." (Douglas, Z.; *supra* at FN 292, p. 472, para. 882)

See also, VANDEVELDE who considers that

> "[h]ost states are not necessarily in a position to know whether third country nationals own or control an investment. Further, the fact may be of no significance until a dispute arises and an investor suddenly claims the benefit of a treaty […]." (Vandevelde, K.J.; *supra* at FN 271, p. 171)

denial right has prospective or retrospective effect are issues still controversial in the practice of the ECT tribunals.

3.3 Denial of Benefits and Legal Entities

The first situation dealt with by Article 17 of the ECT refers to the denial of benefits of Part III 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. The denial of benefits concerns legal entities and not individuals. Article 17(1) of the ECT refers to legal entities owned or controlled by nationals or citizens of third states, and, thus, it does not apply when legal entities are owned or controlled by permanent residents of third states.

Article 17(1) of the ECT sets forth two cumulative conditions for a Contracting Party to exercise its right to deny the benefits to promotion and protection of Investments. Only legal entities controlled or owned by citizens or nationals of a third state and that have no substantial business activity in the Contracting Party where they are organized may be denied the benefit of Part III of the ECT. If one of the requisites provided by Article 17(1) of the ECT is not met, the denial of the benefits clause is inapplicable.[647]

a. Legal entities owned or controlled by nationals or citizens of a third state

Article 17(1) of the ECT excludes the benefits of Part III to legal entities when owned or controlled by "citizens or nationals of a third state". Article 17(1) limits the ownership and control to nationals and citizens, and does not include permanent

[647] The tribunal in the *Yukos Cases* pointed out that
"[i]t is apparent from the wording of Article 17(1) that two additional cumulative substantive conditions must be met before the "denial-of-benefits" clause can be exercised in respect of any particular entity." (*Yukos Cases; supra* at FN 98, para. 460)

residents of third states. Further, the meaning of 'third state' in this context refers to a non–Contracting Party.[648]

In the *Yukos Cases*, the tribunal had to interpret the reference to 'third state' under the first paragraph of the denial of benefits clause of the ECT. In doing so, the tribunal looked at several provision of the ECT that employ the wording 'third state' and reached the conclusion that the drafters of the ECT intended to refer to non–Contracting Parties:

> "[…] several provisions distinguish between a Contracting Party and third State (for example, Articles (1)(7), 10(3) and 10(7), and 17) and that there is no equation in the ECT between a Contracting Party and a third State. This conclusion is further supported by the *travaux préparatoires*, which demonstrate that the term "third state" was substituted for the term "non–Contracting Party."[649]

The tribunal in *Amto v. Ukraine* concluded that 'third state'

> "[…] is used in Article 1(7) in contradistinction to 'Contracting Party', which suggests that a third state is any state that is not a Contracting Party to the ECT."[650]

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[648] JAGUSCH and SINCLAIR conclude that "the "*third state*" in the first limb of the Article 17(1) is simply a non-Contracting Party." *See,* Jagusch, S.; Sinclair, A.; *supra* at FN 640, p. 19, emphasis original. The authors also consider that 'third state' may also include the host Contracting Party, when a legal entity is owned or controlled by nationals or citizens of the host Contracting Party, since they are not entitled to receive the protection of the ECT:

> "The interpretation of "*third state*" […] catches not only entities or nationals of States that are not Contracting Parties to the ECT, but might also apply in respect of entities or nationals of the host State to whom the ECT was never intended to confer international protection." (Jagusch, S.; Sinclair, A; *supra* at FN 640*,* p. 19, emphasis original)

[649] *Yukos Cases; supra* at FN 98, para. 544, emphasis original. In this context, the tribunal made the distinction between the meaning of 'third state' under Articles 7 and 17 of the ECT:

> "The transit provision of Article 7(10)(a)(i) is clearly distinguishable. That provision defines "transit" as
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> > (i) the carriage through the Area of a Contracting Party, or to or from port facilities in its Area for loading or unloading, of Energy Materials and Products originating in the Area of another state and destined for the Area of a third state, so long as either the other state or the third state is a Contracting Party;
>
> In this particular context, the term "third state" is used simply to designate the third of the three States necessarily involved in the transit relationship, and not a category of States distinct from Contracting Parties. The French version of the Treaty uses the term "troisième Etat" in Article 7(10)(a)(i), but "Etat tiers" elsewhere in the Treaty, clearly supporting the distinct meaning of the term in the different contexts." (*Yukos Cases; supra* at FN 98, para. 545)

See also, the *ECT Draft of 15 March 1993*, first version; *supra* at FN 609, which refers to "non-signatory" instead of "third state". For more comments on the meaning of 'third state' under Art. 17, *see*, Pinsolle, P., in Fernández–Ballesteros, M.Á.; Arias, D. (eds.); *supra* at FN 320, pp. 970–974.

[650] *Amto v. Ukraine; supra* at FN 529, para. 62.

While ownership of a legal entity appears to be a straightforward notion, the term 'control' used by Article 17(1) of the ECT seems to be more complex. The only explanation of the notion of 'control' can be found in Understanding no. 3 of the Final Act.[651] As mentioned before, the wording of Understanding no. 3 restricts its purpose to the definition of investment under Article 1(6) of the ECT,[652] but, nevertheless, it offers guidance as to the understanding of the drafters with respect to the notion of 'control'.[653] In establishing the meaning of 'control' for the purpose of Article 17, ECT tribunals looked behind the first layer of ownership or control,[654] and discarded minority beneficiaries or ownership in assessing control.[655]

b. Legal entities with no substantial business activity in the area of the Contracting Party where it is organized

The second requirement for the application of Article 17(1) of the ECT refers to the absence of 'substantial business activities' of the legal entities in the Area of the Contracting Party where it is organized. The expression 'substantial business activities' is not defined by the ECT. In *AMTO v. Ukraine*, the tribunal discussed the meaning of the term 'substantial' and reached the conclusion that

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[651] *See, supra* at FN 524.

[652] In *Plama v. Bulgaria,* the tribunal did not pay much attention to Understanding no. 3. It only did so when discussing the burden of proof under Article 17(1) of the ECT. *See, Plama v. Bulgaria; supra* at FN 93, para. 166. Similarly, the tribunal in *Amto v. Ukraine* referred to Understanding no. 3 when discussing the burden of proof. *See, Amto v. Ukraine; supra* at FN 529, para. 64.

[653] For the notion of 'control' and the ECT, *see*, Chapter II.2.1.2 above. Whether tribunals consider that Understanding no. 3 is applicable in the case of Article 17(1) of the ECT, this brings in another consequence besides the explanation of the meaning of 'control'. Understanding no. 3 places the burden of proof on Investor, should there be doubts as to such control. *See, supra* at FN 524. But *see* also, ESSIG:

> "Understanding 3 cannot be generalized as containing a rule that for all questions concerning the control over an investment the burden of proof is borne by the investor." (Essig, H.; *supra* at FN 632, p. 13)

[654] *See, Amto v. Ukraine; supra* at FN 529, paras 66–67; *Yukos Cases; supra* at FN 98, para. 536; *Plama v. Bulgaria,* Award; *supra* at FN 621, para. 88.

Where the legal entity is controlled by nationals of a non–Contracting Party, but at the next layer it is controlled by nationals of a Contracting Party to the ECT, arguably, the denial of benefits would not apply. *See* also, JAGUSCH and SINCLAIR:

> "[…] it would follow that immediate ownership of a company by a national of a non-ECT Contracting Party would presumably not justify the application of Article 17 if the company's ultimate beneficial owner were a national of an ECT Contracting Party." (Jagusch, S.; Sinclair, A.; *supra* at FN 629, p. 95)

[655] *Yukos Cases; supra* at FN 98, para. 536.

> "[…] in this context means 'of substance, and not merely of form'. It does not mean 'large', and the materiality not the magnitude of the business activity is the decisive question."[656]

The plain meaning of the terms 'substantial business activities' suggests that a legal entity should be more than a mere façade incorporated in the Contracting Party for other purposes than doing business there. As the tribunal in *Amto v. Ukraine* put forward, it is not the size of the business that counts, but the existence of the business activities. As explained by some authors,

> "[…] one would expect that, at a minimum, [a company] will be engaged in buying, selling, and contracting in that territory beyond the normal activities or functions required merely by the fact of its corporate existence (such as corporate registration and administration, including holding requisite board or shareholders' meetings and the payment of associated taxes and corporate registration fees)."[657]

The term 'substantial' used by Article 17(1) of the ECT appears to have a qualitative rather than a quantitative meaning, and, therefore, intended to exclude the so–called 'mailbox companies' from the protection of the ECT, since their activities either occur elsewhere or they are temporary or restricted to the existence of the legal entity in the area of a Contracting Party. The term 'substantial' also indicates that temporary activities would not be considered for the purpose of Article 17(1) of the ECT.[658] The ECT does not provide for a list of criteria for determining whether legal entities have substantial business activity. However, tribunals should seek to determine this question based on the facts of each case, taking into consideration the nature and duration of their activities, whether or not they pay taxes and make profit or have permanent

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[656] *Amto v. Ukraine; supra* at FN 529, para. 69.

[657] Jagusch, S.; Sinclair, A.; *supra* at FN 640, p. 20. The authors also suggest that
> "[o]ne would also expect such a company: (1) to have employees in the territory of the Contracting Party in which it is organised carrying out assignments in furtherance of the business; (2) to have resident managers involved in a hands-on manner in the actual decision-making of the business; (3) to be a party to substantial transactions in the Area of the Contracting Party associated with the furtherance of the business; (4) to pay taxes to the treasury of that Contracting Party in relation to profits earned from these transactions; and (5) to engage in procurement locally of inputs for the business." (Jagusch, S.; Sinclair, A.; *supra* at FN 640, p. 20)

[658] *See* also, Jagusch, S.; Sinclair, A.; *supra* at FN 640, p. 20.

employees.[659] For instance, the tribunal in *AMTO v. Ukraine* held that claimant had substantial business activities in Latvia, based on the activities conducted there, which involved permanent staff.[660]

3.4 Denial of Benefits to an Investment

Article 17(2) of the ECT allows Contracting Parties to deny the benefits of Part III to Investments of an Investor of a third state if the denying Contracting Party (i) does not maintain diplomatic relation with this third state, or (ii) adopts or maintains measures that prohibit transactions with investors of the third state or such measures would be violated or circumvented if the benefits of Part III of the ECT were accorded to such investors or their investments. The denial of benefits clause to an Investment of an Investor of a third state on diplomatic or economic grounds is seen as a "means of furthering certain foreign policy goals of the host state by denying treaty benefits to investors of certain specific states."[661]

The denial of benefits to Investments is applicable if the prerequisites under Article 17(2) of the ECT are met. First, the denying Contracting Party must establish that

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[659] JAGUSCH and SINCLAIR consider that these entities should also have resident managers and be party to substantial transactions in the Areas of the Contracting Parties in which they are organized. *See,* Jagusch, S.; Sinclair, A.; *supra* at FN 640, p. 20.

[660] *Amto v. Ukraine; supra* at FN 529, para. 69:

> "In the present case, the Tribunal is satisfied that the Claimant has substantial business activity in Latvia, on the basis of its investment related activities conducted from premises in Latvia, and involving the employment of a small but permanent staff."

See also, the conclusion of the tribunal in *Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar*, Award of 31 March 2003, para. 52 regarding the "effective management" of Yaung Chi Oo Trading PTE Ltd., as required by Art. I.2 of the *Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments*, 15 December 1987.

[661] Vandevelde, K.J.; *supra* at FN 271, p. 163.

such Investment is an Investment of an Investor of a third state.[662] Secondly, there has to be a case where the Contracting Party either does not maintain diplomatic relations with the third state or adopts or maintains measures that would be incompatible with the benefits offered by Part III of the ECT. ECT tribunals have not yet been faced with situations where the respondent Contracting Party relied on Article 17(2) of the ECT for denying the protection and promotion of investments.

4. CONCLUSIONS

The core Chapter of this Thesis analysed the notion of 'Investor' in the light of the definition of Article 1(7)(a) and the relevant provisions of the ECT. The interplay between the ECT and the ICSID Convention, in particular, showed that outside the ECT's framework, the notion of 'Investor' suffers important restrictions that are relevant for the jurisdiction of arbitral tribunals in the context of Investor–Contracting Party dispute resolution mechanism. The analysis also revealed that there are distinct limitations placed on the notion of 'Investor' in the context of the substantial and procedural protection of the ECT. The notion of 'Investor' under the ECT generously encompasses natural persons – nationals, citizens and permanent residents of the Contracting Parties, and legal entities – companies and any other organizations organized in accordance with the laws of the Contracting Parties. Thus, the link between

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[662] Thus, the burden of proof is on the denying Contracting Party. *See* also, Mistelis, Loukas; Baltag, Crina; *Denial of Benefits and Article 17 of the Energy Charter Treaty*, p. 315, in Carbonneau, Thomas E.; Sinopole, Angelica M. (eds.); *Building Civilization of Arbitration,* London: Wildy, Simmonds & Hill Publishing, 2010.

For the notion of 'Investor of a third state', *see* Art. 1(7)(b) of the ECT, which provides for the following:

> ""Investor" means:
> […] (b) with respect to a "third state", a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party."

The definition of an Investor of a third state was introduced following the proposal of the Legal Sub–Group because there was "a need to define "Investor" not only in relation to a "Contracting Party" but also in respect to "third states", since a "third state" standard is employed". *See*, *Memorandum of C. Bamberger, Chairman of the Legal Sub–Group,* 27 May 1993.

Investor and the Contracting Parties can take various forms and it is not restricted to the bond of nationality.

Natural persons qualify as ECT Investors if they possess the nationality or citizenship of or are permanent residents of the Contracting Parties, in accordance with their municipal laws. The ECT does not provide for definitions of nationality, citizenship or permanent residence, but it refers this matter to the laws of the Contracting Parties. The terms 'nationality' and 'citizenship', as revealed in this Chapter, may not have the same meaning for all the Contracting Parties. Relevant for the notion of 'Investor' is the quality of an individual to be "subject of a certain state",[663] irrespective of whether this link is called nationality or citizenship. In this context, the nature and legal effects of the EU citizenship have been considered. The EU citizenship cannot be construed as nationality for the purpose of international and investment law, mainly because it is a subsidiary 'citizenship' that attests the link between nationals of states and a regional organization, and which cannot exist in the absence of the nationality of an EU Member State. The ECT also extends its protection to permanent residents of Contracting Parties. Permanent residence only and not any type of residence, in accordance with the laws of the Contracting Parties, allows individuals to claim the protection of the ECT.

A controversial issue related to Investor natural person, likely to arise in practice, refers to the dual nationality *lato sensu*. Article 26(1) of the ECT refers to disputes "between a Contracting Party and an Investor of another Contracting Party". Although the terms of the ECT do not expressly exclude Investors of dual nationality *lato sensu*, it is argued that Article 26(1) suggests two possible interpretations: the consent under Article 26(1) of the ECT covers (a) disputes between a Contracting Party and an Investor of another

[663] Jennings, R.; Watts, A.; *supra* at FN 278, p. 851.

Contracting Party, except for the respondent Contracting Party; or (b) disputes between a Contracting Party and an Investor of any other Contracting Party, including the respondent Contracting Party. The practice of states, and in particular that related to the exercise of diplomatic protection, is divided between the principle of non–responsibility, which prevents a state from espousing a claim of its national who holds, at the same time, the nationality of the respondent state; and the principle of dominant nationality, which allows claims of individuals against one of their own states, as long as the dominant nationality is not of the respondent state. The documents of the ECT's negotiation do not record any substantial discussion between the negotiating parties on the issue of dual nationality; some of the negotiating parties understood, however, that dual nationals are not excluded from the ECT's coverage. Nevertheless, Article 25(2)(a) of the ICSID Convention contains an absolute prohibition for individuals who possess the nationality of a Contracting State and of the respondent Contracting State, although the drafting history of the ICSID Convention shows that the drafters of the ICSID Convention considered allowing these individuals to resort to the ICSID mechanism. The review of the dual nationality in the jurisprudence of international tribunals revealed that the principle of non–responsibility lost ground against the dominant nationality rule. Nonetheless, the application of the dominant nationality principle in investment law is not yet settled. These conclusions of the research are also valid when the individual is a national of a Contracting Party to the ECT and a permanent resident of the respondent Contracting Party or the opposite. When natural persons hold the nationality of or are permanent residents of a Contracting Party and of a non–disputing Contracting Party or third state, such situation would apparently not create problems for the jurisdiction of arbitral tribunals.

Companies and other organizations are probably the types of Investors that are more visible in claiming the protection of investment treaties. The ECT covers companies and any organization organized in accordance with the laws of the Contracting Parties. Article 1(7)(a)(ii) of the ECT retains the incorporation test for determining the link between legal entities and Contracting Parties. The analysis of the *Societas Europaea* revealed that this is not a company of EU nationality, but a company that has the nationality of the state of incorporation. The ECT does not approach the issue of state–owned or controlled companies as Investors under the ECT, although the drafting history of the ECT reveals that earlier drafts included references to such companies as Investors under the ECT. As the ECT does not expressly exclude these companies, it is possible that ECT tribunals would follow the criteria adopted by the ICSID tribunals: state–owned or controlled companies will benefit from the ECT's protection if they do not act as agents of the state and are not fulfilling essential governmental functions.

Disputes against states are most often brought under investment treaties by shareholders of companies. Shareholders rely on the interest they hold in companies to ask for direct damages or for indirect damages caused by measures taken by the states that affect the companies and, indirectly, the value of their interest. The access of shareholders under the ECT is granted under Article 1(6) of the ECT, which provides that Investments may take the form of a company or business enterprise or shares, stock or other form of participation in a company. Article 26(7) of the ECT also allows legal entities that have the nationality of the host Contracting Party and are controlled by Investors of another Contracting Party to bring a dispute against the host Contracting Party. This provision, however, is restricted to disputes brought to the ICSID. Dual nationality of legal entities may occur when different states adopt varied criteria for considering these legal entities their nationals. The issue has been scarcely present in the scholarly debates and the

practice of international tribunals. If applying *mutatis mutandis* the analysis of the dual nationality of natural persons to legal entities, it can be deemed that the ECT does not restrict the access of legal entities possessing dual nationality. However, scholars have been reluctant in endorsing the rule of dominant nationality where legal entities also have the nationality of the host state.

Not only companies, but any other organization organized in accordance with the laws of a Contracting Party may claim the status of Investor and the benefits of the ECT. The terms 'other organization' are broad enough to cover any type of association, with or without legal personality, from joint ventures to partnerships and non–profit association. However, particularly for NGOs, the extensive wording of Article 1(7) of the ECT is shaped by the notion of 'Investment'. Also, for benefiting from the procedural protection of the ECT, NGOs must have an Investment within the meaning of the ECT and the dispute with a Contracting Party must relate to this Investment.

The sole requirement imposed by the ECT on legal entities is their organization in accordance with the laws of the Contracting Parties. ECT tribunals discussed whether any other prerequisites can be inferred from the language of the ECT, such as the nationality of the ultimate beneficiaries of a legal entity. In the *Yukos Cases*, the tribunal forcefully rejected the existence of such requirements, relying on the text of the ECT and the principles of international law. Moreover, the *Yukos* tribunal concluded that it is bound to interpret the terms of the ECT as they are, and not "as they might have been written".[664]

[664] *Yukos Cases; supra* at FN 98, para. 413.

The final part of this Chapter discussed the limitations imposed on the notions of 'Investor' and 'Investment' by the denial of benefits clause under Article 17 of the ECT. The denial of benefits clause, when exercised by the denying Contracting Party, restricts the benefits of the provisions for the protection and promotion of Investments to legal entities and Investments. For legal entities, the denial of benefits clause may be exercised where the legal entity is owned or controlled by nationals of a third state, and the legal entity does not have substantial business activity in the Contracting Party in which it is organized. For Investments, Article 17(2) of the ECT allows Contracting Parties to rely on the denial of benefits clause against Investments of Investors of third states towards which the respondent Contracting Party took certain economic and political measures.

CHAPTER III – INVESTOR AND THE NOTION OF INVESTMENT UNDER THE ENERGY CHARTER TREATY

For an Investment–related claim to succeed to the merits phase, an ECT arbitral tribunal must also be satisfied that the Investor has an Investment within the meaning of the ECT.[665] The fact that natural persons or legal entities fulfil the requirements imposed by the ECT in respect of the notion of 'Investor' is not sufficient. The consent of the Contracting Parties on the types of disputes that can be submitted to the Contracting Party–Investor dispute resolution mechanism extends to disputes between an Investor and a Contracting Party relating to an Investment.[666] Apart from this, the substantive protection undertaken by the Contracting Parties is mostly directed towards Investments of Investors. For example, Article 10(1) of the ECT provides that Contracting Parties shall accord at all time fair and equitable treatment to Investments of Investors, and that Investments shall enjoy the most constant protection and security. The notion of 'Investment' is, thus, indissolubly connected to the notion of 'Investor'.

The notion of 'investment' is controversial: it is much used by investment treaties, scholars and tribunals, but, as in the case of the notion of 'nationality', there is no universal definition of the concept. Referring to the notion of 'investment' in a conference paper of 1961, LAUTERPACHT summarized the hurdles encountered by the drafters of investment instruments in trying to find the proper definition of the notion of 'investment':

[665] When an ECT dispute is brought for resolution under the provisions of the ICSID Convention, investors must observe a two–fold test, both jurisdictional requirements of the ECT and of the ICSID Convention must be satisfied. Similar test must be considered for the ICSID Additional Facility Rules.
[666] Art. 26(1) of the ECT.

> "But what is "an investment" for these purposes? The word is not a term of art in international law and there is room for a variety of interpretations and approaches. […] For example, is "investment" the same as "property"? To this the answer is No. The word "investment" carries with it some additional connotation representing the idea of development, growth or return. Not all property possesses these characteristics."[667]

The concept of 'investment' does not have the same meaning for lawyers and economists.[668] For investment treaties, investments are seen as "subset of assets",[669] while economists portray investment as "a phenomenon, a process, or an action."[670] Investments, unlike ordinary commercial transactions, require more than a simple exchange of performances. SORNARAJAH defines investments as involving the transfer of tangible or intangible assets from one country into another "for the purpose of their use in that country to generate wealth under the total or partial control of the owner of

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[667] Lauterpacht, E.; *supra* at FN 67, p. 28. LAUTERPACHT further reflects upon the test for determining what constitutes an investment:

> "It is, of course, possible to enumerate the categories of property which the Parties are prepared to regard as constituting an investment. Alternatively, one can introduce a subjective test–for example, that an investment for the purposes of convention is made with the consent of the recipient State and acknowledged by it to be an investment." (Lauterpacht, E.; *supra* at FN 67, p. 28)

[668] As metaphorically explained by a scholar, "[t]he notion of investment is a notion in motion." *See,* Nathan, K. V. S. K.; *ICSID Convention. The Law of the International Centre for Settlement of Investment Disputes*, New York: JurisNet, LLC, 2000, p. 111. *See* also, Dugan, C.; Wallace jr., D.; Rubins, N. D.; Sabahi, B.; *supra* at FN 198, p. 247.

[669] It is argued that these treaties "set forth definitions of investment that are quite broad and unhelpful". *See*, Dugan, C.; Wallace Jr., D.; Rubins, N. D.; Sabahi, B.; *supra* at FN 198, p. 247.

[670] Rubins, Noah; *The Notion of 'Investment' in International Investment Arbitration*, p. 284, footnote omitted, in Horn, Norbert; Kröll, Stefan (eds.); *Arbitrating Foreign Investment Disputes*, The Hague: Kluwer Law International, 2004. For the dual nature of the notion of 'investment', *see* also, Salacuse, Jeswald W.; *The Law of Investment Treaties*, New York: Oxford University Press, 2010, pp. 18–19. *See* also, the distinction between direct investments – the traditional notion of 'investment' – and portfolio investments. The *OECD Benchmark Definition of Foreign Direct Investment* refers to foreign direct investments as follows:

> "Foreign direct investment reflects the objective of obtaining a lasting interest by a resident entity in one economy (''direct investor'') in an entity resident in an economy other than that of the investor (''direct investment enterprise''). The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence on the management of the enterprise. Direct investment involves both the initial transaction between the two entities and all subsequent capital transactions between them and among affiliated enterprises, both incorporated and unincorporated." (OECD*; OECD Benchmark Definition of Foreign Direct Investment,* 3rd edition, 1999, pp. 7–8)

The IMF distinguishes portfolio investment from other investments as it "provides a direct way to access financial markets, and thus it can provide liquidity and flexibility", while it "is associated with financial markets and with their specialized service providers, such as exchanges, dealers, and regulators." *See,* International Monetary Fund; *Balance of Payments and International Investment Position Manual*, 6th edition, Washington D.C.: International Monetary Fund, 2009 p. 99. Usually, the difference between portfolio investment and direct investment is the absence of management and control rights of the investor under portfolio investments. *See,* Sornarajah, M.; *supra* at FN 439, p. 8.

the assets".[671] BROWNLIE, in his Separate Opinion in the *CME v. Czech Republic*, noted that the application of the provisions of an investment treaty "necessarily involves recognition" of some elements out of which one refers to "the nature of investment as a form of expenditure or transfer of funds for the precise purpose of obtaining a return."[672]

1. INVESTMENT AND THE ENERGY CHARTER TREATY

Article 1(6) of the ECT provides for the definition of the notion of 'Investment', as follows:

> ""Investment" means every kind of asset, 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 contract having an economic value and associated with an Investment;
> (d) Intellectual Property;[673]
> (e) Returns;[674]
> (f) 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."[675]

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[671] Sornarajah, M.; *supra* at FN 439, p. 7.
[672] *CME v. Czech Republic,* Separate Opinion of Ian Brownlie; *supra* at FN 581, para. 34.
[673] Pursuant to Art. 1(12) of the ECT, Intellectual Property "includes copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information."
[674] The term 'Returns' is defined by Art. 1(9) of the ECT as:
> "[…] amounts derived from or associated with an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind."

[675] The documents of the negotiation of the ECT show that Art. 1(6) of the ECT was one of the most debated provisions of the ECT, after the provisions of Art. 10 on the Promotion, Protection and Treatment of Investments.
The *Basic Protocol of 11 September 1991* defined Investment as follows:
> ""Investment" means every kind of asset, including changes in the form in which assets are invested and in particular, though not exclusively, includes any of the following:
> (i) movable and immovable property and any other related property rights such as mortgages liens or pledges;
> (ii) shares in, and stock, bonds and debentures of, and any other form of participation in, a company or business enterprise;
> (iii) claims to money, and claims to performance under contract having a financial value;

Paragraph three of Article 1(6) of the ECT specifies that

> ""Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat."

The provisions of Article 1(6) of the ECT offer a broad approach to the notion of 'Investment', as it virtually covers any kind of asset, whether owned or controlled directly or indirectly by an Investor. It also offers a non–exhaustive enumeration of the kinds of assets that could be covered by the notion of 'Investment'. Nevertheless, the notion of 'Investment' is particularized to investments that are associated with an Economic Activity in the Energy Sector, a concept explained in Article 1(5) of the ECT:

> ""Economic Activity in the Energy Sector" means an 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 ECT refers to the notion of 'Investment' as "any kind of asset" and provides for an open list of assets that may constitute an Investment.[676] It is common for BITs to offer a

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(iv) intellectual property rights, goodwill, technical processes, know-how and any other benefit or advantage attached to a business;
(v) rights, conferred by law or under contract, to undertake any commercial activity, including the search for, or the cultivation, extraction or exploitation of natural resources;
which is used in connection with the implementation of the principles of the Charter and in accordance with the provisions of this Agreement." (Art. 1(e) of the *Basic Protocol of 11 September 1991,* 8/91 BP 2)

Art. 1(4)(f) of the *Basic Agreement of 20 January 1992,* 4/92 BA 6, also included

"[…] goods which under a leasing agreement are placed at the disposal of a lessee in the Territory of a Contracting Party in conformity with its laws and regulations".

The same draft defined Investment as

"[…] every kind of asset, which are used in connection with the implementation of the principles of the Charter and in accordance with the provisions of this Agreement" (Art. 1(4))

The version of 19 March 1992 of the Basic Agreement added to the definition of Investment "every kind of asset, which has been used or is used". *See,* Art. 1(4) of the *Basic Agreement of 19 March 1992,* 17/92 BA 10.

[676] The tribunal in *Amto v. Ukraine* summarized the definition of 'Investment' under Article 1(6) of the ECT as follows:

"This definition of Investment has three parts: a wide definition ('every kind of asset') illustrated by a list of six types of rights; a clarification (covering changes in form, and a temporal qualification of the investment),

non–exhaustive list of assets or activities that may be regarded as covered investments.[677] There are, however, other treaties providing for an exhaustive list of covered assets and transactions that may qualify as an investment. Article 1139 of the NAFTA, for example, contains two lists of assets: assets that may be considered investments,[678] and assets that are excluded from the notion of 'investment'.[679] Some

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and a restriction as to the types of economic activity included in the definition of investment. The definition part reflects a standard formula of investment treaties; the clarifications are also routine; and the restriction reflects the purpose of the Energy Charter Treaty to promote long term cooperation in a particular sector, namely the energy sector." (*Amto v. Ukraine; supra* at FN 529, para. 36)

As explained by WAELDE, the ECT "assigns the widest possible meaning to the term "investment", basically encompassing any legal right of financial value." *See,* Waelde, T.W.; *supra* at FN 66, p. 270–271.

[677] The United Kingdom-Armenia BIT refers to investment as

"[…] every kind of asset and in particular, though not exclusively, includes:
(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
(ii) shares in and stock and debentures of a company and any other form of participation in a company;
(iii) claims of money or to any performance under a contract having a financial value;
(iv) intellectual property rights, goodwill, technical process and know-how;
(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources." (Art. 1(a) of the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Armenia for the Promotion and Protection of Investments*, 11 July 1996)

As explained by DOLZER and STEVENS,

"[…] BITs have adopted a more elaborate formula, illustrated by a list of five groups of specific rights which usually include traditional property rights, rights in companies, monetary claims and titles to performance, copyrights and industrial property rights as well as concessions and similar rights. It is frequently stated that these illustrations are not exhaustive." (Dolzer, R.; Stevens, M.; *supra* at FN 424, p. 26)

[678] Art. 1139 of the NAFTA provides that

"[…] **investment** means:
(a) an enterprise;
(b) an equity security of an enterprise;
(c) a debt security of an enterprise
(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the debt security is at least three years,
but does not include a debt security, regardless of original maturity, of a state enterprise;
(d) a loan to an enterprise
(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the loan is at least three years,
but does not include a loan, regardless of original maturity, to a state enterprise;
(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise"

[679] These refer to:

"[…] (i) claims to money that arise solely from
(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or
(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
(j) any other claims to money,
that do not involve the kinds of interests set out in subparagraphs (a) through (h)".

treaties are more explicit as to the characteristics an asset must have in order to be regarded as an investment. Article 1 of the United States Model BIT refers to investment as

> "[…] every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[680]

However, as observed by the tribunal in *Petrobart v. Kyrgyzstan,*

> "[t]here is no uniform definition of the term investment, but the meaning of this term varies […]. While in ordinary language investment is often understood as being capital or property used as a financial basis for a company or a business activity with the aim to produce revenue or income, wider definitions are frequently found in treaties on the protection of investments, whether bilateral (*BITs*) or multilateral (*MITs*).
> The term investment must therefore be interpreted in the context of each particular treaty in which the term is used."[681]

A definition, by essence, requires certain criteria against which potential concepts, activities, assets etc. should be tested. As noted by MANCIAUX,

> "[…] if a definition is necessary, it could not result from an enumerative method retained in the near totality of international treaties, if not because an enumeration, no matter how long, has never constituted a definition."[682]

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[680] Art. 1 of the 2004 United States Model BIT. The definition continues with a non–exhaustive enumeration of the forms that an investment may take:
"[…] (a) an enterprise;
(b) shares, stock, and other forms of equity participation in an enterprise;
(c) bonds, debentures, other debt instruments, and loans;
(d) futures, options, and other derivatives;
(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
(f) intellectual property rights;
(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges."

[681] *Petrobart v. Kyrgyzstan; supra* at FN 124, p. 69, emphasis original.

[682] Manciaux, Sébastien; *The Notion of Investment: New Controversies,* 9(6) Journal of World Investment and Trade (2008), p. 6. *See* also, *Robert Azinian and others v. United Mexican States,* Award of 1 November 1999, para. 90: "Labelling is, however, no substitute for analysis." Also, the Cour D'Appel de Paris in the Decision of 25 September 2008 in the case of *Czech Republic v. Pren Nreka*, for the annulment of the Arbitral Award of 15 March 2007, p. 5: "[…] les dispositions du TBI [BIT] qui viennent d'être rappelées ne fournissent pas de critère pour caractériser ce qu'est un investissement mais donnent seulement une énumération, et encore de manière non limitative, des cas considérés comme des investissements […]."

The understanding of the definition of 'Investment' under Article 1(6) of the ECT must rely on the ordinary meaning of the terms used therein, in their context and in accordance with the object and purpose of the ECT.[683] Article 1(6) refers to any asset and provides for a non–exhaustive list of such assets that may qualify as an Investment. However, there may be assets that, although not listed, could be considered Investments. The question, therefore, refers to what kind of test should be applied in assessing whether such assets are Investments.

While the terms of a treaty must be interpreted within their ordinary meaning,[684] this must not result in a simple grammatical or literal interpretation of the text, thus ignoring the context and the object and purpose of the treaty.[685] The principle of integration calls for the interpretation of the provisions of a treaty in the context in which they occur.[686] In the *Advisory Opinion No. 2*, the PCIJ stated the principle as follows:

> "[…] it is obvious that the Treaty must be read as a whole, and that its meaning should not be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense."[687]

The term 'context' includes "the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of the treaty".[688] It is therefore required for the terms of a treaty to be given a contextual interpretation, starting with the actual sentence in which they emerge. This, in turn, means that the drafters intended to give a meaning to each term in the treaty. In accordance with the rule of non–surplus, the

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[683] Art. 31(1) of the Vienna Convention.
[684] Which is the "current and normal (regular, usual) meaning". *See,* Villiger, Mark E.; *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden and Boston: Martinus Nijhoff Publishes, 2009, p. 426.
[685] *Iranian Oil Case; supra* at FN 156, p. 104
[686] *See*, Fitzmaurice, G.G.; *supra* at FN 194, p. 9; Vattel, E.; *supra* at FN 155, pp. 254–255; Publius Celsus: *Incivile est, nisi tota lege perspecta, una aliqua particula eius proposita iudicare vel respondere* (unofficial translation: "It is improper to judge or to counsel based on a fragment of the law, without taking into consideration the law in its entirety").
[687] *Advisory Opinion No. 2 of 12 August 1922 (Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture),* p. 23.
[688] Villiger, M. E.; *supra* at FN 684, p. 427.

parties to a treaty "must be presumed to have used the particular word or words intending that they should have some significance."[689] As explained by FITZMAURICE, the rule of non–surplus is a consequence of the principle of effectiveness, which refers to the interpretation of the provisions of a treaty so as to "give them their fullest weight and effect consistent with the normal sense of words and with other parts of the text, in such a way that a reason and a meaning can be attributed to every part of the text."[690]

The rules of interpretation as presented above must be applied to the provisions of Article 1(6) of the ECT in order to shed light on the meaning of the notion of 'Investment'. Paragraph 3 of the Article specifies that ""Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party". The term 'Investment' appears in this text four times: once with capital 'I', "Investment", and quotation marks and three times in lower case, 'investment' or 'investments'. The provision employs the wording ""Investment" refers to any investment". Similarly, paragraph 2 of the Article 1(6) refers to "[a] change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force". The term 'investment' also appears in this provision as 'Investment' and 'investment'. The provision also refers to ""Investment" [that] includes all investments". While it is clear that the term "Investment" has the meaning designated by Article 1(6) – Article 1 of the ECT referring to "Definitions", the issue to be

[689] Hogg, James H.; *The International Court: Rules of Treaty Interpretation II,* 44 Minn. L.Rev. 5 (1959–1960), p. 11. *See* also, the Separate Opinion of Judge Anzilotti in the *Lighthouse Case Between France and Greece,* Judgment of 17 March 1943, p. 31:

> "[…] it is a fundamental rule in interpreting legal texts that one should not lightly admit that they contain superfluous words: the right course, whenever possible, is to seek for an interpretation which allows a reason and a meaning to every word in the text."

[690] Fitzmaurice, G.; *supra* at FN 156, p. 211. *See* also, VILLIGER who, relying on Art. 31(1) of the Vienna Convention, concludes that there is "the presumption that the treaty terms were intended to mean something, rather than nothing." *See,* Villiger, M. E.; *supra* at FN 684, p. 425, footnote omitted.

clarified is the meaning of the term 'investment' in lower case. The principles of integration and effectiveness, together with the rule of non–surplus, suggest that the Contracting Parties intended to give a different meaning to the two terms.[691] As suggested by VATTEL,

> "[i]*f any one of those expressions which are susceptible of different significations occurs more than once in the same piece, we cannot make it a rule to take it every–where in the same signification*. For we must […] take such expression, in each article, according as the subject requires […]." [692]

It appears that the Contracting Parties to the ECT ascribed an objective meaning to the term 'investment' in lower case, according to which the notion of "Investment", as established by Article 1(6), should be tested against.[693] Otherwise, the expressions under paragraphs 2 and 3 of Article 1(6) would be rendered meaningless:

> "*It ought to be interpreted in such a manner, as that it may have its effect, and not prove vain and nugatory* […]."[694]

If such objective meaning would be ignored, than the wording ""Investment" refers to any investment" would be stripped of its proper meaning.[695] This would go against the rules of interpretation of the Vienna Convention. Moreover, such objective meaning, as supported by the wording of Article 1(6), allows for assets not listed under the definition to be considered Investments if they fall under this meaning of the term

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[691] Other provisions of the ECT refer to the notion of 'investment' in lower case, but as adjectives and not as nouns: trade-related investment measure (e.g. Article 10(11)), investment agreements and investment authorizations (e.g. Article 10(12)), inward investments (e.g., Article 14(3)), energy investment projects (e.g. Article 19(1)(i)).

[692] Vattel, E.; *supra* at FN 155, p. 252, emphasis original.

[693] As suggested by the drafting documents of the ECT,

> "[…] the practice in the ECT [is] of using initial capital letters to identify defined terms. […] we could find no persuasive rationale that would justify departing from the ECT's existing usage […]." (*Message No. 269L*, Subject: Legal Sub–Group Meeting – Report, 10 October 1994)

See also, Art. 1(4) of the *Basic Agreement of 12 August 1992*, 37/92 BA 15, which refers to Investment as "every kind of energy investment".

[694] Vattel, E.; *supra* at FN 155, p. 253, emphasis original.

[695] Further, if the drafters of the ECT would have intended to give the same meaning to 'Investment' and 'investment', they could have simply used one of the terms or a different wording of the provisions in which these terms appear. For example, paragraph 3 of Art. 1(6) could have been: ""Investment" must be associated with an Economic Activity in the Energy Sector", rather than ""Investment refers to any investment associated with an Economic Activity in the Energy Sector".

'investment'. Likewise, since Article 1(6) of the ECT virtually covers "every asset", not all assets will constitute an Investment, but only those assets that, pursuant to paragraph 3, represent an "investment associated with an Economic Activity in the Energy Sector".[696]

A similar conclusion was reached by the tribunal in *Romak v. Uzbekistan,* a non–ECT arbitration under the UNCITRAL Rules, where the tribunal had to interpret the meaning of the notion of 'investment' under the Uzbekistan–Switzerland BIT.[697] The dispute arose between Romak S.A., a Swiss company, and Uzbekistan in connection with a set of contracts of supply of wheat between Romak S.A. and three Uzbek entities.[698] In interpreting the notion of 'investment', the tribunal relied on the ordinary meaning of

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[696] *See* also, the comments of CABROL with respect to the non–exhaustive list of assets in the definition of 'investment' in BITs:

> "[…] it will not suffice for the tribunal to check that the operation matches one of the items listed in the article. This only checks that the form of investment in question falls under the BIT. However, it will also have to consider whether the operation itself qualifies as an investment." (Cabrol, Emmanuelle; *Pren Nreka v. Czech Republic and the Notion of Investment under Bilateral Investment Treaties. Does "Investment" Really Mean "Every Kind of Asset"?,* p. 229, in Sauvant, Karl P.; Yearbook on International Investment Law & Policy 2009–2010, New York: Oxford University Press, 2010)

[697] *Agreement between the Swiss Confederation and the Republic of Uzbekistan concerning the Promotion and Reciprocal Protection of Investments*, 5 November 1993. *See, Romak S.A. v. Republic of Uzbekistan,* Award of 26 November 2009, para. 7.

[698] Uzkhleboproduct (or Uzdonmakhsulot), Uzdon and Odil. *See*, *Romak v. Uzbekistan; supra* at FN 697, para. 14 *et seq.* The UNCITRAL arbitration was preceded by another arbitration under the auspices of the Grain and Feed Trade Association (GAFTA), where the tribunal ruled that Romak S.A. was entitled to receive the payment for the delivered wheat and awarded damages in the amount of USD 10,510,629 plus interest. *See, Romak v. Uzbekistan, supra,* para. 52 *et seq.* After unsuccessful attempts to enforce the GAFTA award, Romak S.A. commenced the arbitration against Uzbekistan relying on the Uzbekistan–Switzerland BIT. To this extent, Uzbekistan objected to the jurisdiction of the tribunal by arguing, among others, that the underlying transaction does not qualify as an investment within the meaning of Article 1(2) of the Uzbekistan–Switzerland BIT. Art. 1(2) of the Uzbekistan–Switzerland BIT provides that

> "[t]he term "investments" shall include every kind of assets and particularly:
> a. movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
> b. shares, parts or any other kind of participation in companies;
> c. claims to money or to any performance having an economic value;
> d. copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), technical processes, know-how and goodwill;
> e. concessions under public law, including concession to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law." (para. 97)

According to Uzbekistan, the sale of goods, which was the transaction envisaged by the agreements between the Claimant and the Uzbek entities, does not constitute an investment under the Uzbekistan–Switzerland BIT. *See, Romak v. Uzbekistan, supra* at FN 697, para. 98. This argument was supported, claimed the respondent, by the fact that Uzbekistan and Switzerland negotiated and concluded at the same time with the BIT, a separate agreement regulating the relations between these two states with respect to sales of goods. *See, Agreement on Trade and Economic Cooperation (ATEC), Romak v. Uzbekistan, supra* at FN 697, para. 100.

the terms of the Uzbekistan–Switzerland BIT, in their context and in the light of its object and purpose. The tribunal rejected Romak S.A.'s request to "simply confirm that the Claimant's assets fall within one or more of the categories listed in Article 1(2) of the BIT, thus sponsoring a construction of the BIT that puts special emphasis on the literal words in the list".[699] The *Romak v. Uzbekistan* tribunal considered the list of assets under Article 1(2) of the Uzbekistan–Switzerland BIT a non–exhaustive enumeration that "do not constitute an all–encompassing definition of "investment"."[700] Assets that are not explicitly listed must be assessed against a "benchmark", which, in the tribunal's opinion, is the meaning of the notion of 'investment' itself.[701] The interpretation of the notion of 'investment', therefore, cannot rely on the literal meaning of the terms only, but also on the context and object and purpose of the Uzbekistan–Switzerland BIT, as required by Article 31(1) of the Vienna Convention.[702] A "mechanical" application of Article 1(2) of the Uzbekistan–Switzerland BIT, without considering the rules of interpretation of the Vienna Convention, would produce a manifestly absurd and unreasonable result and "would eliminate any practical limitation to the scope of the concept of "investment"".[703]

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[699] *Romak v. Uzbekistan; supra* at FN 697, para. 178, footnote omitted.
[700] *Ibid*., para. 180.
[701] *Id.* The language of the Uzbekistan–Switzerland BIT differs essentially from one used in Art. 1(6) of the ECT, as the 'benchmark' referred to by the tribunal – the notion of 'investment' itself – is not expressly mentioned therein.
[702] *Romak v. Uzbekistan; supra* at FN 697, para. 181. The tribunal relied on the Preamble of the Uzbekistan–Switzerland BIT to find the object and purpose of the BIT: "by referring to "*economic cooperation to the mutual benefit of both States*" and to the "*aim to foster the economic prosperity of both States*", suggests an intent to protect a particular kind of assets, distinguishing them from mere ordinary commercial transactions." *See, Romak v. Uzbekistan*; *supra* at FN 697, para. 189, emphasis original.
Art. 31(1) of the Vienna Convention refers to the "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". However, "object and purpose functions as a means of shedding light on the ordinary meaning rather than merely as an indicator of a general approach to be taken to treaty interpretation." *See,* Gardiner, R.; *supra* at FN 101, p. 190. *See* also, *infra,* Chapter III.7, for the controversy surrounding the requirement built on the Preamble of the ICSID Convention that refers to the contribution to the economic development of the host state.
[703] *Romak v. Uzbekistan*; *supra* at FN 697*,* paras 184–185.

The ordinary meaning of the term 'investment' includes "the action or process of investing money for profit or material result", "the thing that is worth buying because it may be profitable or useful in the future", "an act of devoting time, effort, or energy to a particular undertaking with the expectation of a worthwhile result".[704] The tribunal in *Romak v. Kazakhstan* referred to the ordinary meaning of 'investments' as "the commitment of funds or other assets with the purpose to receive a profit, or "return," from that commitment of capital",[705] while the term 'asset' "means property of any kind".[706] In *Saba Fakes v. Turkey*, the tribunal considered the criteria of contribution, certain duration and risk as "necessary and sufficient" for the definition of investment within the meaning of the ICSID Convention.[707] The tribunal went on and explained that

> "[t]hese three criteria derive from the ordinary meaning of the word 'investment', be it in the context of a complex international transaction or that of the education of one's child: in both instances, one is required to contribute a certain amount of funds or know–how, one cannot harvest the benefits of such contribution instantaneously, and one runs the risk that no benefits would be reaped at all, as the project might never be completed or a child might not be up to his parents' hopes or expectations."[708]

The ordinary meaning of the term 'investment' must effectively encompass at least two elements, contribution and returns, while the third one, the risk, may, nevertheless, be deemed inherent to any investment, given the contribution and returns criteria.[709] As for

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[704] The New Oxford American Dictionary; *supra* at FN 136, p. 887. GARDINER refers to dictionaries as allowing "the basic discovery of ordinary meaning of a term" (Gardiner, R.; *supra* at FN 101, p. 166)

[705] *Romak v. Uzbekistan; supra* at FN 697, para. 177, footnote omitted. The tribunal cites the definition of 'investment' of the Black's Law Dictionary:

> "***Investment.*** *(16c)* ***1.*** *An expenditure to acquire property or assets to produce revenue; a capital outlay.* ***2.*** *The asset acquired or the sum investment.* ***3.*** *Investiture.* ***4.*** *Livery of Saisin.*" (*Romak v. Uzbekistan; supra* at FN 697, note 152, emphasis original)

[706] *Romak v. Uzbekistan; supra* at FN 697, para. 177, footnote omitted. The tribunal refers to the Black's Law Dictionary for the definition of 'asset':

> *"**Asset**. (16c)* ***1.*** *An item that is owned and has value.* ***2.*** *(pl.) The entries on a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable, and goodwill.* ***3.*** *(pl.) All the property of a person (esp. a bankrupt or deceased person) available for paying debts or for distribution.*" (*Romak v. Uzbekistan; supra* at FN 697, note 153, emphasis original)

[707] *Saba Fakes v. Turkey; supra* at FN 302, para. 110.

[708] *Id.*

[709] *See,* the conclusion of the tribunal in *Alpha v. Ukraine*:

the element of 'duration' retained by the tribunal in *Saba Fakes v. Turkey,* it appears that the ordinary meaning of the term 'investment' does not discriminate between investments of one hour and investments of three years. Portfolio investments, for example, may vary between a few minutes and few years.

The interpretation of Article 1(6) of the ECT suggests that the while the definition of 'Investment' is broad enough to encompass "every kind of asset, owned or controlled directly of indirectly by an Investor", it is not boundless. Paragraph 3 of Article 1(6) restricts the notion of 'Investment' to "investment associated with an Economic Activity in the Energy Sector". Besides the required association between the Investment and the Economic Activity in the Energy Sector, the Investment must be an investment within the ordinary meaning of the term. Consequently, not "every asset" is an Investment under the ECT, but only those assets that are investments. For example, sale of goods and other one–off transaction, although associated with an Economic Activity in the Energy Sector, may not be construed as Investments, as they do not satisfy the requirement to be investments within the ordinary meaning of the term.

Investors may only submit a dispute under Article 26 of the ECT if there is a dispute relating to an Investment that concerns an alleged breach of the obligations under Part

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> "Should a tribunal find it necessary to check whether a transaction falls outside any reasonable understanding of "investment," the criteria of resources, duration, and risk would seem fully to serve that objective." (*Alpha Projektholding GmbH v. Ukraine*, Award of 8 November 2010, para. 312)

See also, Douglas, Z.; *supra* at FN 292, p. 189:

> "**Rule 23. The Economic materialisation of an investment requires the commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return.**" (emphasis original, footnote omitted)

DOUGLAS' conclusion was retained by the tribunal in *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, Award of 30 July 2009, paras 36–47. *See* also, the conclusion of the tribunal in *Toto Costruzioni v. Lebanon*:

> "In the absence of specific criteria or definitions in the ICSID Convention, the underlying concept of investment, which is economical in nature, becomes relevant: it implies an economical operation initiated and conducted by an entrepreneur using its own financial means and at its own financial risk, with the objective of making a profit within a given period of time." (*Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, Decision on Jurisdiction of 11 September 2009, para. 84)

For further comments on the 'risk' criterion, *see* Baltag, Crina; *The Risk of Investment under the ICSID Convention,* 3(5) TDM (2006).

III of the ECT.[710] The ECT does not define the terms "disputes […] relating to an Investment",[711] but the words "relating to" suggest that a dispute should be connected or associated with an Investment, terms that are broader than the wording 'dispute arising out of an Investment'.[712]

The notion of 'Investment' under the ECT is not settled in the practice and literature of the ECT. While the ECT case law is not yet abundant, it raises interesting debates concerning the notion of 'Investment'.[713] The provision under Article 1(6)(b) of the ECT – "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" – was discussed by several ECT tribunals. In the *Yukos Cases*, the tribunal rejected the argument of the Russian Federation that the drafters of the ECT meant beneficial rather than legal ownership. Referring to the wording of Article 1(6)(b) of the ECT, the *Yukos* tribunal found that it contains

> "[…] the widest possible definition of an interest in a company […], with no indication whatsoever that the drafters of the Treaty intended to limit ownership to "beneficial" ownership."[714]

The tribunal in *Kardassopoulos v. Georgia* held that indirect ownership of shares constitutes an investment under the ECT.[715] Similar conclusion was reached by the tribunal in *Amto v. Ukraine*:

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[710] Art. 26(1) of the ECT.

[711] *See* also, Waelde, Thomas W.; Ben Hamida, Walid; *The Energy Charter Treaty and corporate acquisition,* p. 187, in Coop, G.; Ribeiro, C. (eds.); *supra* at FN 90.

[712] *See* also, on this wording, Lew, Julian D.M.; Mistelis, Loukas A.; Kröll, Stefan M.; *Comparative International Commercial Arbitration,* The Hague: Kluwer Law International, 2003, p. 169.
Art. 25(1) of the ICSID Convention extends the jurisdiction of the ICSID to "any legal dispute arising directly out of an investment". The wording of this provision reduces significantly the types of disputes covered by the ICSID mechanism.

[713] *See,* the OGEMID discussion on the notion of Investment under Art. 1(6) of the ECT and the ICSID Convention, were Kaj HOBÉR concludes that

> "[…] we have discussed numerous critical and thorny issues that arbitral tribunals may struggle with when interpreting fundamental concepts of investment instruments [and] these discussions will continue […] in front of arbitral tribunals." (OGEMID; Guest Kaj Hobér: *The Investor as the Initiator of Emerging Trends in Investment Treaty Interpretation*, 8(1) TDM (2011))

[714] *Yukos Cases; supra* at FN 98, para. 430.

> "The Arbitral Tribunal accepts that the Claimant owns 204,165 shares in EYUM–10. These shares constitute a kind of asset owned by the Claimant within the definition of the first part of Article 1(6) ECT, and in particular constitute 'shares ...in a company or business enterprise' identified in Article **1(6)(b).**"[716]

The issue whether contracts of sale and other one–off transactions could be covered by the definition of Investment under Article 1(6) of the ECT was debated in *Petrobart v. Kyrgyzstan*.[717] The tribunal concluded that, although the dispute in this case related to a contract for the sale of gas condensate, it constituted an investment within the meaning of the ECT.[718] While taking into account the provision of Article 1(6)(c) of the ECT

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[715] *Kardassopoulos v. Georgia; supra* at FN 83, para. 124:

> "The Tribunal is of the view that, in the present case, the indirect ownership of shares by Claimant constitutes an "investment" under the BIT and the ECT".

[716] *Amto v. Ukraine; supra* at FN 529, para. 39, emphasis original. Also, *Mohammad Ammar Al–Bahloul v. Republic of Tajikistan*, Partial Award on Jurisdiction and Liability of 2 September 2009, para 142:

> "[…] the Energy Charter Treaty protects not only directly, but also indirectly, owned or controlled investments. It applies to assets held through an intermediary company in a non-ECT State. Here, Claimant alleges he owns and controls 100% of the shares in Vivalo […], and thus indirectly owns shares in the Baldjuvon and Petroleum SUGD joint ventures companies."

See also, the conclusion of the tribunal in *AES v. Hungary*:

> "Both actions (purchasing the company and carrying out the Retrofit of the power station) qualify as investments in accordance with Article 1(6) of the ECT […]." (*AES v. Hungary; supra* at FN 240, para. 6.2.5)

[717] Under the ICSID Convention, the issue was recently discussed by the tribunal in *Globex v. Ukraine*. The claimants, Global Trading Resource Corp. and Globex International Inc., alleged that Ukraine breached its obligations under the US–Ukraine BIT by failure to pay and take most of the poultry shipped by the claimants under several sale and purchase contracts. (*Globex Trading Resource Corp. and Globex International, Inc. v. Ukraine*, Award of 1 December 2010, para. 39) The tribunal concluded that sale–purchase contracts are pure commercial transactions and cannot qualify as an investment under Art. 25 of the ICSID Convention. Although the claimants argued that they were induced to conclude the contracts by the Ukrainian Prime–Minister, the tribunal in *Globex v. Ukraine* held that this particularity does not change the nature of the transactions. The tribunal concluded that

> these are individual contracts, of limited duration, for the purchase and sale of goods, on a commercial basis and under normal CIF trading terms, and which provide for delivery, the transfer of title, and final payment, before the goods are cleared for import into the recipient territory; and that neither contracts of that kind, nor the money expended by the supplier in financing its part in their performance, can by any reasonable process of interpretation be construed to be 'investments' for the purposes of the ICSID Convention. (*Globex v. Ukraine*, para. 56)

See also the conclusion of the Annulment Committee in *MHS v. Malaysia*

> It appears to have been assumed by the [ICSID] Convention's drafters that use of the term "investment" excluded a simple sale and like transient commercial transactions from the jurisdiction of the Centre. (*Malaysian Historical Salvors SDN BHD v. Malaysia*, Decision on the Application for Annulment of 16 April 2009, para. 69)

[718] *Petrobart v. Kyrgyzstan; supra* at FN 124, pp. 69 and 72. Claimant's claim also referred to the judgements of the Bishkek Court, which recognized the rights of the claimant deriving from the sale contract. The tribunal dismissed Petrobart's argument on this issue and concluded that

> "[…] a correct legal analysis leads to the conclusion that the Contract and the judgment are not in themselves assets but merely legal documents or instruments which are bearers of legal rights, and these legal rights, depending on their character, may or may not be considered as assets. The relevant question which requires consideration is therefore whether the rights provided for in the Contract and confirmed in the judgment constituted assets and were therefore an investment in the meaning of the Treaty. In other words, the question

providing for "claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment", the tribunal in *Petrobart v. Kyrgyzstan* held that this provision is not unusual for investment treaties, as the definition of 'investment' "is often a wide concept in connection with investment protection and […] claims to money may constitute investments even if they are not part of a long–term business engagement in another country."[719] However, the tribunal rejected this argument in determining whether claimant had an Investment within the meaning of the ECT since the provision under Article 1(6)(c) "presents certain ambiguities". As the tribunal suggested,

> "[…] it is not entirely clear whether the words "pursuant to contract having an economic value and associated with an Investment" or parts of these words – "having an economic value and associated with an Investment" or "associated with an Investment" – relate only to "claims to performance" or also to "claims for money". If we assume that at least the terms "associated with an Investment" also relate to "claims for money", we are faced with the logical problem that the term "Investment" is not only the term to be defined but is also used as one of the terms by which "Investment" is defined. This means that the definition is in reality a circular one which raises a logical problem and creates some doubt about the correct interpretation."[720]

Considering that the Article 1(6)(c) is a circular provision, the tribunal decided to pursue a different line of reasoning and referred to the provisions of Article 1(6)(f), which encompasses "any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector." The conclusion of the tribunal was that "a right conferred by contract to

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is whether Petrobart's right under the Contract to payment for goods delivered under the Contract was an asset and constituted an investment under the Treaty." (*Petrobart v. Kyrgyzstan; supra* at FN, p. 71)

[719] *Petrobart v. Kyrgyzstan; supra* at FN 124, p. 71. In *Al–Bahloul v. Tajikistan*, the claimant entered into six oil and gas exploration agreements with the State Committee for Oil & Gas of Tajikistan. *See*, *Al–Bahloul v. Tajikistan, supra* at FN 716, para. 136. The tribunal held that

> "[s]ince the exercise of the exploration and exploitation rights pursuant to these agreements requires the issuance of a license, they cannot be considered to constitute "*rights conferred by law…to undertake any Economic Activity in the Energy Sector*" […]. However, they do give Claimant a contractual right […] to the issuance of necessary licenses to start these activities […]. As such, they may be considered as "*claims to performance pursuant to contract having an economic value and associated with an Investment"* […]. It is clear that they relate to an Economic Activity in the Energy Sector, and therefore satisfy that requirement as well." (*Al–Bahloul v. Tajikistan, supra* at FN 716, para. 139, emphasis original)

[720] *Petrobart v. Kyrgyzstan; supra* at FN 124*,* p. 72.

undertake an economic activity concerning the sale of gas condensate is an investment according to the Treaty"[721]

As shown above, the ECT envisaged an objective notion of 'Investment'. Although the list provided by Article 1(6) is generous and could virtually encompass any asset, paragraph 3 of Article 1(6) calls for the Investment to be an "investment associated with an Economic Activity in the Energy Sector". As explained by the tribunal in *Romak v. Uzbekistan*, pure commercial transactions, such as one–off sales of goods, may constitute an investment if included by the states in the covered investments under a BIT.[722] However, "in such cases, the wording of the instrument in question must leave no room for doubt that the intention of the contracting States was to accord to the term "investment" an extraordinary and counterintuitive meaning."[723] The tribunal in *Petrobart v. Kyrgyzstan* disregarded the objective meaning of the notion of 'investment', as stated in paragraph 3 of Article 1(6) and misinterpreted the provisions of Article 1(6)(c). Article 1(6)(c) refers to "claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment". There is no circular or unclear meaning of this provision, as suggested by the tribunal.

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[721] *Id.* The Svea Court of Appeal upheld the conclusion of the tribunal in *Petrobart v. Kyrgyzstan*, stating that

> "[…] the term *investment* can have different meaning in different international contexts. The meaning of the term as defined in the ECT has a wide scope of application. […]
> The Court of Appeal finds, as well as the Arbitral Tribunal, that the definitions in Article 1 (6) and 1 (5) in the ECT must be interpreted as including the investment made by Petrobart. Thus, it can not be claimed that the arbitration award is not covered by a valid arbitration agreement between the parties." (*Republic of Kyrgyzstan v. Petrobart Ltd.*, Svea Court of Appeal; *supra* at FN 204, p. 8)

[722] *Romak v. Uzbekistan; supra* at FN 697, para. 205.

[723] *Id.* The tribunal gave considerable weight to the ATEC concluded at the same time with the BIT by Uzbekistan and Switzerland. *See, supra* at FN 698.
The tribunal in *Romak v. Uzbekistan* also relied on the object and purpose of the BIT, which refers to "economic cooperation to the mutual benefit of both States" and to the "aim to foster the economic prosperity of both States". In the opinion of the tribunal, the object and purpose of the BIT suggests "an intent to protect a particular kind of assets, distinguishing them from mere ordinary commercial transactions". *See, Romak v. Uzbekistan; supra* at FN 697, para. 189. *See* also, the Draft OECD Multilateral Agreement on Investment refers to claims of money, which may also arise from sales of goods or services, and concludes that "[t]hese claims are not generally considered as investments." (OECD; *OECD Draft Multilateral Agreement on Investment*, DAFFE/MAI(98)8/REV1, 22 April 1998, p. 7, pt. 11)

The textual interpretation of the terms of Article 1(6)(c) suggest that 'claims to money' and 'claims to performance', arising from a 'contract' which has 'an economic value' and it is 'associated with an Investment' are to be considered potential Investments.[724] It is not claims to money, as possible Investments, that must be associated with an Investment – the interpretation which lead the tribunal in *Petrobart v. Kyrgyzstan* to conclude that Article 1(6)(c) is a circular provision, but the contract from which the claims to money arise.[725] These contracts – the contract for sale of gas condensate in *Petrobart v. Kyrgyzstan* – must be associated with an Investment,[726] which was not the case in this dispute.[727] Similarly, Article 1(6)(f) of the ECT refers to "any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector." The provision refers to "any right […] to undertake any Economic Activity in the Energy Sector", while this right can be granted pursuant to 'law', 'contract', 'licenses' and 'permits'. While the notion of 'Economic Activity in the Energy Sector' is broad enough to cover

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[724] The requirement for the contracts to be associated with an Investment was suggested by the United States delegation. *See*, *Basic Agreement of 24 June 1992*, 32/92 BA 14.

[725] This suggests that there is an indirect association between the claims to money and the claims to performance and the Investment. This provision is, thus, correlated with Art. 26(1) of the ECT that refers to "[d]isputes […] relating to an Investment".
The tribunal in *Al–Bahloul v. Tajikistan, supra* at FN 716, para. 136, had the opportunity to discuss this provision and to revisit the conclusions of the *Petrobart v. Kyrgyzstan*, but it simply concluded that claimant's Investment falls under the provisions of Art. 1(6)(c) of the ECT.

[726] *See* also, Poulain, B.; *Energy Charter Treaty – Petrobart vs. The Kyrgyz Republic – a few reservations regarding the Tribunal's constructions of the material, temporal and spatial application of the Treaty*, 3(3) OGEL (2005):

> "[…] this position appears to dismiss a little too quickly the very last part of this definition, which requires a link – or an association – with an «Investment»." (Poulain, B.; *supra,* p. 3)

For a similar opinion, *see,* Zukova, Galina; *The Award in* Petrobart Limited v. Kyrgyz Republic*,* pp. 337–338, in Alvarez Aguilar, Guillermo; Reisman, Michael W. (eds); *The Reasons Requirement in International Investment Arbitration*; Leiden: Martinus Nijhoff Publishers, 2008. *See* also, Douglas, Z.; *supra* at FN 292, pp. 184–185, paras 385–389.

[727] Similar provision can be found in Article 1(c)(iii) of the 1983 United States Model BIT, which refers to "a claim of money or a claim to performance having economic value, and associated with an investment". *See,* Art. 1(c)(iii) of the 1983 United States Model BIT, in Vandevelde, K.J.; *supra* at 569, p. 780. As VANDEVELDE points out with reference to the 1983 United States Model BIT, "[t]he phrase "associated with an investment" is intended to exclude claims associated with a current commercial transaction, such as the sale of goods." *See,* Vandevelde, K.J.; *supra* at 569, p. 117.

"marketing, or sale of Energy Materials and Products",[728] paragraph 3 of Article 1(6) still requires for an Investment to be an investment within the ordinary meaning of the term. The two provisions discussed by the tribunal in *Petrobart v. Kyrgyzstan* are not sufficient to justify the inclusion of one–off transactions, such as sale of gas, under the notion of 'Investment'.[729]

2 INVESTMENT ASSOCIATED WITH AN ECONOMIC ACTIVITY IN THE ENERGY SECTOR

The definition of 'Investment' under Article 1(6) extends only to "investments associated with an Economic Activity in the Energy Sector". Economic Activity in the Energy Sector is defined by Art. 1(5) of the ECT as

> "[…] an economic activity concerning exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade,

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[728] Art. 1(5) of the ECT. But *see,* PETROCHILOS and RUBINS, who suggest that one–off transactions are covered by both Articles 1(6)(c) and 1(6)(f):

> "[i]t would have been relatively simple for the ECT's drafters to indicate, either in the treaty text or in supporting documentation, that trade contracts were not intended to fall within the scope of treaty protection. This could have been done by removing the words "marketing" and "sale" from Article 1(6)(f) and narrowly defining the types of "investment" to which contract rights must be related to qualify under the Treaty." (Petrochilos, Georgios; Rubins, Noah; *Final Arbitral Award Rendered in 2005 in SCC Case 126/2003 Petrobart Ltd v. The Kyrgyz Republic,* SIAR 2005:3, para. 26)

However, contrary to what the authors assert, paragraph 3 of Art. 1(6) of the ECT requires that Investments must constitute an investment. While the authors consider that it is possible that "the phrase "and associated with an Investment" in Article 1(6)(c) was intended to limit ECT's coverage to contract related to more traditional investment projects", they suggest that the literal interpretation of this provision allowed the tribunal to conclude that Petrobart made an Investment. *See,* Petrochilos, G; Rubins, N; *supra*, para. 26. The textual interpretation of Art. 1(6)(c), though, suggests the opposite conclusion.

[729] As POULAIN explains,

> "[i]f today, it is accepted that bilateral and multilateral instruments adopt a broad definition of the concept of «investment», transactions in the international sale of goods traditionally stay on the fringe of this characterization." (Poulain, B.; *supra* at FN 726, p. 5)

WAELDE, in a paper published in 1996, considered that the expansion of the notion of 'investment' "has not yet reached merely contractual claims against government or private entities, arising out of short–term commercial transactions without relation to a more lasting, more substantial, "investment" project." *See,* Waelde, T.W; *supra* at FN 66, p. 271, footnote omitted. In a paper published after the award in *Petrobart v. Kyrgyzstan* was rendered, WAELDE reconsidered his earlier opinion and concluded that

> "[…] the ECT covers not only contractual claims to performance when the contract is part of a foreign direct investment scheme–the traditional notion, but also simple contract claims, e.g. non-payment on a sales contract or embodied in a judgment based on a sales contract." (Waelde, Thomas W.; *Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues based on Recent Litigation Experience*, p. 232, in Horn, N.; Kröll, S. (eds.); *supra* at FN 670)

marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises."[730]

Understanding no. 2 of the Final Act clarifies the notion of "Economic Activity in the Energy Sector" by providing an illustrative list of such Activity:

> "[…] (i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium;
> (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;
> (iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal–slurry pipelines;

[730] Annex NI of the ECT reads as follows:

> "27.07 Oils and other products of the distillation of high temperature coal tar; similar products in which the weight of the aromatic constituents exceeds that of the non-aromatic constituents (e.g., benzole, toluole, xylole, naphtalene, other aromatic hydrocarbon mixtures, phenols, creosote oils and others).
> 44.01.10 Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms.
> 44.02 Charcoal (including charcoal from shells or nuts), whether or not agglomerated."

The concept of "Energy Materials and Products" is defined by Art. 1(4) of the ECT:

> ""Energy Materials and Products", based on the Harmonized System of the Customs Co-operation Council and the Combined Nomenclature of the European Communities, means the items included in Annex EM."

Annex EM to the ECT provides for the following Energy Materials and Products: **Nuclear energy** 26.12 Uranium or thorium ores and concentrates; 26.12.10 Uranium ores and concentrates; 26.12.20 Thorium ores and concentrates; 28.44 Radioactive chemical elements and radioactive isotopes (including the fissile or fertile chemical elements and isotopes) and their compounds; mixtures and residues containing these products; 28.44.10 Natural uranium and its compounds; 28.44.20 Uranium enriched in U235 and its compounds; plutonium and its compounds; 28.44.30 Uranium depleted in U235 and its compounds; thorium and its compounds; 28.44.40 Radioactive elements and isotopes and radioactive compounds other than 28.44.10, 28.44.20 or 28.44.30; 28.44.50 Spent (irradiated) fuel elements (cartridges) of nuclear reactors; 28.45.10 Heavy water (deuterium oxide); **Coal, Natural Gas, Petroleum and Petroleum Products, Electrical Energy** 27.01 Coal, briquettes, ovoids and similar solid fuels manufactured from coal; 27.02 Lignite, whether or not agglomerated excluding jet; 27.03 Peat (including peat litter), whether or not agglomerated; 27.04 Coke and semi-coke of coal, of lignite or of peat, whether or not agglomerated; retort carbon; 27.05 Coal gas, water gas, producer gas and similar gases, other than petroleum gases and other gaseous hydrocarbons; 27.06 Tar distilled from coal, from lignite or from peat, and other mineral tars, whether or not dehydrated or partially distilled, including reconstituted tars; 27.07 Oils and other products of the distillation of high temperature coal tar; similar products in which the weight of the aromatic constituents exceeds that of the non-aromatic constituents (e.g., benzole, toluole, xylole, naphtalene, other aromatic hydrocarbon mixtures, phenols, creosote oils and others); 27.08 Pitch and pitch coke, obtained from coal tar or from other mineral tars; 27.09 Petroleum oils and oils obtained from bituminous minerals, crude; 27.10 Petroleum oils and oils obtained from bituminous minerals, other than crude; 27.11 Liquified petroleum gases and other gaseous hydrocarbons - natural gas, - propane, - butanes, - ethylene, propylene, butylene and butadiene (27.11.14), - other. In gaseous state: - natural gas, - other; 27.13 Petroleum coke, petroleum bitumen and other residues of petroleum oils or of oils obtained from bituminous minerals; 27.14 Bitumen and asphalt, natural; bituminous or oil shale and tar sands; asphaltites and asphaltic rocks; 27.15 Bituminous mixtures based on natural asphalt, on natural bitumen, on petroleum bitumen, on mineral tar or on mineral tar pitch (e.g., bituminous mastics, cut-backs); 27.16 Electrical energy; **Other Energy** 44.01.10 Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms; 44.02 Charcoal (including charcoal from shells or nuts), whether or not agglomerated.

For the Harmonized System of the Customs Co–operation Council and the Combined Nomenclature of the European Communities, *see Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff*; *Commission Regulation (EC) No 948/2009 of 30 September 2009 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.*

(iv) removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations;
(v) decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;
(vi) marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and
(vii) research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency."

The documents of the ECT's negotiation show that there were various proposals on the relationship between Investments and the Economic Activities in the Energy Sector until the final version was approved. The proposal to restrict the definition of Investment to the energy field was suggested by the United States delegation in March 1992.[731] The Basic Agreement of 12 August 1992 referred to "every kind of energy investment",[732] while the Basic Agreement of 21 October 1992 defined the notion of 'Investment' as "every kind of energy asset".[733] Later on, it was suggested to replace the reference to "energy asset" with "every kind of asset employed in the activities of exploration, production, conversion, storage, transport, distribution and supply of Energy Materials and Products […] and, in related services".[734] The Basic Agreement of 9 February 1993 inserted a new paragraph in the definition of the notion of 'Investment' according to which, "[f]or the purposes of this Agreement, "Investment" refers to any investment associated with an economic activity in the Energy Sector."[735]

[731] *Basic Agreement of 19 March 1992*, 17/92 BA 10.
[732] Art. 1(4) of the *Basic Agreement of 12 August 1992*, 37/92 BA 15.
[733] Art. 1(4) of the *Basic Agreement of 21 October 1992*, 53/92 BA 22.
[734] *Note from the Chairman of Working Group II,* 8 December 1992. The proposal was inserted in the *Basic Agreement of 21 December 1992*, 76/92 BA 31.
[735] Art. 1(5) paragraph 3 of the *Basic Agreement of 9 February 1993*, 15/93 BA 35. The "Energy Sector" was defined as "the exploration, extraction, production, conversion, storage, transmission, distribution and trade in, marketing and sales of Energy Materials and Products […]", while the illustrative list of economic activities in the Energy Sector included the activities currently included in Understanding no. 2.

The definition under Article 1(5) excludes maritime and air transportation,[736] and Economic Activity in the Energy Sector concerning the Energy Materials and Products listed in Annex NI.[737] The term 'Economic Activity' suggests that only activities having economic character are considered for the purpose of the ECT.[738] Given this economic nature of the activity, it is suggested that "purely scientific activities, e.g. by foreign scientific organizations, are not covered" by the definition under Article 1(5) of the ECT.[739]

While many of the activities listed in Understanding no. 2 "are traditional activities associated with the energy industry and should not, in practice, raise particular difficulty",[740] the critical point of paragraph 3 of Article 1(6) of the ECT is the wording "associated with".[741] The issue raised by the terms 'associated with' refers to the degree of association between investment and an Economic Activity in the Energy Sector in order to recognize an Investment. The tribunal in *Amto v. Ukraine* explained that

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[736] Art. 1(5) refers to "land transportation" only. The early definition of Economic Activity in the Energy Sector generally referred to "transport". *See*, for example, *ECT Draft of 1 June 1993*, third version, 46/93 CONF 60. The proposal to exclude maritime and air transportation came with the seventh version of the ECT Draft and it was suggested by the United States and Japan. According to this proposal, the following provision should have been inserted in the ECT:

> "Nothing in the Treaty shall apply to maritime transport (including inland waterways) and related activities, and to air transport (including specially air services)." (*ECT Draft of 17 March 1994,* seventh version, 17/94 CONF 96)

However,

> "[…] the extension of the definition of 'Investment' to investments (i.e. assets) 'associated with' an 'Economic Activity in the Energy Sector" attenuates the sectoral restriction of the Treaty's protections and dispute resolution mechanisms; it can provide a basis for claiming coverage, for example, with respect to otherwise uncovered petrochemical facilities within an oil refinery complex, or maritime transportation that is 'associated with' a covered on-land investment." (Bamberger, Craig; Linehan, Jan; Waelde, Thomas; *The Energy Charter Treaty*, para. 4.16, in Roggenkamp, Martha; Redgwell, Catherine; Rønne, Anita; Del Guayo, Iñigo (eds.); *Energy Law in Europe. National, EU and International Law and Institutions*, New York: Oxford University Press, 2001)

[737] *See, supra* at FN 730.

[738] *The New Oxford American Dictionary* defines the term 'economic' as "relating to economics or the economy", while the notion of 'economics' means "the branch of knowledge concerned with the production, consumption, and transfer of wealth" and the term 'economy' refers to "the wealth and resources of a country or region". *See, The New Oxford American Dictionary; supra* at FN 136, p. 536.

[739] Waelde, T.W.; *supra* at FN 66, p. 273.

[740] Gaillard, E.; *supra* at FN 420, p. 66.

[741] WAELDE referred to it as an "open–ended term". *See,* Waelde, T.W.; *supra* at FN 66, pp. 273–274.

> "[t]he drafters of the Energy Charter Treaty did not require an Investment to be an Economic Activity in the Energy Sector, but only to be 'associated with' such an activity."[742]

The Energy Charter Secretariat, referring to the terms 'investment associated with an economic Activity in the Energy Sector', emphasises that

> "[t]he term "associated with" implies that it includes not only the establishment of an energy company as such (e.g. a refinery), but also investments indirectly linked to economic activity in the energy sector (e.g. office space associated with a refinery)".[743]

The ordinary meaning of the terms 'associated with' refers to something that is "connected with something else",[744] while the term 'connected' is understood as to "have a link or relationship with" or to "associate or relate in some respect".[745] This suggests, as noted by the tribunal in *Amto v. Ukraine*, that while there must be a link or a relationship between an investment and an Economic Activity in the Energy Sector, there is no identity requirement between an investment and an Economic Activity in the Energy Sector to identify an Investment within the meaning of the ECT. Or, as clarified by the *Amto v. Ukraine* tribunal,

> "[t]he associated activity of any alleged investment must be energy related, without itself needing to satisfy the definition in Article 1(5) of an Economic Activity in the Energy Sector."[746]

Nevertheless, the terms 'associated with' do not exclude the identity between an investment and an Economic Activity, which suggests that an Investment may be any investment identified as an Economic Activity in the Energy Sector.[747]

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[742] *Amto v. Ukraine; supra* at FN 529, para. 42.
[743] *The Energy Charter Treaty. A Reader's Guide; supra* at FN 52, p. 21.
[744] *The New Oxford American Dictionary; supra* at FN 136, p. 95.
[745] *Ibid.*, p. 361.
[746] *Amto v. Ukraine; supra* at FN 529, para. 42.
[747] "*Cui licet quod est plus, licet utique quod est minus*", *Regulae Iuris in VI Decretalium Bonifacii VIII*, 1298 (unofficial translation: Who may do more, may do less).

The tribunal in *Amto v. Ukraine* explained that the association between an Investment and an Economic Activity in the Energy Sector should be based on "factual rather than legal" association.[748] In the tribunal's opinion,

> "[a] mere contractual relationship with an energy producer is insufficient to attract ECT protection where the subject matter of the contract has no functional relationship with the energy sector."[749]

WAELDE separated potential Investments associated with an Economic Activity in the Energy Sector into two categories: "clearly covered core zones of related activities",[750] and "mixed (energy/non–energy) investments".[751] For the first category, he gave the example of a company having "an energy label […] in the firm's name and […] predominantly engaged in energy services",[752] while for the second, he referred to "a department of a larger organization [that] provides energy–focused services",[753] and to "a company [that] is only occasionally engaged, with an energy company, in commercial transactions of a type that has no energy–specificity".[754] In the case of mixed investments, WAELDE noted that the situation of a company occasionally engaged in commercial transactions having no energy–specificity would not qualify for the ECT's coverage since "there must be a substantial, and lasting, energy–industry specificity written clearly on the face of a covered activity."[755] However, Article 1(6) and Understanding no. 2 of the ECT do not refer to a "substantial" and "lasting"

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[748] *Amto v. Ukraine; supra* at FN 529, para. 42.
[749] *Ibid.*, para. 42.
[750] Waelde, T.W.; *supra* at FN 66, p. 274.
[751] *Id.*
[752] *Id.*
[753] *Id.*
[754] *Id.* WAELDE referred here to "selling non-energy-specific products and services to, or purchasing energy products from, an energy project." *See,* Waelde, T.W.; *supra* at FN 66, p. 274.
[755] Waelde, T.W.; *supra* at FN 66, p. 274. For the mixed (energy/non–energy) investments, WAELDE suggested two approaches: "either to make a separation (for application of the Treaty's standards and Article 26 arbitration), which is very difficult in practice; or to establish if the energy character or the non–energy activity predominates." *See,* Waelde, T.W.; *supra* at FN 66, p. 274.

association between an investment and an Economic Activity in the Energy Sector.[756] The ordinary meaning of the terms 'associated with' suggests that a link between an Investment and an Economic Activity is sufficient to qualify an Investment under the ECT.[757] Nonetheless, Article 1(6) of the ECT requires that such association is established between an "investment" and an Economic Activity in the Energy Sector, which leads to the conclusion that one–off transactions, even substantially associated with an Economic Activity, will not qualify as an Investment for the purpose of the ECT.

The requirement in paragraph 3 of Article 1(6) of the ECT was extensively discussed in *Amto v. Ukraine*. The claimant, a Latvian investment company,[758] purchased 67.2% of the shares in EYUM–10,[759] a Ukrainian company, having as main activity the "'installation of electric wiring and reinforcement', 'installation of fire and security alarm systems' and 'painting works'".[760] EYUM–10 provided services to ZAES, the largest nuclear power plant in Ukraine and a division of the National Nuclear Power

[756] The documents of the negotiation of the ECT record a proposal from the Japanese delegation, which suggested to particularize Investments as "any investment associated with an economic activity whose principal purpose is the exploration, extraction, production, conversion, storage, transmission, distribution and trade in, marketing and sales of Energy Materials and Products […]", because, as explained by the Japanese representatives, there are investments included in the definition of Investment in industries that are not energy industries, for example, "power generators […] for the production of computer soft/hardwares in an IBM plant in Japan." *See, Letter from Shinya Wakimoto, Japan, to the European Energy Charter Conference Secretariat,* 18 February 1993. The proposal was not retained for the final draft of the ECT. The Chairman of the Legal Sub–Group, though, expressed its concern regarding the coverage of non–energy activities by the ECT given the wording "associated with":

> "[…] Article 1(6) reference to investment "associated with" and "Economic Activity in the Energy Sector" leaves ambiguity as to whether the non-energy aspects of an energy investment are intended to be covered by the Treaty." (*Memorandum of C. Bamberger, Chairman of the Legal Sub–Group; supra* at FN 662)

[757] Apparently, the drafters of the ECT did not intend to include every investment associated with an Economic Activity in the Energy Sector in the notion of 'Investment'. A document in connection with the drafting of the ECT suggests that one of the original wordings of Understanding No. 2 of the ECT contained a paragraph that excluded insurance and financial services from the ECT's coverage:

> "The establishment or operation of banks, insurance companies and other institutions providing financial services shall not be considered Economic Activities in the Energy Sector." (European Energy Charter Conference Secretariat, *Annex III*, 23 August 1994)

The proposal was later removed from the final version of Understanding No. 2.

[758] *Amto v. Ukraine; supra* at FN 529, para. 16.

[759] *Ibid.*, para. 19.

[760] *Ibid,* para. 17.

Generating Company 'Energoatom'.[761] ZAES described the relationship with EYUM–10 as follows:

> "*«*[…] *CJSC EYUM–10 has been being* [sic] *the strategic partner of SD ZAES for 20 years executing important works on reconstruction and technical rearmament repair.* […] *CJSC EYUM–10 works* [are] *strategically important and directed on the reliable and safe exploitation of power units of our nuclear power plant.* […] *The continuation of the contractual relations is vitally an important stage not only for SD ZAES but also for atomic energy on the whole.»*"[762]

Ukraine objected to the jurisdiction of the tribunal based on the fact that "AMTO's shares in EYUM–10 do not constitute a qualified 'Investment' under the ECT, since they are not 'associated with an Economic Activity in the Energy Sector', as required by Article 1(6) of the ECT".[763] Ukraine further contended that "EYUM–10's activities, which consist of electric installation works, repair, reconstruction and technical re–equipment works and services to ZAES", are not covered by Article 1(5) and Understanding no. 2 of the ECT and are "not sufficiently closely "associated with" an economic activity of ZAES/Energoatom in the energy sector, such as the production (or sale) of Energy Materials and Products."[764] The tribunal rejected Ukraine's objection and rightfully concluded that AMTO's shareholding in EYUM–10 constitutes an Investment for the purpose of the ECT and satisfies the requirement under paragraph 3 of Article 1(6) of the ECT to be associated with an Economic Activity in the Energy Sector.[765] The tribunal relied on the fact that "ZAES/Energoatom is engaged in an Economic Activity in the Energy Sector as its activity concerns the production of Energy Material and Products, namely electrical energy", while "EYUM–10 provides

[761] *Ibid,* para. 20.
[762] *Id.*
[763] *Amto v. Ukraine; supra* at FN 529, para. 26.
[764] *Id.*
[765] *Amto v. Ukraine; supra* at FN 529, para. 43.

technical services –installation, repair and upgrades– directly related to the production of electrical energy".[766]

3. INVESTMENT IN THE AREA OF A CONTRACTING PARTY

Article 26(1) of the ECT specifies that the consent to submit disputes between an Investor and a Contracting Party arising out of alleged breaches of Part III of the ECT covers only Investments "in the Area" of the respondent Contracting Party.[767] Article 1(10) of the ECT defines the notion of 'Area', as follows:

> ""Area" means with respect to a state that is a Contracting Party:
> (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and
> (b) subject to and in accordance with the international law of the sea: the sea, sea–bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.
> With respect to a Regional Economic Integration Organization which is a Contracting Party, Area means the Areas of the member states of such Organization, under the provisions contained in the agreement establishing that Organization."[768]

For states that are Contracting Parties to the ECT, Article 1(10) defines the notion of 'Area' as including the territory of the state with its land, internal waters and territorial

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[766] Besides this, the tribunal retained as relevant the long–lasting relationship between EYUM–10 and ZAES, as EYUM–10 "has provided these services through multiple contracts over a substantial period of time." *See, Amto v. Ukraine; supra* at FN 529, para. 43.

[767] The earlier drafts of the ECT included the requirement for Investments to be in the Area of another Contracting Party in the definition of Investment under Art. 1(6):

> ""Investment" means every kind of asset owned or controlled, directly or indirectly, by Investors of one or more Contracting Parties in the Domain of another Contracting Party […]." (Art. 1(5) of the *Basic Agreement of 9 February 1993*, 15/93 BA 35)

The requirement was soon afterwards excluded from the wording of Art. 1(6) of the ECT.

[768] Territories that are not excluded by a Contracting Party from the application of the ECT, in accordance with Art. 40 of the ECT, are included in the Area of that Contracting Party. *See,* Chapter I.1.4 above.
The first draft of this provision referred to the notion of "Territory" and was defined, in respect of each Contracting Party, as

> "[…] its land territory as well as those maritime areas adjacent to the outer limit of its territorial sea of any of its territories, over which the state concerned exercises, in accordance with international law, sovereign rights for the purpose of exploration and exploitation of the natural resources of such areas." (Art. 1(i) of the *Basic Protocol of 11 September 1991,* 8/91 BP 2)

The later drafts referred to the notion of 'Domain', before settling on the term 'Area', and included references to the Area of REIOs.

sea,[769] and, in accordance with the international law of the sea, the sea, the seabed and its subsoil over which the Contracting Party exercises sovereign rights and jurisdiction.[770] For energy investments, Article 1(10)(b) is probably of utmost importance, as relevant energy–related natural resources are found in the continental margins of coastal states. Unlike BITs,[771] the ECT provides for a definition of the term 'Area', which is clear enough to extend the protection of Investments to those made in the continental shelf area.[772] For REIOs, Article 1(10) explains that Area consists of the

[769] Internal waters are those which are situated landward of the baseline from which the territorial sea is measured (Art. 8 (1) of the UNCLOS; *supra* at FN 129, and Art. 5(1) of the *Convention on the Territorial Sea and the Contiguous Zone* (Convention on the Territorial Sea), 10 September 1964) and over which the coastal state exercises full territorial sovereignty (Art. 2(1) of the UNCLOS and Art. 1(1) of the Convention on the Territorial Sea).
The territorial sea is set up by the UNCLOS to maximum 12 nautical miles measured from the normal baseline, which is the low–water line along the coast as marked on large–scale charts officially recognized by the coastal State. *See*, Articles 3 and 5 of the UNCLOS. Costal states exercise their sovereignty over the territorial sea, including the air space over the territorial sea, its bed and subsoil (Art. 2 of the UNCLOS).

[770] The UNCLOS regulates the contiguous zone and the sea bed of the sea. In accordance with Art. 33(2) of the UNCLOS, the contiguous zone is the zone of the sea seaward of the territorial sea, which may not exceed 24 nautical miles from the baseline (for the notion of 'baseline', *see*, *supra* at FN 769). In the contiguous zone, states may only exercise enforcement jurisdiction (Art. 33(1) of the UNCLOS*; see* also, Churchill R.R.; Lowe, A.V.; The Law of the Sea, 3rd edition, Manchester: Manchester University Press, 1999, p. 137). The UNCLOS provides for two distinct legal bases for the sovereign rights of states over the sea bed: the exclusive economic zone (EEZ) and the continental shelf (*see* also, the *Convention on the Continental Shelf,* 10 June 1964). While these two areas may coincide, this is not always the case. As explained by CHURCHILL and LOWE, the EEZ "may be greater or less than the breadth of the 'physical' continental shelf under the classical doctrine [i.e. *Convention on the Continental Shelf*]." (Churchill R.R.; Lowe, A.V.; *supra*, p. 145) The EEZ is the zone of the sea extending up to 200 nautical miles from the baseline (Art. 57 of the UNCLOS) where states enjoy sovereign and jurisdictional rights. Art. 56(1) of the UNCLOS refers to rights "for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non–living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds". The EEZ must be claimed by the states, while the continental shelf exists *ipso facto* (*see* Art. 77(3) of the UNCLOS). Pursuant to Art. 76(1) of the UNCLOS, the continental shelf "comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance". In the continental shelf area, states exercise sovereign rights for the purpose of exploring it and exploiting its natural resources (Art. 77(1) of the UNCLOS).

[771] *See* for example, Egypt–Thailand BIT providing that ""Territory" means territory over which Contracting Party has sovereignty and/or jurisdiction" (*Agreement between the Government of the Kingdom of Thailand and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments*, 27 February 2002), or the Italy–China BIT which provides no definition of the term 'territory' (*Agreement between the Government of the Republic of Italy and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, 28 August 1987).

[772] It is estimated that "around 70 per cent of the world's undiscovered [gas and oil] reserves lie offshore". *See,* Churchill R.R.; Lowe, A.V.; *supra* at FN 770, p. 141. For energy disputes related to concessions extending to the continental shelf, *see, Petroleum Development (Qatar) Ltd. v. Ruler of Qatar*, Award of

Areas of the member states, in accordance with the agreement establishing the REIO. The territorial scope of the treaties establishing the EU and EURATOM is provided for by Article 355 of the TFEU,[773] and by Article 198 of the EURATOM Treaty, respectively.[774]

The requirement that an Investment must be in the Area of the respondent Contracting Party in order to trigger the dispute resolution mechanism under Article 26 of the ECT brings up the issue as to whether this must be understood as demanding a physical presence of such Investment in the Area of the Contracting Party. The terms of Article 26(1) of the ECT providing for this prerequisite must be read within their ordinary

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April 1950, and *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, Award of September 1951. According to an explanatory memorandum from the EU regarding the safety of offshore activities, out of the "900 offshore installations operating in the EU, 486 are in the UK, 181 in the Netherlands, 61 in Denmark, 2 in Germany, 2 in Ireland, 123 in Italy, 4 in Spain, 2 in Greece, 7 in Romania, 1 in Bulgaria and 3 in Poland." *See*, EU; *Safety of Offshore Oil and Gas Exploration and Production: Questions and Answers*, MEMO/10/486, 13 October 2010.

The definition of the notion of 'Area' and its reference to sea, sea bed and subsoil suffered important amendments throughout the negotiation process and raised debates as to the appropriate wording of the definition. The Australian delegation, for example, suggested in its first comments to the early Basic Protocol to "review the definition of "territory" with the generally accepted concept of territory in international law". *See*, *Basic Protocol of 11 September 1991*, 8/91 BP 2.

[773] Art. 355 of the TFEU reads as follows:

> "1. The provisions of the Treaties shall apply to Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands in accordance with Article 349.
>
> 2. The special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II.
>
> The Treaties shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.
>
> 3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.
>
> 4. The provisions of the Treaties shall apply to the Åland Islands in accordance with the provisions set out in Protocol 2 to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.
>
> 5. Notwithstanding Article 52 of the Treaty on European Union and paragraphs 1 to 4 of this Article:
>
> (a) the Treaties shall not apply to the Faeroe Islands;
>
> (b) the Treaties shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus annexed to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union and in accordance with the terms of that Protocol;
>
> (c) the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972. […]"

See also, Article 52 of the TEU.

[774] Art. 198 of the EURATOM Treaty provides for a provision similar to the one under Art. 355 of the TFEU.

meaning and in their context, in accordance with the rules of treaty interpretation of the Vienna Convention. The wording of Article 26 of the ECT does not refer to Investments 'made in the Area', but to "Investment […] in the Area", which would suggest that Investments need not be physically located in the host Contracting Party. Article 26(1) of the ECT must, however, be examined in conjunction with Article 1(6) of the ECT, which defines the notion of 'Investment'. Among the assets listed under Article 1(6) as potential Investments, there are some that, by definition, cannot by physically located in the host Contracting Party. For example, while tangible property (Article 1(6)(a)) and companies (Article 1(6)(b)) have physical materialization in the Area of the host Contracting Party, bonds (Article 1(6)(b)), claims to money (Article 1(6)(c)) or intellectual property (Article 1(6)(d)) would not be a tangible presence in the Contracting Party.[775] Therefore, the meaning of the terms 'Investments […] in the Area' should not be restricted to physical manifestations of Investments in the host Contracting Party. There should be "a certain degree of flexibility",[776] as some forms of Investments cannot physically materialize in the host Contracting Party. The requirement of Investment to be in the Area of the respondent Contracting Party can be satisfied when the Investment is directed or originated in this Contracting Party. As suggested by scholars,

> "[…] the interpretation of a territorial requirement will to a large extent depend on the type of investment. Investment in movable and particularly immovable property will require a territorial nexus. In cases involving financial obligations the *locus* of the investment can often be determined by reference to the debtor and its location. In this way financial instruments issued by Sates have their *situs* in that State. Investment through shareholding may be seen to take place at the company's place of registration or main place of activity. Services may be seen to be located in a State if their chief impact is in that State."[777]

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[775] *See*, Baltag, Crina; *Territoriality under the ICSID Convention: Two Issues*, 4(5) TDM (2007), p. 4; Schreuer, C.; with Malintoppi, L., Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 139, para. 197.
[776] Schreuer, C.; with Malintoppi, L., Reinisch, A. and Sinclair, A.; *supra* at FN 293, p. 139, para. 197.
[777] *Ibid.*, p. 140, para. 198, emphasis original.
See also, Douglas, who suggests that

ICSID tribunals discussed the territoriality requirement of investments under the ICSID Convention and BITs and, by and large, they adopted the flexible approach suggested by scholars. The ICSID Convention, however, makes no reference to investments being located or made in the territory of a Contracting State.[778] In *Fedax v. Venezuela,* where the claimant acquired promissory notes issued by Venezuela, respondent argued that the claimant failed to make an investment "in the territory" of Venezuela.[779] In rejecting respondent's contentions, the tribunal distinguished between investments that can take a physical form and investments that, by their nature, cannot materialize in the territory of the host state:

> "[w]hile it is true that in some kind of investments listed under Article 1(a) of the Agreement, such as the acquisition of interests in immovable property, companies and the like, a transfer of funds or value will be made into the territory of the host country, this does not necessarily happen in a number of other types of investments, particularly those of a financial nature. It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere. In fact, many loans and credits do not leave the country of origin at all, but are made available to suppliers or other entities."[780]

> "[r]esort must be had to the rules of private international law of the host state which, in respect of some forms of intangible property, may supply a fictitious *situs*. A debt may have its *situs* at the place of the debtor; shares – at the place where the company's share register is maintained. In each case, if the host state's rules of private international law locate the intangible property rights in the host state, then the territorial requirement is satisfied with respect to a putative investment in that form of intangible property." (Douglas, Z; *supra* at FN 292, pp. 171–172, para. 351, emphasis original, footnotes omitted)

For the rules of private international law, *see* in general, McClean, David; Beevers, Kisch; *The Conflict of Laws by J.H.S. Morris*; 7th edition, London: Sweet & Maxwell, 2009; Fawcett, James; Carruthers, Janeen M; *Cheshire, North & Fawcett Private International Law*; 14th edition, New York: Oxford University Press, 2008.

[778] Nevertheless. the Report of the Executive Directors refers to the

> "[..] adherence to the Convention by a country [which] would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention." (Report of the Executive Directors*; supra* at FN 541, para. 12)

[779] *Fedax N.V. v. Republic of Venezuela*, Decision on Objections to Jurisdiction of 11 July 1997, para. 41.

[780] *Fedax v. Venezuela; supra* at FN 779, para. 41. Art. 1(a) of the Netherlands–Venezuela BIT provides for the definition of investment:

> "[…] the term 'investments' shall comprise every kind of asset and more particularly though not exclusively:
> i. movable and immovable property, as well as any other rights in rem in respect of every kind of asset;
> ii. rights derived from shares, bonds, and other kinds of interests in companies and joint-ventures;
> iii. title to money, to other assets or to any performance having an economic value;
> iv. rights in the field of intellectual property, technical processes, goodwill and know-how;
> v. rights granted under public law, including rights to prospect, explore, extract, and win natural resources." (*Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela*, 1 November 1993)

In assessing whether claimant's investment was made in the territory of Venezuela, the tribunal in *Fedax v. Venezuela* concluded that "[t]he important question is whether the funds made available are utilized by the beneficiary of the credit […] so as to finance its various governmental needs."[781] Similarly, in *CSOB v. Slovakia,* where the dispute involved a loan agreement, the tribunal held that "a transaction can qualify as an investment even in the absence of a physical transfer of funds".[782] In *LESI–DIPENTA v. Algeria*, the tribunal also emphasized that the physical presence of the investment in the territory of the host state is "not an absolute condition".[783] However, whether or not the Investment has a physical presence, it must be made, linked, or directed to the host Contracting Party, and not to the home state of the Investor.[784]

4. LAWFULNESS, APPROVAL AND AUTHORIZATION OF INVESTMENT

There are investment treaties that do not grant unconditional rights of admission and establishment in the host state. There are various reasons for limiting the access of foreign investments: economic policies, national security, the need to safeguard

[781] *Fedax v. Venezuela; supra* at FN 779, para. 41.
[782] *CSOB v. Slovakia; supra* at FN 544, para. 78, footnote omitted.
[783] *LESI–DIPENTA v. Algeria; supra* at FN 567, para. 14(1), p. 451. The identical conclusion reached the same tribunal in the *LESI & Astaldi v. Algeria*; *supra* at FN 568, Decision on Jurisdiction of 12 July 2006, para. 73(i):

> "De même est-il fréquent que ces investissements soient effectués dans le pays concerné, mais il ne s'agit pas non plus d'une condition absolue. Rien n'empêche en effet que des investissements soient en partie du moins engagés depuis le pays de résidence du contractant mais en vue et dans le cadre du projet à réaliser à l'étranger."

[784] In *Bayview v. Mexico*, the tribunal stated that

> "Chapter Eleven [of the NAFTA] applies to "investments of investors of another Party in the territory of the Party": Article 1101(1)(b). It is clear that the words "territory of the Party" in that phrase do not refer to the territory of the Party of whom the investors are nationals. It requires investment in the territory of another NAFTA Party –the Party that has adopted or maintained the measures challenged. In short, in order to be an "investor" under Article 1139 one must make an investment in the territory of another NAFTA State, not in one's own." (*Bayview Irrigation Distrct and others v. United Mexican States*, Award of 19 June 2007, para. 105)

However, this was a case, as the tribunal concluded, where the claimants made the investment in the territory of their own state, rather than in the territory of the respondent state:

> "They [the claimants] have substantial investments in Texas, in the form of their businesses and, in the context of these proceedings, more particularly in the form of the infrastructure for the distribution of the water that they extract from the Rio Bravo / Rio Grande. They have investments in the form of the water rights granted by the State of Texas. They are certainly "investors"; but their investments are in Texas, and they are not investors in Mexico or vis-à-vis Mexico." (*Bayview v. Mexico; supra*, para. 113)

imperative interests of host states in crucial industries or to have control over the entry and establishment of foreign investments in the national territory. Some authors consider these limitations as facilitating the identification of investments that are entitled to the protection granted by the investment treaties or as ensuring that investments are channelled into economic areas where they are needed.[785] There are BITs that provide protection only to investments made in accordance with the laws of the host states,[786] or that are authorized or approved by the host states.[787] These provisions allow states to adopt national laws on admission of foreign investments in accordance with their economic or political interests or policies.

The ECT does not contain explicit provisions requiring the conformity of an Investment with the laws of the host Contracting Party and for Investments to be approved or authorized by the host Contracting Party, as jurisdictional requirements. [788] The rules of interpretation of treaties do not allow reading in a treaty what is not there. As expressed

[785] Perera, Rohan A.; *The Role and Implications of Bilateral Investment Treaties*, 26(1) Commonwealth Law Bulletin 607 (2000), p. 609.

[786] Where an investment is unlawfully made, this does not mean that there is no investment within the ordinary meaning of the term, but that such investment is not protected under the specific BIT, and the jurisdiction of the arbitral tribunals does not extend to disputes related to this investment. *See*, Baltag, Crina; *Admission of Investments and the ICSID Convention*; 6(1) TDM (2009), p. 7.

[787] See, Art. 4(a) of the *ASEAN Comprehensive Investment Agreement*, 26 February 2009, which covers only investments "admitted according to […] laws, regulations, and national policies, and, where applicable, specifically approved in writing." (footnote omitted) *See* also, Annex 1 to the ASEAN Comprehensive Investment Agreement dealing with the approval in writing of investments. *See* also, Art. I.1.b.ii of the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments*, 21 October 1988 which refers to investments made in projects classified as an "approved project" by the appropriate Ministry of Malaysia, in accordance with its legislation and administrative practice.

[788] *See* also, Gaillard, E.; *supra* at FN 420, p. 62. The requirement for Investments to be made in accordance with the laws of the host Contracting Party cannot be implicitly understood in the context of the ECT. The wording of Art. 1(6)(f) of the ECT, "any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law", for example, cannot be construed as such implicit requirement. Nevertheless, the absence of these jurisdictional requisites in the ECT does not affect the requirements provided for in the national laws in respect to the admission or lawfulness of Investments.
There was a proposal during the negotiation of the ECT to include in the definition of Investment the following wording: "admitted by one of the other Contracting Parties subject to its laws and investment policies." See, the comments of the Australian delegation to the *Basic Agreement of 31 October 1991*, 21/91 BA 4. *See* also, the comments at *supra* FN 555.

in various decisions of the ICJ and of the ICSID arbitral tribunals, the duty is "to interpret the Treaties, not to revise them".[789]

The lawfulness of Investment was discussed in *Plama v. Bulgaria.*[790] Contrary to the text of the ECT, the tribunal in *Plama v. Bulgaria* held that there is an implied requirement for Investments to be in accordance with the laws of the host Contracting Party. While the tribunal admitted that, "[u]nlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with a particular law",[791] the absence of such express provision "does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law."[792] In reaching this conclusion, the tribunal relied on an introductory note to the ECT drafted by the Energy Charter Secretariat, which provides that "[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues".[793] Relying of this statement, the tribunal in *Plama v. Bulgaria* reasoned that

> "[…] the ECT should be interpreted in a manner consistent with the aim of encouraging the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law."[794]

While the tribunal took into consideration the declaration made by the Energy Charter Secretariat, this statement, however, cannot have legal effects in the interpretation of

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[789] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* second phase, Advisory Opinion of 18 July 1950, p. 229. *See* also, the conclusion of the ICJ in the *Morocco Case:*

> "The Court can not, by way of interpretation, derive from the Act a general rule as to full consular jurisdiction which it does not contain." (*Morocco Case; supra* at FN 304, p. 199)

[790] In *Kardassopoulos v. Georgia,* the tribunal analysed the lawfulness of claimant's Investment based only on the provisions of the Greece–Georgia BIT under Art. 12, which provides that

> "[t]his Agreement shall also apply to investments made prior to its entry into force by Investors of either Contracting Party in the territory of the other Contracting Party, consistent with the latter's legislation."

[791] *Plama v. Bulgaria,* Award; *supra* at FN 621, para. 138, footnote omitted.

[792] *Id*., footnote omitted.

[793] Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*, *An Introduction to the Energy Charter Treaty*, p. 14.

[794] *Plama v. Bulgaria,* Award; *supra* at FN 621, para. 139.

the provisions of the ECT, although the Energy Charter Secretariat is a body established by the ECT itself. First, a declaration of this kind is not envisaged by Article 31(2) of the Vienna Convention, which refers to "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" and to "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty", or by Article 31(3), which allows to be taken into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" or "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Nor can this statement gain legal effects based on the provisions of Article 32 of the Vienna Convention, which refers to "the preparatory work of the treaty and the circumstances of its conclusion". Secondly, Article 35 of the ECT does not provide for any interpretative prerogative of the Energy Charter Secretariat, as its main function is to assist the Energy Charter Conference in the performance of its duties.[795]

The provisions of the ECT suggest that there is no such jurisdictional requirement for Investments to be made in accordance with the laws of the host Contracting Party or authorized or approved by that Contracting Party.[796] Nonetheless, these issues become relevant when tribunals decide the merits of the dispute.[797]

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[795] Art. 35(4) of the ECT. Moreover, the Energy Charter Conference, which is the body of the ECT assembling the representatives of the Contracting Parties, does not have the prerogatives to interpret or amend the provisions of the ECT. *See*, Art. 34(3) of the ECT.

[796] *See* also, Blanch, J.; Moody, A.; Lawn, N.; *supra* at FN 254, p. 5.

[797] *See*, Gaillard, E.; *supra* at FN 420, p. 62. For the opinion that there is a jurisdictional bar for Investments made in breach of the laws of the host Contracting Party, *see*, Waelde, T.W.; *supra* at FN 66, p. 273:

> "[…] an invalid right or title, not issued by the competent authority, but issued under material breach of mandatory procedures or issued in contravention of peremptory law, does not constitute "investment". A contractual right to explore and develop oil and gas issued by an incompetent local entity, or issued without complying with mandatory tender procedures, or issued with material breach of such procedures suggesting illicit practices and, certainly, if issued under the influence of proven corruption, would not seem to constitute "investment"."

The ICSID Convention, like the ECT, does not contain the requirement for investment to be made in accordance with the laws of the host Contracting Party or to be authorized or approved in any way. As stated in *Saba Fakes v. Turkey,* the ICSID Convention "remains neutral" with respect to the lawfulness of investments; however, "bilateral investment treaties are at liberty to condition their application and the whole protection they afford […] to a legality requirement".[798] Consequently, an ECT dispute submitted under the ICSID Convention should not raise jurisdictional questions of unlawfulness or approval of the Investment, unless, as it was in the case of *Kardassopoulos v. Georgia,* the Investor also relies on a BIT that provides for such prerequisites.[799]

5. ORIGIN OF INVESTMENT

The tribunal in the *Yukos Cases* was called to decide on whether the ECT contains any requirement regarding the origin of Investment. The interpretation of the ECT's provisions does not reveal the prerequisite that Investments should have a foreign source, nor does it require evidence of a real link between the Investor and its home Contracting Party.[800] While Article 2 refers to the purpose of the ECT to "promote long–term cooperation in the energy field", this is not sufficient to suggest an implied requirement of the foreign origin of Investment.[801] As explained by the tribunal in the *Yukos Cases,* "the ECT is directed towards the promotion of foreign investments,

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[798] *Saba Fakes v. Turkey; supra* at FN 302, para. 114.
[799] *See*, *supra* FN 790.
[800] *See* also, the *Yukos Cases*:
"[…] the definition of investment in Article 1(6) of the ECT does not include any additional requirement with regard to the origin of capital or the necessity of an injection of foreign capital." (*Yukos Cases; supra* at FN 98, para. 432)
[801] Furthermore, the ECT, unlike the ICSID Convention, as it will be seen below, is not using the term 'foreign' or 'international' jointly with the notion of 'Investment'.

especially of investment by Western sources in the energy resources of the Russian Federation and other successor States of the USSR."[802] However, "the Tribunal is bound to interpret the terms of the ECT not as they might have been written so as exclusively to apply to foreign investment but as they were actually written."[803] In the tribunal's opinion, the provisions of the ECT do not require that Investments originate from the home Contracting Party of the Investor, even though the "ultimate source of the investments at issue in the instant cases may be Russian."[804]

The ECT does not impose a jurisdictional requirement regarding the foreign origin of Investments. If there is a foreign nature condition of Investment under the ECT, at the most, this must be presumed to be assimilated in the Investor requirement under Article 1(7).[805] This provision defines Investor as a natural person having the nationality, citizenship or permanent residence of a Contracting Party and as a legal entity organized in accordance with the laws of a Contracting Party. When Investor makes an Investment in a Contracting Party, other than his home Contracting Party, the foreign character of the invested capital becomes apparent. In effect, the provisions of the ECT are not dissociating the foreign character of the Investment from the Investor criteria under the ECT.[806]

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[802] *Yukos Cases; supra* at FN 98, para. 434.

[803] *Ibid.*, para. 435. Also,

> "[t]he Tribunal cannot in effect impose upon the parties a definition of "Investment" other than that which the parties to the ECT, including Respondent, have agreed." (*Yukos Cases; supra* at FN 98, para.432)

[804] *Yukos Cases; supra* at FN 98, para. 434. The tribunal, though, draw attention to the following:

> "If the States that took part in the drafting of the ECT had been asked in the course of that process whether the ECT was designed to protect—and should be interpreted and applied to protect—investments in a Contracting State by nationals of that same Contracting State whose capital derived from the energy resources of that State, it may well be that the answer would have been in the negative, not only from the representatives of the Russian Federation but from the generality of the delegates." (*Yukos Cases; supra* at FN 98, para. 434)

[805] SALACUSE refers to the international nature of an investment that comes from two attributes: "(1) the person or entity undertaking the investment is not a citizen, or at least not a resident, of the country in which the investment is made; and (2) the investment process includes the transfer of funds or capital from a foreign country to the country of investment". Nevertheless, the author concludes that "a physical transfer of capital from one country to another may not necessarily be present in all international investment transactions." *See,* Salacuse, J.W.; *supra* at FN 670, pp. 27–28.

[806] *See* also, Castro de Figueiredo, R.; *supra* at FN 427, p. 3.

The origin of the invested capital was also debated by ICSID tribunals. In *Tokios Tokelès v. Ukraine*, where the claimant was a company incorporated in Lithuania, but owned and controlled by Ukrainian nationals, respondent objected to the jurisdiction of the tribunal based on the fact that the dispute did not arise out of an investment having international character, since the invested capital of the claimant originated in Ukraine and not in the home state, Lithuania. The majority of the tribunal rejected claimant's contentions and stated that "[t]he origin of the capital used to acquire these assets is not relevant to the question of jurisdiction under the [ICSID] Convention".[807] The tribunal went on and concluded that "the ICSID Convention contains no inchoate requirement that the investment at issue in a dispute have an international character in which the origin of the capital is decisive."[808] The drafting history of the ICSID Convention shows that the proposal regarding the jurisdiction of the ICSID based on the nationality of the investment was rejected. BROCHES explained that he could not see "how the Convention could make a distinction based on the origin of funds once the host State had agreed with the investor to accept the jurisdiction of the Center."[809] However, it is argued by scholars that the context of the ICSID Convention and, in particular, its Preamble would suggest that the notion of 'investment' under Article 25(1) of the ICSID Convention demands a foreign character of investments. The Preamble of the ICSID Convention recognizes "the need for international cooperation for economic development, and the role of private international investment therein" as the major

[807] *Tokios Tokelès v. Ukraine; supra* at FN 596, para. 81. The tribunal recalled the conclusion of the tribunal in *Tradex v. Albania*:

> "The 1993 Law, in its definition of "Foreign investment" in Art. 1 (3), nowhere requires that the foreign investor has to finance the investment from his own resources. As seen above, quite to the contrary, the law provides for a broad interpretation of "investment"." (*Tradex Hellas S.A. v. Republic of Albania,* Award of 29 April 1999, para. 109)

[808] *Tokios Tokelès v. Ukraine; supra* at FN 596, para. 82.

[809] *History of the ICSID Convention; supra* at FN 366, vol. II–1, p. 261. Broches also stated that

> "[…] if those funds were really not of foreign origin, the host State was entirely justified in treating the resident investor on the same footing as its own nationals."

This, for example, could be done by inserting the origin requirement of investments in the investment treaties that record the consent to the ICSID.

purpose of the ICSID Convention.[810] The conclusion of the tribunal in *Tokios Tokelès v. Ukraine* was opposed by the chairman, PROSPER WEIL, who maintained in his Dissenting Opinion that "[t]he ICSID mechanism and remedy are not meant for investments made in a State by its own citizens with domestic capital through the channel of a foreign entity, whether preexistent or created for that purpose."[811] The Dissenting Opinion concludes that "when it comes to ascertaining the *international* character of an investment, the origin of the capital *is* relevant, and even decisive",[812] and that the purpose of the ICSID Convention "is to protect *foreign* investment, [and] it should not be interpreted so as to allow domestic, national corporations to evade the application of their domestic, national law and the jurisdiction of their domestic, national tribunals."[813]

Scholarly writings are divided on whether the ICSID Convention requires indeed, as a jurisdictional prerequisite, that investments to be of foreign origin. Some authors are of the opinion that there is no requirement regarding the origin of the invested capital,[814] while others conclude that the interpretation of the provisions of the ICSID Convention in their context, including its Preamble, requires investments to have foreign source.[815] It is suggested that this foreign nature requirement is more justified when "a domestic investor channels the investment made in his own home State through a foreign entity, used as a mere investment vehicle, in order to be covered by rules of foreign investment protection set forth in an international investment treaty".[816] In this case, although the

[810] *See* also, the Report of the Executive Directors; *supra* at FN 541, which contains several references to 'international investment': "encourage a larger flow of private international investment" (para. 13), "stimulate a larger flow of private international investment into its territories" (para. 12); 'international capital': "stimulating a larger flow of private international capital into those countries" (para. 9).
[811] *Tokios Tokelès v. Ukraine,* Dissenting Opinion; *supra* at FN 596, para. 19.
[812] *Ibid.,* para. 20, emphasis original.
[813] *Ibid.,* para. 23, emphasis original.
[814] *See*, Douglas, Z.; *supra* at FN 292, p. 314 *et seq.*, para. 583 *et seq.*
[815] Castro de Figueiredo, R.; *supra* at FN 427, pp. 31–37.
[816] *Ibid.*, p. 4.

investment is formally foreign, because of the way it is structured, there should be an emphasis on the "economic reality in which the effective origin of the investment plays a crucial role",[817] and, thus, prevent investors to shop for convenient jurisdictions to channel their investments. The ICSID case law suggests, so far, that when submitting a dispute under the ICSID Convention, the claimant is not required to show that his investment is a foreign investment.[818]

The ECT does not provide and its provisions do not suggest a foreign character of Investment, as a jurisdictional prerequisite. It can be the case that the invested capital of the Investor is of domestic origin. However, in the absence of a jurisdictional requirement of 'foreign origin' of Investment, ECT tribunals cannot dismiss a claim based on the fact that the source of Investor's Investment is in the host Contracting Party.

6. PRE–INVESTMENT AND THE ENERGY CHARTER TREATY

The investment process is usually regarded as consisting of two phases: the admission or the establishment phase, often referred to as the 'pre–investment' stage, and the investment or the 'post–investment' phase.[819] In the admission phase, potential investors evaluate the possibility to investment: they develop studies and discussions about the investment, gather information, develop contacts with the local market, and participate "in more or less formal and regulated tenders."[820] But while it is not disputed that expenses are made and intellectual effort is committed to establishing an

[817] *Id.*
[818] The tribunal in *Rompetrol v. Romania* rejected respondent's objections based on the origin of the claimant's funds, in the context of the nationality of investor. *See, Rompetrol v. Romania; supra* at FN 599, para. 110.
[819] *See* also, Waelde, T.W.; Ben Hamida, W.; *supra* at FN 711, p. 168.
[820] Waelde, T.W.; Ben Hamida, W.; *supra* at FN 711, p. 175.

investment,[821] host states rarely agree to offer their protection at this stage of the investment process. Investment treaties usually bestow their protection at the post–investment stage, when the process of establishing the investment is completed. For example, Article 2(2) of the United Kingdom–Morocco BIT provides that

> "[e]ach Contracting Party shall in its territory ensure fair and equitable treatment and provide full protection and security for investments of nationals of the other Contracting Party. Neither Contracting Party shall impair by discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals of the other Contracting Party. Each of the Contracting Parties shall observe any obligation it may have entered into with regard to investments of nationals of the Contracting Party."[822]

In contrast, there are some investment treaties that extend their protection to the pre–investment stage of the investment process. Article II(1) of the United States–Croatia BIT states that

> "[w]ith respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favorable than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter "national treatment") or to investments in its territory of nationals or companies of a third country (hereinafter "most favored nation treatment"), whichever is most favorable (hereinafter "national and most favored nation treatment")."[823]

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[821] *See* also, the statement made by the tribunal in *Mihaly v. Sri Lanka* regarding the costs incurred by the claimant in the tender procedure:

> "The expression of interest itself was obviously the product of considerable work and expenditure of money on the part of the Claimant." (*Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, Award of 15 March 2002, para. 38)

[822] *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Morocco,* signed on 30 October 1990, not in force.

[823] *Treaty between the Government of the United States of America and the Government of the Republic of Croatia concerning the Encouragement and Reciprocal Protection of Investment*, 20 June 2001. *See* also, Article 2 of the Japan–Turkey BIT, which provides for the following:

> "1. Each Contracting Party shall, subject to its rights to exercise powers in accordance with the applicable laws and regulations, encourage and create favourable conditions for nationals and companies of the other Contracting Party to make investment in its territory, and, subject to the same rights, shall admit such investment.
>
> 2. Nationals and companies of either Contracting Party shall within the territory of the other Contracting Party be accorded treatment no less favourable than that accorded to nationals and companies of any third country in respect of the matters relating to the admission of investment." (*Agreement concerning the Reciprocal Promotion and Protection of Investment between Turkey and Japan*, 12 March 1993)

Authors explain that states express their consent to protect only investments – at the post–investment phase – because at this stage "the investor has made a serious commitment of capital exposed to government risk."[824] At this point, the investor, who does not have the choice of investing or not anymore, needs the substantive protection of the investment treaties. As soon as the investor has an investment, it is also natural "to subject the state to more stringent and internationally enforceable obligations to avoid the abuse of political power against acquired rights".[825]

However, the distinction made between pre–investment and post–investment stage of the investment process for the purpose of the substantive and procedural protection offered by investment treaties looks rather straightforward in academic discussions, but fairly complex applied to the actual investment process.[826] Complex investments, like the ones made in the energy area, require an elaborate investment process that comprises various steps, from information–gathering and studies to gradual investments.[827]

Under the provisions of the ICSID Convention, the tribunals denied the coverage of pre–investment expenditures. In *Mihaly v. Sri Lanka*, a case relying on the substantive protection of the United States–Sri Lanka BIT,[828] the tribunal had to decide whether in

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[824] Waelde, T.W.; Ben Hamida, W.; *supra* at FN 711, p. 175.
[825] *Id.*
[826] As explained by EWING, the term 'pre–investment' entails different meanings and in "its narrower sense it means the carrying out of all those specific studies required before seeking or committing finance for the execution of a project". *See*, Ewing, A.F.; *Pre–Investment*, 8(3) Journal of World Trade Law 316 (1974), p. 316. *See* also, the comment made by the representatives of the United States in the negotiation of the ECT in respect to the definition of the notion of 'Make Investments' or 'Making of Investments':

> "[…] the current definition may not be sufficiently precise in drawing the line between the Making of Investments and the post-establishment activity of managing, maintaining, etc. the investment […]." (*U.S. Proposal – Art. 1(8) Make/Making of Investments*, Room Document 6, 9 June 1994)

[827] EWING identifies three steps in respect to the studies undertaken at the pre–investment stage: the preliminary study, also referred to as "prefeasibility study"; the feasibility study, both technical and economic; and the engineering study, for the major infrastructural or industrial projects. *See*, Ewing, A.F.; *supra* at FN 826, pp. 318–319.
[828] *Mihaly v. Sri Lanka; supra* at FN 821, para. 1.

the absence of a contract signed by the parties, the expenditures incurred by the claimant could constitute an investment for the purpose of Article 25 of the ICSID Convention. In reaching the decision, the tribunal emphasized that its decision rests on the particular facts of the case, and that it "cannot consider in a vacuum whether or not in other circumstances expenditure of moneys might constitute an "investment"".[829] In deciding whether the costs incurred by the claimant could represent an investment for the purpose of ICSID Convention, the tribunal extensively relied on the particular wording of the documents between the parties which contained express provisions pursuant to which there were no contractual obligations on any party resulting from these Letters. The fact that Sri Lanka inserted these limitations in the documents negotiated with the claimant compelled the tribunal to conclude that the expenditures incurred by claimant cannot represent an investment. The tribunal admitted, however, that "in other circumstances, similar expenditure may perhaps be described as an investment",[830] and acknowledged that

> "[…] if the negotiations […] had come to fruition, it may well have been the case that the moneys expended during the period of negotiations might have been capitalised as part of the cost of the project and thereby become part of the investment".[831]

Zhinvali v. Georgia, an ICSID case brought under the provisions of the Georgian law, had similar underlying facts to the *Mihaly v. Sri Lanka* case. The case involved the rehabilitation of a Georgian power plant for which the claimant was granted exclusivity in signing the contract, without having a tender procedure.[832] The claimant executed a Memorandum of Understanding and a Head of the Agreement, which dealt with the modalities of cooperation with the state–owned company operating the power plant, and

[829] *Ibid.,* para. 48.
[830] *Ibid.,* para. 49.
[831] *Ibid.,* para. 50.
[832] *Zhinvali Development Ltd. v. Republic of Georgia*, Award of 24 January 2003 and Separate Opinion of Andrew J. Jacovides., paras 89–94.

circulated a draft contract, [833] but the parties did not sign the concession contract. Georgia objected to the jurisdiction of the ICSID based on the fact that the claimant did not have an investment within the meaning of Article 25 of the ICSID Convention.[834] Zhinvali argued, on the other hand, that it did make an investment within the meaning of the 1996 Georgian Investment Law applicable in the dispute, although the concession contract was not signed, since it committed intellectual property in the form of "various agreements, drafts and studies",[835] while respondent gained "valuable "know–how" from its dealings with the Claimant and even went so far […] as to use the Claimant's proposed draft transactional documents as a model for another deal with a third party".[836] The tribunal rejected these arguments and concluded that the claimant "failed to demonstrate any intellectual property contributions" capable of satisfying the definition of investment under the Georgian law.

ICSID tribunals have been reluctant in accommodating disputes arising out of pre–investment expenditures under the provisions of Article 25(1) of the ICSID Convention. As pointed out by scholars, "[t]he sole question is whether the claimant has made an investment in the host state; the notion of a 'pre–investment' is meaningless."[837]

There is no arbitral decision and only few scholarly writings are dealing with pre–Investments and the ECT. [838] Article 1(8) of the ECT refers to the establishment of

[833] *Ibid.,* para. 94 *et seq.*
[834] The claimant contended that the respondent broke its promises to sign the concession contract. *See, Zhinvali v. Georgia; supra* at FN 832, para. 190.
[835] *Zhinvali v. Georgia; supra* at FN 832, para. 364–365.
[836] *Ibid.,* para. 385.
[837] Douglas, Z.; *supra* at FN 292, p. 187, para. 398. ICSID tribunals, however, failed to take into consideration the relevance of the wording of Art. 25(1) of the ICSID Convention referring to "dispute arising directly out of an investment" when deciding on the jurisdiction over pre-investment expenditures.
[838] The distinction between pre–investment and post–investment stages, for the procedural protection offered by investment instruments, is an issue pertaining to the types of disputes covered by an investment treaty, rather than related to the notion of 'investment'. *See*, Baltag, C.; *supra* at FN 786, p. 19. Yet, for the analysis of the notion of 'Investment', it appears appropriate to discuss this matter here.

Investments and defines the term 'Make Investments' or 'Making of Investments' as "establishing new Investments, acquiring all or part of existing Investment or moving into different fields of Investment activity."[839] The ECT, thus, distinguishes between Investments and the Making of Investments, relevant in the context of the protection afforded by the ECT. Article 10(1) of the ECT provides only for an obligation on the Contracting Parties to "encourage and create stable, equitable, favourable and transparent conditions" for the Making of Investments:

> "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors or other Contracting Parties to Make Investments in its Area."

This general obligation to encourage and create proper conditions for Investors who are Making Investments in a Contracting Party contrasts with the commitment of the Contracting Parties to accord Investments fair and equitable treatment, provide them with the most constant protection and security and abstain from unreasonable and discriminatory measures:

> "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."[840]

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[839] According to VANDEVELDE, "the right to "establish" investment can refer to the right to acquire existing investment as well as the right to create new investment." *See,* Vandevelde, K.J.; *supra* at 569, p. 237.
The first definition of the notion 'Make Investments' or 'Making of Investments' was inserted in the *Basic Agreement of 19 March 1992* and read as follows:

> ""To make Investments" means establishing a new Investment, acquiring all or part of an existing Investment, and expanding an existing Investment." (Art. 1(7) of the *Basic Agreement of 19 March 1992*, 17/92 BA 10)

Later on, the definition was expanded in order to include the action of "substantially altering the type or the objective of an existing Investment." *See,* Art. 1(6) of the *Basic Agreement of 12 August 1992*, 37/92 BA 15.

[840] Art. 10(1) of the ECT. The wording of this provision appears to be slightly confusing. The terms 'such conditions' refer to the first part of Art. 10(1), cited above:

In addition, Articles 10(2) and 10(3) of the ECT provide that Contracting Parties shall only "endeavour" to accord the national and most favoured nation treatment for Making of Investments:

> "Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).[841]
> […] "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable."[842]

The obligation to accord the national and most favoured nation treatment is to be regulated by a supplementary treaty, as stated under Article 10(4) of the ECT. However, even though Contracting Parties have no obligation under the ECT to grant national treatment or the most favoured nation treatment with respect to the Making of Investments, Article 10(5) of the ECT provides that each Contracting Party shall endeavour to

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> "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors or other Contracting Parties to Make Investments in its Area."

However, while the first phrase of Art. 10(1) refers to the Making of Investments, the second part of the provision deals only with the obligations of the Contracting Parties concerning Investments. This misleading wording was spotted during the negotiations of the ECT. In a document of the Legal Sub–Group, it is stated the following:

> "It was suggested in the Sub-Group that the terms "such Investment" and "such Investments" which appear in the third and fourth sentences of paragraph (1) could be read as referring, inter alia, to the obligation in the paragraph's first sentence concerning conditions for investors to "Make Investments". If such an interpretation were to prevail, the obligations contained in the third and fourth sentences could apply to the making of investments." (*LSG/notes/Report 2*, 6 October 1994)

In order to avoid this confusion, it was suggested to either insert an Understanding clarifying that the terms 'such Investment' and 'such Investments' do not refer to the Making of Investments, either to restructure the first paragraph and create a distinction between the pre– and post–Investment obligations. *See, LSG/notes/Report 2*, 6 October 1994. The representatives of Canada also showed their concern in this respect. As mentioned in a letter to the Chairman of the Legal Sub–Group,

> "[…] the present construction of para (1) could lead both to the conclusion that pre-establishment matters are subject to binding obligations under this paragraph […], and that such obligations could become the subject of ECT dispute settlement." (*Fax from David Ehinger, Canadian Economic Law Division, to C. Bamberger,* 13 October 1994, emphasis original)

However, it was recommended that "no change should be made". *See, Fax from Sydney Fremantle to Clive Jones, 20 October 1994.*

[841] Art. 10(2) of the ECT.

[842] Art. 10(3) of the ECT.

> "[…] (a) limit to the minimum the exceptions to the Treatment described in paragraph (3);
> (b) progressively remove existing restrictions affecting Investors of other Contracting Parties."

The obligations of the Contracting Parties at the pre–Investment stage are obligations of best efforts – "shall endeavour", "shall … encourage", in contrast with the obligations towards Investments, which are obligations of result – "commitment to accord", "shall … enjoy", "shall observe".[843] The obligations of the Contracting Parties at the Making of Investments stage are often referred to as "softer" obligations.[844] Even though the obligations of the Contracting Parties at the Making of Investment phase are softer than the ones towards Investments, it does not make them not binding commitments or "merely hortatory".[845]

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[843] The early drafts of the ECT provided for an obligation of the Contracting Parties to accord national and the most favoured nation treatment in the Making of Investments:

> "Each Contracting Party shall permit Investors of other Contracting Parties to make Investments in its Territory on a basis no less favourable than that accorded to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable subject to the provisions of paragraphs (3) to (6) below." (*Summary Note of Working Group II Meeting on 25–28 February 1992,* Note from the Secretariat, 15/92 BA9, 5 March 1992)

The current wording was built upon a proposal made by the European Communities, which provided that Contracting Parties "shall endeavour to permit Investors" to Make Investments based on the national and the most favoured nation treatment. See, *European Union Proposal – Article 13 – Promotion, Protection and Treatment of Investments*, 14 December 1993.

[844] Waelde, T.W.; Ben Hamida, W.; *supra* at FN 711, p. 179. While authors refer to the obligations of the Contracting Parties at the pre–Investment phase as 'soft law' obligations (*see* also, Waelde, T.W.; *supra* at FN 66, p. 279), the distinction between 'soft law' and 'hard law' is, in itself, controversial. *See,* Chinkin, C.M.; *The Challenge of Soft Law: Development and Change in International Law*, 38 ICLQ 850 (1989):

> "Soft law instruments range from treaties, but which include only soft obligations (""legal soft law), to non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organisations ("non-legal soft law"), to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles." (Chinkin, C.M.; *supra*, p. 851, footnotes omitted)

See also, Pronto, Arnold N.; *Some Thoughts on the Making of International Law*, 19 EJIL 601 (2008); Klabbers, Jan; *The Redundancy of Soft Law;* 65 Nordic J. Int'l L. 167 (1996); Fitzmaurice, Malgosia; Elias, Olufemi; Contemporary Issues in the Law of the Treaties, Utrecht: Eleven International Publishing, 2005, pp. 26–48; Gruchalla–Wesierski, Tadeusz; *A Framework for Understanding "Soft Law"*, 30 McGill L. J. 37 (1984–1985):

> "[…] the term soft law is used as a convenient shorthand to include vague legal norms. Examples of such norms include: the duty to cooperate found in the Framework Agreement between Canada and the E.E.C.; the duty to consult found in G.A.T.T.; the precise non-legal norms such as those found in the O.E.C.D. Guidelines for Multinational Enterprises […]." (Gruchalla–Wesierski, T.; *supra*, p. 44, footnotes omitted)

[845] Waelde, T.W.; *supra* at FN 66, p. 281. *See* also on the Making of Investments, Elshihabi, Saamir; *The Difficulty Behind Securing Sector–Specific Investment Establishment Rights: The Case of the Energy Charter Treaty;* 35 Int'l L. 137 (2001).

Scholars are of the opinion that obligations of Contracting Parties towards the Making of Investments are contained in Part III of the ECT and "[t]here is, therefore, no reason why they can not be justiciable under the investor–state arbitration regime".[846] The moderate character of the obligations of the Contracting Parties at the pre–Investment stage "does not mean that they are not susceptible of being "enforced" by an investor–initiated arbitration under Article 26."[847] While this is apparent, one must not ignore the wording of Article 26(1) of the ECT. Tribunals will have to be satisfied that there is a dispute relating to an Investment and that this dispute concerns alleged breaches of Part III of the ECT by a Contracting Party. Although it is uncontested that the protection of the Making of Investments is included in Part III, the distinction made by the ECT between Investments and Making of Investments cannot suggest that, in the absence of an Investment, tribunals will have jurisdiction to hear a dispute related to the Making of Investments. Similar to the ICSID Convention, the ECT registers the consent of the Contracting Parties with respect to Investments. Nevertheless, if the Investor satisfies the tribunal that there is an Investment, then, claims concerning the Making of Investments and which are related to the Investment could be covered by Article 26(1) of the ECT.[848]

[846] Waelde, T.W.; Ben Hamida, W.; *supra* at FN 711, p. 178.
[847] *Ibid.,* p. 180.
[848] Although scholars suggest that Art. 26(1) of the ECT does not "explicitly exclude the "making of investment"" and since "the usual approach in the Treaty is to specifically mention exclusions from the scope provided for direct investor-state arbitration", "[i]t is, therefore, not possible to imply an exclusion of the pre-investment obligations – binding obligations although with a soft and flexible content". *See,* Waelde, T.W.; Ben Hamida, W.; *supra* at FN 711, p. 187. Consequently, "[t]he term "*relating to an investment*" in Article 26(1) should, therefore, be understood as relating to an investment that is being made, i.e. pre–investment, or relating to an investment that has been made, i.e., post–investment." *See,* Waelde, T.W.; Ben Hamida, W.; *supra* at FN 711, p. 187, emphasis original.

7. INVESTMENT AND THE ICSID CONVENTION

When an ECT dispute is submitted for resolution under the provision of the ICSID Convention, Investors must observe the provisions of Article 25 of the ICSID Convention providing for the jurisdictional requirements laid down therein.[849] Accordingly, arbitral tribunals must be satisfied that they have jurisdiction under both Article 26 of the ECT and Article 25 of the ICSID Convention.[850]

Article 25 of the ICSID Convention refers to the jurisdiction of the ICSID over "any legal dispute arising directly out of an investment […] which the parties to the dispute consent in writing to submit to the Centre."[851] Even though it is the cornerstone of the ICSID Convention, the notion of 'investment' employed by Article 25 is not defined. This generated extensive debate in the practice of the ICSID tribunals and scholarly writings.[852]

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[849] It is relatively rare nowadays that the parties in dispute submit a dispute to the ICSID based on an arbitration clause contained in a contract between them. Investors tend to rely on the offer of consent made by the states in investment treaties or national investment legislation, a situation characterized by PAULSSON as "arbitration without privity". *See*, Paulsson, Jan; *Arbitration without Privity,* 10 ICSID Rev. – FILJ 232 (1995). The treaty based on which the investor submits a dispute against a state, including the definitions of 'investor' and 'investment' therein, constitute the agreement of the parties to arbitrate.

[850] *See*, *Kardassopoulos v. Georgia; supra* at FN 83, para. 113:

> "In order for the Tribunal to have jurisdiction *ratione materiae* over the present dispute, it must be found to have jurisdiction under the ICSID Convention, and under the ECT or the BIT." (emphasis original, footnote omitted)

[851] When an ECT dispute is brought under the ICSID Additional Facility Rules, the investment requirement under the ICSID Convention must be satisfied only with respect to Art. 2(1)(a); Art. 2(1)(b) of the ICSID Additional Facility Rules allows the submissions of disputes that do not arise directly out of an investment. *See* also, Chapter I.2.2.1 above.

[852] For the notion of 'investment' under the ICSID Convention, *see,* Schreuer, Christoph H.; *Commentary to the ICSID Convention: Article 25*, 11 ICSID Rev.–FILJ 320 (1996); Dolzer, R.; Schreuer, C.; *supra* at FN 258, pp. 60–71; Schreuer, C.; with Malintoppi, L.; Reinisch, A. and Sinclair, A.; *supra* at FN 293, pp. pp. 114–143, paras 113–210; McLachlan, Campbell; Shore, Laurence; Weiniger, Matthew; *International Investment Arbitration. Substantive Principles*, New York: Oxford University Press, 2007, pp. 163–196; Ben Hamida, Walid; *Two Nebulous ICSID features: The notion of Investment and the Scope of Annulment Control:* Ad Hoc *Committee's Decision in* Patrick Mitchell v. Democratic Republic of Congo*,* 24 J. Int'l Arb. 287 (2007); Broches, A.; *supra* at FN 429, pp. 361–364; Krishan, Devanish; *A Notion of ICSID Investment*, p. 61, in Grierson Weiler, T.J. (ed.); *supra* at FN 371; Manciaux, S.; *supra* at FN 682; Rubins, N.; *supra* at FN 670; Yala, Farouk; *The Notion of "Investment" in ICSID Case Law: A Drifting Jurisdictional Requirement? Some "Unconventional" Thoughts on Salini, SGS and Mihaly,* 22 J. Int'l Arb. 105 (2005) etc.

Although the Report of the Executive Directors states that "[n]o attempt was made to define the term "investment"",[853] the drafting history of the ICSID Convention shows that there were some attempts to define this notion, but the Contracting States deliberately left out the definition of the notion of 'investment' from the text of the ICSID Convention.[854] As noted by MANCIAUX,

> "[t]the absence of a definition of the notion of investment in the Washington Convention is thus presented as the result of a choice, just as the presence in the near totality of international treaties on investment of these long non exhaustive lists […] of transactions considered as investments […]."[855]

The lack of a definition of 'investment' in the ICSID Convention generated two approaches in ICSID practice and literature: the subjectivist and objectivist theories.[856]

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[853] Report of the Executive Directors; *supra* at FN 541, para. 27.

[854] The Working Paper of 5 June 1962, which is the first draft of the ICSID Convention based on which the discussions begun (*History of the ICSID Convention; supra* at FN 366, vol. II–1, pp. 19–46), did not contain any mention of the term 'investment'. BROCHES explained the absence of the limitation in the nature of the disputes submitted to the ICSID with reference to the difficulty in defining the term 'investment dispute' "with the precision required to avoid disagreements arising as to the applicability of the Convention to a given undertaking" (*ibid.,* p. 22) The reference to 'investment' was introduced in the First Preliminary Draft of the ICSID Convention of 9 August 1963, which provided in Article II, Section 1 that "[t]he jurisdiction of the Center shall be limited to proceedings for conciliation and arbitration with respect to any existing or future investment dispute". (*ibid.,* p. 148) The commentary to this provision indicates that no definition of the term 'investment' was inserted in the First Preliminary Draft because "Contracting States would be free to determine in advance in each particular case what disputes they would submit to the Center" and due to the fact that "a more precise definition would tend to open the door for frequent disagreements as to the applicability of the Convention to a particular undertaking". (*ibid.,* p. 149) The First Draft of the ICSID Convention of 11 September 1964 provided in Article 26(1) that "[t]he jurisdiction of the Center shall extend to all legal disputes […] arising out of or in connection with any investment" (*ibid.,* pp. 621–622) and contained a definition of the notion of 'investment':

> ""investment" means any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years". (Art. 30(1), *History of the ICSID Convention; supra,* p. 623)

The Revised Draft of the ICSID Convention of 11 December 1964 contained a different wording of the provision on the jurisdiction of the ICSID and no definition of the notion of 'investment'. *See, History of the ICSID Convention; supra* at FN 366, vol. II–2, pp. 918–919. Article 25(1) of the Revised Draft, which after some minor changes in the wording became the Article 25(1) of the ICSID Convention, provided that "[t]he jurisdiction of the Centre shall extend to any dispute of a legal character, arising directly out of an investment". (*ibid.,* p. 918)

[855] Manciaux, S.; *supra* at FN 682, p. 4.

[856] There are scholars who advocate a hybrid theory based on which the consent of the parties, as well as the objective meaning of the investment are relevant for the jurisdiction of the ICSID. *See*, Ben Hamida, Walid; *The* Mihaly v. Sri Lanka *case: Some Thoughts Relating to the Status of Pre–Investment Expenditures*, pp. 55–56, in Weiler, Todd (ed.); *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law,* London: Cameron May, 2005. The author refers to the theory as using "a subjective consent criterion, in addition to objective elements, to qualify the meaning of "investment"" and refers to the cases of *Alcoa Minerals of Jamaica, Inc. v. Jamaica,* Decision on Jurisdiction and Competence of 6 July 1975*, Kaiser Bauxite*

The subjectivist theory argues that the lack of a definition of 'investment' was the result of the intention of the drafters to give full effect to the consent of the parties concerning the investment disputes to be submitted to the ICSID. The subjectivist theory relies on the statement of the Report of the Executive Directors, which refers to the fact that "[n]o attempt was made to define the term "investment" given the essential requirements of consent by the parties".[857] Accordingly, the consent of the parties on the term 'investment' is necessary and sufficient for the purpose of Article 25(1) of the ICSID Convention. According to this theory, the notion of 'Investment' under the ECT would represent the consent of the parties for the purpose of the ICSID's jurisdiction, and thus, the jurisdiction requirement of investment under the ICSID Convention would be satisfied.

In *MCI Power v. Ecuador*, a dispute referred to the ICSID based on the Ecuador–United States BIT,[858] the respondent objected to the ICSID's jurisdiction based on the fact that the definition of 'investment' under the BIT could not alter the objective requirement of investment under the ICSID Convention.[859] The tribunal rejected respondent's contentions and concluded that the definition of investment in the BIT complements the ICSID Convention, given that the absence of a definition in the ICSID Convention suggests the freedom of the parties to determine the meaning of this notion:

> "The Tribunal notes that numerous arbitral precedents confirm the statement in the Report of the Executive Directors of the World Bank that the Convention does not define the term "investments" because it wants to leave

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Company v. Jamaica, Decision on Jurisdiction and Competence of 6 July 1975, and *Aucoven v. Venezuela; supra* at FN 445.

[857] Report of the Executive Directors; *supra* at FN 541, para. 27.

[858] *Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment*, 11 May 1997; *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, Award of 31 July 2007, para. 27.

[859] *MCI Power v. Ecuador; supra* at FN 858, para. 141. *See* also, *Lanco. v. Argentina; supra* at FN 429, para. 48; *Mihaly v. Sri Lanka*; *supra* at FN 821, para. 33; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, Award of 16 August 2007, para. 305.

> the parties free to decide what class of disputes they would submit to the ICSID.
> The BIT indicates in its Article 1 which investments are to be protected under it. Thus, the BIT complements Article 25 of the ICSID Convention, for purposes of defining the Competence of the Tribunal with respect to any legal dispute arising directly out of an investment."[860]

The subjectivist theory, which gives preference to the consent of the parties expressed in an investment treaty or other instrument, while relying on the paragraph 27 of the Report of the Executive Directors, ignores the statement made under paragraph 25 of the same Report, which provides that "[w]hile consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction."[861]

The objectivist theory is based on the idea, also advocated in paragraph 25 of the Report of the Executive Directors, that consent alone is not enough to establish the jurisdiction of the ICSID under Article 25(1) of the ICSID Convention. The notion of 'investment' under Article 25(1) has an objective meaning that cannot be overridden by the consent of the parties. In *CSOB v. Slovakia,* the tribunal acknowledged that the agreement of the parties describing their transaction as an investment is not sufficient for the jurisdiction of the ICSID.[862] The tribunal concluded that

> "[t]he concept of an investment as spelled out in that provision is objective in nature in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre's jurisdiction, but they may not choose to submit disputes to the Centre that are not related to an investment. A two–fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT."[863]

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[860] *MCI Power v. Ecuador; supra* at FN 858, paras 159–160, footnote omitted.
[861] Report of the Executive Directors; *supra* at FN 541, para. 25.
[862] *CSOB v. Slovakia; supra* at FN 544, para. 68.
[863] *Id.*

In *Fedax v. Venezuela,* the tribunal considered that apart from the consent of the parties, there is an objective meaning of the notion of 'investment' under Article 25(1) of the ICSID Convention.[864] Although it did not expressly identify them as characteristics of ICSID investments, the tribunal referred to the

> "[…] basic features of an investment [which] have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development."[865]

Probably the most notorious case advocating the objectivist theory is *Salini v. Morocco*, where the tribunal, acknowledging the objective meaning of the notion of 'investment',[866] recognized the elements of investment within the meaning of the ICSID Convention:

> "The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction […]. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.
> In reality, these various elements may be interdependent. […] As a result, these criteria should be assessed globally […]."[867]

The 'Salini test', as it is referred to, provides that the investment must bear a contribution, a certain duration, be subject to risk and contribute to the economic development of the host state. The 'Salini test' was followed by several ICSID tribunals,[868] including by the tribunal in *Kardassopoulos v. Georgia*. In *Kardassopoulos*

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[864] *Fedax v. Venezuela; supra* at FN 779, para. 22.
[865] *Ibid.,* para. 43, footnote omitted. The tribunal referred here to the features of investment as explained by SCHREUER in Schreuer, C.H.; *supra* at FN 852, p. 372.
[866] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, Decision on Jurisdiction of 23 July 2001, para. 52.
[867] *Id.*
[868] *See* also, *Joy Mining v. Egypt*; *supra* at FN 581; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* Decision on Jurisdiction of 14 November 2005; *Jan de Nul v. Egypt; supra* at FN 102; *Helnan International Hotels A/S v. Arab Republic of Egypt*, Decision on Jurisdiction of 17 October 2006; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, Award of 28 May 2007; *Noble Energy Inc. and MachalaPower Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad,* Decision on Jurisdiction of 5 March 2008; *Víctor Pey Casado v. Chile; supra* at FN 373; *Phoenix Action Ltd v. Czech Republic,* Award of 15 April 2009, where the tribunal held that an operation made in

v. Georgia, a case brought under the ECT and the Greece–Georgia BIT, the tribunal concluded that, although the ICSID Convention does not provide for the definition of 'investment',

> "ICSID tribunals have, however, developed a set of conjunctive criteria to determine whether an investment was made within the meaning of the Convention. There must be: (i) a contribution, (ii) a "certain duration of performance of the contract", (iii) a "participation in the risks of the transaction", and (iv) a contribution to the host State's economic development."[869]

The diversity of opinions expressed by the ICSID tribunals shows that there is no consensus on what the notion of 'investment' is. The drafting history of the ICSID Convention and the rules of treaty interpretation suggest that there is an objective meaning of the term 'investment' and consent alone will not suffice to bring a dispute under the ICSID. The elements proposed by the 'Salini test' were developed based on the scholarly writings, and, in particular, on a paper written by SCHREUER in 1996, in which he concluded that:

> "[…] it seems possible to identify certain features that are typical to most of the operations in question. The first such feature is that the projects have a certain *duration*. […] The second feature is a certain *regularity of profit and return*. […] The third feature is the assumption of *risk* usually by both sides. […] The fourth typical feature is that the commitment is *substantial*. […] The fifth feature is the operation's significance for the host State's *development*. This is not necessarily characteristic of investments in general. But the wording of the Preamble and the Executive Directors' Report […] suggest that development is part of the Convention's object and purpose. These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention."[870]

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violation of the principle of good faith cannot constitute an investment (para. 100); *Patrick Mitchell v. Democratic Republic of the Congo*, Decision on Annulment of 1 November 2006 etc.
To the elements of investment under the 'Salini test', tribunals added a fifth one, the regularity of profit and return. *See, Joy Mining v. Egypt*; *supra* at FN 581, para. 53. *See* also, Schreuer, C.H.; *supra* at FN 852, p. 372.

[869] *Ibid.*, para. 116, footnote omitted. The tribunal then turned to analyse the provisions of the ECT and the BIT, based on respondent objection that claimant has no interest in the investment made in Georgia. The tribunal found, however, that claimant had sufficient interest in the investment and rejected Georgia's contentions. *See, Kardassopoulos v. Georgia; supra* at FN 83, para. 141.

[870] Schreuer, C.H.; *supra* at FN 852, p. 372, emphasis original, footnotes omitted.

As suggested by SCHREUER, these elements of the investment should be considered typical characteristics and not jurisdictional requirements under Article 25 of the ICSID Convention. However, the jurisprudence of the ICSID Convention is not settled on this issue. The 'Salini test' does not explain whether the elements of investment are typical characteristics or jurisdictional requirements, while subsequent tribunals that followed the 'Salini test' have not reached an agreement on the nature of these requirements. For example, in *Joy Mining v. Egypt*, the tribunal considered them as jurisdictional prerequisites,[871] while in *Noble Energy v. Ecuador*, the tribunal saw the elements proposed by the 'Salini test' as typical features.[872] The consequence for this qualification may result in the lack of jurisdiction of the ICSID in the absence of one element of the term 'investment'.

In spite of the numerous decisions advocating the 'Salini test',[873] the absence of a definition of 'investment' in the ICSID Convention suggests that the notion should be understood within its ordinary meaning and in the context in which the term is used, and not merely assessed based on criteria developed by the ICSID tribunals and scholars.[874]

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[871] *Joy Mining v. Egypt; supra* at FN 581, para. 53: "the elements that an activity must have in order to qualify as an investment".

[872] *Noble Energy v. Ecuador; supra* at FN 868, para. 128:

> "The Tribunal concurs with earlier ICSID decisions which, subject to minor variations, have relied on the so-called "*Salini* test". Such test identifies the following elements as indicative of an "investment" for purposes of the ICSID Convention […]" (emphasis original)

[873] *See* also, the idea of unity of investment advocated in *CSOB v. Slovakia supra* at FN 544, para. 72:

> "[…] a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment." (footnote omitted)

The unity of investment was also considered by the tribunal in *Alpha v. Ukraine*:

> "The Tribunal concludes that it is the character of the project *in toto* which determines the nature of the commercial arrangements and not the individual agreements in isolation. (*Alpha v. Ukraine*; *supra* at FN 709, para. 272, emphasis original)

[874] *See*, Douglas, Z.; *supra* at FN 292, p. 164, para. 343. *See* also, the conclusion of the tribunal in *Alpha v. Ukraine*:

> "[…] the elements of the so-called *Salini* test, which some tribunals have applied mandatorily and cumulatively […] are not found in Article 25(1) of the ICSID Convention. In applying the criteria in this manner, these tribunals have sought to apply a universal definition of "investment" under the ICSID Convention, despite the fact that the drafters and signatories of the Convention decided that it should not have one." (*Alpha v. Ukraine*; *supra* at FN 709, para. 311, emphasis original, footnotes omitted)

This was the conclusion of the tribunal in *Saba Fakes v. Turkey*, where the respondent objected to the jurisdiction of the ICSID arguing that claimant's alleged investment is not covered by the meaning of Article 25(1) of the ICSID, [875] and asked the tribunal to follow the 'Salini test' when deciding on this issue.[876] The tribunal held that consent of the parties is not sufficient for satisfying the ICSID's jurisdiction,[877] and reasoned that

> "[…] an objective definition of the notion of investment was contemplated within the framework of the ICSID Convention, since certain terms of Article 25 would otherwise be devoid of any meaning."[878]

The tribunal in *Saba Fakes v. Turkey* concluded that

> "[…] the criteria of (i) contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention."[879]

These criteria, the tribunal added, reflect "an objective definition of 'investment', without doing violence either to the text or the object and purpose of the ICSID Convention",[880] and "derive from the ordinary meaning of the term 'investment'".[881]

When Investors submit their ECT disputes under the ICSID option, they must consider the jurisdictional requirement of 'investment' under Article 25(1) of the ICSID Convention. ICSID tribunals have developed controversial approaches on the notion of 'investment' given the absence of a definition of this term in the ICSID Convention. It

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Nevertheless, some of the elements of the 'Salini test' are reflected in the ordinary meaning of the notion of 'investment'. *See*, Chapter III.1 above.

[875] *Saba Fakes v. Turkey; supra* at FN 302*,* para. 82.

[876] *Ibid.,* para. 83.

[877] *Ibid.,* para. 108.

[878] *Id.*

[879] *Saba Fakes v. Turkey; supra* at FN 302, para. 110.

[880] *Id.*

[881] *Saba Fakes v. Turkey; supra* at FN 302, para. 110. The tribunal held that the 'contribution to the economic development of the host state' requirement is "an expected consequence, not a separate requirement". *See, Saba Fakes v. Turkey; supra* at FN 302, para. 111. Also, the tribunal concluded that the principle of good faith advocated in the *Phoenix v. Czech Republic; supra* at FN 868, "cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention". *See, Saba Fakes v. Turkey; supra* at FN 302*,* para. 112.

is possible for a tribunal sitting in a dispute based on the ECT's provisions to adopt the subjectivist approach on the notion of 'investment' or the 'Salini test'.[882] It might also

[882] The 'Salini test' was also applied to disputes that had not been submitted under the ICSID Convention. In *Romak v. Uzbekistan* tribunal concluded that "the term "investments" under the BIT has an inherent meaning […] entailing a contribution that extends over a certain period of time and involves some risk." (*Romak v. Uzbekistan; supra* at FN 697, para. 207, emphasis original) The tribunal reached the definition of investment by relying on the meaning of the notion of 'investment' under the ICSID Convention, as developed by the ICSID arbitral tribunals, although the dispute was brought under the UNCITRAL Rules. Uzbekistan argued that the tribunal should observe the 'Salini test', where a transaction, in order to be considered investment, must have the following characteristics: regularity of profits and returns, certain duration, risk, significant contribution to the development of the host state. (*ibid.,* paras 104–105) Romak S.A. argued, in turn, that the definition of the notion of 'investment' "may vary depending on the investor's choice between UNCITRAL or ICSID Arbitration" and suggested that the definition under the UNCITRAL proceedings is wider that in ICSID arbitration. (*ibid.,* para. 193) The *Romak v. Uzbekistan* tribunal rejected claimant's argument and relied on the fact that the Uzbekistan–Switzerland BIT provides for ICSID arbitration, besides the UNCITRAL option. In the tribunal's opinion, claimant's argument referring to the fact that a dispute brought under the UNCITRAL Rules or the ICSID Convention may narrow or widen the substantive protection offered by the BIT could lead to unreasonable results. (*ibid.*, para. 194) The tribunal reasoned that there is no basis to suppose that the term 'investment' has different meaning in the context of the ICSID than it has in relation to the BIT (*ibid.,* para. 194) and concluded that an investment, irrespective of whether investors resort to ICSID or UNCITRAL proceedings, entails a contribution, a certain duration and risk.

In the related court proceedings regarding the enforcement of Romak S.A.'s GAFTA arbitral award (*see, supra* at FN 698), the Cour d'Appel de Paris concluded in its decision of 4 December 2008 that the definition of investment developed by ICSID case law cannot be applied in a non–ICSID case. *See,* Duprey, Pierre; *Comments on the Paris Court of Appeal Decision on Czech Republic v. Pren Nreka,* 26(4) J. Int'l Arb. 591 (2009), at note 32. It was reported that in *Nreka v. Czech Republic*, a non–ICSID case, the tribunal applied the 'Salini test'. *See,* the case report in Yannaca–Small, Katia; *Definition of "Investment": An Open–ended Search for a Balanced Approach*, p. 257, in Yannaca–Small, K. (ed.); *supra* at FN 69. In the challenge procedures against the award brought by the Czech Republic (*see, supra* at FN 682), Cour d'Appel de Paris reverted the conclusion of the tribunal on the application of the 'Salini test', and gave full effect to the definition of 'investment' under the relevant BIT. *See, supra* at FN 682; also, Cabrol, E.; *supra* at FN 696, pp. 217–231.

In *AFT v. Slovakia*, a non-ICSID and ad hoc arbitration, the tribunal reached the unusual conclusion that the elements of the 'Salini test' are to be applied by any tribunals dealing with disputes between investors and states, whether ICSID-based or not, and that in this sense, ICSID tribunals helped to elucidate the notion of 'investment' under customary international law having these elements:

> A more than abundant number of cases have contributed to elucidate the notion of investment under the ICSID Convention and, more general, international customary law. It is now common ground that the necessary conditions or characteristics to be satisfied for attributing the quality of 'investment' to a contractual relationship include: *(a)* a capital contribution to the host-State by the private contracting party, *(b)* a significant duration over which the project is implemented and *(c)* a sharing of operational risks inherent to the contribution together with long-term commitments. (*AFT v. Slovakia,* para. 241, emphasis original, footnotes omitted)

Not only that the *AFT v. Slovakia* tribunal resorted in a non-ICSID arbitration to the 'Salini test' as applied by ICSID tribunals, but it reached the odd conclusion that the notion of 'investment' is part of customary international law (the tribunal referred to the notion of 'investment' as a 'general concept given by international law rules' – *AFT v. Slovakia*, para. 240), while considering that it is of its duty to follow the conclusions of ICSID tribunals (*AFT v. Slovakia*, para. 239). It is difficult, however, to imagine how the notion of 'investment', which is not a normative rule, may turn into a generally applicable concept. Moreover, it is difficult to substantiate the existence of customary rules in the context of investment law which is divided between different treaty and non-treaty regimes and settlement of disputes under various dispute resolution mechanisms, including arbitration under the auspices of different institutions or ad hoc tribunals, some of them with their particular substantive provisions. In spite of these peculiarities, there are voices – including, most recently, arbitral tribunals - advocating the formation of these rules in investment law. *See,* Schwebel, Stephen M.; *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 Am. Soc'y Int'l L. Proc. 27 (2004); Schill, Stephan W.; *The Multilateralization of International Investment Law*, Cambridge: Cambridge University Press, 2009.

be that ICSID tribunals consider the ordinary meaning of the term 'investment', as suggested by the drafting history of the ICSID Convention and recent ICSID decisions. In this latter instance, the notion of 'Investment' under the ECT will identify itself with the meaning of the term under the ICSID Convention.[883] However, it may be that ICSID tribunals will develop a new approach of the notion of 'investment'. A diligent Investor will have to take into consideration all relevant criteria, including the chances for an ECT dispute to be dismissed by an ICSID tribunal because of the failure to fulfil the investment requirement under Article 25(1) of the ICSID Convention.[884]

8. CONCLUSIONS

The notion of 'Investor' under the ECT cannot be discussed outside the concept of 'Investment'. The consent of the Contracting Parties under Article 26 of the ECT is given in respect of disputes between Investors and Contracting Parties relating to an Investment. The substantive protection offered by the ECT is also confined, in most of its parts, to Investments of Investors. Similar to other treaties providing for protection and promotion of investments, the ECT has a broad definition of covered Investments. Article 1(6) encompasses any asset owned or controlled directly or indirectly by an Investor. The non–exhaustive list of assets comprises movable and immovable property,

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[883] *See* also, DOUGLAS, who is of the opinion that

> "[…] the open-textured nature of the standard formulation in investment treaties preserves the ordinary meaning of the term 'investment' and therefore its consistency with the characteristics that must be attributed to the same term as employed in Article 25 of the ICSID Convention.
>
> It is difficult to conceive of a hypothetical conflict between the conceptions of an investment in Article 25 of the ICSID Convention and an investment treaty because the use of the term 'investment' in both instruments imports the same basic economic attributes of an investment derived from the ordinary meaning of that term […]." (Douglas, Z.; *supra* at FN 292, p. 164, paras 343–344)

But *see,* authors who suggest that the notion of 'Investment' under the ECT is broader than the notion of 'investment' under Art. 25(1) of the ICSID Convention: Waelde, T.W.; Ben Hamida, W.; *supra* at FN 711, p. 203.

[884] For an overview and statistics on the jurisdictional challenges related to the notion of 'investment' under the ICSID Convention, *see*, Commission, J.P.; *An Analysis of a Developing Jurisprudence in International Investment Law – What Investment Treaty Tribunals Are Saying and Doing (Tables)*, 6(1) TDM (2009).

company or business enterprise, shares and debts in a company, intellectual property, returns, claims to money and claims to performance pursuant to a contract associated with an Investment, and any right to undertake an Economic Activity in the Energy Sector. The broad character of the definition of the notion of 'Investment' was captured by the tribunal in *Plama v. Bulgaria*:

> "[…] a broad, non–exhaustive list of different kinds of assets encompassing virtually any right, property or interest in money or money's worth […]".[885]

However, this virtual boundless notion of 'Investment' is limited in paragraph 3 of Article 1(6) by two restrictive stipulations: the Investment must be an investment within the ordinary meaning of the term, and the Investment must be associated with an Economic Activity in the Energy Sector. Thus, the notion of 'Investment' under the ECT could not be extended as to encompass one–off transactions, such as sale of goods. The requirement that Investments must be associated with an Economic Activity in the Energy Sector gives expression to the purpose of the ECT to promote cooperation in the energy field. The notion of 'Economic Activity in the Energy Sector' is explained by Article 1(5) as being an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products. Investments must be associated with an Economic Activity, and not represent an Economic Activity in the Energy Sector *per se*.

The consent of the Contracting Parties regarding the disputes between Investors and Contracting Parties covers Investments that are in the Area of the respondent Contracting Party. While the terms 'in the Area' would apparently suggest a physical materialization of Investments in the territory of the host Contracting Party, some of the potential Investments listed under Article 1(6) would not necessarily take a material

[885] *Plama v. Bulgaria; supra* at FN 93, para. 125.

form. Therefore, it is not required for Investments to be physically located in the Contracting Party, but to be linked or directed to the host Contracting Party. Disputes related to the Making of Investments are excluded from the unconditional consent of the Contracting Parties to the ECT, as Article 26(1) refers to disputes "relating to an Investment". The ECT does not provide for express provisions regarding the lawfulness or approval or Investments, nor does it discuss the origin of the Investment.

The ECT is not a self–contained treaty. The Investor–Contracting Parties dispute may only be arbitrated under one of the options provided for by Article 26(4) of the ECT. While the UNCITRAL and SCC Rules do not contain provisions regarding the jurisdiction of the tribunals, the ICSID Convention and the ICSID Additional Facility Rules place several limitations on the jurisdiction of the ICSID. Consequently, Investors must observe the requirements laid down in Article 25 of the ICSID Convention that include the prerequisite of having an 'investment'. The notion of 'investment' is much debated in ICSID case law and scholarly writings, given the absence of the definition of this notion in the ICSID Convention. Tribunals are divided between a subjectivist approach, giving preference to the consent of the parties, and an objectivist position towards this concept, which adopts an objective meaning of the term. ICSID tribunals applying the objectivist theory consider either the so–called 'Salini test' or the 'ordinary meaning' approach. The 'Salini test' provides that an investment must bear a contribution, have a certain duration, be subject to risk and contribute to the economic development of the host state, while the 'ordinary meaning' approach suggests that the ordinary meaning of the term should be observed in the absence of the definition of the notion of 'investment' in the ICSID Convention. The review of ICSID case law is not just a useful academic research. It shows that Investors bringing their disputes to the ICSID relying on the ECT may face a lack of consistency in the approach of the ICSID

tribunals towards the investment requirement under Article 25 of the ICSID Convention.

CONCLUSIONS

The last decades revealed a boom in the number of disputes between investors and states related to measures (or omissions) taken by states in respect to the promotion and protection of investors' investments. The ICSID statistics show that more than one third of the disputes between investors and the Contracting States of the ICSID Convention are related to investments in the energy field. The over 2,600 BITs and the increasing number of trade agreements contributed to the implementation of standards of protection of investors and their investments, but also played an important part in the rapid raise of the number of cases brought under the investor–state dispute resolution mechanism, and, in particular, under the arbitration proceedings.

The ECT came to life in the aftermath of the fall of the communist regimes across Europe and the dissolution of the Soviet Union. The political and economic interests of the Western European states, largely dependent on imports of energy resources, secured a framework agreement with the Eastern European and former Soviet states, with the purpose of developing an innovative multilateral treaty regulating the energy field. The European Charter, although no more than a political statement, laid down the foundation of the ECT. The ECT was negotiated in a short period, compared to the goals it intended to achieve, and received support not only from the European states, but also from the international community. The ECT is a unique treaty aiming at strengthening the rule of law in the energy field, by setting minimum standards of action in three main areas: trade, transit and investment protection. The provisions for the protection and promotion of Investments, reinforced by the dispute resolution

mechanism under Article 26 of the ECT, contribute to the predictability and stability of the investment environment and help improving Investors' confidence in undertaking long–term and expensive investment opportunities. Although the protection and promotion of Investments and the mechanisms for the settlement of disputes related to these Investments brought notoriety to the ECT, all the provisions of the ECT contributed to its success.

This Thesis aimed at clarifying the notion of 'Investor' within the ECT framework, while bringing up some of the key problems surrounding this notion. The notion of 'Investor' is the keystone of the provisions for the promotion and protection of Investments and for the procedural remedies under Article 26 of the ECT. Although the ECT contains a definition of the term 'Investor' in Article 1(7), the notion of 'Investor' goes beyond this provision. The research showed that the notion of 'Investor' is shaped under the substantive protection provisions and under the procedural remedies. It also suffers limitations when Investors choose to arbitrate their disputes with the Contracting Parties under the ICSID Convention and the ICSID Additional Facility Rules. The analysis of the notion of 'Investor' is not an easy task. The ECT is a web of provisions that are not always clear and interact with external provisions found in related treaties and rules. As explained by an author, the ECT is

> "[…] a tortuous legal instrument where great principles are announced and then taken back, excepted, mitigated and delayed – usually in the less–conspicuous forms of annexes and annexed declarations and understandings. To understand the Treaty, it is necessary to appreciate the maze of textual compromises which paved the way to signature […].[886]"

The research began from the definition of Investor under Article 1(7) and the consent expressed in Article 26(1) of the ECT on the types of disputes that can be brought under

[886] Waelde, T.W.; *supra* at FN 66, p. 269.

the Investor–Contracting Party dispute resolution mechanism. These two provisions revealed that a comprehensive analysis of the notion of 'Investor' must necessarily refer to three concepts: the notion of 'Contracting Parties to the ECT', the notion of 'Investor' and the links between natural persons and legal entities and the Contracting Parties, and the notion of 'Investment'. The discussion considered both substantive and procedural protection of the ECT and constantly weighted the issues against the provisions of the related treaties and rules, with particular emphasis on the ICSID Convention. The network of – not always clear – provisions of the ECT and the interaction of the ECT with other provisions of related treaties and rules, turn the notion of 'Investor' into a nuanced and complex concept and, arguably, too generously defined.

The analysis of the notion of 'Investor' revealed several controversial issues, some of which have already been discussed by ECT arbitral tribunals. While the Chapters of this Thesis highlighted and discussed them in detail, it is the role of these 'Conclusions' to summarise and assess the most important ones and, where possible, suggest solutions. These issues do not concern only the ECT *per se*, but also the manner in which arbitral tribunals considered them and how they would influence Investor's decision to submit a dispute to one or other arbitration fora under Article 26 of the ECT.

a. Dual Nationality of Natural Persons. Rules of Diplomatic Protection and Investment Law

Considerable space was devoted in Chapter II to the issue of dual nationality *lato sensu* of natural persons and the analysis concluded with the view that the ECT does not explicitly exclude dual nationals from its protection – opinion which was expressed by representatives of the negotiating parties on the working drafts of the ECT. To support

this conclusion, the research revealed that there is the tendency nowadays in international law, based on the realities of our globalized society, to eliminate the rule of non-responsibility of states - which under the rules of diplomatic protection prevented the state of one of the nationalities of an individual to take up a claim against the state of the other nationality -, and give preference to the rule of dominant nationality, thus recognizing that an individual with double or multiple nationality may have stronger ties with one state than with another, without making the other nationality(ies) ineffective. However, the analysis revealed not only a grey area of the notion of 'Investor', which has potential to become highly debatable in the practice of arbitral tribunals, but also the relevance of the rules of diplomatic protection in investment law, which in itself is a controversy among scholars and arbitrators. Chapter II of the Thesis briefly referred to the relation between the rules of diplomatic protection and investment law and spotlighted that opinions are divided. Some voices argue that the very nature of investment law excludes the rules of diplomatic protection since under the protection regime offered by investment law investors no longer need their state of nationality to espouse their claims. Other scholars claim that in the absence of specific rules in investment treaties there is nothing to prevent the reliance on the rules of diplomatic protection. Whichever side is taken, the rules of diplomatic protection may become relevant when interpreting the provisions of a treaty to the extent that these rules are rules of international of law.

b. Shareholders and Companies. Treaty Shopping and Parallel Proceedings

Chapter II also analysed the quality of shareholder and its relation to companies and raised the issues of implied requirements for legal entities, such as the nationality of the real beneficiaries or controllers of a company – issue reiterated in Chapter III in respect of the origin of Investment. It was highlighted that problems of parallel proceedings and

'treaty shopping' may come up in connection with these aspects of the notion of 'Investor'. It is thus the place to reopen this discussion – although the Thesis is not intended to examine procedural issues in connection with the notion of 'Investor' – and analyse whether the notion of 'Investor' under the ECT is too broad or the language of the provisions dealing with it must be revisited.

In the *Yukos Cases* the tribunal took a literal approach to the terms of the definition of 'Investor' under Article 1(7) of the ECT and rejected to read into this provision that the ECT requires more than the incorporation of a company in a Contracting Party. Respondent in these cases argued that the claimants were holding companies used by Russian nationals to bring claims against their home Contracting Party.[887] Arguably, this translates into an abuse of the ECT's provisions relying on the fact that the only express requirement for a company to be considered Investor under the ECT is the incorporation of that company in a Contracting Party of the ECT, irrespective of the nationalities of the shareholders or ultimate beneficiaries. This widening of the protection of a treaty is also referred to as 'treaty shopping' and it is seen as a misuse of a treaty, which normally would not protect those foreign investors, in violation of the principle of reciprocity between the parties to that treaty.[888] Nevertheless, 'treaty shopping' is usually counteracted by the parties to a treaty by imposing further requirements on the nationality of controllers or shareholders of a company. Where these additional requirements are not expressly provided for in a treaty, tribunals – such as the one in the *Yukos Cases* - have been reluctant to read in a treaty something that was not expressly provided.[889] The analysis of the provisions of the ECT in respect of these implied requirements for Investors legal entities and, implicitly, 'treaty shopping'

[887] *Yukos Cases; supra* at FN 98, para. 407.
[888] *See*, Mistelis, Loukas; Baltag, Crina; *supra* at FN 662, p. 303.
[889] *See* also, *Saluka v. Czech Republic; supra* at FN 595.

methods concluded that the rules of treaty interpretation do not allow to read in a treaty something that it is not there, opinion also expressed by the tribunal in the *Yukos Cases*. However, the economic realities and the purpose of the ECT – which is also based on the principle of reciprocity mentioned above – would suggest that tribunals should probably counteract the abuse of the ECT's provisions and reject claims from shell companies set up by nationals of the respondent Contracting Party or of a third state in Contracting Parties in order to obtain – artificially - access to the protection of the ECT. However, one cannot disregard the fact that the Contracting Parties themselves had the opportunity, while negotiating the ECT, to prevent the misuse of the protection of the ECT and include adequate mechanisms for this purpose – one of which is the 'denial of benefits' clause which shall be revisited below. Would tribunals create less damage to the economic reality of the ECT by reading into the ECT something that it is not there? The tribunal in the *Yukos Cases* saw less injustice in following the plain wording of the provisions of the ECT than in condemning practices of 'treaty shopping', of which the Contracting Parties must have been aware of when agreeing on the provisions of the ECT. The broad definition of 'Investor' under Article 1(7) may not be restricted by interpretations of arbitral tribunals which would depart from the rules of treaty interpretation. Narrowing down the circle of Investors could, however, be done by other means provided by the ECT and referred to in the next pages.

The 'denial of benefits' clause under the Article 17 of the ECT was introduced to balance the generous provisions of the ECT and prevent their abuse for the benefit of individuals or legal entities not protected by the ECT. However, as the analysis of Article 17 revealed, this clause proved to be controversial in the practice of ECT tribunals. The tribunals in *Plama v. Bulgaria* and the *Yukos Cases* expressed opinions which *de facto* leave the 'denial of benefits' clause with no practical consequences.

What would suppose to be a valid mechanism for counteracting manipulations of the protection of the ECT was turned by these tribunals into a beneficial provision for treaty shoppers. The arguments of the parties in these two cases raised questions regarding the exercise and effects of the 'denial of benefits' clause and the time when this clause may be reasonably invoked by a Contracting Party. Both tribunals held that the 'denial of benefits' clause does not function automatically, but that Contracting Parties must exercise this right in a timely manner and, when it is exercised, it can only have prospective effects. Without revisiting the arguments exposed in Chapter II of the Thesis, it is important to mention here that in reaching their decisions, the tribunals in *Plama* and *Yukos Cases* misinterpreted the provisions of the Article 17 of the ECT. For example, in respect of the prospective effect – which goes hand-in-hand with the issue of timing - one would wonder whether the purpose of the 'denial of benefits' clause would not be defeated since a purported Investor would still be able to claim the protection of the ECT although it was never entitled to it. The issues highlighted in connection with the 'denial of benefits' clause relate not only to the broad or unclear language of Article 17, but also to the manner in which tribunals apply the rules of treaty interpretation and/or follow the decisions of previous tribunals on similar issues.

Chapter II extensively dealt with the quality of shareholders as Investors under the ECT and referred to another important problem arising out of the inclusion of shareholders in the broad circle of Investors, which relates to parallel proceedings arising from the same act of a Contracting Party. It were mentioned the *CME* and *Lauder* cases where both tribunals rejected claims of *lis pendens* and *res judicata*, as well as the abuse of process by the claimants. The tribunals reiterated that in the application of the two principles there must be identity of the cause of action, parties and subject-matter. In the *CME* and *Lauder* cases the parties also failed to agree on the consolidation of the related arbitral

proceedings and the appointment of the same tribunal to hear both claims. While the tribunals in these cases did not see an abuse of treaty provisions by allowing a company and its shareholders/beneficiaries to recover damages arising out of the same action or omission of a state, this is a situation which can turn into a problem, especially where it results in a double recovery of damages or in irreconcilable awards. The provisions of the ECT equally protect shareholders and companies and, thus, each of these Investors is entitled to rely on the ECT and seek compensation for the damages caused by a Contracting Party. It can also be the case, as in the *CME* and *Lauder* cases, that these claims appear not solely within the ECT system, but also outside it, for example when the shareholder relies on a BIT because it does not satisfy the Investor requirements of the ECT. Thus, taking a formalistic approach, these situations would not entitle the application of the principles of *res judicata* and *lis pendens* since in the first case there would not be a strict identity of parties, while in the second case, the parties and well as the cause of action would be different. The remedy for this problem could either be at the procedural level or within the treaty system. While the last solution will be discussed below, the procedural remedies within the ECT system – which were previously mentioned - are briefly discussed here. Tribunals and parties could manage parallel proceedings and duplication of claims by consolidating the proceedings. Although the ECT does not provide for this option, the parties may agree to consolidate new claims with the pending proceedings.[890] Where consolidation is not possible or cannot be agreed by the parties, another option would be the appointment of the same tribunal to hear the claims, together or separately (seriatim). Another solution would be

[890] Only the SCC Arbitration Rules provide for consolidation (Art. 11). The other treaties and arbitration rules are silent on this.
See also, Art. 1117 (3) of the NAFTA which provides for the possibility to consolidate a claim brought under Art. 1117 (by a controlling shareholder on behalf of the company) and a claim made under Art. 1116 (by a shareholder on its own behalf). Also, Art. 1121(1)(b) of the NAFTA which provides for the condition precedent for shareholders submitting claims on their own behalf, i.e. the company waived the right to any dispute resolution mechanism with respect to the measure of the state giving rise to the alleged breach of Art. 1116.

for arbitral tribunals to take a wider approach on the *res judicata* and *lis pendens* doctrines because "from an economic point of view, such formalism prevents the law from addressing […] a true abuse of investment protection."[891] It is suggested that tribunals should retain the identity of parties when they bear the same interest – such as shareholders and companies, and assess the cause of action with reference to the nature of the rights asserted and not to their source.[892] Arguably, such economic approach would give efficiency to the finality of arbitral awards and discourage parties to manoeuvre the provisions of investment treaties and resubmit claims arising from the same conduct of a state. Arbitral tribunals must also acknowledge that when dealing with claims brought by shareholders for damages caused to their Investment by conduct of Contracting Parties directed to their company the compensation awarded to shareholders may not be equivalent to the one which the company would be entitled to receive. This approach was adopted by the tribunal in *Nykomb v. Latvia* which noted that the reduced tariff did not cause Nykomb, as shareholder – albeit the sole shareholder of Windau - , the same damage as to Windau. The tribunal thus regarded the shares held by Nykomb as the Investment protected by the ECT and concluded that "[a]n assessment of the Claimant's loss on or damage to its investment based directly on the reduced income flow into Windau is unfounded and must be rejected."[893] The NAFTA also provides for a solution to the potential problems raised by claims brought by shareholders arising out of the conduct of states towards companies. However, this

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[891] Cremades, Bernardo M.; *Parallel Arbitration Tribunals and Awards*, p. 312, in Ribeiro, C. (ed.); *supra* at FN 89.

[892] McLachlan, C.; Shore, L.; Weiniger, M.; *International Investment Arbitration. Substantive Principles; supra* at FN 852, p. 130. *See* also, Schreuer, Christoph; Reinisch, August; *Legal Opinion in CME Czech Republic B.V. (The Netherlands) v. The Czech Republic,* 3 TDM (2005), where the authors suggest that the doctrine of *res judicata* does not require strict identity of parties, but that it is sufficient that their "privies" are the same. (*ibid.,* p. 14) As to the identity of cause of action, the authors explain that parties can easily escape this strict requirement by modifying the grounds relied upon – for example seeking compensation for expropriation under customary international law in one case and under a BIT in another. (*ibid.,* pp. 17-18) It is also suggested in this *Legal Opinion* that tribunals should identify the real party in interest, which in the *Lauder* and *CME* cases was Mr Lauder as the ultimate controller of all companies involved. (*ibid.,* p. 27)

[893] *Nykomb v. Latvia, supra* at FN 531, para. 5.2, p. 39.

solution concerns claims by shareholders on behalf of companies and not the case when shareholders submit the claims in their own name. Article 1117 of the NAFTA provides that any payment of damages in the case of claims brought by shareholder on behalf of the company has to be made directly to the company that suffered the damage.[894] It must also be mentioned in this context the fact that Article 26(2) of the ECT allows Investors to choose between three mechanisms for the resolution of their disputes with Contracting Parties and this choice, when made, is not irrevocable and, accordingly, Investors may take the dispute to the other forums under Article 26.[895] This means that in addition to the possibility that shareholders of a company and the company itself claim for damages arising out of the same conduct of the host Contracting Party, there also exists the possibility to reproduce the dispute resolution alternatives, even at the same time. [896]

c. Investor and Investment. Customary International Law and the Definition of Investment

Chapter III of the Thesis analysed the notion of 'Investment' as an essential element which defines the notion of 'Investor' and highlighted - yet - other controversial issues. The main one concerns the apparently broad definition under Article 1(6) of the ECT as virtually encompassing any kind of asset owned or controlled by an Investor. The research revealed that this broadness is limited by two requirements set forth in paragraph 3 of Article 1(6), namely that the assets must constitute an investment within the ordinary meaning of the term and they must be associated with an Economic

[894] Under Art. 1117, the shareholder must own or control the company. *See* also, Art. 1117(3) for the consolidation of claims and the condition precedent under Art. 1121 for shareholders bringing claims on their own behalf, *supra* at FN 890.
[895] This conclusion results from the inclusion of Annex ID to the ECT which refers to the list of Contracting Parties not allowing an Investor to resubmit the same dispute to arbitration at a later stage.
[896] *See, Petrobart v. Kyrgyzstan* where the claimant, prior to the ECT arbitration, brought the dispute under the UNCITRAL Arbitration Rules and the Kyrgz Foreign Investment Law.

Activity in the Energy Sector. Thus, the notion of 'Investment' within the meaning of the ECT excludes one-off transactions and, consequently, natural personas or legal entities engaged in these types of transactions cannot avail themselves of the quality of Investor. In spite of this, the tribunal in *Petrobart v. Kyrgyzstan* held that a right conferred by contract to undertake an activity concerning the sale of gas condensate is an Investment. As it will be discussed below, arbitral tribunals have the duty to properly interpret the provisions of the ECT and, thus, not to expand the language of these provisions and widen the protection offered by the ECT. The analysis of the notion of 'Investment' also revealed that there is currently a movement towards a standardization of investment law and its concepts. In *AFT v. Slovakia* the tribunal reached the unusual conclusion that the elements of the 'Salini test', as explained in Section 7 of Chapter III, are to be applied by any tribunals dealing with disputes between investors and states, whether ICSID-based or not, and, in this sense, they "contributed to elucidate the notion of investment under […] customary international law".[897] As mentioned before, it is difficult to substantiate this conclusion when, first, the notion of 'investment' is not a normative rule, and second, the traditional elements of custom – duration, consistency, generality and opinion juris -¯ are unlikely to be identified in investment law given the diversity of treaties and fora under which the rights of investors are granted and protected. However, this does not exclude the application of the existent customary international law rules by arbitral tribunals.

d. Potential Solutions within the ECT System

The problems identified throughout the Thesis and, in particular, the ones reiterated here above, raise distinct issues and solutions, some of which referred to in the previous pages.

[897] *See, supra* at FN 882.

First, there are decisions of arbitral tribunals constituted under Article 26 of the ECT which failed to correctly apply the rules of treaty interpretation codified by the Vienna Convention. This issue reveals not only a failure of behalf of distinguished arbitrators, but also the absence of a mechanism whereby questions of interpretation of the ECT's provisions should be addressed. This discussion was also raised in the context of the ICSID Convention, in particular with regard to the jurisdiction of the ICSID.[898] The Energy Charter Conference and the Energy Charter Secretariat, as mentioned in Chapter III, do not have interpretative powers. Each arbitral tribunal constituted under the dispute resolution mechanism of Article 26 has the competence to interpret the provisions of the ECT. It is true that this system, as it is the case with arbitral tribunals established under different structures, creates a fragmentation of the ECT since each tribunal may advocate its own view on the interpretation of the ECT. This situation can be solved by using the tools already present in the ECT to clarify or amend some of the ECT's provisions. Examples of these provisions include the definition of 'Investor' under Article 1(7) which is silent on the inclusion or exclusion of dual nationals and state-owned or controlled legal entities, on the legal personality of legal entities etc., the application of the denial of benefits clause under Article 17, the issues of parallel proceedings and treaty shopping etc.

The clarification of these provisions may be done through the mechanism of Article 34(3)(b) of the ECT which authorizes the Energy Charter Conference to keep under review and facilitate the implementation of the provisions of the ECT, by way of protocols or declarations (Article 33(1) of the ECT). Contracting Parties may also resort

[898] *See*, ICSID Secretariat, *Discussion Paper on Possible Improvements of the Framework for ICSID Arbitration*, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf>, (last visited 11 August 2011).

to the provisions of Article 42 of the ECT which provides for the amendment of the ECT. However, the shortcomings of the mechanisms under Article 34 and 42 concern the approval by all Contracting Parties of the protocols or amendments, in order to have the desired effects.

Further, issues of misinterpretation of ECT's provisions may also be prevented if a *de facto stare decisis* doctrine is not adopted by ECT tribunals – see for example the nearly identical decisions of the tribunals in the *Plama v. Bulgaria* and the *Yukos Cases* in respect of the 'denial of benefits' clause. As mentioned in the 'Introduction' to this Thesis, the ECT does not codify the *stare decisis* doctrine which would oblige tribunals to observe the decisions taken in previous cases. Arbitral awards and decisions under the ECT – and the same is valid in the context of the ICSID - are binding only on the parties to the dispute.[899] While tribunals discuss previous decisions because they are either raised by the parties or because they seek to find support for their conclusions, this may not result in the application of the provisions of the ECT contrary to the rules of treaty interpretation.

Last but not least, the issues raised by the interplay between the ECT and the related treaties and arbitration rules have significant consequences on the decision of Investor between the arbitration venues made available by Article 26 of the ECT. The same dispute may have different outcomes under the different options laid down in Article 26 of the ECT. This sensible choice made by the Investor must take into consideration not

[899] But *see*, *Burlington Resources, Inc. v. Republic of Ecuador*, Decision on Jurisdiction of 2 June 2010, para. 100, footnote omitted:

> "The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. The majority believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law. […]"

only the supplementary requirements imposed by the related treaties and arbitration rules, but also other factors, such as the applicable procedure, the applicable law, the enforcement of the arbitral awards, the time and resources spent in the arbitration proceedings etc.[900]

The aim of this Thesis was to attempt a comprehensive analysis of the notion of 'Investor', as it is presented within the framework of the ECT and its related treaties and arbitration rules. While the inclusive approach of this research might have suffered from inherent limitations due the scope and nature of this Thesis, the intention was to present the concept of Investor not in isolation from other notions of the ECT, but as it interacts, naturally, with other concepts and provisions, within or outside the ECT. This research revealed that the notion of 'Investor' under the ECT has two important features: it is difficult to define and it is adaptable. A definition of the notion of 'Investor' may be put together, but there will always be limitations, caveats, statements, understandings, explanations etc. that come to clarify its meaning. It is adaptable because as soon as it leaves the frame of the ECT, it is shaped by the applicable provisions of related treaties or rules.

The task of negotiating and bringing the ECT into force was a challenging endeavour for "breaking new ground in international treaties",[901] especially when the treaty covers "a very heterogeneous set of countries with a wide variety of existing international treaty commitments."[902] The speed of the ECT's negotiation was the determining factor

[900] For the different factors influencing the decision to arbitrate under particular rules or institutions, *see*, Mistelis, Loukas; *International Arbitration: Corporate Attitudes and Practices; 12 Perceptions Tested: Myths, Data and Analysis*, 15(3–4) Am. Rev. Int'l Arb. 525 (2004); Blanch, J.; Moody, A.; Lawn, N.; *supra* at FN 254, p. 11; Bernardini, Piero; *ICSID Versus Non–ICSID Investment Treaty Arbitration* in Fernández–Ballesteros, M.Á.; Arias, D. (eds.); *supra* at FN 320.
[901] *Note from the Chairman of Working Group II; supra* at FN 330.
[902] *Id.*

that contributed to the entry into force of the ECT. However, as admitted by the Chairman of the Legal Sub–Group for the ECT's negotiation,

> "[…] forcing the issues to a conclusion may have resulted in a scope of investment protection that is understood differently by different negotiating parties. The same probably can be said of various other provisions of the Treaty."[903]

The analysis of the notion of 'Investor' brought up controversial issues as a result of sometimes ambiguous or broad language of the ECT's provisions. While some of these issues may be solved in practice through the rules of treaty interpretation, others might deserve further clarification form the Contracting Parties to the ECT.

While the ECT might not be perfect, it has brought positive changes to the energy investment environment and laid down an enforceable legal framework for the development of Investments. At least from a historical perspective, the ECT has achieved what other treaties or projects are struggling to accomplish. Nevertheless, it is still to be seen whether the ECT served as precedent for other multilateral treaties.

[903] Bamberger, Craig S.; *The Negotiation of the Energy Charter Treaty*, p. xlviii, in Coop, G.; Ribeiro, C. (eds.); *supra* at FN 90.

LIST OF TREATIES AND LEGISLATION

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Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership, entered into force on 1 April 2005, <http://www.mofa.go.jp/region/latin/mexico/agreement/agreement.pdf>

American Convention on Human Rights, entered into force on 18 July 1978, 9 ILM 673 (1970)

Antarctic Treaty Environmental Protocol, entered into force on 14 January 1998, <http://www.ats.aq/documents/recatt/Att006_e.pdf>

ASEAN Comprehensive Investment Agreement, entered into force on 26 February 2009, <http://www.aseansec.org/documents/FINAL-SIGNED-ACIA.pdf>

British Nationality Act of 1981, < http://www.legislation.gov.uk/ukpga/1981/61>

British Nationality Act of 1948, <http://www.uniset.ca/naty/BNA1948.htm>

Charter of the United Nations, entered into force on 24 October 1945, <http://www.un.org/en/documents/charter/index.shtml>

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Constitution of the Federative Republic of Brazil of 1988, with subsequent amendments, <http://www.planalto.gov.br/ccivil_03/constituicao/constitui%C3%A7ao.htm>

Constitution of Romania of 1991, published in the Official Bulletin no. 233 of 1991 and amended by Law no. 429 of 23 October 2003, published in the Official Bulletin no. 758 of 2003

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Convention on the Continental Shelf, entered into force on 10 June 1964, 499 UNTS 311

Convention on the Territorial Sea and the Contiguous Zone, entered into force on 10 September 1964, 516 UNTS 205

Convention on the Transboundary Effects of Industrial Accidents, entered into force on 19 April 2000, 2105 UNTS 457

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force on 14 October 1966, 575 UNTS 159, reprinted in 1 ICSID Reports 3 (1993)

Common Customs Tariff and the Commission Regulation (EC) No 948/2009 of 30 September 2009 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 287 of 31 October 2009

Council and Commission Decision 98/181 /EC, ECSC, EURATOM of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, OJ L 69 of 9 March 1998

Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 256 of 7 September 1987

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Energy Charter Treaty Trade Amendment, 21 January 2010, <http://www.encharter.org/fileadmin/user_upload/document/document1158668600.pdf#page=165>

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European Convention on Nationality, entered into force on 1 March 2000, <http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm>

European Energy Charter, signed on 17 December 1991, <http://www.encharter.org/fileadmin/user_upload/document/EN.pdf>

Final Act of the European Energy Charter Conference, 34 ILM 373 (1995)

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Treaty establishing the Energy Community, entered into force on 1 July 2006, <http://www.energy-community.org/pls/portal/docs/530177.PDF>

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