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10 years of Energy Charter Treaty Arbitration

By

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Ten years have passed since the commencement on 25 April 2001 of the first arbitration under the Energy Charter Treaty (ECT)[2], *AES Summit Generation Ltd. v. Hungary* ("AES I").[3] Since then, the number of cases has grown to a total of 29 cases. This report will look in the rear-view mirror on these first ten years of ECT arbitration. What can we learn from these cases? What are the distinguishing factors and relevant metrics of ECT arbitration? Is ECT arbitration a world of its own or no different from investment treaty arbitration in general?

With these questions in mind, the report will first review the basic *facts and figures* that may be extracted from the 29 ECT cases (Section 1). Issues that will be targeted include: the number of cases, the parties, the types of investments, the arbitrators, the arbitration institutions, outcome, time and cost. It should be emphasized, however, that this is not a statistical report. Facts and figures have, thus, not been selected, analyzed, and presented in accordance with statistical methods. However, it is, nevertheless, the author's belief that these facts and figures, and the observations that may be made, although discretionary and random, will give the reader some flavour of the first ten years of ECT arbitration and, hopefully, provide some fresh perspectives.

The report will also address the substance of the 15 cases that have been concluded so-far (Section 2). Is it possible to talk about an emerging body of ECT case law? Do existing cases treat the ECT as a coherent system of law? Since the purpose of this report is to provide a rear-view mirror perspective on the first ten years of ECT arbitration, and since there will be a special report on the emerging body of ECT case

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The author wishes to thank Tonje Ørving, associate of Mannheimer Swartling, for her assistance with background research for this paper.

[2] For an introduction and overview of the ECT and arbitration under the ECT, see e.g. K. Hobér, *The Energy Charter Treaty: An Overview*, in Journal of World Investment & Trade vol. 8 No. 3 June 2007, 323-356; K. Hobér, *The Role of the Energy Charter Treaty in the Context of the European Union and Russia*, in Investment Protection and the Energy Charter Treaty, 2008, 235-306; K. Hobér, *Investment Arbitration and the Energy Charter Treaty*, Journal of International Dispute Settlement, Vol. 1, No. 1 (2010), pp. 153–190; and T Wälde, *Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation*, Arbitration International, Vol. 12 No. 4 (1996), p.437.

[3] *AES Summit Generation Ltd. (UK subsidiary of US-based AES Corporation) v. Hungary*, ICSID Case n°. ARB/01/4.

law, it is not possible, nor desirable, to discuss all issues raised in these cases in detail. The report will rather provide an overview and discuss selected issues that stand out. With respect to jurisdiction, the focus will be on "holding companies", "treaty shopping" and "denial of benefits", since these issues have been under analysis in several different cases. It may, therefore, be discussed whether it is possible to talk about a common approach to these issues in ECT cases. With regard to liability and quantum, on the other hand, the cases tend to be more fact-specific, and reoccurring issues are harder to distinguish. The report will therefore provide a broad overview of the substantive issues involved rather than focus on particular issues. One issue that stand out, however, is the relationship between the ECT and EU law. This issue will be dealt with in Section 3.

Moreover, the provisional application of the ECT, in particular in relation to the Russian Federation, was a fundamentally important question during the first ten years of ECT arbitration. This issue is dealt with in Section 4.

1. 10 years of ECT Arbitration: *Facts and Figures*

1.1 The cases[4]

As mentioned, 29 cases have been commenced under the ECT since 2001, i.e. roughly three cases per year over a decade. This may not sound like a significant number, but should be compared with, for example, 61 cases under the NAFTA during the first 15 years of NAFTA cases, or, roughly, 4 NAFTA cases per year. Admittedly, the NAFTA only has three contracting parties, but is on the other hand, not limited to the energy sector.

The total number of known investment treaty cases during the last ten years is 338 (approximately 34 per year in average) and 383 during the last 15 years (approximately 25.5 per year). The total number of known cases since the first ever investment treaty case was commenced in 1987 is 390.[5]

Looking at the average number of new investment treaty cases during the last 10 years, the ECT represents about 9 percent of the total number of new cases each year, and the 29 ECT cases commenced so-far represent 7.4 percent of the total number of known investment treaty cases.

Thus, viewed in relation to the NAFTA and investment arbitration in general, it becomes clear that the ECT cases, although not huge in numbers, nevertheless, represent a not insignificant part of the total body of investment treaty cases.

[4] A list of these cases together with some of the basic information that will be discussed below in this section is included in Schedule I to this report.
[5] UNCTAD, Latest Developments in Investor-State Dispute Settlement, IIA No 11 March 2011, www.unctad.org/diae.

The above figures may be summarized as follows:

YEAR	Number of ECT Cases	Number of NAFTA Cases	TOTAL number of investment cases
1996		1	6
1997		2	7
1998		6	8
1999		3	11
2000		3	13
2001	2	7	16
2002		8	27
2003	2	5	43
2004	1	4	45
2005	6	3	42
2006	4	3	31
2007	4	2	39
2008	4	6	35
2009	3	1	35
2010	2		25
2011	1		
TOTAL	**29**	**61**	**383**

Another fact to consider is that in the majority of ECT cases commenced to date, the investor had the choice between relying on the ECT or a BIT, but choose the ECT.[6] This does not exclude, of course, that there were cases where the investor choose to commence arbitration under a BIT although the ECT was available. However, subject to this reservation, the ECT seems to be the preferred instrument for investment protection in cases where the investor can choose between the ECT and a BIT. This is not surprising since there are many BITs in force between member States of the ECT, which only includes a limited right to arbitration for compensation in case of expropriation.[7]

[6] In 23 out of the 29 cases there was a BIT in force which potentially could have been relied upon by the investor.

[7] Regarding limited or restrictive arbitration clauses in general see further in e.g. N. Eliasson, *Investment Treaty Protection of Chinese Natural Resources Investments*, Transnational Dispute Management (Volume 7, issue 04, December 2010); N. Eliasson, *Chinese Investment Treaties: Jurisdictional Aspects*,

It is important to point out, however, that the number of cases brought under a treaty does not say much about whether the treaty is effective or serves its purpose. Needless to say, the purpose of the investment protection regime of the ECT is not to generate investment cases, it is to promote and protect investments.[8] What can be said, however, is that the investor's right to bring to arbitration alleged breaches of the member State's obligations in part III of the ECT is clearly being used, and the number of cases constitute a noticeable portion of the total number of cases.

1.2 The parties

Turning next to the parties. Who are the investors making use of the investment protection regime of the ECT, and which are the respondent States?

Looking first at the investors. Investment arbitration is sometimes said to be of greatest value for small or medium sized investors that, unlike multinational corporations, do not have the power to put pressure on the host State to remedy a situation which otherwise could lead to an investment claim. Critical voices also emphasize that claims may be brought by unknown companies, "shell companies" or so-called "vulture funds" that do not contribute to the economy of the host State. Needless to say, the broad protection of equity investments[9] together with broad definitions of protected "investors"[10] under the ECT and other investment treaties permit claims to be brought by investors without scrutinizing such investors contribution to the development of the host State.

However, anyone who browses through the case list of the International Centre for Settlement of Investment Disputes (ICSID)[11] will see the names of big companies as well as small companies and companies that are well-known as well as companies that are unknown. The list of ECT cases display a similar picture:

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in V. Bath and L. Nottage (eds.), Foreign Investment and Dispute Resolution Law and Practice in Asia (forthcoming on Routledge in 2011); N. Eliasson, *Investor-State Arbitration and Chinese Investors*, Contemporary Asia Arbitration Journal, vol. 2, no. 2 (November 2009).

[8] The investment protection provisions of the ECT are found in Part III of the ECT. The aim of the provisions is to establish equal conditions for investments in the energy sector and thereby limit the non-commercial risks connected with such investments.

[9] Pursuant to Article 1(6) "Investment" means every kind of asset associated with an economic activity in the energy sector which is owned or controlled directly or indirectly by an Investor and includes: (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges; (b) ***a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise***; (c) claims to money and claims to performance pursuant to a contract having an economic value and associated with an Investment; (d) Intellectual Property; (e) Returns; (f) any 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".

[10] Pursuant to Article 1(7) ECT, an "Investor" is a natural person having the citizenship or nationality of, or is a permanent resident in, a contracting state in accordance with its applicable law, or a company or other organization organized in accordance with the law applicable in that contracting state.

[11] See http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases.

INVESTOR	NATIONALITY	TYPE OF BUSINESS	NUMBER OF EMPLOYEES
AES Summit Generation Ltd	United Kingdom (subsidiary of US company)	Power Company	29,000
Nykomb Synergetics Technology Holding AB	Sweden	Investment Company	N/A
Plama Consortium Ltd.	Cyprus	Investment Company	N/A
Petrobart Ltd.	Gibraltar (UK)	Natural Gas Transmission	N/A
Alstom Power Italia SpA, Alstom SpA	Italy (subsidiary of French company)	Supplier of equipment and services for the power generation market	80,000
Yukos Universal Ltd.	UK – Isle of Man	Holding Company	N/A
Hulley Enterprises Ltd.	Cyprus	Holding Company	N/A
Veteran Petroleum Trust	Cyprus	Trust/Holding Company	N/A
Ioannis Kardassopoulos	Greece	Private Investor	N/A
Limited Liability Company Amto	Latvia	Investment Company	N/A
Hrvatska Elektropriveda d.d. (HEP)	Croatia	Power Company	N/A
Libananco Holdings Co. Limited	Cyprus	Holding Company	N/A
Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V.	The Netherlands	Holding Company	N/A
Barmek Holding A.S.	Turkey	Holding Company	N/A
Cementownia "Nowa Huta" S.A.	Poland	Investment Company	N/A
Europe Cement Investment and Trade S.A.	Poland	Investment Company	N/A
Liman Caspian Oil B.V. and NCL Dutch Investment B.V.	The Netherlands	Oil and gas exploration	N/A
Electrabel S.A.	Belgium	Power Company	6,349
AES Summit Generation Limited and AES-Tisza Erőmű Kft.	United Kingdom (subsidiary of US company)	Power Company	29,000

INVESTOR	NATIONALITY	TYPE OF BUSINESS	NUMBER OF EMPLOYEES
Mohammad Ammar Al-Bahloul	Austria	Private Investor	N/A
Mercuria Energy Group Ltd.	Cyprus	Trading Company	750
Alapli Elektrik B.V.	The Netherlands	Trust/ Holding Company	N/A
Remington Worldwide Limited	United Kingdom		
Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG	Sweden	Power Company	38,179
EDF International S.A.	France	Power Company	158,842
EVN AG	Austria	Power Company	8,536
AES Corporation and Tau Power B.V.	The Netherlands (subsidiary of US company)	Power Company	29,000
Ascom S.A.	Moldova	Industrial and Financial Company	N/A
Khan Resources B.V.	The Netherlands (subsidiary of Canadian company)	Mineral Exploration and Development Company	N/A

In terms of nationality, the investors are predominately, Western European or European subsidiaries of US and Canadian companies. For instance, the most frequent claimant in ECT cases is the US based AES Group. Most of the Dutch and Cypriot investors, however, are trusts or holding companies. Thus, the incorporation of the investors does in these cases not tell much about the actual origin of the investment. The actual ownership and control of the investor may be of great importance pursuant to the so-called "denial of benefits clause" in Article 17(1) ECT.[12]

In terms of size and scope of business operations, several of the investors are multinationals. The AES Corporation, for example, is a global power company, which operates some 132 power generation facilities in 28 countries, and employs 29,000 persons worldwide. The French EDF Group is a global energy company with 160,000 employees and 38 million customers worldwide, and the Alstom Group, with more than 80,000 employees, is a global supplier of power plants and other equipment and services for the power generation and rail transport markets. Also, Austria's EVN and Sweden's Vattenfall are energy companies with substantial European operations and millions of customers in different countries.

[12] Article 17(1) provides that each contracting party reserves the right to deny the advantages of Part III to an entity owned or controlled by investors of a state that is not a party to the ECT, if that entity has no substantial business activities in the area of the contracting party where it is organized. Article 17 is addressed in Section 2 below.

The list also includes private investors, *viz.*, Ioannis Kardassopoulos (Greece) and Mohammad Ammar Al-Bahloul (Austria). However, the fact that an investor is a private investor or a small corporate investor does not mean that the investment must be insignificant. Mr Kardassopoulos, for instance, made his oil investment in Georgia in the early days before the oil companies started to get interested in the Georgian market.

A third category of investors are, as mentioned above, trusts, funds or investment companies holding shares in companies involved in activities in the energy sector, e.g. Plama Consortium (Cyprus) and the three claimants in the Yukos case (Yukos Universal (Isle of Man), Hulley Enterprises (Cyprus), and Veteran Petroleum Trust (Cyprus)). As will be discussed further in section 2 below, if such holding companies are owned by nationals of States that are not a party to the ECT, the respondent State may try to rely on the denial of benefits clause in Article 17(1).[13]

Turning next to the Respondent States. As set out in the table below, with the exception of Germany, all respondent States are Eastern European or Central Asian. Hungary and Turkey appear at the top of the list, each with four cases against them. However, in the case of Hungary, at least three of the cases concern similar measures taken by Hungary to regulate the price payable to power generating companies and the termination of long term power purchase agreements under pressure from the European Union. Similarly, three out of four cases against Turkey concern the same alleged expropriation of two Turkish power companies.[14] Kazakhstan and Russia appear as respondent three times. However, all the three cases against Russia concern the alleged expropriation of Yukos Oil Corporation.[15] The cases against Kazakhstan, however, do not seem to be related.

The claim brought by the Swedish energy company Vattenfall against Germany is one of few examples (except for claims under the NAFTA) of investment claims by "Western companies" against "Western" States.[16] The case was ultimately settled.

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[13] Article 17(1) ECT was invoked by the respondent states in *Plama Consortium Ltd (Cyprus) v. Bulgaria*, ICSID Case n°. ARB/03/24, *Petrobart Ltd. (Gibraltar) v. Kyrgyzstan*, Arbitration Institute of the SCC, Case no. 126/2003, *Amto v. (Latvia) v. Ukraine,* Arbitration Institute of the SCC, and the three *Yukos* cases: *Yukos Universal Ltd. (UK – Isle of Man) v. Russian Federation*, *Hulley Enterprises Ltd. (Cyprus) v. Russian Federation*, and *Veteran Petroleum Trust (Cyprus) v. Russian Federation*, Ad hoc UNCITRAL Arbitration Rules.

[14] Two of these cases, *Cementownia "Nowa Huta" S.A. (Poland) v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2 and *Europe Cement Investment and Trade S.A. (Poland) v. Republic of Turkey*, ICSID Case n°. ARB(AF)/07/2 were dismissed for lack of jurisdiction, since the investors failed to demonstrate their respective shareholding. The first of these three cases, *Libananco Holdings Co. Limited (Cyprus) v. Republic of Turkey*, ICSID Case No. ARB/06/8. The fourth case against Turkey, *Alapli Elektrik B.V. (the Netherlands) v. Republic of Turkey*, ICSID Case No. ARB/08/13 is unrelated.

[15] I.e. *Yukos Universal Ltd. (UK – Isle of Man) v. Russian Federation*, *Hulley Enterprises Ltd. (Cyprus) v. Russian Federation*, and *Veteran Petroleum Trust (Cyprus) v. Russian Federation*, Ad hoc UNCITRAL Arbitration Rules.

[16] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG (Sweden) v. Federal Republic of Germany*, ICSID Case No. ARB/09/6.

RESPONDENT STATES	NUMBER OF ECT CASES	TOTAL NUMBER OF INVESTMENT TREATY CASES
Hungary	4	6
Turkey	4	8
Kazakhstan	3	10
Russian Federation	3	9
Azerbaijan	2	2
Mongolia	2	4
Ukraine	2	14
Bulgaria	1	1
Georgia	1	7
Germany	1	2
Kyrgyzstan	1	3
Latvia	1	1
Macedonia	1	1
Poland	1	11
Slovenia	1	2
Tajikistan	1	1

1.3 Industries/types of energy investments

The ECT is limited in scope to the energy sector.[17] It may be of interest briefly to look at the type of energy investments involved in the 29 ECT cases commenced so-far. However, publicly available information about the investments involved in the cases is, with the exception for the cases which already have lead to an award, sparse. Moreover, in most of the cases where some information is available the investment was an investment in shares. However, even where the investment was an investment in shares, it may be of interest to look at the business of the invested company to get a general idea of the industries and types of energy investments involved in the 29 ECT claims

[17] Pursuant to Article 1(5) ECT "Economic Activity in the Energy Sector" means economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of "Energy Materials and Products" except those included in Annex NI, or concerning the distribution of heat to multiple premises.

that so far have been brought to arbitration. Based on available information, the investments may be grouped into the following broad categories:

Industry/type of energy investment	Number of ECT cases
Generation and sale of electricity	14
Oil and gas exploration and production (including storage and transportation)	8
Downstream petroleum industry	3
Nuclear Energy	3
Mining	1

Given the strategic importance of oil and gas assets, oil and gas concessions and/or licenses for the extraction of hydrocarbons have for decades, even before the birth of investment treaty arbitration in its current form, been a predominant source of disputes involving State parties. It may therefore be surprising not to find oil and gas exploration and production as the most frequently disputed type of investment under the ECT. Instead the power industry is found at the top. This is likely due to the fact that the electricity markets in the Member States of the European Union as well as in some of the other ECT Member States, including Turkey, have gone through a rather dramatic process of deregulation and privatization, which have reshaped the electricity market in these countries.

1.4 The arbitration institutions/rules

Article 26 ECT which sets out the investor's right to arbitration[18] offers the investor the opportunity to choose between three alternative arbitration institutions and/or rules, *viz.*,

1. The International Centre for Settlement of Investment Disputes (ICSID) or the ICSID Additional Facility;

2. The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules); or

3. The Arbitration Institute of the Stockholm Chamber of Commerce.

The below table sets out the choices made by the investors in the 29 concluded and/or pending ECT cases:

[18] On arbitration under the ECT see e.g. K. Hobér, *Investment Arbitration and the Energy Charter Treaty*, Journal of International Dispute Settlement, Vol. 1, No. 1 (2010), pp. 153–190; and T Wälde, *Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation*, Arbitration International, Vol. 12 No. 4 (1996), p.437.

ARBITRATION INSTITUTE	ECT CASES	TOTAL NUMBER OF KNOWN INVESTMENT TREATY CASES
ICSID or ICSID Additional Facility	17	245[19]
UNCITRAL Rules	5	109
SCC	7	31
ICC	N/A	6

The above figures show a clear preference for ICSID arbitration when it comes to ECT arbitrations. ICSID or the ICSID Additional Facility was chosen in 17 out of 29 cases (approximately 58 percent). This is marginally lower than for investment claims in general. The total number of ICSID cases represents approximately 63 percent of all investment treaty cases where the arbitration institution or the arbitration rules is known. This percentage, however, must be viewed with some caution since there are a number of unreported UNCITRAL cases that, thus, do not appear in any statistics.

The UNCITRAL Rules (5 cases, 17 percent) and the SCC (7 cases, 24 percent) are chosen less frequently than ICSID in ECT arbitration. It should be noted, however, that in all instances where the investors choose not to go to ICSID, they did so despite the fact that ICSID or the ICSID Additional Facility would have been available, thus expressing a preference for the SCC or the UNCITRAL Rules in these cases.

The choices made by investors in ECT cases also express a strong preference for *institutional arbitration*. ICSID and SCC together represent 83 percent of the cases. Moreover, in three of the cases heard under the UNCITRAL Rules, the arbitration is administrated by the Permanent Court of Arbitration (PCA).[20]

Last but not the least, it is interesting to note the strong position the SCC maintains with regard to ECT cases and investment treaty cases in general. After ICSID, there is no other arbitration institution that administrates more investment treaty cases than the SCC. The fact that the SCC was chosen in seven ECT cases where the investor could have chosen ICSID or the ICSID additional facility shows that the SCC represents a viable option for administrated investment arbitration.

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[19] This figure only includes treaty-based investment arbitration cases. The total number of cases under the ICSID Convention and ICSID Additional Facility (including conciliation cases and arbitration cases under investment contracts entered into directly between the investor and the host state and arbitrations under the investment law of the host state) was 331 by 31 December 2010 (The ICSID Caseload – Statistics, Issue 2011-1, www.icsid.worldbank.org). ICSID also administers non-ICSID cases, including State-State cases. These non-ICSID cases administrated by ICSID have ranged between 3 and 12 per year during the last ten years.

[20] These three cases are the *Yukos* cases, i.e. *Yukos Universal Ltd. (UK – Isle of Man) v. Russian Federation*, *Hulley Enterprises Ltd. (Cyprus) v. Russian Federation*, and *Veteran Petroleum Trust (Cyprus) v. Russian Federation*, Ad hoc UNCITRAL Arbitration Rules.

Moreover, the fact that all three options in Article 26 ECT are used demonstrates that the right to choose between different institutions and/or rules depending on the characteristics of the case is of benefit to the investor.

1.5 The arbitrators

Turning next to the arbitrators, the below table sets out the arbitrators who have been appointed in the 29 ECT cases, their number of appointments in ECT cases and their total number of appointments in investment treaty cases in general.

ARBITRATOR	ECT CASES	TOTAL INVESTMENT CASES
Lowe QC, Vaughan	5	10
Lalonde QC, Marc	4	13
Stern, Brigitte	4	19
Berg, Albert Jan van den	3	15
Fortier, L. Yves	3[21]	16
Tercier, Pierre	3	9
Vicuña, Francisco Orrego	3	17
Berman QC, Sir Franklin	2	7
Brower, Judge Charles N.	2	16
Böckstiegel, Karl-Heinz	2	13
Kaufmann-Kohler, Gabrielle	2	15
Paulsson, Jan	2	12
Veeder, V.V.	2	10
Williams, David A. R.	2	8
Alvarez, Henri C.	1	8
Bernardini, Piero	1	10
Bring, Professor Ove	1	1
Crawford, James R.	1	14
Cremades, Bernardo	1	14
Danelius, former Justice Hans	1	5
Dupuy, Pierre-Marie	1	2

[21] The three Yukos cases (*Yukos Universal Ltd. v. Russian Federation, Veteran Petroleum Trust v. Russian Federation* and *Hulley Enterprises Ltd. v. Russian Federation*) are counted as one appointment for the purposes of this list.

ARBITRATOR	ECT CASES	TOTAL INVESTMENT CASES
Feliciano, Florentino P.	1	4
Galbraith, Peter	1	1
Gernandt, Johan	1	1
Greenwood QC, Professor Christopher	1	2
Hanotiau, Bernard	1	3
Happ, Richard	1	1
Haug, Bjørn	1	1
Hertzfeld, Jeffrey M.	1	2
Hobér, Kaj	1	5
Hwang, Michael	1	4
Komarov, Alexander S.	1	1
Kubko, Evgeny	1	1
Lew QC, Julian D M	1	2
Lévy, Laurent	1	4
Mason, Sir Anthony	1	2
McRae, Donald	1	3
Park, William W.	1	1
Philip, Allan	1	1
Poncet, Charles	1[22]	3
Reghizzi, Gabriele Crespi	1	1
Rowley, J. William	1	6
Runeland, Per	1	1
Sachs, Klaus Michael	1	1
Salans, Carl F.	1	2
Schwebel, Stephen	1[23]	10

[22] The three Yukos cases (*Yukos Universal Ltd. v. Russian Federation, Veteran Petroleum Trust v. Russian Federation* and *Hulley Enterprises Ltd. v. Russian Federation)* are counted as one appointment for the purposes of this list.
[23] The three Yukos cases (*Yukos Universal Ltd. v. Russian Federation, Veteran Petroleum Trust v. Russian Federation* and *Hulley Enterprises Ltd. v. Russian Federation*) are counted as one appointment for the purposes of this list.

ARBITRATOR	ECT CASES	TOTAL INVESTMENT CASES
Schütze, Rolf A.	1	1
Smets, Jeroen	1	1
Söderlund, Christer	1	4
Thomas, Christopher	1	6
Weil, Prosper	1	4
Wobeser, Claus von	1	6
Zykin, Professor Ivan S.	1	4

Two observations come to mind. First, the arbitrators appointed in ECT cases are more or less the same persons, who are frequently appointed in investment treaty cases in general. Needless to say, some of the arbitrators have particular energy experience, but the above-statistics do not support a conclusion that there would exist a particular pool of ECT arbitrators. Rather, the ECT arbitrators appear to be chosen from the same pool as for investment treaty cases in general.

Second, there are a number of arbitrators who have been appointed in several ECT cases. On the one hand, this may raise questions about the risk of "issue conflict"[24], i.e. that arbitrators based on decisions made in previous or pending cases (or based on position taken as counsel) already have formed a view on certain legal issues of importance for the outcome of the case. On the other hand, repeat appointments from a smaller pool of arbitrators may promote a uniform application of the ECT. Whether or not this is desirable is, of course, open to discussion, but conflicting rulings on similar issues are sometimes mentioned as a "threat" to the system of investment arbitration.

1.6 Claimed amounts, outcome, time and cost

This *facts & figures* section would not be complete without also looking at the bottom line; the claimed amounts, and, to the extent the cases have been concluded, the outcome and the time and costs involved. The below table only includes cases where some of this information is available.

ECT Case	Claimed Amount	Outcome/Awarded Amount	Time	Cost
AES v. Hungary	Not available	Settlement	8 months	
Nykomb Synergetics Technology Holding v. Latvia	Lats 7,097,680	Respondent was held liable for breach of Article 10(1) ECT Compensation: Lats	2 years	Arbitrators and the SCC: EUR 253,523 Nykomb: SEK 8,354,000

[24] See e.g. Ian A. Laird and Todd Weiler (editors), *Investment Treaty Arbitration and International Law - Volume 2* (Juris Publishing 2009), Part I "Issue Conflict".

ECT Case	Claimed Amount	Outcome/Awarded Amount	Time	Cost
		1,600,000 for past time plus order to pay double tariff until 2007		Latvia: SEK 6,435,270 Latvia was ordered to compensate Nykomb with SEK 2,000,000 for its costs and decided that the parties should each bear 50 percent of the costs of the SCC and the arbitrators
Plama Consortium v. Bulgaria	USD 300 million	Award in favour of Bulgaria.	5 years	ICSID and Arbitrators: USD 948,061 Claimant: USD 4,677,521 Bulgaria: USD 13,243,357 Plama ordered to pay all fees and expenses of the arbitrators and ICSID and USD 7 million of Bulgaria's legal fees
Petrobart v. Kyrgyzstan	USD 2,576,839	The tribunal found that Respondent had violated Article 10(1) ECT. Compensation: USD 1,130,859 plus interest	1 year, 7 months	Fees and expenses of the arbitrators and the SCC: EUR 149,617 Each party responsible for 50 percent of the arbitration costs and each party to bear its own costs
Alstom v. Mongolia		Settlement	2 years	
Yukos Universal, Hulley Enterprises and Veteran Petroleum Trust v. Russia	USD 100 billion	Pending. The tribunal found that it had jurisdiction to hear the merits	4 years and 10 months for the interim award on jurisdicti on	
Ioannis Kardassopoulos v. Georgia	USD 350 million	Respondent found to have expropriated the investment in violation of Article 13(1) ECT. Compensation:USD 15.1 million and pre-award interest in the amount of USD 30,024,736	4 years, 5 months	Mr Kardassopoulos: USD 4,779,745 Georgia: GBP 4,071,405 Amounts payable to the arbitrators and ICSID included in the above amounts Georgia ordered to pay all arbitration costs and the legal fees of Mr Kardassopoulos
Amto v. Ukraine	EUR 15 million	Award in favour of Ukraine	2 years, 4 months	Amto's and Ukraine's legal fees and expenses are not known. The fees and expenses of the arbitrators and the SCC in the amount of EUR 371,175 to be shared equally between the parties. Each party to bear their own legal costs
Hrvatska Elektropriveda v. Slovenia	EUR 31,7 million	Pending		
Libananco v. Turkey	USD 10 billion	Pending		

ECT Case	Claimed Amount	Outcome/Awarded Amount	Time	Cost
Azpetrol v. Azerbaijan		No jurisdiction due to settlement	3 years	Azpetrol GPB 247,863 and Azerbaijan USD 789,760 (in connection with application to dismiss due to settlement) Each party ordered to bear its own costs and bear the costs of arbitration in equal shares
Barmek Holding v. Azerbaijan		Settlement	2 years, 10 months	
Cementownia "Nova Huta" v. Turkey	USD 4,6 billion	Dismissed for lack of jurisdiction	2 years, 10 months	Arbitrators and ICSID: USD 400,000 Cementownia: USD 1,288,449 Turkey: USD 4,904,822 Cementownia was ordered to compensate Turkey for all costs
Europe Cement v. Turkey	USD 3,6 billion	Dismissed for lack of jurisdiction	2 years, 5 months	Arbitrators and ICSID: USD 259,480 Europe Cement: USD 1,011,204 Turkey: USD 3,907,383 Europe Cement was ordered to compensate Turkey for all costs
Liman Caspian Oil v. Kazakhstan	Not known	Not known	2 years, 11 months	Not known
AES v. Hungary	Not known	All claims denied	3 years, 1 month	Arbitrators and ICSID: USD 887,839 AES: USD 8,787,993 Hungary: USD 5,522,883 Arbitration costs to be divided equally between the parties. Both parties to bear their own legal costs
Mohammad Ammar Al-Bahloul v. Tajikistan	USD 227 million plus 240 million in interest	Tajikistan was found to have breached the umbrella clause in 10(1) ECT. All other claims denied. No compensation awarded since Mr Bahoul failed to prove any damage.	2 years	Arbitrators and SCC: EUR 524,977 Mr Al-Bahoul EUR 1,177,584 Tajikistan did not appear in the case. Each party ordered to pay 50 percent of the arbitration costs. Tajikistan was ordered to pay a portion of Mr Al-Bahoul's costs in the amount of EUR 300,000.
Mercuria Energy Group v. Poland	USD 700 million	Pending		
Vattenfall v. Germany	EUR 1.4 billion	Settled		
Ascom S.A.	USD 1	Pending		

ECT Case	Claimed Amount	Outcome/Awarded Amount	Time	Cost
v.Kazakhstan	billion			
Khan Resources v. Mongolia	USD 200 million	Pending		

Looking first at claimed amounts, these ranges from the exceptional claim of USD 100 billion by the claimants in the three *Yukos cases*[25], USD 10 billion in *Libananco*[26] and EUR 1.4 billion in *Vattenfall*[27] to the relatively small claims of USD 2,5 million in *Petrobart*[28], LVL 7 million in *Nykomb*[29] and EUR 15 million in *Amto*[30]. The Yukos and Libananco claims are among the highest amounts ever claimed in investment treaty cases, and, thus, shows the enormous values that may be at stake in energy investments. However, since these cases are still pending it remains to be seen whether the claimed amounts are well-founded (would the investors ultimately succeed on liability).

Turning next to the outcome in the 15 cases that so-far have been concluded, the outcome may be summarized as follows:

Outcome	Number	Percentage of claimed amount
Settled	4	N/A
Settled/Dismissed for lack of jurisdiction	1	N/A
Dismissed for lack of jurisdiction	2	N/A
Denied on the merits	3	N/A
No proved damage due to breach of ECT	1	Zero
Successful	3	Nykomb: 23 percent, Petrobart: 44 percent, Mr Kardassopoulos: 4 percent
Unknown	1	N/A

Thus, 5 out of 15 concluded cases (33 percent) were settled. This corresponds to the statistics for investment treaty cases in general. Approximately 30 percent of all

[25] *Yukos Universal Ltd. (UK – Isle of Man) v. Russian Federation*, *Hulley Enterprises Ltd. (Cyprus) v. Russian Federation*, and *Veteran Petroleum Trust (Cyprus) v. Russian Federation*, Ad hoc UNCITRAL Arbitration Rules (the "Yukos cases").
[26] *Libananco Holdings Co. Limited (Cyprus) v. Republic of Turkey*, ICSID Case No. ARB/06/8.
[27] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG (Sweden) v. Federal Republic of Germany*, ICSID Case No. ARB/09/6.
[28] *Nykomb Synergetics Technology Holding AB (Sweden) v. Latvia*, SCC Case No. 118/2001 ("Nykomb").
[29] *Petrobart Ltd. (Gibraltar) v. Kyrgyzstan*, Arbitration Institute of the SCC, Case no. 126/2003 ("Petrobart").
[30] *Amto v. (Latvia) v. Ukraine,* Arbitration Institute of the SCC ("Amto").

investment cases so-far have resulted in a settlement (60 out of 197 concluded cases).[31] Moreover, the respondent States were successful in 6[32] out of 15 concluded ECT cases (40 percent). A figure, which also corresponds to the pattern for investment cases in general. According to UNCTAD:s statistics, the respondent States have prevailed in 40 percent of all concluded cases (78 out of 197 cases).[33]

The success rate for the investor in ECT cases, however, 20 percent (3 out of 15 cases), is slightly lower than the success rate for the investor in investment treaty cases in general. The figure for investment treaty cases in general is 30 percent (59 out of 197 cases).[34] Thus, the relatively low rate of success for the investors in ECT cases combined with the fact that the compensation awarded in the three cases, in which the investor succeeded, only ranged from 4 to 44 percent of the claimed amount, the conclusion must be that the States, so-far, holds the upper hand.

Turning next to time, the four SCC cases that so-far have led to an award on the merits have been concluded within reasonable time, *viz.*, between 19 months and 28 months.[35] The four ICSID cases that have resulted in a merits award have taken somewhat longer time to conclude, i.e. between 35 and 60 months.[36] However, the fact that *Plama*[37] and *Mr Kardassopoulos*[38]took considerable time is explained by the bifurcated proceedings and other procedural complications in these cases. The time involved in *Liman*[39] and *AES II*[40], 35 and 37 months respectively, must be considered reasonable in an investment arbitration context. *Liman* is not a matter of public record, but the legal and factual issues involved in *AES II* were complex, and, although no jurisdictional objections were made by Hungary, the case involved the submission of an *amicus curiae* brief by the European Commission.

Costs were awarded to the respondent State in three (*Plama*, *Cementownia*[41], and *Europe Cement*[42]) out of the six concluded cases in which the States were successful. In

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[31] UNCTAD, Latest Developments in Investor-State Dispute Settlement, IIA No 11 March 2011, www.unctad.org/diae.
[32] This figure includes case that were dismissed for lack of jurisdiction, denied on the merits or no compensation was awarded to the investor despite finding of liability.
[33] UNCTAD, Latest Developments in Investor-State Dispute Settlement, IIA No 11 March 2011, www.unctad.org/diae.
[34] UNCTAD, Latest Developments in Investor-State Dispute Settlement, IIA No 11 March 2011, www.unctad.org/diae.
[35] 2 years in *Nykomb v. Latvia*; 1 year and 7 months in *Petrobart v. Kyrgyzstan*; and 2 years and 4 months in *Amto v. Ukraine*.
[36] 5 years in *Plama v. Bulgaria*; 4 years and 5 months in *Ioannis Kardasspopoulos v. Georgia*; 2 years and 11 months in *Liman Caspian Oil v. Kazakhstan*; and 3 years and 1 month in *AES v. Hungary*.
[37] *Plama Consortium Ltd (Cyprus) v. Bulgaria*, ICSID Case n°. ARB/03/24 ("Plama").
[38] *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18 ("Mr Kardassopoulos").
[39] *Liman Caspian Oil B.V. (the Netherlands) and NCL Dutch Investment B.V. (the Netherlands) v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14 ("Liman").
[40] *AES Summit Generation Limited and AES-Tisza Erőmű Kft. (UK) v. Republic of Hungary*, ICSID Case No.ARB/07/22 ("AES II").
[41] *Cementownia "Nowa Huta" S.A. (Poland) v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2 ("Cementownia").
[42] *Europe Cement Investment and Trade S.A. (Poland) v. Republic of Turkey*, ICSID Case n°. ARB(AF)/07/2 ("Europe Cement").

two of the cases were the States succeeded on the merits (*Amto* and *AES II*), however, the respective tribunals found that the arbitration costs were to be born equally by both parties and that each party was to bear its own legal costs.

The SCC Rules provides that the "*arbitral tribunal decides on the apportionment of the arbitration costs as between the parties with regard to the outcome of the case and other circumstances*" and that "*the arbitral tribunal may...order the losing party to compensate the other party for legal representation and other expenses for presenting its case*". However, in *Amto*, which was heard under the SCC Rules, the tribunal's decision not to award Ukraine costs, was due to the fact that the tribunal found that for the purpose of allocation of costs, no party could be deemed to have prevailed in the arbitration. Amto had succeeded on jurisdiction and Ukraine on the merits.[43]

In *AES*, which was heard under the ICSID Convention and ICSID Arbitration Rules, Hungary made no jurisdictional objection and was in all respects the winning party. Despite that, the tribunal did not award Hungary compensation for costs and legal fees. The tribunal held that: "*no frivolous claim was filed in the proceeding and that no bad faith was observed from the parties. In fact, the Tribunal notes that the submissions and the argumentations of both parties were presented in a professional manner. Consequently, the Tribunal concludes that each party shall bear its own costs and expenses and share equally in the costs and charges of the Tribunal and the ICSID Secretariat*". This is a relatively common approach to cost allocation in ICSID arbitration (and other investment treaty cases for that matter).[44] Tribunals sometimes appear reluctant to award costs against the 'losing' claimant in investment arbitration save where there is some element of bad faith associated with making of the claim.[45]

In the third case, *Mr Al-Bahloul*[46], Mr Al-Bahloul was awarded limited costs despite the fact that his request for specific performance was denied and no monetary compensation was awarded. The reason being that the proceedings, according to the tribunal, had been rendered more complicated and costly than they would otherwise have been due to Tajikistan's failure to participate in the proceedings.[47]

In the cases in which the investors were (partially) successful, the investor was awarded full costs in *Mr Kardassopoulos*, a portion of its cost in *Nykomb*, and no costs in *Petrobart*. The allocation of costs in *Mr Kardassopoulos* may surprise considering that Mr Kardassopoulos only was awarded a fraction of the claimed amount. The tribunal, however, found it appropriate and reasonable to award Mr Kardassopoulos his costs, including legal fees. The tribunal observed that there is no reason in principle why a

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[43] *Amto v. Ukraine*, paragraph 121.
[44] See, for instance, most recently *Malicorp Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/08/18) Award of 7 February 2011.
[45] See e.g. J. Ragnwaldh and N. Eliasson, *Security for Costs in Investment Arbitration*, in Hobér, Magnusson, Öhrström, Between East and West: Essays in honour of Ulf Franke (Juris Publishing 2010), p. 411.
[46] *Mohammad Ammar Al-Bahloul v.Tajikistan*, Arbitration Institute of the SCC Case n° V (064/2008) ("Mr Al-Bahloul").
[47] *Mohammad Ammar Al-Bahloul v.Tajikistan*, Final Award of 8 June 2010, paragraph 117.

successful claimant in an investment treaty arbitration should not be paid its costs.[48] Apparently, the tribunal considered Mr Kardassopoulos to have been the predominately successful party despite only being awarded a fraction of its claim. This may have been due to the fact that jurisdiction and liability played a more significant role in the arbitration than quantum. The award, however, do not elaborate on this point.

The above discussion, although based on a limited number of cases, show that there is no uniform approach to costs in ECT cases. The ruling may be influenced by the applicable arbitration rules, but also by the views of individual arbitrators. The question is not unimportant given the significant amounts of legal fees, fees of experts and other costs that often are incurred by the parties in investment treaty cases.

2. Is there a "system" of ECT Arbitration

Having analyzed some facts & figures, I will next turn to jurisdictional and substantive issues involved in the 29 ECT cases. An overview of all the cases, to the extent information is available, is set out in Schedule I to this rapport. As indicated in the introduction to this report, it is not possible, nor desirable, to discuss all questions that have arisen in these cases. Other reports to be presented at the conference will address these issues in greater detail. However, this report would not be complete without an overview of jurisictional and substantive issues. The report will also take a closer look at the "denial of benefits" issue (Article 17(1) ECT), raised in several cases, the relationship between the ECT and EU law as well as the provisional application of the ECT.

2.1 Jurisdictional Objections

2.1.1 Overview

Jurisdiction is often hotly contested in investment treaty cases. This is one of the reasons why investment treaty cases tend to take longer time than commercial cases. This is understandable. The ruling on jurisdiction in international commercial arbitration is often limited to determining whether the dispute "*arose out of or in connection with*" the contract containing the arbitration clause. Arbitral tribunals in investment arbitration, on the other hand, frequently must rule on complex issues of public international law, including treaty interpretation, such as whether the claimant qualifies as an "investor" as defined in the treaty, whether the claimant has made an "investment" as defined in the treaty, whether the dispute is covered by the dispute resolution clause of the treaty, etc.[49]

The cases commenced under the ECT display a similar picture:

ECT Case	Jurisdictional objection	Article 17 objection	Outcome

[48] *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award of 3 March 2010, paragraphs 689 and 692.

[49] K. Hobér and Nils Eliasson, *Review of Investment Treaty Awards by Municipal Courts*, in K. Small (ed.), Arbitration under International Investment Agreements (Oxford University Press, 2010).

ECT Case	Jurisdictional objection	Article 17 objection	Outcome
Nykomb Synergetics Technology Holding v. Latvia	Agreement to submit disputes to the courts of Latvia; Temporal application of ECT	No	Denied
Plama Consortium v. Bulgaria	No qualified investment	Yes	Jurisdictional objection denied, but misrepresentation of its true ownership during the approval procedure for the investment in violation of the principle of good faith prevented the tribunal from granting Plama the substantive protections of the ECT
Petrobart v. Kyrgyzstan	No qualified investment; ECT not applicable to Gibraltar; Res judicata	Yes	Denied
Yukos Universal, Hulley Enterprises and Veteran Petroleum Trust v. Russia	Provisional application; No qualified investor or investment; Taxation measure carve-out (art 21); fork in the road	Yes	Denied
Ioannis Kardassopoulos v. Georgia	No proven interest in an investment; alleged violations occurred before entry into force	No	Denied
Amto v. Ukraine	No qualified investment; jurisdiction is limited to claim letter	Yes	Denied
Liman Caspian Oil v. Kazakhstan	Not known	Not known	Not known
Cementownia "Nova Huta" v. Turkey	No proven investment		Dismissed for lack of jurisdiction
Europe Cement v. Turkey	No proven investment		Dismissed for lack of jurisdiction
AES v. Hungary	No		
Al-Bahloul v. Tajikistan	Tajikistan did not participate in the proceedings		

As the above table shows, jurisdictional objections were made in all cases that have resulted in a publicly available award with the exception for *AES II*. No information is available from the *Liman* case and Tajikistan did not participate in *Mr Al-Bahloul*. Save for *Cementownia* and *Europe Cement* the jurisdictional objections were not successful. In these two cases, the investors were found not to have proven that they had made their alleged investments.

A reoccurring question in several of the above-referenced cases concern the identity of the investor and denial of benefits under article 17 ECT. The report will therefore take a closer look at these questions.

2.1.2 The definition of investor in Article 1(7) ECT

The definition of investor in article 1(7) ECT is very wide. Pursuant to article 1(7), an "Investor" is a natural person having the citizenship or nationality of, or is a permanent resident in, a contracting State in accordance with its applicable law, or a company or other organization organized in accordance with the law applicable in that contracting State. Thus, unlike some investment treaties, which require that actual business be conducted in the territory of a contracting State, the ECT defines (for companies) "Investor" by reference to incorporation alone.

Thus, the broad definition of "Investor" in the ECT, offers an opportunity, at least on the face of its wording, for investors from States that are not members of the ECT to make their investments through holding companies in an ECT member State to attract the protection of the investment protection regime of the ECT. Similarly, what otherwise would have been "domestic investments" by nationals of the host State may come within the scope of the ECT if they are made through a holding company in another ECT member State. This type of arrangements are sometimes referred to as "investment planning" or "treaty shopping".[50]

This type of arrangements have been upheld by arbitral tribunals ruling on objections by the host State that such holding companies should not be permitted to bring a claim, since they are not the *real party in interest*, but a mere *vehicle* for the final beneficiary through which the investment has been carried out. Tribunals have ruled that as long as the holding company fulfils the definition of "investor" in the applicable investment treaty, and such investment treaty does not exclude from its applicability entities controlled by nationals of a third State or entities without substantial business activities in the State of incorporation, such holding companies enjoy the same protection as other corporate investors.

For instance, in *Tokios Tokelés v. Ukraine,*[51] the Tribunal held that the only relevant consideration to decide whether the Claimant qualified as an "investor" under the Ukraine-Lithuania BIT was "*whether the Claimant is established under the laws of Lithuania*"[52]. The Tribunal thereby rejected Ukraine's request to restrict the scope of covered investors under the BIT, and to deny jurisdiction on the ground that the investor did not maintain a substantial business activity in Lithuania. In so doing, the Tribunal also rejected Respondent's argument that the relevant persons for the purpose of establishing the nationality of the 'investor' were the controlling shareholders. While acknowledging the fact that a number of investment treaties do allow a party to deny the benefits of the treaty to entities of the other party that are controlled by foreign

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[50] See e.g. N. Eliasson, *Chinese Investment Treaties: Jurisdictional Aspects*, in V. Bath and L. Nottage (eds.), Foreign Investment and Dispute Resolution Law and Practice in Asia (forthcoming on Routledge in 2011); N. Eliasson, *Investor-State Arbitration and Chinese Investors*, Contemporary Asia Arbitration Journal, vol. 2, no. 2 (November 2009), and M. Skinner, C Miles and S. Luttrell, *Access and advantage in investor-State arbitration: The law and practice of treaty shopping*, Journal of World Energy Law and Business, September 2010.

[51] *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004.

[52] *Tokios Tokelés v Ukraine*, paragraph 38.

nationals, the Tribunal pointed out that the Ukraine-Lithuania BIT contained no such 'denial-of-benefits' provision. The Tribunal continued:

> We regard the absence of such provision as a deliberate choice of the Contracting Parties. In our view, *it is not for the tribunals to impose limits on the scope of the BITs not found in the text*, much less limits nowhere evident from the negotiating history. An international tribunal of defined jurisdiction should not reach out to exercise a jurisdiction beyond the borders of the definition. But equally an international tribunal should exercise, and indeed is bound to exercise, the measure of jurisdiction with which it is endowed (para. 36; emphasis added).

Another example where the Tribunal refused to 'import' restrictions, not following from the wording of the treaty, is *Saluka v. Czech Republic.*[53] In this case, the Czech Republic argued that the Claimant was a Dutch shell company, controlled by a Japanese group of companies, and as such lacked standing under the Netherlands-Czech Republic BIT. The Tribunal interpreted the definition of 'investor' according to Article 1(b) of the Czech-Netherlands BIT, stating that:

> Even if it were possible to know an investor's true motivation in making its investment, nothing in Article 1 makes the investor's motivation part of the definition of an 'investment' (para. 209)

> [T]he Tribunal must always bear in mind the terms of the Treaty under which it operates. Those terms expressly give a legal person constituted under the laws of the Netherlands – such as, [the Claimant] – the right to invoke the protection under the Treaty. To depart from that conclusion *requires clear language in the Treaty*, but there is none. [...] [I]t is beyond the powers of this Tribunal to import into the definition of 'investor' some requirement [...] having the effect of excluding from the Treaty's protection a company which the language agreed by the parties included within it (para. 229; emphasis added).

A similar approach has been adopted in ECT cases. In the three *Yukos* cases, Russia argued that "*applicable rules and principles of international law bearing upon the exercise of treaty interpretation [...] require the Tribunal to go beyond the facts relating to Claimant's formal incorporation in order to determine whether Claimant qualifies as an Investor for purposes of Article 1(7) of the ECT*" and that the investors in these cases did "*not qualify for protection under the ECT since [they were] shell compan[ies] beneficially owned and controlled by Russian nationals and, as such, by nationals of the host State*".[54]

The tribunal, however, did not agree. It found that:

> On its face, Article 1(7)(a)(ii) of the ECT contains no requirement other than that the claimant company be duly organized in accordance with the law applicable in a Contracting Party. The Tribunal agrees with Professor Crawford that in order to qualify

[53] *Saluka Investments B.V. v The Czech Republic*, Partial Award, 17 March 2006 (UNCITRAL rules).
[54] *Yukos Universal Ltd. v. Russian Federation*, paragraphs 406-407, *Veteran Petroleum Trust v. Russian Federation,* paragraphs 406-407, and *Hulley Enterprises Ltd. v. Russian Federation*, paragraphs 406-407.

> as a protected Investor under Article 1(7) of the ECT, a company is merely required to be organized under the laws of a Contracting Party.[55]
>
> The Tribunal knows of no 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, which have an unquestionable importance in treaty interpretation, 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.[56]

Similarly, the arbitral tribunal in *Plama* held that to qualify as an investor it was sufficient for a company to be organized in accordance with the law applicable in Cyprus, irrespective of who might own or control the Investor.[57]

2.1.3 Denial of benefits under article 17(1) ECT

The ECT, however, contains another provision which directly addresses the practice of "*investment planning*" or "*treaty shopping*", *viz.*, Article 17(1) ECT. Pursuant to Article 17, each contracting party reserves the right to deny the advantages of Part III (investment promotion and protection) to an entity owned or controlled by investors of a State that is not a party to the ECT, if that entity has no substantial business activities in the area of the contracting party where it is organized.

The interpretation of Article 17, however, raises difficult issues as to the meaning and effect of the provision which may be the subject of conflicting application by different tribunals, or if decided uniformly may contribute to the development of a coherent system of ECT arbitration. These questions include: (i) is Article 17 a jurisdictional defence or a defence on the merits (the distinction is not unimportant since jurisdictional issues may be challenged before the courts at the seat of arbitration or subject to ICSID annulment proceedings); (ii) does Article 17 apply to nationals of the host State; (iii) what does "substantial business activities" in Article 17(1) mean; (iv) when will a State be deemed to have exercised its "right to deny" pursuant to Article 17(1); and (v) does such denial of benefits apply to alleged violations of the ECT that took place before the denial was exercised or only to future violations?

As will be explained below, these questions have been answered in a consistent way by ECT tribunals, which have had to deal with objections under Article 17.

Jurisdiction or merits

In *Plama*, the tribunal held that Article 17, even if applicable would not affect the jurisdiction of the tribunal. The tribunal found, with reference to the wording of Article 17(1), i.e. "*each Contracting Party reserves the right to deny the advantages of this Part [Part III]*", that such denial applies only the substantive investment protection

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[55] *Yukos Universal Ltd. v. Russian Federation*, paragraph 411, *Veteran Petroleum Trust v. Russian Federation,* paragraph 411, and *Hulley Enterprises Ltd. v. Russian Federation*, paragraph 411.
[56] *Yukos Universal Ltd. v. Russian Federation,* paragraph 411*, Veteran Petroleum Trust v. Russian Federation,* paragraph 411 *and Hulley Enterprises Ltd. v. Russian Federation,* paragraph 411.
[57] *Plama Consortium Ltd. v. Bulgaria,* Award on jurisdiction, paragraph 128.

provisions of the ECT. The tribunal concluded that "*it would therefore require a gross manipulation of the language to make it refer to Article 26 in Part V of the ECT*".[58] The tribunal further held:

> 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).[59]

In the *Amto* case, Ukraine went one step further and argued that the question whether the State has duly exercised its rights under Article 17 was not *arbitrable* and that the State is the sole judge of whether Article 17 applies. The tribunal rejected this argument and held that the State'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*".[60]

The tribunal in the *Yukos* cases reached the same conclusion:

> Article 17 specifies - as does the title of that 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.[61]

The tribunal in *Petrobart* did not expressly rule on the question whether Article 17 was a question of jurisdiction or merits. It simply held, on the basis of the factual record in the case, that the conditions for its application were not met.[62] The award in *Petrobart* was subsequently challenged by the Kyrgyz Republic, but upheld by the Swedish courts. Article 17 was not invoked in the challenge proceedings.[63]

Does the reference to nationals of a "third State" in Article 17 apply to nationals of the host State

As mentioned above in Section 2.1.2, in the *Yukos* cases, Russia argued that it was entitled to deny the benefits to the investors pursuant to Article 17(1) because the investor companies were "shell companies" owned and controlled by Russian nationals. Russia further argued that the term, "third State," while not defined in the Treaty, is used in a manner that does not exclude the possibility that a third State may be a Contracting Party or signatory (Russia being the latter). The tribunal, however, rejected this interpretation of the ECT, and held that the ECT "*clearly distinguishes between a*

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[58] *Plama Consortium Ltd. v. Bulgaria,* Award on jurisdiction, paragraph 147.
[59] *Plama Consortium Ltd. v. Bulgaria,* Award on jurisdiction, paragraph 148.
[60] *Amto v. Ukraine,* page 39.
[61] *Yukos Universal Ltd. v. Russian Federation*, paragraph. 441, *Veteran Petroleum Trust v. Russian Federation,* paragraph 497, and *Hulley Enterprises Ltd. v. Russian Federation*, paragraph 440.
[62] *Petrobart v. Kyrgyzstan*, page 63.
[63] K. Hobér and Nils Eliasson, *Review of Investment Treaty Awards by Municipal Courts*, in K. Small (ed.), Arbitration under International Investment Agreements (Oxford University Press, 2010), p. 654.

Contracting Party (and a signatory), on the one hand, and a third State, which is a non-Contracting Party, on the other".[64]

Substantial business activities

The State's right to deny the benefits of Part III of the ECT only applies if the investor does not have "substantial business activities" in the country of incorporation. This criteria was discussed by the tribunal in *Amto*, which found that:

> [T]he purpose of Article 17(1) is to exclude from ECT protection investors which have adopted a nationality of convenience. Accordingly, 'substantial' 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. 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.[65]

In *Plama*, Plama admitted that it did not have any substantial business activities in Cyprus, whereas the question was not subject to determination in the *Yukos* cases.

When will a State be deemed to have exercised its right to deny pursuant to Article 17(1)

Another threshold question under Article 17(1) ECT is whether Article 17(1), in itself, provides sufficient notice to the investor that it is not entitled to rely on the protection of the ECT - assuming the criteria for its application are satisfied - or if an express notification by the host State is required.

In *Plama*, referring to the wording of Article 17(1) ("*reserves the right **to deny***"), the tribunal took the view that Article 17(1) required the denial of benefits to be actively exercised by the contracting State.[66]

The tribunal in the *Yukos* cases reached the same conclusion. It found that "*[A]rticle 17(1) does not deny simpliciter the advantages of Part III of the ECT - as it easily could have been worded to do - to a legal entity if the citizens or nationals of a third State own or control such entity and if that entity has no substantial business in the Contracting Party in which it is organized. It rather "reserves the right" of each Contracting Party to deny the advantages of that Part to such an entity. This imports that, to effect denial, the Contracting Party must exercise the right*".[67]

Retrospective or prospective effect of a denial of benefits pursuant to Article 17

In *Plama*, Bulgaria provided an express notice of denial of Plama's benefits under the ECT to ICISD's Acting Secretary General. However, since Bulgaria had not provided

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[64] *Yukos Universal Ltd. v. Russian Federation*, paragraph 544, *Veteran Petroleum Trust v. Russian Federation,* paragraph 555, and *Hulley Enterprises Ltd. v. Russian Federation*, paragraph 543.
[65] *Amto v. Ukraine*, paragraph 69.
[66] *Plama Consortium Ltd. v. Bulgaria,* Decision on Jurisdiction, paragraphs 155-158.
[67] *Yukos Universal Ltd. v. Russian Federation*, paragraph 455, *Veteran Petroleum Trust v. Russian Federation,* paragraph 512, and *Hulley Enterprises Ltd. v. Russian Federation*, paragraph 455.

such notice until after Plama had made its request for arbitration, and not until four years after Plama had made its investment, the tribunal had to determine whether such notice applied *retrospectively* or only *prospectively*. With reference to Article 31(1) of the Vienna Convention, the tribunal concluded that the exercise by a Contracting Party of its right under Article 17(1) should not have retrospective effect as it would not be consistent with the purpose of the ECT "*to promote the long term co-operation in the energy field*". The tribunal pointed out that such unexercised right could lure putative investors with legitimate expectations only to have those expectations made retrospectively false at a much later date and that the investor could not plan in the long-term for such an effect.[68]

The same conclusion was reached by the tribunal in the *Yukos* cases:

> [I]f the passage in Respondent's First Memorial quoted above in paragraph 445 is construed as an exercise of the reserved right of denial, it can only be prospective in effect from the date of that Memorial. To treat denial as retrospective would, in the light of the ECT's "Purpose," as set out in Article 2 of the Treaty ("The Treaty establishes a legal framework in order to promote long-term cooperation in the energy field …") 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.[69]

2.1.4 Interim conclusions regarding Article 1(7) and 17(1)

As explained above in Sections 2.1.2 and 2.1.3, tribunals dealing with objections about "shell companies" and "denial of benefits" under Article 17(1) have so-far adopted a similar approach to the interpretation of Article 1(7) and Article 17(1). This could be taken as evidence of an emerging body of consistent case law on the application of the ECT. I would submit, however, that one should be careful not to draw to far-reaching conclusions based on the decisions made so-far. Although the cases discussed in Sections 2.1.2 and 2.1.3 do seem to adopt a similar approach, they are still too few to support any conclusions about a general approach. Moreover, the decisions are based on the particular facts of each case. Only time will tell whether a general approach will emerge.

2.2 The merits

Only seven ECT cases so-far have resulted in an award on the merits. In six of these cases the award has been made public. These cases are summarised in the table below.

ECT Case	Claim	Outcome

[68] *Plama Consortium Ltd. v. Bulgaria,* Decision on Jurisdiction, paragraphs 159-165.
[69] *Yukos Universal Ltd. v. Russian Federation*, paragraph 458, *Veteran Petroleum Trust v. Russian Federation,* paragraph 514, and *Hulley Enterprises Ltd. v. Russian Federation*, paragraph 457.

ECT Case	Claim	Outcome
Nykomb Synergetics Technology Holding v. Latvia	Article 10(1) and 13	Discriminatory measures – violation of Article 10(1)
Plama Consortium v. Bulgaria	Article 10(1) and 13	No breach of the ECT
Petrobart v. Kyrgyzstan	Article 10(1) and 13	Failure to accord fair and equitable treatment – violation of Article 10(1)
Ioannis Kardassopoulos v. Georgia	Article 13	Expropriation – violation of Article 13
Amto v. Ukraine	Article 10(1), 10(12) and 22(1)	No breach of the ECT
Liman Caspian Oil v. Kazakhstan	Not known	Not known
AES v. Hungary	Article 10(1) and 13	No breach of the ECT
Al-Bahloul v. Tajikistan	Article 10(1), 10(7) and 13	Breach of the umbrella clause – violation of Article 10(1)

2.2.1 Brief overview of conclusions reached in the merits awards

As will be explained below in this section, these cases give a rather scattered impression and do not easily lend themselves to general conclusions with regard to the ECT as applicable substantive law.

Nykomb represents a relatively straight forward case of *discrimination*. The tribunal found that Latvia had breached its obligation under Article 10(1) of the ECT not to discriminate by offering higher tariffs for produced electricity to other companies than Nykomb's Latvian subsidiary and failing to present any evidence why those companies were different.[70]

As to the standard of compensation applicable in the event of such discrimination, the tribunal noted that the principles of compensation provided for in Article 13(1) of the ECT, in the event of expropriation, were not applicable to the assessment of damages or losses caused by violations of Article 10. The tribunal found that "*the question of remedies to compensate for losses or damages caused by the Respondent's violation of its obligations under Article 10 of the Treaty must primarily find its solution in accordance with established principles of customary international law. Such principles have authoritatively been restated in The International Law Commission's Draft Articles on State Responsibility adopted in November 2001*".[71] The tribunal further found that the reduced earnings of Nykomb's subsidiary due to Latvia's failure to pay the higher tariff constituted the best available basis for the assessment also of Nykomb's losses.

As regards Nykomb's alleged losses on delivery of electric power to Latvenergo for the remainder of the eight year contractual period, the tribunal considered this potential loss

[70] *Nykomb Synergetics Technology Holding AB v. Latvia*, section 4.3.2.(a).
[71] *Nykomb Synergetics Technology Holding AB v. Latvia*, section 5.1.

too uncertain and speculative to form the basis for an award of monetary compensation. The tribunal, however, considered it to be a continuing obligation of Latvia to ensure payment at the double tariff for electrical power delivered under the contract for the rest of the eight year contractual period. It therefore ordered Latvia to fulfil its obligation to pay the double tariff for future deliveries during the remainder of the contractual period.[72]

In *Plama*, the tribunal found that Plama's misrepresentation of its true ownership during the approval procedure for the investment, in violation of the principle of good faith, prevented the tribunal from granting Plama the substantive protections of the ECT. However, the tribunal, nevertheless, considered the merits of the case and came to the conclusion that even if Plama would have had the benefit of the substantive protection of the ECT, Plama's claims on the merits would have failed. The tribunal found that Plama's losses, due to the bankruptcy of its investment, derived from reasons which could not be held attributable to any unlawful actions of Bulgaria. To the contrary, the tribunal concluded that Plama and its owners undertook a high risk project, without having the financial assets of their own to carry it out.

In *Petrobart,* the tribunal was called upon to interpret Article 10(1) ECT and observed that it was not necessary to analyze the Kyrgyz Republic's actions in relation to each of the various specific elements of Article 10(1). The tribunal noted that the paragraph in its entirety was intended to ensure a fair and equitable treatment of investments, and that it was sufficient to conclude that the measures for which the Kyrgyz Republic was responsible, failed to accord Petrobart a fair and equitable treatment of its investments.[73] The tribunal found the Kyrgyz Government liable for such failure to accord fair and equitable treatment by transferring assets from a State-owned company, KGM, which owed Petrobart money for gas delivered by Petrobart, to a new company to the detriment of KGM's creditors, including Petrobart, and by intervening in court proceedings regarding the stay of execution of a final judgment against KGM to the detriment of Petrobart.[74]

As to quantum, the tribunal referred to the *Chorzów Factory* Case and to ILC's Draft Articles on State Responsibility, and held that Petrobart, as far as possible, should be placed financially in the position in which it would have found itself, had the breaches of the ECT not occurred.[75]

In *Mr Kardassopoulos*, the tribunal found that the local company owned by Mr Kardassopoulos had been granted the exclusive rights to possess, use and operate the Samgori-Batumi pipeline and related facilities, and that these rights subsequently had been extinguished through the adoption of various governmental decrees. The tribunal held that the circumstances of Mr. Kardassopoulos' claim presented a classic case of direct expropriation. The tribunal further held that such expropriation had not been carried out in accordance with due process of law and not been accompanied by the payment of any compensation.

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[72] *Nykomb Synergetics Technology Holding AB v. Latvia*, section 5.2.
[73] *Petrobart v. Kyrgyzstan*, page 76.
[74] *Petrobart v. Kyrgyzstan*, page 77.
[75] *Petrobart v. Kyrgyzstan*, pages 77-78.

With regard to the standard of compensation, the tribunal recognized that in case of unlawful expropriation, the standard for compensation required for an expropriation to be lawful pursuant to Article 13(1)(d) ECT would not necessarily apply, and that the requirement of full recovery set out in the *Chorzhow Factory* case sometimes would require a valuation of the investor's rights as of the date of the award rather than as of the time immediately before the expropriation.[76] In the circumstances of the case, however, the tribunal found the appropriate standard of compensation to be that of the fair market value of the oil rights held by the investor at a date which predated the enactment of the decree which was deemed to have commenced the expropriation. This date was chosen to ensure full reparation and to avoid any diminution of the value of the investment attributable to Georgia's conduct leading up to the completion of the expropriation.[77]

In the *Amto* case, Amto's Ukrainian subsidiary had delivered services in relation to a nuclear power plant in the Ukraine, but not been paid by the State-owned company Energoatom in charge of that power plant. Energoatom subsequently went bankrupt, and Amto's main claim in the case was that the treatment of its subsidiary and its claims against Energoatom by the Ukrainian courts, constituted denial of justice in violation of Article 10(1). The tribunal, however, held that Amto had failed to demonstrate any denial of justice in the handling of the bankruptcy proceedings by the Ukrainian courts, or any other series of circumstances that cumulatively amounted to a denial of justice. According to the tribunal, Amto was frustrated by the fact that over a period of years it was unable to enforce its judgment debts against Energoatom. However, the tribunal emphasized that there were many other judgment creditors, and that the debtor was a large and strategic State enterprise. In the view of the tribunal Amto's submissions in the case demonstrated unrealistic expectations of simple and rapid results, in a juridical structure where there were many other interests and competing rights to be considered by the Ukraine courts.[78]

In *AES II*, AES claimed that Hungary violated its obligations under Article 10(1) ECT and expropriated its investment by reintroducing administrative pricing for electricity generated by AES through the issuance of the certain price decrees.

The tribunal first concluded that it could not determine AES' contractual rights, if any, that administrative pricing would not be introduced. The reason for this was that Hungary is one of the ECT Member States that has made a reservation to the effect that alleged breaches of the "umbrella clause" in Article 10(1) may not be referred to arbitration.

With regard to AES:s "fair and equitable treatment" and "unreasonable and discriminatory measures" claims, which were all rejected, the tribunal found that although the reintroduction of administrative pricing in 2006 was principally motivated by the politics surrounding the so-called luxury profits of the power generators, it was a perfectly valid and rational policy objective for a government to address luxury profits. The tribunal further held that while such price regimes may not be seen as desirable in

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[76] *Ioannis Kardassopoulos v. Georgia*, paragraph 507.
[77] *Ioannis Kardassopoulos v. Georgia,* paragraph 517.
[78] *Amto v. Ukraine*, paragraph 84.

certain quarters, this did not mean that such a policy was irrational.[79] The tribunal moreover concluded that, "*the prices fixed for AES Tisza pursuant to the Price Decrees were reasonable, taking into account their consistency with the original returns it earned at the time of the Claimant's original investment*."[80]

Nor did the tribunal find that AES' investment had been expropriated. The tribunal emphasized that: *"[f]or an expropriation to occur, it is necessary for the investor to be deprived, in whole or significant part, of the property in or effective control of its investment; or for its investment to be deprived, in whole or significant part, of its value."*[81] In this case the reintroduction of the administrative pricing did not interfere with the ownership of AES:s property, nor did it prevent AES from continuing to receive substantial revenues. The tribunal therefore concluded that the effects of the reintroduction of the price decrees did not amount to an expropriation of AES:s investment.[82]

The tribunal in *Mr Al-Bahloul*, found that most of Mr Al-Bahloul's claims were unsupported by evidence, and as such had to be rejected by the tribunal. The tribunal did find, however, that Tajikistan had breached the "umbrella clause" in Article 10(1) by not honouring a clear and unconditional undertaking to ensure the issuance of certain licenses.[83] However, since the tribunal found that Mr Al-Bahloul had failed to prove that he had suffered any damage as a result of the breach of the ECT, no compensation was awarded.

2.2.2 Interim conclusion with regard to the merits awards

As the brief overview above indicates, these six cases give a rather scattered impression. The findings by the respective tribunals on liability are fact-specific and do not easily lend themselves to general conclusions with regard to the ECT as applicable substantive law. It is, therefore, difficult, at this stage, to talk about any general approach to the substantive issues raised in these cases.

That being said, however, there is one issue on the merits that have been dealt with in a more or less consistent way, *viz.*, the standard of compensation in the three cases in which the investor was successful on the merits. Similar to most other investment treaties, the ECT does not specify the standard of compensation in case of a breach of the treaty by the host State. Thus, given the absence of treaty provisions in this area, the tribunals have relied, as they must, on customary international law.[84] The tribunals have sought guidance from the ILC Articles on State Responsibility and the *Chorzów*

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[79] *AES Summit Generation Limited and AES-Tisza Erőmű Kft.(UK) v. Republic of Hungary*, ICSID Case No.ARB/07/22, dated 13 August 2007, paragraph 10.3.34.
[80] *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary,* paragraph 10.3.44.
[81] *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, paragraph 14.3.1.
[82] *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, paragraph 14.3.4.
[83] *Mohammad Ammar Al-Bahloul v. Tajikistan*, paragraph 265.
[84] Article 26(6) ECT provides that a tribunal established under article 26(4) ECT shall decide the issues in dispute in accordance with the ECT and *applicable rules and principles of international law*.

Factory case. As stated in Article 31 of the ILC Articles, the standard is "full reparation".[85]

However, establishing the standard of compensation is only the first step. When it comes to the method of establishing and calculating "full reparation," customary international law does not provide much guidance. The cases discussed above illustrate that the method chosen depends upon, and varies with, the circumstances of each individual case, including, *inter alia*, the nature of the violation of the ECT, the investment in question, and whether or not the violation resulted in a total elimination of the investment, as is mostly the case with expropriation, or whether it merely resulted in a decline in the earnings of the investor or had some other negative impact on the investment, which is often the case with respect to other treaty violations than expropriation.

3. ECT and EU law

Looking back at substantive issues raised during the first ten years of ECT arbitration, a few observations must also be made about the ECT and the EU. This topic has many dimensions, and it is not the purpose of this report on pending and concluded cases, to address all of them. This is the topic for a separate report. I will, in this context, only discuss one aspect, *viz.*, the relationship, and potential conflict, between the ECT as applicable substantive law and EU law.

In *AES II*, Hungary, among other things, argued that it had reintroduced the price regulation regime with respect to prices paid to generators of electricity with a view to address the State aid concerns of the EU. Ultimately, the majority of the tribunal found that Hungary's decision to reintroduce the price regulation was not motivated by any pressure from the European Commission.[86] However, the tribunal, nevertheless, made some general observations with respect to the relationship between the ECT and EU law.

The tribunal first recognized that article 26(6) of the ECT provides that "*a tribunal established under paragraph (4) shall decide the issue in dispute in accordance with this Treaty [ECT] and applicable rules and principles of international law*". The tribunal, therefore, concluded that the applicable law to the proceeding was the ECT, together with the applicable rules and principles of international law. Regarding EU competition law the tribunal held that:

> [I]t has a dual nature: on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders. It is common ground that in an international arbitration, national laws are to be considered as facts. Both parties having pleading that the Community competition law regime should be considered as a fact, it will be considered by this Tribunal as a fact, always taking into

[85] This is consistent with the approach taken in investment treaty cases in general, see e.g. K. Hober, Compensation: A Closer Look at Cases Awarding Compensation for Violation of the Fair and Equitable Treatment Standard, in K. Small (ed.), *Arbitration under International Investment Agreements* (Oxford University Press, 2010).

[86] *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, paragraphs 10.3.17 and 10.3.18.

> account that a State may not invoke its domestic law as an excuse for alleged breaches of its international obligations.[87]

The tribunal further concluded that:

> [T]he dispute under analysis in the present arbitration is not about a conflict between the EC Treaty or Community competition law and the ECT.
>
> Rather, the dispute is about the conformity or non-conformity of Hungary's acts and measures with the ECT. Therefore, it is the behaviour of the State (the introduction by Hungary of the Price Decrees) which must be analyzed in light of the ECT, to determine whether the measures, or the manner in which they were introduced, violated the Treaty. The question of whether Hungary was, may have been, or may have felt obliged under EC law to act as it did, is only an element to be considered by this Tribunal when determining the "rationality," "reasonableness," "arbitrariness" and "transparency" of the reintroduction of administrative pricing and the Price Decrees.[88]

Thus, the reasoning of the tribunal may be summarized as follows: (i) EU law, or at least EU competition law, is part of the national legal order of the EU member States, and shall, as other national laws, for the purposes of an arbitration under the ECT be considered as facts; (ii) a State may not invoke its national law, including EU law (to the extent the relevant provisions of EU law is deemed to constitute national law), as an excuse for an alleged breach of international law; and (iii) the fact that the State acted in accordance with EU law or felt obliged to act in a certain way due to EU law may be relevant when assessing the "rationality," "reasonableness," "arbitrariness" or "transparency" of the State's conduct.

How this balance shall be struck in practice, for instance, in situations where the State would face sanctions under EU law if it would not take certain measures that potentially could be in violation of the ECT, was not decided by the tribunal in *AES II*. It, thus, remains to be seen how future tribunals (including the tribunals in the two cases against Hungary which still are pending[89]) will deal with such questions. Suffice it to say here that questions of this kind is likely to arise also in future ECT cases involving EU member States and investors from other EU member States.

4. Provisional Application of the ECT

The last issue which will be addressed in this report is the provisional application of the ECT. This is, or at least used to be, one of the distinctive features of the ECT, and this report on the first ten years of energy charter treaty arbitration would, therefore, not be complete without a section on the provisional application of the ECT and the issues such provisional application have given rise to in practice.

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[87] *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, paragraph 7.6.6.
[88] *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, paragraphs 7.6.8-7.6.9.
[89] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No.ARB/07/19 and *EDF International S.A. v. Republic of Hungary*, Ad hoc UNCITRAL Arbitration Rules.

4.1 Article 45 ECT

Provisional application of a treaty means that treaty obligations are given effect prior to a state's formal ratification or accession to a treaty. The Vienna Convention on the Law of Treaties 1969 (the "Vienna Convention") regulates the provisional application of treaties in article 25 of the Vienna Convention, which provides that a "*treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating states have in some other manner so agreed*". With respect to the ECT such provisional application is provided for in Article 45. Article 45, in its entirety, reads as follows:

PROVISIONAL APPLICATION

(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

(2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depositary a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depositary.

(b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).

(c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.

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

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

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

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

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

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

(7) A state or Regional Economic Integration Organization which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the

> Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article.

Article 45 of the ECT resulted in the provisional application of the treaty by all signatory States between December 1994 and its entry into force in April 1998, unless a member State expressly declared that it was unable to apply the ECT provisionally. After April 1998, the provisional application was restricted to those signatory States which had not yet ratified the treaty, i.e. Australia, Belarus, Iceland, Norway and Russia. Among these five States, only Belarus and Russia applied the ECT provisionally. Australia, Iceland and Norway submitted declarations under Article 45(2)(a) when signing the ECT that they would not apply the treaty provisionally. Needless to say, however, considering the importance of the Russian energy sector, the fact that Russia applied the ECT provisionally made the application and interpretation of Article 45 ECT highly important.[90] Something which was further highlighted by the three *Yukos* cases.[91]

However, Russia's provisional application of the ECT came to an end on 18 October 2009 when Russia terminated its provisional application through a formal notification of its intention not to become a contracting party to the ECT pursuant to Article 45(3)(a) ECT. Energy investments in Russia made after that date no longer enjoy the provisional application of the ECT. However, pursuant to Article 45(3)(b), the obligation of a signatory State under Article 45(1) to apply Parts III (investment promotion and protection) and V (dispute settlement) with respect to any Investments made in such State during the time the provisional application still applied shall nevertheless remain in effect with respect to those investments for twenty years following the effective date of termination. Thus, the provisional application of the ECT by the Russian Federation is still relevant for investments made before 18 October 2009.

4.2 ECT cases dealing with Article 45

4.2.1 Petrobart

The first case which addressed the provisional application of the ECT was *Petrobart*. The issue in this case was whether the ECT was applicable with respect to investors of Gibraltar. When the United Kingdom signed the ECT, it made a declaration under Article 45(1) that the provisional application of the treaty should extend to the United Kingdom of Great Britain and Northern Ireland and to Gibraltar. However, when the United Kingdom ratified the ECT, it was specified in the instrument of ratification, that the ratification was in respect of the United Kingdom of Great Britain and Northern Ireland, the Bailiwick of Jersey and the Isle of Man. Gibraltar was not mentioned in the instrument of ratification.[92] The tribunal therefore had to determine whether the ECT applied to Gibraltar despite the non-inclusion of Gibraltar in the instrument of

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[90] See e.g. K. Hobér and Sophie Nappert, *Provisional application and the Energy Charter Treaty: the Russian Doll Provision*, International Arbitration Law Review, International Law Reporter, Tuesday, 10 July, 2007.
[91] The three *Yukos* cases are: *Yukos Universal Ltd. (UK – Isle of Man) v. Russian Federation*, *Hulley Enterprises Ltd. (Cyprus) v. Russian Federation*, and *Veteran Petroleum Trust (Cyprus) v. Russian Federation*, Ad hoc UNCITRAL Arbitration Rules.
[92] Petrobart Limited v. the Kyrgyz Republic, p. 62.

ratification. The tribunal found that such problem of interpretation had to be resolved through a "*rather formal approach based on the wording of the Treaty*", and noted that:

> according to the text of the Treaty provisional application ceases if it is terminated either by a special notification under Article 45(3)(a) of the Treaty or by transition from provisional application to a corresponding and final legal commitment resulting from the entry into force of the Treaty. It could indeed be expected that the United Kingdom, if it wished the provisional application of the Treaty to Gibraltar to be terminated as a result of a ratification not including Gibraltar, should have made this clear by making a notification in line with Article 45(3)(a) or a declaration in some other form in connection with the ratification. In the Arbitral Tribunal's opinion, the fact that the ratification, for political or other reasons, did not include Gibraltar does not justify the conclusion that the United Kingdom intended to revoke the application of the Treaty to Gibraltar on a provisional basis.[93]

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

This issue was part of the Kyrgyz Republic's challenge of the award before the Svea Court of Appeal. In the challenge proceedings, the Kyrgyz Republic argued that the tribunal exceeded its mandate by finding that the ECT applied provisionally to Gibraltar. The Court of Appeal, however, held that the Tribunal had not exceeded its mandate. The Court found that since there is no provision in the ECT which governs the situation where the ECT has been ratified with regard to a territory not corresponding to the territory covered by the provisional application, it could have been expected that the United Kingdom would have made it clear that the ECT no longer applied to Gibraltar, had this been the intention. With reference thereto, the Court found that the Tribunal had been correct in finding that Gibraltar was still covered by the provisional application of the ECT.[94]

4.2.2 Mr Kardassopoulos

The provisional application of the ECT was addressed also in the decision on jurisdiction in *Kardassopoulos.* In this case, both Mr Kardassopoulos and Gerogia agreed that the ECT had entered into force for Greece and Georgia on 16 April 1998. The question, however, was whether Mr Kardassopoulos pursuant to Article 45 ECT could rely on the protection the ECT with respect to alleged breaches of the ECT taking place before the entry into force but after 17 December 1995 when both Greece and Georgia signed the ECT. The question may appear simple at first. Article 45(1) provides that: "*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*". However, the question was made more difficult by the wording of Article 1(6), which

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[93] Petrobart Limited v. the Kyrgyz Republic, p. 62-63.
[94] K. Hobér and Nils Eliasson, *Review of Investment Treaty Awards by Municipal Courts*, in K. Small (ed.), Arbitration under International Investment Agreements (Oxford University Press, 2010), p. 654.

provides that "*the term "Investment" includes all investments, whether existing at or made after the later of the date of* ***entry into force*** *of this Treaty for the Contracting Party of the Investor making the Investment and that for the Contracting Party in the Area of which the Investment is made (hereinafter referred to as the "Effective Date")* ***provided that the Treaty shall only apply to matters affecting such Investments after the Effective Date***" (emphasis added). The question therefore arose whether *provisional application* of the ECT under Article 45(1) is equivalent to its *entry into force* for the purpose of Article 1(6).

The tribunal answered that question in the affirmative and concluded that:

> the Tribunal is satisfied that, properly interpreted in accordance with international law, 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 for Georgia and Greece.[95]

The second question with respect to the application of Article 45 in this case was whether the ECT, in fact, entered into force on a "provisional application" basis for Georgia and Greece on the date of their signature of the ECT? This question turned on whether such provisional application was "*not inconsistent with*" Georgia's or Greece's "*constitution, laws or regulations*" as provided in article 45(1).

In determining whether provisional application of the ECT was consistent with Georgian or Greek law, the tribunal first rejected Mr Kardassopoulos' argument that since Gorgia had not made use of its possibility under Article 45(2) to make an express declaration that it is unable to accept provisional application of the ECT, Georgia had demonstrated that provisional application of the ECT was not inconsistent with its the constitution, laws or regulations. The tribunal held that "*there is no necessary link between paragraphs (1) and (2) of Article 45. A declaration made under paragraph (2) 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*".[96]

Moreover, in terms of burden of proof the tribunal explained that "*the consideration which has to be given to domestic law arises because inconsistency with domestic law constitutes an exception to the normal rule in Article 45(1) that the ECT is provisionally applicable on signature*" and that such exception had been invoked by Georgia in asserting that the required inconsistency exists in relation both to the law of Georgia and to the law of Greece and that therefore the ECT did not become provisionally applicable on signature. The tribunal therefore held that it was for "*Respondent to make good its assertion, and the burden of proof on this issue lies with Respondent*".[97] The tribunal then went on to analyse the evidence on Greek and Georgian law relied on by the

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[95] *Ioannis Kardassopoulos v. Georgia* (Decision on Jurisdiction), para. 223.
[96] *Ioannis Kardassopoulos v. Georgia* (Decision on Jurisdiction), para. 228.
[97] *Ioannis Kardassopoulos v. Georgia* (Decision on Jurisdiction), para. 229.

parties, but found that Georgia had not demonstrated that provisional application of treaties was inconsistent with Greek or Georgia law.[98]

4.2.3 The Yukos Cases

The most significant example of application of Article 45, however, is unquestionably in the Interim Awards on Jurisdiction and Admissibility in the three *Yukos* cases.[99] This question was the central issue in the jurisdictional phase of the *Yukos* cases. In these cases, the tribunal found (i) that the ECT in its entirety applied provisionally in the Russian Federation until 19 October 2009, (i.e. the date Russia's termination of the provisional application took effect), and (ii) that Parts III and V of the Treaty (including the investor's right to arbitration under Article 26) remain in force until 19 October 2029 for any investments made prior to 19 October 2009.[100]

In reaching its conclusion the tribunal analyzed a number of questions relating to the application of Article 45, some of which will be briefly discussed below.

The tribunal first reached the same conclusion as the tribunal in Mr Kardassopoulos with respect to the question whether a State party to the ECT must have made a declaration under Article 45(2) when signing the ECT that it does not accept provisional application in order to be able to invoke the limitation clause in Article 45(1) that the provisional application only applies to the extent it is not inconsistent with its domestic laws and regulations. The tribunal found that the regimes of provisional application in Article 45(1) and 45(2) are separate, and that the Russian Federation could benefit from the limitation clause in Article 45(1) even though it made no declaration under Article 45(2).[101]

The tribunal also addressed the question whether despite the fact that Article 45(1) and 45(2) were independent some form of declaration or notification nevertheless were required under Article 45(1). The question arose because Russia, unlike some other States, had not expressed its concern that provisional application would be inconsistent with its domestic laws and regulations during the negotiations of the ECT. The tribunal, however, found that the Russian Federation can invoke the limitation clause in Article 45(1) even though it made no prior declaration nor gave any prior notice to other signatories that it intended to rely on Article 45(1) to exclude provisional application. In the view of the tribunal "*applying the rules of interpretation of Articles 31 and 32 of the [Vienna Convention] [...], the Tribunal cannot read into Article 45(1) of the ECT a notification requirement which the text does not disclose and which no recognized legal principle dictates*".[102]

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[98] *Ioannis Kardassopoulos v. Georgia* (Decision on Jurisdiction), paras. 230-246.
[99] *Yukos Universal Ltd. v. Russian Federation*, *Hulley Enterprises Ltd. v. Russian Federation*, and *Veteran Petroleum Trust v. Russian Federation*, Ad hoc UNCITRAL Arbitration Rules.
[100] *Yukos Universal Ltd. v. Russian Federation,* para. 395*, Veteran Petroleum Trust v. Russian Federation,* para. 395 and *Hulley Enterprises Ltd. v. Russian Federation*, para. 395.
[101] *Yukos Universal Ltd. v. Russian Federation,* para. 268-269*, Veteran Petroleum Trust v. Russian Federation,* para. 268-269 and *Hulley Enterprises Ltd. v. Russian Federation*, para. 268-269.
[102] *Yukos Universal Ltd. v. Russian Federation,* para. 283*, Veteran Petroleum Trust v. Russian Federation,* para. 283 and *Hulley Enterprises Ltd. v. Russian Federation*, para. 283.

The parties also had different views as to how the limitation clause, i.e. that the provisional application only applies "*to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*", was to be applied. The Russian Federation argued that the tribunal must assess whether each and every individual provision of the ECT was consistent with the constitution, laws or regulations of Russia, whereas the claimants argued that the correct test under Article 45(1) was whether the principle of provisional application of treaties, as such, was inconsistent with the Constitution, laws or regulations of the Russian Federation. The tribunal accepted the claimant's interpretation of Article 45(1) and concluded that the limitation clause of Article 45(1) negates provisional application of the ECT only where the principle of provisional application is itself inconsistent with the constitution, laws or regulations of the signatory State.[103]

Moreover, having analyzed all evidence, the tribunal found that there was no inconsistency between the provisional application of treaties and the Constitution, laws or regulations of the Russian Federation.[104]

4.3 Interim conclusions regarding provisional application

Article 45 could be viewed as an increasingly *unimportant* provision, since there is only one State, Belarus, which still applies the ECT provisionally. However, the provisions on provisional application in Article 45 still remains important for energy investments made in the Russian Federation made prior to 19 October 2009. Pursuant to Article 45(3) ECT, Parts III (investment protection) and V (dispute resolution including the investor's right to arbitration under Article 26) remain in force until 19 October 2029 for energy investments made in the Russian Federation prior to 19 October 2009 (the date on which the Russian Federation's termination of its provisional application of the ECT took effect).[105] The important confirmation by the tribunal in the *Yukos* cases that there is no inconsistency in the Russian Federation between the provisional application of treaties and its Constitution, laws or regulations,[106] might therefore be relied upon by investors in future cases against the Russian Federation (would any such cases be commenced).

5. Concluding remarks

Having reviewed available data in relation to the 29 ECT cases commenced so far as well as the jurisdictional and substantive issues raised in the twelve cases which have resulted in an award on jurisdiction or a merits award, it is time to conclude this exposé

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[103] *Yukos Universal Ltd. v. Russian Federation,* para. 329*, Veteran Petroleum Trust v. Russian Federation,* para. 329 and *Hulley Enterprises Ltd. v. Russian Federation*, para. 329.
[104] *Yukos Universal Ltd. v. Russian Federation,* para. 338*, Veteran Petroleum Trust v. Russian Federation,* para. 338 and *Hulley Enterprises Ltd. v. Russian Federation*, para. 338.
[105] *Yukos Universal Ltd. v. Russian Federation,* para. 395*, Veteran Petroleum Trust v. Russian Federation,* para. 395 and *Hulley Enterprises Ltd. v. Russian Federation*, para. 395.
[106] K. Hobér and Sophie Nappert, *Provisional application and the Energy Charter Treaty: the Russian Doll Provision*, International Arbitration Law Review, International Law Reporter, Tuesday, 10 July, 2007, p. 56 and *Yukos Universal Ltd. v. Russian Federation,* para. 338*, Veteran Petroleum Trust v. Russian Federation,* para. 338 and *Hulley Enterprises Ltd. v. Russian Federation*, para. 338.

by returning to the questions that were raised in the introduction to this report, *viz.*, "is the Energy Charter Treaty a world of its own" and "what lessons can be learned from ten years of arbitration under the Energy Charter Treaty"?

5.1 A world of its own?

There are a number of things that distinguishes the ECT from other investment treaties. It is, for instance, the only multi-lateral instrument dealing with inter-governmental cooperation in the energy sector, and no other treaty provides an similarly comprehensive investment protection regime for energy investments. However, if one narrows the perspective and look only at the 29 ECT cases, available data does not support a conclusion that the claims brought under the ECT, the parties involved, the arbitrators appointed, or the issues raised, would differ significantly from those in investment treaty cases in general. To the contrary:

1. the investors involved in the 29 cases commenced so-far appear to represent a similar mix of big companies and small companies, well known companies and unknown companies, as in investment treaty cases in general;

2. the respondent States are, with the important exception of the Federal Republic of Germany, States that typically appear as respondents also in other investment treaty cases;

3. the pool of arbitrators from which arbitrators in ECT cases are selected also appears to be largely the same as for investment treaty cases in general; and

4. looking at the bottom line, the outcome, the rate of success for the investors, the rate of success for the respondent States, the proportion of settled cases, the picture is almost identical to that in investment treaty cases in general.

Thus, looking at available facts and figures, ECT arbitration does not appear to be a "world of its own". It rather displays the same trends and patterns as investment treaty arbitration in general. The conclusion remains the same if we add jurisdictional and substantive issues to the equation. The cases concluded so-far has not raised unique jurisdictional or substantive issues. Admittedly, denial of benefits provisions such as Article 17 ECT are not found in all investment treaties and provisions on provisional application are rare. However, these provisions, and the issues they have given rise to in practice, are not sufficient to support a conclusion that the ECT is a world of its own.

5.2 Lessons learned?

Even though the ECT may not be a world of its own, there are a number of lessons to be learned from the first ten years of arbitration under the Energy Charter Treaty.

Two general observations that come to mind are:

1. With an average of three new ECT cases per year, or 9 percent of the total number of new investment cases each year, the ECT represents a small, but, not insignificant part of the total body of investment treaty cases; and

2. When the ECT is applicable, investors appear to prefer to commence arbitration under the ECT rather than under bilateral investment treaties.

Turning next to the *arbitrators*. What lessons are there (if any) to be learned for the arbitrators? In terms of appointments, it seems as if a solid track record as arbitrator in commercial cases and investment treaty cases generally are "sufficient" to be appointed in ECT cases. Specific industry experience from the energy sector seems to have been a less important consideration.

There are important lessons to be learned also for the *arbitration institutions*. One of the distinguishing features of the ECT is that it offers the investor the right to choose between ICSID, UNCITRAL Rules and the SCC. Most investment treaties do not offer such a wide selection. The investor's choice of arbitration institution in ECT cases can therefore be seen as a litmus test for the true preferences of the investors. The choices made demonstrate a strong preference for institutional arbitration, i.e. ICSID and the SCC. ICSID is clearly the dominant institution, but the SCC is a strong runner up with a significant number of ECT cases. The UNCITRAL Rules are chosen in relatively few cases (5 out of 29), and, thus, does not appear to be an as attractive option for investors as the ICSID and the SCC. It should also be noted that three out of the 5 cases in which the UNCITRAL Rules are used are the *Yukos* cases, which are heard by a joint tribunal.

The *investors*, of course, must take a close look at the relatively low rate of success, so-far, in the ECT cases that have gone all the way to an award (20 percent and with a rate of recovery in the range of 4 to 44 percent of the claimed amount). Does this figure indicate that investors have had unrealistic expectations on the investment protection regime of the ECT? This question is not easily answered without full knowledge of the facts of each individual case. I would submit, however, that the statistics do not necessarily support such a conclusion. Even if ultimately not successful, the investors seem, in many cases, to have had good reason to bring their claims. Moreover, since investment arbitration often is used as a last resort, when all other options appear to be exhausted, it is understandable that investors may bring claims to arbitration which are far from certain. The five settled cases must also be taken into account. Although the terms of these settlements are not public, it may be assumed that these settlements were mutually beneficial for the investor and the State, and, hence, that the investor's claim (from the investor's perspective) was not in vain.

For the *States*, one of the lessons to be learnt appear to be that there is no guarantee that the State will be able to recover its arbitration costs and costs for legal representation even if the State wins the case. As described above in section 1.6, tribunals sometimes appear to be reluctant to award costs against the "losing" claimant in investment arbitration save where there is some element of bad faith associated with making of the claim.

Another lesson to be learned for States concern their possibility to exercise their "right to deny the advantages" of the investment protection regime of the ECT to a legal entity which is owned or controlled by nationals of a State which is not a member of the ECT (Article 17(1) ECT). As described in section 2.1.3 above, tribunals have held that a State may only rely on Article 17(1) as a defence to alleged treaty violations if it has notified the investor that it exercises its right to deny the investor the protection of the ECT before the alleged violation of the ECT took place. States that would like to avoid that shellcompanies owned by nationals from non-member states enjoy the protection of the ECT must therefore develop procedures for giving sufficient notice to such investors that their protection is denied. However, this may prove difficult in practice. States may not be aware of the existence of a particular investor until the State receives a claim letter pursuant to Article 26.

As far as the *substantive issues* involved in the six cases that have resulted in an award on the merits are concerned, the lesson to be learned is that there is no simple lesson to be learned. Each case is unique and its resolution specific to the facts. Even though the substantive protection standards in Part III of the ECT are the same in each case, the cases do not lend themselves to general conclusions as to the application of the ECT as substantive law. Only time will tell whether this will change as the number of concluded cases increase. It should be kept in mind, however, that tribunals constituted under the ECT (regardless of the arbitration rules) are tribunals for *ad hoc* dispute resolution in the sense that they are constituted only for one particular case. They owe their duties to the parties in the case and their mandate is to resolve the dispute before them. Tribunals under the ECT has no duty, unless it is required for the resolution of the dispute before them, to develop ECT case law or to develop the ECT as a coherent system of law.

Another lesson to be learned, both States and investors must pay close attention to the interplay between the *ECT and EU law*. Although in the abstract the answer to this particular "conflict of law issue" may be simple, i.e. to the extent EU law constitutes domestic law, it is to be viewed as facts, there are many issues concerning the practical implications of this principle that must be ironed out in practice.

A final lesson to be learned is that *provisional application* of the ECT, which was accepted by the signatory States pursuant to Article 45, did matter. The investors in *Petrobart* and Mr *Kardassopoulos* as well as the investors in the three *Yukos* cases all successfully relied on the provisional application of the ECT.

It has been a pleasure and an honour to be rapporteur on the first ten years of Energy Charter Treaty Arbitration and I look very much forward to the coming ten years.

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