THE ENERGY CHARTER TREATY: AN OVERVIEW

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This article briefly discusses the substantive protections of the Energy Charter Treaty (ECT) (Section I, infra), the ECT's dispute resolution provisions (Section II, infra), and the ECT arbitral jurisprudence to date, including composition of ECT tribunals (Section III, infra).1 This article focuses on the four decisions and awards handed down to date under the ECT: Nykomb v. Latvia (combined jurisdiction and merits award);2 Petrobart v. Kyrgyz Republic

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(combined jurisdiction and merits award);³ *Plama v. Bulgaria* (jurisdiction decision only);⁴ and *Kardassopoulos v. Georgia* (jurisdiction decision only).⁵ Due to the authors’ representation of parties involved with ongoing cases under the ECT, this article does not purport to provide any prescriptive insight into current or future jurisprudence, and instead it sets out in a descriptive manner the main findings of the four ECT tribunals to date.

I. INVESTOR PROTECTIONS

This section summarizes the general purpose of the ECT (Section A), and the individual protections afforded to investors, including the prohibition on expropriation without compensation (Section B), and the requirements of fair and equitable treatment (Section C), no unreasonable and discriminatory treatment (Section D), constant protection and security (Section E), observing obligations (Section F), the most favored nation (Section G) and the minimum standard of treatment (Section H).

A. *The Purpose of the ECT*⁶

Like all investment treaties, the ECT aims to promote and protect foreign investment. The preamble states this aim as being to “catalyse economic growth by means of measures to liberalize investment and trade in energy.”⁷ Article 2 confirms that the ECT aims to create a “legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits.”⁸ The ECT provides foreign investors with substantive protections when they invest in ECT states, and thus aims to stimulate foreign investment in part by protecting investors abroad.

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4. *Plama Consortium Ltd. v. Republic of Bulgaria*, 44 I.L.M. 721 (ICSID 2005). Lucy Martinez previously worked as an associate at White & Case LLP, and was a member of the legal team representing the Republic of Bulgaria in this case.


6. *See* Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).


8. *ECT, supra* note 7, art. 2.
The substantive protections of the ECT are all found in Part III, although the ECT also contains provisions relating to trade, competition, transit, technology, access to capital (Part II), and environmental aspects, transparency, and taxation (Part IV). Disputes regarding these matters cannot be referred to international arbitration pursuant to ECT Article 26, which permits arbitration only for disputes "which concern an alleged breach of an obligation of [a Contracting Party] under Part III."^9

B. Expropriation: ECT Article 13^10

Generally, a host state must compensate a foreign investor if the state expropriates their investment. This basic principle is enshrined in ECT Article 13, which provides in full as follows:

1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:
   a) For a purpose which is in the public interest;
   b) Not discriminatory;
   c) Carried out under due process of law; and
   d) Accompanied by the payment of prompt, adequate and effective compensation.
   Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date.") Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

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2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).

3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.¹¹

Thus, the host state may not expropriate foreign-owned property or take measures tantamount to expropriation unless the measure was:

1) conducted for a purpose in the public interest;
2) not discriminatory;
3) carried out under due process of law; and
4) accompanied by payment of prompt, adequate and effective compensation.

There is a distinction between direct expropriation, being an outright taking by the state, where the investor loses title and control over property, and indirect expropriation, where the investor retains legal title, but its rights of ownership are eroded by being substantially deprived of the use or enjoyment of its investment. Examples of indirect expropriation include denial of access to infrastructure, environmental regulations, and the revocation of a license. Indirect expropriation covers creeping expropriation, where a series of measures together deprive the investor of the economic benefit of the investment, although none alone would necessarily qualify as indirect expropriation, and regulatory expropriation, where the host state takes regulatory measures that affect the economic value of the asset owned by the foreign investor.

The Nykomb Tribunal rejected the claim of indirect expropriation via the state’s non-payment of a double tariff for electricity, finding that:

[T]he decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking [sic] or control over the enterprise the disputed measures entail. In the present case, there is no possession taking [sic] of Windau or its assets, no interference with the shareholder’s rights or with the management’s control over and running of the enterprise—apart from

¹¹ ECT, supra note 7, art. 13.
ordinary regulatory provisions laid down in the production licence, the off-take agreement, etc. The Tribunal therefore concludes that the withholding of payment at the double tariff does not qualify as an expropriation or the equivalent of an expropriation under the Treaty.12

The Petrobart Tribunal also rejected the claim of indirect expropriation through forcible transfer of assets of other companies and state intervention in judicial proceedings, concluding that:

[T]here was no formal expropriation of Petrobart’s investment. Nor does it appear that the measures taken by the Kyrgyz Government and state authorities, although they had negative effects for Petrobart, were directed specifically against Petrobart’s investment or had the aim of transferring economic values from Petrobart to the Kyrgyz Republic. . . . The Arbitral Tribunal considers that the measures taken by the Kyrgyz Republic, while disregarding Petrobart’s legitimate interests as an investor, did not attain the level of de facto expropriation. The Arbitral Tribunal therefore concludes that the Republic’s action does not fall within Article 13(1) of the Treaty.13

Thus, no ECT tribunal to date has found a host state to be in breach of ECT Article 13 on the basis of expropriation, although many ECT cases are just beginning to enter the merits phase.

C. Fair and Equitable Treatment: ECT Article 10(1)14

Article 10 of the ECT is headed “PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS,” and paragraph 1 relevantly provides:

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Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.\textsuperscript{15}

The first sentence provides a slightly more fleshed-out formulation of the fair and equitable treatment standard than that found in other investment treaties. For example, the North American Free Trade Agreement (NAFTA) requires "treatment in accordance with international law, including fair and equitable treatment and full protection and security;"\textsuperscript{16} the (now superseded) 1994 U.S. Model Bilateral Investment Treaty (BIT) provides that "[e]ach Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law;"\textsuperscript{17} and the new 2004 U.S. Model BIT requires "treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."\textsuperscript{18}

The "fair and equitable treatment" clause sets a flexible standard, with considerable room for discretion on the part of tribunals. This provision may cover many different sorts of state conduct, including a breach of legitimate expectations created by the state and relied upon by the investor, actions without transparency, the giving of insufficient reasons for decisions relating to the investment, the state not acting in a reasonable or predictable way, or the state failing to provide an opportunity for the investor to be heard or other denial of justice.

The \textit{Petrobart} case involved a claim by a Gibraltar company for breach of contract for the supply and transfer of stable gas condensate. The Kyrgyz Republic took certain measures to restructure the oil and gas sector, allegedly "to ensure a satisfactory supply of oil and gas to the population."\textsuperscript{19} The Tribunal found a breach of the fair and equitable treatment clause, stating:

\begin{quote}
The\textit{ Arbitral Tribunal does not doubt that there may have been good reasons for restructuring the system for supply of oil and gas in the Kyrgyz Republic. The Arbitral Tribunal considers, however, that as a Contracting Party to the Treaty the Republic was under an}
\end{quote}

\begin{footnotes}
\item[15] ECT, \textit{supra} note 7, art. 10.
\end{footnotes}
obligation to carry out this reorganization in a way which showed
due respect for investors such as Petrobart.\textsuperscript{20}

Citing the state’s forcible transfer of assets and intervention in court
proceedings to the detriment of Petrobart, the Tribunal found: "such
Government intervention in judicial proceedings is not in conformity with the
rule of law in a democratic society and . . . it shows a lack of respect for
Petrobart’s rights as an investor having an investment under the Treaty."\textsuperscript{21} The
Tribunal also found that the state’s intervention in the court proceedings
violated ECT Article 10(12), which requires that domestic law provide effective
means for asserting claims and enforcing rights.\textsuperscript{22} The Tribunal awarded
Petrobart USD $1.1 million, with interest, being compensation for payment of
delivered goods; no additional damages were awarded for the intervention in
the court proceedings, because Petrobart did not show that it suffered additional
damage from these actions.\textsuperscript{23} The Tribunal refused to award compensation for
lost profits, and each party was ordered to bear their own costs.\textsuperscript{24}

Many of the pending ECT cases allege breach of the fair and equitable
treatment clause, and accordingly, further jurisprudence on this clause is
inevitable.

\textbf{D. Unreasonable/Discriminatory Treatment: ECT Article 10(1)}

Article 10(1) of the ECT provides that investments “shall also enjoy the
most constant protection and security and no Contracting Party shall in any way
impair by unreasonable or discriminatory measures their management,
maintenance, use, enjoyment or disposal.”\textsuperscript{25}

Under this provision, the state cannot treat an international investment in
a less favorable manner than a national investment, without any reasonable
basis for this difference of treatment. The investor does not need to show
discriminatory intent, only discriminatory treatment in fact. A breach of the
“fair and equitable treatment” provision usually—but not always—leads to
breach of this standard also.

\begin{itemize}
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id. at 75. The Tribunal also criticized certain retroactive legislation, noting that the “adoption
of a new law which establishes that a previous law shall be interpreted in a restrictive way is retroactive
legislation which is likely to have negative effects for some legal or physical persons in respect of previous
business transactions,” but concluded that in this case there was no breach of the ECT. Id. at 76.
  \item \textsuperscript{22} Id. at 77.
  \item \textsuperscript{23} Id. at 85.
  \item \textsuperscript{24} Petrobart Ltd., SCC Case No. 126/2003 at 87–88.
  \item \textsuperscript{25} ECT, supra note 7, art. 10.
\end{itemize}
The Nykomb Tribunal held that the state had breached the “unreasonable/discriminatory measure” clause of ECT Article 10(1).26 In that case, the Latvian state-owned joint stock company, Latvenergo, entered into a contract for the purchase of electricity with Windau, a subsidiary of the Swedish company, Nykomb (the claimant in the ECT arbitration).27 A dispute arose between the parties regarding the tariff to be paid under the contract. Nykomb claimed that the law in effect when the contract was signed offered double tariffs for eight years to foreigners investing in the Latvian energy sector, while Latvenergo asserted that it was only obliged to pay 0.75 times the average general tariff.28 Leaving aside issues of jurisdiction, the Tribunal agreed that Windau originally had both a statutory and contractual right to the double tariff for an eight-year period, and that Windau had not received this tariff, although other companies were receiving a double tariff.29

The Tribunal rejected Nykomb’s claim of indirect expropriation, but found that Latvia acted in a discriminatory manner in violation of ECT Article 10(1) in depriving Nykomb of the benefit of the double tariff.30 The Tribunal accepted that in evaluating whether there is discrimination in the sense of the ECT, “one should only ‘compare like with like.’”31 The Tribunal found that the companies were all comparable, yet only Windau was not receiving the double tariff—which Latvia could not adequately explain:

In such a situation, and in accordance with established international law, the burden of proof lies with the Respondent to prove that no discrimination has taken or is taking place. The Arbitral Tribunal finds that such burden of proof has not been satisfied and therefore concludes that Windau has been subject to a discriminatory measure in violation of Article 10(1).32

In relation to the assessment of damages, the Nykomb Tribunal concluded that the principles of compensation provided in Article 13 (relating to expropriation) were not applicable to the assessment of damages or losses found to be caused by a breach of Article 10.33 The Tribunal assessed “compensation for

27. Id. at 28.
28. Id. at 30.
29. Id. at 29–30.
30. Id. at 33–34.
31. Nykomb, SCC Case No. 118/2001 at 34.
32. Id.
33. Id. at 38.
the losses or damages inflicted on the Claimant's investment,” although there was limited evidence before it to enable a precise calculation of these damages.\textsuperscript{34} The Tribunal thus made “a discretionary award of one third of the estimated loss in purchase prices of electricity up to the time of this award... as a reasonable basis for quantification of the Claimant’s assumed losses up to the time of this award,” awarding Nykomb approximately USD $3 million, and ordered Latvia to pay approximately USD $300,000 of Claimant’s costs.\textsuperscript{35} The Tribunal also ordered Latvia to ensure the payment at double tariff for electric power delivered under the contract for the remainder of the eight year contract period.\textsuperscript{36}

\textbf{E. Most Constant Protection and Security: ECT Article 10(1)}

Article 10(1) of the ECT provides that investments “shall also enjoy the most constant protection and security and no contracting party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.”\textsuperscript{37}

This provision requires due diligence and vigilance by the host state to protect the investment and to ensure, as far as is reasonably possible, that no harm comes to the investment. This clause has traditionally been used for claims of violence and civil unrest affecting an investment,\textsuperscript{38} but more recently it has been the basis for claims for legal and economic protection and security for an investment. To date there has been no published ECT award on this clause.

\textbf{F. The Umbrella Clause: ECT Article 10(1)}\textsuperscript{39}

Under ECT Article 10, a state must “observe any obligations it has entered into with an Investor or an Investment.”\textsuperscript{40} This is called an “umbrella clause” because it may operate to bring contract breaches under the protective umbrella of the treaty. The jurisprudence on umbrella clauses is complicated and beyond

\begin{itemize}
\item \textsuperscript{34} \textit{Id.} at 39.
\item \textsuperscript{35} \textit{Id.} at 41.
\item \textsuperscript{36} \textit{Nykomb}, SCC Case No. 118/2001 at 41.
\item \textsuperscript{37} ECT, \textit{supra} note 7, art. 10.
\item \textsuperscript{38} See, e.g., Asian Agricultural Products, Ltd. v. Republic of Sri Lanka (H.K. v. Sri Lanka), 30 I.L.M. 577, 583 (ICSID 1991) (security forces destroyed shrimp farm and killed employees while combating Tamil insurgents).
\item \textsuperscript{40} ECT, \textit{supra} note 7, art. 10.
\end{itemize}
the scope of this modest article. For umbrella clause claims under the ECT, it is important to note that four states have ratified ECT Annex IA, which provides that disputes with these states under the umbrella clause cannot go to international arbitration.\textsuperscript{41}

In the ECT context, the Tribunal in \textit{Nykomb} stated that if the claimant "were to be understood as pursuing a contractual claim directly and exclusively based on the agreements . . . , such claims would not be admissible since Article 26 only allows arbitration of claims based on alleged breaches of the Treaty."\textsuperscript{42} However, the Tribunal found that the claimant was making claims on its own behalf, rather than on behalf of its subsidiary, which was the party to the relevant contract, and therefore that the claims were treaty claims.\textsuperscript{43}

\textbf{G. MFN and National Treatment: ECT Articles 10(3), 10(7)}

Article 10 of the ECT relevantly provides:

(3) For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable . . . .

. . . (7) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.\textsuperscript{44}

These clauses prohibit states from discriminating against companies on the basis of nationality and require states to provide equally favorable treatment to investors. Under the national treatment standard, the host state must treat foreign investors and their investments no less favorably than those of its own nationals and companies in similar circumstances. This clause thus overlaps with the discriminatory treatment clause. Under the most favored nation

\textsuperscript{41} ECT, \textit{supra} note 7, Annex IA. The four States listed on this Annex are Australia, Canada, Hungary and Norway, although Canada has not signed the ECT, and Australia has not ratified the ECT.


\textsuperscript{43} \textit{Id}.

\textsuperscript{44} ECT, \textit{supra} note 7, art. 10.
(MFN) clause, the host state must give the foreign investor the highest standard of treatment given to any other foreign investor from any other state. To date there has been no published ECT award on this clause.\(^{45}\)

**H. Minimum Standard Clause: ECT Article 10(1)**

ECT Article 10(1) states: "In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations."\(^{46}\) At the adoption session of the ECT on 17 December 1994, the Chairman noted the Russian Federation's views on this clause, being "that the reference to international law in Article 10(1) is not intended to impose most favoured nation obligations with regard to making of investments. This is clearly in accordance with the intent of the negotiators who decided not to include in this first Treaty MFN obligations for the pre-investment stage."\(^{47}\) To date there has been no published ECT award on this clause.

**II. DISPUTE RESOLUTION PROVISIONS\(^{48}\)**

The key ECT dispute resolution provisions are contained in Part V of the ECT: Article 26 (relating to investor-state disputes); Article 27 (state-state disputes), and Article 28 (limiting the application of Article 27 in certain ways). This article focuses on investor-state disputes, which are the only sorts of disputes that have arisen (at least publicly) under the ECT to date. Article 26 provides in full as follows:

1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

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\(^{45}\) The Plama Tribunal concluded that a MFN clause could not be used to import dispute settlement rights when none previously existed, but this holding related to the MFN clause in the Bulgaria-Cyprus BIT, not the MFN clause in the ECT. Plama Consortium Ltd. v. Republic of Bulgaria, 44 I.L.M. 721, 750 (ICSID 2005).

\(^{46}\) ECT supra note 7, art. 10. See also Final Act of the European Energy Charter Conference, IV(17), in Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 360 [hereinafter Final Act] ("[t]he reference to treaty obligations in the penultimate sentence of Article 10(1) [being the sentence quoted above] does not include decisions taken by international organizations, even if they are legally binding, or treaties which entered into force before 1 January 1970.").

\(^{47}\) Chairman's Statement at Adoption Session on December 17, 1994, available at http://www.encharter.org/index.php?id=28&L=0 (follow “Click to download the 1994 Treaty and all related documents (0.8 MB in .pdf format)” hyperlink).

2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution: (a) to the courts or administrative tribunals of the Contracting Party to the dispute; (b) in accordance with any applicable, previously agreed dispute settlement procedure; or (c) in accordance with the following paragraphs of this Article.

3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b). (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between states and Nationals of other states opened for signature at Washington, 18 March 1965 (hereinafter referred to as the “ICSID Convention”), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the “Additional Facility Rules”), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission
on International Trade Law (hereinafter referred to as “UNCITRAL”); or
(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for: (i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules; (ii) an “agreement in writing” for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the “New York Convention”); and (iii) “the parties to a contract [to] have agreed in writing” for the purposes of article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

7) An Investor other than a natural person which has the nationality of a Contracting Party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a “national of another Contracting State” and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a “national of another State.”

8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a subnational government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards. 49

49. ECT, supra note 7, art. 26.
As noted by the Plama Tribunal, "Article 26 is a very important feature of the ECT which is itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law."\(^{50}\)

The ECT adopts the same general approach to investor-state dispute resolution as the approach taken in most BITs and NAFTA, requiring the satisfaction of certain jurisdictional conditions before a party can invoke the dispute resolution provisions of the ECT. These requirements relate to *ratione personae* (Section A below), *ratione materiae* (Section B, infra) and *ratione temporis* (Section C, infra). This article also addresses certain procedural issues relating to the ECT dispute resolution provisions (Section D, infra).

A. *Ratione Personae: Investor, ECT Contracting State*\(^{51}\)

To commence arbitration under the ECT, the claimant must be protected under the ECT (Section 1, infra), and the respondent state must be bound by the obligations of the ECT (Section 2, infra), including the obligation to arbitrate disputes falling within the scope of the ECT.

1. The Claimant-Investor

The claimant-investor must meet the definition of "Investor" in article 1(7), which provides in full as follows:

"Investor" means:

a) With respect to a Contracting Party: (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law; (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

b) With respect to a "third state," a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.\(^{52}\)

The Petrobart Tribunal rejected the state's claim that Petrobart, a company incorporated in Gibraltar, was not protected by the ECT because the United

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52. *ECT*, *supra* note 7, art. 1(7).
Kingdom did not ratify the ECT on behalf of Gibraltar. The Tribunal rejected these claims partly because they were raised by the Kyrgyz Republic so late in the proceedings, but also because the UK had declared that provisional application of the ECT extended to Gibraltar (although the UK had not declared that ratification of the ECT also extended to Gibraltar). Thus, the claimant was an investor within the meaning of ECT Article 1(7).

The ECT's broad definition of "Investor" in article 1(7) is narrowed by ECT article 17, which permits ECT states to deny the benefits of the ECT to investors under certain circumstances. Article 17 provides in full as follows:

> Each Contracting Party reserves the right to deny the advantages of this Part to:
> 1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; or
> 2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:
>   (a) does not maintain a diplomatic relationship; or
>   (b) adopts or maintains measures that: (i) prohibit transactions with Investors of that state; or (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.

The Petrobart Tribunal briefly considered article 17(1), but concluded that the "conditions for application of article 17(1) . . . are not present in this case."

The Plama Tribunal considered article 17(1) at length, and held that a state's denial of benefits under ECT article 17(1) must be expressly exercised by the state, and that any such exercise has prospective effect only; this ruling has been criticized by commentators. The Plama Tribunal reserved to the

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54. Id. Provisional application is discussed further below in relation to ratione temporis issues.
55. Id. at 70. This conclusion was affirmed by the Svea Court of Appeal, which found no administrative error on the part of the Tribunal in their assessment of this objection to jurisdiction.
56. ECT, supra note 7, art. 17.
59. See, e.g., Jagusch & Sinclair, supra note 51, at 100–01; James Chalker, Making the ECT Too Investor Friendly: Plama Consortium Limited v. the Republic of Bulgaria 3 (No. 5) TRANSNAT'L DISPUTE MGMT. 1 (2006); Lawrence Shore, The Jurisdiction Problem in ECT Claims, 10 (No. 3) INT'L ARB. L. REV.
merits phase its decision on the application of the "ownership or control" aspect of article 17(1) to the factual circumstances of that case.60

2. The Respondent State

The respondent to the dispute must be an ECT Contracting Party, defined in Article 1(2) as being "a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force."61 There are currently fifty-two parties to the ECT.62 Notable absences from the list of ECT Contracting Parties are the United States and Canada, although both were involved in the negotiation of the treaty in the early 1990s.

Issues of attribution may arise in determining whether a claim can be commenced under the ECT, particularly when the investor has dealt directly with a state-owned company rather than with the state itself.63 In Nykomb v. Latvia, as noted above, the Latvian state-owned joint stock company, Latvenero, entered into a contract for, inter alia, the purchase of electricity with Windau, a subsidiary of the Swedish company, Nykomb (the claimant in

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60. Plama Consortium Ltd., 44 I.L.M. at 746.
61. ECT, supra note 7, art. 1(2).
62. See Energy Charter Members & Observers, http://www.encharter.org/index.php?id=61&L=0 (last visited Mar. 16, 2008) for a full list of ECT states. Fifty-one European and Asian countries have signed the Energy Charter Treaty; the Treaty has also been signed collectively by the European Union so the total number of parties to the Treaty is fifty-two. The member states are Albania, Armenia, Australia*, Austria, Azerbaijan, Belarus*, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Communities, Finland, France, Georgia, Germany, Greece, Hungary, Iceland*, Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Netherlands, Norway*, Poland, Portugal, Romania, Russian Federation*, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, Uzbekistan, United Kingdom. (* denotes State in which ratification of the Energy Charter Treaty is still pending).
63. See generally Kaj Hobér, State Responsibility and Investment Arbitration, in INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 261 (Clarisse Ribeiro ed., 2006); Anatoly S. Martynov, State Responsibility under the Energy Charter Treaty and other Investment Protection Treaties, in INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 290 (Clarisse Ribeiro ed., 2006). See also ECT, supra note 7, art. 22, regarding State and privileged enterprises. Article 22 is in Part IV, not Part III of the ECT, but the Nykomb Tribunal found that "the interpretation and application of the relevant Articles of the Treaty, Articles 10 and 13, are best considered under the merits part of this award, and that the references to Article 22 cannot as such be dismissed as inadmissible in the form that the references are relied on." Nykomb Synergetics Tech. Holding AB v. The Republic of Latvia, Arb. Inst. of the SCC, Case No. 118/2001 8 (2003). The Petrobart Tribunal rejected the claim based on Article 22 regarding actions by the State-owned enterprise. Petrobart Ltd. v. The Kyrgyz Republic, Arb. Inst. of the SCC, Case No. 126/2003 77 (2005).
the ECT arbitration). A dispute arose between the parties regarding the tariff to be paid under the contract. The Republic of Latvia made a number of jurisdictional objections, including that Latvenergo’s conduct was not attributable to Latvia. The Tribunal rejected this argument, concluding that Latvenergo:

[W]as clearly an instrument of the State in a highly regulated electricity market . . . . It had no freedom to negotiate electricity prices but was bound, and considered itself to be bound, by the legislation and the regulatory bodies’ determination of the purchase prices to be paid for electric power produced by cogeneration plants. Latvenergo cannot be considered to be, or to have been, an independent commercial enterprise, but clearly [was] a constituent part of the Republic’s organization of the electricity market and a vehicle to implement the Republic’s decisions concerning the price setting for electric power.65

B. Ratione Materiae: The Dispute66

Only certain disputes can be referred to international arbitration pursuant to ECT Article 26. In particular, the dispute must relate to an investment in the energy sector and to an alleged breach of ECT Part III.

“Investment” is broadly defined in ECT Article 1(6) as follows:

“Investment” means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

d) Intellectual Property;

e) returns;


65. Id. at 31.

66. See generally Gaillard, supra note 51; Jagusch & Sinclair, supra note 51.
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.

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the date of entry into force 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. “Investment” refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as “Charter efficiency projects” and so notified to the Secretariat.67

The investment must be in the energy sector, defined in Article 1(5) as meaning:

[A]n 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 [relating to non-applicable energy materials and products, such as charcoal or fuel wood], or concerning the distribution of heat to multiple premises.68

The Nykomb Tribunal accepted that a contract to build a cogeneration plant, to produce electric power and heat on the basis of natural gas, and for the purchase of that electric power, was an “investment” within the meaning of the ECT.69

The Petrobart Tribunal found that the rights arising under a one year contract for the supply and transfer of gas condensate were an “investment” within the meaning of the ECT, although the wording of Article 1(6) was

67. ECT, supra note 7, art. 1(6). See also Final Act, supra note 46, at IV(3) (which sets out factors to consider in determining whether an Investment “is controlled, directly or indirectly, by an Investor of any other Contracting Party . . . .”); id. at VI(1) (which sets out the Russian Federation’s opinion on Article 1(6) and the need to reconsider the importance of national legislation with respect to the issue of control as expressed in the Understandings).

68. ECT, supra note 7, art. 1(5). See also Final Act, supra note 46, at IV(2)(b) (setting out certain activities as “illustrative of Economic Activity in the Energy Sector; [including] (i) prospecting and exploration for, and extraction of e.g., oil, gas, coal and uranium; [and] (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources.”).

ambiguous in parts. The Tribunal found that "a right conferred by contract to undertake an economic activity concerning the sale of gas condensate is an investment according to the Treaty. This must also include the right to be paid for such a sale." An earlier UNCITRAL tribunal had found that Petrobart had not made a "foreign investment" within the meaning of the Kyrgyz Foreign Investment Law, and dismissed Petrobart's claims for lack of jurisdiction.

The dispute must also relate to an alleged breach of ECT Part III, which contains the substantive protections provided by states to investors (discussed in Section I above).

One potential limitation on disputes that can be submitted to arbitration under the ECT is ECT Annex ID, which is the "fork in the road" provision. For the twenty plus countries listed on Annex ID, if the investor has pursued its claim in national courts, the investor cannot bring the claim to international arbitration. The Tribunal in Petrobart noted that the Kyrgyz Republic was not listed in Annex ID, and took this into account in determining the res judicata effect of the previous UNCITRAL arbitration and national court litigation. The investment may also be required to be a valid investment under the law of the host state and international law, meaning that it was not procured by fraud, corruption, misrepresentation or other breach of law. In Kardassopoulos v. Georgia, the Tribunal stated that:

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71. The Contract and the judgment [a court judgment relating to the contract] are not in themselves assets but merely legal documents or instruments which are bearers of legal rights, and these legal rights, depending on their character, may or may not be considered as assets. The relevant question which requires consideration is therefore whether the rights provided for in the Contract and confirmed in the judgment constituted assets and were therefore an investment in the meaning of the Treaty. In other words, the question is whether Petrobart's right under the Contract to payment for goods delivered under the Contract was an asset and constituted an investment under the Treaty.
72. Id. at 71.
73. After reviewing other awards, the Tribunal concluded that "investment is often a wide concept in connection with investment protection and that claims to money may constitute investments even if they are not part of a long-term business engagement in another country."
74. Id. at 72. This conclusion was confirmed by the Svea Court of Appeal.
“Protection of investments” under a BIT is obviously not without some limits. It does not extend, for instance, to an investor making an investment in breach of the local laws of the host State. A State thus retains a degree of control over foreign investments by denying BIT protection to those investments that do not comply with its laws. As noted by one scholar, “no State has taken its fervour for foreign investment to the extent of removing any controls on the flow of foreign investment into the host State.”

However, the Kardassopoulos Tribunal found that a state may be estopped from objecting to a Tribunal’s jurisdiction ratione materiae under the ECT if the state approved the investment without objection as to its legality.

C. Ratione Temporis

The dispute must have arisen, and the investment must have been made, when the ECT was in effect, which raises questions regarding provisional application, addressed by ECT Articles 44 and 45:

Article 44

1) This Treaty shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance or approval thereof, or of accession thereto, by a state or Regional Economic Integration Organization which is a signatory to the Charter as of 16 June 1995.

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

3) For the purposes of paragraph (1), any instrument deposited by a Regional Economic Integration Organization shall not be

75. Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18 49 (July 2007), available at: http://www.encharter.org/index.php?id=213&L=0 (last visited Mar. 2, 2008). These statements were made in the context of the BIT rather than the ECT. See also Plama Consortium, Ltd. v. Republic of Bulgaria, 44 I.L.M. 721, 739–40 (ICSID 2005) (rejecting as untimely a jurisdictional challenge to an “Investment” within the meaning of Article 1(6) if the Claimant had materially misrepresented or willfully failed to disclose the Claimant’s true ownership to the Bulgarian authorities in violation of Bulgarian law; issues of misrepresentation were reserved for determination in the merits phase).

76. Kardassopoulos, ICSID Case No. AB/5/18 at 54.
counted as additional to those deposited by member states of such Organization.  

Article 45

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

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

(b) Neither a signatory which makes a declaration in accordance with subparagraph (a) 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 Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory’s written notification is received by the Depository.

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

ECT, supra note 7, art. 45.
(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 Depository 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.78

The Nykomb Tribunal rejected Latvia’s *ratione temporis* arguments because, although the relevant investment contracts had been signed before the ECT came into force for Latvia in March 1998, the claims were based on subsequent changes in law and breaches of contract.79

The Petrobart Tribunal also addressed provisional application issues, because the United Kingdom had declared that its provisional application of the ECT extended to Gibraltar (the country of incorporation of the claimant investor in that case), but the UK’s declaration of ratification did not include Gibraltar.80 The Tribunal concluded that they should adopt “a rather formal approach based on the wording of the Treaty”81 regarding provisional application, and continued:

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78. ECT, *supra* note 7, art. 44.
81. *Id.* at 62.
[T]he fact that the ratification, for political or other reasons, did not include Gibraltar does not justify the conclusion that the United Kingdom intended to revoke the application of the Treaty to Gibraltar on a provisional basis. It may be observed that what is at issue here is not only the rights of investors from Gibraltar in other states but also the protection of foreign investors in Gibraltar. The Arbitral Tribunal therefore finds that the Treaty continues to apply on a provisional basis to Gibraltar despite the fact that the United Kingdom’s ratification does not cover Gibraltar.\textsuperscript{82}

The \textit{Plama} Tribunal noted in passing that, under Article 45(1) of the ECT, the treaty was “provisionally applied from the date of a [S]tate’s signature, unless that [S]tate declared itself exempt from provisional application under Article 45(2)(a).”\textsuperscript{83}

The \textit{Kardassopoulos} Tribunal held that provisional application means that the ECT comes into effect for a state party as of the date of signature, unless national law precludes such provisional application.\textsuperscript{84} The \textit{Kardassopoulos} Tribunal thus held that, under the provisional application regime of the ECT, states are bound from the date of signature of the ECT (December 1994), regardless of when the ECT actually entered into force for the individual state.\textsuperscript{85} The “domestic law” exception, as recognized in article 45, is where provisional application would be inconsistent with the state’s constitution, laws or regulations.\textsuperscript{86}

This issue of provisional application will likely be important in the context of the pending \textit{Yukos} ECT arbitrations,\textsuperscript{87} because Russia has signed, but not ratified, the ECT.

\textbf{D. Procedural Issues}

The investor commences a claim under the ECT by filing a Request for Arbitration. The investor has the choice of arbitral institutions, and can choose among ICSID (or the Additional Facility if the respondent state has ratified the

\begin{footnotesize}
\textsuperscript{82} \textit{Id.} at 62–63.
\textsuperscript{83} \textit{Plama} Consortium Ltd. v. Republic of Bulgaria, 44 I.L.M. 721, 742 (ICSID 2005).
\textsuperscript{84} \textit{Kardassopoulos}, ICSID Case No. ARB/5/18 at 57 (“the language used in [ECT] 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.”).
\textsuperscript{85} \textit{Id.} at 59.
\textsuperscript{86} ECT, \textit{supra} note 7, art. 45(2)(c).
\end{footnotesize}
ECT but not the ICSID Convention, which is true, for example, for Poland), UNCITRAL ad hoc arbitration, or the Stockholm Chamber of Commerce.

There is no default seat under the ECT, but the default seat for ICSID arbitration is Washington, D.C. The tribunal and parties may agree to hold hearings in other locations for convenience, and often do so.  

The law applicable to the arbitration is the ECT itself, and applicable rules and principles of international law. ECT awards, like all arbitration awards, are not strict precedents, but tribunals often look to prior awards.

The advantages of international arbitration (including arbitration under the ECT) include a neutral forum and ease of enforcement in a variety of jurisdictions, in light of the New York Convention and the ICSID Convention (if the arbitration is brought under the auspices of ICSID). Parties should be aware, however, that international arbitration under the ECT, like most treaty-based arbitration, can be long and expensive.

III. CASES TO DATE

The Annex to this article sets out the Energy Charter Secretariat's very useful summary of cases filed under the ECT, on their website as of April 2008. A few general observations will suffice for present purposes. There were very few cases in the first five years of the ECT, but the slow trickle of cases is now increasing.

A total of eighteen cases have been filed. The first case was filed in April 2001 (AES v. Hungary), which was an ICSID claim by the British subsidiary of a U.S. company for approximately USD $300 million regarding a power purchase and sale agreement and privatization contract. This case settled, but

88. For example, the Plama jurisdictional hearing was held in Paris, and the Kardassopoulos jurisdictional hearing was held in London. See Plama Consortium Ltd., 44 I.L.M. at 724; Kardassopoulos, ICSID Case No. ARB/5/18 at 2.

89. ECT, supra note 7, art. 26(6) ("A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."). See also ICSID Convention Regulations and Rules, art. 42(1), Oct. 14, 1966, amended Apr. 10, 2006, ICSID/15, available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last visited Mar. 16, 2008) ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.").


in 2007 another AES entity filed an ICSID claim under the ECT against Hungary; this case remains pending.\textsuperscript{92}

Like many other treaty-based arbitrations, the ECT cases to date have involved extended preliminary jurisdictional phases, where the state has objected to the jurisdiction of the tribunal or the admissibility of the claims on various grounds. Thus, most cases are just now moving into the merits phase.\textsuperscript{93}

As noted above, no ECT tribunal to date has found a breach of Article 13 relating to expropriation. One tribunal has found a breach of the fair and equitable treatment clause and a breach of the requirement that domestic law provide effective means for asserting claims and enforcing rights (\textit{Petrobart}). One tribunal has found a breach of the discriminatory treatment clause (\textit{Nykomb}).\textsuperscript{94}

Relatively low damages amounts have been awarded (USD $1–3 million), but many claims are pending for large amounts, such as the Yukos claims against the Russian Federation for USD $30 billion (three UNCITRAL/PCA claims brought by three shareholders of Yukos Oil Company), and \textit{Libananco v. Republic of Turkey}, for USD $11 billion.\textsuperscript{95}

Two of the eighteen filed cases have settled; two have gone through to merits awards (\textit{Nykomb} and \textit{Petrobart}); two have proceeded through a jurisdictional phase and are currently in the merits phase (\textit{Plama} and \textit{Kardassopoulou}); twelve cases have not yet had any decision on the jurisdiction or merits.\textsuperscript{96}

The ECT panels constituted to date include many experienced arbitrators. The chart below sets out the names of the arbitrators, with the cases listed in order of filing; the bold names reflect multiple appointments. All of these arbitrators appear to be lawyers, some are law professors and many are practitioners. Tribunals have been constituted in all seventeen cases (although the three \textit{Yukos} cases have the same Tribunal); a number of people have been appointed twice; most are Europeans and North Americans.\textsuperscript{97}

\begin{itemize}
\item \textsuperscript{92} \textit{See} Investor-State Dispute Settlement Cases, \url{http://www.encharter.org/index.php?id=213} (last visited Apr. 3, 2008).
\item \textsuperscript{93} \textit{Id}.
\item \textsuperscript{95} \textit{See} Investor-State Dispute Settlement Cases, \textit{supra} note 90.
\item \textsuperscript{96} \textit{Id}.
\item \textsuperscript{97} \textit{Id}.
\end{itemize}
LIST OF ECT TRIBUNALS CONSTITUTED TO DATE (APRIL 2008)\textsuperscript{98}

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\textsuperscript{98} See Investor-State Dispute Settlement Cases, \textit{supra} note 90; List of Pending Cases, \textit{supra} note 91 (listing the recent constitution of the Tribunals in \textit{AES v. Hungary} (the 2007 case) and \textit{Electrabel v. Hungary}).
IV. CONCLUSION

With fourteen pending cases, the relatively small universe of ECT jurisprudence is certain to expand in the near future. Tribunals assessing claims under the ECT will face challenges similar to all treaty-based tribunals, including complicated questions of jurisdiction and merits, and investors may also face challenges in ensuring payment of awards.
ANNEX—LIST OF ECT CASES\textsuperscript{99}

1. AES SUMMIT GENERATION LTD. (UK SUBSIDIARY OF US-BASED AES CORPORATION) v. HUNGARY
   \textit{Counsel}: Allen \& Overy (S. Jagusch \& J. Gill) v. information not publicly available
   \textit{Case registered}: 25.04.2001
   \textit{Forum \& reference}: ICSID Case no. ARB/01/4
   \textit{Arbitrators}: Allan Philip (chair); Francisco Orrego Vicuña; Prosper Weil
   \textit{Subject matter}: Electricity sale agreement
   \textit{Status of proceeding}: Settlement agreed by the parties and proceeding discontinued at their request (3 January 2002)
   \textit{Claim}: Information not publicly available
   \textit{Award}: N/A

2. NYKOMB SYNERGETICS TECHNOLOGY HOLDING AB (SWEDEN) v. LATVIA
   \textit{Case registered}: 11.12.2001
   \textit{Forum \& reference}: Arbitration Institute of the SCC - Case n.* 118/2001
   \textit{Arbitrators}: Bjørn Haug (chair); Rolf A. Schütze; Johan Gernandt
   \textit{Subject matter}: Electricity sale agreement
   \textit{Status of proceeding}: Award rendered on 16.12.2003
   \textit{Claim}: Information not publicly available
   \textit{Award}: €253,523

3. PLAMA CONSORTIUM LTD. (CYPRUS) v. BULGARIA
   \textit{Counsel}: Shearman \& Sterling LLP (E. Gaillard \& J. Savage) v. Bulgarian Ministry of Finance (I. Kondov); White \& Case LLP (P. Friedland – New-York; C.B. Lamm; A. Cohen Smutny – Washington DC); Tomov \& Tomov (L. Tomov)
   \textit{Case registered}: 19.08.2003
   \textit{Forum \& reference}: ICSID Case no. ARB/03/24
   \textit{Arbitrators}: Carl F. Salans (chair); Albert Jan van den Berg; V.V. Veeder
   \textit{Subject matter}: Oil refinery investment
   \textit{Status of proceeding}:
   08.02.2005 - Pending
   28.10.2005 - Decision on jurisdiction
   25.05.2006 - Tribunal issues Procedural Order No. 5 concerning the schedule for the filing of written submissions
   28.07.2006 - Respondent files a counter-memorial on the merits

\textsuperscript{99} See Investor-State Dispute Settlement Cases, \textit{supra} note 90 (current as of April 2008).
13.04.2007 - Tribunal issues Procedural Order no. 11 concerning the procedural calendar.
27.07.2007 - Respondent files a Rejoinder on the merits
30.10.2007 - Tribunal issues Procedural Order No. 12 concerning its pre-hearing telephone conference of 22 October 2007

**Claim:** USD 300 million (Shearman & Sterling website)
**Award:** N/A

4. **PETROBART LTD. (GIBRALTAR) v. KYRGYZSTAN**
   **Counsel:** Setterwalls Adv. (F. Wennerholm & J. Sidklev) v. Leboeuf, Lamb, Green & McRae (E. Claes – Brussels; J.T. Corrigan & N. Aldashec – Bishkek)
   **Case registered:** 01.09.2003
   **Forum & reference:** Arbitration Institute of the SCC – Case no. 126/2003
   **Arbitrators:** former Justice Hans Danelius (chair), Jeroen Smets, Professor Ove Bring
   **Subject matter:** Gas delivery contract
   **Status of proceeding:**
   Award rendered on 29.03.2005
   Application for setting aside of award rejected by Svea Court of Appeal on 13.04.2006
   **Claim:** Information not publicly available
   **Award:** See website

5. **ALSTOM POWER ITALIA SPA, ALSTOM SPA (ITALY) v. MONGOLIA**
   **Counsel:** Lovells (A.R. Marshall & J. Reynolds), James Crawford SC & Simon Olleson v. Milbank, Tweed, Hadley & McCloy LLP (M.D. Nolan & E. Baldwin)
   **Case registered:** 18.03.2004
   **Forum & reference:** ICSID Case no. ARB/04/10
   **Arbitrators:** Marc Lalonde (chair); Jan Paulsson; Sir Anthony Mason
   **Subject matter:** Thermal energy project, dispute relating to boiler rehabilitation
   **Status of proceeding:** Settlement agreed by the parties and proceeding discontinued at their request. (Order taking note of the discontinuance pursuant to Arbitration Rule 43(1) issued by the Tribunal on 13.03.2006)
   **Claim:** Information not publicly available
   **Award:** N/A

6. **YUKOS UNIVERSAL LTD. (UK – ISLE OF MAN) v. RUSSIAN FEDERATION**
   **Counsel:** Shearman & Sterling (E. Gaillard, Y. Banifatemi, P. Pinsolle) v. Cleary Gottlieb (R.T. Greig, C. Annacker)
   **Case registered:** 03.02.2005
   **Forum & reference:** ad hoc UNCITRAL Arbitration Rules. Arbitration administered by the Permanent Court of Arbitration (PCA) in The Hague
   **Arbitrators:** L. Yves Fortier (chair); Charles Poncet (replacing Daniel
7. HULLEY ENTERPRISES LTD. (CYPRUS) V. RUSSIAN FEDERATION  
**Counsel:** Shearman & Sterling (E. Gaillard, Y. Banifatemi, P. Pinsolle) v. Cleary Gottlieb (R.T. Greig, C. Annacker)  
**Case registered:** 03.02.2005  
**Forum & reference:** ad hoc UNCITRAL Arbitration Rules. Arbitration administered by the Permanent Court of Arbitration (PCA) in The Hague  
**Arbitrators:** L. Yves Fortier (chair); Charles Poncet (replacing Daniel Price); Stephen Schwebel  
**Subject matter:** Discriminatory measures and expropriation of investments  
**Status of proceeding:** Tribunal appointed. First hearing on jurisdiction scheduled for spring of 2008  
**Claim:** US$33 billion (total amount of compensation sought for disputes 6, 7, 8 - Shearman & Sterling website)  
**Award:** N/A  

8. VETERAN PETROLEUM TRUST (CYPRUS) V. RUSSIAN FEDERATION  
**Counsel:** Shearman & Sterling (E. Gaillard, Y. Banifatemi, P. Pinsolle) v. Cleary Gottlieb (R.T. Greig, C. Annacker)  
**Case registered:** 03.02.2005  
**Forum & reference:** ad hoc UNCITRAL Arbitration Rules. Arbitration administered by the Permanent Court of Arbitration (PCA) in The Hague  
**Arbitrators:** L. Yves Fortier (chair); Charles Poncet (replacing Daniel Price); Stephen Schwebel  
**Subject matter:** Discriminatory measures and expropriation of investments  
**Status of proceeding:** Tribunal appointed. First hearing on jurisdiction scheduled for spring of 2008  
**Claim:** US$33 billion (total amount of compensation sought for disputes 6, 7, 8 - Shearman & Sterling website)  
**Award:** N/A  

9. IOANNIS KARDASSOPOULOS (GREECE) V. GEORGIA  
**Counsel:** Skadden, Arps, Slate, Meagher & Flom (UK) LLP (K. Nairn & D. Herlihy) v. DLA Piper (C. Salomon & M. Saunders)  
**Case registered:** 03.10.2005
**Reed & Martinez**

**Forum & reference:** ICSID Case No. ARB/05/18  
**Arbitrators:** L.Yves Fortier (chair); Francisco Orrego Vicuña; Vaughan Lowe (appointed following the passing away of Arthur Watts)  
**Subject matter:** Oil and gas distribution enterprise  
**Status of proceeding:** Pending  
27.02.2006 – tribunal constituted;  
13.07.2006 - Claimant files a memorial on the merits  
29.09.2006 - Respondent files a memorial on jurisdiction  
05.01.2007 - Claimant files a counter-memorial on jurisdiction  
15.01.2007 - Tribunal holds a first hearing on jurisdiction  
06.07.2007 - Decision on jurisdiction  
09.09.2007 - Tribunal issues Procedural Order No. 1 concerning the procedural calendar  
19.11.2007 - Proceeding suspended pursuant to ICSID Arbitration Rule 10(2)  
(Following the passing away of Arthur Watts, the Secretary-General notifies the parties of the vacancy on the Tribunal)  
**Claim:** USD 350 million (DLA Piper website)  
**Award:** N/A

10. AMTO (LATVIA) V. UKRAINE  
**Counsel:** Mannheimer Swartling (K. Höber) & Svahnström (S. Svahnström)  
v. Information not publicly available  
**Case registered:** November 2005  
**Forum & reference:** Arbitration Institute of the SCC  
**Arbitrators:** Bernardo Cremades (chair), Per Runeland, Christer Söderlund  
**Subject matter:** Nuclear power plant (dispute arising out of the bankruptcy of a nuclear power plant and default under contracts to provide services in relation to high voltage electrical equipment used in Zaporizhya power plant in Ukraine)  
**Status of proceeding:** Pending  
**Claim:** Information not publicly available  
**Award:** N/A

11. HRVATSKA ELEKTROPRIVEDA D.D. (HEP) (CROATIA) V. REPUBLIC OF SLOVENIA  
**Counsel:** Information not publicly available v. Allen & Overy (S. Jagusch, M. Levy, A. Sinclair & M. Jain – London; L. Gouiffès – Paris)  
**Case registered:** 28.12.2005  
**Forum & reference:** ICSID Case No. ARB/05/24  
**Arbitrators:** David A. R. Williams (chair); Judge Charles N. Brower; Jan Paulsson  
**Subject matter:** Nuclear power plant
Status of proceeding: Pending
20.04.2006 - Tribunal constituted
03.07.2006 - the Tribunal holds a first session in London
08.12.2006 - Respondent files objection to jurisdiction
22.03.2007 - Tribunal issues a Procedural Consent Order embodying the parties' agreement on the procedural timetable
06.07.2007 - the Respondent files a counter-memorial on the merits and a memorial on objections to jurisdiction and admissibility
10.12.2007 - the Claimant files a reply on the merits and a counter-memorial on objections to jurisdiction and admissibility
Claim: 31.7 Million Euros (statement from Croatia’s Ministry of Economy)
Award: N/A

12. LIBANANCO HOLDINGS CO. LIMITED (CYPRUS) V. REPUBLIC OF TURKEY
Counsel: Crowell & Moring LLP (S.H. Newberger, D. Contratto) & A.L. Demetriades, Barrister (Cyprus) v. Information not publicly available
Case registered: 19.04.2006
Forum & reference: ICSID Case No. ARB/06/8
Arbitrators: Michael Hwang (chair), Henri C. Alvarez and Sir Franklin Berman Q.C.
Subject matter: Electricity generation and distribution concessions (expropriation)
Status of proceeding: Pending
18.12.2006 - Tribunal constituted
12.02.2007 - the Tribunal holds a first session in New York
12.10.2007 - Claimant files a memorial on jurisdiction and the merits
19.12.2007 - the Respondent files requests for the suspension of the proceeding, for production of documents, and for provisional measures
25.02.2008 - the Respondent files a reply in support of its request for provisional measures
Claim: USD 10 billion (claim announced 23.02.2006 www.crowell.com)
Award: N/A

13. AZPETROL INTERNATIONAL HOLDINGS B.V, AZPETROL GROUP B.V. AND AZPETROL OIL SERVICES GROUP B.V (NETHERLANDS) v. AZERBAIJAN
Case registered: 30.08.2006
Forum & reference: ICSID Case No. ARB/06/15
Arbitrators: Sir Arthur Watts QC (chair), Professor Christopher Greenwood QC CMG, Judge Charles N. Brower
Subject matter: Oil and gas distribution, trade, storage and transportation enterprises
Status of proceeding: Pending
02.03.2007 - Tribunal holds its first session by telephone conference
19.12.2007 - the parties agree to extend the time limit for the co-arbitrators to
appoint a new chair
10.03.2008 - the Respondent files a reply on objections to jurisdiction and admissibility
Claim: Information not publicly available
Award: N/A

14. CEMENTOWNIA “NOWA HUTA” S.A. (POLAND) v. REPUBLIC OF TURKEY
Counsel: Mannheimer Swartling Advokatbyrå (K. Hóber, J. Ragnwaldh & N. Eliasson) v. Freshfields Bruckhaus Deringer (J. Paulsson, L. Reed & B. King)
and Cosar Avukatlık Bürosu (Aydın Cosar, U. Cosar & Arzu Cosar)
Case registered: 16.11.2006
Forum & reference: ICSID Case No. ARB(AF)/06/2
Arbitrators: Pierre Tercier (Chair), Marc Lalonde, Christopher Thomas
Subject matter: Electricity concessions
Status of proceeding: Pending
11.05.2007 - Tribunal constituted
23.08.2007 - Tribunal holds a first session in Paris
19.12.2007 - the Respondent files requests for the suspension of the proceeding,
for production of documents, and for provisional measures
Claim: USD 4.6 billion (www.globalarbitrationreview.com)
Award: N/A

15. EUROPE CEMENT INVESTMENT AND TRADE S.A. (POLAND) v. REPUBLIC OF TURKEY
Counsel: Mannheimer Swartling Advokatbyrå (K. Hóber, J. Ragnwaldh & N. Eliasson) v. Freshfields Bruckhaus Deringer (J. Paulsson, L. Reed & B. King)
and Cosar Avukatlık Bürosu (Aydın Cosar, U. Cosar & Arzu Cosar)
Case registered: 06.03.2007
Forum & reference: ICSID Case n°. ARB(AF)/07/2
Arbitrators: Donald McRae (Chair); Julian D M Lew QC; Laurent Lévy
Subject matter: Electricity concessions
Status of proceeding: Pending
13.09.2007 - Tribunal constituted
19.12.2007 - the Respondent files request for the suspension of the proceeding,
for production of documents, and for provisional measures. The Claimant files
a request for provisional measures
Claim: USD 3.8 billion (www.globalarbitrationreview.com)
Award: N/A
16. **LIMAN CASPIAN OIL BV (THE NETHERLANDS) AND NCL DUTCH INVESTMENT BV (THE NETHERLANDS) v. REPUBLIC OF KAZAKHSTAN**

*Counsel:* Clifford Chance (A. Sheppard, A. Panayides & I. Suarez Anzorena) v. Reed Smith LLP (D. Warne & G. Bhattacharya) and 3 Verulam Buildings (A. Malek QC & C. Harris)

*Case registered:* 16.07.2007

*Forum & reference:* ICSID Case No. ARB/07/14

*Arbitrators:* Karl-Heinz Böckstiegel, Kaj Höber and James R. Crawford

*Subject matter:* Exploration and extraction of hydrocarbons

*Status of proceeding:* Pending

24.01.2008 - Tribunal constituted

25.02.2008 - the proposal for disqualification of an arbitrator is declined and the proceeding is resumed pursuant to ICSID Arbitration Rule 9(6)

*Claim:* Information not publicly available

*Award:* N/A

17. **ELECTRABEL S.A. v. REPUBLIC OF HUNGARY**


*Case registered:* 13.08.2007

*Forum & reference:* ICSID Case No.ARB/07/19

*Arbitrators:* V.V. Veeder (Chair); Gabrielle Kaufmann-Kohler; Brigitte Stern

*Subject matter:* Electricity generation

*Status of proceeding:* Pending

05.12.2007 - Tribunal constituted

21.12.2007 - the Claimant files a proposal for the disqualification of an arbitrator and the proceeding is suspended in accordance with ICSID Arbitration Rule 9(6)

25.02.2008 - the proposal for disqualification of an arbitrator is declined and the proceeding is resumed pursuant to ICSID Arbitration Rule 9(6)

*Claim:* Information not publicly available

*Award:* N/A

18. **AES SUMMIT GENERATION LIMITED AND AES-TISZA ERÖMŰ KFT. v. REPUBLIC OF HUNGARY**


*Case registered:* 13.08.2007

*Forum & reference:* ICSID Case No.ARB/07/22

*Arbitrators:* Claus von Wobeser (Chair); J. William Rowley; Brigitte Stern

*Subject matter:* Electricity generation

*Status of proceeding:* Pending
20.11.2007 - Tribunal constituted
09.01.2008 - the Tribunal holds a first session in London
07.03.2008 - the Claimants file a memorial on the merits

Claim: Information not publicly available
Award: N/A