The Energy Charter Treaty

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Development of the Energy Charter Treaty

Disputes arising in the energy sector have long been the subject of international adjudication. As global demand for energy increased, foreign investment became crucial to allow the exploration and development of energy resources in states that otherwise may have lacked sufficient capital to do so. To encourage foreign investment, a stable framework offering binding protections for foreign investors alongside a neutral system of adjudicating disputes, as set out in bilateral and multilateral investment treaties, became essential.

After the end of the Cold War, motivated in part by the desire to facilitate the development of energy resources, promote energy security and encourage economic integration in former Soviet Union countries, a collection of states met to establish a model for energy cooperation.[2] The result of these discussions was the European Energy Charter, a non-binding declaration by which states confirmed their mutual objectives to cooperate in energy-related trade, efficiency, environmental protection and other matters.[3] The signatories further agreed to negotiate in good faith a binding agreement to implement their shared objectives.[4]

On this basis, states negotiated what would become the Energy Charter Treaty (ECT). The ECT, which entered into force on 16 April 1998, is a multilateral treaty designed to create a stable framework to stimulate economic growth and liberalise international investment and trade in the

energy sector.[5] At the time of writing, there are 53 signatories and contracting parties to the ECT, including the European Union itself and every EU Member State except Italy.[6]

The first international arbitration invoking the ECT, *AES v. Hungary I*,[7] was registered on 25 April 2001, three years after the ECT entered into force. The first award followed in December 2003, in *Nykomb v. Latvia*.[8] For several years the number of publicly known arbitrations initiated under the ECT remained steadily within the range of one to four per year.[9] In 2013, however, the number of new arbitrations quadrupled to 16, and peaked in 2015 with 25 cases.[10] The ECT has remained the most frequently invoked investment agreement in international arbitration cases.[11] There are more than 130 publicly known ECT proceedings.[12]

With the passage of time and the increased use of the ECT as the basis for international arbitration, the parties to and the subject matter of ECT arbitrations have evolved. While early cases frequently named central and eastern European states as respondents, more recently the focus has shifted and a large number of cases have been initiated against western European states.[13] More recent cases have also tended to arise out of alleged defects in, or changes to, regulatory frameworks encouraging the development of renewable energy.[14] Consequently, there has been a parallel shift in the nature of the parties to the disputes and the underlying resources at issue. The clearest representation of this trend can be seen with Spain, which has been named as a respondent in almost 50 ECT cases relating to renewable energy, in particular arising from Spain's reduction or elimination of incentives offered to renewable energy producers.[15]

The aim of this chapter is to provide an overview of common elements and issues raised in the course of ECT arbitrations. First is a basic overview of jurisdictional

issues that frequently arise in ECT arbitrations, followed by an outline of the substantive protections the treaty affords to investors. The chapter concludes with trends and anticipated developments in ECT arbitration.

Jurisdiction of tribunals established pursuant to the ECT

Part V of the ECT addresses the resolution of '[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III'.[16] Pursuant to Article 26(1) of the ECT, the parties to the dispute shall, if possible, settle a dispute amicably. If the dispute is not settled within three months of either party's request to settle a dispute amicably, the investor can choose between (1) the courts or an administrative tribunal of the contracting party to the dispute, (2) any applicable, previously agreed dispute settlement procedure, or (3) international arbitration or conciliation as specified in the ECT.[17]

The scope of an international arbitral tribunal's jurisdiction derives from the parties' consent to arbitrate. By signing the ECT, contracting parties (i.e., states or intergovernment organisations party to the ECT) provide their 'unconditional consent' to submit disputes arising between a contracting party and an investor of another contracting party to international arbitration in accordance with the provisions of Article 26.[18] This is subject to potential limitations, including:

- contracting parties may exclude their unconditional consent if the investors had previously submitted their dispute to the courts of the contracting party or in accordance with a previously agreed dispute settlement procedure;[19] and
- contracting parties may further exclude from their consent disputes arising from the final sentence of Article 10(1), the 'umbrella clause' (discussed further below).[20]

Arbitration relies on mutual consent and the ECT requires an investor to provide its written consent to submit its dispute to arbitration, which typically occurs in its request for arbitration.[21] An investor electing to

proceed with international arbitration can submit its dispute to the International Centre for Settlement of Investment Disputes (ICSID),[22] a sole arbitrator or *ad hoc* tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL),[23] or an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.[24]

As is often the case with international arbitration proceedings brought against states, issues relating to the proper jurisdiction of a tribunal have been some of the most heavily contested and adjudicated in arbitrations based on the ECT. The ECT's jurisprudence reveals that objections to admissibility and jurisdiction, in many respects, parallel those brought in the context of other bilateral and multilateral investment treaties. Below we discuss some of the common objections to admissibility and jurisdiction in ECT cases.

Amicable settlement, 'fork in the road' and denial of benefits

The ECT contains several provisions that have been used as the basis of jurisdictional challenges. Three frequently adjudicated provisions relate to amicable settlement, 'fork in the road' and denial of benefits. First, the ECT contains a standard cooling-off period of three months before an investor can initiate international arbitration. Although respondents have raised objections based on a claimant's alleged failure to satisfy the three-month amicable settlement period, these efforts have generally been unsuccessful.[25]

Second, the ECT contains a fork-in-the-road provision in Article 26(2), pursuant to which the investor can elect only one avenue of dispute resolution, and is precluded from arbitrating before multiple forums.[26] To trigger this bar, tribunals have required respondents to establish that the dispute that allegedly has been initiated elsewhere has the same parties, causes of action and object (the triple identity test). Respondents' objections on this basis have largely been unsuccessful. For

example, in *Charanne v. Spain*,[27] Spain alleged that the claimants had brought parallel proceedings before Spain's Supreme Court and the European Court of Human Rights (ECHR) involving the same decrees that had given rise to the arbitration.[28] The tribunal rejected this challenge, observing that the claimants in the Supreme Court and the ECHR proceedings were different from the claimants in the arbitration – the fact that these companies were part of the same group was insufficient to establish that there was a 'substantial identity of the parties' under the first part of the test.[29]

Finally, Article 17 of the ECT contains a 'denial of benefits' clause, which provides that a contracting party 'reserves the right to deny the advantages [of the protections contained in Part III of the ECT] to . . . a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised'.[30] Tribunals have found that Article 17 does not affect the dispute resolution provision contained in Article 26 and therefore does not deprive a tribunal of jurisdiction pursuant to that Article.[31] Several tribunals have also examined how a contracting party may exercise its right to deny benefits under this Article and whether the denial is retrospective or prospective.[32] In *Plama v. Bulgaria*, the tribunal considered that such a right must, in fact, be affirmatively exercised by the contracting party (e.g., by notice),[33] after which it has only prospective effect.[34] A majority of the tribunal in *Masdar Solar & Wind v. Spain* upheld this position, noting that 'it would contradict the text and the purposes of the ECT to say that a Contracting State may deny benefits retrospectively' since it would be 'contrary to the transparency, co-operation and stability objectives of the ECT'.[35] Generally, jurisdictional objections based on this provision have met with little success.

Protected investors and investments

A claimant's qualification as a protected investor that has made a protected investment for the purposes of the ECT has been contested frequently. The ECT's definition of an 'investor' includes any natural person who is a citizen or permanently resides in a contracting party in accordance with its applicable law, or a company or other organisation incorporated in accordance with its applicable law.[36] In the case of natural persons, tribunals have held that citizenship, nationality and permanent residence are three independent avenues for establishing status as a covered investor.[37] In the case of companies and organisations, several tribunals have refused requests by states to look beyond incorporation to pierce the corporate veil in assessing investor status, and more generally to add requirements that go beyond the wording of the ECT's definition.[38] For example, in *Charanne*, the tribunal rejected Spain's invitation to pierce the corporate veil to find that the investors incorporated in the Netherlands and Luxembourg were in fact Spanish nationals.[39] The tribunal found that Article 1(7) requires only that the company be organised in accordance with the laws of the applicable state, a condition that the claimants had satisfied.[40] Moreover, Spain had neither alleged nor proven that the claimants had structured their investments fraudulently to justify piercing the corporate veil.[41]

The ECT's definition of 'investment' covers 'every kind of asset, owned or controlled directly or indirectly by an Investor' and enumerates several categories of investments protected by the ECT, including:

- tangible and intangible property and property rights;
- a company or business enterprise, equity participation and debt in a company or business enterprise;
- claims to money or contractual performance having an economic value and associated with an investment;
- intellectual property;
- returns; and

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- rights conferred by law or contract or by virtue of licences and permits.[42]

In addition, the final paragraph of Article 1(6), as explained by the tribunal in *Electrabel v. Hungary*, imposes the overarching requirement that an investment must be 'associated with an Economic Activity in the Energy Sector' (defined by Article 1(5)).[43] The tribunal in *Amto v. Ukraine* considered that the phrase 'associated with' demonstrates that 'any alleged investment must be energy related, without itself needing to satisfy the definition of Article 1(5)'.[44] Tribunals have taken note of the broad language of this definition, and its non-exhaustive list of qualifying assets.[45] In *RREEF v. Spain*, the tribunal described the ECT's definition of investment as 'open, general and not restricted', and rejected Spain's request to apply criteria 'additional to the definition contained in the ECT' to qualify as a protected investment.[46]

The question of whether the criteria for an investment have been satisfied has been challenged frequently. Some of the most contentious disputes arising in this context relate to whether the right to be paid money qualifies as a protected investment. Article 1(6)(c)'s subcategory of 'claims to money and claims to performance pursuant to a contract . . . associated with an Investment' has been the subject of particular scrutiny, with tribunals grappling with how to address the phrase 'associated with an Investment'.[47] In *Electrabel v. Hungary*, the tribunal concluded that this phrase should be read to mean an investment other than the one addressed in the same sub-paragraph,[48] and therefore an investment under this category 'is dependent on the overall investment'.[49] The tribunal concluded that contractual rights under the agreement in question, including claims to money and performance by a state-owned electricity supply company, qualified as protected investments.[50]

Tax 'carveout'

In *Petrobart v. Kyrgyzstan*, the tribunal explained that although a contract itself is merely a legal document that does not qualify as an investment, it may contain legal rights that do.[51] Observing that the 'circular' definition in Article 1(6)(c) created doubt as to its proper interpretation, the tribunal instead relied on Article 1(6)(f)'s category of 'any right conferred by law or contract . . . to undertake any Economic Activity in the Energy Sector'.[52] Noting that the contract at issue conferred rights relating to the sale of gas condensate on Petrobart, the tribunal found there was a qualifying investment.[53]

In *State Enterprise Energorynok v. Moldova*, the claimant alleged that its claim to money arising from a court judgment awarding US$1.7 million against the Moldovan Ministry of Energy was a qualifying investment in Moldova pursuant to the ECT.[54] Observing that the claimant was not a party to the underlying electricity supply agreement and did not play any part in energy operations, the tribunal declined jurisdiction, stating that the claimant failed to prove that it had any direct or indirect control over the underlying investment to which its claim of money was related.[55] The tribunal distinguished this situation from *Electrabel* and *Amto*,[56] noting that in those cases the claimant was a shareholder engaged in economic activities constituting investments.[57] The tribunal further distinguished *Petrobart* on the basis that the claimant in that case delivered the gas condensate for which payment was due and at all times had full control over its own sales and deliveries.[58]

The qualification of a debt arising from a commercial contract as an investment (rather than an indebtedness represented by loans) will undoubtedly be the subject of further scrutiny. In *Energoalians v. Moldova*, the majority of the tribunal found that the right to claim money for an unpaid debt for the supply of electricity was an investment pursuant to the ECT, citing what it found to be a relatively broad definition of investment in the ECT and the ECT's stated purpose to promote cooperation and development in the energy sector.[59] The tribunal's

chairperson disagreed with the co-arbitrators, considering that a debt acquired under an electricity supply agreement was not a qualifying investment, and issued a dissent, contending that the tribunal did not have jurisdiction.[60] Concurring with the chairperson's reasoning, in April 2016 the Paris Court of Appeal set aside the award.[61] In March 2018, the Court of Cassation overturned the Court of Appeal's decision, taking note of the ECT's broad definition of investment and finding that the Court of Appeal was incorrect to conclude that there must be a contribution to qualify as an 'investment'.[62]

More generally, ECT cases have stimulated discussion on whether investments meeting one or more of the definitions of investment in Article 1(7) must also satisfy independent criteria such as contribution, substantial duration and risk. The weight of published awards suggests that these independent criteria should not be read into the ECT.[63] But this view is not uniform. For example, Professor William Park, as president of the tribunal in *Alapi v. Turkey*, expressed the view that to be 'an investor a person must actually make an investment, in the sense of an active contribution'.[64] Although his view was not adopted by the other tribunal members, the majority declined jurisdiction.

A topic of prominence in ECT arbitration has been the exercise of tribunals' jurisdiction over intra-European Union (EU) disputes – namely claims brought by an investor of one EU contracting party against another EU contracting party. The European Commission (the Commission) has been vocal in its opposition to intra-EU investment treaties and considers them to be contrary to EU law. Similarly, respondents from EU Member States have raised a number of objections to ECT tribunals' jurisdiction on the same basis.

On 6 March 2018, the European Court of Justice (ECJ) ruled that the arbitration clause in the Netherlands–Slovakia BIT was incompatible with EU law.[65] This

decision is not directly applicable to the ECT as it relates to a bilateral investment treaty (BIT) between two EU Member States. However, EU Member States have (thus far without success) sought to rely on this decision to object to jurisdiction under the ECT in cases where the investor is also from an EU Member State. The case arose out of an *ad hoc* arbitration initiated by the Dutch insurer Achmea BV against Slovakia in relation to Slovakia's measures reversing the liberalisation of its health insurance market.[66] Achmea secured a damages award in 2012, following which Slovakia brought set-aside proceedings in Germany.[67] Slovakia argued, *inter alia*, that the arbitral tribunal lacked jurisdiction because the arbitration clause in the Netherlands–Slovakia BIT was incompatible with certain provisions of the Treaty on the Functioning of the European Union (TFEU).[68]

The German court referred the question of compatibility to the ECJ for a preliminary ruling. In relation to the ECJ proceedings, Advocate General Melchior Wathelet issued an advisory opinion to the ECJ rejecting Slovakia's arguments and finding, *inter alia*, that the arbitration provision in the BIT was compatible with EU law since investor-state disputes did not fall within the scope of Article 344 of the TFEU and, as such, did not concern the interpretation or application of EU treaties.[69] The ECJ disagreed. Relying on Articles 344 and 267, the ECJ found that an arbitral tribunal established under the Netherlands–Slovakia BIT may be called on to interpret or apply EU law even though it is not a court or tribunal of an EU Member State, cannot invoke the 'keystone' preliminary ruling procedure provided for in Article 267 of the TFEU and the arbitral decision is not subject to review by a court of a Member State to ensure its compatibility with EU law.[70] According to the ECJ, this 'has an adverse effect on the autonomy of EU law.[71] Accordingly, the ECJ held that the 'TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States such as [the arbitration provision in the Netherlands–Slovakia BIT]'.[72] In light of the ECJ's decision, the German

Supreme Court set aside the arbitral award in November 2018.[73]

Before the ECJ's ruling in *Achmea*, arbitral tribunals established pursuant to both intra-EU BITs and the ECT had largely rejected arguments from respondent states, often supported by *amici curiae* from the Commission, that arbitral tribunals lacked the jurisdiction to hear intra-EU claims. For example, in *Charanne*, Spain argued that neither it nor the investors' home states (the Netherlands and Luxembourg) consented to submit intra-EU disputes to international arbitration.[74] First, Spain contested whether there was 'diversity of territories' between the investor and the contracting party as required under Article 26 of the ECT, arguing that both territories were the European Union.[75] In rejecting this argument, the tribunal emphasised that Spain's position ignored that individual EU Member States have their own legal standing in an action based on the ECT.[76] Second, Spain advanced an argument made by the Commission that there was an 'implicit disconnection clause for intra-EU relations'.[77] Dismissing this second defence, the tribunal stated that the terms of the ECT are clear and contain no explicit or implied disconnection clause to disassociate EU Member States from the terms of the ECT.[78] Last, the tribunal dismissed Spain's contention that Article 344 of the TFEU prohibited the arbitration of the dispute.[79] In *RREEF*, the tribunal considered similar objections raised by Spain,[80] and in dismissing Spain's objections was guided by the overarching conclusion that the ECT is its 'constitution', which 'prevails over any other norm . . . apart from those of *ius cogens*', including EU law.[81] The *RREEF* tribunal observed that to the extent possible, where two treaties are applicable, they must be interpreted in such a way as not to contradict each other.[82] Similarly, the tribunals in *Eiser v. Spain*,[83] *Isolux v. Spain*,[84] *Blusun v. Italy*,[85] *Novenergia v. Spain*[86] and *Antin v. Spain*[87] all rejected submissions by the respondent states that the ECT's dispute resolution provision cannot be applied on an intra-EU basis.

The ECT's substantive protections

Achmea has not affected the views of ECT tribunals on this issue.[88] In *Masdar*, the tribunal found that the *Achmea* judgment had 'no bearing upon the present case' as it only applied to BITs concluded between EU Member States, not multilateral treaties like the ECT, to which the European Union itself is a party.[89] The tribunal noted that Advocate General Wathelet had explicitly drawn a distinction between BITs and the ECT in his opinion, and since the ECJ had not disputed this position in its decision, the tribunal adopted his reasoning.[90] In a subsequent decision in *Vattenfall v. Germany*, the tribunal agreed with the *Masdar* tribunal on this issue.[91] In the *Vattenfall* tribunal's 72-page decision addressing this issue, it observed that a plain reading of Articles 16[92] and 26 of the ECT demonstrated that the ECT did not bar intra-EU arbitrations.[93] While the tribunal acknowledged that the ECJ had interpreted the TFEU in a way that implied a conflict between the TFEU and the Netherlands–Slovakia BIT, the ECJ 'did not go so far as to pronounce upon intra-EU investor-state arbitration under the ECT' and, as such, 'it is not for this Tribunal to assume that the [ECJ's] decision in relation to a bilateral investment treaty applies equally to a multilateral treaty with both EU and non-EU parties, under which the EU itself has consented to investor-state arbitration'.[94] In at least 20 post-*Vattenfall* decisions in arbitrations invoking the ECT, arbitral tribunals have rejected intra-EU based jurisdictional objections raised by respondent states.[95] The result did not differ when the Commission submitted *amicus curiae* in support of the respondent states.[96] Moreover, Spain also has raised the *Achmea* ruling in set-aside proceedings relating to ECT awards rendered against it. In a set-aside application against the award in *Novenergia*, Spain asked the Svea Court of Appeal of Sweden, *inter alia*, to seek the ECJ's guidance on whether its decision in *Achmea* would also apply to the ECT.[97] On 25 April 2019, the Svea Court of Appeal refused to refer the matter to the ECJ.[98] Although the Supreme Court of Sweden requested a preliminary ruling from the ECJ in February 2020 on whether *Achmea* requires it to set aside two intra-EU BIT awards against Poland,[99] on 27 May 2020, the Svea Court

of Appeal refused another request from Spain in *Novenergia* to refer those questions to the ECJ, indicating that it was not motivated at that point to obtain a preliminary ruling from the ECJ.[100] However, the Svea Court of Appeal did allow the Commission to submit a statement on Spain's annulment application, which it submitted on 30 July 2020.[101]

Consistent with the position suggested by the decisions of the Swedish courts, some EU Member States have suggested treating intra-EU BITS differently from the ECT. On 15 and 16 January 2019, EU Member States issued three separate declarations on the 'legal consequences' of *Achmea*.[102] The Member States agreed that, in light of *Achmea*, they would take steps to terminate all BITs concluded between them. However, their views on *Achmea*'s impact on intra-EU arbitration under the ECT differed: 22 of the 28 EU Member States opined that were the ECT's dispute resolution clause interpreted to authorise intra-EU arbitration, it 'would be incompatible with the [EU] Treaties and thus would have to be disapplied'; five Member States, including Sweden, noted that *Achmea* is silent on the ECT and given 'the importance of allowing for due process', it would be 'inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility' of the ECT's dispute resolution provision with EU law; and one Member State (Hungary) declared that *Achmea* 'does not concern' arbitration under the ECT. The 22 Member States that called for intra-EU application of the ECT's dispute provision to be 'disapplied' did not expressly commit to renegotiate or withdraw from the ECT. However, the tribunals that have considered the effect of the 22 EU Member States' declarations have continued to find they have jurisdiction pursuant to the ECT and that the declarations have no impact thereon. In particular, tribunals have flagged the lack of unanimity among the EU Member States' interpretations[103] and the lack of clarity concerning their potential impact on enforcement of any award rendered.[104]

On 5 May 2020, 23 EU Member States signed an agreement for the termination of intra-EU BITs to implement the ruling in *Achmea* that arbitration clauses in intra-EU BITs are incompatible with EU law.[105] The agreement contains one annex with a list of approximately 125 intra-EU BITs currently in force that will be terminated upon entry into force of the agreement for the relevant Member States and further states that their sunset clauses will also be terminated. A second annex lists 11 already terminated intra-EU BITs whose sunset clauses will also cease to produce legal effect upon entry into force of the agreement for the relevant Member States. Notably, the agreement does not cover intra-EU proceedings under the ECT, indicating that the EU and ECT Member States will address this matter at a later stage.[106] However, EU Member States and the Commission continue to argue, *inter alia*, that (1) there is no diversity of territories as required by Article 26 of the ECT since, in intra-EU disputes, both the investor's home state and the contracting party are members of the European Union, (2) there is an implicit disconnection clause for intra-EU relations in the ECT (i.e., a clause providing that, in the case of conflict, EU rules prevail), and (3) certain provisions relating to EU autonomy in the TFEU conflict with the dispute resolution provision in the ECT.

Article 21(1) of the ECT excludes *bona fide* taxation measures from the ambit of the ECT by providing that nothing in the ECT 'shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties'.[107] However, this tax carveout does not apply to taxes amounting to expropriation, and sets forth a mechanism by which issues as to 'whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory' can be referred to a competent tax authority for resolution.[108]

In *Plama*, the tribunal observed that the investor must first exhaust this mechanism by referring the issue to the competent tax authority before submitting the issue to

arbitration.[109] However, the tribunal in the *Yukos* cases concluded that the referral mechanism in Article 21(5) of the ECT is not compulsory where referral to relevant authorities would be an exercise in futility;[110] or the measures at issue are not a *bona fide* exercise of the state's tax powers, in which case Article 21(1) does not apply.[111] The *Yukos* tribunal concluded that the carveout did not apply to Russia's measures as the tax assessments levied against Yukos by Russia 'were designed mainly to impose massive liabilities based on value added tax and related fines, and were essentially aimed at paralyzing Yukos rather than collecting taxes'.[112] Subsequent jurisprudence has confirmed that Article 21 does not apply to *mala fide* taxation measures.[113]

The ECT provides several critical protections to investors of contracting parties. Below we discuss some of the most prominent and frequently claimed protections enshrined in the ECT:

- fair and equitable treatment (Article 10(1));
- full protection and security (Article 10(1));
- the prohibition against unreasonable and discriminatory measures (Article 10(1));
- the prohibition against unlawful expropriation (Article 13); and
- the umbrella clause (Article 10(1)).[114]

Fair and equitable treatment

Article 10(1) obliges the contracting parties to accord fair and equitable treatment (FET) to protected investments. Specifically, it provides that:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.[115]

Legitimate expectations

While these two sentences may be read as separate provisions, tribunals have observed that the standards of protection contained in Article 10(1) are closely related and manifest different components of the FET standard.[116]

There is a well-trodden and extensive debate surrounding the content of the FET standard in international arbitration, and ECT disputes have proven to be no exception. In broad strokes, tribunals considering the ECT's FET protection have recognised, among other components, a contracting party's obligations to act consistently and transparently,[117] accord due process,[118] refrain from arbitrary[119] or discriminatory measures,[120] and ensure stable and equitable conditions.[121] Some tribunals have explained that to breach FET, the state's acts or omissions must be 'manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety)'.[122]

Two common sets of FET claims that have been brought in the context of the ECT are failure to provide a stable and transparent regulatory environment in light of the investor's legitimate expectations, and denial of justice. These are discussed in more detail below.

Several tribunals have considered the role and relevance of an investor's legitimate expectations at the time of investment in considering alleged breaches of FET. In *Electrabel*, the tribunal observed that it is 'widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations'.[123] Other tribunals have also recognised the importance of legitimate expectations. In *Charanne*, the tribunal considered an investor's legitimate expectations to be 'a relevant factor' to the determination of FET, linking this factor to good faith principles under customary international law.[124] The rationale, the tribunal explained, is 'that a State cannot induce an investor to make an investment, hereby generating legitimate expectations,

to later ignore the commitments that had generated such expectations'.[125] To demonstrate that a breach of FET has arisen from an investor's legitimate expectations, tribunals have considered whether: (1) representations or assurances were given by the host state to the investor at the time of investment; (2) the investor reasonably relied on these representations and assurances in making its investment; and (3) the state's conduct was contrary to these representations or assurances.[126]

The degree to which such legitimate expectations must arise from explicit representations has been the source of debate.[127] Although some tribunals have observed that legitimate expectations can be based on the legal order or regulatory framework of the host state or implicit assurances,[128] others have looked for statements and commitments, potentially in the form of a stabilisation clause, that a regulatory environment would not change.[129] However, the majority of ECT decisions follow the former approach. In *Electrabel*, for example, the tribunal found that '[w]hile specific assurances given by the host State may reinforce the investor's expectations, such an assurance is not always indispensable' and rather will make a difference when assessing the investor's knowledge, and of the reasonability and legitimacy of its expectations.[130] The tribunal added that in the absence of such a specific representation, 'the investor must establish a relevant expectation based upon reasonable grounds'.[131]

In this context, tribunals have also considered the stability of a state's legal framework as a component of the FET standard, although tribunals have balanced this element against the state's 'legitimate right to regulate'.[132] In other words, the state is not prohibited from enacting any and all changes to its regulatory framework, and whether it has satisfied its obligations to accord FET will depend on the circumstances of each case. In finding that Hungary had not breached its obligation to provide a stable legal framework, the

tribunal in *AES v. Hungary II* observed that a 'legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts'.[133] Further 'any reasonably informed business person or investor knows that laws can evolve in accordance with the perceived political or policy dictates of the time'.[134] In *Mamidoil v. Albania*, the tribunal explained that an assessment of whether the state has satisfied its obligation to provide a stable and transparent framework should be considered in the specific context of what can be expected in that individual state,[135] and placed a level of responsibility on the investor to complete its due diligence and evaluate the circumstances of its investment.[136]

The stability and predictability of states' regulatory regimes has taken centre stage in more recent renewable energy cases. As noted above, these cases have arisen from reversals made by states in the regulatory incentives offered to renewable energy investors. Several tribunals have found these regulatory changes amount to violations of FET. For example, the tribunal in *Eiser* found that although 'investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs',[137] the 'Respondent's obligation under the ECT to afford investors fair and equitable treatment does protect investors from a fundamental change to the regulatory regime in a manner that does not take account of the circumstances of existing investments made in reliance on the prior regime'.[138] Similarly, the *Novenergia* tribunal held that the FET standard 'protect[s] investors from a radical or fundamental change to legislation'.[139] The tribunal in *Antin* found it instructive that the ECT 'contains a specific obligation – as opposed to a mere declaration in the preamble, and with language that suggests and [an] imperative and not merely a recommendation – to encourage and create stable conditions for investments'.[140]

Denial of justice

ECT tribunals have also treated the denial of justice as a component of the FET standard.[141] In *Amto*, the tribunal quoted the North American Free Trade Agreement tribunal in *Mondev v. USA* to explain that when considering whether a denial of justice has taken place, the question is whether, 'at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment'.[142] The impugned treatment can be considered cumulatively and as a whole (e.g., relating to various proceedings rather than a single decision or act).[143]

In *Energoalians*, the tribunal found that Moldova had breached FET when the Court of Accounts, a 'quasi-judicial' financial oversight body,[144] issued a decree that found, contrary to clear evidence, that the investor had not supplied electricity pursuant to certain contracts and ordered Energoalians to return money allegedly paid to it by Moldtranselectro (the state-owned company responsible for the operation of Moldova's power grids) when there was no evidence that Energoalians had ever been paid.[145] The tribunal observed that this decree amounted to a denial of justice and a breach of Moldova's obligations under Article 10(1).[146]

Claims relating to denial of justice have also been linked to the protection provided by Article 10(12),[147] which provides that '[e]ach Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorisations'.[148] This provision has been interpreted to require 'a legal framework that guarantees effective remedies to investors for realisation and protection of their investments'.[149] The tribunal in *Amto* determined that this provision contains a dual

requirement of law (legislation for the recognition and enforcement of property and contractual rights) and the rule of law (rules of procedure that allow an investor effective action in domestic tribunals).[150] In *Petrobart*, the Vice Prime Minister sent a letter to the Chairman of the Bishkek Court requesting the postponement of the execution of a judgment entitling the claimant to money from the state joint stock company KGM in payment for delivered gas condensate. A few days later, KGM's request for a stay was granted for three months and, before the stay ended, KGM declared bankruptcy, making enforcement of the judgment impossible.[151] The tribunal concluded that this letter was an attempt by the government to influence a judicial decision to Petrobart's detriment, an intervention that failed to comport with the rule of law in a democratic society, amounting to a violation of the Kyrgyz Republic's obligation to Petrobart under Article 10, (1) and (12).[152]

Constant protection and security

Article 10(1) further requires a contracting party to accord 'the most constant protection and security' to an investor's investment.[153] ECT tribunals have observed that a key component of this standard is an obligation of 'due diligence', which requires a state to create a framework that provides security and protects the property of aliens from wrongful injury or harassment.[154] Further, ECT tribunals have recognised the potential for constant protection and security protection – often referred to as full protection and security (FPS) protection – to extend beyond physical security and include legal security.[155] However, tribunals considering alleged breaches of FPS have confirmed that this obligation does not impose strict liability on the state to prevent all injury.[156]

To date, there is no publicly available decision in which a tribunal has found a breach of FPS under the ECT.

Prohibition against unreasonable and discriminatory measures

While potentially overlapping with the obligation to accord FET, Article 10(1)'s prohibition on 'unreasonable and discriminatory measures' has been read as a unique and separate protection under the ECT. Measures that breach this provision, as identified by the *Plama* tribunal, are those that are 'not founded in reason or fact but on caprice, prejudice or personal preference'.[157] The tribunal in *Electrabel* observed that 'a breach of this standard requires the impairment caused by the discriminatory or unreasonable measure to be significant'.[158]

Discriminatory treatment occurs where 'like persons [are] treated in a different manner in similar circumstances without reasonable or justifiable grounds',[159] although there need not be discriminatory intent on the part of the host state.[160] In *AES v. Hungary II*, the tribunal identified two elements to determine whether a state's acts are unreasonable: the existence of a rational policy, and the reasonableness of the state's act relating to that policy.[161] Reasonableness in this context requires 'an appropriate correlation between the state's public policy objective and the measure adopted to achieve it'.[162] In *Greentech Energy Systems A/S (now Athena Investments A/S), et al. v. Italian Republic*, the tribunal addressed the parties' competing interpretations of 'unreasonable . . . measures'.[163] Italy argued that a measure is not 'unreasonable' if there is a 'rational public purpose for the measure, combined with a reasonable manner of effecting that purpose'.[164] Rejecting that view, the majority of the tribunal adopted the investors' position that 'the inquiry should be more inclusive, considering the perspective of the treaty parties or the investor as to whether a measure is reasonable'.[165] In light of that interpretation, a majority of the tribunal concluded that the tariff reduction at issue was an 'unreasonable measure' that impaired the claimants' investments and thus breached Article 10(1).[166]

Expropriation

The ECT's prohibition against unlawful expropriation is contained in Article 13 and correlates with the well-known standard for expropriation under international

law; namely, it provides that expropriation is unlawful unless the following four requirements are satisfied:

- it is done in the public interest;
- it is not discriminatory;
- it is carried out under due process of law; and
- it is accompanied by the payment of prompt, adequate and effective compensation. [167]

There have been only a handful of direct expropriation cases in the ECT context, the majority of which have rejected claims for direct expropriation. For example, in *Kardassopoulous v. Georgia*, the tribunal found that Georgia had committed 'a classic case of direct expropriation' by taking away the claimant's concession to distribute oil and gas in Georgia, transferring them to a state-owned entity, and failing to provide compensation or due process of law.[168]

Article 13 of the ECT also covers indirect expropriation, including in its definition 'a measure or measures having effect equivalent to nationalisation or expropriation'.[169] Thus, indirect expropriation claims are frequently considered by ECT tribunals, who rely heavily on the jurisprudence established by international arbitral tribunals considering indirect expropriation claims arising from bilateral and other multilateral treaties. In some of the most recent and well-known of these cases, controlling shareholders of OAO Yukos Oil Company (Yukos) claimed that Russia breached Articles 10(1) and 13(1) of the ECT by expropriating Yukos. They brought three related arbitrations that were submitted to the same arbitral tribunal.[170] The tribunal in the *Yukos* cases found that Russia's primary objective regarding its tax treatment of Yukos was 'not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets'.[171] Russia's measures, the tribunal observed, were 'in effect a devious and calculated expropriation'.[172] The tribunal concluded that although Russia had not 'explicitly expropriated' Yukos or the holdings of its shareholders,

these measures were 'equivalent to nationalization or expropriation' in breach of Article 13 of the ECT.[173] The tribunal awarded the former Yukos shareholders approximately US$50 billion – the highest value in international arbitration awards known to date. Although The Hague District Court overturned the awards on the basis of the tribunal's decision on its jurisdiction (and not on the merits of the tribunal's finding that Russia breached Article 13 of the ECT), The Hague Court of Appeals overturned the annulment on 18 February 2020, reinstating the awards.[174]

In the ECT context, the standard for indirect expropriation has been articulated in various ways. In *Electrabel*, the tribunal required the claimant to prove that the effect of Hungary's acts were 'materially the same' as if the investment had been directly expropriated,[175] observing that international law requires that the investor 'establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment'.[176] In *Charanne*, the tribunal explained that 'indirect expropriation under international law implies a substantial effect on the property rights of the investor', which requires an effective deprivation of all or part of the assets constituting the investment or a loss of value that could be equal in magnitude to a deprivation of the investment.[177] In finding that there was no indirect expropriation, the tribunal observed that while there was a reduction in profitability as a result of Spain's actions, the value of the investment was not 'destroyed'.[178] Consequently, the loss of value alone was insufficient to constitute indirect expropriation. According to the tribunal in *Mamidoil v. Albania*, there must also be a loss of an attribute of ownership.[179]

Umbrella clause

Trends in ECT arbitrations

The Yukos awards – provisional application of the ECT

Article 10(1) of the ECT also contains an 'umbrella clause', which provides that '[e]ach Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party'.[180] As referenced above, contracting parties may withhold their unconditional consent to international arbitration with respect to disputes arising out of this provision.[181] In *Khan v. Mongolia*, the tribunal found in its decision on jurisdiction that any violation of the domestic foreign investment law would constitute a breach of the ECT's umbrella clause.[182] The tribunal found that Mongolia had breached a provision of its foreign investment law prohibiting unlawful expropriation, thereby breaching the umbrella clause in the ECT.[183] In *Greentech Energy Systems*, the majority of the tribunal found that Italy violated the umbrella clause. The majority interpreted the '"obligations" referred to in the ECT's umbrella clause as sufficiently broad to encompass not only contractual duties but also certain legislative and regulatory instruments that are specific enough to qualify as commitments to identifiable instruments or investors'.[184] The majority found that certain decrees, letters and agreements amounted to such obligations because they were entered into with specific investors and were 'sufficiently specific' because they set forth 'specific tariff rates for a fixed duration of twenty years'.[185] Finding that those obligations should be considered together as a whole, the majority rejected the dissenting arbitrator's position that the umbrella clause could not cover certain agreements that originally were entered into with Italian-owned operators and later came into the possession of a foreign investor, finding that 'no hint of such a temporal dimension' exists 'in the plain wording of the ECT's umbrella clause'.[186]

Significant events that could have influenced the development of ECT jurisprudence – namely a national court of first instance overturning the largest arbitral awards known to date, states withdrawing from the ECT and the CJEU's decision in *Achmea* – have not yet proven to have a meaningful impact. Early in 2020, that national

court decision was overturned, no additional states have withdrawn from the ECT and intra-EU disputes continue to be brought under the ECT. However, new trends are emerging, including efforts to modernise the ECT[187] and attacks on the ECT because of its purported negative effect on efforts to address climate change.[188]

In July 2014, an arbitral tribunal seated in The Hague rendered the *Yukos* awards, ordering Russia to pay more than US$50 billion to former majority shareholders of Yukos. In line with previous jurisprudence under the ECT, the arbitral tribunal found it had jurisdiction based on Russia's provisional application of the ECT, including the arbitration provisions in Article 26.[189] In 2016, The Hague District Court overturned the awards, finding that the arbitral tribunal did not have jurisdiction because dispute resolution through arbitration was at odds with the Russian Constitution and therefore was not part of Russia's provisional application of the ECT.[190]

In 2017, two arbitral tribunals seated outside the Netherlands (in Switzerland and Canada) were not deterred by The Hague District Court's decision (which had not yet been overturned),[191] each separately finding that it had jurisdiction under Article 45 of the ECT and rejecting Russia's jurisdictional objection, among others, that provisional application of the arbitration provision in Article 26 is inconsistent with the Russian Constitution.[192] Russia subsequently challenged these interim decisions. Its challenge was rejected by the Swiss Federal Supreme Court, which deemed it premature.[193] That arbitration has continued on the merits. Set-aside proceedings against the other tribunal's jurisdictional decision continue in Canada, where the Ontario Supreme Court held, on 13 December 2019, that the new evidence Russia sought to admit in the set-aside proceeding was inadmissible.[194]

In a landmark decision of 18 February 2020, The Hague Court of Appeal set aside the District Court's decision, thereby reinstating and upholding the *Yukos* awards.[195]

The Hague Court of Appeal concluded that Russia had undertaken to provisionally apply the ECT and that there was 'no question of conflict' between the ECT's investor-state arbitration provisions and Russian law. On 15 May 2020, Russia appealed to the Dutch Supreme Court, calling The Hague Court of Appeal's decision 'seriously flawed' and arguing, for the first time, that an issue of EU law is at stake that requires referral to the ECJ.[196] The development of this jurisprudence will be closely watched and is likely to have lasting effects.

No trend of withdrawal of states from the ECT and intra-EU disputes continue

Withdrawals from the ECT by Russia in 2009 and Italy in 2015 suggested that a trend towards withdrawals would emerge, but no other states have withdrawn since 2015, nor has the ECT lost its strategic importance. Following Italy's announcement, several arbitration claims were launched against Italy, including by Veolia Propreté SAS (in June 2018) and by Hamburg Commercial Bank AG (in January 2020), both in relation to Italy's measures affecting the renewable energy sector.[197]

According to the United Nations Conference on Trade Development (UNCTAD), the ECT remained the most frequently invoked international investment agreement in 2017 and 2018, accounting for six cases in 2017 and seven cases in 2018, including continuing claims against EU Member States.[198] That trend continued in 2019, with the ECT still the most frequently invoked international investment agreement[199] as the number of investor-state dispute settlement cases passed 1,000.[200] UNCTAD reports that approximately 15 per cent of the 55 known investor-state dispute settlement cases filed in 2019 were intra-EU disputes and five of those seven disputes were brought under the ECT, including against Luxembourg, Austria, Germany and Belgium.[201] Although not included on UNCTAD's list of cases, in 2019, according to the Energy Charter Treaty Secretariat, ECT cases were also registered against Spain (three cases), Romania, Germany and Georgia.[202] And, the European Union faced

its first ECT claim in 2019.[203] As at 15 July 2020, at least three ECT arbitrations have been registered in 2020, two of which involve intra-EU disputes concerning renewable energy.[204]

Intra-EU disputes continue under the ECT

The impact of the ECJ's decision in *Achmea* has also been limited so far. As noted above, the tribunals in *Masdar*, *Vattenfall* and many other cases have refused to extend the decision in *Achmea* to the ECT.[205]

Modernisation of the ECT and addressing climate change

In November 2017, the Energy Charter Conference (the Conference) confirmed the launch of a discussion on the potential modernisation of the ECT.[206] Changing the ECT requires the unanimous backing of all signatories.[207] On 27 November 2018, the Conference approved the list of topics for modernisation of the ECT, including the definitions of FET, investment and investor, the most-favoured-nation clause, the umbrella clause and denial of benefits, among other topics. On 6 October 2019, the Conference approved some suggested policy options for the modernisation of the ECT.

In May 2019, the Commission sought a mandate to negotiate the modernisation of the investment protection provisions of the ECT 'with the aim of minimising the number of investor claims over legitimate public policy measures'.[208] The Commission published its proposals in May 2020.[209] Among the reforms the Commission seeks are clarification and better definition of standards of protection, most-favoured nation treatment, the right to regulate, FET and full protection of security, expropriation (including the nature of indirect expropriation), the umbrella clause, transfers (including safeguards for financial crises) and denial of benefits.[210] Among the suggested 'modernisations' is an amendment to the FET standard that would require a 'denial of justice, fundamental

breach of due process, manifest arbitrariness, targeted discrimination on manifestly wrongful grounds, or abusive treatment such as harassment, duress or coercion'.[211] There is also a new suggested article on security for costs empowering a tribunal to order an investor to post security for costs of the proceedings 'if there are reasonable grounds to believe that the Investor risks not being able or willing to honour a possible decision on costs issued against it'.[212] The Commission also seeks to introduce new self-standing provisions on sustainable development and corporate social responsibility. The first formal round of talks took place from 6 to 9 July 2020 by videoconference. A second round was scheduled for 8 to 11 September 2020.

There are other calls for more radical reform to support anti-climate change policies, including revoking the ECT or for states to withdraw.[213] Reportedly, 260 civil society organisations and trade unions from Europe and worldwide have written to the ECT Member States demanding an end to the investor-state dispute mechanism in the ECT.[214] They take the position that the ECT is incompatible with the Paris Agreement because it will prevent countries from acting to lower their emissions by shutting down polluting power plants.[215] Other climate activists and non-governmental organisations have called on the vice president of the Commission to seek more ambitious reform of the ECT during the modernisation process, seeing it as a unique opportunity to promote clean energy transition.[216] They argue that the current suggested changes to the ECT fall short of making the ECT fit for purpose.

The ECT is evolving and remains in flux. We can expect the body of available jurisprudence under the ECT to continue to grow and evolve.

Notes

[1] Cyrus Benson is a partner, and Charline Yim and Victoria R Orlowski are associates, at Gibson, Dunn & Crutcher LLP.

[2] See Thomas Roe & Mathew Happold, *Settlement of Investment Disputes Under the Energy Charter Treaty* (2011), pp. 8 to 9.

[3] European Energy Charter, Title 1 (Objectives).

[4] European Energy Charter, Title 3 (Specific Agreements).

[5] See Preamble and Article 2 (Purpose of the Treaty) ('This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementaries and mutual benefits, in accordance with the objectives and principles of the Charter.').

[6] See Energy Charter Treaty [ECT] website, available at **https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/**, last accessed 21 July 2020. Signatories to the ECT agree in Article 45(1) to apply the 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, a state may file a declaration if it is unable to accept the provisional application of the ECT prior to ratification. This is addressed further later in the chapter.

[7] *AES Summit Generation Limited v. The Republic of Hungary*, ICSID Case No. ARB/01/04.

[8] *Nykomb Synergetics Technology Holding AB v. Latvia*, Stockholm Chamber of Commerce [SCC] Case No. 118/2001, Arbitral Award, 16 December 2003 (*Nykomb* Arbitral Award). The parties in *AES v. Hungary* entered into a settlement agreement and discontinued the arbitration proceedings. See generally Graham Coop, 'Energy Charter Treaty 20 Year Anniversary: 20 Years of the Energy Charter Treaty', *ICSID Review*, Vol. 29, No. 3 (2014), p. 516.

[9] As reported by the United Nations Conference on

Trade and Development [UNCTAD], and summarised by the Energy Charter Secretariat: 'International Energy Charter, Changing dynamics of investment cases under Energy Charter Treaty (ECT)' (updated as of 18 May 2018), available at https://energycharter.org/what-we-do/dispute-settlement/cases-up-to-18-may-2018.

[10] id.

[11] id.

[12] International Energy Charter, 'List of all Investment Dispute Settlement Cases', https://www.energychartertreaty.org/cases/list-of-cases, last accessed on 21 July 2020.

[13] See Graham Coop, 'Energy Charter Treaty 20 Year Anniversary: 20 Years of the Energy Charter Treaty', *ICSID Review*, Vol. 29, No. 3 (2014), pp. 516 to 517.

[14] See Charles A Patrizia, Joseph R Profaizer, Samuel W Cooper and Igor V Timofeyev, 'Investment Disputes Involving the Renewable Energy Industry Under the Energy Charter Treaty', *Global Arbitration Review*, 2 October 2015.

[15] See International Energy Charter, 'List of all Investment Dispute Settlement Cases' (listing 47 cases with Spain as respondent, three of which were filed in 2019), available at https://www.energychartertreaty.org/cases/list-of-cases, last accessed 21 July 2020.

[16] Article 26(1).

[17] Article 26(2).

[18] Article 26(3)(a).

[19] Article 26(3)(b)(i).

[20] Article 26(3)(c); Article 10(1) ('Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.').

[21] Article 26(4). See, e.g., *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008 (*Amto* Final Award), §§ 45 to 47.

[22] Article 26(4)(a).

[23] Article 26(4)(b).

[24] Article 26(4)(c).

[25] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction (redacted), 6 June 2016 [*RREEF* Decision on Jurisdiction], ¶ 231; *Amto* Final Award, § 58; *Gabriel Stati, Ascom Group S.A., Terra Raf Trans Trading Ltd v. Kazakhstan*, SCC Case No. 116/2010, Award, 19 December 2013 [*Stati* Award], ¶¶ 828 to 830. See also *Mohammad Ammar Al-Bahloul v. Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009 [*Al-Bahloul* Partial Award], ¶¶ 155-56; *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 [*Antin* Award], ¶¶ 353 to 358; *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, Permanent Court of Arbitration [PCA] Case No. 2014-01, Award, 2 May 2018 [*Antaris* Award], ¶ 260.

[26] Article 26(3)(b)(i).

[27] *Charanne B.V. and Construction Investments S.A.R.L. v. The Kingdom of Spain*, SCC Case No. 062/2012, Final Award, 21 January 2016 [*Charanne* Final Award], ¶ 408; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009 [*Hulley* Interim Award], ¶ 597; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction, 30 November 2009 [*Yukos Universal* Interim Award], ¶ 598; *Veteran Petroleum Trust (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009 [*Veteran Petroleum* Interim Award], ¶ 609.

[28] *Charanne* Final Award, ¶ 398.

[29] id. ¶ 408. In addition, the tribunal found that the European Court of Human Rights was not a court of a contracting party or an agreed process of dispute resolution under Article 26. id. ¶ 409.

[30] Article 17(1).

[31] *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 [*Plama* Decision on Jurisdiction], ¶ 149; *Khan Resources Inc et al. v. Government of Mongolia and MonAtom LLC*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012 [*Khan* Decision on Jurisdiction], ¶¶ 411 to 412.

[32] See, e.g., *Libananco Holdings Co. Ltd v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶ 550.

[33] *Plama* Decision on Jurisdiction, ¶¶ 155 to 165 (observing that '[b]y itself, Article 17(1) ECT is at best only half a notice; without further reasonable notice of its exercise by the host state, its terms tell the investor little; and for all practical purposes, something more is needed'). See also *Hulley* Interim Award, ¶ 455; *Yukos Universal* Interim Award, ¶ 456; *Veteran Petroleum* Interim Award, ¶ 512; *Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010 [*Liman* Award Excerpts], ¶ 224.

[34] *Plama* Decision on Jurisdiction,¶¶ 159 to 165. See also *Khan* Decision on Jurisdiction, ¶ 429; *Hulley* Interim Award, ¶ 457; *Yukos Universal* Interim Award, ¶ 458; *Veteran Petroleum* Interim Award, ¶ 514; *Liman* Award Excerpts, ¶ 225.

[35] *Masdar Solar & Wind Cooperatief UA v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 [*Masdar* Award], ¶ 239. Nevertheless, the tribunal in this case did not ultimately resolve this issue as it found, unanimously, that the cumulative conditions to trigger the denial of benefits clause had not been met in this case. id. ¶ 251.

[36] Article 1(7).

[37] *Cem Cengiz Uzan v. Republic of Turkey*, SCC Case No. V 2014/023, Award on Respondent's Bifurcated Preliminary Objections, 20 April 2016, ¶ 139.

[38] *Energoalians v. Moldova*, Award, 23 October 2013 [*Energoalians* Award], ¶ 145; *Charanne* Final Award, ¶¶ 414 to 418; *Hulley* Interim Award, ¶¶ 413 to 417; *Yukos* Universal Interim Award, ¶¶ 413 to 417; *Veteran Petroleum* Interim Award, ¶¶ 413 to 417; *Plama* Decision on Jurisdiction, ¶ 128; *RREEF* Decision on Jurisdiction, ¶¶ 143 to 147.

[39] *Charanne* Final Award, ¶¶ 413 to 414.

[40] id. ¶¶ 414 to 418.

[41] id. ¶¶ 415 to 418.

[42] Article 1(6). Tribunals have confirmed that the definition of investment includes the ownership of shares (regardless of whether the investor was a beneficial owner or controller of the shares). See *Hulley* Interim Award, ¶ 429; *Veteran Petroleum* Interim Award, ¶ 477; *Yukos Universal* Interim Award, ¶ 430; *RREEF* Decision on Jurisdiction, ¶¶ 159 to 160.

[43] Article 1(4) to 1(6); *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 [*Electrabel* Decision on Jurisdiction], ¶ 5.47.

[44] *Amto* Final Award, § 42.

[45] *Plama* Decision on Jurisdiction, ¶ 125; *RREEF* Decision on Jurisdiction, ¶ 156; *Stati* Award, ¶ 806; *Masdar* Award, ¶ 195.

[46] *RREEF* Decision on Jurisdiction, ¶¶ 156 to 157. The tribunal further rejected the same argument with respect to Article 25 of the ICSID Convention.

[47] *Electrabel* Decision on Jurisdiction, ¶¶ 5.52-5.54; *State Enterprise Energorynok v. Moldova*, SCC Arbitration No. V (2012/175), Final Award, 29 January 2015 [*State Enterprise* Final Award], ¶ 85; *Petrobart Ltd. v. Kyrgyzstan*, SCC Case No. 126/2003, Arbitral Award, 29 March 2005 [*Petrobart* Arbitral Award], p. 72, ¶¶ VII.6.38 to VII.6.30.

[48] *Electrabel* Decision on Jurisdiction, ¶¶ 5.52 to 5.53.

[49] id. ¶ 5.53.

[50] id. ¶¶ 5.39, 5.52 to 5.59.

[51] *Petrobart* Arbitral Award, p. 71, ¶ VIII.6.21.

[52] id. p. 72, ¶¶ VIII.6.28 to VIII.6.29.

[53] id. pp. 71 to 72, ¶¶ VIII.6.29 to VIII.6.30.

[54] *State Enterprise* Final Award, ¶¶ 26, 54, 63, 80.

[55] id. ¶¶ 81 to 101.

[56] In *Amto*, the claimant owned shares in a company that provided technical services to a company that produced electrical energy. *Amto* Final Award, § 43.

[57] *State Enterprise* Final Award, ¶ 86.

[58] id. ¶¶ 83, 86 to 87.

[59] *Energoalians* Award, ¶¶ 225 to 252.

[60] See *Energoalians* Award, Dissenting Opinion of Dominic Pellew.

[61] Paris Court of Appeal, 12 April 2016, 13/22531.

[62] Court of Cassation, 28 March 2018, 16-16568.

[63] See, e.g., *Stati* Award, ¶ 810; *Hulley* Interim Award, ¶ 431; *Veteran Petroleum* Interim Award, ¶ 488; *Yukos Universal* Interim Award, ¶ 432.

[64] *Alapli Elektrik B.V. v. Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012 [*Alapli* Award], ¶ 350 – see also ¶¶ 349 to 361.

[65] *Slovak Republic v. Achmea BV*, Case C-284/16, Judgment of the European Court of Justice, 6 March 2018 [*Achmea* ECJ Judgment].

[66] id. ¶ 8.

[67] id. ¶ 12.

[68] Slovakia alleged that the arbitration clause in the bilateral investment treaty [BIT] was incompatible with Treaty on the Functioning of the European Union [TFEU], Articles 18, 267 and 344. id. ¶ 14. Article 18 prohibits discrimination on grounds of nationality and enables the European Parliament and Council to adopt rules designed to prohibit such discrimination. Article 267 provides the Court of Justice of the European Union with the jurisdiction to give preliminary rulings on 'the interpretation of the Treaties [Treaty on European Union and TFEU]'. Article 344 provides that 'Members States undertake not to submit a dispute concerning the interpretation or application of the Treaties [Treaty on European Union and TFEU] to any method of settlement other than those provided for therein'.

[69] *Slovak Republic v. Achmea BV*, Case C-284/16, Opinion of Advocate General Wathelet, 19 September 2017.

[70] *Achmea* ECJ Judgment, ¶¶ 37 to 38.

[71] id. ¶ 59. The ECJ found that it was unnecessary to reach the third question, which was posed in relation to Article 18 of the TFEU. id. ¶ 61.

[72] id. ¶ 60.

[73] Luke E Peterson, 'In Highly Anticipated Verdict, German Supreme Court Determines that Achmea v. Slovakia Award Must be Set Aside in Light of the Recent European Court of Justice Findings on Intra-EU BIT Arbitration', *IAReporter*, 8 November 2018.

[74] *Charanne* Final Award, ¶ 424.

[75] id. ¶ 427.

[76] id. ¶ 429.

[77] id. ¶ 433.

[78] id. ¶¶ 434 to 438.

[79] id. ¶¶ 441 to 445.

[80] *RREEF* Decision on Jurisdiction, ¶¶ 37 to 56.

[81] id. ¶¶ 74 to 75. See also id. ¶¶ 76 to 90.

[82] id. ¶ 76. The findings of the *RREEF* tribunal stand in contrast to those of the tribunal in *Electrabel*, which found that there is no general principle under international law compelling the harmonious interpretation of different treaties (although the tribunal found in the context of the ECT and EU law, various factors compelled that these two legal orders be read in harmony). *Electrabel* Decision on Jurisdiction, ¶¶ 4.130, 4.146 to 4.167, 4.173. While the tribunal observed that the EU legal order and the ECT are not inconsistent or contradictory, it nonetheless found that if there were material inconsistencies, EU law would prevail over the ECT. id. ¶¶ 4.167, 4.172 to 4.189, 4.191, 4.196.

[83] *Eiser* Award, ¶¶ 179 to 207 (subsequently annulled on other grounds).

[84] *Isolux Infrastructure Netherlands BV v. Kingdom of Spain*, SCC Case No. 2013/153, Award, 6 July 2016 [Isolux Award], ¶¶ 622 to 660.

[85] *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 [Blusun Award], ¶¶ 279 to 309.

[86] *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Case No. 2015/063, Award, 15 February 2018 [*Novenergia* Award], ¶¶ 449 to 466.

[87] *Antin* Award, ¶¶ 204 to 230.

[88] However, the first publicly known position by an arbitrator in support of an intra-EU jurisdictional objection was taken in a BIT (non-ECT) arbitration in February 2020 in the dissenting opinion of Professor Marcelo G Kohen in *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49. Professor Kohen argued that the subject-matter of the intra-EU BITs and EU treaties were incompatible and, in such a circumstance, the EU treaties should prevail. Lisa Bohmer, 'For the First Time, An Arbitrator Declines Jurisdiction Under An Intra-EU BIT – But Majority Disagrees, *IAReporter*, 14 February 2020.

[89] *Masdar* Award, ¶ 678. See also *Antin* Award, ¶ 679. The tribunals in *Antaris* and *Antin* declined to hear additional briefings on the CJEU's ruling in *Achmea*, which was issued after the close of the arbitral proceedings but before the issuance of the final arbitral awards. *Antaris* Award, ¶ 73; *Antin* Award, ¶¶ 56 to 58.

[90] *Masdar* Award, ¶¶ 680 to 683.

[91] *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018 [*Vattenfall* Decision on *Achmea*], ¶ 163. ('The Tribunal agrees with the conclusion in *Masdar v. Spain* that the ECJ Judgment is silent on the compatibility of intra-EU investor-state dispute settlement under the ECT with EU law.').

[92] Article 16 of the ECT, entitled 'Relation to Other Agreements', provides: 'Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty, (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment.'

[93] *Vattenfall* Decision on *Achmea*, ¶¶ 187, 192 to 193, 207 to 208. The tribunal found it particularly persuasive that the ECT, unlike other international agreements signed by EU Member States, does not contain a 'disconnection clause', which ensures that the provisions of a mixed agreement only apply with respect to non-EU Member States. id. ¶¶ 201 to 206.

[94] The EC has expressed its view that *Achmea* applies to disputes arising under the ECT that are brought by investors from EU Member States against other EU Member States. European Commission, Press Release of 19 July 2018, 'Capital Markets Union: Commission provides guidance on protection of cross-border EU investments', **http://europa.eu/rapid/press-release_IP-18-4528_en.htm**, last accessed on 21 July 2020.

[95] (1) *Greentech Energy Systems A/S (now Athena Investments A/S), et al. v. Italian Republic*, SCC Case No. V (2015/095), Final Award, 23 December 2018; (2) *CEF Energia BV v. Italian Republic*, SCC Case No. V2015/158, Award, 16 January 2019, ¶ 100; (3) *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Intra-EU Jurisdictional Objection, 25 February 2019, ¶¶ 194, 202 (invoking the ECT); (4) *Eskosol*

S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/10, Decision on Respondent Request for Immediate Termination and Respondent Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019; (5) *WA Investments-Europa Nova Limited v. Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019, ¶ 438; (6) *ICW Europe Investments Limited v. Czech Republic*, PCA Case No. 2014-22, Award, 15 May 2019, ¶ 418; (7) *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, Award, 15 May 2019; (8) *Photovoltaik KnopfBetriebs-GmbH v. Czech Republic*, PCA Case No. 2104-21, Award, 15 May 2019; (9) *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, ¶ 173; (10) *Rockhopper Italia S.p.A., et al, v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection, 26 June 2019, ¶ 211; (11) *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019, ¶ 274; (12) *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019, ¶ 252; (13) *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, ¶ 340; (14) *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, ¶ 388; (15) *Stadtwerke Munchen GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019, ¶ 146; (16) *BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. Arb/15/16, Decision on Jurisdiction and Directions on Quantum, 2 December 2019, ¶ 283; (17) *RWE Innogy GmbH and RWE Innogy Aera S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on jurisdictional, liability and certain issues of quantum, 30 December 2019, ¶ 373; (18) *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020; (19) *PV Investors v. Kingdom of Spain*, PCA Case No 2012-14, Final Award, 28 February 2020, ¶ 549; (20) *SunReserve Luxco Holdings S.A.R.L, et al. v. Italian Republic*, SCC Case No. V2016/32, Final Award, 25 March 2020, ¶ 464.

[96] See, e.g., *Greentech Energy Systems A/S (now Athena Investments A/S), et al. v. Italian Republic*, SCC Case No. V (2015/095), Final Award, 23 December 2018; *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, ¶ 560; *Belenergia S.A. v. Italian Republic*, ICSID Case No.

ARB/15/40, Award, 6 August 2019; *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019; see also *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020; *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU *Acquis*, 12 June 2020.

[97] Damien Charlotin, 'Post-Achmea Developments: Spain Wants Court to Ask ECJ to Rule on Compatibility of Energy Charter Treaty with EU Law; Achmea Ruling Also Touted by Poland as Reason for Discontinued BIT Case', *IAReporter*, 22 May 2018. See also Damien Charlotin, 'Spain Secures Stay of Enforcement in Energy Charter Treaty Award in Swedish Court', *IAReporter* 18 May 2018. The Swedish Svea Court of Appeal decided to grant Spain's request for stay of enforcement but did not set out its reasons in any detail.

[98] Tom Jones, 'Swedish court won't consult ECJ on ECT', *Global Arbitration Review*, 26 April 2019, available at **https://globalarbitrationreview.com/article/1190620/swedish-court-won%E2%80%99t-consult-ecj-on-ect**, last accessed 21 July 2020.

[99] See Case No. T 1569-19, available in unofficial translation at **https://s3.eu-west-2.amazonaws.com/files.lbr.cloud/secure/gar/assets/articles/embedded_files/2020-02-04---Swedish-Supreme-Court---Order-of-reference-to-the-ECJ.pdf**, last accessed 21 July 2020.

[100] See Case No. T 4658-18, Svea Court of Appeal, available in English translation at **https://s3.eu-west-2.amazonaws.com/files.lbr.cloud/secure/gar/assets/articles/embedded_files/D.D.C.-18-cv-01148-dckt-000049_001-filed-2020-06-01.pdf**, last accessed 21 July 2020; Cosmo Sanderson, 'Spain denied ECJ referral over ECT award', *Global Arbitration Review*, 2 June 2020, **https://globalarbitrationreview.com/article/1227417/spain-denied-ecj-referral-over-ect-award**, last accessed 21 July 2020.

[101] *Novenergia II – Energy & Environment (SCA) v. The Kingdom of Spain*, No. 1:18-cv-1148 (TSC) Doc. 56 (D.D.C. 3 September 2020).

[102] Declaration of the Member States of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection dated 15 January 2019, available at **https://ec.europa.eu/info/publications/ 190117-bilateral-investment-treaties_en**, last accessed 21 July 2020; Declaration of five EU Member States on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, 16 January 2019, available at **https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf**, last accessed 21 July 2020; Declaration of Hungary on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, 16 January 2019, available at **https://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf**, last accessed 21 July 2020.

[103] *Landesbank Baden-Württemberg v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Intra-EU Jurisdictional Objection, 25 February 2019.

[104] See, e.g., *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019; *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection, 26 June 2019.

[105] EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties, 5 May 2020, available at **https://ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en**, last accessed 21 July 2020.

[106] id.

[107] Article 21(1).

[108] Article 21(5); *Plama Consortium Ltd v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 [*Plama* Award], ¶ 266 (finding that Article 21 'specifically excludes from the scope of the ECT's protections taxation measures of a Contracting State, with certain exceptions, one of which is that, if a tax constitutes or is alleged to constitute an expropriation or is discriminatory').

[109] *Plama* Award, ¶ 266.

[110] *Hulley Enterprises Ltd (Cyprus) v. Russian Federation*, PCA Case No. AA 226, Final Award, 18 July 2014 [Hulley Final Award], ¶¶ 1421 to 1429; *Yukos Universal Final Award, Ltd (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014 [*Yukos Universal* Final Award], ¶¶ 1421 to 1429; *Veteran Petroleum* Final Award, *Trust (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Final Award, 18 July 2014 (*Veteran Petroleum* Final Award), ¶¶ 1421 to 1429 (together the *Yukos* cases).

[111] *Hulley* Final Award, ¶¶ 1430 to 1444; *Yukos Universal* Final Award, ¶¶ 1430 to 1444; *Veteran Petroleum* Final Award, ¶¶ 1430 to 1444.

[112] *Hulley* Final Award, ¶ 1444; *Yukos Universal* Final Award, ¶ 1444; *Veteran Petroleum* Final Award, ¶ 1444. The tribunal's analysis that these tax measures constituted expropriation is discussed below.

[113] See *Antaris* Award, ¶¶ 215 to 253. The tribunal in *Natland and others v. Czech Republic* also found that the solar levy was not a tax for the purposes of the ECT's exception. However, this award is not yet publicly available. *Damien Charlotin, Natland v. Czech Republic* (Part 1 of 2): 'Tribunal Finds Jurisdiction Over Claimants Under Three out of Four Treaties and Declines to Apply ECT's Tax Carve-Out to Contested Measure', *IAReporter*, 26 July 2018. See also *Novenergia* Final Award, ¶¶ 521 to 524; *Antin* Award, ¶¶ 314, 317 to 322; *Masdar* Award, ¶ 291; *Isolux* Award, ¶ 740. In these cases, the tribunals also

recognised that Article 21 did not apply to *mala fide* measures but found that the claimants had not established that the renewable energy levy imposed by Spain was, in fact, *mala fide*.

[114] In addition to these protections, the ECT also provides protections related to national treatment (Article 10(7)), most-favoured nation (Article 10(7)), and the free transfer of investments (Article 14(1)).

[115] Article 10(1).

[116] *Al-Bahloul* Partial Award, ¶¶ 175 to 179 (observing that these two 'provisions of Article 10(1)' can be treated together as the bases for the ECT's fair and equitable treatment standard). See also *Petrobart* Arbitral Award, p. 76, ¶ VIII.8.20 ('The Arbitral Tribunal does not find it necessary to analyse the Kyrgyz Republic's action in relation to the various specific elements in Article 10(1) of the Treaty but notes that this paragraph in its entirety is intended to ensure a fair and equitable treatment of investments.'); *Plama* Award, ¶ 163; *Amto* Final Award, § 74; *Isolux* Award, ¶¶ 764 to 766; *Novenergia* Final Award, ¶ 646; *Antin* Award, ¶ 533.

[117] *Electrabel* Decision on Jurisdiction, ¶ 7.74; *Plama* Award, ¶ 178; *Al-Bahloul* Partial Award, ¶¶ 183 to 184; *Mamidoil Jetoil Greek Petroleum Products Société Anonyme S.A. v. Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 [*Mamidoil* Award], ¶ 616. The *Electrabel* tribunal stressed that '[t]he reference to transparency can be read to indicate an obligation to be forthcoming with information about intended changes in policy and regulations that may significantly affect investments, so that the investor can adequately plan its investment and, if needed, engage the host State in dialogue about protecting its legitimate expectations.' *Electrabel* Decision on Jurisdiction, ¶ 7.79.

[118] *Mamidoil* Award, ¶ 613; *Electrabel* Decision on Jurisdiction, ¶ 7.74.

[119] A measure will not be arbitrary if it is reasonably related to a rational policy. See *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015 [*Electrabel* Award], ¶ 179; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 [*AES II* Award], ¶¶ 10.3.7 to 10.3.9. This includes the requirement that the impact of the measure on the investor be proportional to the policy objective sought. See *Electrabel* Award, ¶ 179.

[120] *Electrabel* Decision on Jurisdiction, ¶ 7.74.

[121] *Plama* Award, ¶ 173; *Mamidoil* Award, ¶ 616.

[122] *AES II* Award, ¶ 9.3.40; *The AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, ¶ 314.

[123] *Electrabel* Decision on Jurisdiction, ¶ 7.75.

[124] *Charanne* Final Award, ¶ 486.

[125] id.

[126] *AES II* Award, ¶ 9.3.17; *Plama* Award, ¶ 176.

[127] *Masdar* Award, ¶ 490.

[128] *Al-Bahloul* Partial Award, ¶ 202; *Mamidoil* Award, ¶ 731; *Antaris* Award, ¶ 366.

[129] *Charanne* Final Award, ¶ 490.

[130] *Electrabel* Decision on Jurisdiction, ¶ 7.78; *Electrabel* Award, ¶ 155.

[131] *Electrabel* Award, ¶ 155.

[132] *Plama* Award, ¶ 177. See also *Mamidoil* Award, ¶¶ 616, 621; *Electrabel* Decision on Jurisdiction, ¶ 7.77.

[133] *AES II* Award, ¶ 9.3.29.

[134] id. ¶ 9.3.34.

[135] *Mamidoil* Award, ¶¶ 623 to 629.

[136] id. ¶¶ 630 to 634. See also *Antaris* Award, ¶¶ 395, 397, 440; *Masdar* Award, ¶¶ 494 to 499.

[137] *Eiser* Award, ¶ 362 (subsequently annulled on other grounds).

[138] id. ¶ 363.

[139] *Novenergia* Award, ¶ 654.

[140] *Antin* Award, ¶ 533.

[141] *Amto* Final Award, § 75.

[142] id. § 76 (citing *Mondev International Limited v. United States of America*, ICSID Case No. ARB(AF)/99/2, ¶¶ 126 to 127).

[143] id. § 78.

[144] *Energoalians* Award, ¶ 356.

[145] id. ¶¶ 350 to 355.

[146] id. ¶ 356.

[147] See, e.g., *Amto* Final Award, § 75 (observing that the denial of justice 'is a manifestation of a breach of the obligation of a State to provide fair and equitable treatment and the minimum standard of treatment required by international law. Denial of justice relates to the administration of justice, and some understandings of the concept include both judicial failure and also legislative failures relating to the administration of justice (for example, denying access to the courts).').

[148] Article 10(12).

[149] *Charanne* Final Award, ¶ 470.

[150] *Amto* Final Award, § 87. See also id. § 88.

[151] *Petrobart* Arbitral Award, p. 75, ¶ VIII.8.11.

[152] id. pp. 75 to 77, ¶¶ VIII.8.11 to VIII.8.13, VIII.8.20 to 8.22.

[153] Article 10(1).

[154] *Electrabel* Decision on Jurisdiction, ¶ 7.83 (citing *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 522 to 523); *Plama* Award, ¶¶ 179 to 180; *AES II* Award, ¶¶ 13.3.2 to 13.3.3; *Mamidoil* Award, ¶ 821.

[155] *Plama* Award, ¶ 180; *AES II* Award, ¶ 13.3.2. However, in *Liman*, the tribunal emphasised that the purpose of this provision is 'to protect the integrity of an investment against interference by the use of force and particularly physical damage.' *Liman* Award Excerpts, ¶ 289. See also *A.M.F. Airfraftleasing* Final Award ¶ 661 (in a non-ECT arbitration, 'the FPS standard extends beyond physical protection to include (at least) the provision of legal security, in the sense of a duty of due diligence in maintaining a functioning judicial system that is available to foreign investors seeking redress').

[156] *Electrabel* Decision on Jurisdiction, ¶ 7.83; *Plama* Award, ¶ 181; *AES II* Award, ¶ 13.3.2; *Mamidoil* Award, ¶ 821.

[157] *Plama* Award, ¶ 184.

[158] *Electrabel* Decision on Jurisdiction, ¶ 7.152.

[159] *Plama* Award, ¶ 184; *Nykomb* Arbitral Award, ¶ 4.3.2.3.a.4; *Electrabel* Decision on Jurisdiction, ¶ 7.152; *Mamidoil* Award, ¶ 788.

[160] *Electrabel* Decision on Jurisdiction, ¶ 7.152.

[161] *AES II*Award, ¶¶ 10.3.7 to 10.3.8.

[162] id. ¶ 10.3.9.

[163] *Greentech Energy Systems A/S (now Athena Investments A/S), et al. v. Italian Republic*, SCC Case No. V (2015/095), Final Award, 23 December 2018, ¶ 462. See also id. ¶ 594(b).

[164] id.

[165] id.

[166] id.

[167] Article 13(1).

[168] *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, ¶¶ 387 to 408.

[169] Article 13(1).

[170] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (PCA Case No. AA 226); *Yukos Universal Limited (Isle of Man) v. Russian Federation* (PCA Case No. AA 227); and *Veteran Petroleum Limited (Cyprus) v. Russian Federation* (PCA Case No. AA 228).

[171] *Hulley* Final Award, ¶ 756; *Yukos Universal* Final Award, ¶ 756; *Veteran Petroleum* Final Award, ¶ 756. See also *Hulley* Final Award, ¶¶ 757 to 759, 1579; *Yukos Universal* Final Award, ¶¶ 757 to 759, 1579; *Veteran Petroleum* Final Award, ¶¶ 757 to 759, 1579.

[172] *Hulley* Final Award, ¶ 1037; *Yukos Universal* Final Award, ¶ 1037; *Veteran Petroleum* Final Award, ¶ 1037.

[173] *Hulley* Final Award, ¶¶ 1580 to 1585; *Yukos Universal* Final Award, ¶¶ 1580 to 1585; *Veteran Petroleum* Final Award, ¶¶ 1580 to 1585. The tribunal did not go on to examine claims that Russia violated Article 10 of the ECT. *Hulley* Final Award, ¶ 1449; *Yukos Universal* Final Award, ¶ 1449; *Veteran Petroleum* Final Award, ¶ 1449.

[174] The Hague Court of Appeal, Judgment of 18 February 2020, available in unofficial English translation at **https://www.italaw.com/sites/default/files/case-documents/italaw11338_0.pdf**, last accessed 21 July 2020, Cosmo Sanderson, 'Dutch appeal court reinstates US$50 billion Yukos awards', *Global Arbitration Review*, 18 February 2020.

[175] *Electrabel* Decision on Jurisdiction, ¶ 6.53.

[176] id. ¶ 6.62.

[177] *Charanne* Final Award, ¶ 461. See also *AES II* Award, ¶ 14.3.1.

[178] *Charanne* Final Award, ¶ 466.

[179] *Mamidoil* Award, ¶¶ 566 to 572.

[180] Article 10(1).

[181] Article 26(3)(c).

[182] *Khan* Decision on Jurisdiction, ¶ 438; *Khan Resources Inc. et al. v. The Government of Mongolia & MonAtom LLC*, UNCITRAL, PCA Case No. 2011-09, Award on the Merits, 2 March 2015 [*Khan* Award], ¶¶ 295 to 296.

[183] *Khan* Award, ¶ 366.

[184] *Greentech Energy Systems* Final Award, ¶ 464.

[185] id. ¶ 466.

[186] id. ¶ 467.

[187] Commission presents EU proposal for modernising energy Charter Treaty, 27 May 2020, available at **https://trade.ec.europa.eu/doclib/press/index.cfm?id=2148**, last accessed 21 July 2020; Cosmo Sanderson, 'EU publishes proposals for ECT revamp', *Global Arbitration Review*, 28 May 2020, available at **https://globalarbitrationreview.com/article/1227287/eu-publishes-proposals-for-ect-revamp**, last accessed 21 July 2020; EU text proposal for the

modernisation of the Energy Charter Treaty (ECT), available at https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf, last accessed 21 July 2020.

[188] See, e.g., Von Bettina Müller, 'Open Letter – Ending the Membership of the EU and its Member States in the Energy Charter Treaty', 24 September 2019, available at https://power-shift.de/open-letter-ending-the- membership-of-the-eu-and-its-member-states-in-the-energy-charter-treaty, last accessed 21 July 2020.

[189] *Hulley* Interim Award, ¶¶ 393 to 398; *Yukos Universal* Interim Award, ¶¶ 393 to 398; *Veteran Petroleum* Interim Award, ¶¶ 393 to 398.

[190] Daniella Strik, Georgios Fasfalis and Marc Krestin, 'Yukos Awards Set Aside by The Hague District Court', Kluwer Arbitration Blog, 27 April 2016, available at http://arbitrationblog.kluwerarbitration.com/2016/04/27/yukos-awards-set-aside-by-the-hague-district-court; Alison Ross, 'Yukos Shareholders Seek to Reinstate Award', *Global Arbitration Review*, 19 July 2016; 'The First Hearing in the Yukos Appeal – GAR Reports Exclusively on the Arguments', *Global Arbitration Review*, 18 January 2017; Alison Ross, 'Hague Court will Not Split Yukos Appeal', *Global Arbitration Review*, 23 January 2017.

[191] Alison Ross, 'Second Wave Yukos Tribunal Rules on Provisional Application', *Global Arbitration Review*, 16 February 2017.

[192] id. These include cases brought by Yukos Capital and Luxtona against Russia for alleged violations of its obligations under the ECT with tribunals seated in Geneva and Toronto respectively. Jarrod Hepburn, 'Russia Turns to Canadian and Swiss Courts Seeking to Set Aside a Pair of Yukos "Second-Wave" Energy Charter Rulings – But Swiss Bid is Deemed Premature', *IAReporter* 10 August 2017; Jarrod Hepburn, 'Interim Award in Luxtona v. Russia Arbitration Comes to Light, Offering New Reasoning on

Provisional Application of Energy Charter Treaty and Russia's Attempted Denial of Benefits to this Yukos Shareholder', *IAReporter* 4 January 2018.

[193] Jarrod Hepburn, 'Russia Turns to Canadian and Swiss Courts Seeking to Set Aside a Pair of Yukos "Second-Wave" Energy Charter Rulings But Swiss Bid is Deemed Premature', *IAReporter*, 10 August 2017.

[194] Damien Charlotin and Luke Eric Peterson, 'Russia Set-Aside Round-Up: Swiss Court Rules that Russia Does Not Need To Post Security For Costs As It Seeks To Set Aside Crimea Bit Award; Set-Aside Applications Continue In First And Second Wave Yukos Cases', *IAReporter*, 7 December 2017; Sebastian Perry, 'Canadian court bars new evidence in Yukos set-aside bid', *Global Arbitration Review*, 31 January 2020, available at **https://globalarbitrationreview.com/article/1213707/canadian-court-bars-new-evidence-in-yukos-set- aside-bid**, last accessed 21 July 2020.

[195] Judgment of The Hague District Court, Judgment of 20 April 2016, Case Nos. C/09/477160/HA ZA 15-1, C/09/477162/HA ZA 15-2, C/09/481619/HA ZA 15-112, available in English translation at **https://www.italaw.com/sites/default/files/case-documents/italaw7258.pdf**, last accessed 21 July 2020.

[196] Alison Ross, 'Will Yukos now go before the ECJ?', *Global Arbitration Review*, 15 May 2020, available at **https://globalarbitrationreview.com/article/1226901/will-yukos-now-go-before-the-ecj**, last accessed 21 July 2020.

[197] The ECT has a 20-year sunset provision. See *Veolia Propreté SAS v. Italian Republic*, available at **https://energycharter.org/what-we-do/dispute-settlement/investment-dispute-settlement-cases/ 117-veolia-proprete-sas-v-italian-republic**, last accessed 21 July 2020; *Hamburg Commercial Bank AG v. Italian Republic*, ICSID Case No. ARB/20/3, ICSID website, available at **https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/20/3**, last accessed 21 July 2020.

[198] See UNCTAD, Investor-State Dispute Settlement: Review of Developments in 2017, June 2018; UNCTAD Fact Sheet on Investor-State Dispute Settlement Caes in 2018, UNCTAD website, **https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf**, last accessed 21 July 2020.

[199] 'Investor-State Dispute Settlement Cases Pass the 1,000 mark: Cases and Outcomes in 2019', IIA Issues Note, Issue 2 July 2020, available at **https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d6.pdf**, last accessed 21 July 2020.

[200] id.

[201] id.

[202] See **https://www.energychartertreaty.org/cases/list-of-cases**, last accessed 21 July 2020.

[203] Cosmo Sanderson, 'ECT claim against EU underway', *Global Arbitration Review*, 26 May 2020, at **https://globalarbitrationreview.com/article/1227202/ect-claim-against-eu-underway**, last accessed 21 July 2020.

[204] *Hamburg Commercial Bank AG v. Italy*, ICSID Case No. ARB/20/3, registered 21 January 2020 (listing renewable energy generation enterprise as the subject of the dispute), available at **https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/20/3**, lasted accessed 21 July 2020; *EP Wind Project (Rom) Six Ltd. v. Romania*, ICSID Case No. ARB/20/15, registered 19 May 2020 (listing renewable energy generation enterprise as the subject of the dispute), available at **https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/20/15**, last accessed 21 July 2020; *Zaur Leshkasheli and Rosserland Consultants Limited v. Azerbaijan*, ICSID Case No. ARB/20/20, registered 25 June 2020 (listing hydrocarbon exploration and production joint venture as the subject of the dispute), available at **https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?**

CaseNo=ARB/20/20, last accessed 21 July 2020; see Energy Charter Treaty website, https://www.energychartertreaty.org/cases/list-of-cases, last accessed 21 July 2020.

[205] See footnotes 89 to 95, above.

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