THE CONCEPTS OF INVESTOR AND INVESTMENT UNDER THE ECT AND THE LEGAL STANDING TO BRING ARBITRATIONS UNDER THE ECT

Félix J. Montero y Laura Ruiz (1)

RESUMEN

En los últimos tiempos ha ganado protagonismo en países comunitarios la resolución de controversias contra Estados a través del arbitraje de inversión y en concreto a través de los mecanismos previstos en el Tratado de la Carta de la Energía. En el presente artículo analizamos cuestiones relativas a la legitimación activa para emplear los mecanismos previstos en el Tratado así como la posibilidad de acumular arbitrajes e iniciar acciones colectivas contra Estados.

ABSTRACT

The resolution of disputes against States by means of investment arbitration, and specifically of the mechanisms provided by the Energy Charter Treaty, has lately become increasingly significant. This article will analyse issues dealing with the legal standing of the mechanisms of the Treaty as well the possibility to consolidate arbitrations and to bring class actions against States.

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(1) Socio de Litigación y Arbitraje de Pérez-Llorca y Abogada de Litigación y Arbitraje de Pérez-Llorca.

I. INTRODUCTION: WHAT THE ECT IS AND WHY IT HAS BECOME SO IMPORTANT

Today, investments made in the energy sector usually involve long-term commitments to projects that are highly sensitive to regulatory, legal, technological, environmental and cultural influences. In that sense, a large number of both developed and developing states seek to attract foreign capital in order to improve their energy infrastructure, whilst at the same time nationals of states with mature energy sectors seek investment opportunities in new markets, often abroad. As a result of this, contemporary energy markets have become truly global.

In this context, the essential objective of the Energy Charter Treaty («**ECT**») is to establish a legal framework by means of rules and measures designed to create a ´level playing field´ for energy sector investments, liberalise trade and investment flows in the energy sector and minimise the risks associated with energy-related trade and investments. The ECT was signed in December 1994 by thirty-eight countries and the European Communities, and entered into legal force in April 1998. To date, I it has been signed by forty nine and ratified by fifty four states in total (2), among them all of the European States (3) and a number of Asian countries (including Mongolia, Georgia, Japan, Afghanistan, Kazakhstan, Ukraine and Turkey).

The promotion and protection of energy investments and investment dispute resolution are is at the heart of the ECT framework. The investment protection provisions of the ECT, including its arrangements for binding international arbitration, are designed to provide investors with a minimum level of protection, according to international standards. As for investment dispute resolution, the ECT provides for three specific paths: (i) ICSID arbitrations (4); (ii) arbitration under the auspices of the Stockholm Chamber of Commerce («SCC»); and (iii) *ad hoc* arbitration under the UNCITRAL (5) Arbitration Rules.

A typical dispute under the ECT arises when an ECT Signatory state breaches a number of its obligations under the ECT, causing substantial losses to Investors in that ECT state. Any one of the investors may therefore bring an arbitration under the auspices of the ECT in order to receive: (i) a declaration stating that one or a number of the provisions of the ECT have been breached by a Contracting Party and (ii) compensation from the ECT State for damages suffered as a result of infringement of the ECT.

(2) The ratification status of the ECT can be viewed on the following webpage: *www.encharter.org/fileadmin/user_upload/document/ECT_ratification_status.pdf*

(3) The ECT has also been collectively signed by the member states of the European Union and the European Atomic Energy Community (Euratom).

(4) International Centre for Settlement of Investment Disputes (ICSID)

(5) The United Nations Commission on International Trade Law (UNCITRAL). The revised UNCITRAL Rules, which came into force on 1 april 2014, will apply to all future ECT disputes.

In recent years there has been remarkable growth in the number of disputes under the ECT. Interestingly, according to public sources of information (6), while the first few ECT cases were predominantly brought against Eastern European countries, recently there has been an increase in the number of cases against Western European states (7).

This article will outline (i) the concepts of protected Investment and Investor under the ECT; (ii) the abuse of process when determining legal standing of an ECT arbitration; (iii) the possibility of bringing class actions under the ECT; and (iv) the consolidation of arbitration proceedings under the ECT.

II. PROTECTED INVESTMENT AND INVESTOR UNDER THE ECT

The importance of determining the scope and meaning of these terms —«protected Investment» and «Investor»— is that protection under the ECT is limited to specific cases, in accordance with Article 26 (1) of the ECT which covers the settlement of disputes between an Investor and a Contracting Party. In particular, this protection is only granted if all of the following requirements have been met. This means a dispute may be:

(i) «[…] *between a Contracting Party* […]»

(ii) Against «[…] *an investor of another Contracting Party* […]»

(iii) «[…] *relating to an Investment of the latter in the area of the former*»

(iv) «[…] *which concern an alleged breach of an obligation of the former under Part III* [of the ECT] […]»

We have analysed the above mentioned requirements below:

1. Disputes between a Contracting Party and an Investor of another Contracting Party

Firstly, we will analyse the definitions and purpose of a «**Contracting Party**» (in contrast to a «third state») and an «Investor» of a «Contracting Party» under the ECT.

1.1. A Contracting Party vs a third state

As a starting point, it is essential to know the difference between a Contracting Party and a third state. A Contracting Party is a state which has signed and ratified the ECT. In this regard, it should be noted that it is possible to accept to apply the ECT provisionally, creating different circumstances for different countries, for example in the case of Belarus. It is also possible to apply the ECT

(6) *www.encharter.org*

(7) 11 cases —out of the 51 ECT arbitration cases registered— involve Western European States (Spain, Germany and Italy).

provisionally and subsequently decide to stop its application, for example in the case of the Russian Federation (8) as of 2009.

For the purposes of the ECT, a third state (9) is a state outside the scope of Article 26 of the ECT: a third state is neither a Contracting Party, nor an Investor For example, a company incorporated under the laws of a state which has not signed the ECT (such as the United States (10)) may only initiate an arbitration under the ECT if that company is controlled by an Investor of a Contracting Party.

Given that the dispute resolution mechanisms of the ECT are reserved for disputes between a Contracting Party and Investors of another Contracting Party, the ECT expressly excludes the following scenarios:

— A dispute arising against a third state which is not a Contracting Party ;

— A dispute involving an Investor which is a national of a third state; and

— A dispute involving an Investor which is a national of the same Contracting Party against which the claim has been brought (11). In order to confirm that an Investor (never a natural person) is a national of a Contracting Party, it is necessary to confirm that the Investor is incorporated under the laws of that particular Contracting Party.

1.2. The Investor of a Contracting Party

The ECT (12) explicitly protects individuals who are citizens, nationals or permanent residents of a Contracting Party and companies or other legal entities organised and incorporated in accordance with the laws of a Contracting Party. Additionally, (i) the nationality of the Investor as a natural person is determined by the national law or the requirement of residency or domicile of the state in question ; and (ii) the nationality of the Investor as a legal person is determined by the place of incorporation, in accordance with the laws of that state. For instance, a legal person incorporated in accordance with the laws of a Contracting Party will be considered an Investor of that Contracting Party.

The issue of the nationality of legal persons is more complicated than that of natural persons. For instance, in order to determine which shareholders are per-

(8) On 20 august 2009 the Russian Federation officially notified that it did not intend to become a Contracting Party to the ECT. Thus, in accordance with ECT Article 45(3)(a), such notification resulted in Russia's termination of its provisional application of the ECT. Therefore, the last day of Russia's provisional application of the ECT was 18 october 2009.

(9) *Vid.* Article 1 (7) of the ECT: «[…] (b) with respect to a "third state", a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.»

(10) The United States, Canada and China hold an observer status, and therefore, they are not bound by the ECT.

(11) *Vid.* Article 26 of the ECT.

(12) *Vid.* Article 1 (7) of the ECT: «"Investor" means: (a) with respect to a Contracting Party: (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law; (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party; […]».

mitted to bring claims of breaches against a corporation, a number of Tribunals have adopted control when determining the nationality of a legal person (13).

An example of an interesting case would be one in which an indirect foreign Investor, who is controlled by Investors of the host state, brings a claim against the host state. In this case, it would be interesting to consider whether this indirect Investor would have legal standing to bring the arbitration.

A similar case dealt with by the arbitral tribunal was that of the Yukos Universal Ltd. v. Russian Federation (14) case. The Russian Federation contended that in addition to confirming the place of incorporation of the owners of Yukos (the Investors (15)), it was necessary to determine if the Investors were nationals of the Contracting Party against which the claim was being filed. According to the defendant, Yukos was a mere vehicle controlled by Russian investors and therefore Yukos could not benefit from dispute resolution mechanisms established by the ECT.

Yukos stated that there was no basis for interpreting Article 1(7) of the ECT in any way other than confirming the place of incorporation of a company to determine whether an Investor is protected under the ECT In this way, given that Yukos is a company organized in accordance with the laws of the Contracting Party the UK, it was able receive the ECT protection and benefit from dispute resolution mechanisms established in that country.

Finally, the interim award on jurisdiction and admissibility stated that the only criterion required to determine whether an investor is protected under the ECT is the place of incorporation of that Investor. Moreover, the Tribunal specified that Article 1(7) of the ECT (16) offer no ambiguity on the fact that although arbitrators can apply to the ECT for protection, they are not entitled to impose any additional requirements on those expressly mentioned in the ECT (17). This means that arbitrators are not permitted to interpret the conclusions of the ECT in any way other than as expressly outlined in the ECT. With regards to this point, it is important to be note that the Vienna Conven-

(13) For example: Case number ARB/02/18, 29 april 2004 Tokios Tokelés v. Ukraine.

(14) PCA Case number AA 227, Yukos Universal Ltd. (UK - Isle of Man) *v.* Russian Federation.

(15) In 2003, the Yukos Oil Company was the largest oil company in Russia. Its assets were acquired in controversial circumstances from the Russian government during the privatization process of the early 1990s, following the collapse of the Soviet Union.

(16) «"Investor" means: (a) with respect to a Contracting Party: (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law; (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party; (b) with respect to a "third state", a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.»

(17) «Finally the Tribunal cannot accept Respondent's argument that an "Investment", to qualify under the ECT, requires an injection of foreign capital. Indeed, as already explained above, the definition in Article 1(6) of the ECT does not include any additional requirement with regard to the origin of capital or the necessity of an injection of foreign capital *[…]* But as the Tribunal noted earlier, the Tribunal is bound to interpret the terms of the ECT not as they might have been written but as they were actually written. *[…]* Claimant is organized "in accordance with the law applicable" in the Isle of Man and owns shares of Yukos. Thus, Claimant owns and "Investment" protected by the ECT and the Tribunal so finds. The Tribunal is not entitled, by the terms of the ECT to find otherwise.»

tion on the Law of Treaties («**VCLT**») has been referred to many times by a number of Tribunals, whether directly binding on the parties to the ECT as treaty rules or as customary international law. For this reason, many Tribunals have relied on the interpretation provisions foreseen in the VCLT that set out the standards of interpretation, which should be based on the ordinary meaning of the ECT terms, their context and the object and purpose of the Treaty (18).

Another leading case on the very same issue and worth mentioning is Tokyo Tokelés v. Ukraine (19). Although not an ECT case, in this ICSID arbitration the claimant company (Tokios Tokelés) was qualified as a Lithuanian Investor under the Lithuania-Ukraine Bilateral Investment Treaty («**BIT**»), which also defined corporate nationality by the place of incorporation (20).

Ukraine argued, however, that the Tribunal should deny jurisdiction on the grounds that the Ukrainian owners had incorporated the company in Lithuania for the sole purpose of availing themselves of the protection of the Lithuania-Ukraine BIT.

The Tribunal held that a company incorporated in Lithuania was entitled to bring a claim against Ukraine under the Lithuania-Ukraine BIT, although it was controlled and ninety-nine per cent owned by Ukrainian nationals. Although the Tribunal acknowledged that a number of investment agreements denied protection to entities controlled by nationals of the host state, it noted that the Ukraine-Lithuania BIT did not, and that *«it is not for Tribunals to impose limits on the scope of BITs not found in the text»* (21).

The decision made by the Tribunal was supported by the majority of the arbitrators. However, the Chairman of the Tribunal issued a dissenting opinion on the grounds (22) that the investments were made in Ukraine by Ukrainian citizens with domestic Ukrainian capital, through the channel of a foreign entity. For this reason he maintained that the foreign element required for protection under a BIT was not met, and held that the only criterion confirming the nationality of the claimant in fact contradicted both the principles of the ICSID and the principle of protection of foreign investments in a particular state:

> *«When it comes to mechanisms and procedures involving States and implying therefore, issues of public international law, economic and political reality is to prevail over legal structure, so much that the application of the basic principles rules of public international law should not be frustrated by legal concepts and rules prevailing in the relations between private economies and juridical players.»* (23)

(18) *Vid.* Articles 31 and 32 of the VCLT.
(19) Case number ARB/02/18, 29 april 2004 Tokios Tokelés *v.* Ukraine.
(20) «According to the ordinary meaning of the terms of the Treaty, the Claimant is an "investor" of Lithuania if it is a thing of real legal existence that was founded on a secure basis in the territory of Lithuania in conformity with its laws and regulations. The Treaty contains no additional requirements for an entity to qualify as an "investor" of Lithuania.»
(21) Paragraph 36 of the award.
(22) Professor P. Weil.
(23) Paragraph 24 of the award.

In conclusion, indirect Investors are entitled to sue under the ECT if they comply with the general requirements of legal standing, regardless of the nationality of its shareholders. However, our consideration of this issue should not forget that general customary standards, such as those which prevent the abuse of process, must be taken into account. This principle, in connection with the legal standing to sue within the context of investment arbitration, will be further analysed in part III of this article.

1.3. Disputes between a Contracting Party and an Investor of another Contracting Party not under the protection of the ECT, the denial of benefits

Even if the requirements established in Article 26 of the ECT are met, protection under the ECT is not always granted; We are referring to Article 17 ECT (24), known as the «denial of benefits». In accordance with this Article, a Contracting Party is entitled to deny protection under the ECT to Investors if they are (i) incorporated in another Contracting Party; (ii) but (a) under the control of investors of a third state, and (b) do not carry out any substantial business activity in the ECT State of incorporation (25).

These two qualifying factors, of (i) no substantial business activity in the state of incorporation and (ii) ownership or control by Investors of third states are cumulative. The decision of the Plama Consortium Limited *v*. Republic of Bulgaria (26) case dealt with the question of how Article 17 (1) of the ECT should be considered to work in practice.

In this particular case, Bulgaria, after it had received the request for arbitration, sent ICSID a letter by which it denied the claimant protection under the ECT [in accordance with Article 17(1) of the ECT] on the grounds that the claimant was «*a "mailbox" company with no substantial business activities in the Republic of Cyprus* [the country in which Plama was incorporated]» and it was not owned or controlled by a national of a Contracting Party.

Regarding the requirement of substantial business activity, the Tribunal held that the lack of substantial business activity «*cannot be made good with business activities undertaken by an associated but different legal entity*» even when it is owned or controlled by the claimant. As for the requirement of ownership and control by an Investor of a third state the view of the Tribunal was that «*ownership includes indirect and beneficial ownership; and control includes control in fact, including an ability to exercise substantial influence over*

(24) *Vid.* Article 17 (1) of the ECT: «Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized.»

(25) The denial of benefits clause does not operate as a denial of all benefits to a covered investor under the ECT but is expressly limited to a denial of the advantages related to the substantial protection under Part III of the ECT, which is, after all, the part of the Treaty which is protected by the dispute resolution mechanisms established therein.

(26) CIADI, Case Number ARB/03/24, Plama Consortium Ltd. *v.* Bulgaria (*vid.* Decision on jurisdiction rendered on 28 october 2005, *www.encharter.org*).

the legal entity's management, operation and the selection of members of its board of directors or any other managing body». The burden of proof to establish (i) the lack of substantial business activity and (ii) the ownership and control of the company fell to Bulgaria (27).

Finally, the Tribunal ruled against the submissions made by Bulgaria, and additionally held that Article 17(1) of the ECT is related to the merits of the dispute and could not be invoked to support a complaint on the jurisdiction of the Tribunal (28). By contrast, the right to deny the protection provided by many other BITs can result in a filtering of the admissibility of claims.

In conclusion, a question which might arise is whether the denial of benefits may only be applicable to cases in which the final Investors are under the control of Investors of a third state, or whether it is also applicable to cases in which the final Investors are nationals of the same Contracting Party against which the claim has been raised. In this regard, in the case of Plama Consortium Limited *v*. Republic of Bulgaria, referring to the wording of Article 17(1) («*reserves the right to deny*»), the Tribunal took the view that Article 17(1) required the denial of benefits to be actively exercised by the Contracting Party (29).

1.4. Disputes between a Contracting Party and an Investor of the same Contracting Party under the protection of the ECT: the ICSID mechanism

We have just seen how, in a dispute between a Contracting Party and an Investor of another Contracting Party, an Investor may be denied protection under the ECT. Now, we will consider a contrasting case, in which, in a dispute between an Investor and the same Contracting Party in which it is incorporated, an Investor may qualify for protection under the ECT.

Such a case may only exist for the procedural path of ICSID arbitrations. In particular, under Article 25(2) (b) (30) of the ICSID Convention (31) , there may be an agreement between a local company controlled by a foreign investor and

(27) *Vid.* Decision on jurisdiction rendered on 28 october 2005, page 94.

(28) The Tribunal held that Article 17 —even if applicable— would not affect the jurisdiction of the Tribunal. The Tribunal established, with reference to the wording of Article 17(1), i.e. «*each Contracting Party reserves the right to deny the advantages of this Part* [Part III]», that such denial applies only the substantive investment protection provisions of the ECT. The tribunal concluded that «it would therefore require a gross manipulation of the language to make it refer to Article 26 in Part V of the ECT» (*Vid.* Decision on jurisdiction rendered on 28 october 2005, page 147).

(29) *Vid.* Decision on Jurisdiction, paragraphs 155-15.

(30) Article 25(2)(b) of the ICSID Convention: «National of another Contracting State» means: (…) b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.»

(31) Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 march 1965 by the International Centre for Settlement of Investment Disputes (ICSID).

a host state. Under such an agreement, the local company will have access to protection under the ICSID . This allows for a departure from the principle of place of incorporation, in favour of foreign control.

By the same token, and given that ICSID path one of the preferred routes of Investors bringing claims under the ECT, the ECT has specifically set forth a similar rule to that already set out by the ICSID. In Article 26(7), the ECT states that:

> *«An Investor other than a natural person which has the nationality of a Contracting Party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contacting Party, shall for the purpose of Article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" […].»*

Therefore, in the event that a company is able to prove that it is controlled by Investors of another Contracting Party, said company would be able to file an arbitration claim under the ICSID mechanisms (32). In this sense, a number of authors (33) have established that the concept of control means either that (i) Investors hold a certain percentage of participation in that company; or that (ii) Investors have a decisive influence on the Investment management of the company.

2. Disputes relating to an Investment

The ECT offers an extremely wide definition of Investment. Investments are defined by the ECT as any type of asset owned or controlled directly or indirectly by an Investor. Although these investments must be carried out within a specific sector (the so-called ´energy sector´),they may include any number of activities, such as exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing or sale of energy materials and products. With such a wide concept of investment, the only investment activities not included are those related to charcoal, certain oils and the distribution of heat to multiple premises (34).

In terms of different types of Investment, the ECT also seeks to be as comprehensive as possible and includes any kind of asset, whether tangible or intangible, movable or immovable, as well as property and any kind of property rights. It also covers «*a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise*» (35), claims to money and claims to performance, any returns irrespective of the manner in which they are paid or any right that an investor has by virtue of licences for permits granted to

(32) The provision established on Article 26 (7) of the ECT applies only for the purposes of the ICSID Convention (excluding other settlement of disputes, such as, the SCC or *ad hoc* arbitration under the UNCITRAL Rules).

(33) Baltag, C. *The Energy Charter Treaty: the Notion of Investor*, International Arbitration Law Library, Volume 25, Kluwer Law International, 2012, page 111 (available at *www.kluwerarbitration.com*).

(34) See. Annex NI of the ECT.

(35) *Vid.* Article 1 (6) b) of the ECT.

carry out the activities mentioned. It has been discussed whether the catalogue of possibilities mentioned in Article 1(6) of the ECT can to be construed as a closed list, or whether other investments can also be included in the list on analogous grounds (36). Given that it is difficult to quantify cases different to those already provided in Article 1(6) of the ECT, we consider this discussion to be unproductive. What we can assert, however, from the wording of the ECT and the interpretations made by Arbitral Tribunals which have dealt with this issue so far, is that indirect ownership of shares is an investment protected by the ECT (37).

We have discussed what kind of Investments are protected under the ECT. Now we will endeavour to analyse the processes that have led to this status of protection. It is important to note that although it is permitted for an Investment to have been made either before or after the ECT came into force for the Investor´s Contracting Party or the state in which the investment was made, all claims must relate to breaches that occurred after the ECT came into force (38).

In conclusion, it can be a complex process to determine whether specific economic activity can be considered an investment under the provisions set out by the ECT, even though a number of scholars have highlighted that the concept of investment as defined by the ECT is particularly broad (39).

3. Disputes concerning the breach of obligations established in Part III of the ECT

The ECT seeks to establish equal conditions for investments in the energy sector and thereby limit the non-commercial risks connected with such investments, looking to protect foreign investors against arbitrary and capricious treatment by the Contracting Party, to maintain a stable and predictable regulatory framework, and to ensure transparent due process and good faith.

(36) In this sense, Baltag has sustained that article 1(6) provides for an open list of assets that may constitute an investment according to the award in the case Yukos Universal Ltd. (UK - Isle of Man) v. Russian Federation (Ad hoc UNCITRAL Arbitration Rules) where the Tribunal stated that: «(…) an "Investment" includes "every kind of asffset" owned or controlled, directly or indirectly, and extends not only to shares of a company but to its debt (Article 1(6)(b) of the ECT) (…) The Tribunal reads Article 1(6)(b) of the ECT as containing the widest possible definition of an interest in a company, including shares (as in the case at hand), with no indication whatsoever that the drafters of the Treaty intended to limit ownership to "beneficial" ownership» (*vid.* Baltag, C. The Energy Charter Treaty: the Notion of Investor, International Arbitration Law Library, Volume 25, Kluwer Law International, 2012, page 129).

(37) ICSID Case number ARB/05/18, Kardassopoulos *v.* Georgia and Arbitration Institute of the SCC, Case number ARB 080/2005 Amto *v.* Ukraine.

(38) *Vid.* Article 1 (6) of the ECT: «(…) the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.»

(39) Gaillard, E., «Investments and Investors covered by the Energy Charter Treaty» en Ribeiro C., *Investment Arbitration and the Energy Charter Treaty*, Jurisnet LLC, New York, 2006, page 59.

The ECT guarantees fair and equitable treatment. In Article 10 of the ECT, the standard of fair and equitable treatment also refers to protection and security, the prohibition of unreasonable or discriminatory measures, the prohibition of treatment less favourable than that required by international law and to the observance of obligations entered into by different parties:

> *«Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.» (40)*

Despite this, it has not always been easy to determine, when an investor files a claim, if the standard of fair and equitable treatment has been breached. It should be noted that it is the responsibility of the Investor to prove that the alleged fair and equitable standard of treatment exists in the specific context, based on prior practice of the Contracting Party or on its legitimate expectations.

For example, the Arbitral Tribunal managing the SGS v. Philippines (41) case admitted the possibility that a violation of obligations under a contract may give rise to a claim for violation of the fair and equitable standard. In its Decision on Jurisdiction, it found that «*an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under Article IV* [containing the FET standard]».

Nevertheless, other Tribunals have adopted a more differentiated approach, finding that a simple breach of contract by a State would not trigger a violation of the fair and equitable treatment standard.

In the Impreglio v. Pakistan (42) case concerning a contract for the construction of hydroelectric power facilities, the Arbitral Tribunal, in its decision on jurisdiction, found that the success of the claimant's reliance on the fair and equitable treatment standard would depend on whether the impugned activity by the host State involved a «public power», that is, an activity beyond that of an ordinary Contracting Party.

In conclusion, the ECT provides broader protection to investors by granting the prohibition of arbitrary and discriminatory treatment, the denial of justice and abusive conduct towards investors, which, as the main protec-

(40) *Vid.* Article 10(1) of the ECT.
(41) SGS *v.* Philippines, Decision on Jurisdiction, 29 january 2004, 42 I.L.M. 1285.
(42) Impregilo S.P.A. *v.* Pakistan, *Decision on Jurisdiction*, 22 april 2005.

tions guaranteed by the ECT, may be analysed by Tribunals on a case-by-case basis (43).

III. ABUSE OF PROCESS IN DETERMINING THE LEGAL STANDING OF AN ECT ARBITRATION

The promotion and protection of investments and investment dispute settlement are at the heart of the ECT framework. This protection may be invaluable to investors in the energy sector, especially if contractual or national Court remedies are thought or proved to be inadequate.

Given that an Investor may have either direct or indirect ownership or control over an Investment under the ECT, this provisionally opens up the possibility that an Investor might structure their investment through companies of several different nationalities, in order to take advantage of as many different treaty protections as possible, and hence give rise to *forum shopping*.

Specifically, investors could try to look for legal gaps; We have already seen that Investors controlled by nationals of the host State are able to bring arbitrations against the host State under the ECT. For this reason, in reaction to this, it would be possible for nationals of the host State to incorporate a subsidiary company in another Contracting Party to gain access to protection from such investment arbitrations. This may even occur for other reasons, for example as a response to tax structures and regulatory issues.

However, straight-forward solutions to these issues are not always successful. The customary standard which may be invoked to avoid these kinds of undesirable situations, ´the abuse of process´, has been dealt with by a number of awards, sometimes admitting its application and at other times rejecting it. Although these awards have contributed to developing the notion of the abuse of process, however, not one of the cases mentioned below were decided under the ECT.

The first case that we present as an example is the award rendered in the case of Pac Rim Cayman LLC *v.* Republic of El Salvador (44). This award highlighted that the time at which a change of nationality occurs is important in determining whether an abuse of process has occurred, and brought together the already existing doctrine of abuse of process (45).

Pac Rim Cayman LLC was a Canadian company that applied for an environmental permit and a mining exploitation concession in El Salvador through one of its subsidiaries in 2004. The environmental permit and the concession were not granted at that time. Three years later, in December of 2007, Pac Rim Cayman

(43) Montero, F. J. and Romero, M., «The Meaning of the FET Standard», *The European, Middle Eastern and African Arbitration Review* (Global Arbitration Review), 2014.
(44) Case CIADI n.º ARB/09/12, Pac Rim Cayman LLC *v.* Republic of El Salvador.
(45) The award makes reference to several cases where the change of nationality had occurred years before the adoption of the harmful measure; and, for those cases the Arbitral Tribunal understood that there had been no abuse of process.

LLC changed the nationality of another subsidiary, Pac Rim Cayman, from the Cayman Islands to the United States. In 2009 this Canadian company used Pac Rim Cayman to initiate an arbitration under the ECT.

The Republic of El Salvador submitted that the acts alleged by Pac Rim Cayman were completed before the change in its nationality and that for this reason there had been an abuse of process.

Pac Rim Cayman LLC stated that the fact that it changed its nationality –from the Cayman Islands to the United States– after the investment was carried out did not entail an abuse of process.

Despite the above allegations, the Tribunal concluded that the main reason for the change of nationality, if not the only reason, was to gain access to ICSID arbitration through the corresponding BIT. However, the award established that this purpose was not sufficient to establish that there had been an abuse of process and deprive the Tribunal of jurisdiction. The award concluded that other circumstances, such as the moment at which the change of nationality had taken place, should be considered, and if such a change occurred before the activity causing the dispute, there would be no abuse of process.

The Tribunal established the significance of the moment at which the harmful measures occurred, in relation to the moment at which the change of nationality or the restructuring of the investment occurred. In this sense, the award distinguished between different types of harmful measures: those (i) adopted at a given time; (ii) adopted in a continuous way; and those (iii) composed of a series of simpler measures.

In conclusion, the key factor in the case was whether the change of nationality occurred before or after the party considered that there was a high probability that the dispute would occur and not merely that such dispute was deemed likely to occur. If the change of nationality occurred once there was a high probability of a dispute, the award understood that there would be an abuse of process.

Despite the application of abuse of process in this case, case law may not always be unanimous. However, a precedent was set under ICSID arbitrations in the Phoenix Action *v.* Czech Republic (46) case, in which the Tribunal ruled that there was an abuse of process regarding the change of nationality of the Investor .

Phoenix Action, an Israeli company, brought a claim against the Czech Republic related to the purchase of two companies, which were involved in the purchase and sale of ferroalloys. Phoenix Action bought the two Czech companies whilst they were under a criminal investigation over alleged custom duty evasion, and transferred the ownership of these companies to an Israeli company. The Israeli company argued that the lengthy litigation proceedings,

(46) Case CIADI number ARB/06/5, Phoenix Action Ltd. v. Czech Republic.

which continued after it took ownership of the companies, amounted to a denial of justice.

The Czech Republic responded that by transferring the ownership of the companies to Israeli companies, Phoenix Action's purpose was to gain access to international arbitration protection by way of the Israel-Czech Republic BIT.

The Tribunal focused on two different moments: (i) the moment at which the investment was made; and (ii) the moment at which the claim was filed. Regarding the first instance, the Tribunal found that the damages claimed by Phoenix Action had already been caused by the time the investment was made. Furthermore, in relation to the moment at which the claim was filed, the Tribunal stated that the claim was founded on the violation of the principle of fair and equitable treatment caused by an investment problem.

Moreover, the Tribunal found that (i) there was no evidence that Phoenix carried out any substantial business activity in Israel; and (ii) by the time the claim was notified to the Czech Republic, the transfer of shares from the Czech companies to Phoenix Action had not yet been registered. This led the Tribunal to conclude that the transfer was actually made with the sole purpose of Phoenix Action gaining undue access to ICSID jurisdiction.

For all of these reasons, the Tribunal understood that there had been no economic investment, only the redistribution of assets and liabilities to acquire the legal standing to bring an ICSID arbitration (47).

In conclusion, due to the lack of consensus in case law, the determination of any abuse of process may be analysed by Arbitral Tribunals on a case-by-case basis.

IV. THE POSSIBILITY OF BRINGING CLASS ACTIONS UNDER THE ECT AND THE CONSOLIDATION OF PROCEEDINGS UNDER THE ECT

The ECT does not make any provisions regarding class actions. However, under ICSID arbitration (which, as explained, is one possible dispute resolution path under the ECT) a number of precedents (48) have been set, establishing the following requirements *vis-à-vis* class actions:

— The nature of the claims brought by the Investors must be identical and homogeneous.

— The claims brought by the Investors must all arise from the same BIT (i.e. Treaty).

(47) *Vid*. paragraph 94-95 of the ICSID award: «International investors can of course structure upstream their investments, which meet the requirement of participating in the economy of the host State, in a manner that best fits their need for international protection, in choosing freely the vehicle through which they perform their investment. (…) But on the other side, an international investor cannot modify downstream the protection granted to its investment by the host State, once the acts which the investor considers are causing damages to its investment have already been committed».

(48) Case CIADI n.º ARB/07/5, Abaclat et. al. *v.* Argentina.

— All of the claimants must be Investors and must have performed Investments.

For example, in the case of Abaclat et al. v. Argentina (49) (under ICSID arbitration), 60,000 holders of a sovereign wealth fund brought an arbitration against Argentina. Argentina opposed the arbitration alleging that the holders, represented by an association, lacked legal standing. The Tribunal decided that the class action was duly filed because all of the individual claims were identical, homogeneous and all arose from the same BIT.

However, the co-arbitrator Sir Georges Abi-Saab issued a dissenting opinion and argued that (i) the legal standing to bring class actions is not expressly permitted under ICSID Rules; and furthermore, that (ii) it cannot be understood that Argentina's consent to submit any dispute under the BIT means that Argentina has consented the legal standing of thousands of sovereign debt participants in a single arbitration.

Even though the ECT has not yet established any provision concerning class actions, this case could allow the possibility of bringing a class actions arbitration under the ECT in the near future, despite the reluctance of Contracting Parties.

A separate issue to consider is whether several Investors, having each individually initiated a claim against a Contracting State, may subsequently decide to join their arbitrations together to form a class action arbitration. Once again, the ECT, and ICSID do not make any express provision on the possibility of consolidating different arbitration proceedings against the same Contracting Party.

Nevertheless, the ECT is a tool for application in multi-party disputes. In fact, the ECT provides wide protection which is likely to be available for all parties allows one consolidated case to resolve the issues in hand, overall saving time and money, avoiding the issue of conflicting awards and the subsequent enforcement problems that this can entail). This is certainly useful in cases in which the parties have several different nationalities, such as joint operating agreements or production sharing contracts.

However, given that the ECT does not allow for this possibility, in practice different techniques have been used to achieve the same effect of consolidation of arbitration proceedings. In particular, in cases with similar disputes, the ICSID Secretariat appoints the same Tribunal to resolve all similar cases in order to avoid inconsistent awards. This technique has been used in two cases against Morocco (50) and other cases against Argentina (51), given that the claims were based on the same BIT and on the same factual and legal framework.

(49) Case CIADI n.º ARB/07/5, Abaclat et. al. *v.* Argentina.

(50) Case CIADI n.º ARB/00/4, Salini Construttori S.p.A. *v.* Kingdom of Morocco; and Case CIADI nº ARB/00/6, Consortium R.F.C.C *v.* Kingdom of Morocco. In both arbitrations, the Tribunal was comprised of Mr. Robert Briner, Mr. Bernardo Cremades and Mr. Ibrahim Fadlallah.

(51) Case CIADI n.º ARB/03/17, Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. e Interaguas Servicios Integrales de Agua, S.A. *v.* Argentina. and Case CIADI n.º ARB/03/19, Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. *v.* Argentina. In both arbitrations, the Tribunal was comprised of Mr. Jeswald W. Salacuse, Ms. Gabrielle Kaufmann-Kohler and Mr. Pedro Nikken.

Nonetheless, it is to be noted that when executing awards, the constitution of the Tribunal may be challenged.

V. CONCLUSION

Despite being a comparatively young Treaty, the number of Investors and Contracting Party arbitrations brought by the ECT has grown considerably in recent years (52).

In this article we have analysed the scope of protection granted by the ECT. One of the critical issues to be considered when seeking such protection is whether the requirements to be considered an Investor are fulfilled.

In this sense, it is important to note that the concept of Investment as outlined by the ECT is extremely wide, includes indirect Investment and the holding of shares, and that the concept of Investor is rooted in the standard of the place of incorporation. Hence, it can be concluded that the ECT offers Investors protection to across a wide range of circumstances.

ECT arbitration can prove itself an effective mechanism of dispute resolution against Contracting Parties, particularly in circumstances when processes established by the national law of the host state can be long and complicated, and impartiality cannot always be guaranteed. Similarly, ECT arbitration might be useful for the purposes of enforcement .

ECT dispute mechanisms have already been carried out in a significant number of cases. Despite this, we have no doubt that as the disputes become more and more sophisticated, the Arbitral Tribunals dealing with them shall also provide for more flexible and tailored solutions.

(52) Sixteen cases were filed in 2013 and nine cases in the last year alone (of a total of 64 cases reported by the Energy Charter Secretariat). Information available at *www.encharter.org*.