In the matter of:

ELECTRABEL S.A., Claimant

v.

THE REPUBLIC OF HUNGARY, Respondent

ICSID CASE № ARB/07/19

SECOND OPINION OF

PROFESSOR ADNAN AMKHAN

Former Head of Legal Affairs, Energy Charter Secretariat

Table of Contents

I. INTRODUCTION

1. I have been asked by Clifford Chance, acting for the Claimant, to give a brief second opinion on matters concerning the Energy Charter Treaty (hereinafter the "ECT") and international law raised by the Respondent's Counter-Memorial in *Electrabel S.A. v The Republic of Hungary* (ICSID Case No ARB/07/19).

2. Clifford Chance has supplied me with copies of the following documents:

   - Claimant's Memorial dated 29 July 2008;
   - Amendment to Part VII of Claimant's Memorial dated 30 January 2009;
   - Respondent's Counter-Memorial dated 15 May 2009;
   - The European Commission's Written Submission Pursuant to Art. 37(2) of the ICSID Arbitration Rules, dated 12 June 2009;
   - Expert Report of Prof. Piet Jan Slot dated May 14, 2009.

3. At the outset, I wish to reiterate what I said in paragraphs 7 and 10 of my First Opinion dated 28 July 2008.

4. I should also like to confirm that my First Opinion, this Second Opinion, and the conclusions contained therein, are all true to the best my knowledge.

5. In this opinion, I shall present my brief comments on those issues relating to the ECT and international law that I consider relevant to the dispute at hand and which may be of assistance to the Arbitral Tribunal.

6. For ease of reference, I have asked Clifford Chance LLP to cross-reference the authorities to which I refer in the Claimant's bundle of authorities.

7. This Opinion is set out in seven Sections as follows:
   - Applicable Law, and Rules of Interpretation.
   - The ECT's Relation to other International Agreements.
   - The Prohibition of Expropriation: Article 13 of the ECT.
   - The Question of Attribution.
   - Obligations under Article 10(1) and (7) of the ECT.
   - Comments on EC's Written Submission.
   - Conclusions.

II. APPLICABLE LAW AND RULES OF INTERPRETATION

8. The main aim of this section is twofold: first, to revisit the issue of substantive Applicable Law, and to supplement what I said in my First Opinion regarding the relationship between applicable law, Hungarian domestic law, and the European Community law; and second, to expound on the applicable rules of interpretation.

9. At the outset it is noteworthy that the Claimant has seized the present Arbitral Tribunal in exercise of a right granted to it by an international treaty, namely the ECT, to which Hungary is a Contracting Party.

10. Pursuant to Article 26(1) of the ECT, the Claimant's claims are based on Hungary's breach of its various obligations as found in Part III of the ECT.

11. Therefore, all of the Claimant's claims are treaty claims. In other words, the wrongs complained of are actionable under the ECT. Whether or not the measures complained of by the Claimant are actionable and/or lawful under the domestic law of the Respondent or any other legal order is of no substantive consequence to the case at hand.

12. Therefore the rights of the Claimant (as a qualified Investor), and the obligations of Hungary (as an ECT Contracting Party), are to be determined solely by international law and not by any other national law or legal order.

Applicable Law Revisited

13. In para. 36 of my First Opinion, I noted that pursuant to Article 26(6) of the ECT, "... an arbitral tribunal (such as the present one) that has been seized pursuant to paragraph (4) of Article 26 of the ECT is to decide the issues at hand by applying (a) the Treaty provisions [i.e. the ECT] and (b) the applicable rules and principles of public international law."

14. I also stated in para. 37 of the First Opinion that "...because the present claim is an international law claim and because the applicable law to the present dispute is the provisions of the ECT and the rules and principles of international law, Hungarian domestic law is essentially a matter of fact or evidence."

15. In explaining what is meant by "a matter of fact or evidence" I cited the PCIJ's pronouncement in the *Certain German Interests In Polish Upper Silesia* case, which is worth repeating. The PCIJ observed:

> "From the standpoint of International Law ... municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgement on the question [as to] whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."[1]

16. Accordingly, it is clear that in a treaty claim like the present case, an international arbitral tribunal applying international law will consider rules of domestic law as evidence of compliance or non-compliance with specific international law obligations. However, this is not the same as saying that because domestic law is relevant as a matter of fact or evidence it therefore applies to the merits of the case at hand.

17. The Claimant, in its "Amendment to Part VII of the Claimant's Memorial", has submitted "that it is a fundamental principle of international law that a State cannot invoke its municipal law (and in the instant case European law) to justify its breach of international obligations." In support of this principle, the Claimant invoked the *Reparation for Injuries* case (para. 39 of the Amendment) and Articles 27 and 3 of the *Vienna Convention on the Law of Treaties* and the *International Law Commission's Article on Responsibility for Internationally Wrongful Acts* respectively (paras. 40 and 41 of the Amendment).

---

[1] PCIJ Rep., ser A. No. 7, p. 19. [CA-54]

18. I would add that Anthony Aust, in his seminal work on the law of treaties, refers to EC Law as being part of municipal law. He states: "... internal law includes, for example, (supranational) EC law."[2]

19. The Respondent, in its Counter-Memorial seems to accept the above-mentioned legal principles. The Respondent notes "... that the notion of Hungarian domestic law includes EC law as well, due to Hungary's accession to the European Union in 2004. Therefore EC law is also relevant in this arbitration as a matter of fact or evidence."[3]

20. To reiterate therefore:

    a) a party to a treaty may not invoke the provisions of its domestic law as justification for its failure to perform a treaty.

    b) the "characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law".[4]

21. A different facet of this same principle was also affirmed by a Chamber of the International Court of Justice in the *ELSI* case:

> "Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of a treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision."[5]

22. The above principles, and the applicable rules of ECT interpretation, were explicitly confirmed in a statement by the Chairman of the Energy Charter

---

[2] Anthony Aust, *Modern Treaty Law and Practice*, 2007, p. 180, at footnote 11. [CA-66]

[3] Respondent's Counter-Memorial, para 401.

[4] Article 3 of the ILC Articles. [CA-6]

[5] *Elettronica Sicula S.P.A. (ELSI),* ICJ Reports, 1989, p. 15. [RA-16]

Conference during the adoption session on, 17 December 1994. The Chairman's Statement in relevant part reads thus:

> "...
>
> Finally, I note that the representative of Norway supported by the representatives of Armenia, Belarus, Estonia, European *Communities and their Member States*, Finland, Iceland, Lithuania, Liechtenstein, Kazakhstan, Moldova, the Russian Federation, Sweden, Switzerland and Ukraine have declared that the Treaty [ECT] shall be applied and interpreted in accordance with generally recognized rules and principles of the Vienna Convention on the Law of Treaties of 25 May 1969. *In particular in the context of Article 18(2)*[6] *they recalled that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.* The Treaty [ECT] shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose."[7]

23. It is clear from this statement that the European Communities, and its Member States, accepted at the time of the ECT's signature that (a) a Contracting Party to the ECT "may not invoke the provisions of its internal law as justification for its failure to perform [the ECT obligations]" and (b) that the provisions of the ECT are to be interpreted in accordance with Article 31-33 of the Vienna Convention on the Law of the Treaties (1969).

24. In conclusion, I am of the opinion that because the Claimant's claims are treaty claims and also because the applicable law is the ECT and "applicable rules and principles of international law", Hungary can invoke neither its domestic law nor European Community law in order to justify any act or measure which is in

---

[6] The reason that Article 18 (2) of the ECT is specifically mentioned in the Chairman's Statement is in order to highlight the part which reads "...the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources", was based on Article 295 of the European Community Treaty. The ECT negotiators wanted to make clear that the interpretation and application of Article 295 within the context of the European legal order, or by the laws of any Member State, should not be adhered to by an international tribunal seized under the ECT. Relevant in this context is ECT Declaration V, which reads as follows: "[t]he representatives declared that Article 18(2) shall not be construed to allow the circumvention of the application of the other provisions of the Treaty."

[7] Emphasis added.

breach of its ECT obligations. In other words, "the provisions of municipal law cannot prevail over those of the treaty".[8]

The Applicable Rules of Interpretation

25. It is common ground that since this dispute has arisen in connection with the ECT, the interpretation of any of its provisions should be carried out in accordance with the rules of treaty interpretation.

26. It is also common ground that the applicable rules of interpretation are those set out in Article 31-33 of the Vienna Convention on the Law of Treaties 1969 ("VCLT"). That this is the case was also confirmed by the Statement of the Energy Charter Conference Chairman (see para. 22 above).

27. Describing the proper method of interpretation according to Article 31 of the VCLT, Anthony Aust observes:

> "Article 31 is entitled '*General rule* of interpretation'. The singular noun emphasises that the article contains only one rule, that set out in paragraph 1. One must consider each of its three main elements—the text, its context and the object and purpose of the treaty.[9]

28. In para. 21 of my First Opinion, I noted that "*one of the central objectives* of the Treaty is to provide a high level of protection to the investments of investors in the energy sector." This is so because the underlying aim of the whole Energy Charter process is to improve "security of energy supply": an aim which cannot be achieved without long-term investment in all the various stages of the energy cycle. In order to secure such investments, a high level of protection for such investments is essential; in other words, procedural and substantive guarantees that ensure potential political risks are minimized.[10] It is with this in mind that

---

[8] *Greek and Bulgarian Communities* case (1930) PCIJ, Series B, No. 17, at p. 32. [CA-72]

[9] Aust, *Modern Treaty Law and Practice*, 2007, p. 230. [CA-66]

[10] The significance of the Investment guarantees of the ECT has been highlighted in the Article 47 of the ECT entitled "Withdrawal". Article 47(3) reads as follows: "[t]he provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or

the provisions of the ECT's investment provisions should be construed and indeed interpreted.

29. It is to be made clear that I am not advocating any particular form or method of interpretation other than the method set out in Article 31 of the VCLT.

30. In paras. 404-414 of the Counter-Memorial, the Respondent asserts that the Tribunal should seek to harmonise the interpretation of the ECT provisions with EC law.

31. I am of the opinion, however, that this is not the function of this Arbitral Tribunal. Rather, the mandate of this Arbitral Tribunal is to interpret the provisions of the ECT in accordance with the applicable rules of treaty interpretation.

32. The fact that the European Energy Charter was the "brainchild" of the European Community[11] does not necessarily imply that the interpretation of the ECT should be harmonised with EC law. Although both the ECT and the European Community law - in certain respects - based upon similar policy objectives (including market liberalisation); they are clearly two different legal orders.

33. From the perspective of the ECT, European Community law is no different from the domestic laws of other Contracting Parties. It is thus for the European Union to harmonise its legal order to comply with its international obligations. In short, international law has primacy.

34. This, however, should not be construed as denying that the ECT encourages competition, liberalisation of energy markets, and access to energy markets. These

---

in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date."

[11] The origin of the ECT is briefly recounted in the Final Act of the Energy Charter Conference, Item II, pp. 23-24 of the Energy Charter Treaty and Related Instruments, published by the Energy Charter Secretariat in 2004.

objectives are to be implemented, however, within the energy investment legal framework as set out in Part III of the ECT. This is how the drafters perceived the energy regime of the ECT.

III. THE ECT'S RELATION TO OTHER AGREEMENTS

35. I understand that both the Respondent and the European Commission contend that because the European Community legal order is founded on an international treaty, the EC law should also be considered applicable to the instant dispute.[12]

36. I find this argument difficult to understand for the following reasons.

37. First, the fact that the European Community law is based on an international treaty, does not necessarily imply that European Community law should apply to claims brought under a different treaty.

38. Second, the *sui generis* character of the European Community law has long been established. As Richard Gardiner put it:

> "The ECJ has viewed the founding instruments of the European Community more as a constitution of a new legal order than as treaties applying in relations between states parties to them. *Distinguishing the legal order of the Community in this way from public international law has generally resulted in the ECJ not applying the Vienna rules of these* treaties".[13]

39. Richard Happ further elaborates:

> "Unlike many bilateral investment treaties, the ECT does not prescribe the application of municipal law of a contracting party. As a consequence, the EC Treaty is not to be applied by an ECT-based arbitral tribunal. For the EC Treaty is not only an international treaty, it is also the constituting order of the European Communities. As such, it has—from the perspective of international law—a function comparable to the constitution of a state as contracting party."[14]

40. Third, even if we were to accept *arguendo* that the European Community Treaty is directly applicable to the issues at hand, Article 16 of the ECT will apply.

---

[12] Para. 402 of the Respondent's Counter-Claim.

[13] Richard Gardiner, *Treaty Interpretation*, 2008, p. 12 (emphasis added); see, for example, *Van Gend en Loos v Nederlandse Administratie der Belastingern*, [1963] ECR. 1. [CA-76]

[14] Richard Happ, The Legal Status of the Investor vis-a-via the European Communities: Some Salient Thoughts, 10 *International Arbitration Law Review* [2007], p. 74, at p. 76. [CA-77]

Article 16[15] (not mentioned by the Respondent) provides for a clear procedure that protects the rights of an Investor under both Parts III and V of the ECT. It reads as follows:

> "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 [Investment Promotion and Protection] or V [Dispute Settlement] 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.*"[16]

41. It is clear that Article 16 of the ECT was deliberately designed to ensure that a covered Investment [Part III] and a qualified Investor [Part V] will continue to enjoy the most favourable treatment available under *any Treaty*. It is also clear from the wording of Article 16, that the same applies to all Investors and Investments. The fact that the home State of an Investor and the host State of an Investment are contracting parties to another agreement (in the present case the European Community Treaty) does not alter either the procedural or the substantive rights granted to Investors and Investment of a Contracting Party under the provisions of the ECT.

42. In this context, it is relevant to mention Decision 1,[17] made with respect to the ECT as a whole. Decision 1 explicitly excludes the Svalbard Treaty from the

---

[15] Referred to as "The best of the two worlds", see Anthony Aust, *Modern Treaty Law and Practice*, 207, at p. 226. [CA-66]

[16] Emphasis added. Footnote omitted.

[17] It is to be noted that according to Article 48 of the ECT "[t]he Annexes to this Treaty and the Decisions set out in Annex 2 to the Final Act of the European Energy Charter Conference signed at Lisbon on 17 December 1994 are integral parts of the Treaty."

application of Article 16 of the ECT.[18] This exception to Article 16 was introduced at the insistence of Norway. No other treaty, including the European Community Treaty, is excluded from the application of Article 16. The European Communities and its Member States clearly opted not to exclude the European Communities Treaty from the application of Article 16 of the ECT. It therefore follows that Article 16 applies with respect to the European Community Treaty.

43. In my opinion, it is clear that the Claimant's Investments in Hungary cannot be deprived of the ECT's Part III benefits. Similarly, the Claimant (as a qualified Investor) cannot be deprived of its right to initiate an arbitration claim, a right granted to it by Article 26 of the ECT. These ECT rights are neither affected nor altered by the fact that Belgium (the home State), and Hungary (the host State) are themselves parties to the European Community Treaty. Nor is there any evidence whatsoever in the ECT's negotiating history to suggest otherwise.

[18] Decision 1 with respect to the Treaty as a whole reads as follows: "[i]n the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties in respect of the Svalbard Treaty. In the event of conflict or a dispute as to whether there is such conflict or as to its extent, Article 16 and Part V of the Energy Charter shall not apply.

IV. THE PROHIBITION OF EXPROPRIATION: ARTICLE 13 ECT

44. Whether or not the PPA Termination Act constitutes an expropriatory measure prohibited under Article 13(1) of the ECT is a central point of contention between the disputing parties. The Claimant contends that the Termination Act constitutes an expropriation under Article 13(1) of the ECT and "applicable rules and principles of international law." The Respondent argues, however, that the Termination Act is not an expropriatory measure and that it (the Termination Act) was a lawful measure.

45. In this section, I shall first outline the overall design of Article 13(1) of the ECT. Second, I shall consider whether contractual rights are subject to expropriatory measures under Article 13 of the ECT. Finally, I shall examine the Respondent's arguments concerning the interpretation and application of Article 13(1) of the ECT.

The overall design of Article 13 of the ECT

46. It is to be noted at the outset that the obligation (and its exceptions) as set out in Article 13(1) was accepted at a very early stage of the ECT negotiations.

47. The Chapeau of Article 13(1) of the ECT prohibits a Contracting Party from nationalising or expropriating the Investments of Investors of another Contracting Party, or taking a measure or measures the effect of which is equivalent to expropriation. The obligation not to expropriate has four *exceptions*, listed in Article 13(l) (a)-(d).

48. A claimant alleging a breach of obligation under Article 13(1) has the burden of establishing that a particular measure or measures undertaken by the respondent have expropriated its (the claimant's) Investment(s). The respondent will either deny direct or indirect expropriation (as the case may be) or alternatively, seek to establish that the expropriatory measure(s) were: (a) for purposes which are in the public interest; (b) not discriminatory; (c) carried out under due process of law;

and (d) accompanied by the payment of prompt, adequate and effective compensation.

49. It is important to note that the exceptions enumerated in Article 13(1) of the ECT are *cumulative* (as indicated by the word "**and**"): that is, in order for an expropriation to be deemed *lawful*, **all** of the four exceptions (a to d) must be present, including the payment of prompt, adequate and effective compensation. If any of those exceptions is not present, there will be a breach of Article 13(1) of the ECT, thus rendering the expropriatory measure *unlawful*.

Contractual rights are a protected Investment under the ECT

50. Article 1(6) of the ECT defines "Investment" as "every kind of asset, owned or controlled directly or indirectly by an Investor". The same article then provides an illustrative list of specific and distinct assets that fall within the definition of an Investment: e.g., company, business enterprise, shares; claims to performance pursuant to contract; any right conferred by law or contract.

51. It is clear from the structure of Article 1(6) that Investments can therefore take many different forms, all of which are protected by the relevant ECT standards.

52. It is therefore possible that any or all of these Investments can be subject to measures in breach of an ECT obligation, including expropriation. This is abundantly clear from Article 13(1) of the ECT: "*Investments* ...shall not be nationalised or expropriated or subjected to a measure or measures having an effect equivalent to nationalisation or expropriation ..."

53. Additionally, in para. 65 of my First Opinion I referred to the well-established principle of international law that contractual or any economic right (as well as physical property) may be subject to expropriatory measure(s).

54. It follows from the above brief analysis that contractual rights are assets that are protected by the ECT, and that such assets can in themselves be subject to expropriatory measures. This is regardless of whether the contract in question is entered into with the government itself or with any other entity.

55. In the instant case, the Claimant asserts that the termination of the PPA by Hungary constitutes an expropriation or a measure having effect equivalent to an expropriation, and is thus in breach of Article 13(1). The Respondent offers several arguments to the contrary.

A brief analysis of the Respondent's arguments relevant to expropriation

56. First, in para. 527 of the Counter-Memorial, Hungary states that:

> "... the investor [Electrabel] must show that the measure adopted by the host State [Hungary] either directly expropriated the investment or had an effect *equivalent* to expropriation. Once this determination is made, the investor [Electrabel] additionally ... must show that the measure was not taken for a purpose which is in the public interest, was discriminatory, was not carried out under due process, or [*sic*] was not accompanied by the payment of prompt, adequate and effective compensation."[19]

57. This is partially correct. It is true that the onus is on the Claimant to establish that the PPA's termination constitutes an expropriation, or had an effect equivalent to expropriation. It is however incumbent upon the Respondent rather than the Claimant to prove the four cumulative *exceptions*.[20]

---

[19] In para. 547 of Respondent's Counter-Memorial, the Respondent also states that "[i]n order for an ECT violation to be established, Claimant must also show that the Termination Act was adopted for a purpose other than the public interest, was discriminatory, or was carried out in violation of due process, and that compensation wad due but was not been paid."

[20] In the *Feldman* case, the Tribunal observed that "[o]n the question of burden of proof, the majority finds that the following statement of the international law standard helpful, as stated by the Appellate Body of the WTO: "...various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence. *If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other*

58. The Claimant cannot simultaneously be required to prove **both** the breach of an obligation, **and** the exceptions to that same obligation which, if present, make the breach lawful.

59. Second, in paras 528 – 546 of the Counter-Memorial, the Respondent argues extensively in support of the proposition that:

> "[i]n the absence of any deprivation of ownership, use or control, this test traditionally requires ... that an investment be deprived of all meaningful economic value, by measures that are permanent and irreversible. Claimant clearly cannot make this showing, because even though the PPA Termination Act put an end to its contractual rights under the PPA, ... Dunamenti continues to operate in Hungary's electricity market ..."

60. The above proposition by the Respondent warrants the following brief comments.

61. First, the Respondent confuses the different forms of covered Investments, thus committing a category mistake. Simply because "Dunamenti continues to operate in Hungary's electricity market",[21] it does not follow that the PPA termination does not amount to expropriation.

62. As explained above (paras. 50-51), Article 1(6) of the ECT makes it clear that protected "Investment" covers many different forms of assets, including *rights conferred by contract*. It is more than likely that a single Investor would own or control (directly or indirectly) more than one form of Investment. That this would normally be the case is clear from the reference to "Investments of Investors" throughout Part III of the ECT.

---

party, who will fail unless it adduces sufficient evidence to rebut the presumption." (emphasis in original) *Marvin Feldman v Mexico*, ICSID Case No. ARB/(AF)/99/1, Award of December 16, 2005, at. Para. 177. [CA-36]

[21] Para 529 of Respondent's Counter-Memorial.

63. Furthermore, in *Middle East Cement Shipping v Egypt* case, the tribunal accepted that a specific form of investment can indeed be subjected to expropriation, demonstrating that "it is possible to expropriate specific rights enjoyed by the investor separately *regardless of the control over the overall investment.*"[22]

64. Accordingly, it is my opinion that the crucial question in the instant case is not whether the Termination Act has expropriated *Dunamenti* (as an enterprise), but rather whether the Termination Act deprived the Claimant of its contractual rights under the PPA.

65. There is little doubt that the PPA is an asset, and thus an Investment covered by the ECT. It is equally clear that the PPA has been terminated by an organ of the Respondent, with the direct consequence that the PPA (i.e. the Investment) "has lost its economic value completely". It follows therefore that the Termination Act is indeed an expropriatory measure as defined under Article 13 of the ECT.

66. In light of the above analysis, I am of the opinion that the authorities cited by the Respondent denying that the Termination Act constitutes expropriation (or has the effect equivalent to expropriation) are either irrelevant, or, where relevant, actually support the proposition that the Termination Act is a measure that has an effect equivalent to termination, and is thus in breach of Article 13(1) of the ECT.

67. Second, in para. 554, the Respondent contends that "[t]he fact that the PPA has been declared illegal by the European Commission underscores the absence of any compensation obligation." And that "the Commission explicitly warned Hungary it could not compensate generators for any modification or termination of their PPAs..." The Respondent then concludes that "[n]othing in international law requires a State to indemnify investors for modifications to contracts that are

[22] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2008, p. 108 (emphasis added). [CA-43]

illegal as a matter of supervening public policy." However, the "supervening public policy" invoked by the Respondent is EC public policy and not a public policy norm of international law. Again, the Respondent is seeking to invoke a norm from a different legal order and its right to regulate matters within its jurisdiction.

68. The Respondent's above contentions are partly reminiscent of Hungary's argument in the *ADC Affiliate Limited v Hungary* case, in which the tribunal observed that:

> "The Tribunal cannot accept the Respondent's position that the actions taken by it against the Claimants were merely an exercise of its rights under international law to regulate its domestic economic and legal affairs. It is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than *ignored by a later argument of the State's right to regulate.*"[23]

69. As explained above (paras. 13-15), EC law is not the applicable law to the dispute. Moreover, the measure objected to by the Claimant is the Termination Act as promulgated by the Hungarian Parliament.

70. The assertion that the Termination Act was a measure adopted in order to comply with the Commission's Decision of 4 June 2008 does not exonerate the Respondent from its obligation under Article 13(1) of the ECT. As put by Professor Christian Tjetje "from a public international law perspective, an *inter se* modification of the ECT by EC law is not possible."[24]

---

[23] *ADC Affiliate Ltd and ADC & ADMC Management Ltd v The Republic of Hungary*, Award, ICSID Case No. ARB/03/16, para. 423. [CA-51]

[24] Christian Tietje, "The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States", 2008, p. 13. [CA-67]

71. Further, for the purposes of Article 13 (1) of the ECT, even if it is correct to argue that because compensation is prohibited by the European Commission,[25] it is incorrect to conclude that compensation for expropriation is not due under international law.

72. It is relevant to note that on 27 August 1993 (while the ECT was still under negotiation), the Commission of the European Communities issued a "progress report on the Basic Agreement [ECT] negotiations". The Commission's comments on the expropriation Article of the ECT is relevant to the issue at hand, and deserve to be quoted in full:

> *"The Community can agree in principle to the whole of the Article, provided that the former paragraph 3, dealing with the problem of compensation for shareholders of a company who have had their assets but not their shares expropriated, is reinstated. An agreement in the Plenary Session also depends on the Russian position on paragraph 1 (compensation calculated on the basis of a freely convertible currency).*
>
> *As regards the proposals (Norway) which seek to deprive expropriated Investors of the right to compensation if the expropriation is the result of issuing, creating, restricting or revoking mandatory licences, these severely restrict the right to compensation in the case of dispossession and are therefore unacceptable to the Community."*[26]

73. Finally, it is to be noted that the Respondent seems to suggest that some additional conditions should be admitted into the definition of expropriation, such as a measure not being expropriatory if introduced for reasons of public order.[27]

74. I should like to note that the expression "public order" which appears in Article 24 (entitled "Exceptions") invoked by the Respondent denotes public peace, and is

---

[25] A point of contention between the parties: I am not in a position to express an opinion on this particular matter.

[26] Progress report on the Basic Agreement Negotiations – Commission of the European Communities Staff Working Paper, 27 August 1993, p. 4. [CA-75]

[27] Paragraphs 548-549 of the Counter-Memorial.

therefore not relevant to the instant case. However, if the Respondent is in fact suggesting "*ordre public*" as a norm of international law, such a suggestion is highly questionable, and from the perspective of Article 13 of the ECT, clearly inapplicable. In any event, it is clear that Article 24 (1) provides that the exceptions listed in Article 24 shall not apply, *inter alia*, to Article 13 (the Expropriation provisions).

75. It is my opinion that the better view is the one pronounced by the *Santa Elena v Costa Rica* tribunal. In this case, the tribunal held that the fact that measures in question were taken for the purpose of environmental protection did not affect their nature as an expropriatory measure. The tribunal went on to say:

> "Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains."[28]

76. The same compelling logic is directly relevant to the case at hand.

77. In light of the above brief analysis, it is my opinion that:

i. the Termination Act resulting in the termination of the PPA is an expropriatory measure.

ii. the Termination Act constitutes an unlawful expropriation under Article 13(1) of the ECT if the Respondent fails to establish that such measure was (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.

iii. the Termination Act frustrated the on-going legitimate expectations of the Claimant that its investments would not be expropriated in contravention of

[28] *Santa Elena v Costa Rica*, Award, 17 February 2000, para. 72. [CA-41]

Article 13 of the ECT. This is regardless of whether the Termination Act was or was not adopted in compliance with the Commission's Decision.

V. THE QUESTION OF ATTRIBUTION

78. It is common ground that the International Law Commission's Articles on Responsibility of State for Internationally Wrongful Acts (ILC's Articles) reflects customary international law on State responsibility. It is also accepted by the parties that the rules of attribution as set out in the Commission's Articles (Articles 2, 4-11), reflect the current state of international law.

79. Generally speaking, attribution as an element of a wrongful act which entails State responsibility depends on the link between the State and the person (natural or legal) who actually committed the unlawful act or omission.

80. In the instant case, the Respondent does not "... dispute, as a matter of principle, its international responsibility for the acts of the three branches of the Hungarian Government. Nor does Hungary dispute, in principle, its responsibility for the acts of the HEO, which is a government agency, part of Hungary's public administration, and exercises regulatory powers".[29]

81. Accordingly, it appears that the disputing parties are in agreement in considering the following acts to be attributable to the Respondent:

- The HEO's request of the fee renegotiation;
- The Tariffs Decree Claim issue by the executive branch of the Hungarian Government;
- The Mandatory Off-take Decree, and;
- The Hungarian Parliament Act № LXX dated 15 November 2008 entitled "On Certain Questions Related to Electricity" which terminated, among others, Dunamenti's PPA.

82. What seems to be the main point of contention between the parties is whether MVM's conduct (that the Claimant complains of in 2006 and 2008) is attributable to the Respondent under the circumstances of the present case.

[29] Paragraph 369 of Respondent's Counter-Memorial. Footnote omitted.

83. More specifically, the disagreement seems to centre on whether MVM and MVM Trade acted on "the instruction of, or under the direction or control of" the Respondent in seeking to reduce payments. This test of attribution is set out in Article 8 of the ILC Articles, and reads as follows:

> "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

84. In its commentary, the International Law Commission observed that "[i]n the text of article 8, the three terms "instructions", "direction" and "control" are disjunctive; it is sufficient to establish any one of them"[30] in a given instance.

85. Relevant to the case at hand is the clarification provided in the ILC's commentary on Article 8 of the ILC's Articles. The ILC observed that "[i]t is clear ...that a State may, either by *specific directions* or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, *in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of.*"[31]

86. The tests of "instruction" or "directions" and the "relationship between the instruction ... and the specific conduct complained of" are instructive for the purposes of this case. The Claimant identifies both the HEO's letter of 10 November, and the Minister's demand for a reduction in fees, as "specific directions or instructions" to the subsequent conduct of MVM and MVM Trade. In other words, the correlation between the "instruction given or direction" by said letter, and the Minister's own demand provide material evidence that the specific conduct of MVM is attributable to Hungary.

---

[30] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries,* 2002, p. 113. [CA-6]

[31] *Ibid.*, p. 113.

87. Speaking on the test of control, The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Prosecutor v. Tadić*, observed:

> "The requirement of international law for the attribution to State of acts performed by private individuals is that the State exercises control over the individual. The *degree of control* may vary according to the factual circumstances of the each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control."[32]

88. It is noteworthy that the negotiators of the ECT made some attempt to expound on the meaning of "control" (albeit in a different context and with regard to a different subject matter). Thus, Understanding 3 with respect to Article 1(6) provides that "...control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's (a) financial interest, including equity interest ... (b) ability to exercise substantial influence over the management and operation ...; and (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body."

89. These factual evidences as to what constitutes "control" are valuable, and it is arguable that these and similar factual evidence should inform the finding of "control", for the purpose of attributing the conduct of an entity to a State.

90. In light of the above analysis, it is safe therefore to assume that, as a matter of fact, MVM's conducts complained of by the Claimant are attributable to Hungary.

91. The Respondent further argues that MVM's conduct is of a commercial nature and thus may not be attributable to it.

---

[32] Case IT-94-1, *Prosecutor v Tadić*, 38 I.L.M, (1999), p. 1518, at p. 1541 (emphasis in the original text). [CA-71]

92. Admittedly, there are divergent views as to whether the commercial conduct by an entity may be attributable to the State, if any one of the elements enumerated in Article 8 of the ILC Articles is present (instruction, direction, or, control).

93. It is my opinion, the better view is the one expressed by *the Noble Ventures* tribunal when it explained:

> "With regard to the argument of the Respondent that a distinction has to be drawn between attribution of governmental and commercial conduct, the latter not being attributable, the following has to be said. The distinction plays an important role in the field of sovereign immunity when one comes to the question of whether a State can claim immunity before the courts of another State. However, in the context of responsibility, it is difficult to see why commercial acts, so called *acta iure gestionis*, should by definition not be attributable while governmental acts, so called *acta iure imperii*, should be attributable. *The ILC-Draft does not maintain or support such a distinction.* Apart from the fact that there is no reason why one should not regard commercial acts as being in principle also attributable, it is difficult to define whether a particular act is governmental. There is a widespread consensus in international law, as in particular expressed in the discussions in the ILC regarding attribution, that there is no common understanding in international law of what constitutes a governmental or public act. Otherwise there would not be a need for specified rules such as those enunciated by the ILC in its Draft Articles, according to which, in principle, a certain factual link between the State and the actor is required in order to attribute to the State acts of that actor.[33]

94. Accordingly, the Respondent's arguments in support of the contention that MVM's commercial decisions are not attributable to it are questionable.[34]

95. Finally, Article 22 of the ECT entitled "State and Privileged Enterprises" is also relevant to the issue of attribution arising in the context of the present case. It is to be noted however that the placement of this Article in Part IV of the ECT is

---

[33] *Noble Ventures v Romania*, Award, 12 October 2005, para. 82 [CA-7]. This was further confirmed in the *Bayindir Insaat Turizm Ticaret ve Sanyayi A.Ş v Islamic Republic of Pakistan* case, when the tribunal noted "... that attribution under Article 8 [of the ILC Articles] is without prejudice to the characterization of the conduct under consideration as either sovereign or commercial in nature." ICSID Case No. ARB/03/29, August 27, 2009, at paragraph. 129. [CA-57]

[34] Paragraphs 368 – 372 of Respondent's Counter-Memorial.

bound to raise some debate as to whether it (Article 22) falls within the jurisdiction of a tribunal seized under Article 26. This notwithstanding, Article 22 indicates quite clearly the intent of the ECT's negotiating parties regarding the test of attribution concerning the conduct of State enterprises. The Article 22, in relevant part, reads as follows:

> "(1) Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty.
>
> ...
>
> (3) Each Contracting Party shall ensure that if it establishes or maintains an entity and entrusts the entity with regulatory, administrative or other governmental authority, such entity shall exercise that authority in a manner consistent with the Contracting Party's obligations under this Treaty.
>
> (4) No Contracting Party shall encourage or require any entity to which it grants exclusive or special privileges to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under this Treaty.
>
> (5) For the purposes of this Article, "entity" includes any enterprise, agency or other organization or individual."

96. It is clear from the facts of this case that MVM is a State enterprise that has been maintained and/or established by Hungary.

97. In light of the above brief analysis, it is my opinion that there is sufficient evidence in fact, as well in law, to support the conclusion that MVM's specific conduct, complained of by the Claimant, is attributable to the Respondent.

VI. OBLIGATIONS UNDER ARTICLE 10 (1) AND (7) OF THE ECT

98. In this section I shall highlight some of the observations made in my First Opinion concerning the obligations of a Contracting Party under Article 10(1) and (7) of the ECT.

99. At the outset however, I should like to recall two points which I have already made elsewhere in this Opinion.

100. The first point is that under international law, Hungarian domestic law (including EU law) as invoked by the Respondent is relevant only as a matter of fact and/or evidence. Therefore, the legality of conduct under either of these laws (i.e. Hungarian domestic law) should not determine the legality of such conduct under the obligations set out in Article 10 (1) and (7) of the ECT.

101. The second point is that under international law, if the various MVM conduct complained of were carried out under "the instructions of, or under the direction or control of" the Respondent, such conducts would indeed be attributable to Hungary. This principle finds a specific expression in Article 22 of the ECT (see para 95 above).

Stable, equitable, favourable and transparent conditions for Investors

102. In addition to what I have said in para. 45 of my First Opinion, I wish to add the following observations. First, an ECT Contracting Party is under obligation to "encourage and create stable, equitable, favourable and transparent conditions *for Investors* ... to make Investments in its Area." This obligation is operative for a state at the time it becomes a Contracting Party to the ECT. As regards Hungary, this means simply that it was obliged to fulfil these conditions from 16 April 1998 onwards. Therefore, from this date Hungary, owed the Claimant the obligation to "create stable, equitable, favourable and transparent conditions" for the Claimant's investments. And these cumulative conditions should consistently be present for the duration of the Investment.

103. Second, I am still of the opinion that the analysis by the *Metalclad* tribunal (para. 46 of my First Opinion) of the requirement regarding transparency is eminently reasonable, the more so in the context of investments made in the energy sector.

104. Third, I disagree with the two statements attributed by the Respondent to the late Professor Wälde. The first statement is that "[t]he general standards under Article 10(1) ... need to be specified and applied in light of Article 20(2)" (Article 20(2) is the ECT's transparency article). This is not entirely correct. The scope of the transparency obligation should be ascertained not only by reference to Article 20(2) but also the "applicable rules and principles of international law." The second statement of Professor Wälde relied upon by the Respondent is that Article 20(2) provides a "relatively toothless obligation" because it only requires "... States to promptly publish laws and regulations affecting investments". In fact Article 20(2) requires rather more than that: Article 20(2) obliges ECT Contracting Parties to publish promptly "[l]aws, regulations, judicial decisions and administrative rulings of general application made effective by any Contracting Party, and agreements in force between Contracting Parties, which affect other matters [i.e., other than trade] covered by this Treaty ... in such a manner as to enable Contracting Parties and Investors to become acquainted with them." This is therefore far from a "toothless obligation", particularly if read in the context of the level of legal and commercial development of some of the ECT Contracting Parties, which included all of the ex-Soviet satellites.

"Accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment"

105. It is common ground that the "fair and equitable treatment" obligation consists of other sub-obligations, mentioned in para. 48 of my First Opinion.

106. I have three additional brief observations to make. First, the ECT's *travaux* does not reveal any specific content regarding the fair and equitable treatment

obligation. Therefore, its interpretation should be carried out in accordance with the general rule set out in Article 31 of the Vienna Convention of the Law of Treaties (1969). No doubt the Tribunal will most likely seek assistance from the findings of other tribunals and the writings of qualified publicists, without losing sight of the immediate "context" and the "object and purpose" of the ECT. Second, the verb "accord" implies a positive obligation. Third, the expression "at all times" refers to the duration of the Investment.

107. Therefore, the Respondent was obliged to "accord" to the *Investments* of the Claimant "fair and equitable treatment" for the duration of such Investments.

No impairment by unreasonable or discriminatory measures affecting the Investments management, maintenance, use, enjoyment or disposal

108. In the context of this obligation, I reiterate what I said in paras 53-57 of my First Opinion, but would add that the word "*measures*" covers any of a single unreasonable measure, or a single discriminatory measure, or a series of measures which may in aggregate be "unreasonable" or "discriminatory".

Not subject to treatment which is less favourable than that required by international law, including treaty obligations

109. In para. 59 of my First Opinion, I noted that this "provision was included by the drafters of the ECT in order to ensure that a very high standard of investment treatment will be maintained by the Contracting Parties."

110. The Respondent in para. 521 of its Counter-Memorial suggests that the above proposition is mistaken because "...a review of the ECT's *travaux préparatoires* reveals that, contrary to Professor Amkhan's suggestion, the inclusion of this provision was not intended to raise the level of treaty protection. Rather, the ECT drafters expressly recognized that the expression "treatment no less favourable" could in some circumstances been seen as "lower[ing] the level of

protection." In support of this allegation, the Respondent relies on two documents.[35]

111. The Respondent has misunderstood what I said in my First Opinion, and also misunderstood the negotiation history of the penultimate sentence of Article 10(1) of the ECT. This is apparent for the following reasons.

112. First, the first document dated 29 September 1994 does not deal with the penultimate sentence of Article 10(1). The Chairman of the Legal Advisory Committee wrote his comments in response to a proposal for the inclusion of the phrase "fair and equitable treatment" into Article 10(7) which deals with the national and MFN treatments. He suggested that such an inclusion would create confusion and would serve no purpose because the "fair and equitable treatment" standard had already been included in the second sentence of Article 10(1).

113. Second, the second document dated 29 September 1994 does not say what the Respondent attributes to it. Rather, this document deals with the relationship between the penultimate sentence of Article 10(1) and Article 10(10) which excludes intellectual property rights from the application of Article 10(3) and 10(7); in other words, from national and MFN treatment obligations.

114. Third, the main policy objective of the penultimate sentence of Article 10(1) was to ensure that the standards of investment protection set out in Article 10 as a whole would apply to intellectual property. But it was intentionally formulated broadly so that it now covers all treatment under international law, including treaty obligations. This policy objective was clearly stated by Sydney Fremantle in his response to the Legal-sub-group draft report. He stated that "because the existing conventions [IP conventions] are deficient, the IP provisions

[35] Footnote 1038 of the Counter-Memorial

of the Uruguay Round [are] much superior and nothing should be done in the ECT to reinforce the status of the lower standards of the existing conventions."[36]

115. Fourth, the penultimate sentence of Article 10(1)[37] can be legitimately construed as encompassing the MFN vis-à-vis other international agreements; in other words, qualified Investors can "import" a treatment from other agreements, if such treatment is better than provided for in the ECT. This cannot be seen as other than providing "a very high standard of investment treatment".

Not subjected to treatment less favourable than that accorded to Investments of Hungarian Investors or Investments of Investors of any other Contracting Party to the ECT, or any third State, as regards the Claimant's management, maintenance, use, enjoyment or disposal of its investment

116. Article 10(7) provides for a specific application of the non-discrimination concept. As is clear from the wording of Article 10(7), a Contracting Party to the ECT is under an obligation to accord no less favourable treatment to an Investment of an Investor than it accords to Investments of nationals, or to the Investments of another Contracting Party, or to an Investment of an Investor of a third state (i.e. a non-Contracting Party to the ECT); in other words, the better of national and MFN treatments.

---

[36] Original hand written letter from Mr Fremantle [CA-74]. Mr Fremantle, a British national, was one of the main figures of the ECT negotiations. He chaired the Working Group II which dealt with the investment issues of the ECT.

[37] With the exceptions of the treaty obligations mentioned in Understanding 17.

VII. BRIEF COMMENTS ON SOME OF THE ISSUES RAISED IN THE WRITTEN SUBMISSION OF THE EC

117. In this section, I shall discuss briefly some of the issues concerning the relationship between the ECT and the European Community law as raised in the Commission's Written Submission, dated 12 June 2009.

118. In paras. 36-38, the Commission offers some comments on the REIO Clause (Regional Economic Integration Organisation", as defined in Article 1(3) of the ECT. The Commission correctly notes that by virtue of Article 1(3), the EC is a Contracting Party to the ECT.

119. The Commission then refers to the "definition" of the Term "Area" with respect to REIO, which is set out in Article 1(10) of the ECT. Based on this "definition", the Commission contends that "[w]ithout taking account of this provision [1(10)] – which also informs all the provisions of the ECT – the interpretation of rights and obligations of parties would lead to absurd results. For example, "Transit" within the meaning of Art. 7(10)(a) ECT can only apply to the EC, as to [*sic*] the entity having the substantive competence for this issue under the EC Treaty and being a fully fledged customs union as a whole, and not to transportation between the EU Member States."

120. With due respect, the Commission's analysis of the relationship between REIO and Transit (as defined in the ECT) does not reflect the correct position of the European Community regarding the definition of Transit in the ECT. I say this for the following reasons.

121. First, Article 1(10) does not define "Area" as such with respect to REIO. The relevant part of Article 1(10) explains that "Area" with respect to REIO consists of "*Areas* of the member states of such an Organization."[38] What this in effect means is that the Area of a REIO is the aggregate of the *Areas* of the REIO's

[38] Emphasis added.

member states. The Term "Area" is defined, however, in paras (a) and (b) "with respect to a state that is a Contracting Party".

122. Second, the official understanding by the Commission of the word "Transit", as defined in Article 7(10)(a) is that it applies to each Contracting Party, including those who are a member of REIO. I hold this opinion because I dealt directly with this particular issue when I was involved in the negotiation of the Energy Charter Treaty's Transit Protocol (2000 – 2004). During these negotiations, the EU and its Member States submitted a proposal, the effect of which was to limit Transit to the Area of REIO as a whole (in effect the EC Area).[39] This proposal became notorious and was known as one of the three "outstanding issues"[40], and received much opposition from some delegates. The Community's delegate made it absolutely clear that its proposal was not intended to alter the definition of Transit in the ECT, as applying to each Member of the EC. The Commission as well as the Legal Affairs Department of the Energy Charter Secretariat (which I headed) produced separate written legal analyses of the EC's proposal.

123. I have no doubt whatsoever that during the Transit Protocol negotiations, the European Community and its Member States were of the view that the definition of Transit in the ECT applied to each one of the Contracting Parties of the ECT. Had the European Community entertained the same understanding of the definition of Transit as advocated in the Commission's Written Submission, there would have been no reason to introduce the REIO clause into the Transit Protocol in the first place.

---

[39] Article 20 (1) of the yet un-adopted Transit Protocol reads as follows: "For the purposes of this Protocol, the "Area" of a Contracting Party referred to in Article 7(10)(a) of the Treaty shall, as regards Contracting Parties which are members of a Regional Economic Integration Organisation, mean the area to which the treaty establishing such a Regional Economic Integration Organisation applies."

[40] The other two being "Transit Tariffs" and "Right of First Refusal".

124. In the Written Submission, the Commission asserts that "... the Contracting Parties to the Energy Charter took account of the growing importance of European integration and did not wish to impair the proper functioning of the EC, including the application of its State aid system."

125. While this may or may not be true, there is nothing in the ECT's *Travaux* which suggests that this was the reason why a REIO (the EC) was allowed to become a Contracting Party to the ECT.

126. The main reason behind allowing a REIO to become contracting party to the ECT was simply of a practical nature. As I said in my First Opinion, the ECT is more than an investment agreement. In addition to the investment provisions, the ECT contains provisions which deal with trade (EC competence), competition, transfer of capital, transfer of technology, sovereignty over energy resources, and environmental aspects

127. Therefore, the issue of allocation of competences between a REIO and its member states was one of the main practical problems faced by the negotiators of the ECT. Admitting REIO as a Contracting Party was thought to solve this intricate problem; in other words, a State cannot excuse itself from an ECT obligation merely because the subject matter of the obligation falls within the competence of the REIO.

128. Additionally, a REIO, at least in the context of the ECT, does not imply a "disconnection clause", and indeed no such implication is made in the negotiating history of the ECT.[41] (the EC submission tries to read into the REIO definition more than it can bear)

---

[41] Clauses included in a multilateral treaty according to which Member States of the European Union declare that in their relations *inter se*, the European Community Treaty/law will apply and not the treaty. See, e.g., Maja Smrkolj, "The Use of the Disconnection Clause" in International Treaties: What does it tell us about the EC/EU as an Actor in the Sphere of Public International Law?" downloaded from http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1021453. [CA-73]

129. The European Community played a major role in drafting the European Energy Charter (a political declaration). Equally however, the European Community and its Member States participated in the ECT negotiations on an equal footing with all other negotiating parties (e.g., Canada, Japan, USA, Australia, Russia), each one of which attempted to advance its policy objectives and national interests.

130. Furthermore, there is nothing in the *Travaux* of the ECT which suggests that an Investor of a Contracting Party (a member of a particular REIO) is prohibited from submitting an arbitration claim against another Contracting Party, member of the same REIO.

131. Nor does the t*ravaux* of the ECT contain anything to suggest that a Contracting Party (member of a REIO) is exonerated from a breach of its ECT obligation, merely because such a breach was committed in order to comply with a decision of the REIO.

132. In order to avoid repeating myself I respectfully refer the Arbitral Tribunal to Section III above on the issue of the relationship between the ECT and other international agreements.

133. In para. 51 of its Written Submission, the Commission asserts that "the Energy Charter Treaty and general international law directs the Tribunal to attributing the measure [i.e. the Termination Act] at issue to the European Community rather than Hungary." This is an absurd assertion. The Termination Act was promulgated by an ECT Contracting Party (Hungary). An Investor from another ECT Contracting Party is now alleging that the Termination Act is in breach of several ECT obligations. Because Hungary took the measure at issue in compliance with the Commission's Decision, it does not follow that such a measure is not attributable to Hungary under international law. The Commission's invocation of the REIO clause (Article 1(3) of the ECT) in order to

justify its argument is incorrect. As demonstrated above (paras.119-131), the Commission's analysis of the REIO clause in the context of this case is untenable.

134. Moreover, the Commission misinterprets the scope of application of Article 26 of the ECT. Thus, for example, in para. 62 of its Written Submission, the Commission asserts that "[t]he language of Article 26(1) of the ECT makes it plain that, for example, a company incorporated under the laws of one Contracting Party should not be enabled to start international litigation against the measures adopted by that very Party." And in para. 63 the Commission that "[t]he dispute settlement system under Part V of the ECT was ... not intended to grant international litigation rights for investors against measures taken by their own governments." Additionally, according to the Commission , "[i]n view of the negotiating history above, it was certainly not the intention of the Community and its Member States to provide for an alternative forum for EU investors against measures attributable to the Community."

135. To support these assertions, the Community relies again on definition of REIO in Article 1(3) and on the meaning of area (see para. 64).

136. In order to avoid repeating myself, I respectfully refer the Arbitral Tribunal to my analysis regarding REIO and the meaning of "Area" in paras. 11-121 above.

137. It is my opinion that the Commission's attempt to assign to Article 26 of the ECT a meaning it does not bear should not be allowed. The Commission's interpretation is supported neither by the plain wording of Article 26 of the ECT, nor by the negotiating history of the ECT itself. There is nothing in the *travaux* of the ECT which supports the Commission's bold interpretation of Article 26 of the ECT.

138. In my opinion, Professor Tietje is correct when he observes:

> "In conclusion, it is clear that the Energy Charter Treaty is applicable in an ICSID proceeding of an EU national versus an EU Member State. EC

law does not influence such a proceeding which is exclusively governed by public international law."[42]

139. Richard Happ is of the same view:

> "The ECT is applicable to the relationships between investors and the European Communities. From the perspective of international law, it does not matter whether an investor is from an EC Member State or from a third state which is a Contracting Party to the ECT. It is possible to institute arbitration proceedings against the European Communities; an investor is not required to seek recourse with the European Court of Justice."[43]

[42] *Op.cit.*, footnote, 23, at p. 17.

[43] *Op.cit.*, footnote 13, at p. 81.

VIII. CONCLUSIONS

140. In light of the above, my conclusions are as follows:

a) The rights of the Claimant and the obligations of the Respondent are to be determined solely by international law and not by any other national law or legal order.

b) The Respondent can invoke neither its domestic law nor European Community law in order to justify any act or measure which is in breach of its ECT obligations.

c) The Claimant's Investments cannot be deprived of the ECT's Part III benefits. Additionally, the Claimant cannot be deprived of its right to initiate an arbitration claim, a right granted to it by Article 26 of the ECT. These ECT rights are neither affected nor altered by the fact that the home State (Belgium) and host State (Hungary) are Member States of the European Union.

d) Whether or not the Termination Act was adopted by the Respondent in order to comply with the Commission's Decision of 4 June 2008 does not exonerate the Respondent from its obligation under Article 13(1) of the ECT

e) Compensation for expropriation is due under international law, even if such compensation is prohibited under EC law.

f) The 2008 Termination Act constitutes an unlawful expropriation under Article 13(1) of the ECT if the Respondent fails to establish that such a measure was (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.

g) There is sufficient evidence to support the proposition that MVM's specific conduct, as complained of by the Claimant, are attributable to the Respondent.

h) Closer scrutiny of the European Commission's Written Submission reveals that the conclusions expressed therein are based on a highly questionable analysis of the law.

Adnan Amkhan

16 September 2009