In the matter of:

ANATOLIE STATI, GABRIEL STATI, ASCOM GROUP S.A., AND TERRA RAF TRANS TRAIDING LTD., Claimants

v.

REPUBLIC OF KAZAKHSTAN, Respondent

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

ARBITRATION V (116/2010)

EXPERT OPINION

BY

PROFESSOR ADNAN AMKHAN BAYNO

Former Head of Legal Affairs Department of the Energy Charter Secretariat, Brussels

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I. INTRODUCTION

1. My name is Adnan Amkhan Bayno. I am an international investment and commercial arbitration practitioner, acting both as arbitrator and counsel; I am also a Senior Research Fellow of the Energy Analysis Group at the University of Kent.

2. I was an Honorary Fellow at the Law School of the University of Edinburgh and Fellow in Law at the School of Law, University of Bedfordshire, in both of which I taught international investment law and international commercial arbitration to postgraduate students. I was also Professor of International and European Law at BPP Law School, London (2004 – 2006).

3. I was former Head of the Legal Affairs Department of the Energy Charter Secretariat (2000 to 2004), during which period I was responsible for all legal matters of the Energy Charter Conference and its Secretariat. I was responsible for drafting the Energy Charter Treaty Transit Protocol (yet un-adopted). The task of drafting the Transit Protocol involved an extensive examination of the negotiating history of the Energy Charter Treaty (hereinafter referred to as the "ECT").

4. Prior to joining the Energy Charter Secretariat, I was a lecturer in law at the University of Edinburgh where I taught and supervised postgraduate students in international law, international economic law and international commercial arbitration.

5. I have advised governments, international organisations, multinational companies and private clients on matters relating to international law, international investment law, energy law and international commercial arbitration. I have given expert legal opinions before domestic and international courts and tribunals, including the International Court of Justice, the Arbitration Institute of Stockholm Chamber of Commerce and the International Chamber of Commerce.

6. With respect to arbitrations brought under the Energy Charter Treaty, I was lead counsel in *Mohammad Ammar Al-Bahloul v Republic of Tajikistan (Jurisdiction and Liability, SCC Arbitration Case No. V (064/2008),* and have given expert legal opinions in various cases, including: *Nykomb Synergetics Technology Holding AB v The Republic of Latvia* (SCC Arbitration No. 118/2001); *Petrobart Limited v The Republic of Kyrgyzstan* (SCC Arbitration No. 126/2003); and *Electrabel S.A., v The Republic of Hungary* (ICSID Case No. ARB/07/19).

7. I have been asked by King & Spalding acting for the Claimants in the instant proceedings, to give an expert legal opinion on certain matters pertaining to the ECT and related matters of international law raised by the case of *Anatolie Stati, Gabriel Stati, Ascom Group S.A., and Terra Raf Tarans Traidings Ltd. V Republic of Kazakhstan* (Arbitration V (116/2010).

8. This opinion is set out in nine main parts as follows:

- The Energy Charter Treaty
- Applicable Law
- The Processes Involved in Interpreting a Treaty
- Jurisdictional Issues: Article 26 ECT
- Non-Application of Part III in Certain Circumstances: Article 17 ECT
- Sovereignty over Energy Resources: Article 18 ECT
- Taxation: Article 21 ECT
- The Status of Gibraltar under the ECT

9. King & Spalding has supplied me with copies of the following documents:

- Request for Arbitration, dated 26 July 2010
- Statement of Claim, dated 18 May 2011
- Statement of Defence, dated 21 November 2011

10. I am fully aware that the members of the Arbitral Tribunal are distinguished practitioners with extensive experience in international law, and ECT and investment treaty arbitration. I have therefore tried to keep this opinion brief. Without being presumptuous, I hope that my experience as a former Head of Legal Affairs of the Energy Charter Secretariat, my close familiarity with the ECT and its negotiating history,[1] my subsequent practice in various ECT disputes and my extensive academic background may be of assistance to the Arbitral Tribunal.

11. This opinion should in no way be construed as an attempt to usurp the Arbitral Tribunal's power of deciding whether the facts alleged by the Claimants amount to breaches of certain ECT obligations.

12. I am independent of the parties and I have no interest, financial or otherwise, in the outcome of this arbitration.

[1] In addition to having had the opportunity to examine the ECT's negotiating history during the Transit Protocol negotiations (2000-2003), I have also on several occasions examined closely various ECT provisions. For the purposes of this case, I have examined the *travaux préparatoires* of the ECT pertinent to the issues at hand. The *travaux* documents I have examined include the successive drafts of the ECT, relevant room documents and Legal Sub-Group notes and reports.

13. I confirm that to the best my knowledge this opinion and the conclusions therein are true.

II. THE ENERGY CHARTER TREATY

14. In this section I will provide an explanatory review of two interlinked and contextually important issues. First, I shall give a brief summary of the ECT negotiations and the designation of the *travaux* documents. Second, I will give a brief review of the nature, scope and purpose of the ECT.

A. A brief summary of the ECT negotiations and the designation of the Travaux documents

15. The initiative which led to the European Energy Charter and the ECT was first proposed by the Dutch Prime Minister, Mr. Ruud Lubbers, at the European Council in June 1990. He pointed out there was a natural complementarity between the vast the vast energy resources of the East, particularly the former USSR, and the resources of business skills, technology and the significant capacity of private investment available in the West. Mr Lubbers' proposal was that these strengths should be brought together in a new East-West co-operation which could act as a driving force for economic recovery in the East. Mr Lubbers suggested that the damaging economic consequences of the disintegration of the Communist bloc could be halted through co-operation in the energy sector.

16. The other European Community heads of government present at the European Council welcomed Mr. Lubbers' proposal and asked the European Commission to study ways to put his idea into action. In February 1991, the Commission proposed the idea of a European Energy Charter. As a result, the European Community called together an international conference to discuss the proposal with other countries. The Charter Conference met for the first time in July 1991 and was attended by all the countries of Europe, including the USSR as it then was, as well as non-European countries of the OECD such as the U.S, Canada, Australia and Japan. This conference launched the negotiations on a European Energy Charter.

17. The "Conference on a European Energy Charter" formed several Working groups. Thus, Working Group I developed the European Energy Charter ("EEC"), which was intended to be a mere political declaration and which was signed on 19 December 1991. The EEC sets out the objectives of the representatives in the field of energy

investment and trade, and calls for coordinated action to attain those objectives (see paragraphs 27-31 below). The EEC negotiators agreed to negotiate various protocols pertaining to various aspects of the energy sector.

18. Working Group II was mandated to negotiate a "Basic Protocol" ("BP")–this term was later changed to "Basic Agreement" in October 1991. This Basic Agreement was meant to contain relevant fundamental principles of investment, trade and dispute settlement mechanism. Three other Groups were established to negotiate the rules applicable to oil and gas, nuclear energy and energy efficiency.

19. Little progress was made by the last three groups. As a result, emphasis shifted (in summer 1992) towards concentrating the negotiations in Working Group II with the aim of focusing on one single wide-ranging treaty. In spring 1993, the primary negotiating responsibility moved from Working Group II to the European Energy Charter Conference meeting in Plenary Session, which began to call the "Basic Agreement" the "Energy Charter Treaty". The last formal meeting of the Conference Plenary was held in June 1994.

20. The system of document designation used in the negotiations reflects these stages. After the initial issuance of several "BP" designated documents, documents referring to the "Basic Agreement" bore the designation "BA". Documents of the Conference Plenary were "CONF" followed by a number and, if the particular "CONF" document was a draft treaty text, it also bore a serial "ECT" number. Notes and reports produced by the Legal Sub-Group (established in 1992) were designated "LAG".

21. Negotiations and discussions revolved around draft treaty language prepared by the Chairman of the Working Group II or by the provisional Energy Charter Secretariat. Draft textual language that had not been usually agreed was presented within square brackets and underlined, or sometimes only underlined; other proposed amendments were contained in footnotes to each draft article. Amendments proposed during meetings were normally named "Room Document", and commonly found their way into a subsequent draft version of ECT text. In certain cases, the Chairman of Working Group II or the Chairman of the Conference Plenary introduced a "Chairman's compromise" draft treaty text, which constituted the focal point of negotiations.

22. Finally, I would like to make it clear that when I refer to the negotiating history of the ECT in the ensuing pages, I do not purport to outline every step of the negotiation of the provisions under examination, but merely to those steps that bear on the interpretative issues in dispute in this arbitration.

B. Nature, scope and purpose of the ECT

23. The ECT was signed and applied provisionally on 17 December 1994. It entered into force on 16 April 1998 after having received the required thirty ratifications. As of 21 March 2012, forty six states (as well as the European Community, now European Union) have ratified or acceded to the ECT. Five signatories are still to ratify.[2]

24. It is to be noted that the ECT is far more than a typical investment treaty. In addition to provisions pertaining to the promotion and protection of investment in the energy sector (Part III, Articles 10-17), the ECT contains, inter alia, provisions covering trade, competition, access to capital, transfer of technology, environment and transit.

25. The main purpose of the ECT is set out in Article 2, which reads as follows:

> "This Treaty establishes a legal framework in order to promote long-term co-operation in the energy field based on complementarities and mutual benefits, in accordance with the objectives and principles of the ***Charter.***"[3]

26. It is to be noted however that the word "**Charter**" in Article 2 is a reference to the EEC.[4] The relevant point for the purpose of this opinion is that the objectives and principles of the EEC have been incorporated into the ECT text as seen above by virtue of Article 2.

27. Under Title I, entitled "Objectives", the signatories of the EEC undertook "to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation …" The signatories were further determined "to create a climate favourable to the operation of enterprises and

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[2] The five signatories which have not yet deposited instruments of ratification are Australia, Belarus, Iceland, Norway and the Russian Federation. Belarus applies the ECT on provisional basis.

[3] Emphasis added.

[4] Article 1(1) of the ECT defines "Charter" as "the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991; signature of the Concluding Document is considered to be signature of the Charter." The European Energy Charter is a political declaration, which provided the impetus for the subsequent ECT.

to the flow of investments and technologies by implementing market principles in the field of energy."

28. In terms of the implementing the EEC objectives, the signatories (of the European Energy Charter) undertook "to foster private initiative, to make full use of the potential of enterprises, institutions and all available financial resources, and to facilitate co-operation between such enterprises or institutions from different countries, acting on the basis of market principles." More importantly, "[i]n order to promote the international flow of investments, the signatories will at national level provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade".

29. Finally, the signatories to the EEC further affirmed that "it is important for the signatory States to negotiate and ratify legally binding agreements on promotion and protection of investments which ensure a high level of legal security ..."

30. To sum up: as noted above *one of the central objectives* of the ECT is to provide a high level of protection to the investments of investors of a Contracting Party 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 that cannot be achieved without secure investment in all the various stages of the energy cycle. In other words, one of the core objectives of the ECT's procedural and substantive guarantees is to ensure that potential political risks are minimized.[5]

31. In my opinion, it is with the above context in mind that the provisions of the ECT relating to investment should be construed and indeed interpreted.

[5] 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 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."

II. APPLICABLE LAW, AND ITS RELATIONSHIP WITH DOMESTIC LAW

32. In this section, I shall consider two background issues which, I suggest, are crucial to many questions raised in the present dispute. The first issue concerns the applicable law in general. The second issue concerns the relationship between the applicable law and the domestic law of the host State.

A. Applicable Law

33. It is to be noted at the outset that as far as procedural law applicable to the present dispute is concerned, it is the procedural provision of the ECT, the Arbitration Rules of Stockholm Chamber of Commerce, because Stockholm is the place of arbitration any mandatory provision of Swedish law.

34. It is also noteworthy that the Claimants have seized the present Arbitral Tribunal in exercise of a right granted to them by an international treaty, namely the ECT, to which Kazakhstan is a Contracting Party.

35. The ECT is explicit on the issue of the applicable law. Article 26(6) reads as follows:

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

36. The provisions of the above paragraph concerning the applicable law are reasonably clear. The paragraph provides that 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 ECT provisions and (b) the applicable rules and principles of international law.

37. It is perhaps likely that the Arbitral Tribunal will be asked to consider several Kazakh enactments and decrees. However, it is worth recalling 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, Kazakh domestic law is essentially a matter of fact or evidence. One eminent authority explained this principle as follows:

> "[f]rom the standpoint of international law, a national law is generally regarded as a fact with reference to which rules of international law have to be applied, *rather than as a rule to be applied on the international plane as a rule of law* …"[6]

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[6] *Oppenheim's International Law*, (edited by Sir Robert Jennings and Sir Arthur Watts), 9th edition, 1996, p. 83 (footnote omitted). Emphasis added. [AAB-1]

38. Furthermore, in the *Certain German Interests in Polish Upper Silesia* case, the Permanent Court of International Justice 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."[7]

39. Accordingly, it is clear that in a treaty claim like the present case, an international arbitral tribunal applying the ECT and 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.

40. Pursuant to Article 26(1) of the ECT, the Claimants' claims are based on Kazakhstan's alleged breach of its various obligations as found in Part III of the ECT. To be clear, all of the Claimants' claims are treaty claims. Therefore, all the wrongs complained of are actionable under the ECT. Whether or not the measures complained of by the Claimants are actionable and/or lawful under the domestic law of the Respondent is, as we shall see presently, of no substantive consequence to the case at hand.

B. Relationship between Applicable Law and domestic law

41. Another fundamental principle of international law relevant in the context of the instant dispute is that a State cannot invoke its own domestic law to justify its breach of international obligations.

42. The International Court of Justice ("ICJ") has affirmed this principle on several occasions. For instance, in the *Reparation for Injuries* case, the ICJ observed that:

> "[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible [...] the Member cannot contend that this obligation is governed by municipal law".[8]

43. The same principle is codified in Article 27 of the *Vienna Convention on Law of Treaties* (1969), which states that:

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[7] *Certain German Interests in Polish Upper Silesia*, Judgment of 25 May 1926, PICJ Rep. 1926, Series A, No. 7, p. 19. [AAB-2]

[8] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Rep. 1949, p. 174, at p. 180. [AAB-3]

> "A party [to a treaty] must not invoke the provisions of its internal law as justification for its failure to perform a treaty ..."

44. Similarly, Article 3 of the International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) stipulates that:

> "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."

45. In light of the above, I am of the opinion that because the Claimants' claims are treaty claims and also because the applicable law is the ECT and "applicable rules and principles of international law", Kazakhstan cannot invoke or rely upon its domestic law in order to justify any act or measure which is in breach of its ECT obligations. In other words, "the provisions of municipal law cannot prevail over those of the treaty".[9]

46. Finally and relevant to the rest of the ensuing analysis of this opinion, it is a well recognised principle of international law that parties to a treaty may establish for themselves a *lex specialis* which prescribes the particular arrangements which will serve as law between them and will govern their relationship within the bounds of the treaty. Therefore, a party to a treaty is not permitted to frustrate the contracting parties' agreement by means of introducing different principles of domestic law or even customary international law rules, such as those on the exhaustion of local remedies. It is therefore imperative to note that it is in light of this principle that the interpretation and application of any provisions of the ECT must be undertaken. In other words, what the parties intended (and nothing more) should be respected and indeed observed; no additional elements should be imported unless specifically permitted by the applicable law.

[9] *The Greco-Bulgarian "Communities"* case, Advisory Opinion of 31 July 1930, PCIJ Rep. 1930, Series B, No. 17, at p. 32. [AAB-4]

III. THE PROCESSES INVOLVED IN INTERPRETING A TREATY

47. Since the present dispute has arisen in connection with the ECT, the meaning of any of its provisions should be ascertained in accordance with the generally accepted principles and rules of treaty interpretation.

48. In his seminal work on the subject of treaties, Lord McNair described the duty of the interpreter of a treaty "... as the duty of giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances*."[10] *Oppenheim* observes further that:

> "[t]he purpose of interpreting a treaty is to establish the meaning of the text which the parties must be taken to have intended it to bear in relation to the circumstances with reference to which the question of interpretation has arisen."[11]

49. The specific methodology which an interpreter of a treaty is under duty to follow is codified in Articles 31-33 of the 1969 *Vienna Convention on the Law of Treaties* ("VCLT"). Due to the central importance of these articles to many of the issues examined in this opinion, and ease of reference, it is appropriate to reproduce them below.

ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

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[10] Lord McNair, *The Law of Treaties*, 1961, p. 365 (footnote omitted and emphasis in the original). [AAB-5]

[11] *Oppenheim's International Law*, (edited by Sir Robert Jennings and Sir Arthur Watts), 9th edition, 1996, p. 1267. [AAB-6]

ARTICLE 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

ARTICLE 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

A. The General Rule and Means of Interpretation

1. The General Rule

50. Article 31(1) VCLT provides the foundation of the applicable method of interpretation: good faith, the ordinary meaning of terms, the context, and the object and purpose of the treaty. Accordingly, ascertaining the common intention of the parties to the ECT in their choice of certain terms must be undertaken according to the general rule set out in Article 31(1) of the VCLT.[12]

51. The methodology of interpretation set out in the chapeau of Article 31 of the VCLT is embodied in one single rule, as is clear from the title of that Article. Describing this method of interpretation according to Article 31, 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

[12] This was confirmed by a Statement read by the Chairman at the ECT's Adoption Session on 17 December 1994. The Chairman noted "that the representative of Norway supported" by other representatives, including that of Kazakhstan, have declared that "[t]he Treaty [ECT] shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." For the full Statement of the Chairman, please see Annex I to CONF 115, dated 6 January 1995. [AAB-7]

each of its three main elements—*the text, its context and the object and purpose of the treaty*".[13]

52. Paragraph 2 of Article 31 of the VCLT enumerates the kind of evidence that may be resorted to in order to establish the context of the treaty.

53. Therefore, a *good faith* interpretation is to be made of the ordinary meaning of that part of the text in dispute, unless "it is established" that the parties intended to give a term a "special meaning" which would not ordinarily be associated with word or terms used (Article 31(4) above).

2. Supplementary Means

54. In contrast to the single rule methodology of Article 31, the language of Article 32 is of a contingent nature. In the process of interpretation it permits recourse to "supplementary means of interpretation, including the preparatory work of the treaty [the *travaux préparatoires*] and the circumstances of its conclusion."

55. This permissive recourse is exercised only where the application of the general rule set out in Article 31 "[l]eaves the meaning ambiguous or obscure" or "[l]eads to a result which is manifestly absurd or unreasonable" or "to confirm the meaning resulting from the application of Article 31".

B. Interpretation of treaties authenticated in two or more languages

56. According to its Article 50, the texts of the ECT have been signed in six languages, including English and Russian, with each text being "equally authentic".

57. Paragraphs 1, 3 and 4 of Article 33 of the VCLT outline the applicable methodology when issues of interpretation arise with respect to provisions of a treaty "authenticated in two or more languages." Accordingly, the starting point is that "the text is equally authoritative in each language"; secondly, there is a presumption that "the terms of the treaty ... have the same meaning in each text"; thirdly, "when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the text, having regard to the object and purpose of the treaty, shall be adopted."

58. In a long passage, the International Law Commission commented on the mechanism set forth in Article 33, which, due to its direct relevance, I quote in full:

[13] Anthony Aust, *Modern Treaty Law and Practice*, second ed., 2007, p. 234. Emphasis added. [AAB-8]

> "[t]he existence of more than one authentic text clearly introduces a new element—comparison of the texts—into the interpretation of the treaty. It does not involve a different system of interpretation. Plurilingual in expression, the treaty remains a single treaty with a single set of terms the interpretation of which is governed by the rules set out in articles 27 and 28 **[now Articles 31 and 32]**. The unity of the treaty and of each of its terms is of fundamental importance in the interpretation of plurilingual treaties and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text. This presumption requires that every effort should be made to find a common meaning for the texts before preferring one to another. A term of the treaty may be ambiguous or obscure because it is so in all the authentic texts, or because it is so in one text only but it is not certain whether there is a difference between the texts, or because on their face the authentic texts seem not to have exactly the same meaning. But whether the ambiguity or obscurity is found in all the texts or arises from the plurilingual form of the treaty, the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties. The plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, *travaux préparatoires,* the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts means that every reasonable effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation."[14]

59. Anthony Aust elaborates further:

> "If there are two or more authentic texts the normal rules of interpretation in Articles 31 and 32 [of VCLT] still remain the starting point. Although discrepancies between different language texts can complicate interpretation, *when the meaning is ambiguous or obscure in one text it may be clearer in another, so there may be no need to attempt to reconcile them.* Paragraph 3 reflects this approach: the terms of a treaty are presumed to have the same meaning in each authentic text."[15]

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[14] Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law* Commission, 1966, vol. II, paragraph (7), p. 225. [AAB-9]

[15] Anthony Aust, *Modern Treaty Law and Practice*, second ed., 2007, p. 254, footnote omitted and emphasis added. [AAB-10]

IV. JURISDICTIONAL ISSUES: ARTICLE 26 ECT

60. The parties are in disagreement with respect to a number of issues that bear directly upon the interpretation and application of certain provisions of Article 26 of the ECT.

61. In this section of the opinion, I shall provide a textual analysis of those provisions of Article 26 of the ECT pertinent to the instant dispute. I shall refer to the *travaux préparatoires* when such reference is needed in order to clarify the terms which the textual analysis still leaves the meaning of the term used ambiguous, or to confirm the textual analysis of any particular provision.

62. First however, it is important to note at the outset that interpreting the jurisdictional provisions of the ECT is no different from interpreting any other provisions. Thus, the Tribunal in *Mondev v. United States* observed that:

> "...there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties."[16]

63. Article 26 of the ECT, in material parts, reads as follows:

> "(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement the investor party to the dispute may choose to submit it for resolution:
>
> (a) to the courts or administrative tribunals of the Contracting Party to the dispute;
>
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
>
> (c) in accordance with the following paragraphs of this Article.
>
> (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
>
> (b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).
>
> ...
>
> (4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

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[16] *Mondev* v. *United States*, Award, 11 October 2002, 6 ICSID Reports, 192 (2004), paragraph 43 (footnote omitted). Copy of the Award is also available on line at: http://www.state.gov/documents/organization/14442.pdf [AAB-11]

…

> (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce."

A. Specific issues of jurisdiction

64. As is clear from the above provisions, Article 26 of the ECT stipulates in pertinent part that pursuant to paragraph 4(c) Investor-Contracting Party arbitration is available for "[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III [of the ECT]...".

65. The crucial terms of Article 26(1) relevant to determining the jurisdiction of an arbitral tribunal seized under the ECT are defined in Article 1 of the ECT entitled "Definitions". These terms are: (i) Contracting Party, (ii) Investor[17], (iii) Investment, and (iv) Area.

66. I shall now consider each of these terms bearing in mind the relevant rules of interpretation outlined above (see paragraphs 48-59).

1. Contracting Party

67. Article 1(2) of the ECT defines "Contracting Party" as "a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force."

68. The relevant States for the purposes of the instant dispute which have signed and subsequently ratified the ECT are Kazakhstan, Moldova, Romania and the United Kingdom.[18] These states are "Contracting Parties" to the ECT.

69. The only "Regional Economic Integration Organization" that has signed and ratified the ECT is the "European Communities", now the "European Union". The European Communities is a Contracting Party to the ECT.[19]

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[17] It is to be noted that while Article 26 is entitled "Settlement of Disputes Between an Investor and a Contracting Party," the provisions of Article 26(1) makes it clear that the reference is to "an Investor of another Contracting Party."

[18] The relevance of the United Kingdom for the purposes of the present dispute arises in the context of the application of the ECT to Gibraltar (see paragraphs 238-249 below).

[19] The relevance of the European Communities (now the European Union) in the context of the present dispute arises also in connection with the application of the ECT to Gibraltar (see paragraphs 250-259 below).

2. Investor

70. What constitutes an Investor for the purposes of the ECT is defined in its Article 1(7), which reads as follow:

> "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 subparagraphs (a) for a Contracting Party.

71. Article 1(7) is clear in what it says. It requires little comment in terms the construction of its provisions, apart from four general observations by way of clarification:

First, Article 1(7) as a whole recognises two kinds of investors: (a) investors from a Contracting Party and (b) investors from a "third state" (i.e., not from a Contracting Party).

Second, Article 1(7) identifies two categories of investors: (a) natural persons, and (b) companies or other organisations.

Third, if a natural person is a citizen or a national of a Contracting Party or resides permanently in that Contracting Party (all in accordance with the applicable law of that Contracting Party), he or she is an Investor for the purposes of the ECT.

Fourth, if a company (a juridical person) is organised in a Contracting Party, then such a company is also an Investor under the ECT.

72. It is abundantly clear from the provisions of Article 1(7) that no additional requirements to those set out in paragraphs (i) and (ii) of Article 17(a) of the ECT are recognised. This has been confirmed by the Arbitral Tribunal in recent arbitration cases brought against the Russian Federation (referred to hereinafter as "*Yukos/Veteran/Hulley*").[20] Thus, commenting specifically on the design of Article

[20] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, UNCITRAL (Energy Charter Treaty); *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, UNCITRAL (Energy Charter Treaty); *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, UNCITRAL (Energy Charter Treaty). For the sake of brevity and since the substantive texts of these Awards are identical, I have therefore reproduced relevant citations only from the *Yukos* Award throughout this opinion.

17(a)(ii), the *Yukos/Veteran/Hulley* Tribunal clarified the scope of Article 1(7) as follows:

> "On its face, Article 1(7)(a)(ii) of the ECT contains no requirement other than that the claimant Company be duly organized in accordance with the law applicable in a Contracting Party ... The Tribunal is bound to interpret the terms of the ECT, including Article 1(7), not as they might have been written but as they were actually written. Article 1(7) is more comprehensively and neutrally cast ... Claimant was organized "in accordance with the law applicable" in a Contracting Party. Claimant accordingly qualifies as a company so organized in the instant case. The Tribunal is **not entitled**, by the terms of the ECT, to find otherwise ... The Tribunal knows of no general principles of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party. The principles of international law, which have an unquestionable importance in treaty interpretation, do not allow an arbitral tribunal to write new, additional requirements—which the drafters did not include—into a treaty, **no matter how auspicious or appropriate they may appear**."[21]

73. The same logic applies equally to Article 17(a)(i) of the ECT, i.e., a natural person. Therefore, a natural person who is a citizen or national of a Contracting Party or who is permanently resident in a Contracting Party will no doubt qualify as an Investor for the purposes of Article 1(7) of the ECT−that is all that is required of him or her to qualify as an Investor and nothing else.

74. I understand that the four Claimants in this arbitration are two natural persons and two companies as follows:

- Anatolie Stati is a national of both Moldova and Romania;
- Gabriel Stati is a national of both Moldova and Romania;
- Ascom Group S.A.is a company organised in Moldova ("Ascom"); and
- Terra Raf Trans Traiding Ltd., is a company organised in Gibraltar ("Terra Raf").

75. I shall now comment on the Respondent's arguments put forward in its Statement of Defence concerning the question as to whether two of the four claimants, namely, Anatolie Stati and Gabriel Stati singularly qualify as Investors under Article 1(7) of the ECT.

76. I have dealt with the question of whether or not the two corporate entities (i.e. Ascom and Terra Raf) qualify as Investors under the ECT in two separate sections below. I have done so because the Respondent's arguments concerning these two entities have been cast in a manner that goes beyond the clear definition of Investors in Article 1(7)

[21] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, UNCITRAL (Energy Charter Treaty), paragraphs 411, 413, 415. [AAB-12] (hereinafter referred to as "*Yukos* case"). Emphasis added.

of the ECT. Thus, I consider the issues arising in connection with Ascom and Terra Raft, in Sections **6** and **9** respectively below.

a) The Respondent's arguments

Anatolie Stati

77. The Respondent lists a number of "points" according to which it is contended that "Anatolie Stati cannot be seen as an Investor according to ECT".[22]

78. It is my view that, once examined in the light of the definition of "Investor" in Article 1(7) of the ECT, the points put forward by the Respondent seem to misunderstand the requirements needed for a natural person to qualify as an Investor under the ECT.

79. Thus, at paragraph. 8.60(b) of the Statement of Defence ("SoD"), for example, the Respondent argues that because Kazakh law requires that "an individual could only act as a foreign investor in Kazakhstan if he had the status of individual entrepreneur" and since Anatolie Stati is not an individual entrepreneur in Kazakhstan, he, according to the Respondent, "does not have the legal capacity to act as an investor in Kazakhstan."

80. The Respondent's argument in this respect is of no consequence for establishing whether Anatolie Stati is an Investor under the ECT. Put differently, for the purposes of the ECT, Anatolie Stati need only establish is that he is a national, or a citizen of another Contracting Party. This fact alone will qualify him as an Investor.[23] Whether or not he is an "individual entrepreneur" is not a legitimate ground by which to disqualify Anatolie Stati from being an Investor under the ECT.

81. The same reasoning applies to the Respondent's arguments (paragraph. 8.60(c) of the SoD) concerning Anatolie Stati's entrepreneurship status in Moldova. Again, not being an entrepreneur in Moldova does not disqualify him from being an Investor under the ECT.

82. Anatolie Stati is a Moldovan and a Romanian national. It follows that he is an Investor for the purposes of Article 1(7)(a)(i) of the ECT. It is as simple as that.

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[22] See paragraphs 8.57-8.61, at pp. 43-45 of the SoD.

[23] Please note, as a point of clarification, that even where Anatolie Stati had been a national of a third state, i.e. a non-Contracting Party, he would still have been an Investor under Article 1(7)(b) of the ECT. But that would not be enough to bestow on him the locus standi to submit a claim under Article 26 of the ECT, because in order to attain that status he would have to be an Investor of a Contracting Party, which I believe he is.

83. Further, I am also of the opinion that the Respondent seems to miss the point when questioning whether that "Anatolie Stati does not have rights to Terra Raf or Ascom" (paragraph. 859 of the SoD). The points made therein are again totally irrelevant to the specific question: does Anatolie Stati qualify as Investor under the ECT. The Respondent's arguments seem to confuse the definition of an Investor (Article 1(7)) and the definition of Investment set out in Article 1(6) of the ECT.

84. To summarise, from the perspective of the ECT, nothing said in paragraphs 8.57 to 8.61 of the SoD provide any legitimate ground to disqualify Anatolie Stati from being an Investor.

Gabriel Stati

85. The objections voiced by the Respondent against Gabriel Stati qualifying as an Investor under Article 1(7) are evidentiary in nature (paragraph 8.62 of the SoD). I express no opinion on this matter. However, the point made above remains the same: if it is established that Gabriel Stati is either a citizen or national of, or holds a permanent residency in, both or either of Moldova and/or Romania, he will be considered as an Investor for the purposes of this arbitration.

86. Therefore, if the investor in question is an Investor of a Contracting Party, that in itself will suffice to establish the Arbitral Tribunal's *ratione personae* jurisdiction.

3. Investment

87. Article 1(6) of the ECT provides for a broad asset-based definition of "Investment".[24] Thus, "Investment" means "every kind of asset, owned or controlled directly or indirectly by an Investor and includes: ..." This broad asset-based definition of Investment is followed by a *non-exhaustive* list of certain assets that are considered Investments for the purposes of the ECT. In other words, the non-exhaustive list (subparagraphs (a) to (f) of Article 1(6)) provides merely particular examples of certain assets. Therefore, if any or more of these assets are owned or controlled directly or indirectly by an Investor, that *asset* in question is an Investment under the ECT.

88. It is to be emphasised that indirect ownership and control of assets is clearly and explicitly recognised equally as an investment. Therefore, the ECT makes no

[24] A Paper in the UNCTAD Series on issues in international investment agreements, entitled *Scope and Definition* (2011) refers to this kind of asset-based definition as "embrac[ing] everything of economic value, virtually without limitation", p. 24. [AAB-13]

distinction between investment owned or controlled directly, and investment owned or controlled (indirectly) through corporate layers.

89. To make sure, any form of asset owned or controlled directly or indirectly will be covered by the definition of Article 1(6) of the ECT; this clearly includes shares and other forms of equity. Also covered by Article 1(6) of the ECT are investments in the form of, for example: company; claims to money and claims to performance of contract; returns; and, any right conferred by law or contract or by virtue of any licences and permits.

90. For the purposes of the ECT, however, Article 1(6) also makes clear that the Investment refers to "any investment associated with an Economic Activity in the Energy Sector ...".

91. "Economic Activity in the Energy Sector" is defined in Article 1(5) of the ECT as:

> "an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises."[25]

92. "Energy Materials and Products" are set out in Annex EM of the ECT. For the purposes of the present case, see sections: 27.09, 27.10 and 27.11 of Annex EM.

93. In addition, Article 1(6) clarifies that "[a] change in the form in which assets are invested does not affect their character as investments ...". Therefore, for example, a direct ownership of an investment may turn into indirect ownership though shares in the same investment. Such change and other changes in the character of Investment would have no effect upon whether an asset in question is an Investment for the purposes of the ECT.

94. It is important to bear in mind that the interpretation of the provisions of Article 1(6) must follow the methodology set out in Articles 31 and 32 of the VCLT: i.e., the ordinary meaning of the terms employed in the provision, in their context and in the light of the objects and purpose of the Treaty. There is nothing in Article 1(6) or in any other provisions of the ECT which requires that the definition of Investment must fulfil unspecified requirements *additional* to those expressly stipulated in the terms of the ECT.

[25] Emphasis added.

95. This interpretation of Article 1(6) of the ECT is in line with *Yukos/Veteran/Hulley* Tribunal's decisions on jurisdiction and admissibility. First, the Tribunal confirmed the breadth of the Investment definition of Article 1(6) of the ECT. Second, rejecting the Respondent's contention, the Tribunal held that:

> "...the definition of investment 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.[26]

96. Further, the *Yukos/Veteran/Hulley* Tribunal invoked with approval a passage from the *Saluka* Award which stated that "the predominant factor which must guide the Tribunal's exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal's jurisdiction". The *Yukos/Veteran/Hulley* Tribunal therefore concluded that it "cannot in effect impose upon the parties a definition of "Investment" other than that which the parties to the ECT ... have agreed ... [T]he Tribunal is bound to interpret the terms of the ECT not as they might have been written so exclusively to apply to foreign investment but as they were actually written."[27]

97. Finally, I can also confirm that there is nothing in the negotiating history of Article 1(6) of the ECT which indicates that the negotiating parties intended to include in the final text of the ECT any additional conditions or requirements for any asset owned or controlled directly or indirectly by an Investor.

98. Bearing the above in mind, I shall now consider the Respondent's arguments concerning the definition of Investment relevant to the scope of this opinion (section 9, pp. 45-54 of the SoD).

a) The Respondent's arguments

99. The Respondent attempts to read additional requirements into the definition of Investment in Article 1(6) of the ECT (see paragraphs 9.4-9.10 of the SoD), in order to argue that the present Arbitral Tribunal lacks jurisdiction *ratione materiae*.

100. Moreover, in paragraphs. 9.27-9.31 of the SoD, the Respondent alleges that "little or no contribution by the investors was made."

101. Again, for the purposes of the definition of Investment this is irrelevant. As was aptly put by the *Yukos/Veteran/Hulley* Tribunal:

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[26] *Yukos* case, *op.cit*, footnote 21, at paragraph 432. [AAB-14]

[27] *Ibid*., paragraphs 432 and 435. [AAB-15]

> "...the definition of investment 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."[28]

102. I am of the view that the additional conditions put forward by the Respondent are not relevant with regard to what constitutes an Investment under the ECT. As argued above (see paragraphs 87-97 above), the ECT is clear in defining an Investment. As long as any asset associated with an Economic Activity in the energy sector is owned or controlled directly or indirectly by an Investor as defined in Article 1(7), such an asset is an Investment.

103. Had the parties to the ECT wanted to include any additional conditions to those listed in Article 1(6), they would have done so, but they did not. It is imperative that their intention is respected. That is what the *Yukos/Veteran/Hulley* Tribunal meant when it pronounced that "[T]he Tribunal is bound by the terms of the ECT not as they might have been written so exclusively to apply to foreign investment but as they were actually written." (paragraph 72 above).

104. At paragraph 9.19 of the SoD, the Respondent argues that "the Claimants are required to demonstrate that each of the alleged investments was made after the date the ECT came into force". This contention represents a clear misunderstanding of the relevant provisions of Article 1(6).

105. Upon closer inspection, the provisions referred to by the Respondent mean simply this: the term "Investment" in Article 1(6) includes all investments *existing at or made after the Effective Date*. The Effective Date being the date the ECT comes into force for both home and host countries. However, the procedural, jurisdictional, substantive provisions of the ECT become applicable only to matters affecting the investments after the effective Date. Therefore, the Effective Date is only relevant as regards the application of the ECT jurisdictional provisions (*reatione temporis).*

106. In conclusion, for the purposes of Article 1(6) and the jurisdictional provisions in Article 26(1), any assets owned or controlled directly or indirectly by an Investor of a Contracting Party will suffice to establish the Arbitral Tribunal's jurisdiction *ratione materiae*.

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[28] *Ibid.,* paragraph 432.

4. Area

107. Article 1(10) of the ECT defines the word "Area" "with respect to a state that is a Contracting Party as:

> (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea, and
>
> (b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction".

108. In addition, Article 1(10) defines the word "Area" with respect to a Regional Economic Integration Organization as "the Area of the member states of such Organization, under the provisions contained in the agreement establishing that Organization."

B. Summary

109. The above analysis follows from interpreting the relevant provisions in good faith and in accordance with the ordinary meaning of the relevant terms, in their context, and in light of the object and purpose of the ECT. It is abundantly clear that the ECT negotiating parties did not admit any additional requirements to the terms discussed above. The negotiating parties were fully aware of these conditions, but consciously chose not to include them in the text of the ECT. Therefore additional conditions admitted in other arbitrations should not be admitted here. And since the text of the ECT is clear on this point, the Arbitral Tribunal should not be tempted to look beyond what the ECT parties intended.

110. Accordingly, I am of the opinion that once it is established that the Claimants are Investors (according to the terms defined in Article 1(7)(a)(i) and (ii) of the ECT) who owned or controlled directly or indirectly any kind of assets associated with Economic Activity in the Energy Sector in the territory of Kazakhstan, they (the Claimants) would have satisfied the requirements of both *ratione personae* and *ratione materiae* jurisdiction.

C. The scope of Kazakhstan's unconditional consent to international arbitration

111. Article 26(2) of the ECT provides that upon the expiry of the "cooling-off-period" of three months,[29] the aggrieved Investor may submit a dispute concerning "an alleged

[29] I understand that this requirement has been cured by the agreement of the parties to suspend the arbitration proceedings for the period of ninety days in response to the Respondent's letter dated 18

breach of an obligation ... under Part III" of the ECT by a Contracting Party either: (a) to the courts or administrative tribunals of the Contracting Party to the dispute (in the instant case Kazakhstan), or (b) in accordance with any applicable, previously agreed dispute settlement procedure, or (c) to international arbitration.

112. It is clear that it is the aggrieved Investor(s) who alone "may choose to submit" the dispute to one of the three dispute settlement mechanisms listed in Article 26(2).

113. Should the Investor(s) elect to submit the dispute to international arbitration, *each* of the Contracting Parties to the ECT has already given its "unconditional consent" to the submission of the dispute to international arbitration by virtue of Article 26(3)(a) of the ECT.

114. However, with respect to certain Contracting Parties, their unconditional consent has two specific limitations. The Contracting Parties that qualified their unconditional consent are listed in two separate Annexes to the ECT: Annex ID and Annex IA.[30]

Annex ID

115. Pursuant to Article 26(3)(b)(i) of the ECT "[t]he Contracting Parties listed in Annex ID do not give such unconditional consent [to the submission of a dispute to international arbitration] where the Investor *has previously submitted* the dispute under subparagraph (2)(a) or (b)" of Article 26 of the ECT.

116. Kazakhstan is one of the Contracting Parties that has opted to be listed in Annex ID.[31] Therefore Kazakhstan does not allow an Investor to ***resubmit*** the dispute to international arbitration at a later stage under Article 26; in other words, Kazakhstan has opted to apply the "fork-in-the-road" principle to its disputes with Investors of another Contracting Party.

January 2011. However, it is arguable that the two letters sent by the Claimants in March and May 2009 stating that they are minded to submit the dispute to arbitration could be regarded as the point in time from which the three month "cooling-off-period" has commenced. This is because pursuant to Article 26(1) and (2), an Investor has the choice to submit the dispute to a contractually agreed dispute settlement mechanism *or* to international arbitration.

[30] According to Article 48 of the ECT (entitled "Status of Annexes and Decisions") "[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."

[31] It is to be noted that, pursuant to Article 26(3)(b)(ii) ECT, Kazakhstan has "... provided a written statement of its policies, practices and conditions in this regard [not giving its unconditional consent where the Investor has previously submitted the dispute either (a) to its courts or administrative tribunals, or (b) to any applicable, previously agreed dispute settlement procedure] to the Secretariat ..." Kazakhstan's written statement can be found in [AAB-16].

Annex IA

117. Pursuant to Article 26(3)(c) "[a] Contracting Party listed in Annex IA does not give such unconditional consent [to the submission of a dispute to international arbitration] *with respect to a dispute* arising under the last sentence of Article 10(1)."

118. However, Kazakhstan opted **not** to be listed in Annex IA.[32] Therefore, Kazakhstan is a Contracting Party that has chosen to allow an Investor of another Contracting Party to submit a dispute to international arbitration for an alleged breach of the obligation as set out in the last sentence of Article 10(1) of the ECT. The last sentence of Article 10(1) reads as follows:

> "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."

1. Summary and analysis

119. For the purposes of the instant case, certain crucial consequences follow from the above brief textual analysis of the provisions of Article 26(2) and (3) of the ECT.

120. First, had the Claimants in the present arbitration opted initially to submit the disputes concerning Kazakhstan's alleged breach of any of its obligations under Part III of the ECT[33] to (a) Kazakh courts or (b) in accordance with any applicable, previously agreed dispute settlement procedure (i.e., to contractually agreed dispute settlement procedures), they (i.e., the Claimants) would have lost the right to *resubmit* such disputes to international arbitration.[34] This would have been the case because Kazakhstan is listed in Annex ID of the ECT, as explained above.

121. Therefore, the Respondent's contentions, throughout the SoD, that the Claimants should have first submitted their disputes to the Kazakh domestic courts could have been significantly detrimental to the Claimants' claims.

122. Second, it is clear from Article 26(2)(b) ECT that the Claimants could have chosen to submit their contractual disputes to the dispute settlement mechanism agreed upon in such contracts. The Claimants have not done so; instead they have chosen to submit their 'contractual disputes' to international arbitration. Therefore, the crucial question is this: does the Arbitral Tribunal have jurisdiction to entertain claims for breach or

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[32] The only Contracting Party listed in Annex IA is Hungary.

[33] E.g., the allegation that Kazakhstan has expropriated their Investments both directly and indirectly; and that Kazakhstan has breached its contractual obligations.

[34] The Respondent in various places in the SoD contends that this is exactly what the claimants should have done.

improper termination of the contracts in question, even though such contracts contain an explicit reference to dispute settlement mechanism within its terms?

In my opinion, the answer is in the affirmative. I hold this opinion for the following reasons which are based on a textual construction of the relevant provisions:

(a) Pursuant to Article 26(2) ECT, the Investor alone may freely choose between either a contractually agreed mechanism **or** international arbitration. It follows therefore that the Investor's choice to submit the dispute to international arbitration is not constrained by the existence of a dispute settlement mechanism contained in the contract;

(b) If, however, the Investor chooses to submit the contractual dispute to the dispute settlement mechanism contained in the contract, the court or arbitral tribunal seized under such mechanism (as the case may be) will undoubtedly have the jurisdiction to entertain alleged claims of breach or termination of the contract; thus, requiring an examination of the substantive provisions of the contract in question;

(c) If, however, the Investor chooses to submit the contractual dispute (as described in (b) above) to international arbitration, does an arbitral tribunal seized under Article 26(1) have jurisdiction to rule upon such disputes in the same manner as a contractually agreed mechanism? The answer to this question has been given both in Article 26(1) and Article 10(1)'s last sentence of the ECT;

(d) Article 26(1) confers jurisdiction on an arbitral tribunal to rule upon disputes that concern "an alleged breach of an obligation [by a Contracting Party] under Part III" of the ECT. Article 10(1)'s last sentence falls under Part III of the ECT. It reads that "[e]ach Contracting Party shall observe *any obligations* it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.";

(e) Reading Article 26(1) in conjunction with Article 10(1)'s last sentence makes it clear that the non-observance of a contractual obligation arising from a contract between an Investor, or an Investment of an Investor of another Contracting Party amounts to a breach of a treaty obligation. It follows therefore that an arbitral tribunal seized under Article 26(1) has the jurisdiction to entertain an Investor's claim that a Contracting Party to the ECT has breached its contractual obligation. Strictly speaking, such jurisdiction arises

not because of the terms of the contract *per se*, but because of the terms of the Treaty.

123. Third, it follows from the above analysis (a-e) that the present Arbitral Tribunal has the jurisdiction to adjudicate claims submitted by the Claimants alleging that Kazakhstan has breached its obligations under the last sentence of Article 10(1) of the ECT. This jurisdiction may be upheld even though the contracts in question already contain a dispute settlement mechanism. This is so, as explained above, because the Investor has a clear and free choice to select either the contractually agreed mechanism or international arbitration. This is clear from the ECT's relevant provisions. What is more, the Arbitral Tribunal will have jurisdiction to examine the substantive provisions of such contracts and the measures alleged to have been taken by Kazakhstan and its organs which led to it breaching its contractual obligations. To do so, the Arbitral Tribunal will necessarily be required to examine whether or not Kazakhstan has observed its contractual obligations *per se*; in other words whether Kazakhstan has observed its contractual obligation as it has undertaken so to do under Article 10(1) last sentence.

124. The above analysis is in line with the textual interpretation required by Articles 31 and 32 of the VCLT.

125. I shall now turn to consider two jurisdictional issues raised by the Respondent. The first concerns the Respondent's contention that there is no arbitration agreement because Article 26(4)(c) is flawed or ambiguous in the Russian text of the ECT. The second issue is the Respondent's assertion that the arbitration agreement is null and void because Article 26(4)(c) contravenes a *jus cogens* norm.

D. Available international arbitration *fora* for the settlement of disputes under the ECT

126. Before I consider the Respondent's assertions hereunder, it may be useful to say a brief word about the nature and scope of Article 26(4) in general, and its subparagraph (c) in particular.

127. According to Article 26(4), an Investor may "choose to submit" the dispute for resolution either to the ICSID Centre, to ICSID Centre under the rules governing the Additional Facility, or to a sole arbitrator or ad hoc arbitration under UNCITRAL Arbitration Rules, or to "an *arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.*"

128. Accordingly, under Article 26(4)(c) of the ECT the Claimants are entitled to submit a dispute to international arbitration pursuant an "arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce".

129. Interpreting the English provisions of Article 26(4)(c) in *good faith* and in accordance with their ordinary meaning in their context and in the light of ECT's object and purpose, the reference to "an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce" must mean one thing only.

130. These provisions must mean that an Investor of a Contracting Party (as defined in Article 1(7)(a) ECT) may choose to submit the dispute for resolution to arbitration under the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC").

131. I am of the view that this good faith interpretation is confirmed by the negotiating history of Article 26(4)(c) of the ECT.

132. The possibility of submitting a dispute between an Investor and a Contracting Party to "an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce" was introduced into the ECT draft texts early on in the negotiations.[35] The text remained unchanged in the successive texts of the Treaty. There was no discussion on its interpretation. Neither was there disagreement regarding the submission of dispute to the SCC, except for a single query. The query was whether the SCC is open to all interested parties.[36] In response, Sweden issued a statement which read as follow:

> "S [Sweden] wishes to emphasize that arbitral proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce are indeed open to any interested party, and the Institute is actually one of the most used for disputes between Western countries and the former Soviet republics. A recent agreement between Russia and USA renewed the role of the Stockholm Institute as administrator of arbitral proceedings."[37]

133. This clarification was accepted by the negotiators with no further discussion,[38] and no other discussion or clarifications were sought after that. The availability of the SCC as a venue for settling Investor- Contracting Parties disputes was accepted in the form it was proposed.

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[35] See BA 12, dated 9 April 1992. [AAB-17]

[36] Room Document 5, dated 30 March 1993.[AAB-18]

[37] Room Document 5, dated 23 April 1993. [AAB-19]

[38] Room Document 4, dated 24 April 1993: attached to [AAB-19A]

1. The Respondent's arguments concerning Article 26(4)(c) of the ECT

134. I shall turn now to a particular assertion made by the Respondent in the SoD which has been submitted in order to deny the Arbitral Tribunal's jurisdiction. The Respondent presents three arguments in this regard. The first is that there has been an improper reference to the SCC in Article 26(4)(c) of the ECT in the *Russian* text of the ECT; this, according to the Respondent, is enough to exclude the jurisdiction of the present Arbitral Tribunal. The second argument, if I understand it correctly, is that the ECT's reference to the SCC contravenes the international law *jus cogens* principle of "sovereign equality of states". Thirdly, it is contended that some provisions of Article 18 of the ECT concerning sovereignty over energy resources serve to exclude certain claims of the Claimants from the jurisdiction of the Arbitral Tribunal.

135. In this section I shall comment briefly on the first two arguments only. The issues raised by Article 18 of the ECT is dealt with in Section **7** below, not only because it raises questions that are different from the question of whether the SCC is indeed a proper venue for this arbitration, but also because the subject matter of Article 18 is totally unrelated to what has been examined here.

a) Reference to SCC

136. At paragraphs 6.4 to 6.48 of the SoD, the Respondent seems to contend that because Article 26(4)(c) of the ECT's Russian text differs from the English and four other authentic texts, there is "no arbitration agreement".

137. The Respondent embarks upon a lengthy linguistic analysis of the Russian text of Article 26(4)(c), the literal translation of which, according to the Respondent, is: "to an arbitral proceeding under the Arbitration institute of the international chamber of commerce in Stockholm." As such, the Russian text, according to the Respondent, is different from all the other five authentic texts of the ECT. The English version of Article 26(4)(c) reads "an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce."

138. The linguistic discrepancy between the Russian text and the other languages is, according to the Respondent, grounds to nullify the arbitration agreement with the consequence that "... the Arbitral Tribunal has a duty to decline jurisdiction." (at paragraph 6.48 of the SoD).

139. I am not in a position to comment on the long linguistic analysis carried out by the Respondent as regards the expressions of "under the Arbitration Institute" and "in Stockholm". However, I am in a position to say that I have been informed by a Russian language expert that the literal English translation of the Russian text is accurate. And I shall assume that it is.

140. At paragraph 6.8 of the SoD, the Respondent refers to Article 33 of the VCLT to establish that "the Russian version of the ECT is authentic." That much is incontestable, as this is exactly what Article 50 of the ECT explicitly provides, as noted by the Respondent.

141. What the Respondent omits to do is to examine the rest of Article 33 of the VCLT which I shall remedy presently.

142. The Respondent contends that the Russian text of Article 26(4)(c) is "[a]t best ... ambiguous as to its meaning." The Respondent offers the various possible meanings the Russian text may bear.

143. However, at paragraph 6.10 of the SoD, the Respondent concedes that "there is a *plausible* interpretation of the Russian text which is consistent with the text of Article 26(4)(c) of the ECT and of all the other authentic languages, namely: in English, Spanish, Italian, German and French."

144. This should have been the end of this matter. As Anthony Aust observed "... *when the meaning is ambiguous or obscure in one text it may be clearer in another, so there may be no need to attempt to reconcile them*." This notwithstanding, the Respondent still disagrees with the interpretation it admits is plausible.

145. It is to be recalled that "the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term." It is also be recalled that Article 33 VCLT and particularly its paragraphs 3 and 4 provide for the method which should be adopted in order to ascertain what the parties intended if the text of one of the authentic languages of a treaty is different from the other text(s).

146. The starting point of the methodology set out in Article 33 VCLT summarised above (paragraphs 57-59) is the assumption that the terms of a treaty have the same meaning in each authentic text. In addition, Article 33(4) of the VCLT directs the interpreter to adopt "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty ..."

147. As the International Law Commission observed, "...the equality of the texts means that every reasonable effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation."[39]

148. I am of the opinion that this intention of the Contracting Parties to the ECT, including those who only spoke Russian, is clear from the other five authentic text of the ECT. The Russian text, if ambiguous, should be interpreted to mean the same thing as the other five authentic texts.

149. In addition, I am of the opinion that the discrepancy between the Russian text and the other authentic texts of the Treaty is of a technical or editorial nature and thus should be ignored and preference should be given to what the parties clearly intended. As Oppenheim observed "[i]f one language text differs from others because of an editorial oversight, it may be disregarded."[40]

b) The arbitration agreement violates the principle of sovereign equality of States?

150. At paragraphs 6.49-6.60 of the SoD, the Respondent presents several assertions in order to conclude that Article 26(4)(c) "...violates the *jus cogens* norm of sovereign equality of States" (paragraph 6.61 of the SoD), the consequence of which is that the arbitration agreement is null and void.

151. With all due respect to the Respondent and its counsel, this contention is not only fallacious but absurd.

152. The absurdity of the Respondent's argument is underlined by its corollaries. For example, it follows from the Respondent's assertion that the ECT will in its entirety be null and void *ab initio*.[41] Another corollary would be that all the ECT cases that have been decided pursuant to Article 26(4)(c) (seven cases to my knowledge) will be also null and void. It also follows that reference to an arbitration institute, no matter what institute it is and where it is located, contravenes the principle of the "sovereign equality of States". Last but not least, it also follows from the Respondent's

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[39] See paragraph 58 above.

[40] *Oppenheim's International Law,* (edited by Sir Robert Jennings and Sir Arthur Watts), 9th edition, 1996, p. 1283,footnote 3. [AAB-20]

[41] Article 53 of the VCLT provides that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm if general international law is a norm accepted and recognized y the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

contention, that the ECT Contracting Parties have concluded a treaty that contains a rule which is on par with other possible treaties that contain a breach of a *jus congens* principle, such as the prohibition of genocide and the prohibition of crimes against humanity.

153. Therefore I think it would not be considerate of me to burden the Arbitral Tribunal with a detailed examination of what the doctrine of sovereign equality of States means. Nor do I think it appropriate to provide a narrative of the nature and scope of application of the international law doctrine of *jus cogens*. Such doctrinal narratives, I suggest, would be otiose and is indeed, in my opinion, irrelevant for the purposes of this arbitration.

154. However, even if we were to entertain some form of admiration for the element of ingenuity involved in the Respondent's argument concerning the application of the principle of sovereign equality of states, the fact of the matter is that it is utterly wrong and points to a clear misunderstanding of what the principle really means under international law.

155. The former President of the ICJ, the late Sir Robert. Y. Jennings, anticipated the kind of argument put forward by the Respondent. He cautioned thus:

> "Clearly so generous and so tentative an interpretation of the possible content of a *jus cogens* endangers the principle of *pacta sunt servanda* and could quickly reduce the obligations to observe treaty obligations to little more than a question of State convenience."[42]

156. Finally, it is my firm believe that a *good faith* approach to the ECT application and interpretation in general, and to the problem at hand in particular would be better served in the context of two fundamental and equally realistic principles of international law.

157. The first is that "[a]ll international law of today is made up of the limitations of sovereignty, limitations created by sovereignty itself."[43]

158. The second proposition, which has endured the passage of time, is the dictum first espoused by the Permanent Court of International Justice in the *S. S Wimbledon* case. The Court observed:

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[42] R.Y. Jennings, "General Course on Principles of International Law", *Recueil des Cours*, vol. II, 1967, at p. 564. [AAB-21]

[43] Marek Stanislaw Korowicz, "Some Aspects of Sovereignty in International Law", 102 *Recueil des Cours* , (1961), at p.111. [AAB-22]

> "The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But *the right of entering into international engagements is an attribute of State Sovereignty*."[44]

159. In conclusion, in today's interdependent world these principles and the principle of *pacta sunt servanda* are well recognised as fundamental to the proper functions of the international community underlined by the undeniably universal concept of the Rule of Law.

[44] *The S.S. Wimbledon* case, Judgement of 17 August 1923, PCIJ Rep. 1923, Series. A. No.1, at p. 25. [AAB-23]

V. NON-APPLICATION OF PART III IN CERTAIN CIRCUMSTANCES: ARTICLE 17 ECT

160. Article 17 the ECT is relevant in the context of the present arbitration only in respect of one particular argument posited by the Respondent. The Respondent contends that the term "third state" in Article 17(1) includes a Contracting Party to the ECT. If I understand the Respondent's contention correctly, the Respondent seems to argue that because Ascom, a company incorporated in Moldova, is controlled by Anatolie Stati, a national of Romania, Article 17 of the ECT is applicable as far as Ascom is concerned. It is to be recalled that both Ascom and Anatolie Stati are two of the four Claimants in this arbitration. It is also to be recalled that both Moldova and Romania are Contracting Parties to the ECT.

161. Accordingly, I shall limit my consideration below to three key issues: First, the meaning of the phrase "each Contracting Party reserves the right" as appears in the chapeau of Article 17 of the ECT; secondly, the meaning of "third state" in the context of Article 17(1); and, thirdly, whether or not the *travaux* confirms the textual interpretation that I respectfully offer.

162. Article 17 of the ECT reads, in its pertinent part, as follows:

> "Each Contracting Party reserves the right to deny the advantages of this Party to:
>
> (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting party in which it is organized; or
>
> ..."

A. The meaning of "each Contracting Party reserves the right"

163. It is imperative to note that Article 17 embodies a "reserved right" to deny the advantages of Part III of the ECT to any investor or investment meeting the descriptions set out in paragraphs 1 or 2, respectively. However, that right must be exercised to be effective. In other words, the "right" which is reserved, must be exercised by way of positive action by a Contracting Party wishing to benefit from it; and unless that right is exercised, the Investor or investment will continue to enjoy the substantive protections in Part III of the ECT (Articles 10-16).

164. It follows that having "reserved" its rights under Article 17, each Contracting Party may or may not, deny the advantages of Part III to an investor.

165. The above textual interpretation of the chapeau of Article 17 has been confirmed by both the *Plama v Bulgaria* and the *Yukos/Veteran/Hulley* tribunals. For example, the *Plama* tribunal in its Decision on Jurisdiction reasoned as follows:

> "[i]n the Tribunal's view, the existence of a 'right' is distinct from the exercise of that right. For example, a party may have a contractual right to refer a claim to arbitration; but there can be no arbitration unless and until that right is exercised. In the same way, a Contracting Party has a right under Article 17(1) to deny a covered investor the advantages under Part III; but it is not required to exercise that right; and it may never do so."[45]

166. What is clear from the above is that the Contracting Party intending to exercise its right under Article 17 must take a 'positive action' towards that end. The exercise of this right should be timely and exercised in a transparent manner.

167. Furthermore, it is clear from the provisions of Article 17(1) of the ECT that the option to deny the advantages of Part III of the ECT to certain legal entities which have made or claim to have made investments exists only where those entities meet the two sequential requirement, which, for sake of clarity, can be listed as follows:

- that the legal entity in a Contracting Party be owned or controlled by nationals of a "third state";
- however, if the legal entity was owned or controlled by nationals of a third state, then the advantages of Part III may be denied to that entity **if and only if**, a second condition is also present: that the entity (owned or controlled by nationals of a "third state") "has no substantial business activities in the Area of the Contracting Party in which it is organised."

168. The *Yukos/Veteran/Hulley* Tribunal confirmed the inclusive nature of the two conditions that are necessary before a Contracting Party denies the advantages of Part III thus:

> "[i]t is apparent from the wording of Article 17(1) two additional cumulative substantive conditions must be met before the "denial-of-benefits" clause can be exercised in respect of any particular legal entity. First, such legal entity must be owned or controlled by citizens or nationals of a third State; second, the legal entity must have no substantial business activities in the place in which it is organized."[46]

169. To sum up: subject to the proper moment for exercising the right, Article 17(1) permits a host Contracting Party to deny the advantages of Part III of the ECT to an Investor organised according to the laws of another Contracting Party, but owned or

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[45] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, (2005) 20:1 *ICSID Review* 262, at paragraph 155. [AAB-24]

[46] *Yukos* case, footnote 21 above, at paragraph 460. [AAB-25]

controlled by nationals of a third state, **and** if that entity has not substantial business activities in the area of the Contracting Party in which it is organised. The absence of one condition renders the "denial-of-advantages" clause inapplicable.

170. The Respondent misunderstands the above issue completely, by assuming that the application of Article 17 of the ECT is automatic. As shown above it is not.

171. I can confirm that there is nothing in the negotiating history of the ECT that suggests that the parties to the Treaty intended anything other than what the textual interpretation outlined above provides.

B. The meaning of "third state" in Article 17(1) of the ECT

172. The term "third state" does not include nationals of a Contracting Party to the ECT. It is my opinion that the term "third state" in Article 17(1) refers only to states that are not parties to the ECT. I hold this opinion for the following reasons.

1. Textual analysis

173. Applying the rule of interpretation set out in Article 31 of the VCLT, the two terms employed in Article 17, i.e. "third state" and "Contracting Party" must be construed in connection with the definition provided in Article 1(7) of the ECT.

174. As noted above (paragraphs 70-76), Article 1(7) of the ECT recognises two kinds of Investors. First, a natural person having the citizenship, nationality of or permanent residence in a **Contracting Party**, and companies or other organisations organised in accordance with the laws of that Contracting Party. The second type of Investors are natural persons having the citizenship of, nationality of, or permanent residence in a **third state**, and companies or other organisations organised in accordance with those laws.

175. I suggest that the above interpretation of the term "third state" is in line with its ordinary meaning. This is supported by what is said in the 1966 commentary of the International Law Commission on the Vienna Convention: "[t]his term [third state] is in common use to denote a State which is not a party to the treaty ..."[47]

176. Therefore, any other interpretation amounts to assigning a "special meaning" to this term, and the party claiming such special meaning carries a burden of proving it, as required by Article 31(4) of the VCLT.

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[47] Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission*, 1966, vol. II, p. 190. [AAB-26]

177. Based on the above brief textual interpretation of the term in the context of Article 17(1) and in the context of the investment provisions and in light of the ECT's object and purpose, I am of the opinion that the intent of the ECT's parties was that the term "third state" means non-Contracting Parties to the ECT. I am also of the opinion that the textual interpretation summarised above is fully borne by the ECT's *travaux préparatoires*, to which I briefly consider next.

2. Summary of negotiations

178. Early versions of Article 17 (at that time Article 19) from 1992 and 1993 used the term "non-signatory country" in place of the current term "third State".[48] In late 1993, the drafters substituted the phrase "a state that is not a Contracting Party".[49] In July 1994, the Legal Sub-Group recommended to the negotiators of the ECT, among other things, that the term "third state" continued to be defined in the definition of "Investor", but that:

> "the term used in the text is a 'state that is not a Contracting Party.' (See Articles 10(1), 13(3) (7), 14(1), 16(5), 19(1), (2).) One or the other term had to be changed, and we favoured reinserting 'third state' in the text."[50]

179. The Legal Sub-Group introduced its above recommendation concerning the substitution of the term "third state" alongside the term "a state that is not a Contracting Party" in Article 19, into a draft text of the ECT which was subject to technical legal review;[51] thus indicating that the two terms were synonymous. The Legal Sub-Group's recommendation was adopted by the negotiating parties without any further discussion.

180. In conclusion, the *Yukos/Veteran/Hulley* Tribunal summed up succinctly the correct meaning of the term "third stat" in the context of Article 17 as follow:

> "The Treaty [ECT] clearly distinguishes between a Contracting Party ... , on the one hand, and a third State, which is a non-Contracting Party, on the other. The Tribunal agrees with Claimant that, on their face, several provisions distinguish between a Contracting Party and third State (for example, Articles (1)(7), 10(3) and 10(7), and 17) and that there is no equation in the ECT between a Contracting Party and a third State. *This conclusion is further supported by the travaux préparatoires, which demonstrate that the term "third state" was substituted for the term "non-Contracting Party*."[52]

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[48] [AAB-27]

[49] See, for example, CONF 96, dated 17 March 1994. [AAB-28]

[50] Report of the Legal Sub-Group, dated 1 July 1994. [AAB-29]

[51] See Legal Report (as of close of business 8 July 1994). [AAB-30]

[52] *Yukos* case, footnote 21 above, paragraph 544. Emphasis added [AAB-31]

181. Accordingly, the Respondent's assertion that Ascom (incorporated in Moldova) "is not an Investor as per the ECT" partly because Ascom is "controlled by a citizen of a third state (Romania) ..." (paragraph 8.9 of the SoD) is not in accord with the textual analysis of the term "third state" in Article 17(1), nor it is supported by the *travaux préparatoires* of the ECT. In short, Article 17(1) does not apply to Ascom.

182. In addition, the Respondent's invocation of Article 40 of the Vienna Convention on Diplomatic Relations of 1961 (at paragraph 8.9(ii)(B) of the SoD) in support the assertion that a "third state" in the context of Article 17 ECT may be interpreted as a contracting party, is out of context. Article 40 reference to the term "third state" is descriptive of a factual situation and is not a reference to the status of a State. The International Tribunal for the Law of the Sea ("ITLOS") elaborated this point as follows:

> "...the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*".[53]

183. In my opinion, and in light of the above, the Arbitral Tribunal have jurisdiction *ratione personae* in respect of Ascom: it is an Investor of a Contracting Party to the ECT. Therefore, Article 17(1) does not apply in Ascom's case. Ascom is not owned or controlled by a national of a state which is not a Contracting Party to the ECT. For that reason, there is no need to consider whether or not Ascom has substantial business activities in Moldova. This is because the first essential requirement of Article 17(1) has not been satisfied.

184. Finally it is noteworthy that the scope of Article 17 extends only to Part III of the ECT and not Article 26 which falls in Part V. This was confirmed by both the *Plama* and *Yukos/Veteran/Hulley* Tribunals. Thus, the *Yukos* Tribunal observed that:

> "[w]hether or not Claimant is entitled to the advantages of Part III is a question not of jurisdiction but of the merits. Since Article 17 relates not to the ECT as a whole, or to Part V, but exclusively to Part III, its interpretation for that reason cannot determine whether the Tribunal has jurisdiction to entertain the claims of Claimant."[54]

185. Thus, in conclusion, Article 17 does not deprive a tribunal seized under Article 26 of the ECT from exercising jurisdiction.

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[53] *The MOX Plant* case (Ireland v. United Kingdom), Request for provisional measures, Order, dated 3 December 2001, para.51. [AAB-32]

[54] *Yukos* case, paragraph 441, see footnote 21 above.

VI. SOVEREIGNTY OVER ENERGY RESOURCES: ARTICLE 18 ECT

186. In this section I consider two of the issues on which the parties hold conflicting views. First, I shall provide a brief textual interpretative analysis of two central paragraphs of Article 18 of the ECT, namely, paragraphs (1) and (2). Second, I offer a brief outline of the negotiating history of Article 18. I do so with the aim of placing its provisions in their proper context.

187. Article 18 of the ECT entitled "Sovereignty over Energy Resources" is placed in **Part IV** of the Treaty, entitled "Miscellaneous Provisions". It reads as follows:

> (1) The Contracting Parties recognize state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance and subject to the rules of international law.
>
> (2) Without affecting the objectives of promoting access to energy resources, and exploration and development thereof on a commercial basis, the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources.
>
> (3) Each state continues to hold in particular the right to decide the geographical areas with its Area to be made available for exploration and development of its energy resources, the optimalization of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and reclamation within its Area, and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises.
>
> (4) The Contracting Parties undertake to facilitate access to energy resources, inter alia, by allocating in a non-discriminatory manner on the basis of published criteria authorizations, licences, concessions and contracts to prospect and explore for or to exploit or extract energy resources.

188. Two statements that are appended to the ECT are relevant to the interpretation and application of Article 18. The first is Declaration V, the second is the Chairman's Statement at the Adoption Session on 17 December 1994.

189. Declaration V reads as follows:

> "The representatives declared that Article 18(2) shall not be construed to allow the circumvention of the application of the other provisions of the Treaty."

190. The Chairman's Statement made at the ECT's Adoption Session provides, in pertinent part, as follows:

> "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, **Kazakhstan**, Moldova, the Russian Federation, Sweden, Switzerland and Ukraine have declared that the Treaty shall be interpreted in accordance with generally recognized rules and principles of observance, application and interpretation of treaties as reflected in Part III of the Vienna Convention on the Law of Treaties of 25 May 1969. *In particular in the context of Article 18(2) they recalled*

that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty ..."[55]

A. Textual analysis of paragraphs (1) and (2)

Paragraph (1)

191. At the outset, it is noteworthy that the language of paragraph (1) of Article 18 is declaratory: i.e. "*recognise*" and "*reaffirm*".

192. In the first sentence of Article 18(1), the Contracting Parties *recognise* two fundamental concepts of international law: (a) state sovereignty and (b) sovereign rights over energy resources (derived from the widely known principle of international law: permanent sovereignty over national resources). Neither of those two principles is deniable, even though the meaning and scope of application of each has *evolved* in conjunction with the development of international law.

193. Second, in the second sentence of paragraph (1) of Article 18, the Contracting Parties *reaffirm* their commitment to the rule of law: in other words, each Contracting Party *reaffirms* its commitment to exercise its sovereign rights and rights over energy resources "in accordance with and subject to the rules of international law".

194. The second sentence of paragraph (1) therefore clearly indicates that the two principles recognised in the first sentence are not absolute in nature. In other words, they are relative principles: each principle must be exercised/applied in accordance with, and subject to, the rules of international law.

195. *Pacta sunt servanda* is a fundamental rule of customary international law, which has been codified in Article 26 of the VCLT; Article 26 provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[56] It follows therefore that the two principles mentioned in the first sentence of paragraph (1) of Article 18 must be exercised in accordance with the principle of *pacta sunt servanda*.

196. Thus, applying the general rule of treaty interpretation,[57] I am of the opinion that each State that is a Contracting Party to the ECT must exercise its sovereignty in general, and its sovereign rights over energy resources in particular, in accordance with its

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[55] Emphasis added. [AAB-33]

[56] Needless to say that this international law rule is subject to the another international law principle of *jus cogens* (see Article 53 of the VCLT, cited at footnote 41 above)

[57] See Section **4** above.

specific obligation as set out in the rest of the ECT, including those obligations under Part III of the Treaty.

197. I am also of the opinion that Article 18(1) provides a context within which the rest of the Article should be construed, including paragraph (2), which I consider next.

Paragraph (2)

198. The normative segment of this paragraph reads that "... the Treaty [ECT] shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources." Read in isolation, the scope of these provisions could be subject to misunderstanding, as is clearly displayed in the submissions of the Respondent.[58] However, the scope and effect of the relevant provisions of Article 18(2) can be clearly ascertained if read in context, and in light of the object and purpose of the ECT.

199. Relevant to the context are Declaration V and the Chairman's Statement quoted above in paras.188 and 189 respectively. Each of these two statements clarifies the scope and effect of the normative part of Article 18(2). The first clarification is provided by Declaration V which states that "Article 18(2) shall not be construed to allow the circumvention of the application of the other provisions of the ECT." The Chairman's Statement notes that "in the context of Article 18(2) ... a party [to the ECT] may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

200. Reading the provisions in the context of the two above declarations, it is clear that Article 18(2) must mean the following: a Contracting Party has the right to prescribe the rules governing the system of property ownership of energy resources in its Area. This right must not however be interpreted or applied in a way to allow such a Contracting Party to circumvent its specific obligations under the ECT: most notably, the obligations set out in Part III of the ECT. Neither can that Contracting Party rely on its domestic law rules as justification for breaching any of its ECT obligations. It follows that a Contracting Party may not take any measures which are, for example, discriminatory and/or expropriatory and then contend that these measures were taken in exercise of its right under article 18(2).

[58] See paragraphs 11.4-11.16 of the SoD.

201. It is my view that the above construction of Article 18(2) is in conformity with the applicable rule of interpretation of treaties (i.e. the ordinary meaning of the term in accordance with its context and the object and purpose of the treaty).

202. Furthermore, as noted below, the relevant provisions of Article 18(2) mirror what was then Article 222 of the European Communities Treaty (now Article 345 of the Treaty on the Functioning of the European Union ("TFEU"): ex-Article 295. Therefore, it might be helpful, for present purposes, to say a brief word about how the European Court of Justice ("ECJ") has construed the scope and effect of Article 345.

203. On several occasions, the ECJ has made clear that the application of "... the rules in Member States governing the system of property ownership" must be in conformity with the EU Treaties. Thus, for example, in the *Konle* case, the ECJ ruled that "although the system of property ownership continues to be a matter for each Member State under Article 222 of the Treaty, that provision does not have the effect of exempting such a system from the fundamental rules of the Treaty."[59] Furthermore, in the *Commission v Germany*, the ECJ recalled: "...that article [Article 345 TFEU] does not have the effect of exempting the Member State's systems of property ownership from the fundamental rules of the Treaty."[60]

204. In conclusion, I am of the opinion that the expression that "... the Treaty [ECT] in no way prejudices the rules in Contracting Parties governing the system of property ownership of energy resources" does not bear the meaning ascribed to it by the Respondent in its SoD.[61] Therefore, it is not correct to argue that this expression, read in its proper context, deprives the present Arbitral Tribunal from entertaining any of the Claimants' claims; nor is it admissible to invoke Article 18(2) as a justification for breaching any ECT investment obligations set out in Part III of the ECT.

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[59] *Konle v Austria,* Case C-302/97, [1999] ECR I-003099, paragraph 38; [AAB-34]; see also, for example, *Salzmann*, Case C-300/01, [2003] ECR I-04899, paragraph 39, *British American Tobacco*, Case C-491/01, [2002] ECR I-11453, paragraph 147.

[60] Case C-503/04, [2007] ECR I-06153, at paragraph 37.

[61] See paragraph 11.5 of the SoD.

B. Summary of Negotiations

205. An early version of the sovereignty article was included in the various draft texts of the Treaty.[62] In late 1992, Norway introduced a proposal for a new article (Article 26A) entitled "Property" to the draft text of the ECT. Norway's proposed article read that "[t]his Agreement shall in no way prejudice the system existing in Contracting Parties in respect of property."[63] However, this proposal was dropped from the Chairman of Working Group II's Compromise text of the ECT, dated 15 March 1993, and the Sovereignty over Energy Resources article was moved into Part IV entitled "Contextual".[64] The 5th version of the draft ECT is to be noted here. Commenting on the sovereignty article (then Article 21), the Chairman at the plenary "decided to leave this Article open until there was a better understanding on whether provisions of the Charter Treaty could interfere with the concept of sovereignty over energy resources established in international law."[65]

206. The text of the sovereignty article remained one of the least changed and hardly negotiated articles of the ECT. However, when it was thought that the negotiations of the Treaty were at an end, Norway submitted Room Document 7, dated 7 June 1994,[66] in which it was proposed, inter alia, the inclusion of a new article (21bis) to the Chairman's compromise draft ECT text, dated 22 April 1994.[67]

207. On 11 June 1994, with the aim of securing Norway's signature of the ECT and on the basis of informal consultations (with a handful of parties) concerning Norway's Room Document proposals mentioned above, the Chairman of the Plenary proposed an amendment to Article 18 (then Article 21) of the ECT.[68]

208. The Chairman's proposed amendment to the sovereignty article, particularly the "ownership" provisions introduced into paragraph 2 of Article 18 was a cause of

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[62] For earlier versions, see, for example: Article 5 entitled "Sovereignty over Natural Resources" of BP 2, dated 11 September 1991; Article 4 entitled "Sovereignty over Energy Resources" of BA 12, dated 9 April 1992. [AAB-35]

[63] See, for example, BA 26, dated 25 November 1992 and BA-37, dated, 1 March 1993. [AAB-36]

[64] See CONF 50, dated 15 March 1993. [AAB-37]

[65] CONF-72, dated 11 October 1993. [AAB-38]

[66] [AAB-39]

[67] CONF 98, dated 22 April 1994. [AAB-40] Notable here is that the wording of the Chairman's proposed text for Article 18(2) is different from the text which has been adopted in present text of the ECT.

[68] See Room Document 37, dated 11 June 1994. [AAB-41]

concern to many. The Chairman of the Legal Sub-Group, after consultation with other members of the group, produced a lengthy note on what he thought would be the potential consequences of the amendment.[69] Other members of the Legal Sub-Group commented on an earlier version of the Chairman's note,[70] while others expressed their views on the proposed amendment. The Australian member of the Group, for example, expressed his government's position as follows:

> "Australia would like to have it clearly recorded that it can accept Article 21 as currently drafted on the basis that it is merely a declaratory of existing international law. We do not read it as overriding any other provision of the Treaty. In particular, our understanding is that Article 21 does not override the core obligations contained in Article 13 in relation to the standard of treatment to be provided to investments. This is in line with the view expressed by Norway that Article 21(2) and (4) are not intended to undermine or 'gut' the Treaty.[71]

209. It is in order to avoid some of the potential uncertainties surrounding the interpretation of Article 18(2) that Declaration V was made by all representatives (paragraph 189 above). The Statement made by the Chairman of the Conference at the ECT's adoption Session was thought necessary exactly for the same reason (paragraph 190 above). The end result was a political compromise: a compromise between those representatives, predominately Norway, which wanted a sovereignty article in the text of the ECT, and those who feared any late amendment might have a detrimental impact on the substantive provisions of the Treaty. However, all participating representatives of the Contracting Parties agreed on one thing: "*that Article 18(2) shall not be construed to allow the circumvention of the application of the other provisions of the Treaty.*"

C. Summary of the Respondent's arguments

210. It is in light of the above analysis that I shall now turn to say a few words about some of the assertions made by the Respondent regarding Article 18 of the ECT (see paragraphs 11.1-11.30 of the SoD).

211. First, I am not in a position to express an opinion on the Respondent's analysis of the linguistic differences between the English and Russian provisions of Article 18(2); except for two general comments. The first comment is that the Respondent's English translation of the Russian text is word for word identical to the text that was

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[69] [AAB-42]

[70] See, for example, response from Esa Paasivirta, Legal Counsellor, Finnish Ministry of Foreign Affairs, dated 3 August, 1994. [AAB-43]

[71] [AAB-44]

proposed in the Conference Chairman's amendment dated 11 June 1994.[72] The Chairman's text was subject to some critical comments, and was subsequently changed to the present text of Article 18(2). The second comment is that the difference between the English text and the Russian is itself no good reason to argue that "... the Russian text of paragraph 2 Article 18 shall apply in the present case ..." The proper way to resolve any real difference between the two texts with the aim of reconciling their meaning is authoritatively offered in Article 33 VCLT (see paragraphs 57-59 above). However, even if we were to assume, for the sake of argument that the Russian text prevails, it does not follow form it what the Respondent is asserting, particularly if the relevant provisions of the Article are read in the *context* of Declaration V and the Chairman's Statement (see, paragraphs 189 and 190 respectively). Article 18(2) in no way deprives the present Arbitral Tribunal of its jurisdiction to hear the Claimants' claims, nor does it provide justifiable grounds for allowing Contracting Parties the opportunity to breach their core obligations under Articles 10 and 13 of the ECT.[73] The Respondent's assertion effectively 'guts' the ECT of its substance.

212. Second, after reciting the provisions of Article 18(3) and (4) of the ECT, the Respondent moves on to examine some of the Claimants' claims from the perspective of Kazakh law. All this in order to conclude that "... the Tribunal does not have jurisdiction to her any of the claims" that were examined in this part of the SoD. With all due respect, it is my view that the Respondent appears to confuse issues of applicable law, jurisdiction and matters pertaining to the merits of the case. (paragraphs 11.16-11.31of the SoD). I am of the opinion that Article 18(3) and (4) does not deal with any of these matters. All that Article 18(3) provides is an illustrative examples of the "system of property ownership" confirmed in paragraph (2) of the same Article: hence "[e]ach state *continues* to hold ...". As for Article 18(4) of the ECT, it in fact establishes a commitment on the side of the Contracting Parties to act transparently and not to discriminate in allocating "authorization, licences, concessions and contracts to prospect and explore for or to exploit or extract energy resources."

[72] Please see [AAB-41]

213. In conclusion, and in light of all of the above, I am of the opinion that read in its proper context, nothing in Article 18 deprives an arbitral tribunal seized under Article 26 of the ECT from any aspect of its jurisdiction; neither does Article 18(2) have any impact on questions of admissibility of claims.

VII. TAXATION: ARTICLE 21 ECT

214. In this section I shall consider only the interpretative issues raised by the parties in this arbitration concerning the taxation provisions of Article 21 of the ECT. I shall first provide a brief textual analysis of three issues, namely: (a) the overall design and general scope of Article 21; (b) the proper construction of the word "taxes", as set out in paragraph 21(5) and the term "Taxation Measures" defined in Article 21(7); and (c) the consequences of excluding customs duties from the terms "tax provisions" and "taxes" in paragraph (7)(d) of the ECT. Secondly, I provide a brief summary of the negotiating history of Article 21. Thirdly, I offer brief comments on the Respondent's assertions concerning Article 21 of the ECT and the scope of its application in the present arbitration.

A. Textual analysis

1. Overall design: paragraphs (1) and (7)

215. First to note is that Article 21 is designed to serve as an exclusion from the ECT's substantive obligations incumbent on its Contracting Parties. However, it is clear from paragraphs (2), (3), (4) and 7(d) that Article 21's exclusion is not absolute: it is specific and limited. It is specific in that it applies only to "Taxation Measures"; a phrase which has been defined in paragraph 7(a) of Article 21. It is limited in that its reach does not extend to all ECT obligations. Thus, the exclusion does not extend in principle to, *for example*: (a) the obligation to accord Investments of Investors of another Contracting Party the better treatment accorded under the principles of most-favoured-nation and the national treatment (Article 10(7) of the ECT; and (b) to expropriation (Article 13 of the ECT).

216. The above construction of Article 21 is clear from its paragraph (1) which provides that "[e]xcept as otherwise provided in this Article, nothing in this Treaty [ECT] shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties ...".

217. To make clear the limited scope of Article 21's exception of ECT's protections, the term "Taxation Measures" in paragraph (1) has been specifically defined as "**provisions**" of tax treaties and tax legislation. Article 21 thus provides, in pertinent part, that:

> (7) For purposes of this Article:

(a) The term "Taxation Measure" includes:

(i) any **provision** relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and

(ii) any **provision** relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound."[74]

218. It is to be noted that the above definition contains only two related items: "provisions" of domestic tax legislation and "provisions" of tax conventions. Thus, it is my opinion that the exclusion in Article 21(1) serves a dual purpose of (i) preventing the "provisions" of tax-related agreements from being incorporated into the ECT and subjected to its dispute settlement mechanisms (pursuant to the MFN clause); and (ii) preventing Contracting Parties from having to alter the "provisions" of new or existing tax legislation as a result of the obligations undertaken in the ECT.

219. It is also relevant to note here that the above definition of "Taxation Measures" has been left open-ended; this is clear from the phrase "[t]he term "Taxation Measure" *includes*". Applying the proper rule of interpretation, I would argue that the reason behind this open-ended definition is not to inadvertently exclude provisions of similar laws or treaties. There would have been no purpose, in such case, to specifically define Taxation Measures as "provisions."

2. Article 21(5): taxes and not Taxation Measures

220. By referring to Article 13 of the ECT, the chapeau of paragraph (5) makes clear that "*taxes*" could amount to expropriation or measures equivalent to expropriation. However, paragraph (5) refers to "taxes" and **not** to "Taxation Measure", the latter of which has been defined in paragraph (7). As noted below (paragraph 230) the *travaux préparatoires* does not shed light as to why this is the case: why use the term "taxes" instead of "Taxation Measures"? Accordingly, a clear distinction must have been intended between the two terms.

221. Applying the general rule of treaty interpretation outlined above,[75] it can be argued that the intent behind the use of the term "taxes" in paragraph (5) was that it should be interpreted broadly (relative to "Taxation Measures") to encompass **all** actions of an expropriatory nature taken pursuant to a government's taxation authority. This is

[74] Article 21(1) and (7) of the ECT. Emphasis added.

[75] See Section **4** above.

because of the ease with which a State can expropriate foreign investments under the guise of levying taxes. Therefore, broad and strong investment protections were needed in this area, since such protections underline the whole investment regime of the ECT.

222. The second limb of paragraph (5) provides for a unique dispute resolution mechanisms, the procedures of which are quite clear. However, what I find difficult to understand is the distinction drawn between a tax that "constitutes expropriation" and a tax that constitutes a discriminatory expropriation. But this is what the parties clearly stated and it should remain so. Be that as it may, the only remark I wish to make here is simply this: an arbitral tribunal seized under Article 26 of the ECT "**may** take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the tax is an expropriation". However, such a tribunal "**shall** take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the tax is discriminatory". The difference is clear. The verb "may" indicates choice, possibility or permission, whereas the verb "shall" indicates direction. In the present context whether or not the verb shall it indicates mandatory direction is a matter of debate, particularly if read in conjunction with the phrase "take into account".

3. Article 21(7)(d): "customs duties"

223. Article 21(7)(d) leaves no doubt that "customs duties" do not fall within the category of "tax provisions" and "taxes". That this would have been the case even if not stated, as made clear from the expression: "For the avoidance of doubt". Article 21(7)(d) has the effect of dis-applying Article 21 to "customs duties". Therefore, at least for the purposes of the ECT, customs duties are neither "tax provisions" nor "taxes". The effect of this is to expose such measures (i.e. "customs duties") to all ECT's obligations set out in its Part III of the ECT; in other words, customs duties are **not** covered by Article 21 of the ECT.

224. In conclusion, I am of the view that Article 21 of the ECT is not as broadly cast as it might appear at first examination. The exclusion (set out in its provisions) is significantly constrained. This is more so when the terms of its provisions are interpreted in good faith and in accordance their context and in the light of the ECT's object and purpose.

B. Summary of Negotiations

225. In its earliest draft of 1991, the Taxation Article was conceived as means to protect energy investors from the burdens of double taxation, which was thought might frustrate the Treaty's overall goal of fostering investment.[76] The negotiating parties soon abandoned that notion, and in 1992 the Taxation Article was drafted instead with the purpose of ensuring that Contracting Parties were not obliged to extend to investors of other Contracting Parties preferential tax treatment under double taxation conventions or domestic tax legislation.[77]

226. In particular, delegations were concerned that investors might be able to subject to dispute resolution (under the ECT) preferential rights accruing under bilateral tax treaties. Accordingly, for its first meeting on September 9, 1992, the Taxation Sub-Group was charged with the task, among others, of "[r]emov[ing] potential doubts in the text regarding the supremacy of bilateral tax agreements and their dispute settlement provisions".[78]

227. Some delegations voiced concern that, unlike tax treaties, domestic tax legislation presented the risk that Contracting Parties could use such legislation to subject foreign investors to discriminatory or inequitable treatment, or otherwise frustrate the Treaty's investment protections.

228. One proposed solution, reflected in Basic Agreement 12 of April 1992, was to include the following proviso at the end of the exclusion of tax treaties and tax legislation: "… provided that such domestic legislation does not constitute a means of arbitrary or unjustifiable discrimination between investors of any other Contracting Party or a disguised restriction on the benefits accorded to such investors."[79] While this particular formulation was ultimately revised, it reflects the balance that the drafters sought to strike with respect to domestic tax legislation: i.e., between protecting investors from discriminatory and unfair treatment, and preserving the right of Contracting Parties to enact tax legislation in a manner they saw fit.

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[76] See, for example, BA 4, dated 31 October 1991. [AAB-45]

[77] See, for example, BA 10, dated 19 March 1992. [AAB-46]

[78] BA 13, dated 19 June 1992. [AAB-47]

[79] BA 12, dated 9 April 1992. [AAB-48]

229. While the draft text of the Taxation Provisions subsequently underwent further modifications, it is clear that the competing considerations noted above are reflected in the final text of Article 21 of the ECT.

230. Worthy of note here is that in the earlier drafts of the taxation Article, the expropriation carve out was made with respect to "taxation measure".[80] However, this changed in 1993, when the term "taxes" was introduced instead of "taxation measures.[81] I was unable to find an answer in the *travaux préparatoires* as how and why this took place.

231. Finally, I am submitting a document which I hope might provide some assistance in shedding light on the interpretation of Article 21 of the ECT. This document contains responses from members of the Legal Sub-Group to questions regarding the taxation provisions, put to them by the Chairman of the Sub-Group.[82]

232. I shall now consider briefly some of the Respondent's assertions concerning Article 21 of the ECT (see paras.30.6-30-70 of the SoD).

C. The Respondent's arguments

233. At paragraph 30.9 of the SoD, the Respondent asserts that "[t]to the extent that the Claimants rely on tax charges in support of their claim of direct or indirect expropriation, the matters complained of by the Claimants relate to Tax Measures of the Republic under Article 21(7) of the ECT". The Respondent further argues that "measures have been further determined by the Competent Tax authorities not to constitute expropriation".

234. I have the following four comments to make. First, as shown above (paragraphs 219-221), expropriation is not covered by the general exclusion of Article 21, this is clear from Article 21(5)(a), that "Article 13 [the expropriation article] shall apply to "taxes"". Therefore, "**taxes**" can be expropriatory. Second, the Respondent's admission that the tax-related actions taken by the Kazakh authorities have been determined by the Competent Tax Authorities not to constitute expropriation is significant. Such an admission must have the effect of making any referral as to "whether a tax constitutes an expropriation" to the Competent Tax Authorities by the

[80] See BA 22 of 1992. [AAB-49]

[81] See CONF 64, dated 7 July 1993. [AAB-50]

[82] Responses to Legal Sub-Group's Comment on Art. 20, "Taxation", dated 5 March 1993. [AAB-51]

present Arbitral Tribunal unnecessary. Third, it is clear from Article 21(5)(b)(iii) of the ECT that arbitral tribunals seized under Article 26 "**may** [and not shall] take into account any conclusion arrived at by the Competent Tax Authorities regarding whether the tax is an **expropriation.**"[83] Fourth, it is to be recalled that the present Arbitral Tribunal is to determine issues in dispute "in accordance with this Treaty [ECT] and applicable rules and principles of international law." Therefore, whether or not the measures complained of by the Claimants are expropriatory is to be determined by the Applicable Law, and not in accordance with Kazakh law (see paragraphs 32-45 above).

[83] Emphasis added.

VIII. THE STATUS OF GIBRALTAR UNDER THE ECT

235. For the purposes of this section it is sufficient, to note that the question of whether the ECT applies to Gibraltar arises only because one of the Claimants, Terra Raf is a company that is incorporated in Gibraltar. Therefore, I have been asked by King & Spalding to comment on whether Terra Raf as a company incorporated in Gibraltar qualifies as an "Investor" for the purposes of the ECT (Article 1(7)(a)(ii)).

236. I would like to note at the outset that I have already given an expert legal opinion concerning the legal status of Gibraltar regarding its status under the ECT in *Petrobart v Kirgizstan* case. I was also summoned to appear before the Svea Court of Appeal in Stockholm as an expert.[84] Both the *Petrobart* Tribunal and the Svea Court accepted that Gibraltar indeed falls within the ambit of the ECT and that an Investor incorporated in Gibraltar will be considered an Investor for the purposes of Article 1(7)(a)(ii) of the ECT.

237. In this section, I reaffirm what I opined before both the *Petrobart* Tribunal and the Svea court. Although, after reflection, I have amended the way in which I first reasoned before these two tribunals; however, my conclusion remains the same. In addition, I have examined the status of Gibraltar regarding its status within the European Union.

A. The United Kingdom, Gibraltar and the Provisional Application of the ECT

238. Gibraltar is a UK-dependent territory, for whose international relations the UK is responsible. The question accordingly is whether, by virtue of the UK's participation in the ECT, the ECT applies to Gibraltar.

239. The UK signed the ECT on 17 December 1994. On signature of the ECT, the UK does not appear to have made any declaration of the kind referred to in Article 40(1), in which the ECT would be "binding upon it with respect to all the territories for the international relations of which it is responsible, or to one or more of them".

240. Such a declaration, if it had been made, would have taken effect "at the time the Treaty enters into force for [the UK]", i.e. upon ratification by the UK and in accordance with the temporal provisions set out in Article 44. But as I say, no such declaration was made by the UK (it is probable that the reason for the absence of such

[84] [AAB-52]

a declaration is to be found in considerations arising in the context of the dispute between the UK and Spain over Gibraltar).

241. On the face of it, therefore, the existence of Article 40 dis-applies the normal rule (Article 29, Vienna Convention on the Law of Treaties, 1969) that a treaty is binding upon a State in respect "of its entire territory"; and the absence of a declaration in respect of Gibraltar would appear to exclude the Treaty's operation in respect of that territory.

242. However, at the time of its signature of the ECT on 17 December 1994, the UK made a separate declaration under Article 45(1) of the Treaty, stipulating that "provisional application under Article 45(1) shall extend to the United Kingdom of Great Britain and Northern Ireland and to Gibraltar".

243. Thus not only was there no UK declaration of non-provisional application to Gibraltar of the kind provided for in Article 45(2), but there was an express declaration accepting its provisional application to that territory.

244. There is no separate 'territorial application' provision for provisional application under Article 45, and this declaration accordingly has no express basis in the ECT.

245. But the implication must be that it was the intention of the UK on signing the Treaty that, consistently with the principle reflected in Article 40, its signature should have effect upon Gibraltar, so that Gibraltar was part of the territory referred to by the term "each signatory" in Article 45(1). It was the express intention of the UK that the provisional application provisions should apply to Gibraltar, and it is difficult to see how they could do so without the UK's signature as a whole extending to that territory.

246. Provisional application of the ECT is stated to be "pending its entry into force for such signatory". The entry into force of the Treaty for the UK resulted from the UK's ratification of the ECT in December 1996. That ratification was in respect of the UK, Jersey and the Isle of Man - but not Gibraltar. It follows that the Treaty is "in force" for the UK, Jersey and the Isle of Man, and that accordingly its provisional application to them has come to an end.

247. But it equally follows that the ECT is not yet "in force" for Gibraltar, in which case its provisional application to that territory still continues.

248. Provisional application is in principle subject to no other terminal date than eventual entry into force, unless there is an express declaration of the kind referred to in Article 45(3) - which is not the case here.

249. I am therefore still of the opinion that:

(a) the ECT was provisionally applied to Gibraltar by the UK's Declaration of December 1994;

(b) the ECT has not become "in force" for Gibraltar by virtue of the UK's 1996 ratification;

(c) the ECT will not become "in force" for Gibraltar until some further instrument of ratification is executed in respect of Gibraltar;

(d) until then, Gibraltar stays subject to the provisional application regime, which, although "provisional", may nevertheless be open ended in duration;

(e) consequently Gibraltar is currently within the ECT's territorial scope under that regime, and a company (**Terra Raf**) incorporated in Gibraltar qualifies as an "Investor" for purposes of the ECT (Article 1(7)(a)(ii)).

B. The Status of Gibraltar within the European Union (the "EU")

250. Even if we were to assume, *arguendo*, despite the above analysis, that Gibraltar's status remains precarious as far as the ECT is concerned; it is arguable in my opinion that Gibraltar is an integral part of the territory of another Contracting Party to the ECT, namely, the European Union.

251. As explained above (paragraphs 67-69), the European Union is a Contracting Party to the ECT as a REIO.

252. It should also be recalled that Article 1(10) of the ECT define "Area" with respect to a REIO, which is a Contracting Party as "...the Areas of the member states of such Organization, under the provisions contained in the agreement establishing that Organisation."[85]

253. Article 52(1) of the Treaty on European Union ("TEU") makes the Treaties (i.e, the TEU and the Treaty on the Functioning of the European Union ("TFEU") applicable to all EU Member States.

[85] Emphasis added.

254. The territorial scope of the Treaties is determined by Article 52(2) of the TEU, which reads as follows:

> "The territorial scope of the Treaties is specified in Article 335 of the Treaty on the Functioning of the European Union."[86]

255. Article 355 (2) TFEU provides that the Treaties shall not apply to those overseas territories having special relations with the UK which, like Gibraltar, are not included in Annex II of the TEFU.

256. Gibraltar does, however, fall under paragraph (3) of Article 355, which stipulates:

> "The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible."[87]

257. As such, Gibraltar is the only European territory to which, Article 355(3) of the TEFU applies.

258. That this is the case has been confirmed by a declaration made by Spain and the United Kingdom in the context of the EU Treaties which reads as follows:

> "The Treaties apply to Gibraltar as a European territory for whose external relations a Member State is responsible. This shall not imply changes in the respective positions of the Member States concerned."[88]

259. In light of the above analysis, it is my opinion that Gibraltar as "a European territory" falls within the Area of the European Union for the purposes of the ECT. And since the European Union is a Contracting Party to the ECT; it follows therefore that a company registered in Gibraltar is an Investor of a Contracting Party for the purposes of Article 1(7) of the ECT.

260. Finally, without the slightest intent of being presumptuous, I should like to state the following. Based on my personal familiarity of the political sensitivity surrounding Gibraltar, particularly from my time at the Secretariat, I am strongly convinced that the intent, at least as far as the UK is concerned, remains - then as now - that Gibraltar is covered by the ECT. I am aware that commentators who base their analysis purely on comparisons of various ECT provisions may reach a different conclusion. However, not taking the convoluted political context of Gibraltar into

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[86] [AAB-53]

[87] [AAB-54]

[88] Declaration 55 of the Declarations Concerning Provisions of the Treaties. Emphasis added. [AAB-55]

account could result in commentators reaching the wrong overall conclusion, at least if the aim is to ascertain the intent of the party in question.

IX. CONCLUSIONS

261. In light of the above, and based on the reasons provided therein, my conclusions are as follows:

(a) for the purposes of this arbitration, each of the Claimants is an *Investor* of a Contracting Party to the ECT, who directly or indirectly owned various forms of *Investments* in the territory of Kazakhstan (a Contracting Party to the ECT);

(b) thus, the Claimants are entitled to submit dispute(s) relating to Investments concerning Kazakhstan's alleged breach of its obligations under Part III of the ECT to international arbitration. Kazakhstan had already given its consent that such an arbitration may be submitted by the Investors to "an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce";

(c) the present Arbitral Tribunal seized under Article 26 of the ECT have both jurisdiction *ratione personae* and *ratione materiae*; and

(d) there is nothing in Articles, 17, 18 and 21 of the ECT which makes any of the Claimants' claims inadmissible or deprives the present Arbitral Tribunal form the jurisdictional powers it enjoys under Article 26 of the ECT.

I believe the contents of this opinion are true.

Done in Brussels: 11 April 2012

Respectfully submitted,

Professor Adnan Amkhan Bayno