The Grid and *der Krieg*: A Discussion on the Applicability of the Energy Charter Treaty to the War-affected Investments in Nagorno-Karabakh /Artsakh

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Contents

Abstract Following the 1994 Bishkek ceasefire agreement between Armenia and Azerbaijan[1], a *de facto* Republic of Nagorno-Karabakh/Artsakh with a "strong connection"[2] with Armenia emerged on the territories of the former Nagorno-Karabakh Autonomous Region (NKAR) of the Azerbaijan Soviet Socialist Republic and the seven adjacent districts of the NKAR. Later on, several Hydro Power Plants (HPP) were constructed on the region's fast-flowing rivers, primarily by Armenian nationals.[3] At face value, these HPP are nothing but investments in the energy sector owned or controlled by Armenian nationals. As of November 2020, Azerbaijan gained control over the territory where the investments were made. As a result, a *prima facie* expropriation of the investments has played out. Due to the absence of any diplomatic relationships and the hostile relationships between Armenia and Azerbaijan, arbitration is not guaranteed but is seemingly the only plausible avenue should the owners of the HPP try and claim remedy for their damages.

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[1] Bell, C. and Badanjak, S., "Ceasefire Agreement Signed in Bishkek" (PEACE AGREEMENTS DATABASE, 2019) https://www.peaceagreements.org/view/990 accessed 10 January 2021.

[2] Talmon, Stefan. "The Responsibility of Outside Powers for Acts of Secessionist Entities." International and Comparative Law Quarterly. 583 (2009), 493-517.

[3] H. Ghazaryan, D. Ghazaryan, "Shahumyan region hydropower plants: Who are the owners?" (Hetq, 20 February 2020) https://hetq.am/hy/article/113430 accessed 15 March 2020.

This article will discuss the Armenian nationals' hypothetical attempts to submit their dispute to investment arbitration under the Energy Charter Treaty (ECT), arguably the only plausible remedy to fill in the possible legal vacuum in this case.

1. Introduction

The annexation of the Crimean Peninsula by Russia in 2014 proved detrimental for a number of investments owned by Ukrainian investors. Domestic hitherto, these investors overnight found themselves in the shoes of foreign investors deprived of their investments. Several investment arbitration proceedings followed claiming damages for the actions (expropriation) of Russia. [4]

More bizarre a framework can play out in relation with certain investments in the Nagorno-Karabakh region. First, the region appeared under the control of the self-proclaimed Republic of Artsakh, while Azerbaijan maintained *de jure* sovereignty over the area under international law.[5] In this period, investments (the Investments) by primarily Armenian nationals (the Investors) were made in the region's energy sector. As a result of the 2020 war between Armenia and Azerbaijan, the territory changed hands once again, leaving the owners of the Power Plants empty-handed. This paper inquires whether the Armenian nationals can bring their claims against Azerbaijan before arbitral tribunals as aggrieved foreign investors within this framework. I will be arguing that the Tribunals will most likely assume jurisdiction should *the Investors* initiate arbitral proceedings under the Energy Charter Treaty[6] (ECT). It is submitted that the ECT, in the absence of a bilateral investment treaty (BIT) between Armenia and Azerbaijan, is the only legal framework *the Investors* can rely upon.

In the following sections, it will be argued that *the Investors* are in a position of establishing (under the ECT) the existence of an investment (*ratione materiae*) made in the territory of a contracting state *(ratione loci*) at the time when the obligations were already in force (*ratione temporis*) by a national of the other contracting state (*ratione personae*).

Whilst Armenian nationality is sufficient for *the Investors* to be qualified as such under the ECT, and power generation and distribution is an economic activity permitting HPP to be qualified as Investments, the application of the ECT to the territory of the Nagorno-Karabakh can be a tricky challenge to overcome for the Tribunal. Nevertheless, it will be argued that the armed conflicts that

[4] Oschadbank v The Russian Federation (Oschadbank v Russia) and PJSC CB PrivatBank and Finance Company Finilon LLC v The Russian Federation, PCA Case No. 2015-21 (PrivatBank v Russia); Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v The Russian Federation, CA Case No. 2015-07 (Belbek v Russia); (i) Stabil LLC, (ii) Rubenor LLC, (iii) Rustel LLC, (iv) Novel-Estate LLC, (v) PII Kirovograd-Nafta LLC, (vi) Crimea-Petrol LLC, (vii) Pirsan LLC, (viii) Trade-Trust LLC, (ix) Elefteria LLC, (x) VKF Satek LLC, (xi) Stemv Group LLC v The Russian Federation, PCA Case No. 2015-35 (Stabil LLC and others v Russia); PJSC Ukrnafta v The Russian Federation, PCA Case No. 2015-34 (Ukrnafta v Russia); Everest Estate LLC et al. v The Russian Federation, PCA Case No. 2015-36 (Everest Estate LLC and others v Russia); (1) Limited Liability Company Lugzor, (2) Limited Liability Company Libset, (3) Limited Liability Company Ukrinterinvest, (4) Public Joint Stock Company DniproAzot, (5) Limited Liability Company Aberon Ltd v The Russian Federation, PCA Case No. 2015-29 (Lugzor and others v Russia); NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrgasvydobuvannya and others v The Russian Federation, PCA Case No. 2017-16 (Naftogaz and others v Russia).

[5] United nations, "GENERAL ASSEMBLY ADOPTS RESOLUTION REAFFIRMING TERRITORIAL INTEGRITY OF AZERBAIJAN, DEMANDING WITHDRAWAL OF ALL ARMENIAN FORCES" (UN Meetings Coverage and Press Releases, 14 March 2008) https://www.un.org/press/en/2008/ga10693.doc.htm accessed 20 March 2021

[6] Energy Charter Treaty 1994.

affected the territory do not hinder the ECT application to the region, neither from a territorial nor temporal perspective. Next discussed is the alleged illegality of *the Investments*, which also, it is argued, falls short of hindering the arbitral jurisdiction over the dispute. Finally, the denial of benefits clause of the ECT will prove to be of no effect as a jurisdictional impediment.

2. The Investor-State Dispute Settlement (ISDS) of the ECT

This section will briefly introduce the dispute resolution under the ECT intended for investement disputes between foreign investors and the host States.

The principle *compétence de la competence* or *kompetenz-kompetenz* empowers the Tribunals to rule on their own jurisdiction.[7]

The Investor-State Dispute Settlement provisions of the ECT are found under Article 26(1) in Part V:

> 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.

Therefore, an arbitration Tribunal provided for under ECT will have jurisdiction over the claims of an Investors should the following conditions be met: (i) there should be a dispute concerning an alleged breach of an obligation under Part III of the ECT by a Contracting Party; (ii) the dispute must relate to an Investment as defined under ECT; (iii) the Investment must be in the Area of the Contracting Party; (iv) the claimant must be an Investor of a Contracting Party; (v) the events with which the claim is concerned must have occurred at a date such as to give the Tribunal jurisdiction. For the purposes of this discussion, it is assumed, that there is a legal dispute between *the Investors* and the host State, i.e., "a disagreement on the point of law or fact, a conflict of legal views or interests between parties".[8]

Article 26 of the ECT provides for three fora for submission of an unresolved investment dispute between private foreign investors and host States. Whilst this choice includes the national judiciary or administrative tribunals of the host State;[9] and previously agreed dispute settlement procedures[10], international arbitration[11] is the most essential remedy[12]. Article 26 of the ECT imposes no exhaustion of local remedies obligation on foreign investors. Since the ECT is not a "self-contained treaty" the disputes should be submitted to the arbitral institutions outside the ECT.

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[7] See Article 41(1) of the ICSID Convention; Article 21 of the UNCITRAL arbitration rules; Section 2 of the Arbitration Act (Sweden); Section 30 of the Arbitration Act 1996 (England and Wales). Also, Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic, ICSID Case No. ARB/14/32, Decision on Jurisdiction, para 169. Such a jurisdictional ruling of an ICSID Tribunal in rare occasions may be challenged before an ad hoc Committee pursuant to Article 52(1)(b) (the Tribunal has manifestly exceeded its powers). In the case of non-ICSID Tribunals, jurisdictional decisions may be challenged before national courts at the seat of the arbitration or in the place of enforcements of the award.

[8] Case Concerning East Timor (Portugal v Australia), ICJ Reports (1995), 89, 99. Cited in Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (Second edition), Oxford University Press, 2012, 245.

[9] Article 26(2) (a) of the ECT.

[10] Article 26(2) (b) of the ECT.

[11] Article 26(2) (c) of the ECT.

[12] As of 15 January 2021, the Secretariat is aware of 135 investment arbitration cases instituted under the Energy Charter Treaty (sometimes invoked together with a bilateral investment treaty). The full list is available **here.**

[13] Under Article 26(4), investors have the option to choose one of the following venues of investment arbitration:

- ICSID-arbitration (given both the investor's home State and the host State have ratified the International Centre for Settlement of Investment Disputes Convention[14] (ICSID)) [15];
- arbitration under the provisions of the ICSID Convention or of the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID (ICSID Additional Facility Rules[16]) (when either only the investor's home State or only the host State have ratified the ICSID Convention)[17];
- a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)[18]; or
- arbitration under the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)[19].

Since the ECT is an international treaty, the provisions and terms therein should be interpreted according to the Vienna Convention on the Law of Treaties[20] (VCLT). The starting point of the ECT interpretation is the ordinary meaning of the terms read in their context and in the light of the ECT object and purpose stipulated under Article 2 of the Treaty.[21] Reference to the object and purpose together with good faith will ensure the effectiveness of the ECT terms (*ut res magis valeat quam pereat*, the *effet utile*)[22]. The context includes Preamble of the Treaty and its annexes. The documents of the Final Act, e.g., the declarations and understandings should also be considered.[23]

2.1. Ratione personae

This section elaborates on the jurisdiction *ratione personae,* which simply put, refers to certain characteristics that an investor should meet to be covered by the investment treaty at hand. The treaty protection extends to an investor who is a national of a contracting party other than the contracting state hosting the particular investment.

Part III of the ECT accords protection only to the Investments of Investors within the meaning of the Treaty. Consequently, only these investors enjoy access to the remedies available under the ECT. Pursuant to Article 1(7) of the Treaty an Investor is (i) a natural person possessing the citizenship or nationality of, or is permanently residing in a Contracting State in accordance with its

[13] Baltag, Crina. The Energy Charter Treaty: The Notion of Investor. Alphen aan den Rijn: Kluwer Law International (2012), 16.
[14] ICSID Convention 1966.
[15] Article 26(4) (a)(i) of the ECT.
[16] Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID, as amended on 10 April 2006.
[17] Article 26(4) (a)(ii) of the ECT.
[18] Article 26(4) (b) of the ECT.
[19] Article 26(4) (c) of the ECT.
[20] Vienna Convention on the Law of Treaties (1969).
[21] Article 31 of the VCLT.
[22] Villiger, Mark E. Commentary on the 1969 Vienna Convention on the Law of Treaties. Leiden: Martinus Nijhoff Publishers (2009), 428.
[23] Article 32 of the VCLT. Final Act of the European Energy Charter Conference.

applicable law, (ii) or a company or other organization organized in accordance with the law applicable in that Contracting State.

Armenia signed and ratified the ECT on 17 December 1994 and 18 December 1997, respectively.[24] Hence Armenian nationals, citizens, and natural persons permanently residing in Armenia are at face value Investors for the purposes of the ECT. In the case of the ICSID arbitration, however, permanent presidency would not suffice to qualify as an Investor under Article 25(2)(a) of the ICSID Convention.[25]

The same threshold is to be applied *mutatis mutandis* to the legal persons organized under the Armenian law. Article 1(7) of the ECT imposes no additional requirements with respect to shareholding, management, *siege social*, or location of business activities. The *Yukos*[26] Tribunal at this point held that "on its face, Article 1(7)(a)(ii) of the ECT contains no requirement other than that the claimant company be duly organized under the law applicable in a Contracting Party".[27] The *Plama*[28] Tribunal, similarly, ruled that "the Claimant is an "Investor of another Contracting Party" within the definition provided by Article 1(7)(a)(ii) ECT, being a company organized in accordance with the law applicable in Cyprus", and that it was "irrelevant who owns or controls the Claimant at any material time."[29] Therefore, *the Investors* are in the position of establishing the jurisdiction *ratione personae* under the ECT.

Fulfillment of the requirements under Article 1(7) of the ECT is, however, the first step only, not the end of the journey. Save for few instances where the ECT protects only Investors, the Contracting Parties grant promotion and protection to Investments of Investors.[30] Thus, the notion of "Investor" and that of "Investment" must be viewed in conjunction. Jurisdiction over a dispute concerning alleged breaches of the obligations of a host State stipulated in Part III of the ECT exists only when the investor meets the requirements of *ratione personae* and the investment satisfies the requirements *ratione materiae* within the meaning of the ECT.[31]

2.2. Ratione materiae

This section inquires whether the subject matter of the would-be dispute, i.e., *the Investments* can be qualified as such under the ECT definition of "investment".

As Article 1(6) of the ECT stipulates, ""Investment" refers to any investment associated with an Economic Activity in the Energy Sector…".

"Economic Activity in the Energy Sector" under Article 1(5) means:

> an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of

[24] ESC Energy charter secretary, "Contracting Parties and Signatories/Armenia" (Energy Charter Treaty, 20 May 2015) https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/armenia/ accessed 20 March 2021.
[25] Hobér (2020), 443.
[26] Yukos Universal Limited (Isle of Man) v The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227.
[27] Yukos (Isle of Man) v Russia, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras 440-441; Veteran Petroleum Limited (Cyprus) v Russian Federation, UNCITRAL, PCA Case No. 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 497.
[28] Plama Consortium Limited v Republic of Bulgaria, ICSID Case No. ARB/03/24.
[29] Plama v Bulgaria, Decision on Jurisdiction, 8 February 2005, paras 124, 128.
[30] Under Article 10(1) of the ECT, FET and most constant protection and security is to be accorded to *Investments*.
[31] Baltag (2012), 19.

> Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.

Understanding 2 of the ECT provides *inter alia* for seven illustrative (non-exhaustive) examples of "Economic Activity in the Energy Sector" for the purposes of the Treaty, the second and third of which read as follows: (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources; (iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines.[32] It is submitted that the HPP are *prima facie* Investments under Articles 1(5) and 1(6) of the ECT that are associated with (i) construction and operation of power generation facilities; and (ii) distribution and supply by way of transmission and distribution grids.

Where *the Investors* elect to commence proceedings under the ICSID Convention, jurisdiction *ratione materiae* is to be established under both the ECT and the ICSID Convention.[33]

Addressing this point, the Tribunal in *Kardassopoulos v Georgia*[34] concluded that:

> In order for the Tribunal to have jurisdiction *ratione materiae* over the present dispute, it must be found to have jurisdiction under the ICSID Convention, and under the ECT.[35]

The reference to the undefined notion of "investment" in Article 25(1) of the ICSID Convention has brought about two conflicting approaches regarding the consequence of the provision *viz* the subjectivist and the objectivist theories.[36]

The subjectivist theory does not endorse the traditional economic terminology according to which "investment" is objectively definable. Instead, it is argued that the ICSID drafters have intentionally left the definition of the term to the parties that would avail themselves to the ICSID Tribunals through the respective investment documents containing such a definition. *Travaux préparatoires* of the Convention indicate that the Contracting Parties deliberately avoided defining the term "investment". The Report of the Executive Directors states that "no attempt was made to define the term "investment" given the essential requirements of consent by the parties…."[37]

The Tribunal in *MCI Power v Ecuador* noted that the ICSID did not define the term "investment" because it wants to leave the Parties free to decide what class of disputes they would submit to the ICSID. Therefore, the definition of "investment" under the USA – Ecuador BIT was all the Tribunal should consider ruling on its jurisdiction under the ICSID.[38] The subjectivist approach is what *the Investors* want to stick to, provided they submit the dispute to an ICSID arbitration.

The objective reading of the term "Investment" under Article 25, on the other side, is what the Respondent would probably advocate for. Douglas sets a high-water mark for the Objectivist theory stipulating that albeit there is no definition of the term "investment" in the ICSID Convention:

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[32] Final Act of the European Energy Charter Conference, Understandings, n. 2. with respect to Article 1(5).
[33] Baltag (2012), 19.
[34] Ioannis Kardassopoulos v The Republic of Georgia, ICSID Case No. ARB/05/18.
[35] Kardassopoulos v Georgia, Decision on Jurisdiction, para 113.
[36] Baltag (2012), 214.
[37] ICSID Reports 28, para 27.
[38] M.C.I. Power Group L.C. and New Turbine, Inc. v Republic of Ecuador, ICSID Case No. ARB/03/6, paras 159-160.

> The term 'investment', however, is a term of art: its ordinary meaning cannot be extended to bring any rights having an economic value within its scope, for otherwise violence would be done to that ordinary meaning, in contradiction to Article 31 of the Vienna Convention on the Law of Treaties. [39]

If one perceives the notion of "investment" as a term of art, then "investment" under the ICSID Convention is to be given an absolute meaning of its own which outweighs any such meaning that the Parties can give. This line of thinking relies *inter alia* on paragraph 25 of the Report of the Executive Directors, providing that jurisdiction under ICSID according to Article 25(1) of the Convention cannot be established on consent alone.[40]

The Tribunal in *Joy Mining v Egypt* denying its jurisdiction stressed that should the parties to a dispute be allowed to define the notion of "investment" for the purposes of ICSID jurisdiction, in a way falling short of satisfying the objective requirements of Article 25, *per se* would be rendered as meaningless a provision. [41]

Pushing the idea of objectivity towards the "criteria approach" was the Tribunal in *Fedax v Venezuela*[42]. The Tribunal held that:

> The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development.[43]

In *Salini v Morocco*[44], the Tribunal recognized four elements of "investment" within the meaning of the ICSID Convention. These criteria, known as the "Salini test", (i) include regularity of profits and returns, (ii) contribution made by the investor in performance of the activity, (iii) duration of a contract, investor participation in the risks of the transaction, and (iv) contribution to the economic development of the host state.[45]

In *Malaysian Historical Salvors v Malaysia* adhering to the *Fedax/Salini*, the Tribunal interpreted the notion of "investment" as an economic activity promoting positive contribution to the economic development of the host State.[46] Eventually, the Tribunal rejected its jurisdiction since the activity at hand lacked any economic contribution to the host State's development.[47]

Judge Shahabuddeen, in his dissenting opinion in the Decision on Annulment in *Malaysian Historical Salvors v Malaysia*, argued that the Contracting States had never agreed to grant the protection of the ICSID Convention to the economic activities that fail to promote the economic development of the host State.[48] Nevertheless, in Schreuer's opinion, activities not evidently contributing to a host State's development should not be excluded from the protection of the ICSID

[39] Douglas (2012), 164-165.
[40] ICSID Reports 28, para 25.
[41] Joy Mining Machinery Limited v Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2003, paras 50, 53. See also Mr. Patrick Mitchell v Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, paras 39-40.
[42] Fedax N.V v The Republic of Venezuela, ICSID Case No. ARB/96/3.
[43] Fedax v Venezuela, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, para 43.
[44] Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco [I], ICSID Case No. ARB/00/4.
[45] Salini v Morocco [I], Decision on Jurisdiction, 23 July 2001, para 52.
[46] Historical Salvors v Malaysia, Award on Jurisdiction, 17 May 2007, paras 65-68.
[47] Historical Salvors v Malaysia, Award on Jurisdiction, 17 May 2007, paras 123, 132, 144
[48] Historical Salvors v Malaysia, Dissenting Opinion of Judge Mohamed Shahabuddeen, 19 February 2009, paras 21-24.

Convention.[49] It is unfortunate in Schreuer's words that this has led Tribunals to view the elements as jurisdictional requirements. However, should the *test* be applied as such, "its criteria should not be seen as distinct jurisdictional requirements each of which must be met separately".[50]

Both the "*Fedax criteria" and "Salini test"* favor the Respondent's, since when applied in a restrictive manner, this approach constitutes a jurisdictional obstacle, especially should the Respondent stress on the contribution criterion, and the Tribunal considers the criteria as distinct jurisdictional requirements that should be met separately.

The opposing case law either dismisses the "*Fedax*/*Salini test"* or views it as a non-binding and flexible set of criteria.[51] The *Biwater* Tribunal dismissed the *Salini* criteria on two points: (i) Article 25 of the ICSID Convention contains no reference to the *"Salini test",*[52] (ii) the travaux préparatoires of the Convention clearly indicate that "investment" was intentionally not defined[53].

The majority of the Annulment Committee in *Malaysian Historical Salvors v Malaysia* established that the Tribunal failing to apply the definition of investment as agreed by the Parties committed "a gross error that gave rise to a manifest failure to exercise jurisdiction".[54] The *Salini criteria* were wrongly elevated to a jurisdictional threshold, and the Committee relying on Article 52(1)(b) of the ICSID Convention specified that the Tribunal had manifestly exceeded its powers.[55]

In *Abaclat v Argentina*, the Tribunal pointed that the *Salini* criteria absent in the ICSID Convention should not create a limit, which neither the Convention itself nor the Contracting Parties to a specific investment treaty intended to create.[56]

The Tribunal in *Pantechniki v Albania* noted that the *Salini* criteria were not found in the ICSID Convention and that they were elements of subjective judgment leading to unpredictability. [57]

In *Inmaris v Ukraine* the Tribunal stated that establishing what constitutes investment, one should defer to the relevant definition of the term in the investment treaties concluded between the Contracting Parties.[58]

The Tribunal in *RREEF v Spain* stated that no test, criteria, or guidelines should "restrict or replace the definition that exists in the ECT".[59]

The Tribunals in *Fakes v Turkey*[60]*; Alpha v Ukraine*[61]*; LESI SpA et ASTALDI SpA. v Algeria*[62] *and Pey Casado v Chile*[63], refused to read Article 25 of the ICSID Convention as containing

[49] Schreuer and Malintoppi (2013), 134.

[50] Schreuer, Christoph, and Malintoppi, Loretta. The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Cambridge: Cambridge University (2013), 133. See also Schreuer, Christoph. "Commentary on the ICSID Convention: Article 25." ICSID Review: Foreign Investment Law Journal. 11.2 (1996): 318-492, 372; Dolzer and Schreuer (2012), 68.

[51] Biwater v Tanzania, Award 24 July 2008; Historical Salvors v Malaysia, Decision on the Application for Annulment, 16 April 2009; Pantechniki S.A. Contractors & Engineers (Greece) v The Republic of Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009; RSM Production Corporation v Grenada, ICSID Case No. ARB/05/14, Award 13 March 2009; Alpha Projektholding GmbH v Ukraine, ICSID Case No. ARB/07/16, 8 November 2010; Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010.

[52] Biwater v Tanzania, Award 24 July 2008, para 312.

[53] Biwater v Tanzania, Award 24 July 2008, para 313.

[54] Malaysian Historical Salvors, SDN, BHD v The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, para 74.

[55] Historical Salvors v Malaysia, Decision on the Application for Annulment, 16 April 2009, para 80.

[56] Abaclat and Others v Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v The Argentine Republic), Decision on Jurisdiction and Admissibility, 4 August 2011, para 364.

[57] Pantechniki v Award, 30 July 2009, para 43.

[58] Inmaris v Ukraine, Decision on Jurisdiction, 8 March 2010, para 129-130.

[59] RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para 157.

requirement of a contribution to the economic development of host States. The *Pey Casado* Tribunal firmly stated that "an investment may or may not prove to be useful to the host State without losing its status as such". Thus, the development of the host State was not a constitutive element of "investment".[64]

Although recently, the *Salini* elements have often been considered non-coercive, only the possible effect of Article 25(1) of the ICSID Convention must not be overlooked by *the Claimants*.

Isolux v Spain[65] and *Masdar v Spain*[66], decisions indicated that the objectivist approach, including the Salini elements, is not done yet. Accordingly, the *Isolux* Tribunal adopted an objective definition of "investment" containing three *Salini* elements.[67]

Unlike the ICSID Convention, neither the SCC Arbitration Rules nor UNCITRAL Arbitration Rules contain substantive provisions. Thus, these rules do not "filter claims through their own autonomous notion of investment as a condition of jurisdiction *ratione materiae"*.[68]

Notwithstanding this, the *Salini test* was surprisingly applied to distinguish between a sale and an investment in the *Romak v Uzbekistan*[69] case. Under the UNCITRAL Arbitration Rules, the Tribunal considered the definition of "investment" under the Switzerland – Uzbekistan BIT (1993) as non-exhaustive and illustrative. It was ruled that the notion of "investment" must have an inherent meaning of its own. [70] The Tribunal held that the definition of "investment" under the BIT solely fell short of qualifying an asset as "investment", which had the same meaning both under the ICSID Convention and outside of it.[71]

However, in the case under discussion here, with a completely different factual background and a Treaty applicable (the ECT), the *Romak* scenario is improbable. Therefore, although not without considerable difficulties, establishing jurisdiction ratione materiae is not an insurmountable obstacle for *the Claimants.*[72]

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[60] Saba Fakes v Republic of Turkey, ICSID Case No. ARB/07/20, Award, 10 July 2010, para 110-112.
[61] Alpha v Ukraine, Award, 8 November 2010, para 312.
[62] L.E.S.I. S.p.A. and ASTALDI S.p.A. v République Algérienne Démocratique et Populaire, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006), para 72.
[63] Victor Pey Casado and President Allende Foundation v Republic of Chile, ICSID Case No. ARB/98/2, Award, 8 May 2008.
[64] Pey Casado v Chile, Award, 8 May 2008, para 232. Cited in Brown, Chester, and Miles, Kate. Evolution in Investment Treaty Law and Arbitration. Cambridge: Cambridge University Press (2011), 54.
[65] Isolux Netherlands, BV v Kingdom of Spain, SCC Case V2013/153.
[66] Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain, ICSID Case No. ARB/14/1.
[67] Isolux v Spain, Award, 12 July 2016, paras 685-686.
[68] Stephen R. Jagusch. Anthony C. Sinclair. The Limits of Protection for Investments and Investors under the Energy Charter Treaty, in Investment Arbitration and The Energy Charter Treaty in Ribeiro, Clarisse C. Investment Arbitration and the Energy Charter Treaty. Huntington, N.Y: JurisNet (2006), 73, 75, cited in Yannaca-Small (2010), 249.
[69] Romak S.A. (Switzerland) v The Republic of Uzbekistan, UNCITRAL, PCA Case No. AA280.
[70] Romak v Uzbekistan, Award, 26 November 2009, para 188.
[71] Romak v Uzbekistan, Award, 26 November 2009, para 194. See also Masdar v Spain, Award 16 May 2018, paras 196-197, 199-200.
[72] It is submitted, that the ICSID proceedings provide for more potential difficulties in this context than the non-ICSID options. However, I do not propose that the non-ICSID fora are preferable for *the Claimants* than the ICSID arbitration. The comprehensive comparison of the available arbitration options under the ECT is beyond the scope of this paper. For a comparative analysis of the available arbitral fora under the ECT see Roe, Thomas, Matthew Happold, and James Dingemans. Settlement of Investment Disputes Under the Energy Charter Treaty. Cambridge: Cambridge University Press (2011), 152-161; Hobér, Kaj. The Energy Charter Treaty, a Commentary. (2020), 443-447.

2.3. *Ratione loci*

This section examines whether *the Investments* have been located in the territory of the Respondent, as required under the ECT as well as the ICSID Convention.

Article 26(1) of the ECT covers disputes arising out of alleged breaches of Part III of the Treaty relating only to Investments in the *"Area"* of the Contracting Parties.[73] Under Article 1(10) of the ECT:

> "Area" means with respect to a state that is a Contracting Party:
>
> (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.

Investment treaties, in their majority, contain similar requirements of nexus with the host State's territory. The Azerbaijan Model BIT 2016, for instance, defines the term "investment" as "every kind of asset established or acquired directly by an investor of one Contracting Party wholly or exclusively *in the territory* of the state of the other Contracting Party".[74] (emphasis added).

States may exclude certain territories from the application of international treaties. The general rule on the territorial application of a treaty is laid down in Article 29 of the VCLT:

> Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Evidently, Article 29 of the VCLT establishes the rule of territorial unity. But it also leaves room for the Contracting Parties to invoke exceptions to this general rule. Likewise, the ECT *a priori* covers the entire territory of the Contracting Parties. Yet, under Article 40(1), the Treaty allows the Contracting Parties to apply territorial derogations:

> Any state or Regional Economic Integration Organisation may at the time of signature, ratification, acceptance, approval or accession, by a declaration deposited with the Depositary, declare that the Treaty shall be binding upon it with respect to all territories for the international relations of which it is responsible, or to one or more of them. Such declaration shall take effect at the time the Treaty enters into force for that Contracting Party.

Territorial application stipulated under Article 40 of the ECT must be read in conjunction with Article 1(10), which defines the term "Area". Article 40(4) of the ECT provides that the "definition of 'Area' in Article 1(10) shall be construed having regard to any declaration deposited under this Article". Therefore, only territories not excluded by a Contracting Party from the application of the ECT can be construed as the Area of that Contracting Party for the purposes of the Treaty.

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[73] Article 26(1) of the ECT.
[74] Article 1(1) of the Azerbaijan Model BIT 2016.

The Investors should establish that the HPP are located within the territory of the Respondent state *viz* Azerbaijan. This does not seem to be much of a trouble. Should the Respondent participate in the proceedings at all, it will hardly contest the notion that the region concerned is its territory. Indeed, the very conflict in the Nagorno Karabakh region has been of a territorial value for Azerbaijan. To be on the safe side, though, it would suffice to reiterate a statement of Azerbaijani leader Aliyev from 27 September 2020 – shortly after the war was unleashed in Nagorno Karabakh/Artsakh: "Nagorno-Karabakh is Azeri territory."[75]

However, Armenian investors will find themselves in quite a delicate situation, where they should acknowledge Azerbaijan's sovereignty over the concerned region, which can be perceived in Armenia as a controversial legal strategy, to say the least. However, it is essential to highlight that Tribunals only establish the territorial requirement under the investment treaties as a matter of jurisdictional requirement. They do not have the mandate to rule over the sovereignty of a state *vis-a-vis* any territory. Nor would they be interested in such an ambitious undertaking. This rationale was adopted in the "Crimean cases", where the Tribunals sought to avoid questions of the legality of Crimea's "annexation".[76] It should *arguendo* be stated that in any case, the Respondent will be estopped from denying (as a matter of legal strategy) its sovereignty over the territory concerned under the principle of consistency (*venire contra factum proprium non valet*).[77]

At any rate, there is no indication that Azerbaijan has elected not to apply the ECT to the Nagorno-Karabakh region, according to Article 40(1).[78] Consequently, the ECT applies to the entire territory which is considered by Azerbaijan to be under its sovereign authority, including the area on which the HPP were installed. Finally, the ICSID Convention, should it be the instrument governing the arbitral proceedings, contains no territorial requirement of its own. Article 70 of the ICSID Convention establishes a presumption that the Convention will apply to the entire territory of a State. The contrary would have to be expressed explicitly in a written notice to the Convention's depositary.[79]

To summarize, since the Republic of Azerbaijan has not applied any territorial exclusions[80], the ICSID Convention and the ECT apply to the State's entire territory. Hence, *the Investors* are in the position of establishing jurisdiction *ratione loci*.

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[75] NT Kizil, 'Nagorno-Karabakh belongs to Azerbaijan, President Aliyev says' (DAILY SABAH, 4 October 2020) https://www.dailysabah.com/politics/diplomacy/nagorno-karabakh-belongs-to-azerbaijan-president-aliyev-says accessed 1 January 2021.

[76] Olmos, Giupponi B. "Exploring the Links between Nationality Changes and Investment Claims Arising Out of Armed Conflicts: The Case of Russian Passportization in Crimea." in Gómez, Gourgourinis, and Titi (2019), 165, 167; Rees-Evans, Laura. "Litigating the Use of Force: Reflections on the Interaction between Investor-State Dispute Settlement and Other Forms of International Dispute Settlement in the context of the conflict in Ukraine." in Gómez, Gourgourinis, and Titi (2019), 186-187.

[77] Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru, ICSID Case No. ARB/03/28, Award, 18 August 2008, paras 5, 231.
See also in a different context in Happ and Wuschka (2016): 245-268; 261-262.

[78] ESC Energy charter secretary, "Who we are/Azerbaijan" (Energy Charter Treaty, 31 July 2015). https://www.energycharter.org/who-we-are/members-observers/countries/azerbaijan/ accessed 20 March 2021.

[79] Schreuer and Malintoppi (2013), 1276-1277. The current list of exclusions of territories is quite short. New Zealand has excluded Cook Islands, Niue, and Tokelau. The United Kingdom has excluded British Indian Ocean Territory, Pitcairn Islands, British Antarctic Territory, and the Sovereign Base Areas of Cyprus.

[80] ICSID, "About ICSID/Member States/Azerbaijan" (International Centre for Settlement of Investment Disputes WBG), https://icsid.worldbank.org/about/member-states/database-of-member-states/member-state-details?state=ST8 accessed 1 July 2021.

2.4. Ratione temporis

This section deals with the temporal jurisdiction of the Tribunals, which must exist on the date when the arbitral proceedings were initiated. The entry into force of the substantive obligations *the Investors* will be base their claim upon, i.e., the ECT (and the ICSID Convention if *the Investors* file their case to the Centre), is pivotal for the jurisdiction *ratione temporis.*

One recalls a quotation from the book "A Brief History of Time" by Stephen Hawking when grappling with the question of temporal application of investments treaties to the events leading to legal disputes:

> If there were events earlier than this time, then they could not affect what happens at the present time. Their existence can be ignored because it would have no observational consequences.

As stated by Douglas, "the tribunal's jurisdiction ratione temporis extends to claims relating to the claimant's investment, which are founded upon obligations in force and binding upon the host contracting state party at the time of the alleged breach".[81]

The temporal limitations on the right to arbitrate under Article 26 of the ECT are contained within the definition of "Investment" in Article 1(6):

> A change in the form in which assets are invested does not affect their character as investments and the term 'Investment' includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the 'Effective Date') provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

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

The ECT under Article 44, which deals with entry into force of the Treaty for the Contracting Parties, entered into force on 16 April 1998 for the states and REIOs – signatories of the Treaty which had deposited instruments of ratification, acceptance, or approval before this date. For states and REIOs acceding to, ratifying, accepting, or approving the ECT after 16 April 1998, the ECT enters into force on the ninetieth day after the date of deposit of the instrument of ratification, acceptance, approval, or accession.

Azerbaijan signed the ECT on 17 December 1994, ratified on 2 December 1997, deposited on 17 December 1997, and the Treaty entered into force on 16 April 1998.[82]

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[81] Douglas (2012), 329.

[82] ESC Energy charter secretary, "Who we are/Azerbaijan" (Energy Charter Treaty, 31 July 2015). https://www.energycharter.org/who-we-are/members-observers/countries/azerbaijan/ accessed 20 March 2021.

Armenia signed the ECT on 17 December 1994, ratified on 18 December 1997, deposited on 19 January 1998, and the Treaty entered into force on 19 April 1998.[83]

Having established this, let us now examine whether *the Investments* were made when the ECT was in force, and should it be the case, does the Treaty cover *the Investments*?

Treaties typically apply only prospectively from the date of their entry into force. This general rule reflects the non-retroactivity of law – a well-established principle in national and international law as expressed in Article 28 of the VCLT. The principle laying the basis for this rule is reflected in Article 13 of the International Law Commission's Articles on State Responsibility:

> An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.[84]

The ECT in Article 1(6) provides that it also applies to investments made before the Treaty entered into force for the Contracting Parties. However, this is not to be confused with a retrospective application of the ECT. There is an express difference between the application of the Treaty to all investments made, whether prior to or after the "Effective Date", and coverage by the substantive provisions of the ECT of the acts and events that occurred before the same date.[85] Indeed, the plain language "provided that the Treaty shall only apply to matters affecting such investments after the Effective Date" leaves no room for doubt.[86] Therefore, the *Investments of the Investors* that were made prior to or after 16 April 1998 are covered by the substantive provisions of the ECT provided the events affecting *the Investments* took place after the same date. The 2020 war that has outlined this *scenario* falls under this temporal requirement.

The "Effective Date" is the only point of temporal reference for determining jurisdiction *ratione temporis* if Investors chose to initiate arbitration under SCC or UNCITRAL Rules are concerned. Should, however, *the Investors* elect to resort to ICSID arbitration, both the home State of *the Investor* and the host State must also have ratified the ICSID Convention for the Tribunal to assume jurisdiction. As the Tribunal in *Salini v Jordan*[87] observed, "one must distinguish carefully between jurisdiction *ratione temporis* of an ICSID Tribunal and applicability *ratione temporis* of the substantive obligations contained in a BIT."[88]

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[83] ESC Energy charter secretary, "Who we are/Azerbaijan" (Energy Charter Treaty, 31 July 2015). https://www.energycharter.org/who-we-are/members-observers/countries/armenia/ accessed 20 March 2021.

[84] See Crawford, James. The International Law Commission's Articles on State Responsibility, PERSEE (2002), 90.

[85] See SGS Société Générale de Surveillance S.A. v Republic of the Philippines, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para 166; Técnicas Medioambientales Tecmed, S.A. v The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paras 53-68; Kardassopoulos v Georgia, Decision on Jurisdiction, 6 July 2007, paras 253-255; Bayindi v Pakistan, Award, 27 August 2009, paras 131-132; Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, para 170; Impregilo S.p.A. v Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paras 297-304.

[86] Similarly, Article 2(3) of the US Model BIT 2012 reads: "For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty".

[87] Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13.

[88] Salini v Jordan, Decision on Jurisdiction, 9 November 2004, para 176.

The ICSID Convention entered into force on 14 October 1966, 30 days after ratification by the first twenty states.[89] According to Article 68 of the Convention, it enters into force for each State 30 days after the respective instrument of ratification has been duly deposited.[90]

The ICSID Convention entered into force for the Republic of Armenia on 16 October 1992.[91]

The ICSID Convention entered into force for the Republic of Azerbaijan on 18 October 1992.[92]

The relevant date for the jurisdiction of an ICSID Tribunal is the date of institution of proceedings. Both the State of *the Investors'* nationality and the host State must be parties to the ICSID Convention at any date after 18 October 1992. Not even denunciation of the Convention under Article 71 by the host State will affect the jurisdiction of Tribunals in proceedings instituted before the notice of denunciation.[93]

Natural persons, according to Article 25(2)(a) of the ICSID Convention, should have the nationality of a State Party to Convention both on the date of consent and on the date the request for arbitration is registered. *The Investors* must also not have the nationality of the host State on either date, which is not the case in *the present scenario.* Article 25(2)(b) requires that juridical persons on the date of consent must have the nationality of a State party to the ICSID Convention other than the host State. Since the consent to arbitration is a standing offer on behalf of the host State, the date of consent and the date of the institution of proceeding will normally (not necessarily) coincide.[94] To recapitulate: *the Investments* are covered by the jurisdiction *ratione temporis* under the ECT, regardless of the arbitral forum relied upon by *the Investors*.

Another question that should be grappled with is whether the ECT was suspended or otherwise affected during the war for the respective territory. The Respondent, it is assumed, might argue that the answer to the question is in the affirmative.

The ECT itself does not allow Contracting Parties to suspend the Treaty provisions.

The Draft Articles on the Effects of Armed Conflicts on Treaties (Draft Articles) of The International Law Commission of the United Nations (ILC) from 2011 reflect the contemporaneous state of international law.[95] Article 3 of the Draft Articles provides that the existence of an armed conflict[96] does not *ipso facto* terminate or suspend the operation of treaties. This applies "as between the parties to the conflict and a State that is not". Article 7 of the Draft Articles refers to an

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[89] ICSID, "Resources/Rules and Regulations/ICSID Convention" (International Centre for Settlement of Investment Disputes WBG), https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview accessed 1 July 2021.

[90] See the respective dates on entry into force of the ICSID Convention for the Member States:
ICSID, "About ICSID/Member States" (International Centre for Settlement of Investment Disputes WBG) https://icsid.worldbank.org/about/member-states accessed 1 July 2021.

[91] ICSID, "About ICSID/Member States/Armenia" (International Centre for Settlement of Investment Disputes WBG), https://icsid.worldbank.org/about/member-states/database-of-member-states/member-state-details?state=ST5 accessed 1 July 2021.

[92] ICSID, "About ICSID/Member States/Azerbaijan" (International Centre for Settlement of Investment Disputes WBG), https://icsid.worldbank.org/about/member-states/database-of-member-states/member-state-details?state=ST8 accessed 1 July 2021.

[93] Article 72 of the ICSID Convention. See also Schreuer and Malintoppi (2013), 1279-1282.

[94] Dolzer and Schreuer (2012), 40.

[95] Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10). Yearbook of the International Law Commission, 2011, vol. II, Part Two.

[96] Pursuant to Article 2(b) of the Draft Articles "Armed conflict" means a situation in which there has been a resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.

indicative list of treaties, the subject matter of which implies continued operation during armed conflicts. The list includes "Treaties of friendship commerce and navigation and analogous agreements concerning private rights" and "treaties relating to commercial arbitration".[97] Although the Draft Articles do not expressly refer to investment treaties, the ILC in its Commentary views bilateral investment treaties as included in agreements concerning private rights analogs to treaties of friendship, commerce and navigation.[98] The assumption of continuity of investments treaties during armed conflicts is particularly true where the investment treaties expressly address the consequences of armed conflicts[99], which the ECT does in its Articles 12 and 24. Therefore, the ECT in its entirety continues to apply in situations of armed conflict. Otherwise, at least the relevant provisions of the ECT would be pillaged of their meaning and content. In conclusion, the 2020 war *per se* did not suspend or otherwise affect the application of the ECT to the territory concerned and did not hinder jurisdiction *ratione temporis* over the dispute.

2.5. Ratione voluntatis

Ratione voluntatis generally refers to the consent of the Respondent State to arbitrate. Under this section, we will be looking for such consent given by Azerbaijan to the would-be alien investors under the ECT. We also will be inquiring whether *the Investors* can benefit from (accept) that consent.

For an alien investor to commence arbitral proceedings against the host State, it is not sufficient to meet the jurisdictional requirements under the respective investment treaty. The host State should have given its express consent to arbitrate. As Douglas opines, "Consent of the respondent host state to investor/state arbitration in the investment treaty is the most important condition for the vesting of adjudicative power in the tribunal".[100]

The last paragraph of the Preamble of the ICSID Convention unambiguously requires separate consent by the host State for arbitral jurisdiction under the framework of the Convention to exist:

> "… no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration."

Azerbaijan has given such consent. Under Article 26(3)(a) of the ECT, each Contracting Party gives "unconditional consent to the submission of a dispute to international arbitration or conciliation according tothis Article". A Contracting Party heralds its unilateral offer to arbitrate, which is accepted by an aggrieved foreign investor as soon as a notice of arbitration is served upon

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[97] Schreuer, Christoph H. "The Protection of Investments in Armed Conflicts." Investment Law within International Law: Integrationist Perspectives, edited by Baetens, Freya Cambridge University Press, Cambridge (2019), 2.

[98] Draft articles on the effects of armed conflicts on treaties, with commentaries 2011, Commentary 48 to Annex to Article 7 as cited in Schreuer, Christoph H. "War and Peace in International Investment Law." in Gómez, Gourgourinis, and Titi (2019), 7.

[99] Article 7 of the Draft Articles.

[100] Douglas, Zachary. The International Law of Investment Claims. Cambridge: Cambridge University Press (2012), 151.

the host State or one of the institutions listed under Article 26(4) of the ECT.[101] Accordingly, by signing and ratifying the ECT according to Articles 38 and 39, Azerbaijan has given its irrevocable consent to arbitrate over the disputes arising from alleged breaches of the ECT.[102] Once given, the consent cannot be withdrawn upon the commencement of arbitral proceedings.[103] The Latin maxim *pacta sunt servanda* (agreements must be kept) supports this rule. Under Article 26(3)(b) of the ECT, Azerbaijan has limited its consent only to the disputes previously not submitted to its national courts.[104] However, this factor is of no relevance since the chance that *the Investors* will avail themselves to the national courts of Azerbaijan is naught. The "cooling-off period" of three months under Article 26(2) of the Treaty will not constitute a significant issue either since it is plain that the dispute at hand cannot be settled in three months, let alone amicably. At any rate, this period is generally perceived as "procedural and directory, rather than jurisdictional and mandatory".[105]

Therefore, Azerbaijan has given its consent to arbitration to foreign investors for the purposes of the ICSID Convention and the other two options under the ECT[106]. Therefore, establishing the jurisdiction ratione voluntatis for the Claimants is not a major challenge.

2.6. Compliance with the law of the host State: implicit in the ECT?

This section addresses the anticipated argument of the illegality of *the Investments* under Azerbaijani law. This argument may arguably be the bulk of the Respondent's defense. First, we will briefly discuss the nature of the notion of "legality" of investments and the respective consequences that might unfold. It will be finally argued that the legality issue does not necessarily or automatically constitute a jurisdictional bar of arbitral tribunals.

The issue of compliance with the law of host States may arise before Tribunals in the context of jurisdiction over the dispute. It otherwise reaches to the merits of the case or the question of admissibility of the claim. Due to the different wording and allocation in the investment treaties, provisions refereeing to the host state's law, if any, imply varying legal consequences.

Not only Tribunals have the competence to rule over their jurisdiction, but they also are required to do so.[107] Since Tribunals are obliged to render an enforceable award, any factor capable of affecting the validity of the awards should be considered by the Tribunal. Both the exercise of jurisdiction where it does not exist, and unjustified denial of jurisdiction may be grounds for either

[101] Douglas (2012), 75; Hobér (2020), 432; Paulsson, Jan. "Arbitration Without Privity." International Centre for Settlement of Investment Disputes Review. (1995), 232, 247, 250; Dolzer, Rudolf and Schreuer, Christoph. Principles of International Investment Law (Second edition), Oxford University Press, (2012), 254, 260; Limited Liability Company AMTO v Ukraine, SCC, Case No 080/2005, Final Award, 26 March 2008, paras 44-47.
[102] Article 26(1) of the ECT.
[103] Hobér (2013), 230; Hobér (2020), 432.
[104] Annex ID of the ECT.
[105] Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania, ICSID Case No. ARB/05/22, Award 24 July 2008, para 343.
[106] UNCITRAL (Article 26(4)(b) of the ECT), SCC (Article 26(4)(c) of the ECT). Azerbaijan has also consented to arbitrate in international arbitration the disputes with foreign investors in Article 42 of its Law on the Protection of Foreign Investments. UNCTAD, "Azerbaijan/Law on the Protection of Foreign Investments" (Investment Policy Hub,) https://investmentpolicy.unctad.org/investment-laws/laws/9/azerbaijan-foreign-investments-law accessed 1 July 2021. See the original at Kommunikasiya Texnologiyalarıİdarəs Ədliyyə nazirliyinin İnformasiya, "Xarici investisiyanın qorunması haqqında Azərbaycan Respublikasinin qanunu" (E-qanun, taxes.gov.az 15 January 1992) http://www.e-qanun.az/framework/7000 accessed 1 July 2021.
[107] Article 41(1) of the ICSID Convention.

annulment[108] of the award or setting it aside[109]. Therefore, even if the proceedings are conducted *in absentia* of the Respondent, it is assumed that the Tribunal will address *the Investments'* compliance with the law of the host State.

Many investment treaties contain "in accordance with host State law" clauses in the provisions defining investments. For example, article 1 (Definition) of the Azerbaijan – Czech Republic BIT (2011) provides:

> For the purposes of this Agreement:
> The term "investment" shall comprise every kind of asset invested directly in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party *in accordance with the national legislation of the latter* … (emphasis added).

Some investment treaties require the investments to be approved or authorized in accordance with domestic laws and regulations.[110] Sometimes the requirement of compliance with domestic laws appears in provisions that define the scope and coverage of treaties' application, i.e., promotion, admission, and protection. An example is Article 3(1) (Promotion and admission) of the Azerbaijan – Switzerland BIT (2006):

> Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.[111]

The Tribunal in *Achmea v Slovakia* ruled that provisions providing for investment promotion and admission concerned "the duty of each State Party to promote inward investment". These provisions did not intend to qualify the meaning of the notion of "investment" under the investment treaty.[112]

In *Inceysa v El Salvador*, the Tribunal applying the El Salvador – Spain BIT (1995), although denying jurisdiction referred to the domestic laws of the host State not in the definition of investment but in the provisions on admission and protection. The Tribunal stated that the Respondent contested to arbitrate only when the claimant would act under the host State law.[113]

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[108] Article 52(1)(b) of the ICSID Convention.
[109] Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
[110] Article 4(a) of the ASEAN Comprehensive Investment Agreement; Article I.1.b.ii of the UK – Malaysia BIT 1988 which refers to investments made in projects classified as an "approved project" by the appropriate Ministry of Malaysia, in accordance with its legislation and administrative practice; Article 9 of the Belgium–Indonesia BIT.
[111] Also, Article 2.1 of the Azerbaijan – Czech Republic BIT (2011).
[112] Achmea B.V v The Slovak Republic, PCA Case No 2008-13, Final Award, 7 December 2012, paras 165-166,
See also SAUR International S.A. v The Argentine Republic, ICSID Case No ARB/04/4, Decision on Jurisdiction, 6 June 2012, para 307; Álvarez y Marín Corporación S.A. and others v Republic of Panama, ICSID Case No. ARB/15/14, para 127; Churchill Mining Plc v Republic of Indonesia, ICSID Case No ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014, para 291, cited in Mouawad, Caline, and C. J. Beess, Jessica und Chrostin. "The Illegality Objection in Investor – State Arbitration." Arbitration International. (2021), 5-6.
[113] Inceysa v El Salvador, Award, 2 August 2006, para 257.

The *Albaclat Tribunal* diverged from this approach, concluding that where the legality requirement is found elsewhere than the definition of "investment", it should be examined as a matter of merits, not jurisdiction.[114]

The Tribunal in *Fraport v Philippines* dealt with the Germany – Philippines BIT (1997), which referred to the host State laws and regulations in the definition of Investments.[115] Also, the BIT referred to the Constitution, laws, and regulations of the host State in the provisions on admission.[116] According to the Tribunal, Fraport had sought to circumvent the legislation of the host State restricting shareholding and management by foreigners in public utility enterprises ("anti-dummy" law).[117] It was stated that no investment in accordance with law existed, and the jurisdiction *ratione materiae* was denied.[118] The dissenting arbitrator, however, was of the view that the requirement of acceptance of the investments according to the host State law was not to be interpreted as a jurisdictional impediment. The legality of the investor's conduct was a "merits issue".[119]

One applying the general principles of good faith[120] and *nemo auditur propriam turpitudinem allegans* (no one can be heard to invoke his own turpitude) to reject the jurisdiction arguably modifies the investments treaty. The Tribunal in *Saba Fakes v Turkey*, grappling with this issue, observed:

> Likewise, the principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be "legal" or "illegal", made in "good faith" or not, it nonetheless remains an investment. The expressions "legal investment" or "investment made in good faith" are not pleonasms, and the expressions "illegal investment" or "investment made in bad faith" are not oxymorons.[121]

The *Salini* Tribunal dismissing the Respondent's objection based on the wording of the Treaty applicable, which referred to the laws and regulations of the host State in the definition of the term "investment", stressed that the provision referred to the validity of the investment and not to its

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[114] Abaclat v Argentina, Decision on Jurisdiction and Admissibility, 4 August 2011, para 382.

[115] Article 1 of the Germany - Philippines BIT (1997).

As Kriebaum opines "to include the clause in the definition of investment of BITs leads to a paradox: On the one hand host State law becomes a point of reference concerning the extent of the jurisdiction of the Tribunal. In that function host State law can limit the scope of legal review by the Tribunal. On the other hand, host State law is often the very subject of the legal review by the Tribunal, which has to determine whether host State law and its application led to breaches of the BIT. Therefore, host State law becomes yardstick and object of review at once". Kriebaum, Ursula. "Investment Arbitration – Illegal Investments" in Klausegger, Christian, Klein, Peter and others (eds), Austrian Arbitration Yearbook 2010, (Beck, Stämpfli & Manz) (2010), 308-309.

[116] Article 2 of the Germany - Philippines BIT (1997).

[117] Dolzer and Schreuer (2012), 96.

[118] Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines, ICSID Case No. ARB/03/25, Award, 16 August 2007, para 401.

[119] Fraport v Philippines, ICSID, Award, 16 August 2007, Dissenting Opinion of Mr. Bernardo M. Cremades, para 36, 38.

[120] Referred to in Fraport v Philippines, para 396.

[121] Saba Fakes v Turkey, Award, 10 July 2010, para 112.

definition.[122] Nevertheless, the *Salini* Tribunal stated that the clause sought to prevent the Treaty from protecting investments that should not be covered because of their illegal nature.[123] In his profound criticism of this viewpoint, Douglas highlighted the lack of any cited authorities supporting this interpretation, which, without further analyses, was embraced "in a series of awards such that it now holds a virtual monopoly over the interpretative space granted to tribunals".[124]

The foregoing discussion supports the notion that "in accordance with host State law" clauses should not be perceived as *ab initio* depriving the Tribunals of jurisdiction over the claims. Even less so is the case with the ECT, which does not contain any such clause at all.[125]

Emphasizing the absence of such a requirement, the Tribunal in *Stati v Kazakhstan* stated that if the Contracting Parties had intended to include such wording in the Treaty, they could have done so, especially in the case of the ECT where the definition of investment and other details are extremely detailed. At least regarding jurisdiction, the Tribunal did not see where such a requirement could come from.[126]

Instead, the ECT in Article 1(7) requires the legal entities to have been established in accordance with the law of the home State. Therefore, for the purposes of the ECT, it suffices for *the Claimants* to show that the relevant legal entities are organized according to the law of the *home* State.

Tribunals, nevertheless, sometimes assume an implied requirement of compliance with the host State law when the investment treaty does not contain such a clause.[127] *The Investors* should not overlook this factor since they do not meet the formal registration and authorization requirements, nor were *the Investors* granted property rights under the Azerbaijani law. Therefore, is it still possible under such circumstances for *the Investors* to have the arbitral jurisdiction established?

To this end, Douglas states that "a plea by the respondent host State to the effect that the claimant has violated its laws does not provide the basis for an objection to the tribunal's jurisdiction in any circumstances". [128]

Similarly, the *Plama* Tribunal upheld that the Claimant's misrepresentation could not affect the Parties' consent to arbitrate, which is contained in the ECT – "a completely separate document". Thus, under the doctrine of separability, even if the agreement regarding the purchase of the investment was invalid, the agreement to arbitrate remained intact.[129]

The Tribunal *in Malicorp v Egypt* endorsed this understanding observing that according to the doctrine of separability, "only defects that go to the consent to arbitrate itself can deprive the tribunal of jurisdiction", and "the offer to arbitrate thereby covers all disputes that might arise concerning that investment, including its validity".[130]

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[122] Salini v Morocco [I], Decision on Juridiction, 23 July 2001, para 46; Also, Kriebaum concludes that "in accordance with host State law" clauses "concern the legality of an investment not its definition". Kriebaum (2010), 334.
[123] Salini v Morocco [I], Decision on Juridiction, 23 July 2001, para 46.
[124] Douglas, Zachary. "The Plea of Illegality in Investment Treaty Arbitration." *ICSID Review: Foreign Investment Law Journal*. 29.1 (2014), 172 (reference omitted). See also, Kozyakova, Anna. *Foreign Investor Misconduct in International Investment Law*, 2021, 103-105.
[125] Hobér (2020), 100.
[126] Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v Republic of Kazakhstan, SCC Case No. V 116/2010, Award, 19 December 2013, para 812.
[127] Mouawad and Beess (2021), 7-10.
[128] Douglas (2014), 157.
[129] Plama v Bulgaria, Decision on Jurisdiction, 8 February 2005, para 130.
[130] Malicorp Ltd v Arab Republic of Egypt, ICSID Case No ARB/08/18, Award, 7 February 2011, para 119.

The consent to arbitrate under the ECT is established upon the ratification of the Treaty by the given Contracting Party. Hence it is immune to any subsequent defect or violation of law.

The existence of jurisdiction is concerned with the narrow question of whether the Tribunal itself is mandated with adjudicatory power.[131] Any objection to it should be aimed at the very competence of the Tribunal, not the factual circumstances around the dispute which are to be adjudicated upon at the merits. Under the ECT, the matter of alleged illegality of an investment does not affect the jurisdiction of the Tribunal, since the very question of the veracity of those allegations should be determined by the Tribunal, which in order to bring that task about needs to establish its own competence of doing so in the first place. Therefore, the subsequent verdict on the legality of the concerned investment goes either to the admissibility or to the merits of the claim. The *Plama* Tribunal endorsed this understanding. So did the Tribunal in the *Yukos* case, when it resolved to examine the question of the Respondent's "unclean hands" allegation at the merits.[132]

As Paulsson explains, to understand whether the clause and the challenge based thereon pertains to jurisdiction or admissibility, one should imagine it succeeded:

- If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.
- If the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility[133] and the tribunal's decision is final.[134]

To summarize, the "illegality" argument should not hinder the jurisdiction of the Tribunal over the dispute in the case under discussion here.

2.6.1. Consequences on the merits?

The elaboration on possible complications *the Investors* may run into on the merits is a walk through a *terra incognita* compared to the discussion of the jurisdictional stage.

The Investors are in *prima facie* breach of the Law of the Republic of Azerbaijan on the Protection of Foreign Investments (1992)[135] and the Law of the Republic of Azerbaijan on State Registration and State Register of Legal Entities (2003)[136]. Article 38 of the Land Code regulates

[131] Douglas, Zachary (2014), 171-172; Kozyakova, Anna. Foreign Investor Misconduct in International Investment Law (2021), 203; Knahr, Christina. "Investment "in Accordance with Host State Law". International Investment Law in Context. (2008), 28.

[132] Yukos (Isle of Man) v Russia, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 436. 509; Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, para 187.

[133] Oxus Gold v Republic of Uzbekistan, UNCITRAL, Final Award, 17 December 2015, para 713.

[134] Paulsson, Jan. "Jurisdiction and Admissibility." Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner, (2005), 617.

[135] UNCTAD, "Azerbaijan/Law on the Protection of Foreign Investments" (Investment Policy Hub) https://investmentpolicy.unctad.org/investment-laws/laws/9/azerbaijan-foreign-investments-law accessed 1 July 2021.

[136] Kommunikasiya TexnologiyalarıİdarəsƏdliyyə nazirliyinin İnformasiya, "Hüquqi şəxslərin dövlət qeydiyyatı və dövlət reyestri haqqında Azərbaycan Respublikasının qanunu" (E-qanun, ict.az 12 Decmeber 2003)

granting rights for land use, including leasing. Furthermore, Article 28 of the Law on the Protection of Foreign Investments states that taxes are due for foreign investors according to the legislation of the Republic of Azerbaijan. Although the observation of the Azerbaijani law barely scratches the surface, it brings into the open the issues of state registration, acquisition of property rights, and taxation as acting against *the Investors'* case.

The *Plama* Tribunal having the issue of the compliance with the host State law tramped to the merits, assumed an implicit requirement of compliance with the host State law in the ECT:

> Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment: with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law.[137]

The Tribunal relied on an introductory note to the ECT by the Energy Charter Secretariat, saying that "the fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues"[138]. Then, referring to the *ex turpi causa non oritur actio* (no action can be based on a disreputable cause) principle, the Tribunal denied the claim in granting substantive protections of the ECT.[139]

However, Beltag emphasizes that Article 35 (Secretariat) of the ECT does not vest any interpretative prerogative upon the Secretariat. Nor is this rationale supported in the VCLT provisions.[140] Moreover, the ECT does not require the investments to comply with the host State's laws on authorization or approval as impediments to jurisdiction either.

The timing of the alleged illegality is often viewed in the context of its legal effect. Thus, if the violation of the host State law occurred at the moment of establishment of the investment, the Treaty protection is arguably unavailable.[141]

The *Yukos* Tribunal's observance echoes this understanding:

> An investor who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host State, has brought itself within the scope

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http://www.e-qanun.az/framework/5403 accessed 1 July 2021. (Az.); https://ereforms.org/store//media/documents/huq-sexs-rey-en.pdf (Eng.).

[137] Plama v Bulgaria, Award, 27 August 2008, para 138.

[138] Energy Charter Secretariat, The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation, Chairman's Statement at Adoption Session on 17 December 1994, 158.

[139] Plama v Bulgaria, Award, 27 August 2008, 146.

[140] Baltag (2012), 198.

[141] Dolzer and Schreuer (2012), 93; Hobér (2020), 99-103; Kriebaum (2010), 329-334; Brown and Miles (2011), 187-200, 198; Mouawad and Beess (2021), 11; Kozyakova (2021), 203; Moloo, Rahim, and Khachaturian, Alex. "The Compliance with the Law Requirement in International Investment Law." Fordham International Law Journal. 34.6 (2011), 1473-1501, 1499; Douglas (2014), 161; Roe, Happold and Dingemans (2011), 88; Yukos (Isle of Man) v Russia, Final Award, 18 July 2014; Gustav F W Hamester GmbH & Co KG v Republic of Ghana, ICSID Case No. ARB/07/24, Award, 18 June 2010; Fraport v Philippines, Award, 16 August 2007, paras 345, 395; Vladimir Berschader and Moïse Berschader v The Russian Federation, SCC Case No. 080/2004, Award, 21 April 2006, para 111; Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para 277; Churchill v Indonesia, Decision on Jurisdiction, 24 February 2014, para 315.

> of application of the ECT through wrongful acts. Such an investor should not be allowed to benefit from the Treaty.[142]

Likewise, the Tribunal in *Hamester v Ghana* distinguished between illegality *ab initio* being a jurisdictional issue and illegality *ex-post* constituting a merits issue.[143]

As for the subsequent illegalities, Kozyakova opines that such illegality eliminates neither the protection of the investment treaty, nor the tribunals' jurisdiction. Therefore, it is with the merits that the tribunals should deal with it.[144]

Moreover, in the cases where Tribunals denied investment protection, the investors were in intentional violation of the host State law by means of corruption,[145] misrepresentation,[146] fraud[147] , or abuse of constitutional norms and "anti-dummy" law[148].

In *the Investors'* case, non-compliance with the host State law had never been vital for the success of *the Investments*. *The Investors* had no choice but to start the economic activities, assuming the risk of non-compliance with the laws of Azerbaijan, which at the moment was not even in effective control of the territory concerned, or they could have refrained from any business endeavors. *The Investors* elected the former. Nonetheless, non-compliance with the host State law was not detrimental in the way it was in the *Fraport* case, where the Tribunal found that the only option for the Investors to run a profitable Investment was the violation of the "anti-dummy" law of The Philippines.[149] To summarize, it is submitted that non-compliance with the host State law will not constitute a jurisdiction impediment for *the Investors.*

2.6.2. The alleged infraction of the host State law in the light of the expropriation

This subsection discusses the possibility of reducing *the* damages according to *the Investors'* contribution to the injury. In our context, such contribution may be in the form of non-compliance with the host State law.

Article 39 of the ILC Articles on State Responsibility provides:

> In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

The Claimants, it is submitted. will claim damages inflicted by the Respondent's expropriation of *the Investments.* Should such damages be granted, the Tribunal will perhaps weigh the infraction

[142] Yukos (Isle of Man) v Russia, Final Award, 18 July 2014, para 1352.
[143]Hamester GmbH & v Ghana, Award, 18 June 2010, para 127. Also cited in Stephan W, Schill. "Illegal Investments in Investment Treaty Arbitration" in The Law and Practice of International Courts and Tribunals, Martinus Nijhoff Volume 11 (2012) 19. See also Kriebaum (2010), 332.
[144] Kozyakova (2021), 202; Mouawad and Beess (2021), 11
[145] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006.
[146] Plama v Bulgaria, Award, 27 August 2008.
[147] Inceysa v El Salvador, Award, 2 August 2006.
[148] Fraport v Philippines, Award, 16 August 2007.
[149] Fraport v Philippines, Award, 16 August 2007, para 396.

of the host State law against the damages, provided that the gravity of the established non-compliance was insufficient to dismiss the claim as inadmissible.

Failing to assess investment-related risks on behalf of *the Investors* is one factor capable of reducing (or even eliminating) the damages. While the ECT addresses possible political risks by providing standards of treatment of foreign investments, the Treaty is not insurance against all investment-related risks.[150] Nevertheless, the investors should have assumed the risk of both business and political nature that no investment treaty would have addressed. Voluntarily and inadequate assumption of these risks can vest a portion of the damages with *the Investors*.

The Tribunal in *MTD V Chile* decided to reduce the damages by 50% in light of the claimant's failure to undertake an adequate risk assessment.[151] The *Yukos* Tribunal reduced the compensation awarded to the Claimant by 25% for its misconduct, applying the doctrine of contributory fault. [152]

In the present case, however, it would be problematic to establish a contribution to the fault in the way understood in the doctrine. *The Investors* and the Respondent were "separated" in different political realms due to the pre-war status quo. Hence, should the Tribunal establish "fault" on both sides' behalf, *the Claimants'* fault would be hard to see as contributing to that of the Respondent. Thus, it seems plausible to weigh the misconducts of the respective sides against each other, reducing the damages awarded to *the Claimant*. This, however, cannot be done because it feels right to do. According to Article 13 of the ECT, should Investments be nationalized or expropriated in a nondiscriminatory way, for a purpose in the public interest, carried out according to due process of law, prompt, adequate, and effective compensation should be paid. Compensation also is due for losses, including requisitioning or destruction caused by war or other armed conflicts.[153] Hence, the discussion of reducing the damages is appropriate when the Tribunal finds the Respondent in breach of the ECT provisions providing for compensation.

3. Denial of benefits

Under this final section, we will look into another (perhaps a desperate) attempt to exclude *the Investments* of *the Investors* from the coverage of the ECT by invoking Article 17 of the Treaty.

Article 17 of the ECT entitled "Non-Application of Part III in Certain Circumstances" can be relied upon by the Respondent as another tool to attack the jurisdiction of the Tribunal. While the arbitral tribunals usually examine their jurisdiction *ratione persona* and *ratione materiae* even *in absentia* of the Respondent, Article 17 of the ECT can be invoked only upon the Respondent's initiative. The This article examines the relevant provision from the perspective of its invocation by the Respondent as an impediment to the Tribunal's jurisdiction.[154] Article 17 of the ECT reads as follows:

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[150] As the Tribunal in MTD v Chile notes, "the BITs are not an insurance against business risk". MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile, ICSID Case No. ARB/01/7, Award, 13 November 2000, para 64. See also Ripinsky, Sergey. "Assessing Damages in Investment Disputes: Practice in Search of Perfect." Journal of World Investment & Trade. 101 (2009), 5-37, 19.

[151] MTD v Chile, Award, 13 November 2000, paras 242-243.

[152] Yukos (Isle of Man) v Russia, Final Award, 18 July 2014, para 1637. See also Kozyakova (2021), 174-175.

[153] Article 12 of the ECT.

[154] For a general discussion of Article 17 of the ECT see Hobér (2020) 325-346; Dolzer and Schreuer (2012), 55-56; Douglas (2012), 468-472; Baltag (2012), 148-164; Kozyakova (2021), 94-97; Gaillard, Emmanuel and McNeill, Mark "The Energy Charter Treaty" in Yannaca-Small, (2010), 43-46; Mistelis, Loukas A, and Crina M. Baltag. "Denial of

Each Contracting Party reserves the right to deny the advantages of this Part to:

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

From the plain wording "reserves the right" interpreted in the light of Article 31(1) of the VCLT, it is evident that the provision provides an option for a Contracting Party, not an obligation. Furthermore, the provision makes it possible to deny the advantages of "this Part" of the ECT – namely Part III Investment Promotion and Protection, which provides for substantial investment protection obligations. Article 26 of the ECT, containing ISDS, is found in Part V of the Treaty, meaning Article 17 does not affect Article 26.[155] The dissenting school of thought, however, argues that since Article 26 covers disputes arising of the alleged breach of the substantive obligations under Part III, Article 17 of the Treaty also denies the procedural remedies contained in Part V of the ECT.[156] However, the express language of the provision referring to Part III leaves no room for such an effect, which is the case with differently drafted investment treaties[157]. However, further discussion in this contribution would constitute an *obiter* since it suffices to examine whether *the Claimants* are caught by the conditions set forth under Article 17 of the ECT.

According to Article 17(1) of the ECT Investments can be denied the benefits of Part III, should it be established that (i) the legal entity is controlled or owned by citizens or nationals of a third state, and (ii) the legal entity has no substantial business activity in the Contracting Party where it is

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Benefits and Article 17 of the Energy Charter Treaty." Dickinson Law Review. 113.4 (2009), 1301; Gastrell, Lindsay and Le Cannu, Laird Paul-Jean. "Procedural Requirements of "denial-of-Benefits" clauses in Investment Treaties: A Review of Arbitral Decisions." ICSID Review: Foreign Investment Law Journal. 30.1 (2015): 78-97; Chalker, James. "Making the Investment Provisions of the Energy Charter Treaty Sustainable Development Friendly." International Environmental Agreements: Politics, Law and Economics. 6.4 (2007): 435-458; Khachatryan, Davit. "What are the Procedural Requirements of the "Denial of Benefits" provision of the ECT?" Uppsala University (2018). Available at: http://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1212543&dswid=2738

[155] Douglas (2012), 468-472; Hobér (2020) 334; Pinsolle, Philippe. "The Dispute Resolution Provisions of the Energy Charter Treaty." International Arbitration Law Review. 10.3 (2007), 74-81; Roe, Happold and Dingemans (2011), 77-87; Mistelis, Loukas A, and Crina M. Baltag. "Denial of Benefits and Article 17 of the Energy Charter Treaty." Dickinson Law Review. 113.4, (2009), 1301; Gaillard and Banifatemi (2018), 223-267; Plama v Bulgaria, Decision on Jurisdiction, 8 February 2005, paras 147, 240; Hulley Enterprises Limited (Cyprus) v Russian Federation (UNCITRAL (PCA Case No. AA 226)), Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 440; Stati v Kazakhstan, Award, 19 December 2013, para 745.

[156] Chalker (2007), 435-458; Baltag (2012), 150-153.

[157] For instance, Article 1113 of the NAFTA contained in Chapter Eleven refers to "this Chapter", which also contains the dispute resolution mechanism of the Agreement, meaning Article 1113 encompasses the ISDS too.

organized. However, if even one of the requisites is not met, the advantages of Part III cannot be denied to the Investment concerned. Hence for *the Investors* it would suffice to establish that they are not nationals of a "third state" and own or control *the Investments.* The notion of a "third state" as a contradistinction to a "Contracting Party" is implicitly defined in Article 1(7)(b) of the ECT.[158] Also, Articles 10(3), 10(7), 7(10)(a)(i) clearly distinguish between a Contracting Party and a third State. The *Yukos* Tribunal having also examined the ECT *travaux préparatoires* established that:

> The Treaty clearly distinguishes between a Contracting Party (and a signatory), on the one hand, and a third State, which is a non-Contracting Party, on the other. This conclusion is further supported by the *travaux préparatoires*, which demonstrate that the term "third state" was substituted for the term "non-Contracting Party.[159]

This understanding is in line with Article 2(1)(h) of the VCLT, under which a "third State" is "a State not a party to the treaty".

According to the *Plama* Tribunal, "ownership" includes indirect and beneficial ownership, whereas "control" includes an ability to exercise day-to-day control and management.[160]

Due to the express conjunction "and" between the two limbs of Article 17(1) of the ECT, *the Claimants* will be immune from the application of Article 17, having established as much as their Armenian citizenship and ownership/control of *the Investments*, which is not a difficult task to bring about.[161] While the issue of substantial business activities in Armenia or any other Contracting Party of the ECT would be irrelevant, it is submitted as a supportive *obiter* to *the Claimants'* case, that substantive business activities under the ECT refer to the existence of (minimum) business activities *per se*. It does not necessarily mean "large" since the materiality, not the business activity's magnitude, is the decisive factor[162]. Thus, as much as an office operating with minimal staff in the state where the entity is organized will suffice. Consequently, Article 17(1) of the ECT does not apply to *the Claimants'* case.

As for the onus of proof, where Article 17(2) of the ECT expressly requires the denying Contracting Party to establish the alleged facts, Article 17(1) is silent on the matter. Nevertheless, according to the maxim *actori incumbit onus probandi*, the burden of proof rests on the party advancing the allegation. While *the Claimants* bear the onus of establishing their nationality of a Contracting Party and ownership or control of *the Investments,*[163] the Respondent, on the other side,

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[158] AMTO v Ukraine, Final Award, 26 March 2008, para 62. See also Hobér (2020), 336-339.

[159] Yukos (Isle of Man) v Russia, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 544. See also, Stati v Kazakhstan, Award, 19 December 2013, para 717.

[160] Plama v Bulgaria, Decision on Jurisdiction, 8 February 2005, para 170.

[161] Gran Colombia Gold Corp. v Republic of Colombia, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para 134. See also Hobér (2020), 341.

[162] AMTO v Ukraine, Final Award, 26 March 2008, para 69; Gran Colombia. v Colombia, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para 136, where the Tribunal opined that *"some"* substantial business activity would do; Petrobart Limited v The Kyrgyz Republic, SCC Case No. 126/2003, Arbitral Award, 29 May 2005, para 63.

[163] Final Act of the European Energy Charter Conference, Understandings, n. 3. with respect to Article 1(6); AMTO v Ukraine, Final Award, 26 March 2008, para 69. Gran Colombia v Colombia, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para 64; Plama v Bulgaria, Award, 27 August 2008, 89; CCL v Republic of Kazakhstan, SCC Case 122/2001, Jurisdictional Award, 1 January 2003, 152.

seeking to invoke Article 17 of the ECT, shoulders the burden of proving the facts it relies upon[164]. *The Claimants* knowing better who owns or controls *the Investments* and what business activities they carry on in Armenia or another Contracting Party of the ECT may be asked by the Tribunal, or alternatively volunteer to disclose the information required.

The Respondent under Article 17(2) of the ECT is required to establish that *the Claimants* are nationals of a third state (only) with which the Respondent does not maintain diplomatic relationships or adopts or maintains measures that would conflict with the advantages offered by Part III of the ECT. Since *the Claimants* are nationals of Armenia, the remaining conditions are irrelevant, and Article 17(2) of the ECT does not apply.

In conclusion, *the Claimants*, citizens or nationals of Armenia and owning or controlling the Investments, are immune from the denial of benefits clause of the ECT. Should it be established that Article 17 of the ECT does not affect the Tribunal's jurisdiction over the dispute, the Respondent will be estopped from invoking the provision at a later stage of the proceedings. Hence, whether the provision belongs to the admissibility or the merits of the dispute is of no relevance for this paper.

4. Conclusion

This article has sought to apply the advantages of International Investment Law in the context of a hypothesis that emerged by the consequences of the recent war in Artsakh/Nagorno-Karabakh. As observed, international arbitration is the only plausibly effective dispute resolution for *the Investors*. Furthermore, the ECT is the only investment treaty that offers substantive protection to foreign investors that both Armenia and Azerbaijan are Contracting Parties. The jurisdictional threshold under the ECT is arguably not insurmountable should *the Investors* try to benefit from the ISDS of the Treaty.

Jurisdiction *ratione personae* is relatively easy to establish since, under Article 1(7) of the ECT, it suffices for a natural person to be a national citizen or a permanent resident of Armenia to be qualified as an Investor. For a legal entity, the threshold is the proper organization under the law applicable in Armenia. Consequently, *the Investors* qualify as "Investors" under the ECT.

Next comes *ratione materiae* defining the notion of "Investment" under the ECT. Investments must be associated with an Economic Activity, which encompasses a broad circle of activities that *inter alia* includes construction and operation of power generation facilities and distribution grids. The HPP concerned fall under this scope.

Nevertheless, the disputes under the ECT are submitted to arbitral tribunals governed by separate sets of procedural rules, including the ICSID Convention, a self-contained system. This feature has led many Tribunals to view an autonomous definition of "Investor" in Article 25(1) of the treaty. Should a tribunal adhere to the objectivist theory, the jurisdictional threshold is set higher for virtually every putative investor, let alone *the Investors* with their delicate position. This notwithstanding, it has been argued in this paper that the definition of "Investment" under the ECT and the lack of that under the ICSID Convention should suffice to establish the jurisdiction *rantione*

[164] Liman v Kazakhstan, Excerpts of Award, 22 June 2010, para 187; AMTO v Ukraine, Final Award, 26 March 2008, para 65; Generation Ukraine, Inc. v Ukraine, ICSID Case No. ARB/00/9, Award, 13 September 2003, para 15.7. See also Hobér (2020), 344-346.

materiae. *The Investments* meet the respective definitions, thus qualifying as "Investment" under the ECT.

Somewhat tricky is establishing jurisdiction ratione loci since the Investors should at minimum agree not to disagree that the HPP are on the territory of the Republic of Azerbaijan (for the purposes of Article 1(10) of the ECT), something Armenia has never been prone to recognize.[165] However, this is the price of the stand before an International arbitral tribunal against the host State. Azerbaijan, on the other hand, will hardly argue that the region is its territory. Since Azerbaijan has not applied any territorial reservations under Article 40(1) of the ECT, establishing *ratione loci* will not pose any serious issue. As for Armenia, it may apply to be granted to file *amicus curiae* submissions to the Tribunals as Ukraine did in the Crimean cases.[166]

Since both the ECT and the ICSID Convention are in force for Armenia and Azerbaijan, and alleged expropriation took place after "the Effective Date" under the ECT, the requirements for jurisdiction *ratione temporis* can be deemed established as well.

Absent any express language in the ECT, the (implicit) requirement of compliance with the host State's law might be a difficult obstacle to overcome for *the Investors*. To this end, it bears to emphasize that according to the principle *compétence de la competence*, a tribunal needs to uphold and exercise its jurisdiction in the first place to address any allegations against its jurisdiction. Therefore, any illegality apart from one committed at the point of consenting to arbitrate falls short, affecting the Contracting Parties' consent to arbitration under the ECT according to the cornerstone principle of separability. The consent to arbitrate under the ECT, thus, remains uncompromised by possible allegations concerning the legality of *the Investments* under the Azerbaijani law.

Finally, was addressed Article 17 of the ECT designed to secure the Contracting Parties' right to deny the investors of third states to the substantive protections of the Treaty. Since the provision refers to the ECT Part III (Investment Promotion and Protection), the ISDS found in Part V remains unaffected by it. In any case, *the Investors* are not caught by the cumulative conditions under Article 17 of the ECT, rendering this tactic attacking the arbitral jurisdiction effectively perspectiveless for *the Respondent*.

To recapitulate: signing the ECT, the Contracting States have consented to arbitrate the disputes arising out of investments in the energy sector, thus shouldering a considerable burden of obligations as well as a certain level of due diligence in the spirit of *pacta sunt servanda.* Therefore, regardless of State policies, private actors in the energy sector should not be undermined as mere collateral damages, much less where the respective economic activities claim being covered by the ECT or/and other investment treaties.

It is not my intention to advocate for *the Investors'* case (nor is there one yet, for that matter). The arbitral jurisdiction has been viewed in this piece as something the ECT Contracting States have bindingly and irrevocably consented to, as Hobér notes, "a sovereign state must be sovereign enough to make a binding promise"[167]. As for *the Investors,* they are certainly in the position to try and attain a stand before an international Tribunal against the host State.

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[165] A similar, but by far not the same situation had played out in the "Crimean cases", where in order to establish the territorial application of the BIT at hand, the Ukrainian investors were to argue that Crimea constituted a Russian territory. See Giupponi (2019), 165; Rees-Evans (2019), 195; Tzeng, Peter. "Sovereignty Over Crimea: A Case for State-to-State Investment Arbitration." *Yale Journal of International Law*. 41.2 (2016), 462.

[166] Tzeng (2016), 462; Rees-Evans (2019), 179.

[167] Hobér (2013), 500.

What comes next is a different matter well outside the scope of this paper. Although more efficient than litigation through national courts,[168] investment dispute settlement is still a bumpy road since even the most generous award is not the end of the story since only the effective enforcement of the award is the desirable culmination. Furthermore, the execution stage has time and again proved to be a real headache for the winning party. At any rate, international arbitration is worth trying, unless a legal vacuum is what *the Investors* do not mind. A daring "test case", would set an example for the affected actors in the region and answer many questions that can only be speculated upon at this stage.

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