

International Centre for Settlement of Investment Disputes

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CERTIFICATE

Plama Consortium Limited

v.

Republic of Bulgaria

(ICSID Case No. ARB/03/24)

I hereby certify that the attached is a true copy of the Award of the Arbitral Tribunal,
dated August 27, 2008.



Nassib G. Ziadé
Acting Secretary-General

Washington, D.C., August 27, 2008

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDINGS BETWEEN

**PLAMA CONSORTIUM LIMITED
(CLAIMANT)**

and

**REPUBLIC of BULGARIA
(RESPONDENT)**

(ICSID Case No. ARB/03/24)

AWARD

Members of the Tribunal

Carl F. Salans, President
Professor Albert Jan van den Berg, Arbitrator
V.V. Veeder, Arbitrator

Administrative Assistant to the Tribunal

Ms. Anne Secomb

Representing Claimant

Mr. Frank H. Penski
Ms. Abigail Reardon
Nixon Peabody LLP
Mr. Ciril Pelovski
Denev & Oysolov Law Office

Representing Respondent

Mr. Ivan Kondov
*Head of the Judicial Protection of the Ministry
of Finance of the Republic of Bulgaria*
Mr. Paul D. Friedland
Ms. Carolyn B. Lamm
Ms. Abby Cohen Smutny
Mr. Jonathan C. Hamilton
Mr. Francis A. Vasquez, Jr.
White & Case LLP
Mr. Lazar Tomov
Tomov & Tomov

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ANNEX

I. INTRODUCTION

1. The present arbitration arises under the Energy Charter Treaty (“ECT” or the “Treaty”), a multilateral convention whose purpose, according to Article 2 thereof, is to establish a legal framework in order to promote long-term cooperation in the energy sector. In Article 10 of Part III of the ECT, Contracting States undertake the obligation to encourage and create stable, equitable, favorable and transparent conditions for Investments of Investors (as those terms are defined in the ECT -- see Annex) of other Contracting States.
2. The conditions include a commitment to accord at all times to Investments of Investors of other Contracting States “fair and equitable treatment,” “the most constant protection and security” and treatment no less favorable than that required by international law. The Contracting Parties further undertake not to impair in any way by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of Investments and to observe any obligations they have entered into with an Investor or an Investment of an Investor of another Contracting State. Article 13 prohibits expropriation “or measures having effect equivalent to [...] expropriation,” except in certain circumstances and subject to certain conditions. By Article 17 of the ECT, which is also found in Part III, Contracting States reserve the right to deny the advantages of Part III to a legal entity if citizens or nationals of a third State own or control that entity and if that entity has no substantial business activities in the area of the Contracting Party in which it is organized.¹ Part V of the ECT provides for dispute resolution, and its Article 26 permits, *inter alia*, Investors to resort to arbitration pursuant to the ICSID Convention concerning alleged breaches by a Contracting State of an obligation under Part III.

¹ Bulgaria denied the protections of the ECT to Claimant, prospectively, from 18 February 2003. See paragraph 21 below and the discussion in the Decision on Jurisdiction, pp. 50 *et seq.*

3. Because they are referred to in the Parties' submissions and in this Award, the texts of the relevant provisions of the ECT are set forth in the Annex to this Award.

II. PROCEDURE

A. Registration of the Request for Arbitration

4. On 6 January 2003, the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received a request for arbitration dated 24 December 2002 ("Request for Arbitration") from Plama Consortium Limited ("PCL" or "Claimant"), a Cypriot company, with its address at 4 Tenarou Street, Ayios Dometios, Nicosia, Cyprus, against the Republic of Bulgaria ("Bulgaria" or "Respondent"). The two parties together are referred to as "the Parties." The Request for Arbitration invoked the ICSID arbitration provisions of the ECT and the most favored nation ("MFN") provision of a bilateral investment treaty ("BIT") concluded in 1987 between the Government of the Republic of Cyprus and the Government of the People's Republic of Bulgaria ("the BIT"), which allegedly imported into the BIT the ICSID arbitration provisions of other BITs concluded by Bulgaria, in particular the Bulgaria – Finland BIT.
5. The Centre, on 14 January 2003, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("ICSID Institution Rules"), acknowledged receipt of the Request for Arbitration and, on the same day, transmitted a copy to Bulgaria and to the Bulgarian Embassy in Washington, D.C., USA.
6. There ensued exchanges of correspondence between the Parties and the Acting Secretary-General of ICSID concerning the jurisdiction of ICSID over the Request for Arbitration and its registerability under Article 36(3) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("the ICSID Convention") and ICSID Institution Rules 6 and 7.
7. On 17 April 2003, Claimant filed a Supplement to Request for Arbitration dated 6 April 2003. The Centre acknowledged receipt of the Supplement to

Request for Arbitration on 17 April 2003 and, on the same day, transmitted a copy to Bulgaria and to the Bulgarian Embassy in Washington, D.C.

8. Upon requests from both Parties, the Centre deferred registration. A further postponement of registration was sought by Respondent on 12 August 2003 but was opposed by Claimant.
9. The Request for Arbitration, as supplemented, was registered by the Centre on 19 August 2003, pursuant to Article 36(3) of the ICSID Convention and, on the same day, the Acting Secretary-General, in accordance with ICSID Institution Rule 7, notified the Parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.
10. By letter of 12 June 2003, Emmanuel Gaillard and John Savage of the law firm Shearman & Sterling LLP² informed the Centre that they had been retained to represent Claimant, replacing Christian Nordtømme in these proceedings. Claimant further advised that it was also represented by Ciril Pelovski of the law firm Denev & Oysolov. On 20 August 2003, Respondent informed the Centre that it had retained as Counsel in the proceedings Paul D. Friedland, Carolyn B. Lamm and Abby Cohen Smutny of the law firm White & Case LLP. By a letter of 25 March 2004, Respondent further indicated having retained Lazar Tomov of the law firm Tomov & Tomov.

B. Constitution of the Arbitral Tribunal and Commencement of the Proceedings

11. Following the registration of the Request for Arbitration by the Centre, the Parties agreed on a three-member arbitral tribunal (the "Arbitral Tribunal" or the "Tribunal"). The Parties agreed that each of them would appoint an arbitrator and that the third arbitrator, who would be the President of the Tribunal, would be appointed by agreement of the Parties. The Parties agreed that the Centre would appoint the President of the Arbitral Tribunal should they fail to agree on the presiding arbitrator.

² Subsequently, Shearman & Sterling was succeeded as Counsel to Claimant by Virginie Colaiuta and, thereafter, by the law firm Nixon Peabody LLP, *see infra*, paragraphs 38 and 45.

16. At that first session of the Arbitral Tribunal held in Paris on 25 March 2004, the Parties reiterated their agreement on the points communicated to the Tribunal in their joint letter of 19 March 2004, and the remainder of the procedural issues on the agenda for the session were discussed and agreed. All the conclusions were reflected in the written minutes of the session, signed by the President and the Secretary of the Arbitral Tribunal and provided to the Parties, as well as all members of the Tribunal. It was agreed that Respondent's objections to jurisdiction would be treated as a preliminary question. A schedule for the filing of memorials and for the holding of a hearing on jurisdiction in Paris on 20 and 21 September 2004 was agreed.
17. Pursuant to the agreed schedule, Respondent filed a Memorial on Jurisdiction on 26 May 2004. In support of its Memorial, Respondent submitted written statements of MM. Rudolph Dolzer, Charles Kerins, Sean McWeeney, Elias A. Neocleous, Timothy O'Neill, Christo Tepavitcharov and Thomas W. Wälde, accompanied by a further copy of Mr. Jean Christophe Vautrin's first declaration.⁴ Claimant submitted a Counter-Memorial on Jurisdiction dated 25 June 2004, supported by Mr. Jean Christophe Vautrin's second declaration and a declaration from Mr. Jacques Python. This was followed, on 26 July 2004, by a Reply on Jurisdiction from Respondent, accompanied by statements from MM. Stanislav Ananiev, Alexander D. Boshkov, Elias A. Neocleous, Plamen Oresharski, Todor Marinov Palazov, Tencho Ivanov Tenev, Nikolay Vassilev and Milen Veltchev. Claimant's Rejoinder on Jurisdiction, dated 26 August 2004, supported by Mr. Jean Christophe Vautrin's third declaration, was received by the Centre on 30 August 2004.
18. On 26 July 2004, Respondent submitted to the Arbitral Tribunal a request for the production of documents by Claimant. By letter dated 6 August 2004, Claimant opposed that request. After considering the views of the Parties, the Arbitral Tribunal, on 11 August 2004, issued Procedural Order No. 1 directing Claimant to produce all documents falling within the categories listed in the

⁴ Mr. Vautrin's first declaration had been submitted earlier by Claimant's Counsel at the Tribunal's first session of 25 March 2004.

Order, no later than with the filing of its Rejoinder on Jurisdiction. Claimant filed certain documents with its Rejoinder of 26 August 2004. Further to a request for extension made on 17 August 2004, which was accepted by Respondent, Claimant submitted to Respondent, under cover of a letter dated 6 September 2004, other documents pursuant to the Tribunal's Order. Claimant produced an additional set of documents by letter dated 13 September 2004.

19. An oral hearing on the preliminary question of jurisdiction was held in Paris on 20 and 21 September 2004. Counsel for both Parties addressed the Tribunal. One witness, Mr. Jean-Christophe Vautrin, testified orally for Claimant.
20. On 22 October 2004, Respondent filed a Post-Hearing Submission on Jurisdiction, to which Claimant responded by its Post-Hearing Response on Jurisdiction of 19 November 2004. On 3 December 2004, Respondent filed a Post-Hearing Reply on Jurisdiction.
21. On 8 February 2005, the Arbitral Tribunal rendered its Decision on Jurisdiction. In the operative part, it ruled as follows:
 - A. *As to the jurisdictional issues with respect to the ECT:*
 - (1) *Under Article 26 ECT and the ICSID Convention, the Tribunal has jurisdiction to decide on the merits the Claimant's claims against the Respondent for alleged breaches of Part III of the ECT.*
 - (2) *Article 17(1) ECT has no relevance to the Tribunal's jurisdiction to determine the Claimant's claims against the Respondent under Part III of the ECT.*
 - B. *As to the merits of the Respondent's case under Article 17(1) ECT:*
 - (1) *Article 17(1) requires the Contracting State to exercise its right of denial and such exercise operates with prospective effect only, as it did in this case from the Respondent's exercise by letter of 18 February 2003.*

- (2) *The second limb of Article 17(1) regarding “no substantial business activities” is met to the Tribunal’s satisfaction in favor of the Respondent; and*
- (3) *The Tribunal declines for the time being to decide the first limb of Article 17(1) regarding the Claimant’s “ownership” and “control.”*
- C. *The most favored nation provision of the Bulgaria-Cyprus BIT, read with other BITs to which Bulgaria is a Contracting Party (in particular the Bulgaria-Finland BIT), cannot be interpreted as providing the Respondent’s consent to submit the dispute with the Claimant under the Bulgaria-Cyprus BIT to ICSID arbitration or entitling the Claimant to rely in the present case on dispute settlement provisions contained in these other BITs.*
- D. *The Tribunal rejects the Respondent’s application to suspend the proceedings pending the final outcome of the litigation concerning Dolsamex and Mr. O’Neill.*
- E. *The arbitration will now move to the second phase, that is, an examination of the parties’ claims on the merits.*
- F. *A decision on costs is deferred to the second phase of the arbitration on the merits.*

This decision is incorporated by reference into the present award (collectively the “Award”).

22. The Parties then agreed on a procedural timetable for the merits phase, which was reflected in Procedural Order No. 2 dated 31 March 2005. On the same date, the Centre sent to the Parties new certified copies of the Decision on Jurisdiction correcting a clerical error at paragraph 55 of the Decision.
23. On 29 July 2005, Claimant filed a Request for Urgent Provisional Measures in accordance with ICSID Arbitration Rule 39, seeking urgent recommendations of provisional measures pursuant to Article 47 of the ICSID Convention. Claimant sought an order recommending that, *inter alia*, (1) Respondent

- immediately discontinue and/or cause to be discontinued all pending proceedings and refrain from bringing or participating in any future proceedings before the Bulgarian courts and Bulgarian authorities relating in any way to this ICSID arbitration; and (2) Respondent take no action that might aggravate or further extend the dispute.
24. On 19 August 2005, Respondent filed its Opposition to Claimant's Request for Urgent Provisional Measures, contending that the relief sought by Claimant was unnecessary because Claimant had failed to demonstrate that its rights in this ICSID arbitration would be irreparably harmed without the measures it sought.
 25. This was followed by Claimant's Response to Respondent's Opposition to Claimant's Request for Urgent Provisional Measures dated 25 August 2005, and Respondent's Rejoinder to Claimant's Request for Urgent Provisional Measures dated 31 August 2005. A procedural meeting by telephone conference with the Parties' Counsel followed on 1 September 2005, during which the Arbitral Tribunal put various questions to Counsel and discussed the procedure and timetable for rendering the order on provisional measures.
 26. On 6 September 2005, the Arbitral Tribunal issued an Order rejecting Claimant's Request for Urgent Provisional Measures in its entirety and reserving its decision on the costs resulting from the foregoing procedure to a later stage of the arbitration.
 27. Following Claimant's request of 30 September 2005, the Arbitral Tribunal granted to Claimant a four-week extension of time to submit its Memorial on the Merits and issued, on 6 October 2005, Procedural Order No. 3, which modified the procedural calendar set forth in Procedural Order No. 2 for the filing of submissions on the merits.
 28. Accordingly, Claimant filed its Memorial on the Merits on 28 October 2005, supported by the fourth written declaration of Mr. Jean Christophe Vautrin as well as written declarations by Mr. Vladimir Lazarov and Mr. Dimitar Stefanov and expert reports by MM. Robert Duchesne, Nikolay Todorov Dikov and Lyubomir Denev. On 22 December 2005, Claimant sent English translations of some of the exhibits to its Memorial on the Merits and asked

the members of the Arbitral Tribunal to incorporate into their respective copies of the Memorial corrections of some clerical errors therein.

29. On 7 February 2006, Respondent asked Claimant to produce certain documents by 28 February 2006. Although not within the time frame requested by Respondent, Claimant did submit numerous responsive documents but objected to some of Respondent's requests.
30. By e-mail and facsimile of 21 April 2006, Respondent requested an order from the Arbitral Tribunal calling upon Claimant to produce, by 5 May 2006, various documents set forth in its request of 7 February 2006 which Claimant had failed to produce.
31. After further correspondence on this subject between the Parties and considering their respective positions, the Tribunal issued Procedural Order No. 4 on 27 April 2006, directing Claimant to produce to Respondent additional documents.
32. By letter dated 22 May 2006, Respondent requested a modification of the procedural timetable, to which Claimant agreed. On 26 May 2006, the Arbitral Tribunal issued Procedural Order No. 5 to modify, as per the Parties' agreement, certain dates for the filing of submissions in the merits phase set forth in Procedural Order No. 3.
33. Following the execution by the Parties of a confidentiality agreement, Claimant further produced, on 16 June 2006, two confidential documents.
34. On 28 July 2006, Respondent filed its Counter-Memorial on the Merits supported by statements from MM. Kaloyan Vassilev Bonev, Milcho Dimitrov Boyadzhiev, Doncho Brainov, Hristo Dimitrov, Chavdar Georgiev Georgiev, Georgi Ivanov Georgiev, Roumen Georgiev Hristov, Bojko Iliev, Krassimir Vutev Katev, Nikolay Kavardzhikliev, Lyubka Kostova, Nikola Djipov Nikolov, Nikolai Marinov Nikolov, Lyudmil Zhivkov Parvanov, Ognyan Viktorov Petkov, Aksinia Stoyanova Slavcheva, Lilia Nikolova Smokova, Tencho Ivanov Tenev, Tsvetan Tsekov, Maria Lyubenova Tsekova, Nikolay Vassilev and Svetoslav Yordanov and accompanied by legal opinions of Mr. Teodor Antonov Chipev and Professor Metody Markov as well as reports

by Gaffney, Cline & Associates, Navigant Consulting, Inc. and Transacta OOD.

35. By letter dated 10 September 2006, Claimant notified the Tribunal and Respondent that Shearman & Sterling was no longer acting as Claimant's legal Counsel in this arbitration and requested an extension of three months for filing its Reply and such further adjustments to the procedural calendar as would consequently be required.
36. In a letter of 14 September 2006, Respondent objected to this request but urged the Arbitral Tribunal, if it should, nevertheless, grant Claimant's request, to do so only on the condition that Claimant post security in the form of a bond in the amount of no less than USD 2,000,000 against an award of costs in Respondent's favor.
37. On 20 September 2006, the Arbitral Tribunal issued Procedural Order No. 6 in which it (1) agreed in principle to grant a maximum three-month extension of time to Claimant for the filing of its Reply from the date of Claimant's request, (2) urged Claimant to act with the utmost diligence in appointing new Counsel, (3) stated that it would decide the consequent modification of the procedural calendar after discussion with the Parties' Counsel, including Claimant's new Counsel, in a conference call during which the Tribunal would also hear the Parties' arguments regarding Respondent's request that Claimant be ordered to post security for costs, and (4) invited Claimant to submit, by 6 October 2006, any comments it wished to make concerning Respondent's request for security for costs.
38. On 18 December 2006, Claimant informed ICSID that it had appointed new Counsel to represent it in the person of Virginie A. Colaiuta, 25 Boulevard de l'Amiral Bruix, 75782 Paris Cedex 16, France.⁵
39. There ensued correspondence between the Parties and the Arbitral Tribunal in which, among other matters, Respondent requested an increase in the amount of the security for costs that Claimant be ordered to post to USD 9,000,000

⁵ Ms. Colaiuta's address was subsequently changed to 9 rue de Picardie, 75003 Paris, France.

and, in addition, requested that any further proceedings in this arbitration be limited to the oral hearing, contending that Claimant had foregone its right to file any additional written submissions by failing to file its Reply by the deadline fixed in Procedural Order No. 6.

40. It proved difficult to find an early common date for the procedural meeting by conference call envisaged in Procedural Order No. 6. Consequently, the Tribunal organized a meeting in person with the Parties in Paris on 16 February 2007 to discuss Respondent's requests to limit the written phase of these proceedings and to order Claimant to post a bond as security for costs, as well as to fix a time schedule for the future conduct of the arbitration.
41. After hearing presentations by the Parties' Counsel on Respondent's request to limit the proceedings, the Tribunal decided not to grant that request. It communicated that decision to the Parties in writing by Procedural Order No. 8, dated 21 February 2007. The Tribunal next heard the Parties' arguments regarding security for costs. The Parties and the Tribunal then discussed the further steps in these proceedings, the result of which was agreement on a procedural calendar, communicated to the Parties in Procedural Order No. 7 on 21 February 2007. Following the meeting, the Arbitral Tribunal issued Procedural Order No. 9 on 28 February 2007, denying Respondent's request for security for costs. ICSID issued summary minutes of the meeting.
42. Pursuant to Procedural Order No. 7, Claimant made requests to Respondent for the production of documents. With respect to those requests regarding which the Parties could not agree, the Arbitral Tribunal issued Procedural Order No. 10 deciding upon the various document production requests at issue. In an accompanying letter, the Tribunal denied Claimant's request for additional time to file its Reply.
43. By Procedural Order No. 11, the Arbitral Tribunal extended Claimant's time to file its Reply by a few days.
44. Claimant filed its Reply to Respondent's Counter-Memorial on 11 April 2007, together with a second expert report by Mr. Duchesne.
45. In a letter of 25 May 2007, Ms. Colaiuta informed the Arbitral Tribunal that she was withdrawing as Counsel to Claimant. The Tribunal was subsequently

advised that the law firm Nixon Peabody LLP, of 437 Madison Avenue, NY, NY, USA had been appointed by Claimant as its new Counsel.

46. Respondent submitted a Rejoinder on the Merits, dated 27 July 2007, accompanied by written statements of MM. Ivan Iskrov, Alexander Rakov, Nikloay Vassilev and Svetoslav Yordanov, as well as a legal opinion of Mr. Teodor Antonov Chipev, an expert report of Ms. Villy Dashinova-Stefanova, a supplemental expert report of Gaffney, Cline & Associates, a supplemental legal opinion of Professor Metody Markov and a second expert report of Navigant Consulting, Inc.
47. A procedural meeting by telephone conference with the Parties and the Arbitral Tribunal took place on 22 October 2007 for the purpose of preparing the hearing scheduled for January – February 2008 and to address certain other procedural matters. Prior to that conference, the Tribunal circulated to the Parties an agenda and requested the Parties to consult each other with a view to agreeing on a common approach to the agenda's items. The Parties submitted a joint letter dated 18 October 2007 responding to the Arbitral Tribunal's request. Following the telephone conference, ICSID issued summary minutes of the discussion, and the Arbitral Tribunal issued Procedural Order N° 12, dated 30 October 2007, containing its decisions and instructions regarding the matters discussed.
48. On 12 November 2007, Respondent addressed a letter to the Arbitral Tribunal objecting to certain decisions in Procedural Order N° 12. Claimant submitted its comments regarding Respondent's objections in a letter dated 13 November 2007. The Tribunal rendered its decision regarding Respondent's objections on 14 November 2007, which was communicated by ICSID to the Parties.
49. On 8 January 2008, Respondent addressed a letter to the Arbitral Tribunal objecting to the use of a specific exhibit by Claimant in the impending oral hearing. Claimant offered its comments to Respondent's objection by letter of 10 January 2008. The Tribunal rendered its decision regarding Respondent's objections on 11 January 2008, which was communicated by ICSID to the Parties.

50. A hearing on the merits was held at the seat of the Centre in Washington D.C. from 28 January 2008 to 1 February 2008. Counsel for both Parties addressed the Arbitral Tribunal. One witness, Mr. Jean-Christophe Vautrin, and one expert, Mr. Robert Duchesne, appeared for Claimant. Five witnesses, Ms. Aksinia Stoyanova Slavcheva, Minister Nikolay Vassilev, Mr. Svetoslav Yordanov, Mr. Ognyan Viktorov Petkov and Mr. Nikola Djipov Nikolov appeared for Respondent, as well as two experts, Ms. Zoë Reeve of Gaffney, Cline & Associates and Mr. Brent Kaczmarek of Navigant Consulting, Inc. All witnesses and experts were cross-examined by opposing Counsel and re-examined by Counsel for the Party presenting them. ICSID issued summary minutes of the hearing on 13 February 2008.
51. On 20 March 2008, both Parties made written Post-Hearing Submissions.
52. Final oral argument was made by Counsel for the two Parties at a hearing in Washington, D.C. at the seat of the Centre on 14 April 2008.
53. Following the hearing for oral argument, both Parties filed their claims for costs in written submissions dated 21 May 2008. Each Party filed written comments regarding the cost submission of the other on 4 June 2008.
54. The Arbitral Tribunal pronounced the proceedings closed on 9 June 2008 according to ICSID Arbitration Rule 38(1).

III. SUMMARY OF THE DISPUTE

55. The following is a summary of the dispute in the present case. Additional facts appear in Chapters IV and V, “Discussion of the Issues,” *infra*. The facts set forth in this Award are those which the Tribunal determines to be most relevant to its decisions on the Parties’ respective cases.

A. The Refinery’s Acquisition

56. Prior to its privatisation in 1996, Plama AD, which later changed its name to Nova Plama AD (“Nova Plama”), was a Bulgarian 100% State-owned joint stock company which owned an oil refinery (“the Refinery”) in Bulgaria. On 5 September 1996, Bulgaria privatized Nova Plama and sold 75% of its shares to EuroEnergy Holding OOD (“EEH”) (the “‘1996’ or ‘First’ Privatization

Agreement”, Claimant’s Exhibit (“C’s Exh.”) 177). In October 1997, EEH increased Nova Plama’s capital, after which EEH held 96.78% of the company’s outstanding and issued share capital.

57. A year later, Claimant – then known as Trammel Investment Limited – purchased from EEH all of EEH’s 49,837,849 shares of Nova Plama, which represented that 96.78% shareholding. The share purchase agreement, which was subject to the consent of the Bulgarian Privatization Agency, was concluded on 18 September 1998 (C’s Exh. 128). The agreement was amended on 18 December 1998 (C’s Exh. 182).
58. Negotiation for the purchase of Nova Plama shares started at the end of 1997 when Mr. Jean-Christophe Vautrin, who was then working at André & Cie (“André”), a Swiss multinational company involved in trading, project and trade financing, energy and transportation, was contacted by Mr. Boni Bonev of Banque Internationale pour le Commerce et le Developpement (“BICD”). Mr. Bonev mentioned that PriceWaterhouseCoopers (“PWC”) had approached the BICD on behalf of EEH, which was seeking to obtain trade financing facilities for the Refinery (see Claimant’s Counter-Memorial on Jurisdiction, para. 49; Respondent’s Counter-Memorial on the Merits, para. 15).
59. At around the same time, Mr. Vautrin was also approached by the Central Wechsel und Creditbank, which expressed its willingness to facilitate financing for the Refinery, provided, *inter alia*, that it received a counter-guarantee from various partners, including a lubricant oil specialist. Consequently, Mr. Vautrin contacted Mr. Harald Svindseth from Norwegian Oil Trading AS (“NOT”), a company that specialised in the distribution and fabrication of lubricants in emerging markets (see Claimant’s Counter-Memorial on Jurisdiction, para. 49).
60. While André and NOT were not willing to provide financing to EEH because they doubted its trustworthiness, they expressed an interest in acquiring EEH’s shares in Nova Plama. Although negotiations broke down in February 1998, they resumed later that year (see Claimant’s Counter-Memorial on Jurisdiction, para. 52; Respondent’s Counter-Memorial on the Merits, para. 17). As a result, on 18 August 1998, NOT and André entered into a

Memorandum of Agreement with the Privatization Agency (also referred to as the “Memorandum of Understanding”), which was subsequently amended on 21 September 1998 (Respondent’s Exhibits (“R’s Exhs.”) 664, 671), by which the Privatization Agency, in accordance with Article 22 of the First Privatization Agreement, gave consent for the sale and transfer of all shares of Nova Plama to a company presented by NOT and André, provided the satisfaction of a number of conditions stated therein was assured.

61. These conditions, as amended on 21 September 1998, included *inter alia*, (i) evidence of financial resources to resume the operation of the Refinery; (ii) an agreement with the trade unions of Nova Plama; (iii) an agreement with the main creditors of Nova Plama; and (iv) an agreement with the Privatization Agency to “*take over any and all purchaser rights*” in accordance with the First Privatization Agreement (R’s Exhs. 664, 671).
62. On 5 October 1998, Claimant submitted a letter from the Central Wechsel und Creditbank stating that a USD 8 million facility “*for start up and operation of Plama refinery is being organised with the guarantee of André & Cie S.A and Norwegian Oil Trading a.s.*” (R’s Exh. 672). On 11 October 1998, PCL signed an agreement with Nova Plama’s employees (R’s Exh. 673); and, on 26 October 1998, PCL and various creditors of Nova Plama entered into a Debt Settlement Agreement (R’s Exh. 675).
63. Finally, on 17 November 1998, Claimant and the Bulgarian Privatization Agency entered into an agreement (“the Second Privatization Agreement,” R’s Exh. 676) specifying, *inter alia*, the obligations taken over by Claimant under the First Privatization Agreement and indicating that the date of entry into force would be the date of transfer of Nova Plama shares from EEH to PCL .
64. By letter dated 23 November 1998, the Privatization Agency informed EEH and PCL that the conditions stipulated by the Memorandum of Agreement had been met and that, consequently, the Privatization Agency gave its final consent to the transfer of shares (R’s Exh. 677). Following approval by the Privatization Agency, the transfer of shares took place on 18 December 1998.
65. Following a Bulgarian court decision in 2004 invalidating the 1997 capital increase, Nova Plama’s registered share capital reverted to the original number

of shares, so that Claimant then owned 75% of Nova Plama's shares (C's Exh. 183, note 14).

B. The Refinery's Operation and the Bankruptcy

66. The Refinery's key industrial asset was a lubricants manufacturing unit which had processed base-oils produced by the Refinery into a wide range of industrial and consumer lubricants which were used as raw materials for lubricants at the Refinery or by third party blenders. Nova Plama also had its own power plant, with a capacity for sales of excess electric power to the local grid.
67. Nova Plama ceased operations in 1996, while it was still State-owned, due to poor economic conditions and, during EEH's ownership, production was never resumed (Hearing Transcript ("H. Tr."), Day 1, 28 January 2008, p. 28 at lines 20 *et seq.*, p. 85 at lines 14 *et seq.*). On 10 June 1998, Bulgaria's State Fund for Reconstruction and Development initiated insolvency proceedings against Nova Plama (C's Exh. 167). It was while the insolvency proceedings were underway that EEH agreed, with the consent of the relevant Bulgarian authorities, to sell its shares in Nova Plama to Claimant and that the Second Privatization Agreement was concluded.
68. The Refinery re-commenced operations in January 1999, shortly after its acquisition by Claimant, but shut down again in early April 1999 (Claimant's Memorial on the Merits, paras. 37 and 156; H. Tr., Day 1, 28 January 2008, pp. 50 *et seq.* and 202 *et seq.*; R's Exh. 376; Respondent's Counter-Memorial on the Merits, paras. 46 *et seq.*). Claimant and Nova Plama submitted to the Pleven District Court a Recovery Plan dated 5 May 1999, which had been negotiated with Nova Plama's creditors and other interested parties (including the Bulgarian Government). The Court approved this Recovery Plan and terminated Nova Plama's bankruptcy proceedings by decision of 8 July 1999 (R's Exh. 409). In August 1999, Nova Plama's operations resumed, but only until December 1999, when the Refinery was shut down for good (Claimant's Memorial on the Merits, para. 156; Respondent's Counter-Memorial on the Merits, para. 53; H. Tr., Day 1, 28 January 2008, p. 59, lines 11 *et seq.*, p. 69 lines 3 *et seq.*). Discussions ensued among the various interested parties to get

the Refinery back into operation, all of which failed for reasons which are at the heart of the present dispute between the Parties.

69. It should be noted that, as a provisional measure, during the 1998 insolvency proceedings, the bankruptcy court had appointed two provisional syndics or trustees in bankruptcy on 25 June 1998, Syndic Penev and Syndic Todorova (R's Exh. 898); their appointment was extended by the court's decision to open bankruptcy proceedings on 29 July 1998.
70. By decision of 18 May 1999, the Pleven District Court appointed Mr. Penev as a permanent syndic (R's Exh. 900).
71. In July 2005, creditors of Nova Plama re-opened the bankruptcy proceedings, a decision reversed by order of the Bulgarian Supreme Cassation Court of 27 December 2005 (R's Exh. 572). Upon re-filing by the creditors of their applications, the Pleven District Court re-opened the bankruptcy proceedings on 28 April 2006 (R's Exh. 966). Nova Plama underwent liquidation and, on 18 June 2007, its assets were sold to Highway Logistics Center ECOD for approximately USD 30.6 million (R's Exh. 1036; Second Navigant Report, p. 31; H. Tr., Day 1, 28 January 2008, p. 20, lines 3 *et seq.* and p. 73, lines 17 *et seq.*; Respondent's Rejoinder on the Merits, para. 8d).
72. Claimant alleges that the Bulgarian Government, the national legislative and judicial authorities and other public authorities and agencies deliberately created numerous, grave problems for Nova Plama and/or refused or unreasonably delayed the adoption of adequate corrective measures. These actions and omissions, according to Claimant, caused material damage to the operations of the Refinery and have had a direct negative impact on the reputations and market values of the respective Plama Group companies. Bulgaria's actions and/or omissions violate the ECT, to which both Bulgaria and Cyprus are parties.⁶

⁶

Bulgaria ratified the ECT on 15 November 1996 and Cyprus on 16 January 1998.

C. The Dispute

73. It is Claimant's case that, in violation of its obligations under the ECT, Bulgaria has failed to create stable, equitable, favorable and transparent conditions for Claimant's investment in Nova Plama; failed to provide Claimant's investment fair and equitable treatment; and failed to provide Claimant's investment the most constant protection and security. Bulgaria has subjected Claimant's investment to unreasonable and discriminatory measures, breached its contractual obligations *vis-à-vis* Claimant, and has subjected Claimant's investment to measures having an effect equivalent to expropriation. Bulgaria's actions have, Claimant contends, deprived PCL of its chance to make its investment in Nova Plama successful and profitable (Claimant's Reply on the Merits, para. 44). In its Request for Arbitration, Claimant also submits that Respondent had breached its obligations under Article 10(12) of the ECT. It claims compensation for all of these breaches.
74. Respondent denies Claimant's allegations.
75. A statement of the Parties' respective positions on the issues is set forth in Chapters IV and V of this Award, in which the Tribunal examines Bulgaria's alleged breach of its obligations under the ECT and the Parties' respective positions. Before that analysis, the Tribunal will address, as a preliminary matter, the issues that were left unresolved in the Decision on Jurisdiction: Claimant's 'ownership' and 'control' and the allegations on misrepresentation by Claimant.
76. While the Tribunal will not elaborate each and every one of the Parties' arguments with respect to each issue, it has submitted all arguments to exhaustive examination. It will confine itself in the following discussion to those issues which it considers most relevant to the decisions it must make.

IV. **PRELIMINARY DISCUSSION: CLAIMANT'S 'OWNERSHIP' AND 'CONTROL' AND THE ALLEGATIONS OF MISREPRESENTATION**

77. In the operative part of the Decision on Jurisdiction, quoted at paragraph 21 above, two matters were reserved for decision at a later stage: First, the question whether Claimant is a legal entity owned or controlled by citizens or nationals of a State Party to the ECT – this is a question regarding the first

limb of Article 17(1) of the ECT (see Decision on Jurisdiction, paras. 170-178 and 240(B)(3)); and second, the question whether Claimant has misrepresented or willfully failed to disclose to Respondent Claimant's true ownership (see Decision on Jurisdiction, paras. 126-131 and 228-230). These two questions will be examined in the present Section.

78. It is important to note that, in its Decision, the Tribunal made clear that none of these issues affected its jurisdiction and that, consequently, it joined them to the consideration of the merits of the case (see Decision on Jurisdiction, paras. 151 and 229-230 and paras. 130-144 *infra*). A third question deferred in the Decision on Jurisdiction to this second phase of the arbitration, that of costs, is dealt with in Chapter V. F. below.

A. **Is Respondent Entitled to Deny the Advantages of Part III of the ECT to Claimant under Article 17(1)?**

79. Article 17 of the ECT provides:

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

(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; . . .

80. Under Article 17(1) of the ECT, Respondent can refuse to afford the protections of Part III of the ECT to Claimant if the latter has no substantial business activities in the State Party to the ECT where it is incorporated and if it is not owned or controlled by nationals of a Contracting Party. Both conditions must be met before a Contracting State may invoke Article 17(1). Both Parties accepted that ownership or control may be direct or indirect.
81. Claimant is incorporated in Cyprus. Cyprus is a party to the ECT. Claimant has acknowledged that it does not have significant business activities in Cyprus (Claimant's Rejoinder on Jurisdiction, footnote 49).

82. The question then arises whether Claimant is owned or controlled by a national or another Contracting Party. The burden of proof on this issue lies with Claimant (C's Exh. 3, p. 18, para. IV section 3).
83. Mr. Vautrin is a French national and, therefore, a national of a Contracting Party (France being a party to the ECT). Mr. Vautrin claims that he indirectly owns and controls 100% of the shares of PCL.
84. As previously stated (para. 57 *supra*), as a result of the Second Privatization Agreement, PCL became the owner of 96.78% of the shares of Nova Plama. At the time, Plama Holding Limited ("PHL"), another Cyprus company, was the beneficial owner of 100% of the shares of PCL (C's Exhs. 41, 42, 43, 93 and 94). Subsequently, PCL issued additional shares to EMU Investments Limited ("EMU"; C's Exhs. 51, 52 and 95), a company incorporated in the British Virgin Islands (C's Exh. 53). As a consequence, PHL owns 20% of the shares of PCL and EMU, 80%. On 13 September 1998, PHL issued 500 shares to Mediterranean Link (Nominees) Limited and 100 shares to Mediterranean Link (Trustees) Limited, both acting as nominees of EMU. PHL also issued 400 shares to Mediterranean Link (Trustees) as nominee of NOT (C's Exhs. 47, 48 and 49). On 26 October 1998, these 400 shares were transferred from Mediterranean Link (Trustees) Limited, as nominee of NOT, to Mediterranean Link (Trustees) Limited, as nominee of EMU (C's Exh. 50). Thus, since 26 October 1998, EMU owned 100% of the shares of PHL. The capital of EMU is represented by 60 bearer shares (C's Exhs. 54 and 74), 30 of which are said by Claimant to be held in trust for Mr. Vautrin by Mr. Per Christian Nordtømme and 30 of which are said to be held in trust for Mr. Vautrin by Mr. Tom Eivind Haug (see affidavits of MM. Nordtømme and Haug, C's Exhs. 57 and 58, and statements of Mr. Vautrin).
85. Respondent contends that the evidence produced by Claimant is not sufficient to establish Mr. Vautrin's indirect ownership or control of PCL. Among other matters, Respondent has produced documents which indicate that two companies incorporated in the Seychelles, Allspice Trading Inc. ("Allspice") and Panorama Industrial Limited ("Panorama") owned and may still own EMU, and that Panorama agreed to pledge 30 bearer shares in EMU to an undisclosed financial arranger (Respondent's Post-Hearing Submission on

Jurisdiction paras. 41 *et seq.*; Exhs. 57 and 58 to Respondent's Post-Hearing Submission on Jurisdiction). However, Mr. Vautrin claims that the transaction underlying the pledge agreement whereby Panorama and Allspice each expected to obtain ownership of 30 bearer shares was never completed and that the pledge agreement was useless, incorrect and not valid. In any event, Mr. Vautrin testified that Allspice and Panorama were owned indirectly by him (Claimant's Post-Hearing Response on Jurisdiction, para. 20; Exhs. 80 and 81 to Respondent's Post-Hearing Submission on Jurisdiction).

86. The contentions of the Parties regarding the application of Article 17(1) of the ECT were fully developed during the jurisdictional phase of this arbitration and will not all be repeated here. Only those arguments most relevant to the Tribunal's decision are here considered.
87. Respondent's contention, essentially, is that Claimant has failed to prove that it is a legal entity owned or controlled by citizens or nationals of a Contracting Party to the ECT within the meaning of Article 17(1) of the ECT and, therefore, is not entitled to the benefits of Part III of the ECT. The evidence, Respondent says, shows that PCL was and is owned by EMU, which is not a national of an ECT Contracting Party. According to Respondent, Claimant has failed to prove with credible evidence that Mr. Vautrin ultimately owns or controls EMU. Therefore, pursuant to Article 17(1), its claims are inadmissible.
88. Claimant rejects Respondent's argument that it is not entitled to the benefits of Part III because of Article 17(1), stating that Mr. Vautrin is a national of France, a Contracting Party to the ECT, and owns and controls the company, EMU, which in turn controls PHL, which controls Claimant.
89. In its Decision on Jurisdiction, the Arbitral Tribunal decided that Article 17(1) of the ECT has no relevance to the Tribunal's jurisdiction to determine Claimant's claims against Respondent under Part III of the Treaty (para. 21 *supra*). It confirms this decision. The Tribunal will, therefore, examine Respondent's arguments concerning the ownership and control of PCL in order to determine whether they justify a denial of the benefits of Part III to

Claimant. As already indicated, the burden of proof to establish ownership and control is on Claimant.

90. As the Tribunal stated in its Decision on Jurisdiction, “*Mr. Vautrin’s evidence as to his ultimate ownership and control of the Claimant is not only largely unsupported by contemporary documentation but . . . is materially inconsistent with parts of that documentation and also contradicted by other statements apparently attributable to Mr. Vautrin...*” (para. 177). On the other hand, the Tribunal noted that it did not wish to reject his evidence adduced at the jurisdictional hearing at that stage of the proceedings (para. 178). During the merits phase and at the Final Hearing, the Parties made further submissions on all the evidence submitted, including Mr. Vautrin’s numerous statements and oral testimony. The Tribunal has reached the following conclusions on these disputed matters.
91. As seen above, 20% of PCL’s shares are owned by PHL, another Cyprus-incorporated company (para. 84 *supra*) and 80% of PCL’s shares are held by EMU. EMU owns 100% of PHL’s shares. Mr. Vautrin’s testimony and the affidavits of MM. Nordtømme and Haug indicate that the latter each hold half of EMU’s shares in trust for Mr. Vautrin. The record also contains documents or affidavits from other persons acting for the companies concerned to the effect that they were always acting pursuant to instructions received from Mr. Vautrin. André and NOT have written that they were not shareholders at the time of the Second Privatization Agreement (Exhs. 20 and 23 to Mr. Vautrin’s Third Declaration). Moreover, when testifying before the Tribunal and in his witness statements, Mr. Vautrin demonstrated an intimate knowledge of the structure and affairs of the companies concerned, which lend credence to Claimant’s contention that he does own or control them.
92. As for the evidence introduced by Respondent that the shares of EMU were transferred to two Seychelles companies, Panorama and Allspice, the Arbitral Tribunal accepts Mr. Vautrin’s testimony that the transactions, which were contemplated, were never in fact consummated and that, in any event, he was and remains the ultimate owner of the shares of those two companies.

93. The Arbitral Tribunal has also considered the fact that there is litigation pending in Switzerland, discussed in the Decision on Jurisdiction, in which a company, Dolsamex S.A., and Mr. Timothy O'Neill claim ownership of PCL. However, until that litigation is completed, those claims remain just that: mere claims with allegations that cannot and do not affect the ownership or control of PCL.
94. The Arbitral Tribunal accepts Mr. Vautrin's testimony. Moreover, without losing sight of the fact that Claimant bears the burden of proof on this issue, the Arbitral Tribunal has not found Respondent's attempt to cast doubt on Mr. Vautrin's ownership and control of PCL convincing. Respondent has not been able to show to the Arbitral Tribunal's satisfaction that the evidence produced by Claimant as to its ownership is wholly unreliable nor has it introduced cogent evidence as to who is (or are) the persons or entities who own or control the company, other than Mr. Vautrin.
95. In these circumstances, the Arbitral Tribunal decides that Mr. Vautrin owns and controls PCL. Since Mr. Vautrin is a French national (Exh. 1 to Mr. Vautrin's First Declaration, 25 March 2004), and France is a Contracting Party to the ECT, Respondent cannot rely on Article 17(1) of the ECT to deny to PCL the benefits of Part III of the Treaty.

B. Misrepresentation

1. Parties' Positions

96. Respondent, at the jurisdictional hearing, in its Counter-Memorial on the Merits, Rejoinder on the Merits and Post-Hearing Submission on the Merits, raises objections to jurisdiction over and admissibility of Claimant's claims. It says that Claimant obtained its investment in Nova Plama via misrepresentations in violation of Bulgarian law, which is, therefore, void *ab initio* under the Privatisation Act and voidable under the Bulgarian Obligations and Contracts Act. Accordingly, Claimant does not own the investment and did not acquire control of it in accordance with Bulgarian law. As a consequence, there is no "Investment" within the meaning of Article 1(6) of the ECT, and hence the Arbitral Tribunal lacks jurisdiction over Claimant's claims. Even if the Tribunal were to conclude that it did have jurisdiction,

however, Claimant having obtained its investment by unlawful means would render its claim inadmissible.

97. In the Decision on Jurisdiction, the Tribunal concluded that Respondent's allegations on misrepresentation did not deprive it of jurisdiction in this case and, in light of the serious charges raised, the Tribunal decided to examine these allegations during the merits phase.
98. In its Counter-Memorial on the Merits, Rejoinder on the Merits and Post-Hearing Submission on the Merits, Respondent insisted that obtaining the investment via misrepresentation in violation of Bulgarian law made Claimant's claims inadmissible and, in any event, such misrepresentations defeated its claims on the merits. Since the protections provided in Articles 10 and 13 of the ECT can only apply to an Investment made in accordance with law, Claimant cannot seek the protections of the ECT for that investment, having obtained it in violation of international and Bulgarian law.
99. In addition, Respondent pointed out that Bulgaria denied Claimant the advantages of the ECT's substantive protections prospectively from 18 February 2003. Consequently, to the extent that Claimant seeks to present claims in these proceedings as to alleged violations by Respondent of ECT obligations after that date (e.g., claims relating to the re-opened bankruptcy proceedings against Nova Plama in 2005 and claims regarding Varna Port based on facts arising after 18 February 2003), those claims are inadmissible.⁷
100. In support of its allegation of misrepresentation, Respondent contends that Mr. Vautrin and others representing Claimant during the negotiations for the acquisition of Nova Plama consistently represented to the Bulgarian Privatization Agency and others that Claimant was a consortium owned by two large commercial entities, André and NOT. According to Respondent, after these entities withdrew their interest in the investment, Mr. Vautrin intentionally concealed that fact and the fact that he was the sole owner of

⁷ This argument is no longer relevant, since in this Award the Arbitral Tribunal has decided that Bulgaria cannot deny the benefits of Part III to Claimant on the basis of Article 17(1) of the ECT, see paragraph 95 *supra*.

Claimant. Although Mr. Vautrin contends that he informed someone at some point within the Bulgarian Government of André's and NOT's withdrawal, Respondent asserts that this remains unproven.

101. Respondent says that Claimant was obliged to obtain the consent of the Privatization Agency to its purchase of EEH's shares in Nova Plama. This was a requirement of EEH's 1996 Privatization Agreement and the Bulgarian Privatization Act. Respondent says that Claimant procured the Privatization Agency's consent by means of misrepresentations as to Claimant's actual ownership, in violation of Bulgarian law. The consent thus obtained was null and void under Bulgarian law. According to Respondent, because the consent of the Privatization Agency was a legal prerequisite to Claimant's purchase and also a legal prerequisite to the lawfulness and effectiveness of the Share Purchase Agreement between Claimant and EEH (pursuant to which Claimant acquired the shares in Nova Plama that it claims as its investment), Claimant neither owns nor acquired control of its investment in accordance with Bulgarian law and the ECT.
102. Respondent cites Article 5(1) of the Bulgarian Privatization Act "*...[t]ransactions for acquisition under the Act conducted through a fictitious party or by an unidentified proxy shall be deemed null and void*" and states that Claimant misrepresented its ownership and misled the Privatization Agency within the meaning of Article 5(1) in order to obtain the latter's consent to PCL's acquisition of Nova Plama, thus rendering that consent null and void *ab initio*.
103. Respondent contends that the existence of an "Investment" within the meaning of the ECT is a fundamental element necessary for the observance of Article 26 of the ECT. In view of the lack of an Investment within the meaning of Article 1(6) of the ECT, Respondent asserts, this case should be dismissed.
104. Respondent adds that, under international and Bulgarian law, Claimant had an obligation to act honestly and in good faith in its dealings and contract negotiations and that it violated this obligation.
105. Alternatively, Respondent contends that, should the Arbitral Tribunal not find the Second Privatization Agreement null and void under Article 5.1 of the

Privatization Law, that agreement would be voidable under Bulgarian law due to Claimant's misrepresentations.

106. Respondent's argument under the ECT is that Claimant's misrepresentation defeats its claim on the merits. The obligations undertaken by Bulgaria under Articles 10 and 13 of the ECT can only apply to an Investment made in accordance with law. Respondent asserts that, having obtained its investment in violation of international and Bulgarian law, Claimant cannot seek the protections of the ECT for that investment.
107. Claimant denies that it made any misrepresentation to the Bulgarian Government concerning its investment in Nova Plama. It says it had no duty to inform Respondent of the identity of the shareholder(s) of PCL. Claimant acknowledges, in its Memorial on the Merits, that André and NOT were originally interested in buying the Refinery and accepts that the Bulgarian Government, through its Privatization Agency, wanted to screen foreign investors in privatized enterprises (see para. 27). Claimant contends that during the period July-September 1998, André decided that it was not interested in purchasing Nova Plama and only wanted to play an advisory role; so Mr. Vautrin personally took up the opportunity, together with NOT, to make the investment (*ibid.*, para. 30, p. 9).⁸ Subsequently, NOT, too, withdrew from the project as an investor.
108. Claimant says that it informed the Privatization Agency that the purchase of Nova Plama's shares was to be made by a company "*presented by*" André and NOT – not that the purchase was to be made by André and NOT themselves – and that this description of the purchaser was included in the Memorandum of Agreement of 18 August 1998 (Article 1.1), agreeing to the share transfer by EEH to PCL, signed on behalf of the Privatization Agency and PCL. According to Claimant, this wording of the Memorandum of Agreement followed an earlier draft of the agreement, which is not in the record, which stipulated that the company purchasing Nova Plama's shares was a company

⁸ Mr. Vautrin testified at the January-February 2008 hearing (H. Tr., Day 2, 29 January 2008, p. 280) that NOT held 40 percent of the shares of PCL until the end of October 1998.

“formed by” André and NOT (See Mr. Vautrin’s testimony at the January – February 2008 hearing, H. Tr., Day 2, 29 January 2008, pp. 305 *et seq.*). Therefore, Claimant says, the Privatization Agency knew or should have known that a company different from André or NOT was the purchaser. If the Privatization Agency wanted to receive specific information about the change in the language of the agreement and ownership of the investor to be introduced by André and NOT, it could, contends Claimant, have asked for that information. In fact, Claimant says, the Privatization Agency was not interested in the identity of the investor’s shareholders and never asked; they simply wanted the investor to undertake the obligations in the Second Privatization Agreement, which Claimant did. Mr. Vautrin also testified that he had told relevant members of the Bulgarian Government that André and NOT were not to be the ultimate purchasers of Nova Plama’s shares (H. Tr. in French, Mr. Vautrin, 20 September 2004, p. 19).

109. Claimant further contends that nowhere is it accused of having made a positive misrepresentation, that is, Claimant is not accused of having falsely informed the Privatization Agency about its ownership. Therefore, there is no proof of a “wrong by Claimant” and Respondent’s allegations are only limited to the subjective impressions of various Bulgarian authorities.
110. Moreover, Claimant contends that Article 5(1) of the Privatization Act invoked by Respondent is not applicable to this case since the purchase of Nova Plama shares by PCL from EEH did not correspond to a privatization. According to Claimant, the Refinery had already been privatized after its sale to EEH in 1996. If Respondent retained the right to consent to any further sale, such consent was foreseen only for the sale of a minority of Nova Plama shares.
111. Claimant adds that, even if there were a “passive misrepresentation”, as alleged by Respondent, the consent of the Privatization Agency was necessary, if at all, only for the purchase of a minor portion of the shares of Nova Plama – 4.5 million shares out of 51 million. This is so, Claimant contends, because, after the initial privatization of Nova Plama, EEH had increased the company’s capital. Consequently, it was possible for Claimant to purchase from EEH 90% of the shares, which represented the increased capital not

covered by the First Privatization Agreement, without the need for any consent from the Privatization Agency. Moreover, even without the consent of the Privatization Agency, Claimant says, it would have owned and made an Investment within the meaning of Article 1(6) of the ECT, which entitles it to the protection in Part III of the ECT.

2. The Requirement of Approval by the Privatization Agency

112. Contrary to Respondent's argument, the matter of the alleged misrepresentation by Claimant does not pertain to the Tribunal's jurisdiction: that was already decided in the Decision on Jurisdiction (paras. 126-130 and 228-230). Rather, the matter concerns the question as to whether Claimant is entitled to the substantive protections offered by the ECT.
113. The Arbitral Tribunal does not accept Claimant's argument that no approval by the Privatization Agency was necessary for PCL's acquisition of Nova Plama's shares because those shares had already been privatized under the First Privatization Agreement. Claimant itself did not at the time act in a manner consistent with the case it is now advancing; it actively sought and obtained the Privatization Agency's approval to purchase Nova Plama's shares from EEH. The First Privatization Agreement was clear, in its Article 22, that EEH did not have the right to sell or transfer Nova Plama's shares for a period of five years without the prior approval of the Privatization Agency. When EEH did, within that period, sell its shares to PCL, the Privatization Agency's approval was, therefore, required. Claimant's submission that, even without the Privatization Agency's agreement, it would have made an Investment within the meaning of ECT is irrelevant because, in fact, it sought and obtained the Privatization Agency's consent to its purchase of the Refinery.
114. Nor does the Arbitral Tribunal accept Claimant's contention that, if any authorization or approval of the Privatization Agency were required, it only pertained to 10% of Nova Plama's shares. Claimant's case is based on the fact that, after the First Privatization Agreement, Nova Plama's share capital was increased and that Article 22 of the First Privatization Agreement only applied to the shares existing at the time of the first privatization. While the language of Article 22, "*[t]he Buyer shall not have the right to sell or transfer the*

shares acquired under this Contract . . ." (emphasis added), if literally read, could be interpreted in the manner contended by Claimant, the Arbitral Tribunal does not consider that that was what the Parties intended. Again, Claimant did not in 1998, when it sought and obtained the approval of the Privatization Agency for its purchase of Nova Plama's shares, act in conformity with the case it is now advancing. It sought approval for the purchase of *all* of Nova Plama's then-outstanding shares.

115. The Arbitral Tribunal has now to determine whether the alleged misrepresentation did in fact occur as alleged by Respondent, and, if so, what the consequences are for the application of the protections provided under the ECT claimed by Claimant.

3. The Occurrence of Misrepresentation

116. The Tribunal accepts Respondent's factual allegation as to the occurrence of misrepresentation by Claimant. It is important here to review the most pertinent elements which lead the Tribunal to this conclusion.
117. By Order No. 456 of 7 August 1998, the Executive Director of the Privatization Agency established an inter-institutional working group of experts to prepare the transfer of Nova Plama shares from EEH to the Consortium André and NOT. On the same date, the Privatization Agency wrote a letter to EEH and to the "*Coordinator of the Consortium*," Mr. Boni Bonev, announcing that it would give its consent for EEH to transfer its shares in Nova Plama to "*the Consortium 'André & Cie and Norwegian Oil Trading'*" in case an agreement were signed with the Consortium for "*updating and unconditional fulfilment of the obligations already undertaken with the signed contract*" (R's Exhs. 658, 659).
118. Ernst & Young sent a letter on 11 August 1998 to the Privatization Agency, indicating that the foreign investor André & Cie had assigned to it the conduct of due diligence of Nova Plama in view of signing a contract for the purchase of shares in the company (R's. Exh. 660).
119. On 14 August 1998, the Privatization Agency sent a letter to Mr. Bonev enclosing a draft agreement between the consortium "*André & Cie and Norwegian Oil Trading*" and the Privatization Agency (R's. Exh. 197).

120. Thereafter – and in accordance with the draft agreement – a Memorandum of Agreement was made on 18 August 1998 by NOT and André, represented by Mr. Bonev, and the Privatization Agency for the sale of all shares of Nova Plama to a company presented by NOT and André. The agreement was signed by Mr. Bonev “*For company*” (R’s. Exh. 198). Mr. Bonev provided to the Privatization Agency two powers of attorney to act on behalf of André & Cie and NOT. The first document was dated 17 August 1998 and signed by W. Brocard and J.C. Vautrin in the name of André & Cie, to represent it “*in the negotiations to be held with relevant Bulgarian authorities regarding Plama project.*” The second document was also dated 17 August 1998 and was signed by Born Kanppskig and Torgeir Lien to “*negotiate and sign the Memorandum of Understanding concerning Plama AD on our behalf*” (R’s Exhs. 662, 663).
121. On 20 August 1998, the Privatization Agency sent two letters to record that a Memorandum of Agreement had been signed between the Agency, on the one hand, and André and NOT, on the other, authorizing the transfer of Nova Plama shares to a company presented by NOT and André. The first letter was sent to EEH and Mr. Bonev as the “*Consortium Coordinator*” and the second one, to Mr. Radev, Minister of Finance.
122. While Claimant made much of the argument that the language “*a company presented by NOT and André*” did not mean a company *owned* by NOT and André, at the January-February 2008 hearing, Mr. Vautrin testified that, at the time when André and NOT were still contemplating purchasing the Refinery, a July 1998 version of the Memorandum of Understanding (R’s Exh. 657) used similar terminology: “*a corporation to be introduced by André and Norwegian Oil Trading.*” How Bulgaria was reasonably to understand without an explicit explanation that virtually the same language was to mean different things at different times has not been explained by Claimant (H. Tr., Day 2, 29 January 2008, pp. 265 *et seq.*). In addition, the evidence, as set out in this section, indicates that the Privatization Agency had strong reasons to believe that NOT and André were part of the consortium.
123. The Business Plan presented by MM. Bonev and Vautrin to the creditors of Nova Plama in September 1998 described the “*Consortium*” which would

“revive” the Refinery as consisting of NOT, André, Ingérop and Ernst & Young. This is one of the puzzling elements of the misrepresentation issue, because it is difficult to believe that anyone could reasonably consider Ernst & Young and Ingérop as investors. The same is not true for NOT and André. Throughout the Business Plan, reference was made to the measures to be undertaken by the Consortium to resume operation of the Refinery. Information detailing the organization and experience of NOT and André was provided as Annexes 1 and 2 to the Business Plan (R’s Exh. 669).

124. On 8 September 1998, the Ministry of Finance sent a letter to Mr. Bonev, as “*representative of Norwegian Oil Trading A.S and André & Cie*”, inviting him to a meeting on the following day, in view of the intentions expressed by both companies to acquire the shares of Nova Plama (R’s Exh. 667). This and similar statements made in the correspondence exchanged at that time, were never corrected by Mr. Bonev, Mr. Vautrin or anyone else on Claimant’s side.
125. The meeting was held on 9 September 1998 with representatives of the Bulgarian Government, including the Minister of Finance and the Minister of Labour, Mr. Bonev, Mr. Vautrin and Mr. Nordtømme as representatives of the Consortium, as well as the Ambassador of Switzerland, who vouched for the good standing of André (R’s. Exh. 668 and witness statement of Mrs. Slavcheva, 28 July 2006). According to Mr. Vautrin, this meeting occurred after André had decided to withdraw as an investor (H. Tr., Day 2, 29 January 2008, p. 279). There was no apparent Swiss interest other than André.
126. The “Additional Agreement to the Memorandum of Understanding” dated 21 September 1998 named André and NOT as parties and was signed by Mr. Bonev, this time, on behalf of André and NOT (R’s. Exh. 671).
127. Mr. Vautrin has testified on several occasions that he had informed relevant Bulgarian authorities that André and NOT had decided not to be investors (see, e.g., H. Trans., in French, Mr. Vautrin, 20 September 2004, p. 19 and H. Tr., Day 2, 29 January 2008, p. 295). However, these statements contradict declarations made by the authorities concerned, in particular, Mr. Oresharski (who was the Minister of Finance at the time of the Hearing and the former Deputy Minister of Finance at the time of the transaction) and Mr. Palazov

(the Secretary-General of the Agency of State Receivables). They declared that it was their clear understanding, at all relevant times, that André and NOT were to be the ultimate purchasers of Nova Plama (H. Tr. Day 2, 29 January 2008, p. 329, lines 1 *et seq.*; witness statement of Mr. Oresharki, at paras. 7, 9; and witness statement of Mr. Palazov, at para. 10).⁹ Moreover, Mr. Rakov, deputy of the Ministry of Finance, submitted a statement expressly denying Mr. Vautrin's assertions that Mr. Vautrin had informed him that NOT had withdrawn from PCL (witness statement of Mr. Rakov, paras. 5,6; H. Tr., Day 2, 29 January 2008, p. 333, lines 2 *et seq.*).

- 128. The conclusion which the Arbitral Tribunal draws from all of these elements is that the Bulgarian Government clearly understood NOT and André to be the investors (see, e.g., R's Exh. 39) and that PCL – the “*company presented by*” them – was a special purpose vehicle created by them as a consortium for the purpose of the Nova Plama acquisition (see Mr. Vautrin's testimony, H. Tr., Day 2, 29 January 2008, p. 310).
- 129. It also appears to the Arbitral Tribunal that Mr. Vautrin did nothing to remove this misunderstanding, of which he was undoubtedly aware. In particular, Mr. Vautrin deliberately did not inform the Bulgarian Government that he was the sole, ultimate owner of PCL (Claimant's Rejoinder on Jurisdiction, paras. 124 and 129). Mr. Vautrin testified during the jurisdictional phase of the arbitration that, for reasons of personal security, he did not want the Bulgarian Government to know that he was the investor who owned and controlled PCL (see Mr. Vautrin's Third Witness Declaration, 26 August 2004, at para. 8 *et seq.* and H. Tr. Jurisdictional Phase, pp. 65-7). However, Mr. Vautrin has insisted throughout the arbitration that he never represented to the Bulgarian Government that André and NOT were the investors. As noted earlier (para.108 *supra*), Mr. Vautrin testified that he did inform certain Bulgarian officials that André and NOT were not investors. His testimony, also referred to earlier, that a comparison of the language “*formed by*” in an early draft of

⁹ This understanding was confirmed by other Bulgarian authorities including Ms. Slavcheva (in her witness statement and during her cross-examination at the Final Hearing, H. Tr., Day 2, 29 January 2008, p. 450) and Mr. Tenev.

the Memorandum of Understanding (which is not in the record) with the final text “*presented by*” showed clearly that André and NOT were not shareholders cannot be verified (H. Tr., Day 2, 29 January 2008, pp. 295 *et seq.*) and is contested by Respondent (Respondent’s Post-Hearing Submission on the Merits, para. 15). What is clear is that Mr. Vautrin was determined not to disclose his true role in the privatization and, by doing so, he deliberately misrepresented to the Bulgarian authorities the true identity of the investors in Nova Plama.

4. The Consequences of the Misrepresentation

- 130. It is Respondent’s contention that Claimant’s investment is null and void under Article 5.1 of the Privatization Act (para. 102 *supra*), when examined in light of the terms of this so-called “straw man” provision. Counsel for Respondent explained in the January-February 2008 hearing that the straw man in the present case was Mr. Vautrin, acting *as if* he were the representative of André when in fact he was acting for his own account (H. Tr., Day 2, 29 January 2008, pp. 463-4).¹⁰ In the opinion of Respondent’s legal expert, Professor Markov, dated 16 July 2006, an “unidentified proxy” within the meaning of Article 5.1. “*acts in his own name but on the ultimate account of and in the ultimate benefit of somebody else*” (para. 54). This is not what happened here. The party to the Second Privatization Agreement, *i.e.*, the party making the investment, was PCL, not Mr. Vautrin. PCL was not a “straw man” acting for someone else; it was acting for its own account.
- 131. Professor Markov cites a Bulgarian Supreme Court decision, in paragraph 55 of his 16 July 2006 opinion, as follows:

What is an interpositioned person? The concept of interpositioned person, known also in legal theory as “straw man” or “wooden head,” requires the existence of an agreement between the real right-holder (real party) under the

¹⁰ In its Post-Hearing Submission on the Merits, Respondent changed its identification of the straw man as being André and NOT whom Mr. Vautrin used as straw men to conclude the transactions (para. 30).

contract, i.e. the person economically interested in the transaction who actually enters into it, and the interpositioned person. Under this agreement the interpositioned person gives his consent that his name will appear in the real estate contract as though he is the party to the contract, whereas the contract is actually between the economically interested person and a third person, the other party to the contract.

132. In paragraph 56 of his 16 July 2006 opinion, Professor Markov cites the treatise, “Civil Law – General Part” by Professor Pavlova:

§ 5 of the Additional Provisions of TPSOMEA (the Privatization Act) deserves to be noted among the cases of invalidity for prohibition provided for in special legal provisions. Pursuant to this provision the acquisition transactions under this Act shall be invalid where they are executed through an interpositioned person or an undisclosed representative. The law refers to the cases where the transferee under the privatization transaction conceals his name using another person’s name (interpositioned person) or where a person in his own name acquires privatized property acting as a mandatary (a party to a mandate contract) on somebody else’s account and with an obligation to transfer the property acquired to the principal. The severe sanction, envisaged in the provision in question, is designed by the legislator to provide maximum transparency in the acquisitions through privatization transactions. The requirement to reveal the identity of the transferee under the transaction constitutes a guarantee against abuse of official and social position and allows the public to watch closely whether the law is circumvented through follow up actions.

Here, again, we are not dealing with a person who used the name of another person while entering into the Privatization Agreement, nor is the contract signatory acting as a *mandatary* for somebody else’s account and with an

obligation to transfer the investment to the principal. In the present case, PCL was the contracting party, acting for its own account and in its own name.

133. Rather, what happened here was that Mr. Vautrin and his representatives presented PCL as a consortium of major companies having substantial assets, whereas in truth, Mr. Vautrin, who personally did not have significant financial resources, was acting alone as the sole investor in the guise of that "consortium." The Arbitral Tribunal is persuaded that Bulgaria would not have given its consent to the transfer of Nova Plama's shares to PCL had it known it was simply a corporate cover for a private individual with limited financial resources. Given the strategic importance of the Refinery and the significant number of employees and creditors, the managerial and financial capacities of the acquirer were a natural concern to the Bulgarian authorities. André, as a world-wide trader and financial institution and NOT as an experienced oil company, appeared to have the required capacities. Mr. Vautrin alone did not.
134. Claimant contends that it acted in good faith, that Respondent never asked who the shareholders of PCL were and that Claimant had no obligation to volunteer this information. The Arbitral Tribunal does not consider that, in the circumstances of the present case, this contention can be accepted. Claimant represented to the Bulgarian Government that the investor was a consortium – which was true during the early stages of negotiations. It then failed, deliberately, to inform Respondent of the change in circumstances, which the Tribunal considers would have been material to Respondent's decision to accept the investment. On the basis of the evidence in the record, Bulgaria had no reason to suspect that the original composition of the consortium, consisting of two major experienced companies, had changed to an individual investor acting in the guise of that "consortium", and no duty to ask. It was Claimant, knowing the facts, which had an obligation to inform Respondent.
135. The investment in Nova Plama was, therefore, the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capacities required to resume operation of the Refinery. While the Arbitral Tribunal considers that this situation does not involve the "straw-

man” provision set out in the Bulgarian Privatization Law, the Tribunal is of the view that this behavior is contrary to other provisions of Bulgarian law and to international law and that it, therefore, precludes the application of the protections of the ECT.

136. As noted by Professor Markov in his expert report, Articles 27 and 29 of the Obligations and Contracts Acts (OCA) state:¹¹

Art. 27. Contracts concluded by persons of legal incapacity, or by their agents without observing the requirements established for such agents, as well as contracts concluded under mistake, fraud, duress or extreme necessity shall be subject to invalidation.

Art. 29. Fraud shall constitute grounds for invalidating a contract provided that one of the parties has been misled by the other party into concluding the contract through intentional misrepresentation.

In addition, Article 12 OCA introduces the principle of good faith by stating that “*parties must negotiate and enter contracts in good faith.*” According to Bulgaria’s expert, this principle covers various obligations of the parties, including the obligation to inform the other party of all facts relevant to making a decision concerning the conclusion of the contract.¹²

137. The negotiation and conclusion of the Second Privatization Agreement were carried out by PCL and its owner, Mr. Vautrin, in flagrant violation of these provisions of Bulgarian law. The misrepresentation made by Claimant renders the Agreement unlawful.
138. Unlike a number of Bilateral Investment Treaties,¹³ the ECT does not contain a provision requiring the conformity of the Investment with a particular law.

¹¹ Legal Opinion of Professor Markov, dated 16 July 2006, para. 64.

¹² *Ibid*, para 71.

¹³ For example the Germany-Philippines BIT, Lithuania-Ukraine BIT, and Italy-Morocco BIT.

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. As noted by the Chairman's statement at the adoption session of the ECT on 17 December 1994:

[...] *the Treaty shall be applied and interpreted in accordance with generally recognized rules and principles of observance, application and interpretation of treaties as reflected in Part III of the Vienna Convention on the Law of Treaties of 25 May 1969.* [...] *The Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose.*¹⁴

139. In accordance with the introductory note to the ECT “[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues [...]”.¹⁵ Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.
140. The Tribunal finds that the investment in this case violates not only Bulgarian law, as noted above, but also “applicable rules and principles of international law”, in conformity with Article 26(6) of the ECT which states that “[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law”. In order to identify these applicable rules and principles, the Arbitral Tribunal finds helpful guidance in the decisions made in other investment arbitrations cited by Respondent.

¹⁴ 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, p. 158.

¹⁵ Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*, An Introduction to the Energy Charter Treaty, p. 14.

141. In *Inceysa v. El Salvador*,¹⁶ a case in which the investor procured a concession contract for vehicle inspection services in El Salvador through fraud in the public bidding process, the tribunal found that the investment violated the following general principles of law: (i) the principle of good faith defined as the “*absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment*”¹⁷ and (ii) the principle of *nemo auditur propriam turpitudinem allegans* – that nobody can benefit from his own wrong – understood as the prohibition for an investor to “*benefit from an investment effectuated by means of one or several illegal acts*”.¹⁸ In addition, the tribunal found that recognizing the existence of rights arising from illegal acts would violate the “respect for the law” which is a principle of international public policy.¹⁹
142. The notion of international public policy was also invoked by an award in the case of *World Duty Free v. Kenya*.²⁰ In this case, the investor had obtained a contract by paying a bribe to the Kenyan President. According to the tribunal, the term “international public policy” was interpreted to signify “*an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora.*”²¹ Accordingly, the tribunal found that “*claims based on contracts of corruption or contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.*”²² The tribunal further concluded that “*as regards public policy both under English and Kenyan law [...] the Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of ex turpi causa non oritur actio.*”²³ As

¹⁶ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, Award of 2 August 2006, ICSID Case No. ARB/03/26 (“Inceysa”).

¹⁷ *Ibid.*, para. 231.

¹⁸ *Ibid.*, paras. 240-242.

¹⁹ *Ibid.*, para. 249.

²⁰ *World Duty Free Company Limited v. The Republic of Kenya*, Award of 4 October 2006, ICSID Case No. Arb/00/7.

²¹ *Ibid.*, para. 139.

²² *Ibid.*, para. 157.

²³ *Ibid.*, para. 179.

explained in the award, the *ex turpi causa* defence “rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct [...].”²⁴

- 143. Claimant, in the present case, is requesting the Tribunal to grant its investment in Bulgaria the protections provided by the ECT. However, the Tribunal has decided that the investment was obtained by deceitful conduct that is in violation of Bulgarian law. The Tribunal is of the view that granting the ECT’s protections to Claimant’s investment would be contrary to the principle *nemo auditur propriam turpitudinem allegans* invoked above. It would also be contrary to the basic notion of international public policy – that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal.
- 144. The Tribunal finds that Claimant’s conduct is contrary to the principle of good faith which is part not only of Bulgarian law - as indicated above at paragraphs 135-136 - but also of international law - as noted by the tribunal in the *Inceysa* case. The principle of good faith encompasses, *inter alia*, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the State’s approval of the investment.
- 145. Claimant contended that it had no obligation to disclose to Respondent who its real shareholders were. This may be acceptable in some cases but not under the present circumstances in which the State’s approval of the investment was required as a matter of law and dependant on the financial and technical qualifications of the investor. If a material change occurred in the investor’s shareholding that could have an effect on the host State’s approval, the investor was, by virtue of the principle of good faith, obliged to inform the host State of such change. Intentional withholding of this information is therefore contrary to the principle of good faith.

²⁴ *Ibid.*, para. 161.

146. In consideration of the above and in light of the *ex turpi causa* defence, this Tribunal cannot lend its support to Claimant's request and cannot, therefore, grant the substantive protections of the ECT.

V. DISCUSSION OF THE ISSUES – CLAIMANT'S CLAIMS ON THE MERITS

147. The Parties have extensively documented their allegations; numerous exhibits, witness statements and expert reports have been submitted by both Parties. The factual and legal arguments have been discussed in detail during the Final Hearing, in which a number of witnesses and experts were also examined by the Parties and the arbitrators. The Tribunal has therefore decided that, in acknowledgement of the Parties' efforts, it will consider their further allegations on the merits. This consideration will lead to the conclusion that, even if Claimant would have had the benefit of the substantive protections of the ECT, Claimant's claims on the merits would have failed.
148. In its analysis, the Tribunal will follow Claimant's presentation of the allegedly unlawful acts and omissions by Respondent (Section C). Accordingly, the Tribunal will first address the allegations regarding environmental damages (Section C.1 *infra*), followed by the allegations regarding the action of the syndics (Section C.2 *infra*), the so-called paper profits (Section C.3 *infra*), the privatization of the Varna Port (Section C.4 *infra*) and Biochim Bank's unlawful breaches of its debt settlement agreement with PCL (Section C.5 *infra*). Before addressing these allegations, the Arbitral Tribunal will consider the ECT protections invoked by Claimant (Section B *infra*). It will rely on those considerations in its subsequent analysis. The Tribunal will commence by presenting a summary of the Parties' contentions on the merits and the relief sought (Section A *infra*).

A. Summary of the Contentions of the Parties and Relief Sought

1. Claimant's Position

149. According to Claimant, despite the promises made at the pre-acquisition stage, the Bulgarian Government, its legislative and judicial bodies and other State organs and agencies “dashed” Nova Plama’s prospects of success. PCL found itself “*a victim of a series of unlawful acts and omissions which individually*

and cumulatively defeated its efforts to operate the Refinery beyond 1999 and make good its investment.” (Claimant’s Memorial on the Merits, para. 9). These unlawful acts and omissions included:

- (i) *Environmental damages:* Bulgaria’s sudden and unfair amendment of its environmental law to exclude the State’s liability for past environmental damages at the Refinery site, effectively making Nova Plama and PCL liable instead;
 - (ii) *Paper Profits:* Bulgaria’s failure to amend its corporate income tax laws in a timely manner to enable PCL to file Nova Plama’s annual accounts;
 - (iii) *Varna Port:* the unlawful *de facto* privatization of the Varna Port, which Nova Plama relied upon for its crude oil supply;
 - (iv) *Actions of the Syndics:* the unlawful actions of Nova Plama’s syndics who, *inter alia*, instigated a riot at the Refinery which resulted in the first shutdown of the Refinery in April 1999; and
 - (v) *Biochim Bank:* the State-owned Biochim Bank’s deliberate breaches of its debt settlement agreement with PCL.
150. Claimant alleges that, as a result of these actions, it was unable to secure any working capital financing for Nova Plama since the financial institutions that were initially involved withdrew from the project, and other financial institutions simply refused to participate. Nova Plama was obliged to close the Refinery indefinitely on 15 December 1999 and was consequently unable to settle its debts under the Recovery Plan. Its creditors re-opened the insolvency proceedings against it; and a Bulgarian court ordered the liquidation of Nova Plama in July 2005. Claimant asserts that it has therefore been deprived of all economic benefit and use of its investment since 15 December 1999.
151. It is Claimant’s view that these acts are wholly the responsibility of Bulgaria and constitute a violation of several of the protections owed by Bulgaria under Articles 10(1) and 13 of the ECT. In particular, Claimant alleges that Bulgaria has:

- (a) failed to create a stable, equitable, favorable and transparent conditions for making the investment;
 - (b) failed to provide fair and equitable treatment to Claimant's investment;
 - (c) failed to provide to Claimant's investment the most constant protection and security;
 - (d) subjected Claimant's investment to unreasonable measures;
 - (e) breached contracts with PCL; and
 - (f) subjected Claimant's investment to measures having an effect equivalent to expropriation.
152. Claimant submits that, as a result of the expropriation of its investment, and in accordance with Article 13(1) of the ECT, it is entitled to full compensation in the form of fair market value of the shares of Nova Plama at the time immediately before the expropriation calculated using the Discounted Cash Flow ("DCF") method (Claimant's Memorial on the Merits, para. 341). The same compensation should be granted for the other breaches committed by Bulgaria because the nature of the breaches has caused long-term losses to the Claimant as investor.
153. On the basis of the DCF method, Claimant's expert values PCL's losses in the amount of USD 122,258,000. Accordingly, Claimant's request for relief in its Memorial on the Merits (para. 347) reads:
- (a) *an order that Bulgaria pay PCL compensation for losses suffered as a result of the expropriation of its investment in the amount of USD122,258,000;*
 - (b) *an order that Bulgaria pay PCL compound interest on such compensation at a commercial rate from December 15, 1999 until the date of payment;*
 - (c) *in the alternative, an order that Bulgaria pay PCL (i) compensation for losses suffered as a result of the Other ECT Breaches, in the amount of USD122,258,000 and compound*

interest on the compensation awarded at a commercial rate established from December 15, 1999 until the date of payment;

- (d) *an order that Bulgaria pay PCL's costs occasioned by this arbitration, including the arbitrators' fees and administrative costs fixed by ICSID, the expenses of the arbitrators, the fees and expenses of its experts, and the legal costs incurred by the parties (including fees of counsel); and*
- (e) *any other relief that the Tribunal deems appropriate.*

154. In its Reply, Claimant supplements its initial request and indicates that, if the Tribunal were to find that the principles of compensation provided in Article 13(1) – full market value of the Investment immediately before the measures – are not applicable to Claimant's claims on expropriation and the violation of the other ECT standards, Claimant should be compensated according to established principles of customary international law as restated in the International Law Commission's Articles on State Responsibility (Claimant's Reply on the Merits, paras. 214, 217).
155. Accordingly, Claimant alleges its right to recover *damnum emergens* and *lucrum cessans* and reformulates its request for relief from the Arbitral Tribunal in the following terms:

- (a) *to confirm that it has jurisdiction to entertain the claim as submitted by PCL and that such claims are admissible;*
- (b) *to order the Republic of Bulgaria to indemnify Claimant in the amount of US\$ 122,258,000 representing the fair market value of its investment in the Plama Refinery;*
- (c) *subsidiarily, to order the Republic of Bulgaria to pay Claimant an amount of US\$13,862,152 for its losses, outlays, unpaid loans, financings and expenses relating to its investment in the Plama Refinery, all of which have been lost due to Bulgaria's actions, together with compensation in the amount of US\$ 10,000,000*

representing its loss of a chance or opportunity of making a commercial success of the project.

- (d) *to award compound interest at a commercial rate on all sums awarded pursuant to b) and/or c) above from 15 December 1999 through the date of award and until such award is effectively paid in full;*
- (e) *to declare that all costs of this arbitral proceeding, including legal fees, are to be borne by the Republic of Bulgaria; and*
- (f) *to grant Claimant such other relief as the Arbitral Tribunal may deem appropriate.*

2. Respondent's Position

156. Respondent denies all of Claimant's claims. It contends that the Refinery's difficulties derived from factors not attributable to the Republic of Bulgaria, in particular, from the combination of Nova Plama's high costs structure and the very difficult market conditions (Respondent's Counter-Memorial on the Merits, paras. 70, 530).
157. It is Respondent's view that it did not engage in unlawful acts and omissions. In particular, Respondent contends:
 - (a) *Environmental Damages:* Claimant mischaracterizes not only the state of Bulgarian environmental law that was applicable when it acquired Nova Plama but also the terms of the First Privatization Agreement and of the 1999 amendment to the environmental law (Respondent's Counter-Memorial on the Merits, para. 72);
 - (b) *Actions of the Syndics:* the syndic's actions are not legally attributable to the State and, in any event, Claimant has failed to demonstrate in what manner the syndics acted contrary to law or otherwise improperly and in a manner that caused any harm to Claimant (Respondent's Counter-Memorial on the Merits, para. 72);

- (c) *Paper Profits*: the ECT Contracting States do not accept obligations under Article 10 of the ECT with regard to taxation and, in any event, the Bulgarian tax code and accounting rules were transparent and accessible to Claimant; and it had no basis to expect that it would receive some sort of exemption or special treatment (Respondent's Counter-Memorial on the Merits, paras. 285, 308-309);
 - (d) *Varna Port*: the Varna Port is not "exclusive state property" and Claimant never had any legitimate or reasonable expectation that it would remain in the possession of the State; and its privatization was lawful (Respondent's Counter-Memorial on the Merits, para. 311); and
 - (e) *Biochim Bank*: Biochim Bank acted in a commercially predictable and reasonable manner in all its dealings with Nova Plama and did not breach any contractual obligations (Respondent's Counter-Memorial on the Merits, para. 360).
158. Consequently, Respondent alleges that it has not breached its obligations under the ECT, nor did the alleged breaches of Articles 10(1) and 13 of the ECT cause Claimant to lose the value of its investment in Nova Plama's shares. It is Respondent's contention that Claimant is not entitled to any compensation because (Respondent's Rejoinder on the Merits, para. 320):
- (a) *Claimant failed to establish a causal connection between Bulgaria's conduct and the failure of its investment; [footnote omitted]*
 - (b) *Claimant failed to particularize and quantify its alleged losses; [footnote omitted]*
 - (c) *Claimant's use of the DCF method of valuation is inappropriate because Plama has no relevant history of profitability as its cash flows for years were all negative; [footnote omitted]*
 - (d) *Even if one were to accept a valuation of Claimant's investment on the basis of the DCF method, Claimant's*

*valuation of Plama is flawed in numerous material respects;
[footnote omitted]*

(e) Plama was not a money-making enterprise [footnote omitted].

159. Finally, Claimant failed to support its alternative claim for compensation on the basis of Claimant's alleged expenses and expenditures or its claim for compensation in the amount of USD 10,000,000 for its alleged loss of chance to make Nova Plama a profitable enterprise (Respondent's Rejoinder on the Merits, paras. 320-321).
160. Consequently, Respondent requests that the Tribunal dismiss Claimant's claims in their entirety and order Claimant to bear all costs incurred by Bulgaria in connection with this arbitration (Respondent's Counter-Memorial on the Merits, para. 575).

B. The ECT Protections Invoked by Claimant

161. Claimant's allegations refer to violations of the protections provided in Articles 10(1) and 13 of the ECT. Whilst Article 13 contains a standard provision on expropriation – including the condition that the expropriation be lawful and that compensation be prompt, adequate and effective, amounting to the fair market value of the Investment expropriated – Article 10(1) contains a complex provision that refers equally to the obligation to create stable, equitable, favorable and transparent conditions for making the Investment and to the standards of fair and equitable treatment, constant protection and security, the prohibition of unreasonable or discriminatory measures and the observance of obligations entered into with an Investor or an Investment.
162. Professor Schreuer has pointed out the interaction of the standards of protection, in particular under Article 10 of the ECT, and notes that the tribunal in *Petrobart v. The Kyrgyz Republic*, a case decided under the ECT,

opted for subsuming all standards under the purview of fair and equitable treatment.²⁵

163. This Tribunal is also of the view that the standards of protection of Article 10(1) are closely interrelated. This interrelation will surface when analyzing the Parties' factual allegations. It does not mean, however, that each standard could not be defined autonomously. As noted by Professor Schreuer:

*[...] FET is connected to other standards of protection in a variety of ways. It has points of contact to the standards of 'constant protection and security' and protection against unreasonable or discriminatory measures'. Some tribunals have even found it unnecessary to distinguish these two standards from FET. The better view is that these standards, though related, are separate and autonomous. In fact, some tribunals have given them their own specific meaning.*²⁶

164. The Arbitral Tribunal will therefore attempt to provide a relevant definition of the standards, taking into account practice under the ECT and the practice of tribunals under other investment treaties. It will also apply the rules of interpretation delineated by the Chairman's statement at the adoption session of the ECT on 17 December 1994, quoted at paragraph 139. The Tribunal will also apply the rules provided in the Vienna Convention on the Law of Treaties and, in particular, the ECT will be "*[...] interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose.*"²⁷

²⁵ The tribunal noted: "The Arbitral Tribunal does not find it necessary to analyse the Kyrgyz Republic's action in relation to the various specific elements in Article 10(1) of the Treaty but notes that this paragraph in its entirety is intended to ensure a fair and equitable treatment of investments," *Petrobart v. The Kyrgyz Republic*, Award of 29 March 2005. See also C.H. Schreuer, *Fair and Equitable Treatment (FET): Interaction with other Standards*, *Transnational Dispute Management*, Vol. 4, issue 5, September 2007, p. 1.

²⁶ C.H. Schreuer, *op.cit.*, pp. 25-26.

²⁷ See Article 31(1) of the Vienna Convention on the Law of Treaties and Energy Charter Secretariat, *The Energy Charter Treaty and Related Document. A Legal Framework for International Energy Cooperation*, Chairman's Statement at Adoption Session on 17 December 1994, p. 158.

165. As noted by both Parties, Article 2 of the ECT states that the purpose of the Treaty is to establish “*a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.*” Claimant alleges that these objectives and principles of the Treaty include the creation of “*a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the fields of energy.*”²⁸ Consequently, Claimant concludes that the overall aim of the ECT should be considered as one of favoring the protection of foreign investments.
166. Respondent, for its part, cites the guide to the Energy Charter and the Concluding Document of the Hague Conference on the European Energy Charter to explain that the aim of the ECT is not just the promotion of Investments but also the promotion of the economic development of the Contracting States (Respondent’s Counter-Memorial on the Merits, paras. 430-431).
167. The Arbitral Tribunal is of the view that a balanced interpretation which takes into account the totality of the Treaty’s purpose is appropriate. In the words of the tribunal in *El Paso Energy International Co. v. Argentina*:

This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State’s responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow.

1. Protections provided in Article 10(1)

168. The starting point of the Tribunal is therefore the text of Article 10(1) of the ECT:

²⁸ European Energy Charter, Title I – Objectives. Cited by Claimant in its Memorial on the Merits, para. 245.

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

1.1 Stable, Equitable, Favorable and Transparent Conditions

169. Only in its Reply does Claimant introduce the claim that Respondent failed to create stable, equitable, favorable and transparent conditions. Claimant limited its arguments to claiming that it was constantly subjected to “*haphazard and opaque*” decisions by Respondent and that repeated “*interventions*” created “*unstable, inequitable, unfavorable and non-transparent conditions*” for PCL’s investment. Claimant was a victim of “*chronic features of unpredictability and inconsistency.*”
170. Claimant did not, however, set out the content of this standard or to explain precisely how it has been violated. The only specific reference in this regard is that the amendment of the Environmental Law allegedly created unstable and inequitable conditions (Claimant’s Reply on the Merits, para. 178). As noted by Respondent in its Rejoinder on the Merits, Claimant later used the language of the first part of Article 10(1) with respect to the Paper Profit and Varna Port claims.

171. In addition, Respondent alleges that, since the obligation of the Contracting Parties in the first sentence of Article 10(1) is to create conditions “*to make Investments in its Area*”, it applies only to pre-Investment matters or, at most, to the circumstances prevailing when the Investor makes its Investment. In any event, contends Respondent, it did not fail to comply with this standard.
172. The Tribunal observes that the second sentence of Article 10(1) indicates that the conditions listed in the first sentence “*shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment*” and the next sentence links these Investments to the remainder of the protections of this Article. The application of the conditions of the first sentence of Article 10(1) extends in this way to all stages of the Investment and not only to the pre-Investment matters.
173. In addition, the conditions are dependent on their accordance with the other standards. For instance, stable and equitable conditions are clearly part of the fair and equitable treatment standard under the ECT.
174. Consequently, the Tribunal will assess the compliance with these conditions in connection with the other standards analyzed below.

1.2 Fair and Equitable Treatment

175. The Parties appear to agree that, despite the succinct wording of the standard of fair and equitable treatment, arbitral awards published in the past few years have contributed to providing some guidance to ascertain the content of this standard. The Parties agree that the standard includes to a certain extent the protection of the investor’s legitimate expectations and the provision of a stable legal framework (Claimant’s Memorial on the Merits, paras. 251-252; Respondent’s Counter-Memorial on the Merits, para. 436). The Arbitral Tribunal is nonetheless conscious that this may now be a controversial area, particularly with different interpretations being given to the decision of the *ad hoc* Committee in *MTD v Chile*.²⁹ However, in the Tribunal's view, the

²⁹ *MTD Equity Sdn. Bhd. and MTD Chile S. A. v. Republic of Chile*, Award of 25 May 2004, ICSID Case No. ARB/01/7 (“MTD”); *ad hoc* Committee Decision on Annulment of 21 March 2007.

present case can be decided on the facts, whatever interpretation is made of the FET standard in the ECT. Accordingly, for the purpose of this Award, the Tribunal has assumed the interpretation most favorable to the Claimant, as follows.

176. With regard to the protection of legitimate expectations, the Tribunal observes that these include the “*reasonable and justifiable*”³⁰ expectations that were taken into account by the foreign Investor to make the Investment.³¹ These should, therefore, include the conditions that were specifically offered by the State to the Investor when making the Investment and that were relied upon by the Investor to make its Investment.³² These expectations would equally include “*the observation by the host State of such well-established fundamental standards as good faith, due process, and non-discrimination.*”³³
177. The stability of the legal framework has been identified as “*an emerging standard of fair and equitable treatment in international law.*”³⁴ However, the State maintains its legitimate right to regulate, and this right should also be considered when assessing the compliance with the standard of fair and equitable treatment. The tribunal in the *CMS v. Argentina* case explained the situation in the following terms:

It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the

³⁰ *Thunderbird v. The United Mexican States*, Award of 26 January 2006, UNCITRAL-NAFTA, para. 147 (“Thunderbird”).

³¹ *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, Award of 29 May 2003, ICSID Case No. ARB(AF)/00/2, para. 154 (“Tecmed”); *MTD*, para. 114; *Occidental Exploration and Production Company (OEPC) v. The Republic of Ecuador*, Final Award of 1 July 2004, LCIA Case No. UN3467, UNCITRAL, para. 185; *Eureko B.V. v. Republic of Poland*, Partial Award of 19 August 2005, para. 235; *LG&E v. Argentine Republic*, Decision on Liability of 25 July 2007, ICSID Case No. ARB/02/1, para. 127 (“LG&E”).

³² *CME Czech Republic B. V v. The Czech Republic*, Partial Award of 13 September 2001, UNCITRAL, para. 611 (“CME”); *Tecmed*, para. 154; *Thunderbird*, para. 147; *LG&E*, para. 127.

³³ *Saluka*, para. 303.

³⁴ *LG&E*, para. 125.

*framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.*³⁵

178. Finally the Tribunal observes that the condition of transparency, stated in the first sentence of Article 10(1) of the ECT, can be related to the standard of fair and equitable treatment. Transparency appears to be a significant element for the protection of both the legitimate expectations of the Investor and the stability of the legal framework.

1.3 Constant Protection and Security

179. Article 10(1) of the ECT also requires the host State to provide to the Investor's Investment "*the most constant protection and security.*" The Parties are in agreement that this standard imposes an obligation of "due diligence" (Claimant's Memorial on the Merits, paras. 277, 286; Respondent's Counter-Memorial on the Merits, para. 466). As noted by the tribunal in *AMT v. Zaire*, later quoted by the tribunals in *Wena v. Egypt* and *Saluka v. Czech Republic*:

*The obligation incumbent on the [host State] is an obligation of vigilance, in the sense that the [host State] shall take all measures necessary to ensure the full enjoyment of protection and security of its investments and should not be permitted to invoke its own legislation to detract from any such obligation.*³⁶

180. The standard includes, in this manner, an obligation actively to create a framework that grants security. Although the standard has been developed in the context of physical security, some tribunals have also included protection

³⁵ *CMS Gas Transmission Company v. The Argentine Republic*, Award of 12 May 2005, ICSID Case No. AR/O1/8, para. 277 ("CMS").

³⁶ *American Manufacturing & Trading v. Republic of Zaire*, Award of 21 February 1997, ICSID Case No. AR/93/1, para. 28; *Wena Hotel Limited v. Arab Republic of Egypt*, Award on the Merits of 8 December 2000, ICSID Case No. ARB/98/4, para. 84; *Saluka*, para. 484.

concerning legal security. In this last respect, the standard becomes closely connected with the notion of fair and equitable treatment.³⁷

181. Finally, this Tribunal observes that the standard is not absolute and does not imply strict liability of the host State. As noted by the tribunal in *Tecmed* and later quoted by the tribunal in *Saluka* “... *the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it.*”³⁸

1.4 Unreasonable and Discriminatory Measures

182. The host State must also, under Article 10(1) of the ECT, refrain from subjecting the Investor’s Investment to “*unreasonable or discriminatory measures.*” In its Memorial on the Merits, Claimant contends that Respondent’s conduct was “*unreasonable*” and makes no reference to the existence of discriminatory treatment. However, in its Reply, Claimant introduces the allegation that Respondent has engaged in discriminatory practices in favor of Neftochim, a direct competitor of PCL.
183. The Tribunal observes that, on a number of occasions, tribunals in investment arbitrations have found a strong correlation between this standard and the fair and equitable treatment standard. For instance, the tribunal in *Saluka* noted that:

The standard of “reasonableness” has no different meaning in this context than in the context of the “fair and equitable treatment” standard with which it is associated; and the same is true with regard to the standard of “non-discrimination”. The standard of “reasonableness” therefore requires, in this context as well, a showing that the State’s conduct bears a reasonable relationship to some rational policy, whereas the

³⁷ Schreuer, *op. cit.*, p. 4.

³⁸ *Tecmed*, para. 177; *Saluka*, para. 484.

*standard of “non-discrimination” requires a rational justification of any differential treatment of a foreign investor.*³⁹

184. However, this Tribunal believes that, while the standards can overlap on certain issues, they can also be defined separately. Unreasonable or arbitrary measures – as they are sometimes referred to in other investment instruments – are those which are not founded in reason or fact but on caprice, prejudice or personal preference.⁴⁰ With regard to discrimination, it corresponds to the negative formulation of the principle of equality of treatment. It entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds.⁴¹

1.5 Obligations Undertaken Towards Investors

185. The last sentence of Article 10(1) mandates the host State to observe any obligations it has entered into with the Investor or an Investment of an Investor and is described by Claimant as an “*umbrella clause*”.
186. The Arbitral Tribunal can limit itself to noting that the wording of this clause in Article 10(1) of the ECT is wide in scope since it refers to “*any obligation*.” An analysis of the ordinary meaning of the term suggests that it refers to any obligation regardless of its nature, *i.e.*, whether it be contractual or statutory.⁴² However, the *ad hoc* Committee that decided the annulment in the case, *CMS v. Argentina*, commented that the use of the expression “*entered into*” should

³⁹ *Saluka*, para. 460. Other arbitration tribunals have taken a similar position merging this standard and the notion of fair and equitable treatment. As noted by Professor Schreuer, in the context of NAFTA this position could be explained by the fact that there is not a separate provision on the prohibition of arbitrary or discriminatory treatment. Schreuer, *op.cit.*, p. 5. See, e.g., *S.D. Myers v. Canada*, Award on Liability of 13 Nov. 2000, 8 ICSID Reports 18, para. 263; *Waste Management, Inc. v. United Mexican States*, Award, 30 April 2004, ICSID Case No. ARB(AF)/00/3, para. 98. Tribunals deciding cases under other investment treaties that have taken a similar position include *CMS*, para. 290; *Impregilo v. Pakistan*, Decision on Jurisdiction of 22 April 2005, ICSID Case No. ARB /02/2, paras. 264-270; *MTD*, para. 196.

⁴⁰ See *Ronald Lauder v. The Czech Republic*, Final Award of 3 September 2001, UNCITRAL, paras. 221, 222, 232; Schreuer, *op.cit.* pp. 8-9.

⁴¹ See A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. Transnational Law & Policy, Vol. 8:1 (1998).

⁴² *Enron Corporation Ponderosa Assets L.P. v. Argentine Republic*, Award of 22 May 2007, ICSID Case No. ARB/01/3, para. 274.

be interpreted as concerning only consensual obligations.⁴³ In any case, these obligations must be assumed by the host State with an Investor.⁴⁴

187. Following either the wide interpretation of the clause or the more restricted one proposed by the *ad hoc* Committee, contractual obligations are covered by the last sentence of Article 10(1) ECT. Since the Parties are exclusively concerned with the application of the last sentence of Article 10(1) ECT to this type of obligation, the Tribunal need not extend its analysis any further.

2. Protections Provided in Article 13

188. The relevant part of Article 13 of the ECT reads as follows:

Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “Expropriation”) except where such Expropriation is:

- (a) *for a purpose which is in the public interest;*
- (b) *not discriminatory;*
- (c) *carried out under due process of law; and*
- (d) *accompanied by the payment of prompt, adequate and effective compensation.*

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the “Valuation Date”).

189. The Parties are in agreement in identifying the main elements of this provision. In fact, Respondent acknowledged in its Counter-Memorial on the

⁴³ *CMS v. Argentina*, Annulment Decision of 25 September 2007, para. 95.

⁴⁴ *Impregilo v. Pakistan*, Decision on Jurisdiction of 22 April 2005, paras 214-216.

Merits that it did not dispute that “*Article 13(1) of the ECT states an obligation as to expropriation, or the general propositions that expropriation may be indirect; accomplished by omissions as well as by actions; and measured by means of the effect upon the investment [...] that any determination as to whether an expropriation has occurred must be made by reference to the specific facts of an individual case, and [...] the claimed loss of the value of the investment must be due to the actions of the State.*” (footnotes omitted) (Respondent’s Counter-Memorial on the Merits, para. 505)

- 190. Claimant’s claims refer to the existence of indirect expropriation, i.e., its claims do not relate to the physical taking of the property but to the impact that the State’s conduct had on the enjoyment and value of its investment.
- 191. The Tribunal observes that it is widely acknowledged that expropriation can result from State conduct that does not amount to physical control or loss of title but that adversely affects the economic use, enjoyment and value of the investment. This approach was adopted by the Iran–U.S. Claims Tribunal in the *Starret Housing Corp v. Iran* case in the following terms:

[I]t is recognized by international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner.⁴⁵

- 192. This position has been reiterated by a number of subsequent arbitral tribunals. In the *Tecmed v. Mexico* arbitration, the tribunal stated:

. . . it is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that “... any form of exploitation thereof ...” has

⁴⁵ *Starrett Housing Corporation v. Islamic Republic of Iran*, Case No. 24, Interlocutory Award No. ITL 32-24-1, 19 December 1983, 4 Iran-US CTR 122, p.154.

disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed . . . Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary. The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects. (Footnotes omitted)⁴⁶

193. The Arbitral Tribunal considers that the decisive elements in the evaluation of Respondent's conduct in this case are therefore the assessment of (i) substantially complete deprivation of the economic use and enjoyment of the rights to the investment, or of identifiable, distinct parts thereof (*i.e.*, approaching total impairment); (ii) the irreversibility and permanence of the contested measures (*i.e.*, not ephemeral or temporary); and (iii) the extent of the loss of economic value experienced by the investor.⁴⁷

C. Analysis of the Alleged Violations

1. Environmental Damages

1.1 The Parties' Positions

194. Claimant contends that, by holding Nova Plama liable for environmental damage caused at the plant site prior to its acquisition by Claimant, Bulgaria breached its obligations under Article 10 of the ECT. It did so by failing to

⁴⁶ *Tecmed*, para. 116.

⁴⁷ See for a summary of the elements of expropriation under Article 1110 of the NAFTA (which resembles Article 13 of the ECT), *Fireman's Fund Insurance Company (FFIC) v. United Mexican States*, Award of 17 July 2006, ICSID Case No. ARB(AF)/02/01, para. 176.

accord to PCL's investment fair and equitable treatment, failing to provide it the most constant protection and security, impairing by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of PCL's investment and by failing to observe obligations Bulgaria had entered into with PCL. Claimant bases this claim essentially on the alleged breaches by Bulgaria of the provisions of the Second Privatisation Agreement and on the provisions of the Bulgarian environmental law which were amended in 1999, after PCL's acquisition of Nova Plama.

195. Claimant also alleges that Bulgaria violated Article 13 of the ECT because the unlawful amendment of the environmental law resulted in its inability to secure financing for the Refinery. As a consequence, it was forced to shut the Refinery down in December 1999 and was prevented from enjoying any economic benefit from its investment (Claimant's Memorial on the Merits, paras. 332-334).
196. At the time of the Second Privatization agreement, the Bulgarian law on the environment read, in pertinent part, as follows:

In case of restitution, privatization or investment in new construction facilities by foreign and Bulgarian natural and legal persons, such persons shall not be liable for environmental damages resulting from past actions or omissions.⁴⁸

197. The Second Privatisation Agreement (Article 4) provided that:

Plama Consortium Limited shall ensure the maintenance of the required level of the environmental conditions related to the activities of the company in accordance with the provisions of the Bulgarian law. Plama Consortium shall bear no

⁴⁸ In its Post-Hearing Submission, Claimant called this provision "poorly drafted" (para. 49) and as not expressly providing that the Bulgarian State would be liable for environmental damage incurred during the period that the Bulgarian State had owned the polluting enterprise (para. 50).

responsibility for any environmental pollution arising prior to the date of signing of this Agreement." (R's Exh. 676)

198. Claimant contends that this language – and the existing environmental law – protected it from liability both directly and indirectly (*i.e.*, through Nova Plama's being held liable for costs which PCL as shareholder would ultimately have to bear) for the estimated 37.4 million BGN pre-acquisition pollution clean-up costs with respect to Nova Plama.
199. In February 1999, shortly after PCL's acquisition of the Nova Plama shares in November 1998, the Environmental Protection Act was amended⁴⁹ so as to provide, in Section 9(1), that:

In the event of privatisation, with the exception of privatisation agreements concluded prior to 1 February 1999, or in case of restitution, or in the event of investment in new construction facilities by foreign and Bulgarian natural and legal persons, the liability for any environmental damages resulting from past actions or omissions shall be borne by the State under such terms and procedures as set forth by the Council of Ministers.

200. PCL claims that it understood the language of Article 5.1 of the Second Privatization Agreement and the Bulgarian environmental law in force at the time to mean that it – and the company whose shares it was acquiring, Nova Plama – would not be responsible to pay for the clean-up of past environmental damage. It believed that the State would assume such liability, especially since the pollution had occurred during the period when Nova Plama was a State-owned enterprise.
201. Claimant refers, in this respect, to the Neftochim Information Memorandum, dated 11 February 1999 (R's Exh. 811, p. 90), in other words before the above amendment entered into effect, which states that "*according to applicable law, the Bulgarian Government is responsible for funding the environmental remediation programme*". It cites this as evidence that the Bulgarian

⁴⁹ The amendment entered into force on 16 February 1999 (Declaration of Denev, para. 58; Claimant's Post-Hearing Submission, para. 51).

environmental law in force even *prior to* the 16 February 1999 amendment and, therefore, at the time of Nova Plama's second privatization, placed responsibility for past environmental damage on the State. However, as Respondent explains in its Post-Hearing Submission on the Merits, at paragraph 51, the amendment to the environmental law explicitly placing such responsibility on the State was adopted by the Parliament on 29 January 1999 and, although it only entered into force on 16 February 1999, provided for an effective date of 1 February 1999; thus, the Neftochim Information Memorandum referred to the law as amended, not as it stood in 1998. The Arbitral Tribunal accepts this explanation.

202. PCL's understanding of past environmental damage finds expression in the Recovery Plan which was adopted pursuant to the Privatization Agreement. At the end of the Recovery Plan, in Section 7, after referring to the issue of cleaning up past environmental damage, it is stated that "*[t]he Bulgarian Government has taken into consideration this fact and has released the new owners (including Plama AD) of any responsibility for environmental pollution having arisen prior to the date of signing the Privatization Contract, i.e. 17 November 1998.*" (Underlining added. See R's Exh. 609.)
203. Claimant contends that, by adopting amendments to its environmental law that would hold the State of Bulgaria responsible only for past ecological damage with respect to privatizations occurring *after* 1 February 1999 – and, therefore, not to the privatization of Nova Plama which occurred in 1998 – Bulgaria changed its law to the detriment of Claimant and Nova Plama and breached the contractual obligations to PCL as set out in the Second Privatisation Agreement. This was, in turn, a clear violation of the final sentence of Article 10(1) of the ECT.
204. Claimant also cites a letter of 14 June 2002 (C's Exh. 383) from the Bulgarian Minister of Finance to Nova Plama, threatening to reopen the insolvency proceedings against Nova Plama unless it, among other things, undertook its obligation to clean up the pollution at the Refinery, thereby illegally attempting to force Nova Plama to assume liabilities of which it had been contractually absolved.

205. It is Claimant's case that, as a consequence of this change in the law, Nova Plama became liable for past environmental damage at the Refinery – evaluated by it at 31.4 million BGN – and that the burden of such a financial liability rendered it incapable of raising the necessary financing to resume production at the Plama Refinery.
206. Claimant further asserts that, by adopting the February 1999 amendment to apply prospectively only, Respondent acted in a discriminatory way *vis-à-vis* Claimant and Nova Plama by comparison with the treatment accorded to Nova Plama's competitor, Neftochim, another Bulgarian oil Refinery which was privatized in October 1999 and which, by virtue of the 1999 amendment to the environmental law, was exonerated from responsibility for past environmental damage. This discriminatory treatment violated Respondent's obligations under Article 10(1) of the ECT.
207. Respondent contends that, while the language of Article 5.1 of the Privatization Agreement provides to the investor, PCL, immunity from liability for past environmental damage, it does not remove responsibility from the acquired company, Nova Plama. The law in force at the time of the Second Privatization Agreement was no different concerning this issue, as seen from the text quoted above (para. 196 *supra*). Nothing in the law or in the agreement made the State liable for past pollution.
208. Respondent denies that it committed any breach of its obligations under the ECT to PCL. It contends that Bulgaria's actions *vis-à-vis* Nova Plama concerning the environment at the Refinery site were not aimed at imposing onerous liability for remediation of past environmental damage but rather at ensuring that Nova Plama would take the necessary measures to operate the Refinery in a manner compliant with existing regulations. It cites a 1998 information letter (R's Exh. 528; C's Exh. 189) addressed by the Bulgarian Regional Inspectorate to the effect that Nova Plama had no outstanding unpaid sanctions or fines and summarizing pending steps to bring the Refinery's operations into compliance with environmental regulations. In fact, Respondent asserts that there is no evidence that Nova Plama was ever subject to any sanction by Bulgaria in connection with alleged past environmental damages (Respondent's Counter-Memorial on the Merits, para. 119).

209. Respondent contests the reliability of an expert report prepared for Nova Plama in 1999 (the so-called “Control P. Report” – R’s Exh. 521) as an assessment of the measure of past environmental damage. It is upon this report that Claimant relies to determine its estimate of the cost of remediation of past environmental damage. Respondent contends that the Control P. Report is not consistent with the established methodology for assessing the existence of damages actually requiring remediation and that it does not properly assess the costs of any such remediation. It contends that the report fails to distinguish between remediation of past environmental damages and measures regarding compliance with current regulations for re-establishing refinery operations and does not set out reliable costs estimates for the measures it advises should be taken (Respondent’s Counter-Memorial on the Merits, paras. 130 *et seq.*).
210. Respondent also says that Claimant has not proven any detrimental consequences to itself or to Nova Plama due to liability for past environmental damage. It has not been fined, sanctioned or banned. Nor, asserts Respondent, does the evidence submitted by Claimant prove that it was unable to obtain financing or insurance due to outstanding environmental liabilities. Respondent adds that Nova Plama benefitted from the sale of liquid waste, which reduced its environmental remediation costs.
211. As regards the Second Privatization Agreement, Respondent says that it is clear from the language of the Agreement that, while the investor – PCL – would not be held liable for past environmental damage, nothing is said regarding the liability of the target of the investment, Nova Plama. Under the Bulgarian environmental legislation in force at the time of Nova Plama’s privatization (both in 1996 and 1998), Nova Plama remained liable for past environmental damage and, according to Respondent, that fact must have been taken into account in negotiating the terms of Claimant’s purchase of Nova Plama’s shares. Respondent contends that the fact that, prior to Nova Plama’s privatization, the State owned and controlled the Refinery did not, under the law in force during that time, mean that the State was responsible for environmental damage; rather, the liability, under the law, remained with Nova Plama. Respondent denies that the 1999 amendment of the

environmental law discriminated against Claimant and asserts that Claimant and the investor in Neftochim were not in similar circumstances.

1.2 The Tribunal's Analysis

212. The Arbitral Tribunal does not find the evidence and arguments very clear-cut. It seems not unreasonable for PCL to have understood from the text of Article 4 of the Second Privatization Agreement that neither it nor the company it was acquiring would be held liable for cleaning up past environmental damage. After all, where would a bankrupt company, which Nova Plama was at the time of its acquisition by PCL, obtain the money to clean up past pollution if not from its shareholder(s)? In that case, the exemption of PCL alone from liability for past pollution was a hollow provision. This view finds support in a letter from the Ministry of Economy to Nova Plama dated 8 July 2002 (R's Exh. 465) in which the Ministry states, "*. . . the Ministry of Economy deems valid the text of the agreement signed by Plama Consortium Ltd and the Privatization Agency on 17.11.1998 (the Second Privatization Agreement), i.e., we think that Nova Plama AD should not have to bear material responsibility for cleaning out the past ecological damages.*"
213. At the same time, Mr. Vautrin, in his Fourth Witness Statement, said that obtaining a specific provision in the privatization agreement by which the State accepted liability for past environmental damage was a fundamental condition for him to purchase Nova Plama's shares (see para. 37). Yet, one searches in vain for such an explicit exemption in the Second Privatization Agreement. Such an exemption might have been obtained in negotiation; but no evidence was given as to whether an effort was actually made to procure it. Respondent has submitted evidence of other privatizations in which investor and privatized company were exempted from liability for past environmental damage and in which State responsibility for pre-privatization environmental damage was explicitly provided for (R's Exhs. 701 and 702). If it is correct, as Claimant's Counsel implied during the hearing in January-February 2008 (H. Tr. Day 1, 28 January 2008, p. 49), that Bulgaria changed its environmental law in 1999 in order to protect Neftochim from liability for past environmental damage as part of that company's privatization, how do we know that the

Government would not have done the same for Nova Plama had Claimant bargained for it? Respondent asserts that the price paid for Nova Plama's shares reflected (or should have reflected) all known liabilities, past, present and future and that the state of environmental pollution at Nova Plama was known to all parties. No evidence was given on these aspects of the negotiations.

214. Respondent has contended that, if the assumption of State liability for past environmental damage adopted in February 1999 had been made retroactive beyond 1 February 1999, it would have had to extend such liability to a prohibitive number of other Bulgarian companies (see, e.g., R's Exh. 452). However, when one looks at other evidence in the record, for example the World Bank's Implementation Report (C's Exh. 187), it appears that many of the very companies cited by Respondent as being those to which State aid for past environmental damage would have had to be extended if the February 1999 legislation had been retroactive, were in fact beneficiaries of such aid.
215. Another element which renders the issue of past environmental damage unclear is Section 7 of the Recovery Plan (R's Exh. 609), drafted essentially by Claimant, which states that the Government of Bulgaria excused PCL "*including Plama AD*" from paying for past environmental damage. If PCL really believed what it wrote in the Recovery Plan, why did it have to enter a reserve in Nova Plama's books for such damage? Moreover, there is other evidence indicating that Nova Plama did not have any significant past environmental damage to clean up (R's Exhs. 526 and 727, Appendix 3, page 8).⁵⁰
216. Yet, there are elements in the record which seem to indicate the contrary of what is said in Section 7 of the Recovery Plan. Thus, for example, a note to PCL's 1999 Financial Statements stating that, by virtue of the 1999 amendment of the environmental law, Nova Plama is liable for past ecological damages caused in the period when the State was Nova Plama's sole owner

⁵⁰ The Arbitral Tribunal is, of course, mindful of the Control P Report which assesses the Refinery's environmental status.

(C's Exh. 203, p. 13, Section 6), as well as a note from Nova Plama's Chief Ecologist to Syndic Todorova also addressing the Refinery's liability for past pollution (C's Exh. 186, p. 2). There exists also a letter from Minister Vassilev to Mr. Vautrin, dated 14 June 2002 (R's Exh. 463), demanding that Nova Plama "*shoulder the expenses for cleaning out all environmental pollutions resulting from the Refinery's work.*"

217. In light of the foregoing, the Arbitral Tribunal comes to the question of whether there is any element in this confusing situation which establishes a violation by Bulgaria of its obligations under the ECT.
218. The Arbitral Tribunal finds no evidence that the modification of Bulgaria's environmental law in 1999 was aimed directly against Claimant and its investment in Nova Plama or in favor of Neftochim. That modification, implemented pursuant to recommendations made by the World Bank, is seen by the Arbitral Tribunal rather as an effort by Bulgaria to meet its obligations under Article 10(1) of the ECT to create favorable conditions for Investors.
219. In his legal opinion of 28 October 2005, Mr. Denev says that the 1999 amendment of the environmental law was discriminatory against prior investors and, therefore, unconstitutional. The Arbitral Tribunal cannot opine on the constitutionality of the 1999 amendment. However, the Tribunal believes that the ECT does not protect investors against any and all changes in the host country's laws. Under the fair and equitable treatment standard the investor is only protected if (at least) reasonable and justifiable expectations were created in that regard. It does not appear that Bulgaria made any promises or other representations to freeze its legislation on environmental law to the Claimant or at all.
220. Moreover, Bulgaria's environmental law, as it existed prior to PCL's acquisition of Nova Plama (quoted earlier), could give no assurance to Claimant that Nova Plama would be exempt from liability for cleaning up past environmental damage. Claimant admits that the Bulgarian law, as it existed at the time of Nova Plama's second privatization, was, at best, unclear as to liability for past environmental damages (H. Tr. Day 1, 28 January 2008, p. 67). Indeed, Mr. Vautrin must have recognized the uncertainty in the law

because, as he testified (Fourth Witness Declaration, 28 October 2005, para. 37), State assumption of liability for past environment damage was so essential to him that he insisted on an explicit provision in the privatization agreement, exempting Nova Plama from such liability. This indicates to the Arbitral Tribunal that he was aware that Bulgarian law at the time did *not* protect Nova Plama against liability for past pollution but failed to negotiate the contractual guarantees he believed were necessary to avoid such risk. While Claimant criticizes Bulgaria for the inadequacy of its environmental law in this regard, Claimant was, of course, aware of, or should have been aware of, the state of Bulgarian law when it invested in Nova Plama.

221. Claimant also complains that, at the same time as the Privatization Agency was negotiating with PCL over the environmental issue in 1998, the proposal to make the State liable for past environmental damages of privatized companies (which became the February 1999 amendment) was being debated in the Bulgarian Parliament without informing PCL of this impending change in the law. But those parliamentary debates were in the public record and should have been known by PCL's Bulgarian advisors.
222. In light of these circumstances, the Arbitral Tribunal cannot uphold Claimant's allegations that Respondent violated the standard of fair and equitable treatment by amending its environmental law. It is also unclear how Respondent's conduct in this context could amount to a violation of the obligation to provide constant protection and security. Even accepting the approach that this standard includes an obligation to provide legal security, the Tribunal has established that Claimant failed fully to appreciate the scope and specificities of Bulgarian legislation. In addition, Claimant failed to identify and the Tribunal was unable to establish a lack of due diligence in Respondent's treatment of Claimant and its investment with regard to the environmental amendments.
223. As to the claim concerning discriminatory treatment, Bulgaria contended that all companies privatized before 1999 were in the same situation as Nova Plama and did not receive aid to clean up past pollution. There is, nevertheless, evidence that, in the implementation of the 1999 amendment, there may have been some companies not covered by the new law which,

nevertheless, received State assistance, whereas Nova Plama did not (see para. 206 *supra*). However, insufficient evidence has been given to permit the Arbitral Tribunal to determine that Bulgaria's treatment of Nova Plama in this respect was discriminatory. Therefore, the Arbitral Tribunal dismisses Claimant's allegations in this regard.

224. With respect to Claimant's allegation as to the violation of the last sentence of Article 10(1) of the ECT, the Tribunal finds no violation by Bulgaria of its contractual undertakings to PCL. The amendment of the Environmental Law did not breach Article 4 of the Second Privatization Agreement since this provision did not shift Nova Plama's liability to the State.
225. In addition, the Arbitral Tribunal has examined the evidence to see what harm or loss to Claimant or its investment resulted from Nova Plama's liability to clean up past pollution, assuming it existed. Claimant's contention that it could not obtain financing for the project given the large liability for past pollution on its books is not supported by sufficient documentary evidence of a contemporary nature. The only document in the record is a letter from a Swiss insurance company, Intersure, (C's Exh. 204) saying that it needed "*confirmation that the outstanding ecological issue has been solved.*" But such a letter from one insurance company hardly proves that financing was impossible to obtain because of any liability for environmental clean-up. As Counsel for Claimant stated at the January-February 2008 hearing (H. Tr. Day 1, 28 January 2008, p. 42), "*no company or bank would advance money to [Nova Plama] because Plama itself had bad credit.*"
226. Bulgaria has insisted in submissions that its governmental authorities never sought to enforce the obligation to clean up past pollution on Nova Plama.⁵¹ While Claimant, in its Post-Hearing Submission on the Merits (para. 91), asserted that the damage to its investment from liability for past environmental damage is readily quantifiable at USD 23 million, nowhere does it show that it

⁵¹ Indeed, two governmental documents, evaluating Nova Plama's environmental status (R's Exhs. 526 and 528) do not refer to significant past pollution at the Refinery but more to measures which the Refinery would have to take to bring itself into compliance with current standards.

had to pay such amount. There is no evidence of what amounts, if any, Nova Plama actually spent to clean up past environmental damage. In fact, Claimant's Post-Hearing Submission on the Merits does not refer to PCL's or Nova Plama's having had to pay for past environmental damage but rather to the prospect of a demand that they pay (see para. 76). Thus the very basis of Claimant's claim, summarized in paragraph 194 above, that Bulgaria is guilty of "*holding Nova Plama liable for environmental damage*," is not factually established.

227. Absent any proof of harm or loss to the investment or limitation to Claimant's right to use or enjoy its investment as a result of Respondent's conduct with regard to the environmental amendments, it is impossible to see how a claim concerning the expropriation of Claimant's investment could be successful.
228. Therefore, the Arbitral Tribunal is unable to conclude that Respondent violated its obligations under Articles 10(1) and 13 of the ECT.

2. Actions of the Syndics

229. Claimant essentially complains that the syndics appointed to manage Nova Plama while it was in bankruptcy in 1998-1999 failed to fulfil their obligations and took unlawful actions which harmed Nova Plama. It contends that the Bulgarian Government and Courts failed properly to control them, in violation of Respondent's obligations under Article 10(1) of the ECT to afford fair and equitable treatment, the most constant protection and security and to avoid unreasonable measures. Together with other violations, the syndics' actions amount to an indirect expropriation contrary to Article 13 of the ECT.

2.1 Irregularities in the Appointment of the Syndics

230. Claimant contends that there were irregularities in the appointment of the syndics and in the retention of Syndic Penev as a supervisory syndic after approval of the Recovery Plan.

2.2 Unlawful Increases in the Salaries of Nova Plama's Workers

231. Claimant alleges that, prior to its acquisition of Nova Plama, while Claimant was negotiating an agreement with the workers of Nova Plama regarding

payment of back salaries, one of the syndics of Nova Plama, then in insolvency, Syndic Todorova, *ex officio*, and without consulting PCL or Nova Plama, undertook to index workers' salaries in such a way as to increase the amounts owing to the employees as well as to include in the company's receivables payments for taxes, insurance, etc., which were not foreseen. Claimant considers these acts by the syndics, which increased Nova Plama's financial burden, unlawful, citing a Pleven Regional Prosecution Office's conclusion that the syndics had caused Nova Plama to suffer damages in the amounts of BGN 1,583,738.553 by unlawful salary indexation and BGN 2,025,313.581 by unlawful acceptance of amounts corresponding to workers' income tax, social insurance, etc.

2.3 Overloading of Debt by the Syndics

232. Claimant alleges that the syndics unlawfully accepted as debts of Nova Plama pre-insolvency claims which were either fabricated or inflated, thereby burdening the company's debts by BGN 40 million. The creditors of these debts were Mineralbank, First Private Bank and the Bank for Agricultural Credit (BAC). According to Claimant, the Pleven District Court approved all the syndics' actions on 31 May 1999 (C's Exh. 224).
233. Claimant also complains that the syndics unlawfully accepted claims against Nova Plama by First Private Bank which were not owing by Nova Plama to the bank but which were, nevertheless, approved by the competent court. Claimant alleges that the two syndics were criminally indicted in 2004 for accepting non-existent debts in the amount of BGN 40,886,453.645.
234. Claimant says that because, at the time, management of Nova Plama was in the hands of the syndics, and Nova Plama's management board was not given access to the company's financial accounts, PCL and Nova Plama had no way of ascertaining whether the claimed receivables were legitimate or not.

2.4 Misappropriation of Nova Plama's Funds

235. Claimant further alleges that Syndic Penev misappropriated Nova Plama's funds and carried out other unlawful actions during the period from May 1999 to October 2000. According to Claimant, Syndic Penev was found guilty by

the Pleven Regional Court of criminal action in the course of his duties as syndic of Nova Plama.

2.5 Worker Riots

236. Claimant accuses Syndic Todorova of inciting the workers of Nova Plama to strike and riot unlawfully at the Refinery, of herself participating in these actions, and of using violence to evict the Refinery's director from his office (which led to the shutdown of the Refinery on 8 April 1999). In this connection, the police, according to Claimant, failed adequately to protect the Refinery and its management. These unlawful actions allegedly paralyzed the production of the Refinery and blocked all movements of products in and out of the Refinery for two and a half months, escalating into anarchy which lasted for many weeks. Despite reporting these events to the Bulgarian Government, Nova Plama received no police assistance to restore order. Claimant contends that these actions and omissions violate Bulgaria's obligation under Article 10(1) to afford the most constant protection and security to its investment and fall within the scope of Article 12 of the ECT⁵², entitling it to compensation for losses caused by civil disturbances.

2.6 Parallel Recovery Plan

237. In its Reply, Claimant alleges that Syndic Todorova unlawfully submitted a parallel recovery plan to that of Claimant's which delayed the lifting of Nova Plama's insolvency (Claimant's Reply on the Merits, paras. 122-3).
238. Claimant further complains that Syndic Todorova refused to account for products shipped to and from the Refinery and refused PCL's request that its own designated financial and accounting representative be on site (Claimant's Post-Hearing Submission on the Merits, para. 17).
239. Respondent denies that it bears any responsibility for the actions of the syndics complained of by Claimant and contends that, in any event, the syndics' actions were in accordance with Bulgarian law in effect at the time.

⁵²

See text of Article 12 in the Annex to this Award.

Respondent goes on to rebut Claimant's arguments as to the appointment of the syndics, as to unlawful salary increases having been given to the workers, as to debt overloading by the syndics, as to misappropriation by Syndic Penev, as to the alleged riot and unlawful strike and Syndic Todorova's role therein, as to the failure of the police to provide protection to the Refinery and its management and as to the syndics' submission of a parallel recovery plan. Moreover, the so-called "riot", which occurred on 8 April 1999 could not have caused the Refinery shutdown, which began on 5 April 1999 and, therefore, predated this "riot".

240. Respondent's principal contention is that, under Bulgarian law, a syndic is not an organ of the State and does not perform governmental functions; therefore, his/her actions cannot be imputed to the State. Although a syndic is appointed by a court upon nomination by the creditors, the syndic does not, according to Respondent, perform governmental functions or operate under the direction or control of the State and does not act as an agent of the State or of the court. Therefore, contends Respondent, if Claimant complains about the actions of the syndics, those actions cannot form the basis of claims against Respondent under the ECT.
241. In any event, Respondent says, Claimant has failed to demonstrate that the syndics acted contrary to law or otherwise improperly in a manner which caused any harm to Claimant. Nor has Claimant established that the Bulgarian courts took any action or failed to take any action which was improper.
242. With respect to Claimant's contention that the syndics unlawfully accepted pre-insolvency claims against Nova Plama made by BAC, Mineralbank and First Private Bank, Respondent contends that Claimant ratified, at a creditors' meeting on 22 June 1999, a list of accepted claims containing all claims now challenged by it as well as the Recovery Plan which included such claims. In this connection, Respondent challenges Claimant's assertion that it had no legal standing to contest any measures in the insolvency proceeding.
243. Respondent says that, prior to its acquisition of Nova Plama's shares, Claimant had full knowledge of and unimpeded access to information about the Nova Plama bankruptcy proceedings and all claims admitted therein; that Claimant

specifically agreed to the claims it now contests in the Recovery Plan and elsewhere⁵³; that Claimant failed to utilize at the time the remedies available to it under Bulgarian law for contesting the claims in question; and that the syndics' acceptance of the claims of Mineralbank, BAC and First Private Bank was not unlawful because the claims were supported by sufficient evidence.

- 244. Respondent contends that the syndics' acceptance of the claims in question did not increase Nova Plama's debts and had no adverse effect on the Refinery's net economic condition.
- 245. As to the workers' "riot", Respondent denies that the workers' protests over not being paid their salaries amounted to a "riot" or that Syndic Todorova in any way instigated a "riot" by the workers. Respondent adds that the Bulgarian police were constantly present at the Refinery at the time the alleged "riot" occurred and provided any necessary protection. In no event, says Respondent, did the events or "riot" of 8 April 1999 cause the shutdown of the Refinery. According to Respondent, the shutdown began – on Claimant's own initiative – on 4 or 5 April 1999.⁵⁴ Nor, contends Respondent, were the workers' actions responsible for blocking product from coming into or going out of the Refinery.
- 246. Respondent contests Claimant's argument regarding the parallel recovery plan submitted by Syndic Todorova, saying she had the right under Bulgarian law to submit such a plan.
- 247. Finally, Respondent states that the Bulgarian courts, on 13 November 2006, properly acquitted the syndics of criminal charges with the exception of one minor one which had been filed against them (C's Exh. 241).

2.7 The Tribunal's Analysis

- 248. The factual evidence with respect to the actions of the syndics and the alleged riot of the Refinery's workers is in virtually all respects contradictory.

⁵³ See, e.g., R's Exhs. 142 and 598.

⁵⁴ Claimant's Counsel appeared to verify Respondent's argument at the January-February 2008 hearing (H. Tr., Day 5, 1 February 2008, p. 983, lines 20-22 and p. 984, line 1).

Eyewitnesses to the same events gave conflicting testimony as to what they saw. Thus witnesses presented by Claimant testified that the workers at the Refinery rioted, used violence to evict the Refinery's director, Mr. Beauduin, from his office, were encouraged and even led in their actions by Syndic Todorova and that the police did nothing to intervene and afford protection to the premises and its management. Respondent's witnesses testified that the workers gathered to demand payment of their overdue wages, that their demonstration was peaceful, that Syndic Todorova was not seen encouraging or leading the demonstration, that there was no violence and that Mr. Beauduin left his office of his own volition, safely escorted by the police.⁵⁵

249. Given this conflicting evidence, the Arbitral Tribunal is unable to form any firm view as to what really transpired. The burden of proof being on Claimant, the Tribunal cannot, therefore, rule in its favor concerning these allegations, including with respect to its claim under Article 12 of the ECT.
250. As to Claimant's arguments that there were irregularities in the appointment of the syndics, that the syndics unlawfully increased the salaries of the workers, that they accepted debts unlawfully and that they improperly submitted a "*parallel*" recovery plan, the Arbitral Tribunal considers that the evidence shows the contrary (See, e.g., R's Exh. 1030, a decision from the Pleven Municipal Court acquitting the syndics of criminal charges related to the acceptance of claims in the course of the bankruptcy proceedings). The Tribunal is persuaded by Respondent's rebuttal of Claimant's arguments in its Post-Hearing Submission on the Merits (pp. 23 *et seq.*).
251. However, in order to determine the responsibility of Respondent under the ECT, the crucial questions for the Arbitral Tribunal are whether the State is legally responsible for the actions of syndics, whether syndics are instruments of the State and perform State functions and whether the Bulgarian courts failed to control or supervise the syndics in a way which gives rise to State responsibility. Here again, the Arbitral Tribunal has before it conflicting

⁵⁵ This version of the facts is supported by Mr. Beauduin's memorandum dated 8 April 1999, recounting the events of that day (R's Exh. 840).

- experts' opinions on the role and authority of syndics and the courts in a bankruptcy situation in Bulgaria such as that of Nova Plama.
252. Article 8 of the Articles on State Responsibility of the International Law Commission provides:
- The conduct of a person or a group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.*
253. Having reviewed the experts' opinions, the evidence presented and the submissions of the Parties on these points, the Arbitral Tribunal has come to the conclusion that syndics in bankruptcy proceedings, such as that involving Nova Plama, are not instruments or organs of the State for whose acts the State is responsible. Although Claimant's legal expert, Mr. Denev, in his opinion of 28 October 2005 annexed to Claimant's Memorial on the Merits, cites a Bulgarian Supreme Court decision to the effect that a syndic is "*a court's authority*" (see para. 37), the Arbitral Tribunal does not interpret this to mean that a syndic carries out judicial or State functions. Mr. Denev quotes the Commercial Law as defining the syndic as an "*organ of the estate of insolvency*" (see para. 36). The opinions of Professor Chipev, dated 16 July 2006 and 19 July 2007, presented by Respondent, seem more persuasive to the Tribunal in concluding that a syndic is not a State organ and accord with the experience of the members of the Tribunal in other civil law countries. Thus the Arbitral Tribunal concludes that the acts of the syndics, if they were wrongful – and the Tribunal makes no finding in this respect – are not attributable to Respondent, which cannot, therefore, be said to have violated its obligations towards PCL under the ECT.
254. As for Claimant's allegation that the Bulgarian courts failed adequately to control and supervise the acts of the syndics, the Arbitral Tribunal accepts Mr. Denev's opinion that the Bulgarian courts had a role in supervising the work of the syndics. Obviously the courts of a State are organs of that State, and the State may bear responsibility for the acts or omissions of its courts.

According to the expert opinions of Professor Chipev, presented by Respondent, the powers of supervision and control of the courts over syndics are relatively limited, an opinion which the Arbitral Tribunal accepts. It appears that Claimant and/or Nova Plama had access to the Bulgarian courts to complain of actions of the syndics with which they disagreed. In fact, they did bring certain actions in this respect.⁵⁶ The Tribunal can find no evidence that such access to the courts was in any way obstructed or that the courts decided the issues presented to them in anything other than a fair way. The Tribunal finds no evidence which would engage the responsibility of Respondent under the ECT.

255. Consequently, the Arbitral Tribunal rejects Claimant's complaints regarding the syndics.

3. Paper Profits

3.1 The Parties' Positions

256. Claimant contends that, because Bulgaria lacked appropriate accounting rules and tax legislation, the discount or rescheduling of Nova Plama's debts in its Recovery Plan resulted in artificial profit which became taxable and thus created a new debt for the company, requiring an accounting reserve in its books. As a consequence, Nova Plama was not in a position to finalize its 1999, 2000 and 2001 financial statements and missed the deadline for filing its tax return for the 1999 fiscal year and in subsequent years. This, in turn, created a new tax liability. The result was that, being unable to show that taxes due had been paid and therefore to present audited financial statements, it was impossible for Nova Plama to obtain the necessary financing to start up the Refinery.
257. Claimant contends that Bulgaria did not have a proper legal framework for companies which had terminated insolvency proceedings, thereby violating its undertaking in Article 10(1) of the ECT to create stable, equitable and

⁵⁶ Claimant made the general allegation that Respondent violated Article 10(12) of the ECT. The Arbitral Tribunal is not persuaded that this is the case.

favorable conditions for Investors. From 1999 to 2001, Claimant says that Nova Plama sought the Government's approval for various accounting measures which would avoid its having to declare a "paper profit" but never received a satisfactory response.

- 258. Eventually, says Claimant, Bulgaria acknowledged the gap in its legislation and, at the end of 2001, adopted legislation absolving companies of profit tax on such "paper profits".
- 259. Claimant concludes that, by refusing to assist Nova Plama in finding a solution to the problem of "paper profits" and by failing to amend its laws in a timely way regarding the taxation of the paper profit which resulted from the discounted liabilities under the Recovery Plan, Bulgaria violated its obligation under Article 10(1) of the ECT to accord fair and equitable treatment and the most constant protection and security to Claimant's investment and to avoid unreasonable measures. It also violated Article 13 of the ECT, because Bulgaria's conduct in this regard contributed to PCL's inability to secure financing for the Refinery and resulted in the deprivation of Claimant's right to the use and enjoyment of the economic benefits of its investment.
- 260. Respondent replies that ECT Contracting States do not accept an obligation under Article 10(1) of the ECT regarding fair and equitable treatment with respect to tax. It refers to Article 21(1) of the ECT which provides:

Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency [...]

- 261. In any event, Respondent contends, Claimant could not have had any legitimate or reasonable expectation that Nova Plama would not be subject to existing tax law, of which it was perfectly well aware when it purchased the company. It was not excused from filing obligatory tax returns or prevented from preparing financial statements; rather than doing so, it chose to lobby for tax relief and for a change in the law. Respondent submits that the various

Bulgarian authorities concerned acted reasonably and in good faith to respond to Claimant's inquiries and that Bulgaria's tax laws were reasonable and consistent with international standards.

262. In fact, according to Respondent, Nova Plama had available to it alternative accounting methods for treating the discounted debts to that which it adopted which would have avoided the problems it encountered (see Transacta Report, paras. 38-39).
263. Respondent also points out that, in 2001, it did adopt the change to its tax law which Nova Plama sought.
264. Finally, Respondent says that Claimant has failed to produce evidence that it or Nova Plama made any serious attempts to obtain financing that were rejected because of Nova Plama's alleged inability to prepare its financial statements and file tax returns. Nor has it proven otherwise that the "paper profit" issue caused it any injury.

3.2 The Tribunal's Analysis

265. The problem of which Claimant here complains is that the discounted debt (which it was able to negotiate with Nova Plama's creditors) unfairly gave rise under Bulgarian tax law to a "paper profit" on which it was liable to pay company income tax. It demanded a modification of Bulgaria's tax law to eliminate the tax consequences, which it finally obtained in 2001, but until then it was unable, in light of the enormous potential tax liability, to file certified audited financial statements without paying the tax; and this meant it could not obtain financing for the operation of the Refinery.
266. The Arbitral Tribunal cannot see how this claim gives rise to a violation of Bulgaria's obligations under the ECT. In the first place, Article 21 of the ECT specifically excludes from the scope of the ECT's protections taxation measures of a Contracting State, with certain exceptions, one of which is that, if a tax constitutes or is alleged to constitute an expropriation or is discriminatory, the Investor must refer the issue to the competent tax authority, which Claimant did not do.

267. Even putting aside Article 21 of the ECT, the Tribunal finds no action by Respondent which comes anywhere near to being unfair or inequitable treatment or amounting to expropriation. When Claimant purchased the shares of Nova Plama and negotiated its Debt Settlement Agreement, it was or should have been aware of the taxation treatment that would be accorded to debt reduction by Bulgarian law. It could not have had any legitimate expectation that it would be treated otherwise. It had Ernst & Young, one of the world's leading tax advisory firms, advising it on its acquisition.
268. It has been suggested by Respondent and its experts (see Report of Transacta, 28 July 2006, Respondent's Counter-Memorial on the Merits) that Nova Plama could have adopted a method of accounting for its debt reduction under Bulgarian law which would have avoided the tax consequences it complains of. Claimant says that it was not informed at the time. While the members of the Arbitral Tribunal are not experts in Bulgarian accounting or tax law, it is clear to the Tribunal that Claimant, as the investor, was responsible for doing its due diligence regarding the tax consequences of debt reduction and for taking the necessary measures to deal with them.
269. Respondent produced evidence which shows that the tax laws of many countries around the world treat debt reductions, as were negotiated in this case, as income taxable to the beneficiary (see Report of International Fiscal Association, R's Exh. 1027). It cannot be said that Bulgaria's law in this respect was unfair, inadequate, inequitable or discriminatory. It was part of the generally applicable law of the country like that of many other countries.
270. Here again, as in the case of liability for past environmental damage, discussed earlier in this Award, if Claimant was concerned about the tax consequences of the debt reduction it sought and obtained, it could have attempted to negotiate provisions in the Privatization Agreement protecting Nova Plama against them. There is no evidence that it did so.

271. The evidence also shows that Bulgaria did not in fact seek to collect the taxes which were due from Nova Plama.⁵⁷ On the contrary, there is much evidence in the record which demonstrates the Government of Bulgaria's efforts to try to assist Claimant and Nova Plama in this respect (C's Exhs. 273, 275, 282). While in its Post-Hearing Submission, Claimant asserts that its damage from the "hollow" tax is readily quantifiable at USD 23 million (see para. 91), nowhere does it say that it ever had to pay any such tax. And in the end, in 2001, Bulgaria changed its tax laws to exempt Nova Plama from any taxation on these "paper profits". (See Report of Transacta, 28 July 2006, paras. 59 *et seq.*; Respondent's Counter-Memorial on the Merits, paras. 289-301; Respondent's Rejoinder on the Merits, paras. 123-4). In terms of diligence, Bulgaria's behavior with regard to the above is beyond reproach and the claim concerning the violation of the standard of constant protection and security under the ECT is without merit.
272. Finally, the Arbitral Tribunal is not persuaded by the evidence that it was the "paper profits" issue that made it impossible for Claimant or Nova Plama to obtain financing for the operation of the Refinery. As Counsel for Claimant stated at the January-February 2008 hearing (H. Tr. Day 1, January 28, 2008, p. 42), Nova Plama in 1998 "*had bad credit, and no company or bank would advance money to it.*" It is therefore not apparent how Bulgaria's conduct could have deprived Claimant of the economic benefits of its investment. Claimant's claim concerning expropriation on this account must be dismissed.
273. In conclusion, the Arbitral Tribunal finds no evidence that Bulgaria violated its obligations under the ECT (assuming it applies to this issue) towards Claimant with respect to the paper profits issue and, therefore, rejects Claimant's claims.

⁵⁷ Claimant's allegation to the contrary at the January-February 2008 hearing (H. Tr., Day 1, 28 January 2008, p. 21 lines 17 *et seq.*) is unsupported by evidence.

4. Varna Port

4.1 The Parties' Positions

274. Claimant submits that Varna Port is the only Bulgarian port through which crude oil and oil products can be supplied to it by tankers. It contends that, under Bulgarian law, Varna Port is “exclusive state property”, by virtue of the constitution of the Republic of Bulgaria,⁵⁸ the Bulgarian Law on Maritime Spaces, Internal Water Roads and Ports, the Law on Concessions and court decisions. It explains that Varna Port was under the control of a State-owned entity, Petrol A.D., which was privatized in 1999. Claimant says that, contrary to Bulgarian law and its constitution, the Bulgarian Government purported to include Varna Port in the assets owned by Petrol A.D. at the time it was privatized. Even if Varna Port could be transferred to private ownership, it was not transferred to the privatized Petrol A.D. in accordance with the methods available for such transfers under Bulgarian law.
275. As a consequence of Varna Port’s unlawful possession by Petrol A.D., Nova Plama (according to Claimant) could not deal with Petrol A.D. since it was not a lawful owner of the port. It could not know with legal certainty with whom it should contract to obtain port services at Varna. Nor did Nova Plama have any guarantee that it would have access to Varna Port as a public service provided by the State in the future. Respondent refused to provide it any assurances that, if it negotiated a contract with Petrol A.D., its contractual rights would be respected. Petrol A.D. was in a position to abuse its dominant position by terminating unreasonably Nova Plama’s access to the port or by imposing on it unreasonable conditions. In fact, Claimant alleges, the newly privatized Petrol A.D., controlled by the Naftex Group, a competitor of Nova Plama (Claimant’s Reply on the Merits, para. 37), threatened Nova Plama and attempted to impose outrageous prices and conditions for the transit of its crude oil through Varna Port.

⁵⁸ Claimant’s legal expert, Mr. Denev, opined in his statement of 28 October 2005 that under the Bulgarian Constitution ports were “republican roads” which could not be privatized.

276. Claimant also complains that Bulgaria amended its Maritime Law in 2004 to make fundamental changes in the regime governing its ports of public transport. By virtue of this amendment, Varna Port can now be divided into two parts, one remaining public property (wharfs, piers, beach and acquatorium) and the other (a load storage area) as the property of Petrol A.D. Claimant characterizes this amendment as arbitrary and unlawful, causing Nova Plama significant loss, in violation of the ECT.
277. Bulgaria's actions, says Claimant, are a violation of its obligation in Article 10(1) of the ECT to accord PCL fair and equitable treatment, and the most constant protection and security to its investment and have subjected its investment to unreasonable measures. Taken together with the other actions of Bulgaria *vis-à-vis* Nova Plama, its unlawful privatization of Varna Port amounts to an expropriation in violation of Article 13 of the ECT.
278. Respondent replies, first, that Varna Port is not exclusive State property under the Bulgarian constitution or Maritime Act or under decisions of the competent courts and that, therefore, Claimant had no legitimate expectation that the port would remain owned by the State. Respondent points out that there is a pending dispute between Petrol A.D. and the State as to the legal status of certain parts of Varna Port. Respondent contends that Claimant has failed to show that this ownership dispute has had any adverse impact on Nova Plama. According to Respondent, Nova Plama was not denied access to Varna Port or use of its facilities, and, in any event, Nova Plama had other alternatives to Varna Port available to it. Nor has Claimant substantiated its allegation that Petrol A.D. abused a dominant position in its dealings with Nova Plama; and in any case Claimant's claims of anti-competitive conduct by Petrol A.D. are inadmissible (see Respondent's Counter-Memorial on the Merits, paras. 348-351).

4.2 The Tribunal's Analysis

279. Claimant's contentions that Respondent violated its obligations *vis-à-vis* PCL under the ECT can be dismissed in a relatively brief manner. This is so because the Arbitral Tribunal finds no evidence that Nova Plama was in any way denied access to Varna Port and to the use of its facilities on

commercially reasonable terms. In its submissions to the Tribunal, Claimant complains about the effects of the privatisation of Varna Port on its ability to use the port and its facilities. It alleges that the new owner of the port threatened Nova Plama's representatives and intended to drive the company back into bankruptcy; but the Tribunal has been unable to verify these allegations through any cogent evidence in the record. Otherwise, the concerns expressed by Claimant seem largely theoretical; and there is persuasive evidence that in practice – if Nova Plama had really wanted access to the port and its facilities – it could have obtained it on terms equivalent to other users. The evidence shows that Rexoil, an affiliated company of Nova Plama, imported oil through Varna Port throughout the year 1999. Why Nova Plama could not do the same was never explained to the satisfaction of the Arbitral Tribunal.

280. Claimant's allegations that Varna Port was unconstitutionally privatized do not fall within the competence of the Arbitral Tribunal to determine but rather that of the Bulgarian courts. However, the ordinary meaning of the words "republican roads" in the Bulgarian constitution, relied upon by Claimant to show that Varna Port was exclusive State property, does not seem to include ports.⁵⁹ Claimant's concern that the ownership of Varna Port by Petrol A.D., an alleged competitor of Nova Plama, gave it power to strangle Nova Plama by charging it exorbitant rates or denying it access to and use of the port and its facilities could and should have been tested by Nova Plama's entering into negotiations with Petrol A.D. to see whether commercially acceptable terms could be obtained. Even if Claimant believed that Petrol A.D. was not the legal owner of the port facilities, with the backing of the Government, it could, nevertheless, have negotiated with those who were incontestably in control of the port. The Government offered its assistance in this regard (see, for example, R's Exhs. 458, 463, 465 and 481). There was no evidence that any other person or enterprise had any like difficulty in negotiating terms for use

⁵⁹ See also Article 3(2) of the Bulgarian Roads Act, cited in Professor Chipev's legal opinion of 16 July 2006, para. 163: "[T]he republican roads shall be motorways and first, second and third grade roads ensuring transportation connections of national significance and forming the state road network."

of the port or actually using it, including Rexoil, Claimant's affiliate.⁶⁰ While the evidence shows that there were some exchanges and meetings between representatives of Nova Plama and Petrol A.D., there was no evidence that Nova Plama or PCL made any serious effort to work out the terms of an agreement with Petrol A.D. for the use of Varna Port, despite Claimant's contention in its Post-Hearing Submission on the Merits (at paragraph 82 and elsewhere) that it "*attempted to negotiate a renewal of its contract with Petrol.*" The Arbitral Tribunal does not consider that Respondent had an obligation to assure Nova Plama that its rights under any contract it negotiated with Petrol A.D. would be respected, as Claimant demanded.

281. Moreover, the acts of Petrol A.D. complained of by Claimant cannot be attributed to Respondent under Bulgarian or international law. There is no evidence that the Government intervened with Petrol A.D. in any way to encourage it to deny Nova Plama's use of Varna Port on reasonable commercial terms. To the contrary, the evidence shows that the Government tried to assist Claimant and the Refinery to make an arrangement that would allow fuel to flow to the Refinery.
282. The fact that the Government privatized Varna Port is not, in and of itself, violative of any obligation it owed to Claimant under the ECT. There is nothing in the ECT which would prevent Bulgaria from privatizing its ports so long as it was done in a way which did not discriminate against Claimant and did not deprive it of a right necessary to the economic operation of the Refinery - a right which it obtained under its agreements with the Government to purchase the shares of Nova Plama. Nothing in the evidential record persuades the Tribunal that the privatization of Varna Port was done otherwise.⁶¹ As for Bulgaria's amendment of its Maritime Law in 2004, the Arbitral Tribunal finds nothing arbitrary or unlawful in this enactment.

⁶⁰ See R's Exhs. 881, 882, 883, 884, 885, 886, 984, 985, 986, 987 and 988.

⁶¹ During oral argument at the January-February 2008 Hearing concerning Varna Port, Counsel for Claimant alleged that Respondent allowed a Government-owned oil refinery company, Neftochim, to operate in 1999 on discriminatory terms which made competition by Nova Plama nearly impossible (H. Tr., Day 1, January 28, 2008, pp. 23-24). The Arbitral Tribunal is not persuaded by the evidence of these allegations. In any event, allegations of

283. Respondent's final argument that, in any event, this amendment occurred after 18 February 2003, when Bulgaria exercised its right to deny the privileges of the ECT to Claimant, falls away, given that the Tribunal in this Award decides that Mr. Vautrin owned or controlled Claimant (para. 95 *supra*).
284. Given these elements, the Arbitral Tribunal finds no breach by Respondent of its obligations to Claimant under the ECT with respect to the use of Varna Port.

5. Biochim Bank

5.1 The Parties' Positions

285. Claimant states that through a State-owned bank, the Commercial Bank Biochim ("Biochim Bank"), Nova Plama received credit facilities which resulted in the accrual of significant debts owed by Nova Plama to Biochim Bank. Claimant claims that during the negotiation of Nova Plama's Recovery Plan, Biochim Bank coerced the company to accept burdensome amendments and refused to fulfil its obligations under the Debt Settlement Agreement and the Recovery Plan unless its amendments were accepted. Thus, according to Claimant, Biochim Bank refused to accept that PCL buy Nova Plama's debts to Biochim Bank at a discounted value and imposed the requirement that Nova Plama repay 100% of its debts. Biochim Bank had, in Article 4.4 of the Debt Settlement Agreement, agreed, on condition that PCL invest USD 6 million in Nova Plama within two months of the date of start-up of the Refinery, to release Nova Plama's property pledged and mortgaged to it so that PCL could use the property to attract new investment financing. Nonetheless, Biochim Bank reneged on its undertaking even though PCL fulfilled its investment commitment.
286. In addition, Biochim Bank refused to extend the time limit for repayment by Nova Plama of its debts to Biochim Bank even though such extension was

foreseen in the Recovery Plan, threatening to reopen Nova Plama's bankruptcy proceedings.

287. In 2002, Nova Plama contends it tried unsuccessfully to negotiate another debt settlement agreement with Biochim Bank. It then filed a claim against Biochim Bank in the Sofia City Court, which prompted the Bulgarian Ministry of Transport to convoke the company's management to a meeting where, according to Claimant, they were threatened that the State, as a creditor of Nova Plama, would reopen the insolvency proceedings if it did not withdraw the court action. Claimant also alleges that the chairman of Biochim Bank was convoked to a meeting in the Bulgarian Parliament and instructed not to sign a settlement agreement with Nova Plama. In effect, Claimant says, the Government, which was in the process of privatizing Biochim Bank, favored Biochim Bank to the detriment of PCL and Nova Plama, in order to increase the value of Biochim Bank for purposes of its privatization.
288. Biochim Bank was eventually privatized in June 2002 and sold to Bank Austria. According to Claimant, as soon as Biochim Bank was no longer controlled by the Bulgarian State, Nova Plama reached a debt settlement agreement with Bank Austria.
289. Because of the Government's ownership interest in Biochim Bank, Claimant submits that Biochim Bank's actions *vis-à-vis* Nova Plama violate the last sentence of Article 10(1) of the ECT by breaching contractual obligations entered into with PCL. Bulgaria is also in violation of its obligations under Article 22 of the ECT.⁶²
290. Bulgaria's intervention in the relationship of Biochim Bank with Nova Plama is also, contends Claimant, a violation of the fair and equitable treatment standard of Article 10(1) of the ECT, a violation of Bulgaria's obligation to provide PCL's investment the most constant protection and security, a subjection of PCL's investment to unreasonable measures and that it amounts,

62 See Annex for text of Article 22.

together with the other acts of Bulgaria complained of by Claimant, to an expropriation in violation of Article 13 of the ECT.

291. Respondent's reply is, essentially, that there is no persuasive evidence of State intervention in Biochim Bank's decision-making, that Biochim Bank acted in a commercially predictable and reasonable manner in its dealings with Nova Plama and that Biochim Bank did not breach any contractual obligation. On the contrary, Respondent contends, Claimant and Nova Plama made unrealistic and commercially unreasonable demands of the bank, and even when Biochim Bank agreed to terms with Nova Plama, the latter failed to fulfil its obligations.
292. Respondent says that the Debt Settlement Agreement, which provided for Biochim Bank's release of its mortgage over the Nova Plama plant, never entered into force because it was not signed by all parties, including Biochim Bank, as required by its Article 5.1, and, therefore, Biochim Bank cannot be said to have breached any contractual obligations under it. Moreover, Respondent contends that Claimant has never provided any evidence that it fulfilled its commitment to invest at least USD 6 million within two months of the date of start-up of the Refinery. Finally, Respondent contends, Biochim Bank's General Meeting of Shareholders never approved the release of its mortgage, a requirement of the Debt Settlement Agreement.
293. Respondent denies that Biochim Bank coerced Claimant to accept burdensome amendments to the Recovery Plan. It claims that PCL and Nova Plama themselves submitted an amendment to the Recovery Plan which provided that all creditors of Nova Plama, including Biochim Bank, would retain their pre-existing secured interests (R's Exh. 407). The amended Recovery Plan did not obligate Biochim Bank to release its mortgage over the Refinery. Even if Biochim Bank had released its mortgage, says Respondent, Claimant has failed to prove that it would have been able to secure additional financing for Nova Plama's operations.
294. Respondent also contradicts Claimant's assertion that as soon as Biochim Bank was privatized and no longer under Government control, Nova Plama reached a debt settlement with the bank. Respondent says it took two years of

negotiation to reach that settlement which settlement was due essentially to the unlikelihood by that time that Biochim Bank could ever recover any significant amounts from Nova Plama. Respondent says Nova Plama has never paid anything to Biochim Bank.

295. In any event, Respondent contends that the acts of Biochim Bank are not attributable to the State of Bulgaria, which cannot be responsible for them under Article 10(1) of the ECT. Nor is Article 22 of the ECT applicable, since that provision is found in Part IV of the ECT and, therefore, does not fall within the scope of an arbitration under Article 26. Moreover, Biochim Bank is and was even prior to its privatization a commercial bank governed by private law and not a “State enterprise” within the meaning of Article 22 of the ECT.

5.2 The Tribunal’s Analysis

296. As noted above, Claimant contends that Biochim Bank, a State-owned bank, “coerced” Nova Plama into accepting “*burdensome amendments*” and deliberately refused to fulfill its obligations under the Debt Settlement Agreement and the Recovery Plan, causing Nova Plama great difficulties in obtaining new financing. Moreover, Claimant alleges that the State interfered with Biochim Bank and prevented it from reaching a settlement agreement with Nova Plama prior to Biochim Bank’s privatization. Claimant attributes this unlawful conduct to the State on one of two alternative grounds: (i) because Biochim Bank was a State-owned bank and the State used its ownership interest to direct the bank’s acts; and (ii) because of the application of Article 22 of the ECT to Biochim Bank’s conduct.
297. Article 8 of the ILC Articles on State Responsibility contemplates the possibility that the conduct of companies or enterprises owned or controlled by the State be attributable to that state. In the Commentary to the Articles, the ILC notes that:

*Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their*

activities is not attributable to the State, unless they are exercising elements of governmental authority . . .⁶³

298. However, before the question of attribution arises, it is first necessary to determine whether the corporation has in fact engaged in an unlawful act. The ILC notes in this respect that “[i]f such corporations [State-owned and controlled] act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State.”⁶⁴ The Arbitral Tribunal will therefore proceed to determine whether Biochim Bank acted inconsistently with Respondent’s obligations under the ECT.
299. On the evidence before it, the Arbitral Tribunal is not persuaded that Biochim Bank acted *vis-à-vis* Claimant and Nova Plama other than reasonably for its own commercial interests. Nor does it accept Claimant’s argument that Biochim Bank’s refusal to give up its mortgage over Nova Plama’s assets amounted to a breach by Respondent of its obligations *vis-à-vis* Claimant in violation of Article 10(1) of the ECT.
300. Furthermore, while Respondent’s argument that the Debt Settlement Agreement by which Biochim Bank gave up its mortgage over Nova Plama’s assets never entered into force is correct; Biochim Bank’s refusal to give up its mortgage on Nova Plama’s assets was also accepted by Claimant and Nova Plama and confirmed in the Recovery Plan, as amended pursuant to a proposal made by Claimant itself (R. Exh. 407). Undoubtedly, Claimant was under pressure to accept Biochim Bank’s position; but it was free not to accept it and refuse to make further investments on those conditions. It still had considerable negotiating leverage at that time, given Respondent’s strong desire to see Nova Plama continue operations.
301. Nor does the Tribunal find convincing the evidence presented by Claimant that Biochim Bank breached the Recovery Plan or that Respondent exercised undue pressure on Nova Plama to force it into accepting burdensome

⁶³ Commentary to Article 8 of the ILC Articles, p. 107, para. 6.

⁶⁴ *Ibid.*

conditions. In particular, the evidence is not sufficient to substantiate the claim that Bulgaria interfered in any way with Biochim Bank's reasonable commercial decision to decline Nova Plama's settlement offer.

- 302. Under these circumstances, the Tribunal considers that Biochim Bank has not engaged in any unlawful act. There is, therefore, no need to address the question of attribution, nor the issue under Article 22 of the ECT.
- 303. In conclusion, the Arbitral Tribunal finds that Respondent has not committed any violation of its obligations under the ECT with respect to Biochim Bank.

6. Re-opened Bankruptcy Proceedings

- 304. Claimant contended that the re-opened bankruptcy proceedings in 2005 were violative of its rights (Claimant's Memorial on the Merits, paras. 229 *et seq.*). The claim was subject to supplementation, depending on the outcome of local proceedings initiated to contest the decision to re-open the bankruptcy proceedings. Claimant did not submit evidence which persuaded the Tribunal of the merits of this claim.

D. Concluding Observations

- 305. Based on all that the Arbitral Tribunal has seen and heard in this arbitration, it concludes that what happened with respect to Claimant's investment in Nova Plama is that Mr. Vautrin and PCL undertook a high risk project, without having the financial assets of their own to carry it out. It was based on an ambitious plan to borrow enough money to get the Refinery into operation, hoping thereby to generate sufficient revenues through sales of product to finance the continuing operation of the Refinery, to pay off Nova Plama's creditors over time, to pay wages to the Refinery's workers and to make a profit. Unfortunately, for reasons which, in the Tribunal's opinion, were not attributable to any unlawful actions of Bulgaria, Mr. Vautrin's plan did not work, and Nova Plama fell back into bankruptcy.

E. Damages

- 306. Since the Arbitral Tribunal has found that Claimant is not entitled to the protections of the ECT and that, in any event, Respondent did not breach its

obligations to Claimant under the ECT, the Tribunal need not address Claimant's claims for damages.

F. Costs

- 307. Claimant requests an award to it of the costs of the arbitration, including legal fees and other costs, as well as such other relief as the Tribunal may deem appropriate.
- 308. Likewise, Respondent claims all costs of the arbitration, including its legal fees and other costs, and adds that this is so regardless of whether any aspect of Claimant's case is sustained, because of the obstructionist tactics used by Claimant in this arbitration. Respondent did not claim interest on these costs.
- 309. Each Party has, pursuant to the Arbitral Tribunal's request, subdivided its costs into different categories: costs for the jurisdictional phase of the arbitration, costs for the procedure relating to Claimant's request for provisional measures, costs for the procedure relating Respondent's request for security for costs, and costs for the merits phase of the arbitration.
- 310. Accordingly, the Parties have submitted the following claims for legal and other costs (excluding advances made to ICSID):

Claimant:	USD
Jurisdictional phase:	1,662,789.49
Provisional remedies	150,211.00
Merits phase:	2,864,521.30
Total:	4,677,521.79
Respondent:	
Jurisdictional phase:	3,023,288.00
Request for urgent provisional measures:	584,024.00
Request for security for costs:	381,992.00
Merits phase:	9,254,053.00
Total:	13,243,357.00

- 311. Claimant has advanced USD 459,985 and Respondent USD 460,000 (totaling USD 919,985) on account of the fees and expenses of the members of the Arbitral Tribunal as well as ICSID's administrative charges. As of 31 July

2008, interest accrued on the advances made amounted to USD 28,076.82. Therefore, the advances plus interest amounted to USD 948,061.82.

312. The fees and expenses of the Tribunal as well as ICSID's administrative charges and expenses are the following (in USD):

Arbitrators' fees and expenses	803,866.04
ICSID's administrative charges and expenses	144,195.78
Total	948,061.82

313. The Arbitrators' fees and expenses as well as ICSID's administrative charges and expenses are paid out of the advances made by the Parties.
314. Article 61 of the ICSID Convention provides, with respect to costs, that :

[...] The Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings and shall decide how and by whom these expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

315. Rule 47(1) of the ICSID Arbitration Rules provides that the Arbitral Tribunal's Award “shall contain [...] (j) any decision [...] regarding the cost of the proceeding.”
316. Article 61 of the ICSID Convention gives the Arbitral Tribunal the discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate. In the exercise of this discretion, the Arbitral Tribunal will apply the principle that “costs follow the event,” by a weighing of relative success or failure, that is to say, the loser pays costs including reasonable legal and other costs of the prevailing party; or costs are allocated proportionally to the outcome of the case, save for the circumstances described below.

317. In this arbitration, in the jurisdictional phase, in which Respondent sought a decision that the Arbitral Tribunal had no jurisdiction, it was in part the losing party. Respondent contended, however, that whether it won or lost on its jurisdictional pleas, it should be awarded costs for that phase of the arbitration because of the behavior of Claimant (Respondent's Rejoinder on the Merits, paras. 370 *et seq.*).
318. In its Decision on Jurisdiction (para. 238), the Arbitral Tribunal criticized Claimant for not having earlier disclosed to Respondent the details of the ownership and structure of the PCL-PHL-EMU group. That failure of disclosure certainly added to the costs of Respondent during the jurisdictional phase, which have been taken into account by the Tribunal.
319. Following the Decision on Jurisdiction, Claimant made a request for urgent provisional measures, which the Arbitral Tribunal rejected entirely. The Tribunal reserved a decision on the costs resulting from the proceedings on this request to a later stage.
320. The Arbitral Tribunal convened a meeting in Paris on 16 February 2007 to consider with the Parties Respondent's request to limit the scope of further proceedings and to order Claimant to post security for costs. The Tribunal denied both of Respondent's requests (see paras. 36-42 *supra*). Mr. Vautrin testified at this meeting that "*if the costs are reasonable, Plama Consortium will pay through disposal of other assets*" (H. Tr. p. 55).
321. In the merits phase, Respondent is not only the prevailing party, but the Arbitral Tribunal has found that Claimant was guilty of fraudulent misrepresentation in obtaining its investment in Bulgaria and has denied to Claimant the protections of the ECT for that reason.
322. In light of these factors and in particular the circumstance mentioned in the preceding paragraph, the Arbitral Tribunal decides that Claimant shall bear all of the fees and expenses of the Tribunal and ICSID's administrative charges plus the reasonable legal fees and other costs incurred by Respondent.
323. As to the reasonable amount of those legal fees and other costs, taking into account all the circumstances of the present case, the Tribunal determines those fees and other costs of Respondent at USD 7,000,000.

324. Accordingly, the Tribunal determines that Claimant will bear all fees and expenses of the Arbitral Tribunal as well as ICSID's administrative charges and will order Claimant to pay to Respondent USD 460,000 on account of its advance on costs as well as USD 7,000,000 as a reasonable proportion of Respondent's legal fees and other costs.

VI. DISPOSITIVE

325. On the basis of the foregoing, the Arbitral Tribunal makes the following decisions:

1. Incorporates by reference its Decision on Jurisdiction of 8 February 2005;
2. Respondent cannot rely on Article 17(1) of the Energy Charter Treaty to deny Claimant the benefits of Part III of the Treaty until 17 February 2003;
3. Claimant is not entitled to any of the substantive protections afforded by the ECT;
4. Assuming that Claimant would have been entitled to substantive protections afforded by the ECT:
 - (a) Respondent did not violate its obligations to Claimant under the ECT with respect to issues of past environmental damages;
 - (b) Respondent did not violate its obligations to Claimant under the ECT by virtue of the actions of the syndics;
 - (c) Respondent did not violate its obligations to Claimant under the ECT with respect to the matter of taxation of "*paper profits*", even assuming that the ECT applies to this issue;
 - (d) Respondent did not breach its obligations to Claimant under the ECT with respect to the use of Varna Port;
 - (e) Respondent did not breach its obligations to Claimant under the ECT with respect to the actions of Biochim Bank;
 - (f) The Arbitral Tribunal finds no other violations by Respondent of its obligations to Claimant under the ECT;
 - (g) The Arbitral Tribunal rejects all Claimant's claims for damages;

5. Claimant bears all fees and expenses of the Arbitral Tribunal as well as ICSID's administrative charges, being USD 919,985, which are paid out of the advances made by the Parties.
6. Claimant is ordered to pay Respondent USD 460,000 on account of Respondent's advance on costs as well as USD 7,000,000 on account of Respondent's legal fees and other costs.
7. All other claims and requests by the Parties are rejected.

1 - 3

Professor Albert Jan van den Berg
Arbitrator

[August 18, 2008]

Van Den Berg

V.V. Veeder
Arbitrator

[August 13, 2008]

Carl Salans

Carl F. Salans
President

[August 8, 2008]

ANNEX

ECT

Article 1 - Definitions

As used in this Treaty:

...

(6) "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
- (d) Intellectual Property;
- (e) Returns;
- (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

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.

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

(7) *"Investor" means:*

(a) with respect to a Contracting Party:

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

(b) with respect to a "third state", a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.

...

Article 10 – Promotion, Protection and Treatment of Investments.

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investment shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use,

enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

(2) *Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).*

(3) *For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.*

(4) *A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to Investors of other parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3). That treaty shall be open for signature by the states and Regional Economic Integration Organizations which have signed or acceded to this Treaty. Negotiations towards the supplementary treaty shall commence not later than 1 January 1995, with a view to concluding it by 1 January 1998.*

(5) *Each Contracting Party shall, as regards the Making of Investments in its Area, endeavour to:*

(a) limit to the minimum the exceptions to the Treatment described in paragraph (3);

(b) progressively remove existing restrictions affecting Investors of other Contracting Parties.

(6)(a) *A Contracting Party may, as regards the Making of Investments in its Area, at any time declare voluntarily to the*

Charter Conference, through the Secretariat, its intention not to introduce new exceptions to the Treatment described in paragraph (3).

(b) A Contracting Party may, furthermore, at any time make a voluntary commitment to accord to Investors of other Contracting Parties, as regards the Making of Investments in some or all Economic Activities in the Energy Sector in its Area, the Treatment described in paragraph (3). Such commitments shall be notified to the Secretariat and listed in Annex VC and shall be binding under this Treaty.

(7) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

(8) The modalities of application of paragraph (7) in relation to programmes under which a Contracting Party provides grants or other financial assistance, or enters into contracts, for energy technology research and development, shall be reserved for the supplementary treaty described in paragraph (4). Each Contracting Party shall through the Secretariat keep the Charter Conference informed of the modalities it applies to the programmes described in this paragraph.

(9) Each state or Regional Economic Integration Organization which signs or accedes to this Treaty shall, on the date it signs the Treaty or deposits its instrument of accession, submit to the Secretariat a report summarizing all laws, regulations or other measures relevant to:

- (a) exceptions to paragraph (2); or
- (b) the programmes referred to in paragraph (8).

A Contracting Party shall keep its report up to date by promptly submitting amendments to the Secretariat. The Charter Conference shall review these reports periodically.

In respect of subparagraph (a) the report may designate parts of the energy sector in which a Contracting Party accords to Investors of other Contracting Parties the Treatment described in paragraph (3).

In respect of subparagraph (b) the review by the Charter Conference may consider the effects of such programmes on competition and Investments.

(10) Notwithstanding any other provision of this Article, the treatment described in (3) and (7) shall not apply to the protection of Intellectual Property; instead the treatment shall be as specified in the corresponding provisions of the applicable international agreements for the protection of Intellectual Property rights to which the respective Contracting Parties are parties.

(11) For the purposes of Article 26, the application by a Contracting Party of a trade-related investment measure as described in Article 5(1) and (2) to an Investment of an Investor of another Contracting Party existing at the time of such application shall, subject to Article 5(3) and (4), be considered a breach of an obligation of the former Contracting Party under this Part.

(12) Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.

Article 12 – Compensation for Losses

(1) Except where Article 13 applies, an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment which is most favourable of that which that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third state.

...

Article 13 - Expropriation

(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:

- (a) for a purpose which is in the public interest;
- (b) not discriminatory;
- (c) carried out under due process of law; and
- (d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis, of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

(2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).

(3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.

Article 17 – Non-Application of Part III⁶⁵ in Certain Circumstances.

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

(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; ...

⁶⁵ Part III of the ECT provides for the treatment to be accorded by the Contracting Parties to investments covered by the Treaty in their territory and includes Articles 10, 13 and 17 quoted in the Annex to this Award.

- (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.*

Article 22 - State and Privileged Enterprises

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

Article 26 – Settlement of Disputes Between An Investor and a Contracting Party.

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

...

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a)(i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the “ICSID Convention”), if the Contracting Party of the Investor and the Contracting Party to the dispute are both parties to the ICSID Convention;

...

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

...

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute.

...