

The Jurisdiction Problem In Energy Charter Treaty Claims

Arbitral proceedings; Energy; International investment disputes; Jurisdiction; Retrospective legislation; Treaty interpretation

By Laurence Shore

Introduction

Is there a significant threshold barrier for claims made under the Energy Charter Treaty (ECT) that arbitral tribunals should recognise, even though one eminent tribunal has already indicated that any threshold barrier is formalistic and low? The holding in *Plama Consortium Limited v Republic of Bulgaria*¹ is important not simply because of the policy implications that one may glean from it.² The *Plama* Decision on Jurisdiction raises, as a matter of treaty interpretation and international law, a cluster of questions in relation to ECT arbitral jurisdiction: (1) whether allegations of investor/investment status should suffice to carry the claimant to the merits stage of the proceedings; (2) whether ECT Art. 17³ relates to the jurisdictional stage of the proceedings, and; (3) how contracting parties avail themselves of their Art. 17 rights, and whether their actions in seeking to do so only have prospective effect.

Regardless of one's views on whether the *Plama* tribunal answered all or some or none of these questions correctly, the *Plama* Decision on Jurisdiction can be said to represent a further step in making investor-state arbitral proceedings, in the words of one distinguished arbitrator, a "pale replica of the State court system".⁴ Through its reliance on an Opinion by Judge Rosalyn Higgins and by comparing itself, an "ephemeral arbitral tribunal", to the International Court of Justice (ICJ),⁵ the *Plama* tribunal converted a jurisdictional challenge into a motion to dismiss (in US state court terms): that is, the tribunal stated that it would accept the claimant's factual allegations as true in order to decide a jurisdictional objection at an early stage of the proceedings.⁶

While commercial arbitration experts seek to move commercial arbitration back to its historical origins,⁷ encouraging arbitrators to make early decisions and streamline cases, the *Plama* tribunal expressly resisted having to make factual determinations at the jurisdictional stage of the proceedings. An increasing separation of the commercial and investment treaty arbitration worlds may be called for by treaty interpretation and international law. If this separation means that investment treaty arbitration does in fact become a variant of state court litigation (including an appellate mechanism), that may not necessarily be a bad thing.

Under the *Plama* view of the arbitration world created by the ECT, the respondent contracting party waits, as a practical matter, for the merits stage of the proceedings for a substantive determination of whether the arbitral tribunal was genuinely seized of the dispute. However, other tribunals assessing ECT claims may wish to explore the international law foundations of the *Plama* perspective before entering this world. Even when the *Plama* tribunal persuasively explains that a close reading of the ECT relegates a contracting party's invocation of Art. 17 to the merits stage of the proceedings, there is still the first question whether a tribunal should make factual determinations, as opposed to accepting bare allegations, regarding investment/investor status. Moreover, unbound by the *Plama* tribunal's ruling on Art. 17, another ECT-created arbitral tribunal might, under Art. 31 of the Vienna Convention, come to a different conclusion on Art. 17 as a matter for the merits (and/or on its prospective effect).

The ECT's investment/investor requirements and the arbitration mechanism

The pertinent provisions of the ECT may be summarised as follows. First, there are the definitions of “Investment” and “Investor” in Art. 1. “Investment” is defined broadly, in Art. 1(6), to mean “every kind of asset, owned or controlled directly or indirectly by an Investor”, and a list of what “Investment” includes is provided at Art. 1(6)(a)-(f). Article 1(6) clarifies that “Investment”:

“refers to any investment associated with an Economic Activity in the Energy Sector [defined at Article 1(5)] 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”.

“Investor” is defined at Art. 1(7) and, with respect to a contracting party, means:

“(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”.

Article 2 of the ECT states that its purpose is to establish:

“a legal framework in order to promote long-term cooperation in the energy fields, based on complementarities and mutual benefits, in accordance with the objectives and the principles of the [European Energy] Charter”.

Part III of the ECT concerns “Investment Promotion and Protection”. The final article of Pt III, Art. 17, provides for the “Non-Application of Article III 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; or
2. an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:
 - a. does not maintain a diplomatic relationship; or
 - b. adopts or maintains measures that:
 - (1.) prohibit transactions with Investors of that state; or
 - (2.) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments”.

Part 5 of the ECT addresses “Dispute Settlement”. Article 26 is lengthy, and I shall not reproduce it in full here; specific provisions of the Article are considered below. However, at this point it may be useful to be reminded, in very summary form, of the outline of Art. 26:

- para.(1) references disputes between a contracting party and an investor of another contracting party:

“relating to an Investment of the latter in an Area of the former, which concern an alleged breach of the former under Part III”;
- para.(2) gives the investor certain options for dispute resolution;
- para.(3) refers to the contracting party’s unconditional consent to international arbitration;

- para.(4) refers to the Investor’s selection of International Centre for Settlement of Investment Disputes (ICSID) (or ICSID Additional Facility) arbitration or United Nations Commission on International Trade Law (UNCITRAL) ad hoc arbitration or Stockholm Chamber of Commerce arbitration;
- para.(5) refers to the consent to arbitration and “agreement in writing” requirements of the ICSID and New York Conventions as being satisfied by the para.3 consent and para.4 submission to arbitration;
- para.(6) states that the arbitral tribunal “shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law”;
- para.(7) refers to ICSID Convention Art.25(2)(b) and addresses the question of foreign control of an Investor “other than a natural person” which has the nationality of a contracting party to the dispute; and,
- para.(8) concerns arbitration awards.

A useful overview of the “basic mechanism” of arbitration in the ECT is provided in Professor Walde’s article, “Investment Arbitration Under the Energy Charter Treaty—From Dispute Settlement to Treaty Implementation”.⁸

It is apparent from Pts III and IV of the ECT that a claimant must satisfy the condition of being an “Investor” of a contracting party with an investment in the area of another (the respondent) contracting party in order to avail itself of the arbitration mechanism.⁹ Article 17, however, does not specify how and when its provisions relate to those of Art.26, although it is apparent that Art.17(1) relates to “Investor” status and Art.17(2) relates to “Investment” status, and Pt III’s “advantages” — Pt V’s dispute resolution options are not mentioned — may be denied by a contracting party if a legal entity or an investment has certain characteristics. In the case of Art.17(2), it is expressly stated that the contracting party must establish these characteristics; no such burden is identified in Art.17(1).

The ICJ and investment treaty tribunals: the jurisdictional threshold test

Should an ECT Art.26 arbitral tribunal accept the claimant’s allegations as true in determining a jurisdictional objection? The *Plama* tribunal looked to the ICJ, in particular Judge Higgins’s separate Opinion in the *Oil Platforms* case,¹⁰ as well as other investment treaty tribunals, for guidance on this question. Accordingly, one should review these cases, briefly, to consider what the court or tribunal ruled that the claimant had to show for jurisdiction to be entertained.¹¹

The *Plama* tribunal relied in large part on the discussion of jurisdiction in *Salini v Jordan*,¹² which summarises some of the pertinent holdings; it is also helpful to turn to *Impregilo v Pakistan*, which contains a summary almost identical to that in *Salini*.¹³ Both *Impregilo* and *Salini* begin their summary with the observation that “[w]hen considering its jurisdiction to entertain” treaty claims, the arbitral tribunal:

“must not address the merits of the claims, but it must satisfy itself that it has jurisdiction over the dispute, as presented”.

Both then quote from the *Ambatielos* case,¹⁴ in which the ICJ reasoned that in order to decide whether the Hellenic Government’s claim on behalf of Mr Ambatielos was “based on” the Treaty of 1886, the Court did not need to decide whether the Hellenic Government’s interpretation of the Treaty was correct:

“The Court must determine, however, whether the arguments advanced by the Hellenic Government in respect of the treaty provisions on which the Ambatielos claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty. It is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty of 1886”.

Salini and *Impregilo* then comment that more recently the ICJ has not referred to the “plausibility” of claims and has

“used more objective criteria”¹⁵ Here, both tribunals quote from *Oil Platforms*, and point to the following holding (the Court’s holding, not Judge Higgins’s separate Opinion):

“the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain...”¹⁶

The *Salini* tribunal omitted any mention of the separate Opinion of Judge Higgins.¹⁷ The *Impregilo* tribunal quoted from the separate Opinion’s section on accepting “pro tem the facts as alleged by [claimant] to be true”, but only in a footnote, and simply reporting its existence without expressing approval or disapproval: “In her separate Opinion, Judge Higgins proposed the following approach ...”¹⁸ It is difficult, in these circumstances, to view either the *Salini* or *Impregilo* decisions as endorsing Judge Higgins’s “accept the facts as alleged to be true” test. Rather, the quotations relied on in *Ambatielos* and *Oil Platforms* suggest application of, at the very least, a “sufficiently plausible character” test and, more likely, a higher “objective criteria” standard by which some assessment is made of the necessary facts and law to reach a jurisdictional decision. Bare allegations would not appear to be sufficient — and this does not even take into account the point made above (fn.11) regarding the justification for a higher standard, entailing determination of facts, when the jurisdictional issue is *ratione personae* (investor/investment status).

However, the jurisdictional test is not greatly clarified by the remainder of the summaries in *Salini* and *Impregilo*. The two tribunals referred to the cases concerning the Legality of Use of Force in Yugoslavia.¹⁹ The ICJ’s formulation in these cases could be read to mean that a mere allegation of breach, if later found to be true, is sufficient jurisdictionally, but the ICJ actually concluded at the jurisdictional stage that the “bombings which form the subject of the Yugoslav Application” lacked “the element of intent”, and therefore there was no “jurisdiction *prima facie*”.²⁰ That is, the ICJ clearly made a factual investigation and determination at the preliminary stage of the proceedings — which is not the Judge Higgins test.

After the discussion of the cases concerning the Legality of Use of Force in Yugoslavia, the summaries address investment treaty arbitral tribunals, although they diverge in the order in which they address these cases. *Salini* first considers the *SGS v Philippines* case (see below), and *Impregilo* first considers *SGS v Pakistan*.²¹ The quotations from *SGS v Pakistan* as reported in both *Impregilo* and *Salini* crystallise the problem.²² The *SGS v Pakistan* arbitral tribunal stated that:

“if the facts asserted by the Claimants are capable of being regarded as alleged breaches of the BIT consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits”.

This sounds like Judge Higgins’s formulation. However, *Salini* and *Impregilo* immediately juxtapose this quotation with the following one from the same case:

“We do not exclude the possibility that there may arise a situation where the Tribunal may find it necessary at the very beginning to look to the Claimant’s factual claims but this is not such a case”.

This does not sound like the Judge Higgins formulation, and since the *Plama* tribunal relied on *Salini* it would have been helpful if the *Plama* tribunal had considered whether, under the *SGS v Pakistan* explanation of the jurisdictional test, allegations concerning investor/investment status — jurisdiction *ratione personae* — are precisely the types of allegations that require examination “at the very beginning”. At the very least, *SGS v Pakistan* casts some doubt on the strength of the *Plama* tribunal’s conclusion (at [119]) that Judge Higgins’s formulation is not “in any sense controversial”.

Salini and *Impregilo* also commented on *SGS v Philippines*, a case where the arbitral tribunal stated that the mere assertion by the claimant of the existence of a dispute (as to fair treatment and expropriation) is not enough to establish jurisdiction.²³ Again, this suggests that something more is required than the Judge Higgins “motion to dismiss” test, pursuant to which the *Plama* tribunal understood that mere assertion of investor/investment status was enough. The

Salini and *Impregilo* tribunals repeatedly attempt to balance, in their summaries, the potential sufficiency of mere allegation of a dispute cognisable under the relevant investment treaty with the understanding that the:

“test for jurisdiction is an objective one and its resolution may require the definitive interpretation of the treaty provision which is relied on”.²⁴

Indeed, both summaries conclude with a call for balance, expressing “full agreement” with jurisprudence that itself does not appear to define a balance but comprises two competing concerns, one of which a tribunal may give greater credence to given particular circumstances:

“It [this jurisprudence] reflects the balance to be struck between two opposing preoccupations: to ensure that courts and tribunals are not flooded with claims which have no chance of success and sometimes are even of an abusive nature; but to ensure equally that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate. In conformity with this jurisprudence, the Tribunal will accordingly seek to determine whether the facts alleged by the claimants in this case, if established, are capable of coming within those provisions of the BIT which have been invoked”.²⁵

In the particular dispute before them, the *Salini* and *Impregilo* tribunals clearly interpreted the “balance to be struck” to mean the application of a test (the facts alleged, if established) that sounds very much like the Judge Higgins test (taking the claimant’s factual allegations as true for the purposes of determining jurisdiction).²⁶

The above analysis suggests that, contrary to the conclusion reached by the *Plama* tribunal and despite the jurisdictional test ultimately applied by the *Salini* and *Impregilo* tribunals, the Judge Higgins proposal is in some respects controversial and in others simply unexamined (jurisdiction *ratione personae*). ECT arbitral tribunals in coming years that are faced with an objection to investor/investment status should perhaps pay attention to the *SGS v Pakistan* caution that the “Tribunal may find it necessary at the very beginning to look to the Claimant’s factual claims”. If an ECT tribunal did so, it would not necessarily be working out of harmony with ICJ judgments or investment treaty decisions or other ECT awards — or even Judge Higgins’s proposal. Accordingly, when the *Plama* tribunal ruled that:

“[a]pplying Judge Higgins’ approach to disputed facts, the Tribunal must accept, *pro tem*, the investment as alleged by the Claimant; and on this ground alone, the Tribunal decides that Bulgaria’s submission fails”,²⁷

it should be recognised that the Judge Higgins “motion to dismiss” approach is neither compelled by treaty interpretation nor by international law.²⁸

ECT Article 17 - jurisdiction or merits?

As discussed above, under Art. 17 each contracting party reserves the right to “deny the advantages” of Pt III to certain legal entities (that are effectively shell companies controlled by nationals of a third state) and to investments of investors from certain third states. The initial question for the *Plama* tribunal was whether Art. 17(l) only related to merits and not to jurisdiction.²⁹ The tribunal answered this question in the affirmative.³⁰ Its reasoning may be summarised as follows³¹:

- Article 17 expressly and unambiguously refers to ECT Pt III and the advantages conferred to an investor by Pt III.
- Pursuant to the directions of Art. 31 of the Vienna Convention (interpreting treaty terms in “good faith in accordance with their ordinary contextual meaning”),³² the denial of advantages only applies to Pt III.
- It would therefore be wrong to make the denial refer to Art. 26 in Pt V of the ECT.

- Article 26 “provides a procedural remedy for a covered investor’s claims”;³³ ; it is not part of the substantive advantages enjoyed by an Investor under Pt III.
- Further, there must be a procedure to resolve a dispute as to whether the Art. 17 exclusion applies, and the ECT requires (in object and purpose) Art. 26 “to be unaffected by the operation of Article 17(1)”.³⁴
- If Art. 26 is not available to a covered investor, how would a dispute over the applicability of Art. 17(1) be determined? Under the respondent state’s reasoning, no remedy would be available, and in relation to a covered investor, the contracting party “is the judge in its own cause”, which is a “license for injustice”.³⁵
- ECT Art. 27 (settlement of state-state disputes) also points to Art. 17 being inapplicable to the jurisdictional stage: “the Contracting Party’s right to arbitration is unqualified by the host state’s invocation of Article 17(1)”; and a contracting party could claim against the host state for improper reliance on Art. 17(1). This seems “unnecessarily complicated”, when instead the covered investor could simply proceed under Art. 26, under the ordinary meaning of Art. 17(1). After all, under the ECT the covered investor is “more than an object of international law”.³⁶

This is in certain respects a persuasive interpretation of Art. 17(1) in conjunction with Art. 26. It is undeniable that Art. 17 appears in Pt III and only refers to Pt III. Still, subsequent ECT tribunals may be hesitant in adopting this interpretation (particularly when it is coupled with the *Plama* position that a “covered investor” becomes so for jurisdictional purposes simply by asserting that it is covered).³⁷ It is a perfectly plausible reading of ECT Arts 1(7), 17 and 26, pursuant to Art. 31 of the Vienna Convention, to find that as Art. 17(1) relates so centrally to the Art. 26(1) requirements of investor status (“Investor of another Contracting Party”) and a breach of a Pt III obligation, that it constitutes a jurisdictional consideration for an arbitral tribunal. Indeed, in this respect Art. 17(1) might be distinguished from Art. 17(2), which concerns a denial of Pt III advantages to an “Investment” and expressly requires that the denying contracting party “establishes” that the investment has certain characteristics. The *Plama* tribunal did not appear to find any significance in this distinction between paras 1 and 2 of Art. 17, though the lack of an express burden on the State in para.1 at least suggests that Art. 17(1)

Moreover, the *Plama* tribunal’s observations on the unnecessary complications resulting from treating Art. 17(1) as jurisdictional, as well as the unfairness of making the state “the judge in its own cause”, seem overstated. One could equally comment on the unfairness to the respondent state and unnecessary complications from reserving to the merits stage the consideration of whether the “Investor” is a legal entity to which the state can avoid liability. As for being a “judge in its own cause”, this is, as a practical matter, not a consequence of treating Art. 17(1) as a jurisdictional matter under Art. 26. A claimant believing itself entitled to Pt III’s protections and believing that a contracting party had not supplied such protections, with the state wrongly invoking Art. 17(1), would not be precluded from bringing a claim and contesting the Art. 17(1) denial to an arbitral tribunal.³⁸

Further, it is clear from Art. 17(2) that the state must establish its right to deny Pt III advantages to a particular type of investment — but surely this does not mean establish to its own satisfaction or to that of another contracting state. This “establish” squarely puts the burden of proof on the state, if a claim is brought before an arbitral tribunal. A proper contextual reading would, in this respect, also link Art. 17 to Art. 26. In short, subsequent ECT tribunals, which are of course not bound by *Plama*, should not be deterred from revisiting the question whether, as a matter of the ordinary meaning of the terms of ECT Arts 17 and 26 in their context, Art. 17(1) is only referable to the merits stage of an arbitration.

ECT Article 17—retrospective or prospective

The *Plama* tribunal also gave extended consideration to the matter of how ECT Art. 17 operates: the tribunal concluded that a contracting party must exercise its right to deny Pt III’s advantages, and that such exercise only has prospective effect.³⁹ The tribunal’s reasoning on this issue may be summarised as follows:

- The “existence of a ‘right’ is distinct from the exercise of that right”⁴⁰.
- Article 17(1) is drafted in permissive terms.
- If Art. 17(1) did not require exercise of the right, it would have been much easier to draft wording to that effect (using the ASEAN Framework Agreement on Services of December 1995, Art. VI, as an example).
- Requiring the exercise of the right is consistent with the ECT’s object and purpose.
- A general declaration in an official gazette would serve as exercise of the right, as would other steps (including, e.g. “an exchange of letters with a particular investor or class of investors”).⁴¹
- As for prospective versus retrospective effect, the language of Art. 17(1) is not clear, though the use of the present verb tense suggests a prospective effect.
- Considering the object and purpose of the ECT, particularly as stated in Art. 2,⁴² the right’s exercise should have prospective effect, e.g. this will enable the putative investor to plan its business affairs appropriately.
- Retrospective effect would not accord with the good faith interpretation of Art. 17(1) in light of the ECT’s object and purpose.

Perhaps the real guidance that *Plama* gives in this part of its decision is to contracting parties. After reading *Plama*, the prudent ministry of justice or state organ may want to make a declaration in its official gazette (if not add a provision to its investment legislation) regarding the exercise of its Art. 17 rights (and seek to go further by including a statement that it does so for the avoidance of any doubt, but that its position is that such an announcement is not required by the ECT and in any event has retrospective effect).

The prudent ECT arbitral tribunal may want to revisit some of the points that the *Plama* tribunal relied on. Although it was surely correct to point out that the existence and exercise of a right are distinct, and that those favouring a non-exercise interpretation will find it difficult to explain why an ASEAN-style wording was not adopted, it is surely the case⁴³ that Art. 17(1) would put a careful “Investor” on reasonable notice that a contracting party might rely on its provisions. The *Plama* tribunal itself assumed⁴⁴ that a putative investor in a contracting state would pay careful attention to the ECT’s provisions; in these circumstances, the language of Art. 17 would appear to constitute more than “half a notice”⁴⁵ that structuring an investment through a shell gives the host contracting state an option to deny Pt III’s advantages.

If one accepts the *Plama* position that a notice is required, and that it must be reasonably available to investors and their advisers, there may be an argument that anything less than a statutory provision (assuming that there has not been an exchange of letters, which, although it has the virtue of clarity, hardly seems reasonable to expect from a contracting party) actually provides reasonable notice. Moreover, if one accepts that a notice is required, the *Plama* tribunal’s determination that such notice would only have prospective effect rests heavily on its account of the object and purpose of the ECT and considerations of fairness to the investor who makes “long term” plans. However, subsequent ECT tribunals may consider *Plama*’s discussion of the ECT’s object and purpose in this regard to not be fully developed. Mr Chalker’s critique of *Plama* on these points⁴⁶ is worthy of attention and indicates the need to give greater consideration to the Charter, the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, and ECT Understanding 3. He notes that it could be argued “that the retrospective effect of Art. 17(1) would benefit ‘long-term cooperation’ by encouraging investors to be up front about ownership, control, nationality and citizenship”.⁴⁷ Subsequent ECT tribunals may well find that giving an Art. 17 notice retrospective effect is a good faith interpretation of Art. 17(1) — particularly when, as *Plama* conceded, the language of Art. 17(1) is “not by itself clear on this important point”.⁴⁸

Conclusion

ECT jurisdictional decisions and awards are, to date, still relatively few. *Plama* will be used as guidance by many subsequent ECT (and in certain respects, by other investment treaty) arbitral tribunals. In particular, these subsequent tribunals may look to *Plama* for assistance in determining two thorny jurisdictional issues: (1) the test to apply at the jurisdictional stage to challenges to investor/investment status, and (2) whether ECT Art. 17(1) applies to the jurisdictional stage of the arbitral proceedings. The above analysis suggests that the answers given by the *Plama* tribunal are not compelled by interpretation of the ECT or international law rules and principles, and are not particularly persuasive. Subsequent tribunals should not adopt them without very careful further consideration. Further, the *Plama* tribunal's determination that a contracting party's Art.17(1) notice only has prospective effect appears to rest on a less than extensive examination of the object and purpose of the ECT. In a field where decisions and awards do not have precedential effect but are often closely followed, one might observe that hard cases can make for questionable guidance.

Endnotes

1. ICSID Case No.ARB/03/24. Decision on Jurisdiction, February 8, 2005. Tribunal: C. Salans, A. van den Berg, V. Veeder.
2. See, in regard to policy implications, two articles by James Chalker. "Making the Energy Charter Treaty Too Investor Friendly: *Plama Consortium Limited v. The Republic of Bulgaria*" (2006) 3 *Transnational Dispute Management* (TDM) 1, and "Making the investment provisions of the Energy Charter Treaty sustainable development friendly" in *International Environmental Agreements* (Netherlands. Springer, 2006). Vo1.6. No.4, pp.435-458; and a response to the second article by Professor Thomas Walde. "Investment arbitration and sustainable development: good intentions-or effective results?" in *International Environmental Agreements* (Netherlands. Springer, 2006). Vo1.6. No.4. pp.459-466. It should be noted that the TDM article by Mr Chalker is intended to be more a critique of the legal reasoning and international law position in *Plama* than an examination of policy, though Mr Chalker would surely have to concede that a strong policy slant informs his legal analysis.
3. ECT Art.17. is described more fully in the following section (p.59).
4. Alan Redfern. "Investor-State Arbitrations-A Bridge Too Far?" in *Global Reflections on International Law. Commerce and Dispute Resolution; Liber Amicorum in honour of Robert Briner* (Aksen. Bockstiegel, Mustilli, Patocchi, and Whitesell eds. Paris. ICC Publishing, 2005). pp.665-675 at p.675.
5. On Judge Higgins, see *Plama* at [118]-[119]. and Chalker. TDM article, above fn.2. pp.11-15; on "ephemeral arbitral tribunal", see Jan Paulsson. "Jurisdiction and Admissibility" in *Global Reflections on International Law* (above fn.4). pp.601-617, at p.616. fn.47. Mr Paulsson's observations on this point are especially instructive:

"In cases where the State parties have given broad consent to ICJ jurisdiction, arguments about nationality or exhaustion of local remedies may be classified as matters of admissibility because the Court's authority in a general sense remains. If an ephemeral arbitral tribunal is established under a treaty which contains requirements as to the nationality of private claimants ... the claims as such are perhaps subject to no impediment but the *forum seized* is lacking one of the elements required to give it life in the first place. For such a tribunal these are matters of jurisdiction" (emphasis in the original).
6. *Plama* at [118]. [119]. [128]. [132] and [178]. See also the new (effective April 10, 2006, and therefore not applicable to *Plama*) ICSID Arbitration r.41, which in para.(5) expressly gives a party the right, in what I have termed "motion to dismiss"-style, to "file an objection that a claim is manifestly without legal merit". This r.41(5) objection is to be distinguished from the r.41(1) objection to jurisdiction. (One of the procedural points of difference is that the former objection requires a decision by the tribunal at its first session "or promptly thereafter", whereas the latter may be joined to the merits of the dispute (pursuant to para.(5)).
7. See, e.g. a paper recently issued (March 2007) by the ICC Commission on Arbitration, "Techniques For Controlling Time and Cost in Arbitration". To be sure, this backward movement is itself at an early stage; it has been called for precisely because many arbitrators and arbitration counsels have adopted State court litigation approaches. Moreover, joining a jurisdictional decision to the merits is by no means unheard of in international commercial arbitration. But joining jurisdiction to the merits still usually entails a separate factual determination on jurisdiction before reaching the merits.
8. *Arbitration International*, Vo1.12, 1996, No.4, 429-466.
9. *Ibid.*, at pp.452-454; see also *Petrobart Limited v the Kyrgyz Republic*, Arbitration Institute of the Stockholm Chamber of Commerce, Stockholm, Award, Arbitration No.126/2003, Tribunal: H. Danelius, O. Bring, J. Smets, at 68-73, where the tribunal (in an ECT case) clearly considered that it had to come to a finding on investor/investment status as a matter of jurisdiction, and made a factual determination without merely accepting the claimant's allegations as true. This was a matter to be resolved before the tribunal examined the question of breach of the ECT (though there was not a decision on jurisdiction that was published separately from the Award). The Petrobart tribunal also considered Art.17. Although the Award does not state that Art.17 was a matter for the jurisdictional stage of the arbitral proceedings, it appears from the text of the Award that the tribunal treated the State's Art.17(1) objection as a jurisdictional matter; this objection was apparently determined before the tribunal even considered the claimant's investor/investment status. See p.63 of the Petrobart Award. In another ECT case, *Nykomb Synergetics Technology Holding AB v the Republic of Latvia*, Arbitration Institute of the Stockholm Chamber of Commerce, Stockholm,

Award, December 16, 2003, Tribunal: B. Haug, R. Schutze, J. Gernandt, at [2.1]-[2.2], the tribunal identified investor/investment status as a jurisdictional issue, but did not need to make a decision on the appropriate test to apply at the jurisdictional stage since it was not disputed that the claimant qualified as an investor and its acquisition of shares and giving of credits constituted investments under the ECT. An Art. 17 issue was not before the Nycomb tribunal.

10. *Plama* at [118]-[132]. See ICJ Reports 1996, II, 803. According to the *Plama* tribunal, the key passages in Judge Higgins' separate Opinion are at paras 28, 32 and 34. Judge Higgins commented, inter alia, that in the present case before the ICJ, the

“only way in which ... it can be determined whether the claims of [claimant] are sufficiently plausibly based upon the 1955 Treaty is to accept pro tern the facts as alleged by [claimant] to be true ...”

Judge Higgins added that “what is for the merits ... is to determine what exactly the facts are ...”

11. In these cases and in *Plama*, the question whether jurisdiction *ratione personae* should entail a different test is not addressed, though investor/investment status falls in this category, and, arguably, there would be a greater justification for not following Judge Higgins's approach when the question is jurisdiction *ratione personae* and therefore an assessment of the facts at this clearly preliminary stage-and not simply accepting them as alleged by the claimant-is called for. In Judge Higgins' separate Opinion and in many of the other cases, the concern was whether the claimant's allegations stated a breach of treaty (i.e., whether a party's claims fall under the treaty invoked), and there was an understandable concern that, at the jurisdiction stage, the court or tribunal should avoid making an assessment of whether there actually had been a breach of the treaty.

12. *Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan*, ICSID Case No.ARB/02/13, Decision on Jurisdiction, November 15, 2004, Tribunal: G. Guillaume, B. Cremades, I. Sinclair, at [137]-[151]. Mr Chalker's TDM (fn.2 above) article reviews *Salini v Jordan*, but his critique of *Plama's* treatment of that Decision, despite some interesting points (see below), may be regarded as overstated and lacking a certain depth of research and analysis.

13. *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No.ARB/03/3, Decision on Jurisdiction, April 22, 2005, Tribunal: G. Guillaume, B. Cremades, T. Landau, at [237]-[254], is a later decision (appearing two and a half months after the *Plama* Decision) that considers and repeats much of what *Salini v Jordan* had to say about the test for jurisdiction. It will be noted that two-thirds of the *Salini v Jordan* tribunal sat on the *Impregilo* panel.

14. *Ambatielos* case (preliminary objections). Judgment of July 1. 1952. 1952 ICJ Reports. p.28; *Ambatielos* case [Merits]. Judgment of May 19. 1953. 1953 ICJ Reports . p.10. See *Salini v Jordan* at [138]; *Impregilo* at [238].

15. *Salini v Jordan* at [139]; *Impregilo* at [239].

16. (1996) ICJ Reports. II. p.810 at [16]-[17].

17. An omission noted by Mr Chalker in his TOM article (fn.2 above). at p.13.

18. *Impregilo*. at fn.103.

19. *Salini v Jordan* at [140]; *Impregilo* at (240).

20. *Salini v Jordan* at [146]; *Impregilo* at [247].

21. *Salini v Jordan* at [141]; *Impregilo* at [243].

22. *Salini v Jordan* at [147]; *Impregilo* at [248].

23. *Salini v Jordan* at [141]; *Impregilo* at [241]-[242] (which includes the additional passage from *SGS v Philippines* that is specifically referenced here). It should be noted that the Partial Award in *Eureka v Poland* differs from *SGS v Philippines* and is consistent with the Judge Higgins (and *Plama*) approach; the Eureka tribunal was satisfied by the claimant's mere assertion that it had brought treaty claims. See *Eureka v Poland*, ad hoc arbitration, Partial Award, August 19, 2005. This Partial Award can be found on the Investment Claims website-(www.investmentclaims.com).

24. *Salini v Jordan* at [142]; *Impregilo* at [243].

25. *Salini v Jordan* at [151]; *Impregilo* at [254].

26. Chalker, TDM article (fn.2 above), pp.11-13, contends that the *Plama* tribunal's citation of the *Salini v Jordan* “balancing” test is “misleading” in that it incorrectly tilts the balance toward the conclusion the tribunal wished to reach on eschewing a factual determination at the jurisdictional stage. This contention is an example of Mr Chalker's tendency to aggressively overstate his position. The *Plama* tribunal's reading of the conclusion of the *Salini v Jordan* summary reasonably recapitulates the position that the *Salini v Jordan* tribunal ultimately reached. One may reasonably contend that the *Salini v Jordan* conclusion did not take into full account some of the tribunal positions (e.g. *SGS v Pakistan* and *SGS v Philippines*) it quoted, but that, given the case before it, applied an appropriate jurisdictional test. In other circumstances (a point that Judge Higgins's separate Opinion appeared to acknowledge, by prefacing her comments with the phrase, “in the present case”) another test might be appropriate. Such other circumstances could be jurisdiction *ratione personae* (i.e. Investor/Investment status) in ECT cases.

27. *Plama* at [128].

28. *ibid.*, at [129], where there is a hint that had the respondent made an earlier submission challenging the claimant's “Investment” as satisfying Art.1(6) of the ECT, the tribunal might have taken the *SGS v Pakistan* approach of assessing the factual allegations at the jurisdictional stage.

29. *Plama*, at [146].

30. Above fn.29 at [151].

31. Above fn.29 at [147]-[150].
32. Above fn.29 at [147] .
33. Above fn.29 at [148].
34. Above fn.29.
35. Above fn.29 at [149].
36. Above fn.29 at [150].
37. Moreover, it is not apparent that, prior to *Plama*, the *Petrobart* tribunal took the same view of Art.17 being a matter for the merits; see fn.9 above. should be jurisdictional and Art.17(2) should perhaps be reserved to the merits stage.
38. The *Plama* tribunal, at [149], disagrees, and points to the ICSID Convention Art.36(3) gatekeeper function of the Secretary-General, which the State would demand be triggered against registration. However, any demand by the State would not close the gate, because the Secretary-General must make a negative registration decision on the basis of the information contained in the claimant's request for arbitration, and can only refuse registration if that information leads her to find that "the dispute is manifestly outside the jurisdiction of the Centre". This is hardly a high barrier to such a claim going forward to an ICSID tribunal (as *Plama* was). It should also be remembered that a claimant concerned about the gatekeeper function of the ICSID Secretary-General is not compelled to seek ICSID arbitration; ECT Art.26(4)(b) gives the claimant asserting Investor status the option of selecting UNCITRAL ad hoc arbitration, for which there is no gatekeeper who could preclude the claim from reaching an arbitral tribunal.
39. *Plama* at [153]-[164].
40. *Plama* at [155].
41. *Plama* at [157].
42. See p.59 above for a description of ECT Art.2.
43. Contrary to *Plama* at [157], [163].
44. *Plama* at [161].
45. *ibid.*, at [157].
46. Chalker's TDM article (fn.2 above), pp.16-19.
47. *ibid.*, at p.17.
48. *Plama* at [159].