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"UNREASONABLE OR DISCRIMINATORY MEASURES" AS A CAUSE OF ACTION UNDER THE ENERGY CHARTER TREATY

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Arbitral proceedings; Causes of action; Discrimination; Energy; International investment disputes; Treaties; Unreasonable conduct

Introduction

The dispute settlement provisions of Art.26 of the Energy Charter Treaty (the ECT or the Treaty) cover disputes relating to "an alleged breach of an obligation of [a contracting party] under Part III [of the Treaty]." Thus, an investor of a contracting party may bring a claim against another contracting party based on a breach of an obligation undertaken by that contracting party under Pt III of the ECT. What are the "causes of action" created for investors in Pt III that may be asserted against a contracting party in arbitration proceedings brought under Art.26?

The relevant provisions in Pt III of the Treaty are Art.13 and Art.10(1). Article 13 prohibits, in classic international law terms, expropriation of foreign investments in breach of international law and without prompt, adequate and effective compensation, whereas Art.10(1) enumerates a number of standards of treatment of foreign investors that the contracting parties have agreed to uphold. Article 10(1) deserves to be quoted in full:

> "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable 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 a *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 favorable 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 any other Contracting Party." (emphasis added.)

Thus, the ECT establishes at least the following causes of action which may be asserted as a legal basis for a claim[1]:

(1) expropriation;
(2) failure to accord fair and equitable treatment;
(3) failure to provide full protection and security;
(4) impairment of investment by unreasonable and discriminatory measures;
(5) failure to ensure minimum standard of treatment under international law, and;
(6) breach of "observance of obligations" (or "umbrella") clause.[2]

It is an open issue to what extent the above causes of action overlap in the sense that a breach of one of the standards will *ipso jure* amount to a breach of another, related standard, or to what extent they are stand-alone and have an independent scope of application. Indeed, it is arguable that, of the causes of action enumerated in Pt III of the ECT, expropriation is the principal cause of action in the sense that, if established, compensation for expropriation will in effect subsume any remedies that may be available as a result of a breach of all the other standards.[3] This

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1. "At least" since, given the complexity of the provisions of the ECT, it is arguable that breaches of other provisions of the ECT may also serve as an independent cause of action. Indeed, in practice not only the general introductory clause of Art.10(1):
   "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area."
   but also Art.10(12) of the ECT:
   "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."
   have been relied upon as a legal basis for a claim in ECT arbitration. See *Petrobart Limited v Kyrgyz Republic*, Award, March 29, 2005, available at *www.investmentclaims.com*.
2. This obligation, the substance of which is dependent on the contractual obligations actually undertaken by a contracting party, is based on Art.10(1), *in fine*. The observance of obligations clause does not bind those contracting parties that have made a reservation with respect to this particular provision. See Art.26(3)(c) of the ECT ("A Contracting Party listed in Annexe IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).").
3. Assuming of course that the various causes of action are asserted on the basis of the same set of facts. For case law see, e.g.*CME v Czech Republic*, Partial Award, September 13, 2001, available at *www.investmentclaims.com*,

is because compensation for expropriation by definition covers a total loss of an investment and accordingly compensates the claimant for any losses sustained as a result of a breach of the other, "lesser" standards.[4] Conversely, a claim for breach of these other standards may be compensated only if the governmental measure in question falls short of a full-blown expropriation.

On the other hand, it is also possible to argue that in particular standards (2) to (5) above are interrelated and may be considered emanations of the minimum treatment standard (item 5), which is a classic international law standard and is traditionally considered to embody, inter alia, protection against denial of justice.[5] In other words, the minimum treatment standard may be considered as providing, in itself, protection against failure to provide fair and equitable treatment and full protection and security, as well as against unreasonable or discriminatory measures, at least to the extent that the alleged breaches relate to the function of administration of justice.[6] Thus, the sole effect of specifically enumerating standards (2) to (4) in the ECT is, arguably, that these provisions extend the applicability of the standards contained therein to governmental functions other than administration of justice (i.e. the exercise of legislative and executive powers).

The relationship between the remaining standards, i.e. fair and equitable treatment (item 2), full protection and security (item 3) and the prohibition of unreasonable or discriminatory measures (item 4), is less clear. However, the argument can be made—and has been made and indeed accepted—that the fair and equitable treatment standard is more general than the two other standards and that, accordingly, its breach in itself amounts to a breach of the other two standards.[7] At the same time, precisely because the full protection and security standard and the prohibition of unreasonable or discriminatory measures are more specific or concrete than the fair and equitable treatment standard, it is conceivable that in certain circumstances arbitral tribunals will find it more appropriate to base their decision on a breach of these more concrete standards, without making any findings on possible breaches of the fair and equitable treatment standard or indeed the minimum treatment standard.[8]

at [611]–[614] (finding that the facts that constituted an unlawful expropriation also breached fair and equitable treatment, the prohibition of unreasonable or discriminatory measures, the obligation of full security and protection and the minimum standard of treatment under the Dutch–Czech BIT).

4. This is not to say that claims for breaches of the other, lesser standards cannot be granted, as a matter of law, although this may be considered unnecessary as a matter of judicial economy. However, if granted, such other claims cannot be compensated since compensation for expropriation will subsume and cover any loss sustained by the claimant as a result of a breach of the other standards. This is effectively what the tribunal did in *CME*. See *CME*, above fn.3 (finding a series of breaches of the various treatment standards) and *CME v Czech Republic*, Final Award, March 14, 2003, available at *www.investmentclaims.com* (compensating the claimant for the fair market value of the investment as a whole).

5. *cf.* NAFTA Art.1105(1), which provides that:

> "[e]ach party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security",

and the interpretation of this provision adopted by the Free Trade Commission on July 31, 2001. The Commission took the view that:

> "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of another Party",

and that:

> "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens".

For discussion see *The Loewen Group, Inc and Raymond L. Loewen v United States*, Award, June 26, 2003, available at *www.investmentclaims.com*, at 35–39. See also Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press, Cambridge, 2005), p.6

> "Although the expression [denial of justice] does not appear in [human rights conventions] and similar texts, it will continue to influence the way in which international treaties are applied. In turn, the application of treaty provisions will contribute to a modern understanding of the old doctrine. The reason for this inevitable cross-pollination is that the elements of the delict of denial of justice tend to reappear as treaty provisions, for example, when they proscribe 'discrimination' or when they require 'fair and equitable treatment'."

6. At least one arbitral tribunal has also drawn the reverse conclusion, i.e. that the fair and equitable treatment standard in the relevant BIT incorporated the international minimum standard.*Alex Genin v Estonia*, Case No.ARB/99/2, Award, June 25, 2001, available at *investmentclaims.com*, at [367]:

> "While the exact content of th[e] [fair and equitable treatment] standard is not clear, the Tribunal understands it to require an 'international minimum standard' that is separate from domestic law, but that is, indeed, a *minimum standard*.") (emphasis in original; footnote omitted.)

7. See, e.g. *CMS Gas Transmission Co v Argentina*, Case No.ARB/01/08, Award, May 12, 2005, at [290]:

> "The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.";

Saluka Investments B.V. v Czech Republic, UNCITRAL arbitration, Partial Award, March 17, 2006, available at *www.investmentclaims.com*, at [465] (finding that the breach of the fair and equitable treatment standard of the Dutch–Czech BIT at the same time violated the prohibition of unreasonable or discriminatory measures).

8. Thus, one methodological consequence could be that an arbitral tribunal might find it appropriate to consider first whether there has been a breach of the two more specific standards before proceeding to the examination of whether the fair and equitable treatment standard has been breached. See, e.g. *Noble Ventures v Romania*, Case No.ARB/01/11, Award, October 12, 2005, available at *www.investmentclaims.com*, at [175]–[183] (dealing with an alleged breach of the prohibition of arbitrary and discriminatory measures before addressing the fair and

The purpose of this article is to focus on one particular cause of action in Art.10(1) of the ECT—the obligation of a contracting party to refrain from unreasonable or discriminatory measures. This standard is of particular interest in the context of the ECT since the very first ECT case, *Nykomb v Latvia*,[9] involved a breach of this standard and it was also raised in another ECT arbitration, *Petrobart v Kyrgyz Republic*.[10] This standard is also of a more general interest given that it can be found in a number of bilateral investment treaties (BITs), often in combination with at least some if not all of the standards listed in Art.10(1) of the ECT.[11] Thus, it is practically certain that the jurisprudence of ICSID and ad hoc arbitral tribunals dealing with this standard as incorporated in the relevant BITs will inform its interpretation and application in the ECT context.

In analysing the case law dealing with the particular standard of unreasonable or discriminatory measures, it will be seen that one is constantly confronted with the interrelation between this and the other causes of action listed in Art.10(1) of the ECT. While this article is limited to pointing out these issues as they arise, the proper scope of application of each of the different standards, or the methodology that arbitral tribunals employ in determining the sequence in which the various causes of action should be considered, clearly deserves further discussion among investment arbitration practitioners.

The prohibition of unreasonable or discriminatory measures in the practice of ECT tribunals

Nykomb v Latvia

Nykomb arose out of a contract entered into between Windau, a company controlled by Nykomb (a Swedish company), and Latvenergo, the Latvian electricity utility, which obligated Latvenergo to pay Windau a preferential double tariff for the first eight years of production at the Bauska co-generation plant built by Windau pursuant to the contract. As Latvenergo failed to pay the agreed tariff, Nykomb brought a claim before the Arbitration Institute of the Stockholm Chamber of Commerce under Art.26 of the ECT, arguing that Latvenergo's failure constituted a breach of Art.10(1) of the ECT and was attributable to the state. Nykomb asserted a number of alternative causes of action, including breach of fair and equitable treatment, breach of the minimum standard of treatment under international law, impairment by unreasonable or discriminatory measures, and expropriation.[12]

The tribunal dismissed Nykomb's expropriation claim on the basis that, in the circumstances:

> "there [was] no possession taking of Windau or its assets, no interference with the shareholders' rights or with the management's control over and running of the enterprise."[13]

As to the other causes of action, the tribunal noted that the state's failure to ensure that Latvenergo pay Windau the contractually agreed double tariff was capable of constituting a breach of "various Treaty provisions". However, since the damage or loss caused by the non-payment to the claimant was in all instances the same, the tribunal concluded that:

> "in order to establish liability for the Republic it is strictly speaking sufficient to find that one of the relevant provisions has been violated."[14]

The tribunal then proceeded to consider Nykomb's claim that the Republic had failed to comply with its obligation to ensure that Nykomb's investment was not impaired by unreasonable or discriminatory measures. The tribunal concluded that the Republic had indeed acted in a discriminatory manner since it was established, and the Republic did not deny, that Latvenergo was paying double tariff for electricity produced by two other companies which the tribunal considered were comparable to Windau and operated under the same laws and regulations. The Republic failed to prove that the different treatment was justified. This was the crux of the tribunal's reasoning:

> "The Arbitral Tribunal accepts that in evaluating whether there is discrimination in the sense of the Treaty one should only 'compare like with like.' However, little if anything has been documented by the Respondent to show the criteria or methodology used in fixing the multiplier, or to what extent Latvenergo is authorized to apply multipliers other than those documented in this arbitration. On the other hand, all of the information available to the Tribunal suggests that the three companies are comparable, and subject to the same laws and regulations. In particular, this appears to be the situation with respect to Latelektro-Gulbene and Windau. In such a situation, and in accordance with established international law, the burden of proof lies with the Respondent to prove that no discrimination has taken or is taking place. The Arbitral Tribunal finds that such burden of proof has not been satisfied, and therefore concludes that Windau has been subject to a discriminatory measure in violation of Article 10(1)."[15] (emphasis omitted)

Having found a breach of the prohibition of unreasonable and discriminatory measures, and keeping in mind that a finding of any additional breaches would not have affected the quantification of the claim, the tribunal concluded that there was no need to proceed any further

equitable treatment standard). For further discussion see below

9. *Nykomb Synergetics Technology Holding AB v Latvia*, Arbitral Award, December 16, 2003, available at *www.investmentclaims.com* (hereinafter "*Nykomb*").

10. Above fn.1.

11. Often formulated in terms of "arbitrary or discriminatory measures." For discussion of whether there is a substantive difference between the two formulations of the standard see below.

12. Above fn.9 at [5]. Nykomb did not assert a breach of contract claim under the umbrella clause since it was not party to the contract out of which the dispute arose.

13. Above fn.9 at [33].

14. Above fn.9 at [34].

15. Above fn.9.

in order to examine whether such additional breaches of the ECT had in fact occurred.

The tribunal did not explain why it chose to examine the alleged breach of one particular treaty standard—failure to refrain from unreasonable or discriminatory measures—rather than the other breaches alleged by the claimant. The methodology adopted by the tribunal cannot be explained by reference to the manner in which the claimant pleaded its case since it appears that the order in which the tribunal chose to examine the claimant's causes of action was not the one in which the claimant asserted them. The most likely explanation for the chosen order appears to be that, based on the evidence, a finding of breach of the reasonable and non-discriminatory measures standard was relatively easy to establish and thus was the obvious standard to be considered first. In any event, as a result of the chosen approach, the award sheds little light on the relationship between the various standards enumerated in Art.10(1) or, more generally, in Pt III of the Treaty—apart from the position, in effect endorsed by the tribunal, that expropriation is the principal cause of action in terms of judicial economy in that compensation for expropriation subsumes remedies available under all of the other causes of action listed in Art.10(1). Indeed, the tribunal's finding was limited to only one of the two legs of the standard it chose to apply—it found the respondent's action "discriminatory" but did not say anything about its "reasonableness". This suggests—as is indeed indicated by the very formulation of the standard ("unreasonable *or* discriminatory measures")—that the two components of the standard are independent of each other and that, accordingly, it is sufficient, for the purposes of establishing a breach of the standard, that one of the two elements of the standard has been breached.[16]

Petrobart v Kyrgyz Republic

A claim relating to the breach of the reasonable and non-discriminatory measures standard was also raised, among a number of other causes of action, in *Petrobart v Kyrgyz Republic,* another ECT arbitration.[17] This case involved a contract between Petrobart, a company based in Gibraltar, and Kyrgyzgazmunaizat (KGM), a state-owned petroleum supply and distribution company, for the sale of gas condensate. Since KGM failed to comply with its payment obligations, Petrobart brought court proceedings against KGM. Petrobart alleged that the state interfered in these proceedings and stripped KGM of its assets by transferring them to two newly established companies, thus preventing Petrobart from satisfying its legal claims and causing damage. The tribunal held that the respondent had failed to respect Petrobart's rights under the investment agreement, in breach of Art.10(1) of the ECT. However, the tribunal declined to enter into a detailed analysis of all of the claimant's causes of action and instead opted for a more comprehensive approach:

> "The Arbitral Tribunal does not find it necessary to analyze 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. In the Arbitral Tribunal's opinion, it is sufficient to conclude that the measures for which the Kyrgyz Republic is responsible failed to accord Petrobart a fair and equitable treatment of its investments to which it was entitled under Article 10(1) of the Treaty."[18]

Like the *Nykomb* tribunal, the *Petrobart* tribunal seemed to take the view that it was not required to follow the order in which the claimant asserted its causes of action, or indeed even to examine them one by one, but instead was entitled to freely select the legal basis of its decision. Moreover, like the *Nykomb* tribunal, the *Petrobart* tribunal did not provide any explanations or reasons as to why it chose to base its decision on one particular standard—in this case breach of the fair and equitable treatment standard—rather than any of the various other standards asserted by the claimant.

The prohibition of unreasonable (or arbitrary) or discriminatory measures in the practice of BIT tribunals

The reasonable or non-discriminatory measures standard has also been raised in a number of BIT arbitrations, although in none of them has it been asserted by the claimant as its principal or exclusive cause of action. Perhaps the most elaborate analysis of the standard has been conducted in *Saluka,*[19] *Noble Ventures,*[20] *Occidental v Ecuador*[21] and *MTD v Chile.*[22]

16. A similar approach was adopted by an ICSID Tribunal operating under the US–Romanian BIT. *Noble Ventures,* above fn.8 at [175]–[183] (examining separately a possible breach of the two elements of the arbitrary and discriminatory measures standard). See also *Azurix Corp v Argentina,* Case No.ARB/01/12, Award, July 14, 2006, available at *http://investmentclaims.com,* at [391] (finding that a measure needs "only to be arbitrary to constitute a breach" of the standard). *cf. Ronald S. Lauder v Czech Republic,* Final Award, September 3, 2001, available at *http://investmentclaims.com,* at [219] (concluding that the wording of Art.II(2)(b) of the US–Czech BIT—"arbitrary *and* discriminatory measures"—implied that a breach of the standard required both an arbitrary and a discriminatory measure by the State).

17. *Petrobart,* above fn.1.

18. *Petrobart,* above fn.1 at [76]. The claimant had claimed that the State had breached the following standards of treatment: (1) failure to create stable, equitable, favorable and transparent conditions for investment; (2) failure to accord fair and equitable treatment; (3) breach of prohibition of unreasonable and discriminatory measures; (4) breach of observance of obligations clause; (5) breach of the minimum treatment standard; (6) failure to ensure that domestic law provides effective means for assertion of claims and enforcement of rights with respect to investments; (7) expropriation, and; (8) failure to ensure that a State enterprise conducts its activities in accordance with the State's obligations under Pt III of the ECT.

19. Above fn.7.

20. Above fn.8.

21. *Occidental Exploration and Production Co v Ecuador,* LCIA Case No.UN 3467, Final Award, July 1, 2004, available at *http://investmentclaims.com.*

22. *MTD Equity v Chile,* Case No.ARB/01/7, Award, May 25, 2004, available at *http://investmentclaims.com.*

In *Saluka,* the tribunal having dismissed the claimant's deprivation (expropriation) claim, found that the respondent had nonetheless acted unfairly and inequitably. However, unlike the *Nykomb* and *Petrobart* tribunals, the *Saluka* tribunal did not stop there, but went on to examine whether the respondent had also breached the prohibition of unreasonable or discriminatory measures, or what the tribunal termed the "non-impairment" standard. Observing that "'impairment' means, according to its ordinary meaning...any negative impact or effect caused by measures" taken by the respondent, the tribunal proceeded to consider the meaning of the term "reasonableness" as well as the relationship between the non-impairment standard and the fair and equitable treatment standard:

> "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 of 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 standard of 'non-discrimination' requires a rational justification of any differential treatment of a foreign investor. ...In so far as the standard of conduct is concerned, a violation of the non-impairment standard does not therefore differ substantially from a violation of the 'fair and equitable treatment' standard. The non-impairment merely identifies more specific effects of any such violation, namely with regard to the operation, management, maintenance, use, enjoyment or disposal of the investment by the investor."[23]

The tribunal eventually found that the conduct of the respondent had indeed been "unjustifiable and unreasonable" and thus in breach of the impairment standard.[24]

Noble Ventures involved a similar but not identical standard—protection against arbitrary (rather than unreasonable) or discriminatory measures. However, unlike the *Saluka tribunal,* the *Noble Ventures* tribunal did not address the causes of action in the order in which they were asserted by the claimant, nor in the order in which they were listed in the applicable US–Romanian BIT. Instead, the tribunal first addressed and disposed of the impairment claim, finding neither arbitrariness nor discrimination. The tribunal then moved on to the fair and equitable treatment claim. Based on the placement of the fair and equitable treatment standard "at the very beginning" of the relevant provision (Art.II(2) of the US–Romanian BIT), the tribunal considered this standard to be:

> "a more general standard which finds its specific application in inter alia the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor."[25]

Since the fair and equitable treatment standard is also placed at the "beginning" (if not "at the very beginning") of Art.10(1) of the ECT, the logic of the *Noble Ventures* tribunal would lead to the conclusion that the prohibition of unreasonable and discriminatory measures and the obligation to provide full protection and security are to be considered as specific instances, or applications, of the fair and equitable treatment standard. This, in turn, would imply that an arbitral tribunal, when interpreting and applying Art.10(1) of the ECT, should give priority to these more specific standards and examine first whether they have been breached, before considering the more general fair and equitable treatment standard (*lex specialis derogat legi generali*).

However, this approach has not been followed by other BIT tribunals, which have generally tended to consider claimants' causes of action in the order in which they have been presented. This has often led—like in *Saluka*—in the examination of claims based on breach of the fair and equitable treatment standard before claims based on the more specific standards. There are also more complex scenarios. Thus, in *Occidental,* the tribunal first considered the expropriation claim, dismissing it as inadmissible. It then decided to examine the claimant's remaining claims "following the reverse order," which led it to consider first the impairment claim (i.e. breach of the prohibition of arbitrary or discriminatory treatment). Stressing that:

> "the claim that these measures [complained of by the claimant] are also discriminatory has a meaning under this Article only to the extent that impairment has occurred,"

the tribunal was eventually persuaded that the respondent had acted arbitrarily, "at least to an extent".[26] The tribunal then proceeded to examine the claim that the respondent had failed to honor its obligation to accord fair and equitable treatment, finding a breach and concluding that:

> "[i]n the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security."[27]

Thus, the tribunal effectively subsumed the full protection and security standard under the fair and equitable treatment standard, while treating the non-impairment standard as a stand-alone cause of action. This approach may well have a reflection of the BIT itself, since the BIT in question was somewhat unusual in that the non-impairment standard was contained in a separate provision of the BIT (Art.II(3)(b)), whereas the fair and equitable treatment and full protection and security standards were included in the same provision (Art.II(3)(a)).

23. *Saluka,* above fn.7 at [460]–[461].
24. *Saluka,* above fn.7 at [481].
25. *Noble Ventures,* above fn.8 at [182].
26. *Occidental,* above fn.21 at [162], [165].
27. *Occidental,* above fn.21 at [187]. *Accord Azurix,* above fn.16 at [406]–[408].

Finally, in *MTD* the claimant alleged a series of breaches of the Malaysia–Chile BIT and certain other BITs, based on a most-favoured-nation clause, including a breach of the prohibition of unreasonable or discriminatory measures. The tribunal recognised the potential overlap between the various treatment standards, including that between fair and equitable treatment and the prohibition of unreasonable or discriminatory measures. Observing that:

> "[t]o a certain extent, this claim [i.e. the impairment claim] has been considered by the Tribunal as part of the fair and equitable treatment,"

the tribunal noted that the approval of an investment against the Government urban policy—the measure that formed the basis of the claimant's claims—"can be equally considered unreasonable."[28] However, the tribunal found no discrimination and although the reasoning is not entirely clear, eventually appears to have concluded that there had been no breach of the BIT on this account.[29]

Conclusion

The case law reviewed above shows that international arbitral jurisprudence is in flux as to the methodology to be applied in determining the order in which the various alternative causes of action asserted by investors should be examined. Similarly, no set rules appear to exist regarding the interrelationship between the various treatment standards and their scope of application. This observation also applies to the limited jurisprudence that currently exists regarding the treatment standards embodied in Art.10(1) of the ECT, in particular if the practice of BIT tribunals is taken as any indication of what arbitral tribunals might do under the ECT.

At least some arbitral tribunals, in particular those operating under the ECT, appear to consider that they have full freedom to select the legal basis of their decision and that they are free to disregard the order in which the claimant chooses to argue its causes of action, without having to provide any explanation or justification for the choice made. Such an approach, which is arguably consistent with and justified under the doctrine of *jura novit curia*, is not necessarily inappropriate.[30] However, those who prefer the arbitration paradigm (as opposed to the adjudication paradigm) might justifiably argue that the *jura novit curia* doctrine must be applied with particular care in an arbitration context, if at all. As the jurisdiction of an arbitral tribunal is based on the parties' consent (and not law), it is hardly appropriate to "arbitrate by ambush", that is, make findings that take the parties by surprise. While an arbitral tribunal's obligation to hear the parties on legal issues may not go so far as to require it to share with them the methodology that it intends to apply in determining the causes of action relied upon by the claimant, at the very least, however, it owes the parties an explanation as to how it arrived at the result it eventually reached. Failure by an arbitral tribunal to do so might well expose the resulting award to a justified challenge for failure to state reasons.

In light of the present state of play of ECT arbitration, it is hard to predict in which circumstances an arbitral tribunal is likely to select the prohibition of unreasonable or discriminatory measures as a sole, or even principal, basis of its decision. It is possible, under the *Nykomb* scenario, that this will occur only when the tribunal takes the view that the principal issue in the case is discriminatory treatment of the foreign investor and when this has been established to the tribunal's satisfaction. There are no known ECT precedents relating to the other leg of the standard—prohibition of unreasonable treatment—although the reasoning of the *Saluka* tribunal is likely to serve as guidance for ECT tribunals as well.

In the end, however, whatever the methodology applied in determining the order in which the various causes of action in Art.10(1) of the ECT are considered, it is reasonably clear that there is no magic formula that could resolve, once and for all, all the uncertainties surrounding the interpretation and application of standards such as the prohibition of unreasonable or discriminatory measures. Such determinations cannot be made *in abstracto*, outside the context of a concrete case; they will inevitably depend on how the cause of action in question is argued and how the supporting evidence is presented to the arbitral tribunal. A finding of a breach of a treatment standard such as the prohibition of unreasonable or discriminatory treatment is ultimately a function of the *effect* that the legal argument and evidence presented by the parties has on the arbitral tribunal. This effect cannot be created or defined by searching for meaning of words in a dictionary but rather is a matter of advocacy and thus can only be produced in a concrete context.

The effect that an advocate must be able to create in order to be able to sustain a breach of a treatment standard claim such as the prohibition of unreasonable or discriminatory measures was aptly summarised by the International Court of Justice (ICJ) in the *ELSI* case. While this case involved the interpretation and application of the term "arbitrariness" rather than "unreasonable"

28. *MTD Equity*, above fn.22 at [196].

29. See the dispositif of the award (referring only to a breach of Art.3(1) of the Malaysia–Chile BIT, which contains the fair and equitable treatment standard, but not mentioning Art.3(3) of the Croatia–Chile BIT, which contains the impairment standard). For a discrimination claim see also *Champion Trading Co v Egypt*, Case No.ARB/02/09, Award, October 27, 2006, available at *http://investmentclaims.com*, at [125]–[156] (finding no discrimination since the relevant parties were not in "like situations").

30. As endorsed by the International Court of Justice (the ICJ or the Court) and its predecessor, the Permanent Court of International Justice (the PCIJ), in a number of decisions. Perhaps the most opportune in this context is the formulation adopted by the ICJ in *The Application of the Convention of 1902 Governing the Guardianship of Infant (Neth. v Swe)*, 1958 ICJ Reports 55, 62 (Judgment of November 28):

> "[The Court] retains its freedom to select the ground upon which it will base its judgment, and is under no obligation to examine all the considerations advanced by the Parties if other considerations appear to it to be sufficient for its purpose."

or "discriminatory," and while it is arguable that the threshold for establishing a breach of arbitrariness is higher than that for establishing unreasonableness or discrimination, the Court's words would appear to apply *mutatis mutandis* in the latter case:

> "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law... It is willful disregard of due process of law, an act which *shocks,* or at least *surprises* a sense of judicial propriety."[31] (emphasis added.)

Similarly, it could be argued that standards such as "unreasonable" or "discriminatory" are not so much something opposed to the *form* of the governmental measure in question as something opposed to its *substance*. In other words, it is not enough that a governmental measure adversely affecting foreign investment is formally justified on the basis of the applicable law; one must also consider whether it bears any rational relationship to a legitimate governmental policy. If it lacks such a relationship to an extent that it creates the effect of "shock" or "surprise," or at least substantial dissatisfaction, a breach of the standard likely will have been established.

31. *Elettronica Sicula S.p.A. v United States,* 1989 ICJ Reports 15 (Judgment of July 20), at [128].