

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

IN THE PROCEEDING BETWEEN

**PLAMA CONSORTIUM LIMITED
(CLAIMANT)**

and

**REPUBLIC of BULGARIA
(RESPONDENT)**

(ICSID Case No. ARB/03/24)

DECISION ON JURISDICTION

Members of the Tribunal

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

Secretary of the Tribunal

Ms. Aurélia Antonietti

Representing the Claimant

Mr. Emmanuel Gaillard
and Mr. John Savage
Shearman & Sterling LLP

Representing the 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
White & Case LLP
Mr. Lazar Tomov
Tomov & Tomov

TABLE OF CONTENTS

I.	<u>PROCEDURE</u>	4
A.	Registration of the Request for Arbitration	4
B.	Constitution of the Arbitral Tribunal and Commencement of the Proceeding	5
C.	Written and Oral Procedure	6
II.	<u>BACKGROUND FACTS</u>	7
III.	<u>THE SUBMISSIONS OF THE PARTIES ON JURISDICTION</u>	13
A.	The Respondent's Memorial on Jurisdiction	13
B.	The Claimant's Counter-Memorial on Jurisdiction	16
C.	The Respondent's Reply on Jurisdiction	19
D.	The Claimant's Rejoinder on Jurisdiction	23
E.	The Hearing on 20 and 21 September 2004	26
1.	The Respondent's Arguments	26
2.	The Claimant's Arguments	28
F.	Post-Hearing Submissions	31
1.	The Respondent's Post-Hearing Submission	32
2.	The Claimant's Post-Hearing Submission	32
3.	The Respondent's Post-Hearing Reply	33
IV.	<u>EXAMINATION OF THE PARTIES' SUBMISSIONS</u>	34
A.	The Energy Charter Treaty	36
1.	Qualifying Definitions	37
2.	The Claimant's "Consent"	40

3.	The Respondent's "Consent"	42
4.	The Tribunal's Conditional Conclusion on Article 26 ECT	43
5.	Article 17 ECT	44
6.	Article 17 as a Jurisdictional Issue	45
7.	Article 17 as an Issue on the Merits	48
8.	Burden and Standard of Proof	52
9.	Article 17(1) Second Limb: "No Substantial Business Activities" ..	53
10.	Article 17(1) First Limb: "Own or Control"	54
11.	Mr. Vautrin	54
12.	Summary on the Energy Charter Treaty	57
B.	The Respondent's Request that the Arbitral Proceedings Be Suspended	58
C.	Jurisdiction of the Arbitral Tribunal under The Bulgaria-Cyprus BIT	59
D.	Misrepresentation	72
E.	Registration by ICSID of the Request for Arbitration	73
F.	Costs	74
V.	THE DECISION	75

I. PROCEDURE

A. Registration of the Request for Arbitration

1. By letter of 24 December 2002, Plama Consortium Limited ("Plama" or "the Claimant"), a Cypriot company, filed a request for arbitration with the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") against the Republic of Bulgaria ("Bulgaria" or "the Respondent"). The request invoked the ICSID arbitration provisions of the Energy Charter Treaty ("ECT") and the most favored nation ("MFN") provision of a bilateral investment treaty ("BIT") entered into in 1987 between the Government of the Republic of Cyprus and the Government of the People's Republic of Bulgaria, the Agreement on Mutual Encouragement and Protection of Investments ("the BIT"), which would import into the BIT the ICSID arbitration provisions of other BITs entered into by Bulgaria.
2. 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 (the "ICSID Institution Rules") acknowledged receipt of the request and on the same day transmitted a copy to the Republic of Bulgaria and to the Bulgarian Embassy in Washington, D.C.
3. There ensued exchanges of correspondence between the parties and the Acting Secretary General of ICSID concerning the jurisdiction of ICSID over the Request made by the Claimant 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.
4. On 17 April 2003, the 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 the Republic of Bulgaria and to the Bulgarian Embassy in Washington, D.C.
5. On 12 June 2003, Professor Emmanuel Gaillard and Mr. John Savage of the law firm, Sherman & Sterling LLP, informed the Centre that they had been retained as new counsel for the Claimant, replacing Mr. Christian Nordtømme.

6. Upon requests from both parties, the Centre deferred registration. A further postponement of registration was finally sought by the Respondent on 12 August 2003, but was opposed by the Claimant.
7. The request 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.

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

8. On 20 August 2003, the Respondent informed the Centre that it had retained as counsel in the proceeding Mr. Paul D. Friedland, Mmes. Carolyn B. Lamm and Abby Cohen Smutny of the law firm, White & Case LLP. By a letter of 25 March 2004, the Respondent further indicated having retained Mr. Lazar Tomov of the law firm, Tomov & Tomov.
9. Following the registration of the request for arbitration by the Centre, the parties agreed on a three-member Tribunal. The parties agreed that each 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 if they failed to agree on the presiding arbitrator, the Centre would appoint the President of the Arbitral Tribunal.
10. The Claimant appointed Mr. Albert Jan van den Berg, a national of the Netherlands, IT Tower – 9th Floor, 480, Avenue Louise, Bte 9, B-1050 Brussels, Belgium, and the Respondent appointed Mr. V. V. Veeder, a national of the United Kingdom, Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, England.
11. In the absence of agreement by the parties regarding the appointment of a President, the Centre, after consultation with the parties as far as possible, appointed directly as President of the Tribunal, Mr. Carl F. Salans, a national of the United-States, 9 rue Boissy d'Anglas, 75008 Paris, France.

12. All three arbitrators having accepted their appointments, the Centre by a letter of 10 February 2004, informed the parties of the constitution of the Tribunal, and that the proceeding was deemed to have commenced on that day, pursuant to Rule 6(1) of the ICSID's Rules of Procedure for Arbitration Proceedings ("the ICSID Arbitration Rules"). The parties were further informed that Ms. Aurélia Antonietti, counsel at ICSID, would serve as Secretary of the Tribunal.

C. Written and Oral Procedure

13. In accordance with ICSID Arbitration Rule 13(1), after consulting with the parties and the Centre, the Tribunal scheduled a first session, in Paris for 25 March 2004. The parties, by a joint letter of 19 March 2004, communicated to the Tribunal the agreements they had reached on procedural matters identified in the provisional agenda for the first session, which had been sent to them by the Tribunal's Secretary. In that letter, the parties notified the Tribunal that the Respondent intended to raise objections to jurisdiction, which the Tribunal would be required to rule on before proceeding to the merits of the case in accordance with Article 41 of the ICSID Arbitration Rules. The parties in the same letter informed the Tribunal that they had not reached an agreement on the procedural schedule.
14. At the first session of the 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 Tribunal and provided to the parties, as well as all Members of the Tribunal. It was agreed that the 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.
15. Pursuant to the agreed schedule, the Respondent filed a Memorial on Jurisdiction on 26 May 2004. The Claimant submitted a Counter-Memorial on Jurisdiction dated 25 June 2004. This was followed, on 26 July 2004, by a Reply on Jurisdiction from the Respondent. The Claimant's Rejoinder on Jurisdiction dated 26 August 2004, was received by the Centre on 30 August 2004.

16. On 26 July 2004, the Respondent submitted to the Arbitral Tribunal a request for the production of documents by the Claimant. By letter dated 6 August 2004, the Claimant opposed that request. After considering the views of the parties, the Arbitral Tribunal, on 11 August 2004, issued an Order directing the Claimant to produce all documents falling within the categories listed in the Order, no later than with the filing of its Rejoinder on Jurisdiction. The Claimant filed certain documents with its 26 August 2004 Rejoinder. Further to a request for extension made on 17 August 2004, which was accepted by the Respondent, the Claimant submitted to the Respondent, under cover of a letter dated 6 September 2004, documents pursuant to the Tribunal's Order. The Claimant made an additional production of documents by letter dated 13 September 2004.
17. A hearing on the preliminary questions was held in Paris on 20 and 21 September 2004, during which Messrs. Emmanuel Gaillard and John Savage addressed the Tribunal on behalf of the Claimant and Mr. Paul D. Friedland, Ms. Carolyn B. Lamm, Ms. Abby Cohen Smutny and Mr. Jonathan Hamilton addressed the Tribunal on behalf of the Respondent. One witness, Mr. Jean-Christophe Vautrin, testified for the Claimant.
18. Following the September 2004 hearing, the parties filed submissions relating to the documents produced pursuant to the Tribunal's Order of 11 August 2004 as well as to costs.

II. BACKGROUND FACTS

19. According to the Request for Arbitration, the Claimant -- then known as Trammel Investment Limited -- purchased from EuroEnergy Holding OOD (hereafter, "EEH") all of EEH's 49,837,849 shares of Plama AD, which later changed its name to Nova Plama AD ("Nova Plama"), a Bulgarian company which owned an oil refinery in Bulgaria, representing 96.78% of Nova Plama's capital. The share purchase agreement was concluded on 18 September 1998. The transfer of shares took place on 18 December 1998.
20. The refinery's key industrial asset was a lubricants manufacturing unit which processes 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 has its own power plant with a capacity for sales of excess electric power to the local grid.

21. The 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 the Claimant, caused and are still causing material damage to the operations of the refinery and have had, and are still having, 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,¹ and the BIT. The Claimant seeks an award of damages for breaches of the treaties and compensation for expropriation.
22. The Energy Charter Treaty is a multilateral convention whose purpose, according to Article 2 of the Treaty, is to establish a legal framework in order to promote long-term cooperation in the energy sector. In Part III of the Treaty, Contracting States undertake the obligation to accord to the Investments of Investors (as those terms are defined in the Treaty) of other Contracting States "fair and equitable treatment" and "the most constant protection and security". By Article 17 of the Treaty, which is 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. Article 26, Part V, of the Treaty is devoted to dispute resolution and provides, *inter alia*, the right of Investors to resort to arbitration pursuant to the ICSID Convention.
23. The Respondent, in the first instance, argues that the claims made by the Claimant fall outside the jurisdiction of ICSID.
24. Bulgaria ratified the ICSID Convention on 13 May 2001. Cyprus did so on 25 November 1996.
25. Article 25(1) of the ICSID Convention provides as follows:

¹ Bulgaria ratified the ECT on 15 November 1996 and Cyprus, on 16 January 1998.

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

26. Because they are referred to repeatedly in the parties' submissions and in this Decision, the texts of certain provisions of the ECT and the BIT as well as of the Vienna Convention on the Law of Treaties are set forth at this point.

ECT

Article 17 – Non-Application of Part III² 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;...

(2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with 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.

² 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.

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 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 Center 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 party to the dispute are both parties to the ICSID Convention;

...

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or

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

...

(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.

THE BIT

Article 3

1. Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favorable than that accorded to investments by investors of third states.

...

Article 4

4.1 The legality of the expropriation shall be checked at the request of the concerned investor through the regular administrative and legal procedure of the contracting party that had taken the expropriation steps. In cases of dispute with regard to the amount of the compensation, which disputes were not settled in an administrative order, the concerned investor and the legal representatives of the other Contracting Party shall hold consultations for fixing this value. If within 3 months after the beginning of the consultations no agreement is reached, the amount of the compensation at the request of the

concerned investor shall be checked either in a legal regular procedure of the Contracting Party which had taken the measure on expropriation or by an international "Ad hoc" Arbitration Court.

4.2 The International Court of Arbitration mentioned in paragraph 4.1 of the Article 4 shall be established on a case-by-case basis. Each Contracting Party shall designate one arbitrator, and the two arbitrators agree upon a national of the third state to be a Chairman... If the appointments are not made within the time period specified above, and if no other arrangement is agreed, either Contracting Party may request the Chairman of the Court of Arbitration to the Chamber of Commerce in Stockholm to make the necessary appointments...

4.3 The arbitration procedure is determined by the Arbitration Court itself, by applying the arbitration regulations of the U.N. Commission for International Trade Law (UNCITRAL) of 15th December 1976.

THE VIENNA CONVENTION ON THE LAW OF TREATIES

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

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

(a) leaves the meaning ambiguous or obscure; or

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

III. THE SUBMISSIONS OF THE PARTIES ON JURISDICTION

27. The Claimant argues in the Request for Arbitration that the Respondent has consented to ICSID arbitration of disputes regarding investments such as that made by PCL in Nova Plama by virtue of its ratification of the ECT as well as by virtue of the Most Favored Nation (“MFN”) clause of the BIT.

A. The Respondent's Memorial on Jurisdiction

28. On 26 May 2004, the Respondent filed a Memorial on Jurisdiction whose principal arguments are summarized in paragraphs 29 to 39 hereafter.

29. The Respondent argues that the Arbitral Tribunal's jurisdiction must be established by reference to Article 25(1) of the ICSID Convention, which requires the consent in

writing of the parties to the dispute to submit to ICSID disputes arising directly out of an investment between a Contracting State and a national of another Contracting State.

30. The Respondent contends that its consent to submit disputes to ICSID arbitration under Article 26 (1) ECT is expressly limited to disputes concerning an alleged breach of an obligation arising under Part III of the ECT. Part III contains Article 17, which reserves to a Contracting Party the right to deny the advantages of that Part to "*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*".
31. Promptly upon receiving the Claimant's Request for Arbitration on 24 December 2002, the Respondent, in a letter to ICSID dated 18 February 2003, exercised its right in accordance with Article 17(1) ECT to deny the advantages of the ECT to the Claimant, citing the lack of evidence as to ownership and control. It did so on the basis that the Claimant is a "mailbox company" which has no substantial business activities in the Republic of Cyprus, where it is incorporated; and it has failed to establish that it is owned or controlled by nationals of an ECT Contracting State.
32. Since, the Respondent says, it has denied and continues to deny to the Claimant the protections afforded by Article 17(1) ECT, Bulgaria's consent to submit disputes as to alleged breaches of ECT obligations does not provide a basis for jurisdiction in this case.
33. It is the contention of the Respondent that when, on the basis of Article 17(1), a Contracting Party rightfully denies the advantages of Part III to a legal entity, the ECT does not apply to the circumstances of that entity. Consequently, there can be no corresponding breach of any ECT Part III obligation. The entity's posture vis-à-vis the ECT is akin to a legal entity from a non-ECT State, which could not avail itself of Part III of the treaty.
34. On the basis of the evidence which it has been able to find, and which has been produced to it by the Claimant, the Respondent concludes that it is at best unclear whether an ECT national owned or was in control of the Claimant over the period of time relevant to its claims, as from its incorporation until after Bulgaria raised its Article 17(1) objection. The Respondent asserts that a Mr. Timothy O'Neill, a

Canadian national, and a Bahamian company, Dolsamex International S.A. ("Dolsamex"), hold the bearer shares of PCL, that 1000 shares of the Claimant have been owned indirectly by unknown non-residents of Cyprus from 2 September 1998, to the present, that from 1 March 2001 until today a further 4000 shares in the Claimant have been held by another non-ECT mailbox company and that as from incorporation until after Bulgaria raised its objection under Article 17(1) ECT the directors of the Claimant were either mere nominees or non-ECT nationals, making it uncertain whether an ECT national was in control during the time period relevant to its claims.

35. Turning to the BIT between Cyprus and Bulgaria, it is the Respondent's contention that it did not consent by virtue of the MFN clause of that treaty to submit claims presented by the Claimant to ICSID arbitration.
36. Citing Article 4 of the International Law Commission's Final Draft Articles on Most Favored Nation Clauses, the Respondent says that an MFN obligation applies only "in an agreed sphere of relations" (the *ejusdem generis* rule). The rule provides that MFN treatment can be claimed only within the framework set by the clause and relates only to the subject matter for which the clause has been stipulated. Bulgaria's treaty practice and the context of the Bulgaria-Cyprus BIT demonstrate that Bulgaria did not consider the terms of its consent to international arbitration to be encompassed in its agreements to extend MFN treatment. Consequently, the 1987 Bulgaria-Cyprus BIT provides investors only limited access to international arbitration subject to restrictive terms. BITs concluded by Bulgaria following the collapse of communism reflect fundamental changes in Bulgaria's public policy and in the applicable legal regime which do not inform the object and purpose or context of its earlier BITs, such as that with Cyprus.
37. The Respondent concludes that the MFN provision of the Bulgaria-Cyprus BIT cannot be interpreted as providing consent to submit a dispute under that treaty to ICSID arbitration. It summarizes its three basic arguments. First, that absent express evidence otherwise, an MFN provision cannot create a basis for jurisdiction where none exists in the basic treaty. Second, that the subject matter of the MFN provision in the Bulgaria-Cyprus BIT does not encompass dispute resolution. Third, that even if dispute resolution is deemed to fall within the subject matter of the treatment

contemplated by the BIT, the Claimant cannot invoke MFN treatment to override fundamental policy considerations reflected in the BIT's provisions.

38. Finally, the Respondent argues that ICSID's Secretary General did not register the Claimant's request for ICSID arbitration of its dispute as to the Bulgaria-Cyprus BIT but only as to the ECT, compelling the conclusion that the dispute is outside ICSID's jurisdiction with respect to the BIT.
39. For all the reasons set forth in its memorial on Jurisdiction, the Respondent asks that the Claimant's claims be dismissed in their entirety. The Respondent also requests the Tribunal to order the Claimant to compensate it for all the costs and expenses of this proceeding.

B. The Claimant's Counter-Memorial on Jurisdiction

40. The Claimant filed its Counter-Memorial on Jurisdiction on 25 June 2004. It claims that Bulgaria has consented in Article 26 ECT to submit the present dispute to ICSID arbitration or, in the alternative, through operation of the MFN clause in the Bulgaria-Cyprus BIT. The Claimant's principal arguments are summarized in paragraphs 41 - 53 below.
41. With respect to the ECT, the Claimant's position is that the Respondent's reliance on Article 17(1) to deny the Claimant the advantages of Part III of the ECT is not a true objection to jurisdiction but rather is a defense on the merits - a denial by the Respondent of the benefits of Part III, which would not affect Bulgaria's offer of (or consent to) arbitration, which is found in Part V of the ECT. The Claimant argues that from the moment it alleges a breach by Bulgaria of its obligations under Part III of the ECT, those allegations become an acceptance of Bulgaria's offer of arbitration under Article 26(3) ECT.
42. The Claimant goes on to say that even though Bulgaria's objection based on Article 17(1) is not an issue of jurisdiction, the Claimant is prepared to have the Arbitral Tribunal decide on that objection as part of the preliminary phase of the arbitration.
43. The Claimant argues that any valid denial of Part III benefits by Bulgaria would only affect benefits otherwise applicable after the date of denial. Article 17(1) ECT

constitutes a reservation by each Contracting Party of a right to deny the advantages of Part III but does not constitute a denial of the benefits in itself. That right, to become effective, must be expressly exercised, and once exercised, cannot take effect retroactively. The Claimant contends that the Respondent's purported exercise of the denial of Part III benefits to the Claimant only occurred on 18 February 2003, when its Ministry of Finance sent a letter to ICSID stating that the application of the ECT to the Claimant "shall be denied".

44. In any event, the Claimant says, Article 17(1) ECT cannot apply in this case because the conditions for its application do not exist. These conditions are that the investor company must be owned or controlled by citizens or nationals of a state not party to the ECT and that the investor must have no substantial business activities in the area of the Contracting State in which it is organized. According to the Claimant, the burden is on Bulgaria, the party relying on Article 17(1), to show that the two conditions of application are satisfied.
45. The Claimant contends that it has been owned and controlled from the date of investment to the present time by Mr. Jean-Christophe Vautrin, a national of France, which is a contracting party to the ECT. This ownership and control is described by the Claimant as set forth in paragraphs 46 - 49 below.
46. PCL was incorporated in Cyprus on 2 September 1998 under the name Trammel Investments, Ltd. It changed its name to Plama Consortium Limited on 24 September 1998. PCL has an authorized share capital of 5000 shares. On 2 September 1998, 500 shares were issued to Mediterranean Link (Nominees) Ltd. ("MedLink Nominees") and 500 shares to Mediterranean Link (Trustees) Ltd. ("Medlink Trustees"), both purportedly acting as nominees of a Cyprus non-resident beneficiary, Plama Holding Limited ("PHL").
47. PHL has an authorized capital of 5000 shares. On 13 September 1998, it issued 500 shares to MedLink Nominees and 100 shares to MedLink Trustees, both purportedly acting as nominees of a Cyprus non-resident beneficiary, EMU Investments Limited ("EMU"). A further 400 shares of PHL were issued to MedLink Trustees as nominee of a Cyprus non-resident beneficiary, Norwegian Oil Trading ("NOT"). On 26 October 1998, 400 shares of PHL were transferred from MedLink Trustees as nominee

of NOT to MedLink Trustees as nominee of EMU. From that date, EMU has been the sole beneficial owner of PHL.

48. On 1 March 2001, PCL issued its remaining 4000 shares to EMU. From 1 March 2001, EMU has been the immediate majority shareholder of PCL, with PHL retaining, through MedLink Nominees and MedLink Trustees, 1000 shares or twenty percent of PCL's shares.
49. EMU was incorporated in the British Virgin Islands on 21 August 1997. On that date, the Board of Directors issued 60 bearer shares. In the autumn of 1998, when EMU became the sole shareholder of PHL, Mr. Jean-Christophe Vautrin was the owner of EMU's entire issued share capital, which means that through EMU's ownership of the shares of PHL and PCL, Mr. Vautrin was and is the sole beneficial owner of PCL. The 60 bearer share certificates of EMU were initially in the possession of Mr. Vautrin. From June or July 1999 to February 2004, these shares were held for the exclusive benefit of Mr. Vautrin by Mr. Per Christian Nordtømme, a Norwegian lawyer. Since February 2004, he has held 30 of these bearer shares for the benefit of Mr. Vautrin; and Mr. Tom Eivind Haug, another Norwegian lawyer, has held 30 bearer shares of EMU for Mr. Vautrin's benefit since 12 February 2004.
50. As for the Dolsamex/O'Neill claim to ownership of PCL's shares, the Claimant argues that they were mere "chargees" with a lien on those shares, which could not give rise to a legal or beneficial right of ownership over the shares. While they were able to obtain possession of PCL's share certificates through court actions in Switzerland, there has been no transfer of either legal or beneficial ownership of the shares to Mr. O'Neill, Dolsamex or Mr. O'Neill's Bulgarian associates. Moreover, any rights as chargees or otherwise they may have would attach to only 1000, or twenty percent of PCL's shares owned by PHL which were held in escrow to secure royalty payments under certain agreements made by the parties, since, on 1 March 2001, PCL had issued 4000 shares directly to EMU.
51. With respect to the Bulgaria-Cyprus BIT, it is the position of the Claimant that Bulgaria consented to ICSID arbitration of this dispute by virtue of the MFN clause of that treaty. The Claimant argues that the MFN clause must be construed as extending to more favorable dispute settlement mechanisms than those in the Bulgaria-Cyprus

BIT which are contained in other investment treaties concluded by Bulgaria. Bulgaria's objections on the basis of policy and otherwise are irrelevant and misguided.

52. Finally, the Claimant says that the registration by ICSID of its Request for Arbitration can have no effect on the jurisdiction of the Arbitral Tribunal. Rule 6 of the Institution Rules does not allow for the partial registration of a request, and, therefore, the Claimant's Request must be deemed to have been registered in its entirety.
53. In its request for relief, the Claimant asks the Tribunal to make a decision:
 - (i) dismissing Bulgaria's objections to jurisdiction, and retaining jurisdiction over the claims raised by PCL in this arbitration;
 - (ii) in the event that it finds the conditions of application of Article 17(1) ECT to be fulfilled in this case, declaring that Bulgaria's exercise of its right under Article 17(1) ECT shall only operate to deny PCL the advantages of Part III of the ECT after the date of such exercise, and that (a) PCL therefore benefited from the advantages of Part III of the ECT prior to such date, and (b) the pursuit by PCL of claims in respect of breaches by Bulgaria of the obligations (or advantages) owed to PCL under Part III of the ECT prior to such date is therefore unaffected by Bulgaria's exercise of its right to deny PCL Part III advantages;
 - (iii) ordering Bulgaria to pay the full costs incurred by PCL in resisting Bulgaria's objections to jurisdiction, including the fees and expenses of the Centre, the arbitrators and PCL's legal counsel.
 - (iv) granting PCL any other relief that the Tribunal shall deem appropriate; and
 - (v) proceeding to hear the merits of PCL's claims.

C. The Respondent's Reply on Jurisdiction

54. On 26 July 2004, the Respondent filed a Reply on Jurisdiction. Its principal arguments are summarized below in paragraphs 55-68 below.

55. The Respondent states first that in the terms of Article 17(1) ECT, PCL has never had any substantial business activity in Cyprus. As for the tests of ownership or control in Article 17(1), the Respondent states that it has assembled evidence that:
- (i) a consortium of foreign investors, including a Swiss company, André & Cie ("André"), and the Norwegian company, NOT, (Switzerland and Norway not being parties to the ECT), was responsible for the purchase of Nova Plama in late 1998;
 - (ii) to the extent that Mr. Vautrin was involved in the solicitation and supervision of the investment in Nova Plama in his 1998-2001 contacts with the Respondent, he was at all times presented and identified as acting, not on his own behalf, but as a representative of André;
 - (iii) The Claimant has been directly owned and controlled by entities and individuals from non-ECT States, including the Bahamas, the British Virgin Islands and Norway.
56. The Respondent contends that the Claimant is asking the Tribunal to ignore the *documented* role of all these entities in favor of the *undocumented* role of one French national whose name does not appear on any publicly available corporate records of ownership (in terms of shareholding) or control (in terms of directors) of PCL until June 2003, well after Bulgaria first raised its Article 17(1) ECT objection.
57. The Respondent says that the Claimant also is asking the Tribunal to ignore the fact that, when the Claimant made its original investment, it concluded contracts with third parties (O'Neill/Dolsamex) granting security interests over the shares in PCL; that events leading those third parties to seek to exercise their security interests occurred; that the Claimant took steps to frustrate those parties from exercising their rights; and that litigation is now proceeding in several courts regarding the legal consequences of these events.
58. The Respondent argues that consistent with ECT Understanding N° 3, the Claimant bears the burden of proof under Article 17 ECT. Even if the Respondent initially had the burden of proving the justification for the denial of Article 17(1) ECT benefits,

given the above evidence, the burden of proof has shifted to the party which is in exclusive control of the relevant evidence, i.e., the Claimant.

59. In addition, the fact that issues central to the ownership and control of PCL are subject to litigation in Switzerland (and possibly other jurisdictions as well), in regard to a dispute that pre-dates this arbitration, makes a determination by this Tribunal as to ownership unworkable because this Tribunal's decisions cannot bind all the parties to the wider dispute about ownership and control of the Claimant.
60. The Respondent contends that the Claimant has failed to produce credible evidence demonstrating that Mr. Vautrin has ever been its ultimate owner. Nor has it produced such evidence regarding Mr. Vautrin's control over the non-ECT entities which have exercised control over the Claimant. The fact that the Claimant has refused to produce relevant evidence uniquely in its control is a sufficient basis to conclude that Mr. Vautrin's unsworn, unsupported assertions regarding ownership and control cannot be sustained.
61. The Respondent goes on to allege that there is substantial evidence that André and NOT and other entities have owned or controlled the Claimant and that the consent of the Republic of Bulgaria to sell Nova Plama was predicated on the fact that these two companies were the purchasers, i.e., that PCL was a consortium of André and NOT. During the negotiation of that sale, Mr. Vautrin represented himself to the Bulgarian authorities not as an investor on his own behalf but as a representative of André. Should material misrepresentation be found, the investment must be deemed to have been solicited and pursued in violation of Bulgarian law, with the consequence that the protections of the ECT and the BIT would not apply.
62. The Respondent repeats the argument contained in its Memorial on Jurisdiction that the rights of ownership and control of the Claimant are held by Mr. Timothy O'Neill and Dolsamex International, S.A. The rights of Dolsamex are effectively those of an owner, not a mere "chargee". The issuance in March 2001 of 4000 shares in PCL to EMU was an attempt by the Claimant to dilute PHL's shareholding in PCL and was wrongful. In light of the contracts involving those parties and related disputes pending in Swiss courts, the Respondent says the Claimant cannot prove and the Tribunal cannot find that there is an adequate degree of certainty regarding Mr. Vautrin's

asserted ownership and control of the Claimant and, accordingly, should sustain the Respondent's objection to jurisdiction. As an alternative, in light of the fact that Mr. Vautrin's ownership and control of the Claimant are *sub judice* in Switzerland, the Tribunal should stay the arbitration until the litigation has been definitively resolved. Otherwise, the Respondent will be exposed to the risk that multiple claims may be commenced by competing owners claiming to be acting for the Claimant and that, should an award be issued in the Claimant's favor, the Respondent will pay an award to an entity with no legal entitlement to act for the company.

63. The Respondent contends that Mr. O'Neill and Dolsamex have had contractual rights under a Throughput Agreement and Deed of Charge to control the Claimant since the Claimant's alleged initial investment and that Mr. Vautrin's claim to ownership and control of the Claimant cannot be quieted while disputes with Mr. O'Neill and Dolsamex remain unresolved.
64. In answer to the Claimant's argument that Article 17(1) ECT constitutes a reservation which permits a Contracting State to exercise the right to deny benefits to certain investors, which denial, to be effective, must be exercised, the Respondent says that Article 17 is not a reservation. Rather Article 17 contains substantive provisions of the treaty which qualify, limit or narrow the scope of the Contracting Parties' Part III obligations. Where the conditions in Article 17(1) are met, ECT Contracting Parties have no Part III obligations. A Contracting Party need not take any further step to realize its right to deny.
65. The Respondent argues that it has only consented in Article 26 ECT to submit a defined class of disputes to ICSID arbitration, i.e., one concerning an alleged breach of an obligation under Part III. The Claimant cannot allege a breach of an obligation of Bulgaria under Part III because Bulgaria owes no Part III obligations to the Claimant.
66. With respect to the MFN clause in the Bulgaria-Cyprus BIT, Bulgaria demonstrated in its Memorial that the MFN clause in the BIT cannot support jurisdiction in this case. That is because (a) the MFN provision in this case does not encompass dispute resolution and (b) the MFN provision cannot transform the consent given by Bulgaria under other treaties to submit other disputes to ICSID arbitration into consent to submit disputes under the Bulgaria-Cyprus BIT to ICSID arbitration. The terms of the

MFN provision, interpreted in accordance with their ordinary meaning, in their context, and in light of the BIT's object and purpose, show the Respondent did not consent to the ICSID arbitration of the disputes in issue in the present case.

67. The Respondent reiterates its argument that the registration of this case by ICSID shows that the Request for Arbitration was registered only with respect to the ECT, not the BIT.
68. Finally, the Respondent sets forth its request for relief in identical terms to those in its Memorial on Jurisdiction.

D. The Claimant's Rejoinder on Jurisdiction

69. The Claimant filed a Rejoinder on Jurisdiction dated 26 August 2004. The principal arguments made in the Rejoinder are summarized below in paragraphs 70 – 80 below.
70. With respect to Article 17(1) ECT, the Claimant says that ECT Part III does not include the Treaty's investor/state dispute resolution provisions which are found in Part V, Article 26, and, therefore, does not affect either the parties' consent to ICSID jurisdiction or ICSID's jurisdiction more generally. The Respondent's objection, consequently, is not an objection to jurisdiction but a defense to the merits of the Claimant's claims.
71. In any event, argues the Claimant, Article 17 ECT can only operate to allow the Respondent to deny advantages or benefits otherwise available after the date of the exercise of the right to deny those benefits; and Article 17 does not apply at all because the Claimant is owned and controlled by an ECT national and has been since it invested in Bulgaria in 1998.
72. It cannot be, according to the Claimant, that Article 17 ECT operates automatically to deny benefits under Part III to investors falling within its ambit because, if that were the case, Article 17 would be no more than an "exception" or exclusion clause which, unlike Article 24 ECT, it is not.
73. The Claimant argues that to interpret Article 17(1) ECT as requiring a Contracting State to exercise its option to deny rights to certain investors would not be burdensome to the Contracting State. If it is deemed important enough that various categories of

investors within the scope of Article 17 be denied the benefits of the ECT, it is open to such State to declare this upon its accession to the ECT and thereby exercise its right to deny such benefits from the outset.

74. The Claimant accepts that it does not conduct substantial business activities in Cyprus. However, as to the ownership of PCL, the Claimant states that the British Virgin Islands company, EMU, which owns PHL and PCL, issued bearer shares, that Mr. Vautrin is able to produce the bearer shares in question, and that it is in the nature of such shares that their presentation is sufficient *prima facie* proof of ownership at the present time. With regard to ownership and possession of the shares in the past, the Claimant relies on personal testimony of himself, nominees, agents and others that Mr. Vautrin was in actual physical or constructive possession of the shares at all material times. Unless the Respondent is able to produce evidence casting doubt on Mr. Vautrin's possession of those shares at the relevant times, no further proof of previous ownership is necessary to discharge the Claimant's *prime facie* burden of proof.
75. The Claimant admits that at the time of its purchase of Nova Plama certain of Bulgaria's representatives were unaware that Mr. Vautrin was the ultimate owner of the Claimant. But Mr. Vautrin, the Claimant or others made no misrepresentations as to the Claimant's ownership. The Respondent appeared largely indifferent as to the identity of the Claimant's ultimate owner.
76. Regarding the claims by Dolsamex and Mr. O'Neill to ownership or control of PCL, the Claimant denies (a) that they have had a contractual right to control the Claimant since the date of the Claimant's incorporation; (b) that the Throughput Agreement and Deed of Charge granted Dolsamex absolute ownership and control rights over the Claimant and not those of a mere "chargee"; (c) that Mr. O'Neill's physical possession of PCL share certificates is *prima facie* evidence of Dolsamex's right to control the Claimant and that the Claimant has frustrated Mr. O'Neill's security rights and Dolsamex's attempt to sell the shares in the Claimant by not providing Dolsamex with the original instruments of transfer; (d) that the issuance of the remaining 4000 shares in the Claimant to EMU was an attempt to dilute PHL's shareholding in the Claimant and was not performed in accordance with Cypriot law; and (e) that to acknowledge Mr. Vautrin's ownership of and control over the Claimant in the face of legal

proceedings in Switzerland would expose Bulgaria to the risk of multiple claims by owners claiming to act for the Claimant.

77. The Claimant states that the names on its share certificates are MedLink Nominees holding 500 shares on trust for PHL, MedLink Trustees holding another 500 shares on trust for PHL and EMU holding 4000 shares – which constitutes the entire issued share capital of the Claimant. Under Cypriot law, all shareholders of the Claimant must be registered in the Register of Members of the Claimant. Only a registered shareholder can claim to be a legal and beneficial owner of Claimant's shares. No instruments of transfer of the Claimant's shares have been remitted to Dolsamex or Mr. O'Neill, which means they cannot be registered as the shareholders of the Claimant in Cyprus. Absent instruments of transfer and the registration of shareholding, neither Dolsamex nor Mr. O'Neill can lay claim to ownership of any shares of the Claimant.
78. If the Swiss litigation were decided in favor of Dolsamex and Mr. O'Neill, the Claimant argues, they can only be awarded rights over the 1000 shares held by PHL, i.e., twenty percent of the Claimant's shares, since EMU holds the other 4000 shares of the Claimant. In addition, says the Claimant, if Dolsamex and Mr. O'Neill did or do own or control the Claimant, the latter will still be owned or controlled by ECT nationals and, therefore, not meet the conditions for application of Article 17(1) ECT. Mr. O'Neill is a French national, and the other owners of Dolsamex are Bulgarian nationals. Even if Bulgarian nationals cannot bring ECT claims directly against Bulgaria, as the Respondent alleges, they can bring claims as ultimate owners and controllers of a company incorporated in Cyprus as they, too, are ECT nationals and do not meet the conditions of application of Article 17(1) ECT.
79. As regards the Bulgaria-Cyprus BIT, the Claimant contends that the scope of the MFN clause in that treaty extends to dispute settlement and that by operation of the MFN clause, the dispute resolution provisions of other Bulgarian BITs such as the Bulgaria-Finland BIT of 3 October 1997, which provides for the possibility of ICSID arbitration, are imported into the Bulgarian-Cyprus BIT. The Respondent has, therefore, through the MFN provision, consented to submit investment disputes with investors of Cyprus to ICSID arbitration regardless of the scope of the dispute resolution provision in the Bulgaria-Cyprus BIT; and none of the policy exceptions to the operation of the MFN clause relied upon by the Respondent applies in this case.

80. Slightly modifying the requests for relief by comparison with those in its Counter-Memorial, the Claimant added a new paragraph (ii) requesting that the Arbitral Tribunal issue a decision:

(ii) *Denying the application of Article 17(1) to the dispute on the grounds that the conditions of application of that provision are not satisfied.*

Otherwise, the Claimant's requests for relief remain the same as in the Counter-Memorial on Jurisdiction.

E. The Hearing on 20 and 21 September 2004

81. At a hearing on 20 and 21 September 2004, Mr. Jean-Christophe Vautrin was examined and cross-examined by the parties' counsel. There followed oral presentation by each side of its respective case.

The Respondent's Arguments

82. The Respondent's arguments were presented in three parts: (1) the Dolsamex/O'Neill litigations and their incidence on the ownership of PCL; (2) the ECT and Article 17(1); and (3) the MFN issue. The Respondent also requested an award of costs for the jurisdiction phase of the arbitration.
83. With respect to the Dolsamex/O'Neill litigations, the Respondent argued that they cast a cloud over the ownership of PCL such that it is impossible to find with adequate assurance that PCL is even present in this arbitration. This uncertainty makes it impossible for the Claimant to satisfy the requirements of Article 25 of the ICSID Convention³ because it cannot be found with adequate assurance that PCL has consented to submit the present dispute to ICSID arbitration. If this arbitration is allowed to proceed, according the Respondent, and it is ultimately found that Mr. Vautrin does not actually own PCL, Bulgaria stands exposed to the risk of another claim by the true owners for the same events alleged in this arbitration.
84. Regarding Article 17(1) ECT, the Respondent said that this "denial of benefit provision means that a Contracting State is not obligated to extend any treaty

protections to a national that does not have a meaningful link with the other Contracting State. Article 17(1) gives to the Contracting State an option to provide ECT Part III benefits or not when the circumstances described in that article exist. Its purpose is to provide states with flexibility to determine when such a denial of benefits is warranted. Article 17 does not require a Contracting State to give advance notice of denial of benefits to an investor: Article 17 is itself a notice. The Claimant is wrong when it interprets the ECT as obligating Contracting States to provide all of the Treaty's advantages in all circumstances unless and until they decide affirmatively to deny. A company which falls afoul of Article 17 conditions has, according to the Respondent, no reasonable expectation that the ECT obligations are owing to it because States are not bound to provide those advantages in that circumstance; the investor in that situation knows from the outset that it has no ECT rights. There is, thus, no retroactive effect as the Claimant argues. Moreover, Article 26 ECT, the dispute resolution provision, is not binding on a State vis-à-vis an investor which falls afoul of Article 17.

85. It was the Respondent's submission at the hearing that Article 17 operates to defeat jurisdiction under Article 25(1) of the ICSID Convention and/or Article 26 ECT. To establish Bulgaria's consent to ICSID arbitration, there must be a dispute that concerns an alleged breach of an ECT Part III obligation. If the Arbitral Tribunal were to decide that the circumstances are present to satisfy an Article 17(1) denial, then the facts alleged by the Claimant necessarily would be incapable of forming the basis of a claim that ECT Part III has been breached. In that circumstance, Article 17(1) operates to defeat Bulgaria's consent, which extends only to disputes involving a possible breach of Part III and would operate to defeat jurisdiction under Article 25 of the ICSID Convention. There would be no substantive obligations applicable in the relationship between the parties which would be capable of forming the basis of a legal dispute as required by the ICSID Convention.
86. Furthermore, the Respondent contended, Article 17 ECT was intended to have the effect of denying all the benefits that flow from claims espousal as expressed in the investment treatment portion of the ECT. A principal benefit of Part III is that ECT Part V expressly provides a dispute resolution mechanism for breaches.

³ See paragraph 25 *supra*.

87. Turning to the issue of Mr. Vautrin's ownership and control of PCL, the Respondent argued that Mr. Vautrin's resistance to disclose fully and openly what the ownership of PCL is raises serious doubts as to the credibility and reliability of the information he has now given as to ownership. The Respondent pointed to inconsistencies in and unanswered questions raised by the documents in evidence. Reference was made to pledge agreements only recently produced by the Claimant in which the shares of EMU were pledged by two Seychelles companies, Panorama Industrial Limited ("Panorama") and Allspice Limited ("Allspice"), stating that they were the owners of the shares, which also casts doubt on the ultimate ownership of PCL.
88. Even if the Arbitral Tribunal were to find that Mr. Vautrin is the ultimate owner of PCL, the Respondent argued, the Claimant obtained the right to acquire its investment in Bulgaria by intentionally misleading the Bulgarian government regarding the ownership of PCL, the investor, in order to obtain the consent of its Privatization Agency. Bulgaria objects to jurisdiction on the ground that none of the protections of the ECT, the Cyprus-Bulgaria BIT or the ICSID Convention can be used by a the Claimant that obtained its investments through fraudulent misrepresentations. The consent of Bulgaria to the underlying investment, and, therefore, the Claimant's purchase of Nova Plama shares are void as a matter of Bulgarian law. The Claimant does not own the shares of Nova Plama, and consequently it has no investment in Bulgaria under any of the applicable treaties.
89. Finally, the Respondent addressed the MFN issue, arguing that the MFN clause in the Bulgaria-Cyprus BIT could not be used to import into that BIT from another treaty a forum for dispute resolution different from the forum designated in that BIT.

The Claimant's Arguments

90. The Claimant pointed out that PCL, as a company incorporated in Cyprus, is a covered investor under the ECT, under the definition in Article 1(7) ECT. By buying Nova Plama, PCL made an investment in Bulgaria falling within the definition in Article 1(6) ECT. In Part III of the ECT, Bulgaria committed itself to protect covered investments by covered investors of other contracting parties such as Cyprus. And in Article 26 ECT, Bulgaria consented to ICSID arbitration of disputes such as those subject of the present arbitration.

91. In reply to the Respondent's contention that Bulgaria's consent to arbitrate disputes must concern an alleged breach of an obligation under ECT Part III and that there is no such obligation in this case, the Claimant argued that PCL, as a covered investor with a covered investment, enjoys Part III protections until they are validly denied. Bulgaria only purported to deny benefits on 18 February 2003; prior thereto it had owed PCL Part III obligations for over four years during which time it had committed the breaches of the ECT alleged by the Claimant. By 18 February 2003, both parties had perfected their consent to ICSID arbitration under Article 26 ECT concerning those alleged breaches, which consent cannot be unilaterally withdrawn under the ICSID Convention.
92. In any event, the Claimant argued, Article 17(1) ECT cannot apply because a third State national does not own or control PCL. In this respect, the Claimant repeated what it had said earlier in the arbitration, that it accepted that PCL has no substantial business activities in Cyprus [D2.8]⁴. Counsel for the Claimant proceeded to describe the facts which he said showed that Mr. Vautrin has ultimately owned and controlled PCL at all times after the acquisition of Nova Plama.
93. During this presentation, the Claimant's counsel explained, as had Mr. Vautrin in his testimony, that pledge agreements of 13 November 2002, by which Mr. Nordtømme was depository of all of EMU shares on behalf of their owners, Panorama and Allspice, were never consummated; and the shares were never transferred to Panorama and Allspice. But even if they had been, these entities were beneficially owned by Mr. Vautrin; so that would have changed nothing.
94. With respect to the issue of alleged misrepresentation by PCL vis-à-vis Bulgaria at the time of its purchase of Nova Plama's shares, the Claimant did not necessarily dispute that Bulgaria understood at the time that André and NOT were the owners of PCL. Neither André nor NOT, and certainly not Mr. Vautrin who wanted to keep his ownership of PCL confidential, saw any need to correct Bulgaria's understanding. However, the Claimant pointed out that Mr. Vautrin and Mr. Nordtømme had both testified that during the pre-closing negotiations they told Bulgarian officials that André and NOT had withdrawn. There was no requirement that Mr. Vautrin disclose

⁴ References to the Transcript of the Hearing on 20-21 September 2004 are to Day 1 or 2 followed by the page number of the transcript of that day's hearing.

that he was the owner of PCL. There is no false representation as to ownership of PCL, the Claimants asserted, but at most an incorrect understanding by Bulgaria.

95. The Claimant went on to argue that Mr. Vautrin's control over PCL is demonstrated by the fact that the directors and secretaries of PCL were all lawyers or nominee companies who took their instructions from Mr. Vautrin or his lawyers.
96. Regarding the Respondent's argument that, because of the Dolsamex/O'Neill litigations and the cloud they cast over Mr. Vautrin's ownership of PCL, PCL may not have validly given its consent to arbitration, the Claimant replied that it is the directors of PCL, not the shareholders, who have power to authorize the company to commence an arbitration, which they did. The ownership of PCL is, therefore, irrelevant to the validity of PCL's consent to arbitration.
97. The Claimant asserted that Dolsamex did not have a valid claim to ownership of PCL, but that even if it were the owner it is principally held by Bulgarian nationals, and, consequently, Article 17(1) ECT does not apply. Moreover, even if Dolsamex had a valid claim, that claim would relate only to 20% of PCL's capital.
98. The Claimant explained again its interpretation of Article 17(1) ECT as reserving the right of a Contracting State to deny ECT benefits to certain investors. Until the Contracting State exercises that right – and Bulgaria did so only on 18 February 2003 – the protections of the ECT are owed to the investor. Since the Claimant's Request for Arbitration was filed on 19 December 2002, Bulgaria's purported denial of benefits took place after the Claimant's consent to arbitration was effected and can have no effect on the jurisdiction of the Arbitral Tribunal.
99. The Claimant reiterated its contention that pursuant to the MFN clause of the Bulgarian-Cyprus BIT, PCL benefits from the more favorable provisions of other Bulgarian BITs, such as the Bulgaria–Finland BIT, permitting dispute resolution under ICSID. The argument was that PCL is an investor under the Bulgaria-Cyprus BIT, that that BIT contains an MFN provision which applies to all aspects of "treatment" and that treatment refers not only to substantive provisions of other BITs but to settlement of dispute provisions as well. It is more favorable treatment than the restrictive recourse to arbitration in the Bulgaria-Cyprus BIT for an investor to have,

as is provided in other Bulgarian BITs, a choice of fora for its arbitration and to have the merits of a dispute settled by arbitration rather than only the quantum of damages.

F. Post-Hearing Submissions

The Respondent's Post-Hearing Submission

100. The Respondent filed a post-hearing submission on jurisdiction dated 22 October 2004.
101. The documents produced by the Claimant on 26 August, 6 September and 13 September 2004, says the Respondent, do not support the Claimant's claim that Mr. Vautrin owned and controlled PCL from the outset. On the contrary, the documents show that other entities and individuals have had ownership and control interests in PCL, such as Panorama and Allspice, André, Forus, and Russian financiers acting through Forus and Mr. Bonev. At best, the Claimant's evidence supporting its claim of Mr. Vautrin's ownership and control is uncertain and conflicting. As such, it cannot support the Tribunal's jurisdiction.
102. Moreover, the documents demonstrate that if the Claimant is correct that Mr. Vautrin owns and controls the Claimant, it acquired its investment in Bulgaria through misrepresentations to the Government of Bulgaria and is not entitled to the protections of any of the treaties at issue in this case. The Claimant never disclosed to Bulgaria that André and NOT did not intend to purchase the shares of Nova Plama and that Mr. Vautrin intended instead to purchase them in his personal capacity.
103. The Respondent further argues that since the ownership and control of the Claimant is subject to ongoing litigation with Dolsamex and Mr. O'Neill, it is impossible to determine the ownership and control of the Claimant as required by Article 17(1) ECT – or even whether the person(s) purporting to act on behalf of the Claimant in commencing this arbitration is (are) properly authorized to do so.
104. Finally, the Respondent submitted the costs it has incurred in respect of its jurisdictional objections amounting to US\$ 2,679,400. It requested that it be awarded all these costs.

The Claimant's Post-Hearing Submission

105. The Claimant submitted its Post-Hearing Response on 19 November 2004. The Claimant complained, in that Response, that the Respondent had ignored the Tribunal's directions given at the September 2004 hearing by not limiting itself in its post-hearing submission to arguments concerning the Claimant's document production prior to the hearing. The Claimant, therefore, requested the Tribunal to disregard the Respondent's submission other than as it relates to such documents.
106. The Claimant's submission argues that the documents it has produced in this arbitration do not show that a non-ECT national owned or controlled PCL and do not allow the Respondent to discharge its burden of proving that the factual conditions of Article 17(1) ECT are satisfied. The documents rather confirm that it is Mr. Vautrin who owned and controlled PCL at all relevant times. At no time did Panorama, Allspice, André, Mr. Bonev, Ms. Guichoud, Messrs. Vassiliades and Co., Mr. Nordtømme or anyone else own or control PCL.
107. The Claimant submitted information regarding litigation in Bulgaria relevant to the claim by Mr. O'Neill and Dolsamex of ownership of PCL shares.
108. As regards Bulgaria's allegations that PCL's investment in Nova Plama was obtained through misrepresentations to the Bulgarian authorities, the Claimant argues that this allegation was first raised as an objection to jurisdiction at the September 2004 hearing, too late, it says, for the Tribunal to consider it. In any event, the Claimant asserts that there was no misrepresentation by the Claimant as to the ownership of PCL, as ownership of PCL was not an issue at the time of the acquisition. Since it was not then an issue, there was no requirement for disclosure of that ownership.
109. The Claimant submits a claim for costs of US\$ 1,256,775.49. It argues that costs should follow a decision by the Tribunal in PCL's favor, that the jurisdictional phase of the arbitration could have been avoided or abbreviated with more cooperation from the Respondent, and that PCL is impecunious as a result of Bulgaria's unlawful conduct and, therefore, in urgent need of financial relief. It attacks the Respondent's claim for costs as excessive.

The Respondent's Post-Hearing Reply

110. The Respondent's Post-Hearing Reply was filed on 3 December 2004. In the Reply, the Respondent rejects the Claimant's charge that costs claimed by it are excessive. The Respondent had to bear high costs, it argues, because the Claimant refused to disclose information in its possession and, thereby, needlessly aggravated the costs to Bulgaria of having itself to find relevant information.
111. The Respondent characterizes the Claimant's allegations regarding recent Bulgarian court orders relevant to the claims of Dolsamex and Mr. O'Neill as patently incorrect.
112. The Respondent's reply reiterates and defends its request to be awarded costs and asks the Arbitral Tribunal to deny the Claimant's request for an award of costs in the Claimant's favor.
113. Finally, the Respondent rejects the Claimant's assertions that the Respondent's Post-Hearing Submission went beyond the scope of the Tribunal's directions.

*
* *

114. In a letter to the Tribunal dated 8 December 2004, the Claimant objected to the Respondent's Post-Hearing Reply on grounds that it makes arguments entirely unrelated to the Claimant's costs and submits new documents, contrary to the Tribunal's directions. The Claimant requests the Tribunal to disregard all submissions made by the Respondent in its Post-Hearing Reply except those on costs and to disregard new documents submitted.
115. With regard to all the foregoing arguments, the parties cite the Vienna Convention on the Law of Treaties, rules of international law, decisions of courts and arbitral tribunals and learned authors to support their respective provisions. The Arbitral Tribunal will, in the course of its examination of the parties' arguments below, discuss the law and jurisprudence and their applicability to the facts of the present case. The Tribunal adds that while Part V of this Decision summarizes the principal arguments of the parties, other arguments were made and considered by the Tribunal and will be referred to later to the extent the Tribunal considers them relevant to its decision.

IV. EXAMINATION OF THE PARTIES' SUBMISSIONS

116. The Tribunal is required to decide the Respondent's objection, under Rule 41 of the ICSID Arbitration Rules that the present dispute and the Claimant's claims are not within the competence or jurisdiction of the Tribunal and the Centre. The Claimant contends that the Tribunal's jurisdiction is established under three instruments referred to at the outset of this Decision: (a) the Energy Charter Treaty (the "ECT"); (b) the Bilateral Investment Treaty between Bulgaria and Cyprus ("the BIT"); and (c) the ICSID Convention ("the ICSID Convention"). The Claimant also contends that the Tribunal's jurisdiction can be established under either the ECT or the BIT as alternatives. It is therefore appropriate below for the Tribunal to consider the ECT and the BIT separately in turn, although the ICSID Convention is relevant to both.
117. *Applicable Law:* All three instruments are treaties under international law; and their interpretation is governed by rules of international law, expressed in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969 quoted in paragraph 26 *supra*. Under Article 31(1), the general rule requires a treaty to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their "context" and in the light of the treaty's "object" and "purpose"; Article 31(2) defines "context"; and the remaining provisions of Articles 31 and 32 provide further means of interpretation as applicable. The Tribunal considers these provisions in more detail below.
118. *Burden of Proof:* As regards the burden of proof on the Respondent's jurisdictional objection, the Tribunal adopts the test proffered by Judge Higgins in her separate opinion in the *Oil Platforms Case*⁵. In addressing the question, "what is the test by which the Court is to make its finding" in face of a preliminary objection to its jurisdiction on grounds that a party's claims do not fall under the treaty invoked, Judge Higgins cited the *Mavrommatis Case*⁶, in which the International Court of Justice held that in the absence of any test set forth in the treaty or in the rules governing the Court itself, the Court was "*at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an*

⁵ Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), 1996, ICJ Reports 803, at 810).

⁶ Mavrommatis Palestine Concessions, Judgement N° 2, 1924, P.C.I.J., Series A. N° 2, p. 16.

international tribunal and most in conformity with the fundamental principles of international law" (para. 28 of the separate opinion). The learned Judge continued:

The only way in which, in the present case, it can be determined whether the claims of [Claimant] are sufficiently plausibly based upon the 1955 Treaty is to accept pro tem the facts as alleged by [Claimant] to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes, that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them. (para. 32).

Stated in another way, the principle Judge Higgins proposed was the following:

The Court should... see if, on the facts as alleged by Claimant], the [Respondent's] actions complained of might violate the Treaty articles (§ 33) ... Nothing in this approach puts at risk the obligation of the Court to keep separate the jurisdictional and merits phases... and to protect the integrity of the proceedings on the merits... what is for the merits, (and which remains pristine and untouched by this approach to the jurisdictional issue) is to determine what exactly the facts are, whether as finally determined they do sustain a violation of ...[the treaty] and if so, whether there is a defence to that violation... In short it is at the merits that one sees 'whether there really has been a breach'. (para. 34).

119. This approach has subsequently been followed by several international arbitration tribunals deciding jurisdictional objections by a respondent state against a claimant investor, including *Methanex v USA*, *SGS v Philippines* and *Salini v Jordan*. In the last of these cases⁷, the tribunal decided that it was up to the claimant to present its own case as it saw fit; that, in doing so, the claimant must show that the alleged facts on which it relied were capable of falling within the provisions of the treaty (paras. 131 *et. seq.*); and that:

⁷ *Salini Costruttori S.p.A and Italstrade S.p.A v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award of 15 November 2004, <http://www.worldbank.org/icsid>.

In considering issues of jurisdiction, courts and tribunals do not go into the merits of the case without sufficient prior debate. In conformity with this jurisprudence, the Tribunal will accordingly seek to determine whether the facts alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked. (para. 151).

This Tribunal does not understand that Judge Higgins' approach is in any sense controversial, either at large or as between the parties to these proceedings. Accordingly, the Tribunal applies this approach to the jurisdictional issues considered below.

120. As regards the burden proof on other issues, relating to the merits and not to jurisdiction, the Tribunal cannot apply the same approach; and the parties' request that the Tribunal should decide such issues at this early stage of these proceedings has created certain difficulties. In particular, there was a significant difference between the parties as to which of them bore the burden of proof on disputed facts; and there was no agreement on the standard of proof or (as the Respondent contended but the Claimant denied) whether and how far it was appropriate for the Tribunal to draw any adverse inferences against the Claimant. As applicable, the Tribunal returns to these difficulties in more detail below.

A. The Energy Charter Treaty

121. The Claimant here rests its case on Article 26 ECT. Part V of the ECT regulates the settlements of disputes, with Article 26 providing for state-investor disputes and Article 27 for state-state disputes. In relevant part taken from the ECT's English version, Article 26 (1), (2) and (4) provide: "*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*"; and if not so amicably settled within a period of three months, "*the Investor party to the dispute may choose to submit it for resolution*" to, *inter alia*, international arbitration under the ICSID Convention. Article 26 is limited to the state's obligations under Part III ECT;

whereas state-state arbitration under Article 27 is not so limited. (The text of Article 26 is more fully set out in paragraph 26 of this Decision, *supra*). The ECT was the first multilateral treaty to provide as a general rule the settlement of investor-state disputes by international arbitration; and to date, it has been signed by at least 51 states and the European Communities.

Qualifying Definitions

122. It is necessary first to address the definition of certain terms used in Article 26: "Contracting Parties", "Investor", "Investment" and "alleged breach".
123. *Contracting Parties*: Bulgaria is a "Contracting Party" within the definition provided by Article 1(2) ECT, as a state having consented to be bound by the ECT and for which the ECT is in force, having ratified the ECT on 15 November 1996. Cyprus and France are also Contracting Parties, having ratified the ECT on 16 January 1998 and 28 September 1999 respectively.
124. *Investor*: The Claimant is an "Investor of another Contracting Party" within the definition provided by Article 1(7)(a)(ii) ECT, being a company organized in accordance with the law applicable in Cyprus. With its Request for Arbitration, the Claimant produced a certificate dated 29 March 2002 from Cyprus' Department of Registrar of Companies, certifying that in accordance with its records, the Claimant was registered on 2 September 1998 and remained on its register (Exhibit C6).
125. *Investment*: There is undoubtedly a dispute between the Respondent and the Claimant, the first relevant issue being whether the dispute relates to the Claimant's "Investment in the Area" of Bulgaria. As defined by Article 1(6) ECT, "*Investment*' means every kind of asset, owned or controlled directly or indirectly by an Investor"; and there follows a broad, non-exhaustive list of different kinds of assets encompassing virtually any right, property or interest in money or money's worth, including "(b) ... shares, stock or other forms of equity participation in a company ...". As defined by Article 1(10), "*Area*' means with respect to any state that is a Contracting Party (a) the territory under its sovereignty". The Claimant asserts that its substantial shareholding in Nova Plama, as a company carrying on business in Bulgaria, qualifies as an "Investment". The Claimant produced with its Request for Arbitration a temporary

shareholding certificate endorsed on 18 December 1998 showing a transfer of 4,976,377 shares of Nova Plama to the Claimant (Exhibit C4) and a temporary shareholding certificate also endorsed on 18 December 1998 showing a further transfer of 44,862,472 of Nova Plama's shares to the Claimant (Exhibit C5). As recorded in Paragraph 19 of this Decision (*supra*), those shares represented 96.78% of Nova Plama's share capital.

126. The Respondent contended, at the September hearing, that there was no "Investment" under Article 1(6) ECT because the Claimant had materially misrepresented or willfully failed to disclose the Claimant's true ownership to the Bulgarian authorities in violation of Bulgarian law. Accordingly, Bulgaria's Privatization Agency's consent to the Claimant's purchase of Nova Plama shares was null and void under Bulgarian law; and it followed that the Claimant had never made any valid investment. This particular submission had not been advanced before the September Hearing. In paragraph 80 of its Reply (p. 34), the Respondent had stated that it *"reserves the right, should the Tribunal sustain jurisdiction on the basis that Mr. Vautrin was at all times the sole owner of PCL, to raise an objection relating to whether Claimant's investment was made in accordance with law"*. Subsequently, after receiving the Claimant's Rejoinder of 26 August 2004 and hearing Mr. Vautrin's further testimony at the September Hearing, Bulgaria's Counsel stated that it was now making its objection and "exercising that right" [D1.227-229].
127. As understood by the Tribunal, as a jurisdictional objection, this submission is distinct from albeit factually similar to the broader case advanced by the Respondent on "misrepresentation", which the Tribunal considers separately below. In any event, it was also subject to the Claimant's procedural complaint recorded at the September Hearing [D2.56]. It is however appropriate to decide this particular submission here because, in the Tribunal's view, it necessarily fails *in limine* as a jurisdictional challenge on several grounds.
128. First, whatever the eventual merits of the Respondent's "misrepresentation" case (which is denied by the Claimant), it remains the case that the Claimant was an "Investor" under Article 1(7) ECT: it is here irrelevant who owns or controls the Claimant at any material time. The definition of "Investment" under Article 1(6) refers to the Investor's investment, in other words it is again here irrelevant who owns or

controls the Claimant at any material time; and as already noted above, the definition is broad, extending to "*any right conferred by law or contract*". That definition would be satisfied by a contractual or property right even if it were defeasible. Applying 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.

129. Second, it is clear that no point was taken by the Respondent on the validity of the Privatization Agency's consent as a jurisdictional point until the September Hearing. In particular, as at the time of the Claimant's Request for Arbitration of 24 December 2002 and the Respondent's Memorial of 26 May 2004, the Claimant's investment as an "Investment" under Article 1(6) ECT had not been impugned by the Respondent, no attempt having been made to avoid or to treat as null and void under Bulgarian law the Privatization Agency's consent. In these circumstances, the actual state of the Privatization Agency's consent under Bulgarian law and its effect on the Claimant's investment remains unclear to the Tribunal. The Tribunal here expresses no criticism of either party's conduct; but it decides that this submission cannot be admitted so belatedly as a jurisdictional challenge. This decision is limited to this jurisdictional submission; and in particular it does not extend to the merits of the Respondent's case on "misrepresentation".
130. In any event, the Tribunal notes that the Respondent's charges of misrepresentation are not directed specifically at the parties' agreement to arbitrate found in Article 26 ECT. The alleged misrepresentation relates to the transaction involving the sale of the shares of Nova Plama by EEH to PCL and the approval thereof given by Bulgaria in the Privatization Agreement and elsewhere. It is not in these documents that the agreement to arbitrate is found. Bulgaria's agreement to arbitrate is found in the ECT, a multilateral treaty, a completely separate document. The Respondent has not alleged that the Claimant's purported misrepresentation nullified the ECT or its consent to arbitrate contained in the ECT. Thus not only are the dispute settlement provisions of the ECT, including Article 26, autonomous and separable from Part III of that Treaty but they are independent of the entire Nova Plama transaction; so even if the parties' agreement regarding the purchase of Nova Plama is arguably invalid because of misrepresentation by the Claimant, the agreement to arbitrate remains effective.

131. Accordingly, in the Tribunal's view, the present dispute does relate to an "Investment" by the Claimant as an "Investor" in Bulgaria's "Area".
132. *Alleged Breach:* The next issue is whether the parties' present dispute concerns "an alleged breach of an obligation of [the Respondent] under Part III". Part III ECT is the chapter entitled "Investment, Promotion and Protection", containing the ECT's principal substantive protections for Investors, including Promotion, Protection and Treatment of Investments, Compensation for Losses, Key Personnel and Expropriation under Articles 10, 12 and 13 ECT, respectively. It is self-evident from the Claimant's written and oral submissions to date that it is "alleging" violations by the Respondent of several provisions in Part III of the ECT. For example, the Claimant pleads as its "principal causes of action" Articles 10, 12 and 13 ECT in paragraphs 127 and 130-144 of its Request for Arbitration. These are all alleged breaches of the Respondent's obligations under Part III of the ECT. In the Tribunal's view, it is not necessary, at this jurisdictional stage of the proceedings, for the Claimant to prove positively actual violations by the Respondent: the unambiguous wording in Article 26 ECT is met by the Claimant's *allegations* of such violations. Referring again to Judge Higgins' test in *Oil Platforms*, if on the facts alleged by the Claimant, the Respondent's actions might violate the ECT, then the Tribunal has jurisdiction to determine exactly what the facts are and see whether they do sustain a violation of that Treaty.

The Claimant's "Consent"

133. The Claimant contends that it validly exercised its right under Article 26 ECT in referring its disputes with the Respondent to ICSID Arbitration; and that its own "consent in writing" expressly submitting to ICSID's jurisdiction, as required by Article 25(1) of the ICSID Convention, is contained in paragraphs 109-111 of the Claimant's Request for Arbitration, which was confirmed by the Claimant's letter dated 24 December 2002 to the Respondent (Exhibit C15). As recorded in the minutes of the meeting of the Claimant's board of directors dated 11 November 2002, the board resolved that Mr. Nordtømme (*inter alios*) be entrusted to bring ICSID arbitration proceedings against the Respondent (Exhibit C19); and a power of attorney to that end was granted by the Claimant to Mr. Nordtømme also dated 11 November 2002. The Claimant's Request for Arbitration and the Claimant's letter dated 24 December 2002

were both signed by Mr. Nordtømme as attorney for the Claimant; and by profession, Mr. Nordtømme is a practicing attorney from Oslo, Norway.

134. The Respondent disputes the validity of this exercise and expression of consent in the Claimant's name on the ground that the persons purporting to act for the Claimant were not entitled or authorized to do so. This submission is based on the disputed ownership of shares in the Claimant as between Dolsamex, Mr. O'Neill and PHL. (This is a different submission from, albeit not factually dissimilar to, the issue addressed below relating to Article 17(1)'s first limb on the Claimant's continuous ownership and control.)
135. In the Tribunal's view, the issue raised by the Respondent must be dismissed on two cumulative grounds. First, the relevant exercise and consent were made by the Claimant acting through its duly appointed corporate organs of management and duly authorized attorney. It was not performed by the Claimant's shareholders or persons purporting to act as shareholders. The Claimant's articles of association incorporate Table A of the Companies Act of Cyprus, whereby the Claimant's board of directors is granted the general power to manage the Claimant, including the right to bring legal or arbitration proceedings in the company's name. That power is not granted to the Claimant's shareholders; and accordingly, any dispute over the Claimant's share ownership is irrelevant to the legal validity of the acts undertaken in the Claimant's name by its duly authorized and appointed managers and agents for the time being. It is not suggested, nor could it be on the materials currently before the Tribunal, that the appointment of the Claimant's board members or the power of attorney granted to Mr. Nordtømme were otherwise invalid.
136. Second, the litigation between Dolsamex, Mr. O'Neill and PHL over the Claimant's share ownership remains unresolved in the Swiss and Bulgarian Courts; and those unresolved disputes, still months if not years from their final end, cannot by themselves invalidate the otherwise valid acts of the Claimant's managers and attorneys. Of course, if the disputes were to be finally resolved adversely to PHL in the future, that might then lead to a significant change in the composition of the Claimant's board and the continuing authority of its attorneys; but these changes would operate only for the future; and neither, by themselves, could render invalid retrospectively what had otherwise been done validly at the time in the Claimant's

name. Nor would the change of ownership or of the board of the Claimant affect any decision rendered by this Tribunal, which will be *res judicata* between PCL and Bulgaria.

137. Accordingly, the Tribunal decides that there was a valid exercise by the Claimant of its right to refer its dispute with the Respondent to ICSID under Article 26 ECT and that it validly made the requisite written consent under Article 25(1) of the ICSID Convention.

The Respondent's "Consent"

138. The Claimant contends that Bulgaria's signature and accession to the ECT constitutes the Respondent's "consent in writing" to ICSID arbitration, required by Article 25(1) of the ICSID Convention. It submits that Article 26 ECT contains a standing, open written offer of (*inter alia*) ICSID arbitration by Contracting States to Investors of other Contracting States. By filing its Request for Arbitration, as already noted, the Claimant accepted that offer; and having given its own written consent to arbitration under Article 25(1) of the ICSID Convention, the Tribunal's jurisdiction is established under the ICSID Convention and Article 26 ECT.
139. The Respondent counters that to establish Bulgaria's consent to ICSID arbitration, there must be a dispute that concerns an alleged breach of an ECT Part III obligation. The conditions of Article 17(1) ECT having been fulfilled, according to the Respondent, there can be no claim of a breach of Part III and no consent of Bulgaria to arbitrate any such claim.
140. The Tribunal accepts the Claimant's analysis of the ECT and ICSID Convention of investor-state arbitration; but for purposes which will appear later, it wishes to emphasize several characteristics of the parties' arbitration agreement created by these two instruments. First, Article 26(3)(a) ECT provides that the Contracting Parties thereby give their "unconditional assent" to such state-investor arbitration (subject to specific exceptions which are here immaterial); and accordingly, as a Contracting Party, the Respondent thereby expressed unconditionally its written consent required under the ICSID Convention. Second, Article 46 ECT provides that no reservations may be made to the ECT; none were in fact made in regard to Article 26 by Bulgaria;

and accordingly Bulgaria's consent was unreserved. Third, under Article 25(1) of the ICSID Convention, when the parties have given their consent, no party "may withdraw its consent unilaterally"; and accordingly the Respondent's consent was also irrevocable from the date of the Claimant's Request for Arbitration. Lastly, Article 45(1) ECT provides that each signatory agrees to apply the treaty provisionally pending its entry into force for such signatory; and in accordance with Article 25 of the Vienna Convention, it follows that Article 26 ECT provisionally applied from the date of a state's signature, unless that state declared itself exempt from provisional application under Article 45(2)(a) ECT. (Bulgaria made no such declaration).

141. For all these reasons, Article 26 ECT provides to a covered investor an almost unprecedented remedy for its claim against a host state. The ECT has been described, together with NAFTA, as *"the major multilateral treaty pioneering the extensive use of legal methods characteristic of the fledgling regulation of the global economy"*, of which *"perhaps the most important aspect of the ECT's investment regime is the provision for compulsory arbitration against governments at the option of foreign investors ..."*; and these same distinguished commentators concluded: *"With a paradigm shift away from mere protection by the home state of investors and traders to the legal architecture of a liberal global economy, goes a coordinated use of trade and investment law methods to achieve the same objective: a global level playing field for activities in competitive markets"*⁸. By any standards, Article 26 is a very important feature of the ECT which is itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law.

The Tribunal's Conditional Conclusion on Article 26 ECT

142. In conclusion, subject to the major issue raised by the Respondent on Article 17(1) ECT (which is considered below), it follows from the decisions so far that this Tribunal decides that it would have jurisdiction to determine on its merits the present dispute between the Claimant and the Respondent under Article 26 ECT and the ICSID Convention, and that both parties to the dispute have given their written consent thereto within the meaning of Article 25(1) of the ICSID Convention.

⁸ Bamberger, Lineham and Wälde, *The Energy Charter Treaty in 2000* (in *Energy Law in Europe*, ed Roggenkamp; 2000), pp. 11, 31 and 32 (Legal Appendix to Reply, Exhibit 73).

Article 17 ECT

143. Article 17 ECT is contained in Part III of the ECT, the same part containing the ECT's substantive protections for Investors but a different part from Part V containing the provisions for dispute settlement. Article 17 is entitled "Non-Application of Part III in Certain Circumstances"; and taken from the ECT's English version, Article 17(1) provides: *"Each Contracting Party reserves the right to deny the advantages of this Part [i.e., Part III] to: (1) a legal entity [Limb i] if citizens or nationals of a third state own or control such entity and [Limb ii] if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised; ..."*. The Tribunal attaches significance to the word "and" linking both limbs of Article 17(1), thereby requiring both to be satisfied. (For ease of reference below, the Tribunal has added in the quotation above the roman numerals in square brackets to indicate these first and second limbs). Article 17(2) ECT contains a similar provision for an "Investment" in differently specified circumstances. (The full text of Article 17 ECT is set out in paragraph 26 of this Decision, *supra*).
144. By letter dated 18 February 2003 to ICSID's Acting Secretary-General, the Respondent exercised its right under Article 17(1) ECT to deny the advantages of Part III to the Claimant, purportedly including the right to refer its claim to arbitration under Article 26 ECT, as follows: *"The application of ECT shall be denied to the claimant since Plama Holding Limited [sic] has not provided any evidence that the ultimate owners of its shares are nationals or citizens of a Contracting State to ECT and that it has any substantial business activities in the Area of the Contracting Party in which it is organised, namely Cyprus."* (Exhibit C36). In a further letter dated 4 March 2003 to the Acting Secretary-General of ICSID, the Respondent clarified its position: *"... the clear and unambiguous wording of Article 17 of the ECT leaves no doubt that each [Contracting Party] has reserved this right with the conclusion of the ECT and that no prior or subsequent reservation is needed for its exercise ... Consequently, Article 17 of the ECT confers on each [Contracting Party] a direct and unconditional right of denial which may be exercised at any time and in any manner."* (Exhibit C37).

145. It will be noted, as was emphasized by the Claimant in its submissions, that the language here first used by the Respondent apparently assumed (i) the need to "exercise" the right of denial and (ii) that its effect was prospective from the right's exercise ("shall be denied"), using the future tense to deny advantages to the Claimant as if for the future only. In that event the Claimant submitted that, even if Article 17(1) applied in the present case, given that the Claimant had already submitted its Request for Arbitration earlier on 24 December 2002, it could not deprive this Tribunal of any jurisdiction or even operate as a defense on the merits to any claims pleaded by the Claimant arising from still earlier events. It is necessary for the Tribunal to consider Bulgaria's submissions on Article 17(1) separately as regards jurisdiction and merits.

Article 17 as a Jurisdictional Issue

146. The first question is whether any issue raised under Article 17(1) by Bulgaria can deprive this Tribunal of all jurisdiction to decide the merits of the parties' dispute. As already described in Section III of this Decision (*supra*), the Claimant submits that the Respondent's reliance on Article 17(1) can only relate to the merits and not to jurisdiction, whereas Bulgaria primarily contends the opposite. The Respondent contends that there can be no dispute over its obligations under Part III of the ECT when the Claimant has no relevant "advantages" under Part III legally capable of giving rise to any claim pleaded under Part III. The Respondent contends that the denial of such "advantages" are not limited to those conferred by Part III of the ECT but include also all advantages relating to Part III, including the right to invoke international arbitration under Article 26 of Part V of the ECT alleging any breach of Part III. In its counsel's words at the September Hearing: "*it's the whole thing*" [D1.160]; and as the Tribunal has already noted, unlike Article 27, Article 26 is a remedy limited to an alleged breach of Part III.
147. In the Tribunal's view, the Respondent's jurisdictional case here turns on the effect of Articles 17(1) and 26 ECT, interpreted under Article 31(1) of the Vienna Convention. The express terms of Article 17 refer to a denial of the advantages "of this Part", thereby referring to the substantive advantages conferred upon an investor by Part III of the ECT. The language is unambiguous; but it is confirmed by the title to Article 17: "Non-Application of *Part III* in Certain Circumstances" (emphasis supplied). All

authentic texts in the other five languages are to the same effect. From these terms, interpreted in good faith in accordance with their ordinary contextual meaning, the denial applies only to advantages under Part III. It would therefore require a gross manipulation of the language to make it refer to Article 26 in Part V of the ECT. Nonetheless, the Tribunal has considered whether any such manipulation is permissible in the light of the ECT's object and purpose.

148. Article 26 provides a procedural remedy for a covered investor's claims; and it is not physically or juridically part of the ECT's substantive advantages enjoyed by that investor under Part III. As a matter of language, it would have been simple to exclude a class of investors completely from the scope of the ECT as a whole, as do certain other bilateral investment treaties; but that is self-evidently not the approach taken in the ECT. This limited exclusion from Part III for a covered investor, dependent on certain specific criteria, requires a procedure to resolve a dispute as to whether that exclusion applies in any particular case; and the object and purpose of the ECT, in the Tribunal's view, clearly requires Article 26 to be unaffected by the operation of Article 17(1). As already noted above, for a covered investor, Article 26 is a very important feature of the ECT.
149. In the Tribunal's view, the contrary approach would clearly not accord with the ECT's object and purpose. Unlike most modern investment treaties, Article 17(1) does not operate as a denial of all benefits to a covered investor under the treaty but is expressly limited to a denial of the advantages of Part III of the ECT. A Contracting State can only deny these advantages if Article 17(1)'s specific criteria are satisfied; and it cannot validly exercise its right of denial otherwise. A disputed question of its valid exercise may arise, raising issues of treaty interpretation, other legal issues and issues of fact, particularly as regards the first and second limbs of Article 17(1) ECT. It is notorious that issues as to citizenship, nationality, ownership, control and the scope and location of business activities can raise wide-ranging, complex and highly controversial disputes, as in the present case. In the absence of Article 26 as a remedy available to the covered investor (as the Respondent contends), how are such disputes to be determined between the host state and the covered investor, given that such determination is crucial to both? According to the Respondent, there is no remedy available to a covered investor under the ECT at all: it has no advantages under the

ECT at all; it has no rights under Article 26 to amicable negotiations or international arbitration; and any attempt to initiate arbitration before ICSID will be met with a demand by the host state that the request for arbitration should not be registered under Article 36(3) of the ICSID Convention (as the Respondent contended in its letter dated 4 March 2003, cited above). Towards the covered investor, under the Respondent's case, the Contracting State invoking the application of Article 17(1) is the judge in its own cause. That is a license for injustice; and it treats a covered investor as if it were not covered under the ECT at all. It is not tempered, as the Respondent's counsel tentatively suggested at the September hearing, by the possibility that the Contracting State might choose, in its discretion, to extend in a friendly but wholly voluntary way any or all of the advantages of Part III during amicable negotiations with the aggrieved investor [D1.151ff].

150. This contrary approach also cannot be reconciled with Article 27 ECT on state-state arbitration. Under Article 27, a Contracting Party can refer to arbitration a dispute with the host state (as another Contracting Party) any dispute concerning the application or interpretation of the ECT, including the host state's exercise of its right of denial to a covered investor under Article 17(1) ECT. The Contracting Party's right to arbitration is unqualified by the host state's invocation of Article 17(1); and it follows that a Contracting Party could pursue a claim against the host state for its improper reliance on Article 17(1) towards a covered investor. In other words, even if (as the Respondent contends), the investor cannot invoke Article 26 at all, it would leave intact its home state's right, as a Contracting State, to invoke Article 27 against the host state. It seems an unnecessarily complicated result to resolve that dispute when, on the ordinary meaning of Article 17(1), the covered investor could invoke Article 26 directly against the host state without the assistance of its home state. The Tribunal notes again that for a covered investor, Article 26 is a very important feature of the ECT; and as a remedy exercisable by an investor by itself and in its own right against the host state, it cannot be equated with Article 27. Under the ECT, the covered investor is more than an object of international law (see *supra*, paragraph 139).

151. *Conclusion:* For these reasons, the Tribunal decides that the Respondent's case on Article 17(1) cannot support a complaint to the jurisdiction of the Tribunal in this case. It would ordinarily be appropriate to stop here as regards any further consideration of Article 17(1) ECT. However, for understandable reasons, both parties requested the Tribunal to decide upon the application or non-application of Article 17(1) ECT even if it did not relate to the Tribunal's jurisdiction but related to the merits of their dispute. Accordingly, the Tribunal now proceeds further to meet the parties' request.

Article 17 as an Issue on the Merits

152. The Tribunal addresses this part of the parties' submissions on the assumption (as decided above) that the Tribunal has jurisdiction to decide the Claimant's claims against the Respondent for one or more alleged breaches of Part III of the ECT. These submissions raise distinct issues of legal interpretation and related factual issues.
153. *Exercise of the Right to Deny:* The Claimant contends first that where a Contracting State wishes to deny the advantages of Part III of the ECT to a legal entity under Article 17(1) ECT, that State must first exercise its right to deny such advantages or take equivalent positive action that it intends to do so; and further that the denial then operates only prospectively from the date of such exercise or other action. Accordingly, the legal entity enjoys in full the advantages of Part III of the ECT up to that date. In its counsel's words at the September Hearing: " ... '*reserves the right*', *this means the right exists, but it's not yet exercised, the right to deny exists, but not the denial*" [D2.65]; and reference was made to Professor Wälde's expert opinion filed by the Respondent in support of its Memorial on Jurisdiction to the effect that Article 17(1) provides an "option" for the Contracting State, thereby also suggesting the need for that option to be exercised by the state (at paragraph 62).
154. The Respondent contends otherwise: first that Article 17(1) ECT requires no action by Bulgaria; and, second, whether or not it did, the denial of benefits would operate retrospectively. It contends that Article 17(1) is a so-called "denial of benefits" provision found in many modern investment treaties; that the principal feature of such treaties is the implementation, in a pragmatic way, of the home State's right under customary international law to provide diplomatic protection to its nationals through the mechanism of claims espousal against the host state; and that under such law, the

host state is not obliged to entertain a claim presented by the home state unless there is a genuine and continuous link between that state and its national from the date of the alleged injury until the award settling the inter-state claim, relying on the ICJ's decision in the *Nottebohm Case*⁹.

155. In the Tribunal's view, the existence of a "right" is distinct from the exercise of that right. For example, a party may have a contractual right to refer a claim to arbitration; but there can be no arbitration unless and until that right is exercised. In the same way, a Contracting Party has a right under Article 17(1) ECT to deny a covered investor the advantages under Part III; but it is not required to exercise that right; and it may never do so. The language of Article 17(1) is unambiguous; and that meaning is consistent with the different state practices of the ECT's Contracting States under different bilateral investment treaties: certain of them applying a generous approach to legal entities incorporated in a state with no significant business presence there (such as the Netherlands) and certain others applying a more restrictive approach (such as the USA). The ECT is a multilateral treaty with Article 17(1) drafted in permissive terms, not surprisingly, in order to accommodate these different state practices.
156. Moreover, if the Respondent were correct, it is surprising that Article 17(1) should be drafted as it is: it would have been much easier to draft suitable wording to make the Respondent's meaning plain. For example, the ASEAN Framework Agreement on Services of December 1995 provides in Article VI ("Denial of Benefits"):

The benefits of this Framework Agreement shall be denied to a service supplier who is a natural person of a non-Member State or a juridical person owned or controlled by persons of a non-Member State constituted under the laws of a Member State, but not engaged in substantive business operations in the territory of Member States(s). (Exhibit C66).

That simple language requires no exercise or other action by a contracting state; and it leaves no room for ambiguity, even though this treaty is of a different type from the ECT. It requires little effort to imagine other similarly effective language which could have been used for Article 17(1) ECT - but which has not there been used. In these

⁹ Liechtenstein v Guatemala, 1955 ICJ 4.

circumstances, it would clearly not be permissible for the Tribunal to re-write Article 17(1) ECT in the Respondent's favor.

157. The Tribunal has also considered whether the requirement for the right's exercise is inconsistent with the ECT's object and purpose. The exercise would necessarily be associated with publicity or other notice so as to become reasonably available to investors and their advisers. To this end, a general declaration in a Contracting State's official gazette could suffice; or a statutory provision in a Contracting State's investment or other laws; or even an exchange of letters with a particular investor or class of investors. Given that in practice an investor must distinguish between Contracting States with different state practices, it is not unreasonable or impractical to interpret Article 17(1) as requiring that a Contracting State must exercise its right before applying it to an investor and be seen to have done so. By itself, Article 17(1) ECT is at best only half a notice; without further reasonable notice of its exercise by the host state, its terms tell the investor little; and for all practical purposes, something more is needed. The Tribunal was referred to Article 1113(2) NAFTA as an example of a term providing for the denial of benefits which provides for a form of prior notification and consultation; and whilst the wording is materially different from Article 17(1) ECT, this term does suggest that the Tribunal's interpretation is not unreasonable as a practical matter.
158. For these reasons, in the Tribunal's view, the interpretation of Article 17(1) ECT under Article 31(1) of the Vienna Convention requires the right of denial to be exercised by the Contracting State. Accordingly, the Tribunal decides in the present case that the Respondent was required to exercise its right against the Claimant; and that it did so only on 18 February 2003, more than four years after the Claimant made its investment in Nova Plama. The real point at issue, therefore, is whether that exercise had retrospective effect to 1998 or only prospective effect from 2003, on the Claimant's "advantages" under Part III ECT.
159. *Retrospective or Prospective Effect:* The language of Article 17(1) ECT is not by itself clear on this important point. There is some slight guidance from Article 17(1) suggesting a prospective effect, given the use of the present tense to coincide with the right's exercise ("own or control" ... "has no substantial activities" ... "is organized"); and likewise, Article 17(2) ECT suggests only a prospective effect to a denial of

advantages to an Investment (" ... if the denying Contracting Party establishes ..." etc). However, the Tribunal would not wish to base its decision on such semantic indications only.

160. The Tribunal returns to the object and purpose of the ECT under Article 31 of the Vienna Convention. The parties did not here invoke under Article 31(3) and (4) any subsequent agreement or practice between the ECT's Contracting Parties or under Article 32 any of the ECT's preparatory work. Accordingly, as with many issues of disputed interpretation turning on a relatively few words, it is a short point of almost first impression.
161. The covered investor enjoys the advantages of Part III unless the host state exercises its right under Article 17(1) ECT; and a putative covered investor has legitimate expectations of such advantages until that right's exercise. A putative investor therefore requires reasonable notice before making any investment in the host state whether or not that host state has exercised its right under Article 17(1) ECT. At that stage, the putative investor can so plan its business affairs to come within or without the criteria there specified, as it chooses. It can also plan not to make any investment at all or to make it elsewhere. After an investment is made in the host state, the "hostage-factor" is introduced; the covered investor's choices are accordingly more limited; and the investor is correspondingly more vulnerable to the host state's exercise of its right under Article 17(1) ECT. At this time, therefore, the covered investor needs at least the same protection as it enjoyed as a putative investor able to plan its investment. The ECT's express "purpose" under Article 2 ECT is the establishment of "... *a legal framework in order to promote long-term co-operation in the energy field ... in accordance with the objectives and principles of the Charter*" (emphasis supplied). It is not easy to see how any retrospective effect is consistent with this "long-term" purpose.
162. In the Tribunal's view, therefore, the object and purpose of the ECT suggest that the right's exercise should not have retrospective effect. A putative investor, properly informed and advised of the potential effect of Article 17(1), could adjust its plans accordingly prior to making its investment. If, however, the right's exercise had retrospective effect, the consequences for the investor would be serious. The investor could not plan in the "long term" for such an effect (if at all); and indeed such an

unexercised right could lure putative investors with legitimate expectations only to have those expectations made retrospectively false at a much later date. Moreover, in the present case, the Respondent asserts a retrospective effect from a very late date, even after the Claimant's Request for Arbitration and the accrual of the Claimant's causes of action under Part III ECT.

163. The Respondent has argued that by the very existence of Article 17(1) in the ECT, the Investor is put on notice before it makes its investment that it could be denied ECT advantages if it falls within that Article and, therefore, if it did so fall within Article 17(1) it would have no legitimate expectations of such advantages. Such an interpretation of the ECT would deprive the Investor of any certainty as to its rights and the host country's obligations when it makes its investment and must be rejected.
164. For the Investor, the practical difference between prospective and retrospective effect is sharp. The former accords with the good faith interpretation of the relevant wording of Article 17(1) in the light of the ECT's object and purpose; but the latter does not. Moreover, if (contrary to the Tribunal's decision), the effect could be retrospective, the Tribunal would have to decide whether, nevertheless, in the present case it was not so exercised, given the terms of the Respondent's letter dated 18 February 2003. In the circumstances, however, it is unnecessary to decide this further question.
165. In conclusion, the Tribunal decides that the Respondent's exercise of its right under Article 17(1) ECT by its letter dated 18 February 2003 only deprived the Claimant of the advantages under Part III of the ECT prospectively from that date onwards. In the present case, it may well be that this particular decision will render moot, or substantially moot, any further need to consider other issues arising from the first and second limbs of Article 17(1) ECT. Nonetheless, as requested by the parties, the Tribunal has sought to address these issues here also.

Burden and Standard of Proof

166. The Claimant asserts that the Respondent bears the burden of showing that Article 17(1) applies factually to the present dispute to disqualify its claim on the merits. The Respondent contends that, although it might have borne the burden initially in asserting Article 17(1), the burden subsequently shifted to the Claimant to show that

its ownership and control has never been held by a national of a third state, being an approach consistent with ECT Understanding No 3 (relating to Article 1(6) defining "Investment" where there is a "doubt" as to whether an Investor controls an Investment, directly or indirectly). Further, Respondent contended that the burden shifted to the Claimant when it alone could produce the relevant documentation and testimony required to resolve disputed factual issues over its own ownership and control.

167. In the Tribunal's view, as already indicated above, the burden of proof on the merits is significantly different from the burden applied to a jurisdictional issue. Further, the parties were not agreed on the standard of proof, including the drawing of adverse inferences; and the parties' submissions may disguise a further difference between the legal and evidential burdens of proof. Given these factors, the Tribunal has experienced difficulties in addressing factual issues disputed between the parties, particularly as regards Article 17(1)'s first limb. It is however convenient to begin with its second limb where no such difficulties arise.

Article 17(1)'s Second Limb: "No Substantial Business Activities"

168. Under Article 17(1)'s second limb, the factual question is whether the Claimant *"has no substantial business activities in the Area of the Contracting Party in which it is organized"*, i.e., Cyprus. In its Request for Arbitration, the Claimant asserted that it had *"substantial business activities in Nicosia"* (see paragraph 85). In its Rejoinder, the Claimant appeared to concede that it did not conduct substantial business activities in Cyprus. In an equivocal footnote number 49 (at page 24), the Claimant there stated that it was *"prepared to accept, for present purposes, that it does not conduct substantial business activities in Cyprus. The same is not true of PHL ..."*. At the hearing on 21 September 2004, that concession was confirmed by the Claimant's counsel without any qualification: *"We do accept that the second limb of Article 17 is satisfied; we accept that PCL [the Claimant] has no substantial business activities in Cyprus, the Area of the Contracting Party in which it is organised, for the purposes of the ECT ..."* [D2.8].
169. In the Tribunal's view, the concession was rightly, if belatedly, made by the Claimant. It is clear to the Tribunal that the Claimant itself has never had any substantial business

activities in Cyprus; and contrary to the Claimant's pleading, this shortfall cannot be made good with business activities undertaken by an associated but different legal entity, Plama Holding Limited ("PHL"), even where PHL owns or controls the Claimant. In the Tribunal's view, the second limb of Article 17(1) is satisfied and applies to the present case.

Article 17(1)'s First Limb: "Own or Control"

170. Under Article 17(1)'s first limb, the question is whether the Claimant is a legal entity owned or controlled "by citizens or nationals of a third state". A "third state" being a non-Contracting State under the ECT, it would not include France (as a Contracting State); and if a national of France "owned" and "controlled" the Claimant at all material times, it would follow that Article 17(1)'s first limb would not be satisfied in the present case. In the Tribunal's view, the word "or" signifies that ownership and control are alternatives: in other words, only one need be met for the first limb to be satisfied, as the Claimant rightly conceded at the September Hearing [D2.37]. Also, in the Tribunal's view, ownership includes indirect and beneficial ownership; and control includes control in fact, including an ability to exercise substantial influence over the legal entity's management, operation and the selection of members of its board of directors or any other managing body. This interpretation appeared to be common ground between the parties: see the Respondent's Memorial at paragraphs 49 ff (page 17) and the Claimant's submissions at the September Hearing [D2.38]. What was not remotely common ground were the relevant facts.

Mr. Vautrin

171. The Claimant's present case relies on Mr. Jean-Christophe Vautrin as a French national controlling and owning the Claimant at all material times; and accordingly the factual question under this first limb can be reformulated more simply: does the evidence submitted support the Claimant's assertion that the Claimant's shares were and remain beneficially owned by PHL, incorporated in Cyprus; that PHL's shares were and remain beneficially owned by EMU Investments Limited (EMU), incorporated in the British Virgin Islands; that EMU's bearer shares were and remain beneficially owned by Mr. Vautrin; and that consequently the Claimant was a legal entity "owned" by Mr. Vautrin as a French national under Article 17(1) ECT and by

virtue of such ownership, Mr. Vautrin "controlled" the Claimant? The answer to this question is not, however, simple from the materials currently available to the Tribunal.

172. Mr. Vautrin provided three written witness statements dated 25 March, 25 June and 26 August 2004; and he testified orally in French before the Tribunal on 20 September 2004, as recorded in English translation in the corrected transcript¹⁰. At the outset of his oral evidence to the Tribunal, Mr. Vautrin made the following declaration: (translation from the French) "*I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth and nothing but the truth*" (in accordance with Rule 35(2) of the ICSID Arbitration Rules); and he also confirmed the truth of his earlier witness statements [D1.5]. At the September Hearing, he was examined by the Claimant and cross-examined by the Respondent and answered questions from the Tribunal. [D1.5: examination by the Claimant; D1.39: cross-examination by the Respondent; and D1.82: examination by the Tribunal]. Subject to Article 21(a) of the ICSID Convention, Mr. Vautrin thereby took personal responsibility over his testimony.
173. Mr. Vautrin testified that he was a French national and that he had never been the national of any other country [D1.6]. He testified that he was a businessman by profession and, a factor which may bear certain relevance in this case, not a lawyer [D1.6 and 49]. He testified that, in the summer of 1998, he decided to participate in his personal capacity in the purchase of Nova Plama [D1.22 and 83], that it was he who had then given instructions to his own lawyer, Mr. Nordtømme, to incorporate the Claimant and to act for the Claimant in the negotiations for Nova Plama's purchase [D1.23 and 25.]. He unequivocally testified that he was the Claimant's ultimate owner from 1998 onwards and that the Claimant was run according to his instructions also from 1998 onwards [D1.38-39].
174. Mr. Vautrin testified that whilst he had never sought to mislead the Bulgarian Government as to who owned or controlled the Claimant in the negotiations and purchase of Nova Plama's shares in 1998, he had also not told them that he did [D1.59]. He explained that subsequently he did not wish to disclose publicly his true role out of concern for his personal safety in Bulgaria; and that he only very belatedly

¹⁰ As of the date of this Decision, the parties had not yet agreed on a transcript of either the original French or English translation of Mr. Vautrin's testimony, a fact which does not affect this Decision.

agreed to disclose that role in connection with these arbitration proceedings because "*it was explained to me that I had to do so; but I decided to do so as late in time as possible*" [D1.67]. That time was the first session of these arbitration proceedings held in Paris on 25 March 2004, where counsel for the Claimant disclosed, in the presence of Mr. Vautrin (and in accordance with Mr. Vautrin's first witness statement made that same day), that Mr. Vautrin was the sole person ultimately owning and controlling the Claimant; and further that the reference in the plural to "ultimate owners" in paragraph 84 of the Claimant's Request for Arbitration was a mistake by the Claimant's previous legal representatives, which (as the record shows) included Mr. Nordtømme.

175. As regards the Dolsamex/O'Neill claim to ownership of PCL's shares, Mr. Vautrin unequivocally testified in his second witness statement: "*... I confirm that neither Mr. O'Neill nor any entity owned or represented by him possess any ownership rights relating to PCL or any of the Plama group entities. No rights of any nature have been recognised to these persons by courts in Switzerland or elsewhere. Neither have these persons at any time prior to this sought to exercise any type of management control over PCL or any of the companies in the project*" (paragraph 53).
176. As regards the Pledge Agreement of 13 November 2002 whereby EMU shares were apparently pledged to a lending institution as pledgee by Allspice Trading Inc and Panorama Industrial Inc (both incorporated in the Seychelles), Mr. Vautrin unequivocally testified that no EMU bearer shares had in fact been transferred to these Seychelles companies for the purpose of this pledge (or at all); and in any event that he had owned and still owned the shares in these two Seychelles companies [D1.37]. Accordingly, the Claimant submitted that this Pledge Agreement did not evidence any break in Mr. Vautrin's continuous ownership and control of the Claimant.
177. Bulgaria complains that the Claimant's explanations of its ultimate ownership and control by Mr. Vautrin are belated, incomplete, unreliable, incredible and even where technically correct, less than the whole truth. The Respondent submits that the Tribunal should reject Mr. Vautrin's testimony and decide that the Claimant has failed to establish that Mr. Vautrin owns and controls the Claimant within the meaning of the first limb to Article 17(1) ECT. For reasons set out below, the Tribunal does not here accept this submission; but it is appropriate to record that Mr. Vautrin's evidence as to his ultimate ownership and control of the Claimant is not only largely unsupported by

contemporary documentation but that it is materially inconsistent with parts of that documentation and also contradicted by other statements apparently attributable to Mr. Vautrin, particularly in the several legal proceedings by Mr. O'Neill and Dolsamex and in the local and international press. It is also appropriate to record that the Tribunal did not hear relevant testimony at the September Hearing from other important witnesses from the Claimant, especially Mr. Nordtømme (although as he was tendered by the Claimant to the Respondent as a witness available for cross-examination).

178. In the Tribunal's view, the fact remains that Mr. Vautrin testified under cross-examination before the Tribunal at the September Hearing; his own testimony remained unequivocal on the relevant issues; and on the existing materials, the Tribunal would not wish to reject his evidence as false at this stage of the proceedings. If this were a factual issue relevant only to jurisdiction, the Tribunal would therefore be minded to accept Mr. Vautrin's testimony at face value under Judge Higgins' approach, notwithstanding any doubts regarding Mr. Vautrin's continuous ownership of the Claimant from September 1998 to the present day. As the Tribunal has already decided, however, Article 17(1)'s first limb is not a jurisdictional issue; nor is it necessary to decide this issue on the merits for the non-application of Article 17(1) retrospectively from 18 February 2003. Moreover, the Tribunal is concerned that the factual issue of the Claimant's ownership may significantly overlap the "misrepresentation" case advanced by the Respondent on the merits, which cannot be decided by the Tribunal at this stage of these proceedings (as explained further below). There is a risk of the Tribunal prejudicing one or other party's position on these future issues; and for the time being, therefore, the less said here the better. If it later proves necessary for the Tribunal to decide on the merits whether Article 17(1)'s first limb was satisfied, it can always do so. For all these reasons, the Tribunal decides that it would be wrong here to decide whether or not Article 17(1)'s first limb was or was not satisfied; and the Tribunal does not do so. It reserves that decision for a later stage of the proceedings.

Summary on the Energy Charter Treaty

179. It is convenient to summarize the Tribunal's several decisions on the ECT: (A) As to the *jurisdictional* issues: (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 those claims; (3) Accordingly, the Tribunal rejects the Respondent's objection to the Tribunal's jurisdiction under the ECT and ICSID Convention; and (B) as to the *merits* of the Respondent's case under Article 17(1) ECT; (4) 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 date of the Respondent's exercise by letter of 18 February 2003; (5) the second limb of Article 17(1) regarding "no substantial business activities" is satisfied to the Tribunal's satisfaction; and (6) the Tribunal declines for the time being to decide the first limb of article 17(1) regarding the Claimant's "ownership" and "control".

B. The Respondent's Request that the Arbitral Proceedings Be Suspended

180. The Respondent requests that, in the event the Tribunal decides that it has jurisdiction over this dispute, which it has now done, it suspend the arbitral proceedings until the Swiss courts finally decide in the Dolsamex litigation who the real owner of the shares of PCL is. The Respondent argues that should the Tribunal find that it has jurisdiction and decide this case and should Dolsamex then be found by the competent courts to be the owner of PCL's shares, the Respondent risks a second arbitration claim against it by the Claimant and its new owners. Should an award be issued in favor of the Claimant, the Respondent may pay any monies awarded to an entity with no legal entitlement to act for PCL.
181. The Tribunal does not believe that is a correct analysis of the situation. PCL, not the shareholders of PCL, is the party to this arbitration. As already noted in paragraph 135 *supra*, PCL has shown, in the record, that its filing for arbitration was authorized by its registered directors. It is not seriously contested that they had the authority under Cyprus law to do so. Any decision rendered by the Tribunal will be binding upon PCL as well as on Bulgaria and will be *res judicata* between the parties. If Dolsamex is found to be the owner of the shares of PCL, it may have a claim against the company or against Mr. Vautrin; but the Tribunal does not see how PCL, with new shareholders, could successfully make the same claims against the Respondent as in the present arbitration or reopen the Tribunal's decision.

182. As a consequence of the considerations set forth in the preceding paragraph, the Tribunal does not accept the Respondent's request that it suspend the arbitration proceedings.

C. Jurisdiction of the Arbitral Tribunal under The Bulgaria-Cyprus BIT

183. The Claimant contends that to the extent that Bulgaria's denial of Part III advantages of the ECT affects this Tribunal's jurisdiction, Bulgaria consented to ICSID arbitration of the present dispute in the 1987 Bulgaria-Cyprus BIT through the MFN provision contained therein. The mechanism for arriving at that conclusion is, according to the Claimant, the following: (a) the Claimant qualifies as an investor under the Bulgaria-Cyprus BIT; (b) the Bulgaria-Cyprus BIT contains an MFN provision; (c) the MFN provision in the Bulgaria-Cyprus BIT applies to all aspects of "treatment;" and (d) "treatment" covers settlement of disputes provisions in other BITs to which Bulgaria is a Contracting Party. In that connection, the Claimant relies, *inter alia*, on the Bulgaria-Finland BIT. The Respondent contests the Claimant's contention on grounds that will be considered below.
184. The Tribunal concludes that the MFN provision of the Bulgaria-Cyprus BIT cannot be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration for the reasons set forth hereafter.
185. The Tribunal notes at the outset that the Respondent does not seriously contest that the Claimant qualifies as an investor under the Bulgaria-Cyprus BIT. As a result, the question before the Tribunal is how the MFN provision in that BIT should be interpreted.
186. The Claimant's position appears to be prompted by the limited dispute settlement provisions in the Bulgaria-Cyprus BIT (quoted at paragraph 26 *supra*). Said provisions are concerned only with disputes relating to expropriation, the legality of which *"shall be checked at the request of the concerned investor through the regular administrative and legal procedures of the Contracting Party that had taken the appropriate steps."* (Article 4.1). A dispute *"with regard to the amount of compensation ... shall be checked either in a legal regular procedure of the Contracting Party which has taken the measure on expropriation or by an*

international 'Ad Hoc' Arbitration Court" (*id.*), which is detailed in Articles 4.2 – 4.5 (basically, UNCITRAL arbitration, the "Chairman of the Court of Arbitration to the Chamber of Commerce in Stockholm" being the Appointing Authority). The Claimant does not invoke these dispute settlement provisions in the present case.

187. The MFN provision set forth in Article 3 of the Bulgaria-Cyprus BIT reads as follows:

1. Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states.

2. This treatment shall not be applied to the privileges which either Contracting Party accords to investors from third countries in virtue of their participation in economic communities and unions, a customs union or a free trade area.

188. Whilst the Claimant and the Respondent agree that this provision is to be interpreted pursuant to Articles 31 and 32 of the Vienna Convention of 1969 (see text at paragraph 26, *supra*), they reach opposite conclusions.

189. It is not clear whether the ordinary meaning of the term "treatment" in the MFN provision of the BIT includes or excludes dispute settlement provisions contained in other BITs to which Bulgaria is a Contracting Party. Inclusion or exclusion may or may not satisfy the *ejusdem generis* principle (i.e., when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed), but as it will be seen below, it is not relevant to address that question.

190. In this connection, the difference between the terms "*treatment ... accorded to investments*," as appearing in Article 3(1) of the Bulgaria-Cyprus BIT, and "*treatment... accorded to investors*," as appearing in other BITs, is to be noted. The Tribunal does not attach a particular significance to the use of the different terms, in particular not since Article 3(1) contains the words "*investments by investors*"¹¹.

¹¹ See also, *Siemens v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision of 3 August 2004, at paragraphs 91-92, http://www.asil.org/ilib/Siemens_Argentina.pdf.

191. The second paragraph of Article 3 of the Bulgaria-Cyprus BIT contains an exception to MFN treatment relating to economic communities and unions, a customs union or a free trade area. This may be considered as supporting the view that all other matters, including dispute settlement, fall under the MFN provision of the first paragraph of Article 3 (on the basis of the principle *expressio unius est exclusio alterius*). However, the fact that the second paragraph refers to "privileges" may be viewed as indicating that MFN treatment should be understood as relating to substantive protection. Hence, it can be argued with equal force that the second paragraph demonstrates that the first paragraph is solely concerned with provisions relating to substantive protection to the exclusion of the procedural provisions relating to dispute settlement.
192. The "context" may support the Claimant's interpretation since the MFN provision is set forth amongst the Treaty's provisions relating to substantive investment protection. However, the context alone, in light of the other elements of interpretation considered herein, does not persuade the Tribunal that the parties intended such an interpretation. And the Tribunal has no evidence before it of the negotiating history of the BIT to convince it otherwise.
193. The object and purpose of the Bulgaria-Cyprus BIT are: *"the creation of favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party."* (Preamble, see also title which refers to *"mutual encouragement and protection of investments"*). The Claimant places much reliance on the foregoing and on the Report of the Executive Directors on the ICSID Convention of 1965, according to which: *"the creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital in those countries which wish to attract it"* (Exhibit C60, at paragraph 9). The Claimant further relies on UNCTAD's study "Bilateral Investment Treaties in the Mid-1990s" which contains language to the same effect (Exhibit C104 at p. 5). The Claimant also points to the *Maffezini* decision in which it is observed: *"dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to*

the protection of rights of traders under treaties of commerce"¹². Such statements are as such undeniable in their generality, but they are legally insufficient to conclude that the Contracting Parties to the Bulgaria-Cyprus BIT intended to cover by the MFN provision agreements to arbitrate in other treaties to which Bulgaria (and Cyprus for that matter) is a Contracting Party. Here, the Tribunal is mindful of Sir Ian Sinclair's warning of the *"risk that the placing of undue emphasis on the 'object and purpose' of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties"*¹³.

194. The Tribunal finds no guidance in the provisions of paragraphs 2 and 3 of Article 31 of the Vienna Convention, as there are no facts or circumstances that point to their application. The same goes for paragraph 4 of Article 31 of the Vienna Convention (*"A special meaning shall be given to a term if it is established that the parties so intended"*).
195. It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into. The Claimant has provided a very clear and insightful presentation of Bulgaria's practice in relation to the conclusion of investment treaties subsequent to the conclusion of the Bulgaria-Cyprus BIT in 1987. In the 1990s, after Bulgaria's communist regime changed, it began concluding BITs with much more liberal dispute resolution provisions, including resort to ICSID arbitration. However, that practice is not particularly relevant in the present case since subsequent negotiations between Bulgaria and Cyprus indicate that these Contracting Parties did not intend the MFN provision to have the meaning that otherwise might be inferred from Bulgaria's subsequent treaty practice. Bulgaria and Cyprus negotiated a revision of their BIT in 1998. The negotiations failed but specifically contemplated a revision of the dispute settlement provisions (see Witness Statement by Christo P. Tepavitcharov at paragraph 20 and Exhibit 5 thereto, containing an exchange of notes between Bulgaria and Cyprus). It can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs.

¹² *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000, reprinted in 16 ICSID Rev.-F.I.L.J. 212 (2001), at paragraph 54.

¹³ The Vienna Convention on the Law of Treaties, 2nd ed. 1984, at 130.

196. It may be mentioned here (see also Article 32 of the Vienna Convention) that the parties to the present arbitration have not produced preparatory work of the Bulgaria-Cyprus BIT. They did provide some indication of the circumstances surrounding its conclusion. At that time, Bulgaria was under a communist regime that favored bilateral investment treaties with limited protections for foreign investors and with very limited dispute resolution provisions.
197. The previous two paragraphs indicate that, at the time of conclusion, Bulgaria and Cyprus limited specific investor-state dispute settlement to the provisions set forth in the BIT and had no intention of extending those provisions through the MFN provision.
198. In the view of the Tribunal, the following consideration is equally, if not more, important. With the advent of bilateral and multilateral investment treaties since the 1980s (today estimated to be more than 1,500), the traditional diplomatic protection mechanism by home states for their nationals investing abroad has been largely replaced by direct access by investors to arbitration against host states. Nowadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate. It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous. In the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires.
199. Doubts as to the parties' clear and unambiguous intention can arise if the agreement to arbitrate is to be reached by incorporation by reference. The Claimant argues that the MFN provision produces such effect, stating that in contractual relationships the incorporation by reference of an arbitration agreement is commonplace. In support thereof, the Claimant relies on Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration of 1985. The Claimant adds that in treaty relationships the importation of the arbitration agreement through the MFN provision operates in exactly the same way.
200. Article 7(2) of the UNCITRAL Model Law provides:

The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract. (emphasis added)

Thus, a reference may in and of itself not be sufficient; the reference is required to be such as to make the arbitration clause part of the contract (i.e., in this case, the Bulgaria-Cyprus BIT). This is another way of saying that the reference must be such that the parties' intention to import the arbitration provision of the other agreement is clear and unambiguous. A clause reading "*a treatment which is not less favourable than that accorded to investments by investors of third states*" as appears in Article 3(1) of the Bulgaria-Cyprus BIT, cannot be said to be a typical incorporation by reference clause as appearing in ordinary contracts. It creates doubt whether the reference to the other document (in this case the other BITs concluded by Bulgaria) clearly and unambiguously includes a reference to the dispute settlement provisions contained in those BITs.

201. The Claimant contends that the MFN provision in the Bulgaria-Cyprus BIT is a broad provision and is in contrast to other types of MFN provisions, such as Article 1103 NAFTA:

Each Party shall accord to investors of another Party treatment no less favorable than it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

202. The same provision can be found in Free Trade of the Americas (FTAA) draft of 21 November 2003. Footnote 13 to the draft FTAA reads:

Note: One delegation proposes the following footnote to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Article and the Maffezini case. This footnote would be deleted in the final text of the Agreement:

The Parties note the recent decision of the arbitral tribunal in the Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most favored nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision on Jurisdiction §§ 38-64 (January 25, 2000), reprinted in 16 ICSID Rev.-F.I.L.J. 212 (2002). By contrast, the Most-Favored-Nation Article of this Agreement is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C.2.b (Dispute Settlement between a Party and an Investor of Another Party) of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case.

203. This shows that in NAFTA and probably in the FTAA the incorporation by reference of the dispute settlement provisions set forth in other BITs is explicitly excluded. Yet, if such language is lacking in an MFN provision, one cannot reason *a contrario* that the dispute resolution provisions must be deemed to be incorporated. The specific exclusion in the draft FTAA is the result of a reaction by States to the expansive interpretation made in the *Maffezini* case. That interpretation went beyond what State Parties to BITs generally intended to achieve by an MFN provision in a bilateral or multilateral investment treaty. The Tribunal will examine the *Maffezini* decision in more detail below.
204. Rather, the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed. This is, for example, the case with the UK Model BIT, which provides in its Article 3(3):

For avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

Articles 8 and 9 of the UK Model BIT provide for dispute settlement. The drafters of the UK Model BIT rightly noted that there could be doubt and expressly neutralized that doubt.

205. The expression "*with respect to all matters*" as appearing in MFN provisions in a number of other BITs (but not the Bulgaria-Cyprus BIT) does not alleviate the doubt as pointed out in *Siemens v. The Argentine Republic* ¹⁴.
206. Doubt may be further created by the scope of the dispute settlement provisions in the other BITs. A number of them refer to disputes arising out of the particular BIT ¹⁵. It appears to be difficult to interpret the MFN clause as importing into the particular BIT such specific language from other BITs.
207. Conversely, dispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context.
208. Moreover, the doubt as to the relevance of the MFN clause in one BIT to the incorporation of dispute resolution provisions in other agreements is compounded by the difficulty of applying an objective test to the issue of what is more favorable. The Claimant argues that it is obviously more favorable for the investor to have a choice among different dispute resolution mechanisms, and to have the entire dispute resolved by arbitration as provided in the Bulgaria-Finland BIT, than to be confined to *ad hoc* arbitration limited to the quantum of compensation for expropriation. The Tribunal is inclined to agree with the Claimant that in this particular case, a choice is better than no choice. But what if one BIT provides for UNCITRAL arbitration and another provides for ICSID? Which is more favorable?
209. It is also not evident that when parties have agreed in a particular BIT on a specific dispute resolution mechanism, as is the case with the Bulgaria-Cyprus BIT (*ad hoc*

¹⁴ See footnote 11, *supra*

¹⁵ See, for example Article 10(1) of the Bulgaria-Morocco BIT and Article 9(1) of the Bulgaria-Tunisia BIT, referring to disputes relating to "failure to perform obligations under this Agreement" or obligations "arising from this Agreement". Article 8 of the Bulgaria-Finland BIT on which Claimant relies is not entirely clear in that respect.

arbitration), their agreement to most-favored nation treatment means that they intended that, by operation of the MFN clause, their specific agreement on such a dispute settlement mechanism could be replaced by a totally different dispute resolution mechanism (ICSID arbitration). It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.

210. The Claimant has relied on a number of cases that it believes support its interpretation. It is to be noted, however, that in none of these cases was it held that the dispute settlement provisions in the basic treaty are replaced *in toto* by the dispute settlement provisions contained in the other treaty through operation of the MFN provision in the basic treaty. Indeed, the Respondent contended that no tribunal has ever done what the Claimant is requesting this Tribunal to do in the present case.
211. The decision in *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*¹⁶ is not relevant. The case concerned a clause in a specific contract ("Consolidation Agreement") between the parties to those proceedings in which it was provided: "[T]his Agreement shall be governed by the laws of the Czech Republic and the Treaty on the Promotion and Mutual Protection of Investments between the Czech Republic and the Slovak Republic dated November 23, 1992." The tribunal in that case concluded that "by referring to the BIT, the parties intended to incorporate Article 8 of the BIT [i.e., dispute settlement provisions] by reference into the Consolidation Agreement, in order to provide for international arbitration as their chosen dispute settlement method" (Decision at paragraph 55). The tribunal reached that conclusion on the basis of the negotiating history between the parties to the Consolidation Agreement. That is a setting which is different from the incorporation of dispute settlement provisions through an MFN provision in a BIT between two states.
212. In the Tribunal's view, the lack of precedent is not surprising. When concluding a multilateral or bilateral investment treaty with specific dispute resolution provisions, states cannot be expected to leave those provisions to future (partial) replacement by different dispute resolution provisions through the operation of an MFN provision,

¹⁶ ICSID Case No. ARB/97/4, Decision on Jurisdiction of 24 May 1999, reprinted in 14 ICSID Rev.-F.I.L.J. 250 (1999).

unless the States have explicitly agreed thereto (as in the case of BITs based on the UK Model BIT). This matter can also be viewed as forming part of the nowadays generally accepted principle of the separability (autonomy) of the arbitration clause. Dispute resolution provisions constitute an agreement on their own, usually with interrelated provisions.

213. In the *Case Concerning Rights of Nationals of America in Morocco*,¹⁷ the United States claimed "*privileges with regard to consular jurisdiction*" as appearing in treaties that Morocco had concluded with Spain and the United Kingdom, on the basis of the MFN provision in the treaty of 1936 between Morocco and the United States ("*whatever indulgence, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be equally entitled to them*"). The International Court of Justice rejected such reliance by the United States because Spain and the United Kingdom had terminated those provisions. The United States had argued that such treaty provisions were intended to be "*incorporated permanently by reference*". The International Court of Justice, however, examined the intent of the Contracting Parties and the "general treaty pattern" of the other treaties concluded by Morocco. Such a broader examination shows that, in the view of the International Court of Justice, an MFN provision does not operate as an automatic incorporation by reference.
214. In the *Anglo-Iranian Oil Co. Case*¹⁸, the International Court of Justice specifically stated: "*Without considering the meaning and the scope of the most-favoured-nation clause ...*" (at para. 109). The Court concluded that the MFN provisions in the Iran-United Kingdom treaties "*had no relation whatsoever to jurisdictional matters*" between those two States.
215. In the *Ambatielos Case*¹⁹ the International Court of Justice did not reach the issue, although as a matter of principle it may be that the Court accepted that an MFN provision can extend to jurisdictional matters. In the ensuing arbitration²⁰, the parties differed on the question whether "administration of justice" was comprised by the term "commerce and navigation" appearing in the MFN provision in the Anglo-Greek

¹⁷ 152 I.C.J. Rep. 176, Judgment of 27 August 1952.

¹⁸ United Kingdom v. Iran, 1952 I.C.J. 39, Judgment on preliminary objection of 22 July 1952.

¹⁹ Greece v. United Kingdom, 1953 I.C.J. 10, Judgment on the Obligation to Arbitrate, 19 May 1953.

²⁰ Ambatielos Claim, Greece v. United Kingdom, XII U.N. R.I.A.A. 9, Award of 6 March 1956.

Treaty of Commerce and Navigation of 1886. The Commission of Arbitration held that it did. However, that ruling relates to provisions concerning substantive protection in the sense of denial of justice in the domestic courts. It does not relate to the import of dispute resolution provisions of another treaty into the basic treaty.

216. In *Emilio Agustín Maffezini v. Kingdom of Spain*²¹, the question arose whether the requirement set forth in the dispute settlement provisions in the Argentina-Spain BIT of 1991 that "*domestic courts [be given] the opportunity to deal with a dispute for a period of eighteen months before it may be submitted to arbitration*" was inapplicable by reliance on the dispute settlement provisions in the Chile-Spain BIT (which does not impose such condition) through operation of the MFN provision in the Argentina-Spain BIT. The arbitral tribunal in that case answered the question in the affirmative.
217. In *Maffezini* the tribunal relied on *Case Concerning Rights of Nationals of America in Morocco*, *Anglo-Iranian Oil Co. Case*, and *Ambatielos Claim*. However, the foregoing review of those decisions shows that they do not provide a conclusive answer to the question.
218. The tribunal in *Maffezini* also noted that in other treaties the MFN provision mentions "*all rights contained in the present Agreement*" or "*all matters subject to this Agreement*," in which case, according to the tribunal, "*it must be established whether the omission [in the Argentina-Spain BIT] was intended by the parties [i.e., Contracting Parties] or can reasonably be inferred from the practice followed by the parties in their treatment of foreign investors and their own investors*" (Decision, paragraph 53). The present Tribunal considers such a basis for analysis in principle to be inappropriate for the question whether dispute resolution provisions in the basic treaty can be replaced by dispute resolution provisions in another treaty. As explained above, an arbitration clause must be clear and unambiguous and the reference to an arbitration clause must be such as to make the clause part of the contract (treaty).
219. The tribunal in *Maffezini* further referred to "*the fact that the application of the most favoured nation clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements*" (Decision at paragraph 62). The present Tribunal fails to see how

harmonization of dispute settlement provisions can be achieved by reliance on the MFN provision. Rather, the "basket of treatment" and "self-adaptation of an MFN provision" in relation to dispute settlement provisions (as alleged by the Claimant) has as effect that an investor has the option to pick and choose provisions from the various BITs. If that were true, a host state which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation – actually counterproductive to harmonization – cannot be the presumed intent of Contracting Parties.

220. The *Maffezini* tribunal was apparently aware of this risk when it added:

[T]here are some important limits that ought to be kept in mind. As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the [C]ontracting [P]arties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight. (id.)

The examples given by the tribunal are: (1) exhaustion of local remedies condition; (2) fork in the road provision; (3) *"if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration"*; (4) *"if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure"* (referring as example to NAFTA). (Decision at paragraph 63).

221. The present Tribunal was puzzled as to what the origin of these "public policy considerations" is. When asked by the Tribunal at the Hearing, counsel for the Claimant responded: *"They just made it up."* [D2.134]. The present Tribunal does not wish to go that far in its appraisal of the *Maffezini* decision. Rather, it seems that the

²¹ See footnote 12, *supra*.

effect of the "public policy considerations" is that they take away much of the breadth of the preceding observations made by the tribunal in *Maffezini*.

222. In *Maffezini* the tribunal pointed out:

It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand. (Id.)

223. The present Tribunal agrees with that observation, albeit that the principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.

224. The decision in *Maffezini* is perhaps understandable. The case concerned a curious requirement that during the first 18 months the dispute be tried in the local courts. The present Tribunal sympathizes with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view. However, such exceptional circumstances should not be treated as a statement of general principle guiding future tribunals in other cases where exceptional circumstances are not present.

225. Whilst the Tribunal has not relied on it since the parties have not been in a position to include it in their pleadings, the Tribunal notes that the foregoing considerations are in line with the recent award in *Salini v. Jordan*²².

226. In light of the foregoing review, the Tribunal need not examine the decisions in *Técnicas Medioambientales Tecmed v. United Mexican States*²³ and *Siemens AG v. The Argentine Republic*²⁴ as both decisions are partially based on the *Maffezini*

²² See footnote 7, *supra*

²³ ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, reprinted in Spanish in 19 ICSID Rev.-F.I.L.J. 158 (2004).

²⁴ See footnote 11, *supra*.

decision. Actually, the *Siemens* decision illustrates the danger caused by the manner in which the *Maffezini* decision has approached the question: the principle is retained in the form of a "string citation" of principle and the exceptions are relegated to a brief examination, prone to falling soon into oblivion (Decision, at paragraphs 105, 109 and 120).

227. For the foregoing reasons, the Tribunal concludes that the MFN provision of the Bulgaria-Cyprus BIT cannot be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration and that the Claimant cannot rely on dispute settlement provisions in other BITs to which Bulgaria is a Contracting Party in the present case.

D. Misrepresentation

228. The Respondent alleges that PCL misled it into believing that the Plama Consortium consisted of Norwegian Oil Company and André & Cie, and never revealed to Bulgaria (1) that those two companies had decided not to be investors and (2) that Mr. Vautrin had become the owner of PCL. If it had known these facts, the Respondent affirms that it would not have approved the purchase of Nova Plama by PCL. Under Bulgarian law, and, in particular, Article 5(1) of the Bulgarian Privatization Act, the obtaining of Bulgaria's consent to the investment by such misrepresentation vitiates Bulgaria's consent so that there is no valid investment under the ECT and consequently no ICSID jurisdiction under that treaty.
229. As the Arbitral Tribunal has already stated, in paragraphs 126-130 of this Decision, the Respondent's allegation of misrepresentation by the Claimant does not deprive the Tribunal of jurisdiction in this case. Nevertheless, these assertions by the Respondent are serious charges which, the Tribunal will have to examine on the merits.
230. In its Reply, the Respondent reserved the right, should the Tribunal sustain its jurisdiction, to raise an objection relating to whether the Claimant's investment was made in accordance with law, given the alleged misrepresentation. The Tribunal, consequently, joins the issue of misrepresentation to the consideration of the merits of the case.

E. Registration by ICSID of the Request for Arbitration

231. The Respondent argues that ICSID, in registering the Claimant's Request for Arbitration, did so only with respect to the claims based on the ECT and not those based on the BIT. Consequently, says the Respondent, the Arbitral Tribunal has jurisdiction only over the claims under the ECT. Given the Tribunal's decision with respect to the BIT in section IV.C. *supra*, this point has become moot. Nevertheless, the Tribunal makes the following comments.

232. The Respondent's argument is based on a letter from the Acting Secretary General of ICSID dated 4 June 2003. That letter states:

... I have carefully studied the request for arbitration and all of the related correspondence and documents that we have received from the Republic of Bulgaria and from Plama Consortium Limited. I do not find with the required degree of certainty ("beyond reasonable doubt") that the request is unregistrable under the provisions of the Energy Charter Treaty. I must therefore register the request under those provisions. The formal notice of registration will shortly be sent to the parties.

233. On 19 August 2003, the Acting Secretary General sent to the parties the Notice of Registration, pursuant to Article 36(3) of the ICSID Convention. In that Notice of Registration it is said:

... I hereby notify you that I have on August 19, 2003, which is also the date of the dispatch of this Notice, registered in the Arbitration Register the request for arbitration of Plama Consortium Limited of December 24, 2002, as supplemented by its letters to the Centre of February 25, March 10, April 7, May 20, June 12 and 13, 2003.

234. While ICSID's letter of 4 June 2003 could be read as limited in character, the official Notice of Registration cannot. It is plain on its face that ICSID registered the Claimant's Request for Arbitration without any limitation at all. That Notice of Registration is the official notice referred to in Article 36(3) of the ICSID Convention.

It is then up to the Arbitral Tribunal, under Article 41(2) of the ICSID Convention, to determine its own competence.

F. Costs

235. Each party has requested the Arbitral Tribunal to award it costs for the jurisdictional phase of the arbitration. Each party submitted its costs in its post-hearing memorials and commented on the other party's cost submissions.
236. The Claimant says that the Respondent should bear the costs of the jurisdictional phase because it failed to cooperate with PCL which offered and provided assistance to satisfy the Respondent, when it first raised jurisdictional objections, that Mr. Vautrin owned and controlled PCL.
237. The Respondent requests costs principally on the basis that as a result of the complicated structure of the ownership of PCL and the Claimant's unwillingness to respond fully to the Respondent's requests for information regarding ownership and control of PCL, the Respondent was obliged to spend considerable time, effort and money to obtain such information as it could on its own.
238. The Arbitral Tribunal is sympathetic to the Respondent's position. The Claimant had access to and/or control over all information relating to its ownership and control. It was obvious when PCL began this arbitration that questions would arise as to its ownership and control in light of the provisions of Article 17(1) ECT. The evidence of Mr. Vautrin's asserted ownership and control of PCL should have been submitted by the Claimant as part of its case. The fact that it did not and that the structure of ownership it described in its memorials is so obtuse has raised many questions in the minds of the Arbitrators which remain to be explored in the second phase of this arbitration.
239. This being said, for the time being, the Arbitral Tribunal has decided to defer a decision on costs to the second phase of the case when it will be in a position to make an overall judgment about the costs of the arbitration.

V. THE DECISION

240. In light of the foregoing considerations, the Arbitral Tribunal makes the following decisions:

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.

Place of Proceeding: Washington, D.C.

Date: 8 February 2005

/signed/

Albert Jan van den Berg

/signed/

V.V.Veeder

/signed/

Carl F. Salans