The Art of Saying No
What are the Procedural Requirements of the ‘Denial of Benefits’ provision of the ECT?

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# List of Abbreviations

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<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<tr>
<td>CAFTA-DR</td>
<td>The Dominican Republic–Central America Free Trade Agreement</td>
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<td>CIS</td>
<td>Commonwealth of Independent Countries</td>
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<td>ECT</td>
<td>Energy Charter Treaty</td>
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<td>FCN</td>
<td>Friendship, Commerce and Navigation</td>
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<td>FIPPA</td>
<td>Foreign Investment Protection and Promotion Agreement</td>
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<td>GAI</td>
<td>Guaracachi Americca Inc.</td>
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<td>GAR</td>
<td>Global Arbitration Review</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICSID</td>
<td>International Center for Settlement of Investment Disputes</td>
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<td>MFN</td>
<td>Most Favoured Nation</td>
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<td>MIT</td>
<td>Multilateral Investment Treaty</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<td>SCC</td>
<td>The Stockholm Chamber of Commerce</td>
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<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>US</td>
<td>The United States</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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1 Introduction

1.1 Introductory remarks

Each investment treaty provides its scope of benefits for investors of Contracting Parties. These benefits, however, may by denial of benefits provisions be denied to investors having origin of other than Contracting States. The Energy Charter Treaty (ECT) under Article 17 also allows the Contracting Parties to deny the advantages of Part III entitled “Investment Promotion and Protection” to investors from third states.

Article 17 of the ECT has been invoked by host States in several occasions to date. Tribunals dealing with the denial of benefits provision, have formed a jurisprudence which establishes that states, intending to invoke the denial of benefits clause, should activate the right, due to the wording of the Article, which provides for a ‘reserved’ rather than automatically operating right. Tribunals have also concluded that Article 17 can affect the investments of the investors claiming benefits under the ECT only starting from the moment of the exercise or activation of the right to deny.

Nevertheless, this trend contains inconsistent solutions to certain points as well. While it is established that denying states must notify investors in advance, the tribunals undertook different approaches as to when the notice should be made. Three options were offered so far: (i) before the investment is made, (ii) before the dispute is arisen; and (iii) before filing to arbitration.

Remarkably, tribunals, discussing Article 17(1), have also referred to the purpose of the ECT. Both procedural requirements and effects the Article were analyzed with reference to Article 2 of the ECT defining purpose of the treaty. On the other hand, non-ECT tribunals, dealing with differently worded denial of benefits provisions of other treaties, have developed a different, perhaps contradicting jurisprudence. This dissemblance will inter alia be discussed in this paper.

1.2 Purpose and aim

This thesis aims to analyze the operation of denial of benefits provision encapsulated in Article 17 of the ECT. The analysis aims to observe the Article in accordance with the Vienna Convention of the Law of Treaties (VCLT). The purpose
of such observation is to reveal (i) possible issues during interpretation of the provision, (ii) examine the general critique against the provision, (iii) discuss the link of the Article with the purpose of the Treaty, (iv) to emphasize that the Article and issues arising thereof should be viewed in accordance with the prevalingly accepted methods of interpretation in international law. The thesis inter alia aims to highlight the role of the VCLT when a legal point in international law is to be interpreted.

What is not a purpose for this paper, is to offer a comprehensive solution to the issues discussed and exhaustively answer the criticism against the prevailing interpretation line of Article 17(1) of the ECT. Rather it will be emphasized that disagreements and criticism have always acted as stimulating factors, leading to improvement of law.

The purpose and particular goals of the thesis do not overlap the research questions expressed below, rather the thesis will develop and try to effectively answer research inquires in order to maximally achieve the purpose of the thesis.

1.2.1 Research inquiry

The matter of analysis is manifold, including general research questions and sub-inquires arising thereof. Article 17 of the ECT contains two sections, first of which has been addressed in several investment disputes to date raising inter alia several procedural questions as to invocation of the right to deny benefits of ECT Part III.

Denial of benefits clauses are important to both investors and host States for effective employment of investment treaties. Given the different language of such clauses, arbitral tribunals have interpreted them in various ways. In particular, the Plama\(^1\) tribunal has made the largest interpretative contribution to Article 17(1) of the ECT. Successive tribunals followed the Plama's line to a large extent. However, certain issues concerning procedural requirements of the provision, even being addressed by tribunals, cause particular issues needed to be researched. Perhaps, the main reason is the wording of Article 17(1) of the ECT which contains some portion of vagueness (the provision can be found in Section 3). Tribunals interpreting Article 17(1) of the ECT and tribunals dealing with other denial of benefits clauses have come up with slightly

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\(^1\) Plama Consortium Limited v Republic of Bulgaria, ICSID Case No. ARB/03/24.
different decisions as to when, how and with what effect those provisions can be invoked by denying states.

The existing inconsistency is not surprising considering different language of the denial of benefits clauses. The thesis intends to determine procedural requirements of Article 17(1) in light of diverging jurisprudence. However, since the ECT does not clarify the procedural requirements of the denial of benefits provision, arbitral tribunals have put forward different solutions. This puts both host States and investors in a marginal position where they do not exactly know when, how and with what effect the exercise of the right to deny can affect. Lack of predictability to these issues may badly influence the investing process in the energy sector.

Hence, the central research question is what are procedural requirements of the denial of benefits clause of the ECT? Put differently, when, how and with what effect the Article can be invoked. The research question contains sub-issues having separate standing to a notable extent but complementing each other withal. The following sub-issues flow from the central research question:

1. Does Article 17(1) of the ECT envisage certain undertakings on behalf of a host State before the invocation of relative provision?
2. Does Article 17(1) of the ECT operate retrospectively or prospectively?
3. Does Article 17(1) of the ECT contain a time limit within which the State must act to deny the benefits?

The answers to these questions may on the one hand affect the investors when structuring their investments and on the other hand the host States when regulating, monitoring and controlling the investments made in their territory.

1.3 Delimitations and sources

The thesis aims to remain within the scope of its purpose and be limited solely by elaborations orbiting the research inquiries. There are many other layers and areas of international investment law closely relating to the core of this thesis that will not be included into the scope. A larger discussion would require thorough references to the issues of definitions of “investments” and “investors” inasmuch as a denying state will invoke such provision against an alleged investor holding an alleged investment in its
territory.\textsuperscript{2} The starting point of such invocation is the threshold required for investors and investments in a treaty at hand.

As the thesis reviews the relevant procedural requirements in light of the ECT case law, Article 17(2) of the ECT not being addressed in any publicly available arbitral award, will not be discussed in the paper.

More so, the interaction of the Most Favored Nation (MFN) and denial of benefits clauses is another topic. While the former provides large avenues for so-called “treaty shopping”, the latter is meant to keep the advantages of a treaty for negotiated parties solely. The question whether they contradict each other or co-exist without principal collusions is another interesting topic. Finally, a line of thought considers Transparency in the ECT as an instrument which might encourage investors to provide basic disclosures as to their identity, ownership and control. This allegedly would eliminate the need in denial of benefits clauses, as the bone of contention –information of the investor’s origin would be disclosed. Moreover, this paper does not address the definition of ‘substantial’ economic activities found in the denial of benefit clauses. Interesting and closely relating are, yet, these fields of research do not fall within the auspices of this paper.

The ECT is a complete and self-contained legal regulation, which, however, does not stand in a legal vacuum. Hence, for the purposes of this analysis the Treaty and Article 17(1) of the ECT particularly will be compared with relevant treaties and provisions.

The discussion is specified to investment treaty arbitration. Therefore, such spheres as diplomatic protection, the practice and legislation of international courts (ICJ, PCIJ) as well as various dimensions of international trade, supply and service provisions will not be analyzed in the paper. The ECT is the main source of the discussion, followed by Regional Investment Treaties such as the North American Free Trade Agreement (NAFTA), The Dominican Republic–Central America Free Trade Agreement (CAFTA-DR); and Bilateral Investment Treaties (BIT), signed with the United States

(US-Bolivia BIT, US-Ecuador BIT, US-Egypt BIT), as well as the case law developed under these treaties; and international investment law in general. Yet both the practice and the legal sources of the World Trade Organization (WTO) as well as friendship, commerce, and navigation (FCN) treaties first entered by the United States, do not fall into the scope of interests of this paper. Nevertheless, historical and comparative references to those treaties and bodies as well as fields of researches mentioned above (definition of “investors” and “investments”, MFN and Transparency) should not be viewed as an expansion of the thesis limits.

1.4 Methodology

Methodology generally establishes tools and approaches being undertaken for and in accordance with the purpose of the writing. The purpose of this thesis and the research object – Article 17(1) of the ECT, appears as a complex of evolving issues of practical nature, on the one hand, and theoretical observations as well as possible approaches intended to a better understanding of the issues, on the other hand.

Accordingly, the traditional legal method generally referred to as the legal dogmatic method is used in this thesis. Relevant legal instruments and questions arising thereof will be described and analyzed as they exist – de lege lata and as they should or expected to be – de lege ferenda. The law should be considered in the way it stands – de lege lata, when addressing the questions of practical values considering the comparison between the ECT and alien legal frameworks, for instance. Interestingly, de lege lata appears to be an approach to the standing questions, but provides an answer even to questions that have not been answered yet. Analyzing possible solutions as de lege ferenda, it is highly likely to conclude that solutions have always been there, standing as de lege lata. This notion finds its echoes in this thesis: treaties and provisions therein are not identical and should be interpreted and considered as they are. The present thesis also discusses possible outcomes that future tribunals may come up with interpreting Article 17(1) of the ECT. Tribunals have formed an ECT trend interpreting Article 17(1) of the Treaty. Yet, is there an unofficial pattern that the future tribunals would most probably follow? This is where the research adopts a speculative approach, where the law and the ambience are being considered as they should or may
be. More so, since the denial of benefits provision of the ECT is crucial both for potential investors and host States when the planning of investments is concerned, on the one hand, and the legislative regulations, on the other hand, *de lege ferenda* is an appropriate approach.

Finally, tribunals undertake *de lege ferenda* opining on prospective and retrospective application of Article 17(1) of the ECT, since the wording does not expressly address the issue. Nevertheless, a vivid separation of *de lege lata* and *de lege ferenda* should not be expected. Investment law and consequently this thesis rather coincides these two approaches. In sum, this thesis dealing with question within the scope of international law, implements both approaches separately when needed, but more frequently simultaneously or shifting from one to another.

### 1.5 Disposition

The thesis is structured by so-called ‘top down’ approach to the research object *viz* Article 17(1) of the ECT. This approach decompounds the provision in order to discuss its layers separately. Then the analyzed information will be put together to form concluding remarks by the ‘bottom up’ approach.

The first chapter (following the Introduction) discusses denial of benefits in general. Alongside with Article 17(1) of the ECT, similar provisions of different treaties will be presented as well. The subsequent chapter refers to the ECT jurisprudence in the field of Article 17(1). At this point the relevant case law and the specific findings of the tribunals regarding the research inquiry will be analyzed. The third chapter discusses non-ECT jurisprudence based on different treaties. The chapter will present the tribunals’ findings regarding the procedural requirements to the denial of benefits provisions of the US BITs and CAFTA. The fourth chapter will compare the procedural requirements established by the tribunals analyzing the denial of benefits provisions of the ECT and other treaties. The comparison is conducted in light of the purpose and benefits as well as the specific wording of different treaties. Finally, the thesis does not intend to come up with any hard and fast solution. Therefore, it does not offer any strict conclusion, rather the final part, entitled “Concluding Remarks”, assembles the cordial findings of the thesis regarding the research question. It
highlights the importance for specific language of each treaty, that perhaps justifies the differences between the tribunals’ findings in the field of procedural requirements of denial of benefits clauses. These remarks answer the research questions according to the respective findings of the evolved to date jurisprudence.

2 Definition of Denial of Benefits clauses

The majority of the investment treaties (if not all) proclaim mutual benefits as a vital component of the treaty purpose. At this point, one may ask if it is open to a Treaty Party to legitimately deny the benefits of a treaty to a certain category of investors. The Energy Charter Treaty (ECT) introduces such option under Article 17. Even being the largest multilateral investment treaty, the ECT still has its boundaries. Naturally, the ECT drafters have undertaken to provide benefits to investors of Treaty Parties only; and make it possible for the latter to deny benefits to investors from non-Signatory States.

Early examples of denial of benefits provisions “guarded against the possibility of a ‘free ride’ by third-country interests and operated as latent protective clauses that could be utilized by a party to the treaty if it wishes to take the initiative of so doing.”3 The FCN Treaty between the US and China, signed in 1946, establishes:

“High Contracting Party reserves the right to deny any of the rights and privileges accorded by this Treaty to any corporation or association created or organized under the laws and regulations of the other High Contracting Party which is directly or indirectly owned or controlled, through majority stock ownership or otherwise, by nationals, corporations or associations of any third country or countries.”4

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4 Friendship, Commerce and Navigation, United States of America and The Republic of China, Article XXVI (5), 4 November 1946.
In this vein, under the 1953 US – Japan FCN\(^5\) and 1954 US – Federal Republic of Germany FCN\(^6\), the treaty did not “preclude the application of measures … denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty.”

The Treaty of Amity and Economic Relations with Thailand, signed in 1966, provides that nothing shall preclude the denial of the advantages of the Treaty to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest.\(^7\)

The rationale underlying denial of benefits clauses has not changed a lot to date: no benefits can be claimed if no obligations are taken over. Yet, investors often seek to benefit from available treaties by means of treaty shopping. They undertake corporate structuring policies allowing to pick up between various treaties. However, this may violate the principle of reciprocity of the treaties.

Jeswald W. Salacuse notes that “allowing the benefits of the BITs to nationals of third countries or to those who are primarily associated with those countries and with which the denying country has no relationship, would be to abandon… the right to negotiate corresponding privileges and obligations from those countries.”\(^8\).

Thus, denial of benefits clauses can prevent ‘free-riding’—that is, nationals of third States seeking to benefit from treaty protections that the contracting States did not intend to grant them.\(^9\) This exclusion may prevent these third country nationals from enjoying the benefits of a treaty when their home States have not accepted any of its

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\(^5\) Friendship, Commerce and Navigation, United States of America and Japan, Article XXI (1) (e), 2 April 1953.

\(^6\) Friendship, Commerce and Navigation, United States of America and Federal Republic of Germany, Article XXIV (1) (e), 29 October 1954.


obligations.\textsuperscript{10} Therefore, denial of benefits provisions is considered as a safety measure safeguarding the principle of reciprocity embodied in investment treaties.

To generalize, denial-of-benefits clauses allow states to limit investors’ use of corporate structuring as a means of ‘treaty shopping’,\textsuperscript{11} thereby counterbalancing the effect of the broad definitions of ‘investment’ and ‘investors’ that are contained in most investment treaties.\textsuperscript{12} To this extend, an argument might stand what is the purpose of denial of benefits clauses at all if possible concerns addressed by them might be excluded by thoroughly defining the ‘investors’? The answer from capital-exporting states’ perspective is that the broader ‘investor’ definition is the larger economic export is available for them. On the other hand, however, treaties are reciprocal, hence both capital-exporting and importing states, concerned about the risk of claims brought by ‘mail box’ companies, use denial of benefits provisions to secure an effective middle ground.

Rudolf Dolzer and Christoph Schreuer have categorized denial of benefits clauses as one of the states’ methods to counteract strategies that seek the protection of particular treaties by acquiring a favorable nationality.\textsuperscript{13} They go on to define the denial of benefits clauses thusly:

“Under such a clause the states reserve the right to deny the benefits of the treaty to a company that does not have an economic connection to the state on whose nationality it relies. The economic connection would consist in control by nationals of the state of nationality or in substantial business activities in that state.”\textsuperscript{14}

The definition is compatible with the language of Article 17(1) of the ECT providing that each Contracting Party may invoke the clause against investors of third

\textsuperscript{12} Anthony C Sinclair, Part I Chapter 1: Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of “Investor”. in Rachel Thorn and Jennifer Doucleff (eds), The Substance of Nationality Requirements in Investment Treaty Arbitration (ICSID Rev—FILJ 2005), 378.
\textsuperscript{13} See above, n 11, 55
\textsuperscript{14} Ibid.
states lacking substantial business activities in that states. Denial of benefits clauses, pursuing identical aims in general, however, dissent in their wordings. This paper will address the issues of interpretation and compare different denial of benefits provisions from the perspective of their operation and effect. However, before that let us review the very benefits of the ECT which is to be denied pursuant to Article 17.

2.1 Purpose and benefits of the ECT

Purpose of the ECT is enshrined under Article 2. In a broader understanding purpose would encapsulate more extensive scope of aims leading to a dynamically developing and desirable results in the energy sector. On the other hand, the ECT Preamble reflects the general objectives of the Contracting Parties. Yet, Article 2 literally enshrines the colossal volume of the Treaty purpose in one sentence. In sum, Article 2 of the ECT is the peak of a pyramid where the Preamble is the base.

Article 2 entitled “Purpose of the Treaty”, states that the Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter. Unambiguous wording clearly defines the hallmark of the Treaty viz the creation of a well-functioning legal mechanism providing a fertile ground for cooperation in the energy sector by means of complementarities and pursuing mutual benefits.

Article 17 of the ECT is entitled “Non-application of Part III in Certain Circumstances”. Invoking Article 17, a state can deny such cornerstone principles and guarantees as Fair and Equitable Treatment, most constant protection and security and stable observance of obligations. Moreover, compensation for losses owing to war or other armed conflict, state of emergency, civil disturbance, or other similar event, safeguarded under Article 12, may also be denied. Finally, it is largely acknowledged that the most constant and affective attack by the host States on the investments is expropriation and measures equivalent to expropriation. Article 13 of the ECT provides protection against unlawful expropriation to the investments of investors of a

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15 Article 10 of the ECT.
16 Article 12 of the ECT.
Contracting Party in the Area of any other Contracting Party. Accordingly, all these essential guarantees and benefits provided under Part III can be denied in case of successful invocation of the denial of benefits clause.

3 ECT jurisprudence interpreting Article 17(1) of the ECT

Article 17(1) is entitled “Non – Application of Part III in Certain Circumstances” and reads as follows:

“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;”

According to the ordinary meaning of the title, the right to deny is limited to Part III. This is being additionally confirmed by the first sentence of the Article, specifying this Part i.e. Part III. Part III does not include the dispute resolution clause – Article 26, contained in Part V. This is important for another question – whether Article 17 result jurisdictional issues or issues on merits. Interestingly the clause affects only juridical persons as the plain wording refers to ‘legal entities’ only, rather than natural persons. In turn, the word ‘reserves’ indicates discretion. A state is not obliged to deny the benefits of the ECT Part III as Article 17 speaks of a ‘right’ rather than an ‘obligation’. In different words, the clause provides for a passive or stand by right, which is to be activated by the state intending to invoke it. Sub-article 1 establishes two layers of thresholds: (i) an entity should be owned or controlled by citizens or nationals of a third state, and (ii) the entity should lack substantial business activities in the Area of the Contracting Party in which it is organized. While, either ownership or control by nationals of a third state will suffice for the purposes of the clause, the conjunction ‘and’ links points (i) and (ii) to each other. Even if one of them is not met, such an entity cannot be affected by invocation of Article 17(1) of the ECT. ‘Third state’ is not defined in the ECT, but it is indicated in Article 1(7) in contradiction to ‘Contracting Party’, hence a third state is any state that is not a Contracting Party to the

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17 Article 13 of the ECT.
ECT. This reasoning is also followed by the tribunal in the Limited Liability Company AMTO v Ukraine Case.\(^{18}\)

Having briefly interpreted Article 17(1) of the ECT, the thesis now will discuss both the ECT and non-ECT case law interpreting the denial of benefits provisions.

### 3.1.1 Plama v Bulgaria

As it was indicated before, the *Plama* tribunal was the first to thoroughly examine Article 17(1) of the ECT, including the relevant procedural requirements. Plama Consortium Limited was incorporate in Cyprus. After it filed its request to arbitration in December 2002, Bulgaria by a letter sent on 18 February 2003 to ICSID, informed about its intend to exercise the denial of benefits right under Article 17(1) of the ECT. According to Bulgaria, Plama was a shell (‘mailbox’) company with no substantial economic activities in Cyprus. Additionally, the Claimant allegedly failed to show that it was owned or controlled by nationals of an ECT Contracting Party.\(^{19}\)

The Tribunal, analyzing Article 17(1) of the ECT, concluded that the application of the denial of benefits provision was a question ‘related to the merits’ of the dispute, rather than to the jurisdiction of the Tribunal.\(^{20}\) Since the plain language of the Article provides “Non application of Part III…” followed by “…reserves the right to deny the advantages of this Part…”, it would be practically impossible, to construe something other from the text than that the clause allows to the states to deny advantages within the ambit of Part III. (emphasis added) Hence, when Bulgaria argued that it could deny all the advantages of the Treaty including the dispute settlement mechanism under Article 26 of the ECT, the Tribunal concluded that Article 26 being in Part V could not be denied by Article 17(1) of the ECT.\(^{21}\)

Had the opposite been established, it would give an authority to the denying state, unilaterally decide the issue at hand. In the words of the tribunal: “under the Respondent’s case, the Contracting State invoking the application of Article 17(1) is

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\(^{19}\) Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24., Decision on Jurisdiction, 8 February 2005, paras 19, 31, 158.

\(^{20}\) Ibid, para 151.

\(^{21}\) Ibid, para 147.
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.”

This reasoning yet has its criticism among commentators. For instance, Thomas W. Walde argues that nothing in the preparatory works of the ECT indicated a shift for denial of benefits practice, and thus “the Part III reference in an interpretation of the context (Articles 26(1) - 17(1)) should be seen as nothing but a reminder that the denial of benefits, for example, raising a jurisdictional objection, only applied to the arbitrable (justiciable) Part III investment obligations.”

Laurence Shore supports Walde’s interpretation, and suggests that:

“it is a perfectly plausible reading. . .to find that as Art. 17(1) relates so centrally to the Art. 26(1) requirements of investor status ("Investor of another Contracting Party") and a breach of Part III obligation, that it constitutes a jurisdictional consideration for an arbitral tribunal.”

Nevertheless, this critique can barely stand against the plain wording of the provision speaking of particularly the Part III of the ECT. A significant effort is required to construe something else out of that explicit text. Moreover, it should be emphasized that should Article 26 of the ECT be denied to investors, they would be deprived from any fora at all, since Article 26 contains not only international arbitration but section 2(a) providing for the local courts. While the tribunal opines that dispute settlement issues are out of the ambit of substantive advantages of the ECT, and highlights that “the contrary approach would clearly not accord with the ECT’s object and purpose”, this paper emphasizes that there is no need to deepen on questions whether dispute settlement is a substantive or jurisdictional issue or rely on the effect and purpose of the Treaty, inasmuch as, the ordinary meaning of the clause clarifies

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22 Ibid, para 149.
26 See above, n. 19, para 148.
27 Ibid, para 149.
that only the advantages provided under Part III of the ECT can be denied to investors. Then the Tribunal addressed the temporal effect of the right to deny the Treaty benefits. The Tribunal’s analysis on retrospective effect derives notable difficulties. Starting its analysis on this point, the Tribunal correctly noted that the language of the clause is not clear on the question. It is worth to note that the relevant provisions of the US BITs and CAFTA provisions are also silent to this point. The Plama Tribunal put forward two decisive points leading to its conclusion. It heavily relied on (i) the legitimate expectations of the investors, and (ii) the object and purpose of the ECT. Elaborating on the legitimate expectations, the Tribunal stated that, an investor has a legitimate expectation that it will enjoy the advantages of Part III of the ECT unless and until a State exercises its right under Article 17.\(^{28}\) Shifting to the object and purpose of the ECT, the Tribunal opined that the express ‘Purpose of the Treaty’ under Article 2 of the ECT is to promote long-term cooperation in the energy sector by establishing a corresponding legal framework. Highlighting the wording ‘long-term’, the Tribunal concluded that it would be difficult to achieve this objective with a retrospective effect of exercising the right to deny the benefits of the ECT.\(^{29}\) Combining these factors, it concluded thusly:

“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.”\(^{30}\)

This finding gave rise of another issue – whether a denying state should exercise its right to deny notifying to investors and, if yes, what are the time requirements to the notification. According to the Tribunal, Article 17(1) by itself is ‘a half notice’.\(^{31}\)

\(^{28}\) Ibid, para 161.  
\(^{29}\) Ibid.  
\(^{30}\) Ibid, para 162.  
\(^{31}\) Ibid, para 157.
Hence, investors are entitled to ‘reasonable notice’ as to whether the state will deny benefits under Article 17(1) before the investor makes the investment in the host State.\textsuperscript{32} In the Tribunal’s view, an exercise of the right under Article 17(1) after an investment is made in the host State introduces the ‘hostage-factor’.\textsuperscript{33} The Tribunal went on to suggest the examples of notification forms. To this end, a general declaration in a Contracting State’s official gazette could suffice; or a statutory provision in a Contracting Party’s investment or other laws; or even an exchange of letters with a particular investor or class of investors.\textsuperscript{34} In sum, the Tribunal established, that (i) Article 17(1) of the ECT raises issues to merits rather than to jurisdiction, (ii) the right to deny must be effectively exercised, (iii) such an exercise would have only a prospective effect, (iv) the host States should notify the investors of their intention to deny the advantages of the Part III of the ECT before the investments are made. While the first two points are firmly supported by the language of the clause, following two conclusions, not being explicitly mentioned in the provision, raise certain criticism.

3.1.2 Critic echoes to the Plama Tribunal’s certain findings

Before addressing the general criticism to the Plama Tribunal’s certain findings, it would be fair to consider that the Tribunal was the pioneer in this field back in its time, facing with unknown and difficult tasks.

Yet, the Tribunal’s reliance on the legitimate expectations of investors may perceived as exaggerated. Article 17 of the ECT stands for attention of Contracting Parties as well as potential investors. It would be appropriate to say that all the conditions of the ECT are to be equally considered both by the Contracting Parties and would-be investors. Hence, it is not only a right for a host State but is a notice for a potential investor. A putative and reasonable investor will investigate and weigh all possible characteristics of the environment in which it is going to make investments.

In the \textit{Guaracachi America, Inc. (GAI) and Rurelec v Bolivia} case, the tribunal stated that any investor claiming under the US-Bolivia BIT, such as GAI, should be aware of the existence of the denial of benefits clause and its potential invocation by a

\textsuperscript{32} Ibid, para 161.
\textsuperscript{33} Ibid.
\textsuperscript{34} Ibid, para 157.
host State if the requirements contained therein are satisfied. When accepting the offer by host States to arbitrate, investors simultaneously accept the risk envisaged in Article XII of the governing BIT, hence no legitimate expectations are affected by the denial of benefits.\textsuperscript{35} Although this case fell within the ambit of another Treaty, however, given that the ECT as well as the BIT at hand do not expressly refer to any timing requirement, it is a proper example to consider here. Anyways, the non-ECT jurisprudence will be done addressed in the following chapter.

To this end, James Chalker opines that retrospective effect of Article 17(1) would benefit 'long-term cooperation' by encouraging investors to be upfront about ownership, control, nationality, and citizenship.\textsuperscript{36} Such understanding does not explicitly contradict to the purpose of the ECT and the long-term cooperation therein. Furthermore, if according to the Tribunal the denying state should notify of its intention before the investments are made, it could be well argued that such policy can be perceived as preconceived approach to the potential investors. On the other hand, this approach may trigger inconsistency with the discretionary nature of the right to deny the Treaty benefits. Since the states ‘reserve’ the right to deny, it is completely up to them to decide if exercise the right at all and exercise it against a particular investor. It would be not unreasonable or impractical to suggest that a state may exercise its right to deny benefits, when such benefits are claimed.

The \textit{Plama} Tribunal supports its approach with example of Article 1113(2) NAFTA which indicates a form of prior notification and consultation.\textsuperscript{37} However, the Tribunal does not focus on the fact that NAFTA Article does include such a requirement, whereas ECT provision does not. The Tribunal explains that the example comes to establish that its interpretation is reasonable. At this point, the question stands not to reasonableness of the interpretation, but the compatibility of the interpretation to the wording of Article 17(1). Have the drafters wished to include a prior notification wording as in NAFTA, for instance, they could easily do that.

\footnotesize{\textsuperscript{35} Guaracachi America, Inc. (USA) and Rurelec plc (United Kingdom) v. Plurinational State of Bolivia, UNCITRAL, Award, 31 January 2014, para 372.\
\textsuperscript{37} See above, n 19, para 157.}
On the other hand, the ECT and non-ECT Tribunals have merged two general trends: (i) the right to deny is one, and a denying state can manifest the activation of the right once and to the all would-be investors; and (ii) the right to deny can be activated on ad hoc basis – to particular investor(s) in particular circumstances.

The *Plama* tribunal follows the first understanding, and accordingly puts forward its vision of proper notification. Nevertheless, the ECT case law, interestingly, is not consistent to the question as to when investors should be notified. This thesis, in turn, does not intend to criticize any of those approaches. Instead, it analyzes arguments of both sides and as a conclusion highlights that counterarguments to the *Plama* Tribunal understanding are not unreasonable and futile.

### 3.1.3 The Yukos Saga\(^\text{38}\) (Cases against Russia)

Next Arbitral findings concerning the procedural requirements of the denial of benefits provision of the ECT were introduced in the Interim Awards on Jurisdiction in the Yukos cases on 30 November 2009. In this manifold line of cases the Claimants were Hulley Enterprises, Veteran Petroleum Limited (both incorporated in Cyprus) and Yukos Universal Limited (Isle of Man). These entities controlled and held the majority of the former Yukos Oil Company’s shares. The entities commenced three arbitral proceedings against Russia under the ECT and the UNCITRAL Arbitration Rules.\(^\text{39}\)

Russia, in its Memorial on Jurisdiction, undertook to deny the benefits of the ECT to the Claimants alleging that those were shell companies owned by Russian nationals. Additionally, the entities allegedly held no business activities in their countries of incorporation. According to the Respondent, Article 17(1) precluded the shell companies from commencing arbitration as well.\(^\text{40}\) Russia also argued that no prior notification should be required to exercise its right under Article 17(1) of the ECT.\(^\text{41}\)

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38 Hulley Enterprises Limited (Cyprus) v The Russian Federation, UNCITRAL, PCA Case No AA 226, Interim Award on Jurisdiction and Admissibility (30 November 2009); Veteran Petroleum Limited (Cyprus) v The Russian Federation, UNCITRAL, PCA Case No AA 228, Interim Award on Jurisdiction and Admissibility (30 November 2009); Yukos Universal Limited (Isle of Man) v The Russian Federation, UNCITRAL, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility (30 November 2009).

39 Yukos Universal Limited (Isle of Man) v The Russian Federation, UNCITRAL, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility (30 November 2009), para 4.

40 Ibid, paras 50-52.

41 Ibid, paras 50-52.
As a support to this position, Russia compared Article 1113 of the NAFTA, which explicitly contain prior notification and consultation, and Article 17(1) of the ECT, which does not expressly provide for prior notification. According to the Respondent, the Plama understanding of prior notification converted something that the investor knew with certainty, whether it has substantial business in the State of incorporation and whether it is owned or controlled by third or the host State nationals, into a burden to make such a determination with respect to a potential investor that a the host State cannot know or determine.

The Tribunal was not convinced by these arguments. It stated that a denying state in order to exercise the right to deny under the ECT, should notify the investor.

The tribunal pointing the object and purpose of the ECT, in particular principles of ‘long-term cooperation’ and the ‘Promotion, Protection and Treatment of Investments’, reasoned that denial of benefits under the ECT can be exercised only prospectively. Thus, the Respondent was precluded from exercising its right under Article 17(1) in the Memorial on Jurisdiction to deny the Claimants benefits of part III of the ECT. Unlike the Plama Tribunal, however, the Yukos Tribunal did not clarify that a state must invoke Article 17(1) before the relevant investment is made. No other timing alternatives were put forward.

In Sum, the Yukos Tribunal undertook the Plama Tribunal’s approaches dealing with the procedural requirements of Article 17(1) of the ECT.

### 3.1.4 Liman v Kazakhstan

The claims in this case arose out of the transfer of claimants’ license to explore and extract hydrocarbons in the Liman block in Western Kazakhstan.

The Liman Tribunal also concluded that a state’s exercise of its right to deny under Article 17(1) of the ECT cannot have retrospective effect. As in the Yukos case, the

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42 Ibid, para 445.
43 Ibid, para 452.
44 Ibid, para 461.
46 Ibid, para 459.
47 Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan, ICSID Case No ARB/07/14.
48 Ibid, Award, 22 June 2010, para 227.
*Liman* Tribunal held that it did not need to deal with the question of whether the intention to rely on the right to deny the Treaty benefits must be notified to the investor prior to the making of the investment.\(^4^9\) Furthermore, the Tribunal found that Kazakhstan’s invocation of Article 17(1) of the ECT was ‘belatedly’ in its Counter-Memorial. The tribunal reasoned thusly:

“The tribunal also does not have to decide whether in case of a change in the relevant factual circumstances or appearance of new facts, the host State may exceptionally be permitted to retroactively invoke the right under Article 17(1) of the ECT at the time when it becomes aware of the new situation.”\(^5^0\)

Interestingly, the *Liman* Tribunal appears to offer potential ways of relief for denying States that failed to invoke Article 17(1) at the appropriate time, due to lack of knowledge of an investor’s organizational structure or other changes in certain circumstances.\(^5^1\) The Tribunal arguably introduces the possibility that a state can successfully invoke Article 17(1) even after an arbitration commences if it is able to prove that it first learned that the investor fell within the scope of the provision after the request for arbitration and that it then promptly invoked its right of denial.\(^5^2\)

### 3.1.5 *Ascom v Kazakhstan*\(^5^3\)

The dispute arose out of the alleged harassments by the Kazakh State which culminated with the abrupt cancellation of oil and gas exploration contracts held by claimant’s local operating companies, followed by the seizure of its Kazakh assets.\(^5^4\)

The *Ascom* Tribunal based its interpretation of Article 17(1) on the *Plana* Tribunal’s analysis. The Tribunal stated that Article 17 could apply only to Part III of the ECT, leaving the dispute resolution clause in Part V unaffected. More so, Article

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\(^4^9\) Ibid, 226.

\(^5^0\) Ibid, 227.


\(^5^3\) Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v Kazakhstan, SCC, Case No 116/2010.

17(1) of the ECT could operate only if a state had invoked that provision before the dispute arose. As the Ascom tribunal notably contradicted to the Plama’s reasoning requiring a denying state to exercise the right to deny before the investment is made.

3.1.6 **Petrobart v The Kyrgyz Republic**

The dispute arose in connection with a sales contract between Petrobart and Kyrgyz state owned company KGM. A line of state actions caused allegations of breaches of several vital principles under Article 10(1) of the ECT. Petrobart initiated arbitration proceedings before the Stockholm Chamber of Commerce (SCC).

Among other jurisdictional objections, the Kyrgyz Republic also argued that Petrobart, according to Article 17(1) ECT, should be denied the benefits of Part III of the ECT, since the latter was owned or controlled by nationals of a non-contracting party of the ECT, and since Petrobart had no substantial business activities in Gibraltar, where it was incorporated.

The Tribunal, based on information provided by Petrobart showing that it was managed by an English company, found that the Respondent’s exercise of the denial of benefits clause should be rejected. The reference by the Tribunal to Article 10(2) of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, regarding the jurisdictional objections’ timing, shows that the Tribunal considered Article 17 of the ECT as a part of jurisdictional defense. Therefore, it should be invoked with other jurisdictional objections in accordance with Article 10(2) of the SCC Rules. This particular finding diverges from the established approach of other ECT tribunals considering Article 17(1) of the ECT as an issue of merits rather than jurisdiction.

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55 See above n 53, Award, 19 December 2013, para 745.
58 Ibid.
59 Article 10 (2) of the SCC Rules 1999.
60 Kaj Hobér, *Selected Writings on Investment Treaty Arbitration* (Studentlitteratur AB 2013), 247
61 See above n 56, Arbitral Award, 29 March 2005, page 62.
4 Non-ECT jurisprudence interpreting denial of benefits clauses

The relevant provisions addressed by non-ECT jurisprudence are found in the US BITs. Article XII of the US-Bolivia BIT in particular reads thusly:

Each Party reserves the right to deny to a company of the other Party the benefits of this Treaty if nationals of a third country own or control the company and:

(a) the denying Party does not maintain normal economic relations with the third country; or

(b) the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.\(^\text{62}\)

Article I (2) of US-Ecuador BIT contains similar wording:

Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.\(^\text{63}\)

As in the case of Article 17(1) of the ECT, interpreted in accordance with Article 31(1) of the VCLT, the language of these clauses also provides for a reserved rather than an automatically operating right to deny. Thus, Tribunals tasked with interpretation of the provision will be challenged to deal with the identical with those of Article 17(1) of the ECT procedural requirements.

Denying states successfully invoking the right, may deny the benefits of the Treaty. It should be stressed that in contrast to the relevant provision of the ECT, this clause does not indicate any part of the Treaty that can be denied. Thus, the ambit of the clause encompasses the Treaty’s dispute resolution provisions as well.

Accordingly, denying states use the clause in arbitrations as a jurisdictional defense too. The rest of the wording refers to qualifications of investors and investments for the purposes of the BIT. The language is quite similar to that of Article 17(1) of the ECT.

\(^{62}\) US-Bolivia BIT 1998, Article XII.

\(^{63}\) US-Ecuador BIT 1993, Article I (2).
Substantial business activities are cordial here as well. Yet, this paper will not address the issue of definition of ‘substantial business activities’.

At this point let us analyze corresponding findings of Tribunals interpreting relevant provisions of the US BITs and CAFTA. These Tribunals have discussed the same procedural requirements addressed in relation to Article 17(1) by the ECT Tribunals. However, they have come up with different decisions.

4.1 Disputes covered by US-Ecuador BIT

4.1.1 EMELEC v Ecuador§

EMELEC, an electricity company incorporated in the state of Maine, signed a 60-year concession contract in 1925 to produce, transmit and distribute electricity to Guayaquil, Ecuador. EMELEC claimed that, on 23 March 2000 the company’s assets were frozen by an order of Ecuador’s National Council for Electricity, and those actions were equal to expropriation. Ecuador ultimately undertook to deny the benefits of the BIT under Article I (2). The Tribunal did not go deeply into the analysis of the denial of benefits clause. It concluded thusly:

“...The tribunal considers that Ecuador announced the denial of benefits to EMELEC at the proper stage of the proceedings, i.e. upon raising its objections on jurisdiction.”§§

Unfortunately, the Tribunal provided no further reasoning for the purposes of the thesis. However, from the wording at hand it could be construed that the Tribunal viewed the exercise of the right to deny as a matter of jurisdictional objection which had been timely raised. Hence, no prior notification was required. Additionally, the exercise of Article I (2) of the BIT had retroactive effect. The Tribunal put forward five potential grounds that would state the absence of its jurisdiction over the dispute.§§ The Tribunal eventually rejected its jurisdiction relying on a different ground than the exercise of Article I (2) by the Respondent. Still, from the Tribunal’s reasoning it was

§ Empresa Electrica del Ecuador, Inc v Republic of Ecuador, ICSID Case No ARB/05/9.
§§ Ibid, Award, 2 June 2009 para 71.
§§§ Ibid, para 73.
obvious that the denial of benefits clause of the BIT would act retrospectively. The Tribunal, thus, observed:

“Even on the assumption that the requirement of nationality *rationae personae* were to be deemed fulfilled, EMELEC cannot invoke the BIT in its favour because under Article I (2) of the Treaty the advantages thereof were denied to it.”67 (emphasis is original)

### 4.1.2 Ulysseas v Ecuador68

In this case the claims arose out of the same governmental measures which had caused the dispute in EMELEC case. Ulysseas, an American entity claimed that those measures altered the legal regulatory framework governing the power sector in Ecuador, including the State’s withdrawal of claimant’s operating permit due to alleged contractual breaches. Ulysseas, filed in UNCITRAL arbitration against Ecuador in May 2009.69 Nearly nine months later, Ecuador relied on Article I (2) of the US-Ecuador BIT to deny the advantages of the Treaty to Ulysseas, including access to arbitration70 since the company was owned by a Brazilian national and had no substantial business activities in the United States.71

The Tribunal viewed the denial of benefits clause as a jurisdictional bar:

“In the Tribunal’s view, since such advantages include BIT arbitration, a valid exercise of the right would have the effect of depriving the Tribunal of jurisdiction under the BIT.”72

Then the Tribunal analyzed whether there was any time limit for the exercise by the State of the right to deny the BIT’s advantages. It stated that nothing in Article I (2) of the BIT to prevent a state from exercising its right after an investor had sought advantages of the BIT through a request for arbitration.73

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67 Ibid.
68 Ulysseas, Inc v The Republic of Ecuador, UNCITRAL.
69 Ibid, Interim Award, 28 September 2010, paras 1, 73.
70 Ibid, paras 75, 172.
71 Ibid, para 114.
72 Ibid, para 172.
73 Ibid, para 172.
According to the Tribunal the date on which the conditions for a valid and effective denial of advantages were to be met in the instant case was the date of the Notice of Arbitration, i.e. 8 May 2009. The Ulysseas Tribunal applied only the time limit under Article 21 of the UNCITRAL Arbitration Rules, providing that the respondent may object to a tribunal’s jurisdiction no later than in the statement of defense.

Second crucial finding of the Tribunal regarded the retrospective effect of the operation of Article I (2) of the BIT. The Claimant had stated that retrospective application of the denial of benefits provision would violate the legitimate expectations of investors. The Tribunal rejecting such allegations, opined thusly:

“…it may be noted that since the possibility for the host State to exercise the right in question is known to the investor from the time when it made its the investment, it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT’s advantages by the host State.”

To sum, The Tribunal found no valid reasons to exclude the retrospective effect.

This paper sympathizes this approach to the legitimate expectations of investors: the mere standing of denial of benefits clauses in a treaty informs potential investors that the host States may deny the advantages of the treaty if certain conditions under the provisions are met. Hence, the exercise of the right to deny can hardly violate the legitimate expectations of investors. The Tribunal eventually accepted Ecuador’s exercise of the right to deny the BIT benefits as a jurisdictional objection that was made in time and applied retrospectively. However, the Tribunal did not apply Article I (2) of the BIT since it found that the Claimant was controlled by a US citizen.

4.1.3 Rurelec v Bolivia

In this case the Tribunal dealt with Article XII of the US-Bolivia BIT.

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74 Ibid, para 174.
75 Ibid, para 172.
76 Ibid, para 173.
77 Ibid, para 190.
78 Guaracachi America, Inc and Rurelec PLC v The Plurinational State of Bolivia, UNCITRAL, PCA Case No 2011-17.
The claimant was an indirect controlling shareholding in Bolivian company holding a 30-year electricity generation license. Claims arose out of the Bolivian government’s nationalization of Guaracachi America, Inc.

Bolivia, however, claimed that GAI was a shell company controlled by its British Virgin Islands parent. Hence, Bolivia invoked Article XII in its Memorial on Jurisdiction, denying the benefits of the BIT to GAI. This was done nearly two years after the Claimant commenced arbitration. Interestingly, the Claimant’s investment had been made before the BIT entered into force.

The Claimant argued that Bolivia exercising the right to deny retrospectively and without any prior notice would “violate the international principle of pacta sunt servanda and would contradict to the object and purpose of investment treaties”. However, the Tribunal agreed with the approaches established in the Ulysseas case. It stated that although an investor can be “in something of a fragile position, since the investor will never know if there might be a denial of benefits exactly when the investor needs them the most. At the same time, one cannot say that such a denial will come as a total surprise for the investor, since the BIT is not secret…”

Regarding the retrospective application of the clause, the Tribunal opined thusly:

“The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is ‘activated’ when the benefits are being claimed.”

The Tribunal stated that the denial of benefits provision can be used whenever an investor decided to invoke one of the benefits of the BIT. Furthermore, the denying state may decide if the objective conditions for the denial are met and, if so, decide on whether to exercise its right to deny the benefits of the BIT, up to the submission of its
statement of defense. Hence, the Tribunal proclaimed that the denying states were not required to undertake a prior notification, and the state had discretion to exercise the right to deny. According to the Tribunal, it would be odd for a denying state to examine if an investor fell with the ambit of a denial of benefits provision before a dispute arose:

“In that case, the notification of the denial of benefits would—per se—be seen as an unfriendly and groundless act, contrary to the promotion of foreign investments. On the other side, the fulfilment of the aforementioned requirements is not static and can change from one day to the next, which means that it is only when a dispute arises that the respondent State will be able to assess whether such requirements are met and decide whether it will deny the benefits of the treaty in respect of that particular dispute.”

The Tribunal had viewed the invocation of denial of benefits clause as a jurisdictional issue. The provision, according to the Tribunal, covered the dispute resolution mechanism of the BIT as well. This was construed from the plain language of the clause. Had the drafters intended otherwise they could easily draft the provision differently. Eventually, the Tribunal stated that Bolivia invoked Article XII of the BIT in the Memorial on Jurisdiction in a timely manner pursuant to the time limit for jurisdictional objections found in the UNCITRAL Arbitration Rules. The Tribunal found that the conditions of Article XII had been met. Thus, applying Article XII of the BIT retrospectively, the Tribunal rejected its jurisdiction.

4.1.4 Pac Rim v El Salvador (CAFTA)

Before considering the relevant findings in the decision on jurisdiction in Pac Rim v El Salvador, let us briefly analyze the denial of benefits provision of CAFTA - Article 10.12:

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86 Ibid, para 378.
87 Ibid, para 379.
88 Ibid, paras 366, 373, 377, 381.
89 Ibid, para 377.
90 Ibid, para 382.
91 Ibid, para 384.
92 Pac Rim Cayman LLC v Republic of El Salvador, ICSID Case No ARB/09/12.
1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or
(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.

According to the ordinary meaning of the language ‘may deny’, CAFTA as well as other treaties provides the denial of benefits clause as an option. Hence, a denying party needs to exercise the right if it intends to do so. The clause in CAFTA as well as in the ECT encapsulates a specific Chapter or Part of the Treaties and respective commitments and advantages therein. Article 10.12 found in Chapter Ten, covers only that part of the Treaty. However, unlike the ECT, the same Chapter of CAFTA contains the ISDS mechanism. Therefore, Article 10.12 of CAFTA covers both jurisdictional and substantive matters. A denying state is able to effectively invoke the clause as a jurisdictional bar to investment arbitration provided under Article 10.16 (3)(a) CAFTA. The further wording defining the category of investors falling under the operation of the clause, is identical to other denial of benefits provisions.

The second paragraph of Article 10.12 subjects the right to deny to the notification and consultation. Interestingly these obligations refer to the other state parties of

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93 Article 18.3(1) CAFTA.
94 Article 20.4(1) CAFTA.
CAFTA rather than investors, since the wording of the Articles state that “…each Party shall notify any other Party…”\textsuperscript{95} and “Any Party may request in writing consultations with any other Party”\textsuperscript{96}. Since this paper is interested in the procedural requirements of denial of benefits clauses, this feature is decisive for the question if the state has invoked its right to deny in a timely manner.

In \textit{Pac Rim v El Salvador}, the dispute arose out of the Government's refusal to issue necessary mining licenses for Pacific Rim’s El Dorado gold mining project due to alleged environmental concerns.

Pac Rim invested in El Salvador in 2002, being a national of the Cayman Islands. Pac Rim then registered in the United States, and El Salvador became aware of this fact in 2008. Pac Rim requested for ICSID arbitration on 30 April 2009. One year later pursuant to Article 10.12.2 the Respondent notified the United States of its intent to deny the Claimant the benefits of CAFTA.\textsuperscript{97} Then El Salvador objected to the arbitral tribunal’s jurisdiction by virtue of the denial of benefits provision.

The United States and Costa Rica made their own submissions as non-disputing CAFTA parties. They stated that under CAFTA state parties were not obliged to invoke the right to deny prior to the investor’s request to arbitration. The Parties were also not obliged to provide any prior notice to an investor.\textsuperscript{98} More so, it would be practically impossible for state parties to continuously monitor investors’ corporate structure.\textsuperscript{99} Costa Rica observed that such obligations would be contrary to the object and purpose of CAFTA.\textsuperscript{100}

The Tribunal confirmed that the denial of benefits clause covers ‘all the benefits conferred upon the investor under Chapter 10 of CAFTA including the ISDS mechanism.\textsuperscript{101} The Tribunal compared Article 10.12 of CAFTA with Article 17(1) of the ECT and stated that the latter covered more limited scope of issues. On the other

\textsuperscript{95} See above, n 93.
\textsuperscript{96} See above, n 94.
\textsuperscript{97} See above n 92, 1 June 2012, Decision on the Respondent’s Jurisdictional Objections, paras 2.24, 4.41.
\textsuperscript{98} Ibid, para 4.56, 4.57.
\textsuperscript{99} Ibid, para 4.56.
\textsuperscript{100} Ibid, para 4.53.
\textsuperscript{101} Ibid, para 4.4
hand, the denial of benefits clause of CAFTA was similar to Article 1113(1) of NAFTA. Therefore, the Tribunal’s analysis should not be comparative but based only on the relative principles of the VCLT. The Tribunal stated that CAFTA did not contain any express time limit ‘for the election by a CAFTA Party to deny benefits under CAFTA Article 10.12.2’. A denying state should consider only the time limit found in ICSID Arbitration Rule 41, establishing that jurisdictional objections must be submitted ‘no later than the expiration of the time limit fixed for the filing of the counter-memorial’. The Tribunal agreed with the United States and Costa Rica that any other (earlier) time limit would be inconsistent with the object and purpose of the provision. The Claimant submitted that the Respondent had deliberately delayed the notification to the United States of its intention to deny the benefits. The Tribunal disagreed with the Claimant thusly:

“...It is not apparent to the Tribunal that the Respondent thereby deliberately sought or indeed gained any advantage over the Claimant, by waiting until 1 March 2010 (as regards notification to the US) or 3 August 2010 (for its invocation of denial of benefits to the Claimant)”.  

According to the Tribunal, the decision to invoke the right to deny the benefits of the Treaty required time and careful attention. Hence, the delay was justified. Yet, the Tribunal did not provide for any time-limit for a denying state’s notification obligation pursuant to Article 10.12.2 of CAFTA. Finally, it observed that the Respondent had respected the procedural requirements of Article 10.12.2 of CAFTA. The Tribunal established that Pac Rim was owned by a Canadian national and lacked any substantial business activities in the United States. As a result, the Claimant was rejected to receive any benefits under CAFTA, including the ISDS mechanism.
Notwithstanding this, it upheld its jurisdiction over the Claimant’s claims under the Respondent’s investment law.\textsuperscript{109}

\textbf{4.1.5 Ampal v Egypt\textsuperscript{110} (US-Egypt BIT)\textsuperscript{111}}

The Claimant filed its claims to the ICSID arbitration under US-Egypt BIT, containing Protocol 1 invoked by the Respondent to deny to the Claimant the benefits of the Treaty:

“Each Party reserves the right to deny the benefits of this Treaty to any company of either Party, or its affiliates or subsidiaries, if nationals of any third country control such company, affiliate or subsidiary; provided that, whenever one Party concludes that the benefits of this Treaty should not be extended for this reason, it shall promptly consult with the other Party to seek a mutually satisfactory resolution of this matter.” \textsuperscript{112}

The language of the clause is similar to other BITs concluded by the United States, however, additionally provides for consultation between the state Parties, similar to denial of benefits provisions of CAFTA and NAFTA. This clause also provides for a reserved right to deny and covers the BIT including the ISDS under Article VII.

In this case the dispute arose out of alleged breaches of a long-term contract for the supply of natural gas between the parties, including the prolonged interruption of gas supply and failure to deliver the agreed volume of gas.\textsuperscript{113} The Tribunal observed that there had been evolved two general jurisprudences addressing the denial of benefits clauses – based on the ECT on the one hand and the US BITs and CAFTA on the other hand.\textsuperscript{114} It found that the clauses of the US BITs and CAFTA have more in common with Protocol 1 to the US-Egypt BIT.\textsuperscript{115} However, the procedural requirements of Protocol 1 were to be determined considering the factual background of the case and

\begin{itemize}
\item \textsuperscript{109} Ibid, para 7.1 (B)
\item \textsuperscript{110} Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11.
\item \textsuperscript{111} US-Egypt BIT 1986.
\item \textsuperscript{112} Ibid, Protocol 1.
\item \textsuperscript{113} \url{http://investmentpolicyhub.unctad.org/ISDS/Details/469}
\item \textsuperscript{114} See above n 110, Decision on Jurisdiction, 1 February 2016, para 128.
\item \textsuperscript{115} Ibid, para 129.
\end{itemize}
interpreting the provision pursuant to the VCLT.\textsuperscript{116} A denying state was obliged ‘to consult with the other Party in order to search for a mutually satisfactory resolution of the matter and such consultations must be held promptly’.\textsuperscript{117} The wording ‘shall promptly consult’ left no doubt for the Tribunal. It then noted that after deciding to deny the benefits of the BIT to the investor, Egypt informed the United States about its decision on 23 January 2013. However, such notification was a mere \textit{fait accompli} rather than an invitation to commence consultations in order to reach a mutually satisfactory outcome of the issue raised by Egypt.\textsuperscript{118} In the Tribunal’s view Egypt in accordance with Protocol 1 should have initiated consultations with the United States prior to invoking its right to deny the benefits of the treaty to Ampal.\textsuperscript{119} As the Tribunal maintains:

“The object and purpose of the mandatory consultation is to find a satisfactory resolution, not to discuss whether a decision previously taken by one Party should be endorsed and accepted by the other Party.”\textsuperscript{120}

Therefore, those mandatory requirements were not met in this case.\textsuperscript{121} When valid timing for consultation is concerned, the Tribunal stated that in accordance with Article VII (3) of the Treaty, Egypt should have undertaken to resolve the dispute with the Claimant by negotiations and consultation within six months starting from the moment Ampal notified Egypt of the existence of a legal investment dispute under the BIT. During the same period consultations with the United States should have been initiated had Egypt decided to deny the benefits of the Treaty to Ampal even after attempts at amicable settlements,\textsuperscript{122} since Article VII (2) required the parties to initially undertake to resolve the dispute by consultation and negotiation. In brief, valid timing for consultations started after the Claimant’s notification of the existence of a legal dispute under the Treaty.

\textsuperscript{116} Ibid, para 131, 144.
\textsuperscript{117} Ibid, para 147.
\textsuperscript{118} Ibid, para 149.
\textsuperscript{119} Ibid, para 151.
\textsuperscript{120} Ibid, para 154.
\textsuperscript{121} Ibid, para 148, 157.
\textsuperscript{122} Ibid, para 160.
The Respondent argued that the denial of benefits clause of the Treaty acted retrospectively and as a result it withdrew its consent to arbitration given under Article 25 (1) of the ICSID Convention. The Tribunal, however, agreed with the Claimants that the jurisdiction of the Centre must be determined at the time that the request for Arbitration is registered. The Tribunal rejected the expert opinion relied upon by the Respondent that it could deny the benefits of the Treaty "at any time" after the Request for Arbitration has been filed. Thus, an effective denial should be made prior to the filing and registration of the Request for Arbitration. Eventually, the Tribunal concluded that the Respondent's denial of benefits to the Claimant was not effective and dismissed the objection to jurisdiction. This decision came to diverge from the corresponding arbitral findings under the US BITs and CAFTA. In addition to different factual background, the decisive factor was the treaty drafting. Protocol 1 of the BIT unlike other denial of benefits provisions, expressly subject the exercise of the right to deny to prior consultations and notifications.

5 Comparing procedural requirements of denial of benefits clauses of the ECT and other treaties.

5.1 Exercising the right to deny

Tribunals have established varying procedural requirements analyzing Article 17(1) of the ECT and the denial of benefits clauses of other Treaties. This is not surprising considering the variation in treaty drafting. However, the Treaties discussed in this paper consistently provide that a state ‘reserves the right’ to deny or ‘may’ deny the benefits of to an investor. Therefore, tribunals are unanimous to the point that the states have right and not obligation to deny. Additionally, tribunals have stated that the right to deny benefits does not operate automatically. Instead, a denying state must affirmatively exercise its right to deny benefits to an investor.

123 Ibid, para 164.
124 Ibid, para 167.
125 Ibid, para 170.
126 Ibid, para 173.
127 Article 17(1) of the ECT; Article XII of the US-Bolivia BIT 1998; Article I (2) of the US – Ecuador BIT1993; Protocol 1 of the US-Egypt BIT 1986.
128 Article 10.12.2 of CAFTA.
In the frequently cited case of *Plama v Bulgaria* the Tribunal held that:

“The existence of a ‘right’ is distinct from the exercise of that right… Contracting Party has a right under Article 17(1) ECT to deny a covered investor the advantages of Part III; but it is not required to exercise that right; and it may never do so.”\(^{129}\)

In the *Yukos* case the tribunal also was tasked to decide whether a state should affirmatively exercise its right to deny. In these cases, the Russian Federation stated that the denial of benefits clause of the ECT would have automatically denied the advantages of Part III of the ECT to companies falling into the scope of the clause. However, the tribunal denied such allegations, by stating that:

“Article 17(1) does not deny simpliciter the advantages of Part III of the ECT [to investors within its scope]. It rather ‘reserves the right’ of each Contracting Party to deny the advantages of that Part to such an entity. This imports that, to effect denial, the Contracting Party must exercise the right.”\(^{130}\)

Both *Plama* and *Yukos* tribunals stated that, had the drafters intended to give Article 17(1) of the ECT effect of automatic operation, they easily could do so.\(^{131}\) As an illustrative example of a provision having such effect, the tribunals cited the ASEAN Framework Agreement on Services providing that the benefits of this Framework Agreement *shall* be denied to a service supplier who is not engaged in substantive business operations in the territory of Member State(s).\(^{132}\) (emphasis added). Obviously, the word ‘shall’ leaves a little, if any, room for maneuver: once the requirements under the Article are met, the benefits shall be automatically denied.

The AMTO tribunal follows this line, which interpreting Article 17(1) reasoned that certain requirement under the Article must be met “in order for the host State to *exercise* its right to deny”.\(^{133}\) (emphasis added)

\(^{129}\) See above, n 19, para 155.

\(^{130}\) See above, n 39, para 455.

\(^{131}\) Ibid, para 454; See also *Plama*, above n 19, para 156.

\(^{132}\) ASEAN Framework Agreement on Services, Article VI, (1992).

\(^{133}\) See above, n 18, para 62.
In Ascom v Kazakhstan case, the tribunal explicitly stated that Article 17 of the ECT would only apply if a state invoked that provision to deny benefits to an investor before a dispute arose and Respondent did not exercise this right. Apparently the Respondent in the Liman case have not even objected to this point. Obviously, tribunals dealing with Article 17(1) of the ECT, without exclusion reasoned that the denying states must effectively exercise the right to deny: no automatic operation under of the denial of benefits clause under the ECT is possible. Interpreting the wording ‘reserves’ in good faith and according to the ordinary meaning of the text, it would be impossible to state that the clause operates automatically and compulsory regardless of the host States’ discretion. Other tribunals have briefly concluded, or at least assumed, that a denying state should effectively exercise its right to deny the benefits of the ECT or other treaties. The Respondents did not even contest this point in other cases.

5.2 The proper time and form of the exercise of right to deny

The denial of benefits clauses are silent to the point as to when and how a denying state should exercise its right. Therefore, the Tribunals addressing these procedural requirements undertook a certain portion of speculative interpretation. Looking beyond the language of the clauses, the Plama Tribunal, for instance, relied on the object of purpose of the ECT and the legitimate expectation of the investors, to decide when and how the Respondent should have invoked its right to deny. The Tribunal in the Yukos cases, followed the same pattern. This pattern raised voices of criticism presented in Section 3.1.2 of the thesis. The Tribunals were faced with different factual backgrounds and party submissions both being analyzed under a specific treaty. Thus, the Tribunals

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134 See above n 53, Award, 19 December 2013, para 745.
136 Liman Caspian Oil BV v NCL Dutch Investment BV v Republic of Kazakhstan, ICSID Case No ARB/07/14, para 224; Ulysseas, Inc v The Republic of Ecuador, UNCITRAL, Interim Award, 28 September 2010, para 124; Pac Rim Cayman LLC v Republic of El Salvador, ICSID Case No ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, para 4.18; Guaracachi America, Inc and Rurelec PLC v The Plurinational State of Bolivia, UNCITRAL, PCA Case No 2011-17, Award, 31 January 2014, para 212.
137 See above, Section 3.1.1.
138 See above, Section 3.1.2.
have come up with varying reasoning as to when and how the denying states can exercise their right to deny the treaty benefits.

5.2.1 The ECT case law

The Plama Tribunal established that Article 17 (1) of the ECT operated only prospectively and the denying state should make a ‘reasonable notice is to the potential investors before the investments had been made in the territory of the host State.\textsuperscript{139}

In the Yukos cases, the Tribunal found that Article 17 (1) of the ECT applied only prospectively. Prior notice was required too, but the timing of the notice was not specified by the Tribunal.\textsuperscript{140}

The Liman Tribunal established that the denial of benefits provision of the ECT affected only prospectively. Prior notice was required, but the Tribunal did not specify the timing of the notice.\textsuperscript{141}

In the Ascom v Kazakhstan case, the Tribunal found that Article 17 (1) of the ECT affected prospectively only. Notice was required and it should be given before the dispute arose.\textsuperscript{142}

Diverging from the ECT pattern, the Petrobart Tribunal, did not expressly address these procedural requirements. However, since the Tribunal viewed Article 17(1) of the ECT as a jurisdictional issue,\textsuperscript{143} it could be assumed that the clause might have retroactive effect had the Tribunal rejected its jurisdiction on that objection.

5.2.2 The US BITs and CAFTA case law

The Tribunal in the EMELEC v Ecuador case, applying Article I (2) of the US – Ecuador BIT, found that the denial of benefits clause applied retrospectively. The ‘proper stage of the proceedings’ to invoke the denial of benefits clause was the objection on jurisdiction.\textsuperscript{144} Although the Tribunal did not expressly mention but given that the proceedings were within the auspices of the ICSID Convention, such a ‘proper

\textsuperscript{139} See above n 19, paras 157-165.
\textsuperscript{140} See above n 39, paras 457-458.
\textsuperscript{141} See above n 47, Award, 22 June 2010, para 227.
\textsuperscript{142} See above n 53, Award, 19 December 2013, para 745.
\textsuperscript{143} See above n 56, Arbitral Award, 29 March 2005, page 62.
\textsuperscript{144} See above n 64, Award, 2 June 2009, para 71.
stage’ could be defined in accordance with Arbitration Rule 41 of the ICSID Convention.

The *Ulyseas* tribunal, applying Article I (2) of the US – Ecuador BIT, stated that the Article affected retrospectively. The Respondent should invoke the denial of benefits no later than the Statement of Defense, pursuant to the UNCITRAL Arbitration Rules.\(^{145}\)

The *Rurelec* Tribunal, interpreting Article XII of the US – Bolivia BIT, found that the denial of benefits provision applied retrospectively. The denial of benefits should be exercised no later than the Statement of Defense according to the UNCITRAL Arbitration Rules.\(^{146}\)

In the *Pac Rim v El Salvador* case the Tribunal, applying Article 10.12.2 of CAFTA stated that the provision operated retrospectively, and the Respondent should invoke the denial of benefits clause no later than the Counter-Memorial, in accordance with the Arbitration Rule 41 of the ICSID Convention.\(^{147}\)

The *Ampal* Tribunal diverged from the trend established by the Tribunals dealing with the US BITs. Albeit the governing treaty in this dispute was one concluded by the United States, it was drafted differently. In particular, the US-Egypt BIT requires a denying state to consult with the other Party, have the former decided to deny the Treaty benefits to an investor. CAFTA contains a similar mechanism in Article 10.12.2. The *Ampal* Tribunal explained that it was aware of the decision of the tribunal in *Pac-Rim v El Salvador* that the denial of benefits pursuant to a clause nearly identical to that in Paragraph 1 of the Protocol in the present case was held to be effective.\(^{148}\) Nevertheless, according to the Tribunal there was a significant difference between CAFTA language and the Treaty language in the present case. In CAFTA, governing the Pac Rim case, the consultations between the two State parties according

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\(^{145}\) See above n 68, Interim Award, 28 September 2010, paras 172-174.

\(^{146}\) See above n 78, Award, 31 January 2014, paras 376–384.

\(^{147}\) See above n 92, 1 June 2012, Decision on the Respondent’s Jurisdictional Objections, paras 4.83–4.91.

\(^{148}\) See above n 110, Decision on Jurisdiction, 1 February 2016, para 155.
to Article 20.4.1 of the Agreement were only discretionary\(^{149}\), whereas, Protocol 1 of the US-Egypt BIT provided for mandatory consultations.\(^{150}\)

Therefore, the Tribunal applying Protocol 1 of the Treaty, concluded that the denial of benefits clause applied only prospectively.\(^{151}\) In accordance with Protocol 1, valid timing for notification (consultations) was ‘promptly’ after the Claimant’s notification of the existence of a legal dispute under the Treaty.\(^{152}\)

### 6 Concluding remarks

The ECT being the largest investment Treaty regulates the energy sector which is vital both for states and public. Consequently, the research question of this thesis addressing the procedural requirements of Article 17(1) of the ECT is an important topic for discussion. Thus, the operation of denial of benefits clauses in practice is essential for both the investors and the host States. Both need to know when a host State will be able to effectively deny the benefits of a treaty to the investor. Moreover, whether the denial will have retrospective or prospective effect and if the denying states have any formal obligations exercising the right to deny. Article 17 of the ECT is reluctant on these points. The US BITs and CAFTA also do not expressly clarify these issues. Considering various factual backgrounds and party submissions in each case, the tribunals have to deal with these challenges in the context of the particular treaty on case-by-case basis.

This thesis observed Article 17 (1) of the ECT in light of case law evolved to date. Procedural requirements of the denial of benefits provision of the ECT being the central research question of the thesis were viewed according to \textit{de lege lata} approach i.e. the law as it exists. Therefore, the thesis heavily relied on the relevant findings of arbitral Tribunals. The review of these findings indicates two varying trends emerged in the jurisprudence on the procedural requirements of denial of benefits provisions of the ECT on the one hand and the US BITs and CAFTA on the other hand. The patterns in these trends can be generalized thusly:

\(^{149}\) See above n 92, 1 June 2012, Decision on the Respondent’s Jurisdictional Objections, para 4.57.
\(^{150}\) See above n 110, Decision on Jurisdiction, 1 February 2016, para 156.
\(^{151}\) Ibid, para 170.
\(^{152}\) Ibid, para 160.
(i) Interpreting Article 17(1) of the ECT, tribunals have maintained that the denying states to effectively exercise the right to deny the benefits of the ECT Part III to an investor, should notify the latter of the denial. The notification must be done either before the investment is made (Plama) or before the dispute arises (Ascom). The denial of benefits provision does not affect retrospectively. Therefore, this summary answers the sub questions arising out of the central research inquiry as de lege lata - as the case law stands. Yet, following tribunals are not obliged to follow this trend meaning any imperative or de lege ferenda answer would a priori be futile.

(ii) Interpreting the US BITs and CAFTA, tribunals have maintained that the denying states to effectively exercise its right to deny the benefits of the governing Treaty to an investor, should invoke the relevant denial of benefits clause within the time limit for the submission of jurisdictional objections in accordance with the applicable arbitration rules. No prior notification to the investor is required. The exercise of the denial of benefits clauses can affect retrospectively.

These trends, however, are not decisive for the future arbitral tribunals, which are not obliged to follow these patterns. More so, this thesis presented exceptions from both general approaches. The Petrobart Tribunal, even in its short contribution, appears to view Article 17(1) of the ECT as a jurisdictional issue; and the exercise of the right to deny can affect retrospectively. On the other hand, the Ampal tribunal relying on the express language of Protocol 1 of the US-Egypt BIT, established that the denying state must notify the investor in prior, and the exercise of the right to deny the benefits of the Treaty did not operate retrospectively. Hence, both Tribunals dissented from the general patterns evolved under the ECT and the US BITs and CAFTA respectively.

Different treaty drafting of the ECT and the other treaties discussed in the thesis have naturally led to varying arbitral findings. Tribunals dealing with Article 17(1) of the ECT, starting with the Plama tribunal, relied on Article 2 of the ECT, providing that the purpose of the ECT was to ‘promote long-term cooperation in the energy field’.

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153 See above 51, 94.
154 The first decision regarding the denial of benefits provision of NAFTA is expected in Saint Marys VCNA, LLC v Government of Canada, where Canada invoked NAFTA (n 22) art 1113(2) after the filing of the Notice of Arbitration, but the parties settled before the Tribunal had the opportunity to rule upon the validity of this invocation. Saint Marys VCNA, LLC v Government of Canada, UNCITRAL, Consent Award (29 March 2013) paras 4, 5.
This led the tribunals to conclude that the denial of benefits provision did not apply retrospectively. Relying on the legitimate expectations of the investors the tribunals also concluded in favor of prior notifications. However, should the Tribunals prioritize the purpose of the ECT weighing against retrospective application of the denial of benefits clause, when the language of the clause is silent on the issue? This question is a matter of criticism against the so-called Plama line. On the other hand, should the legitimate expectations of investors oblige host States to make general prior notifications of exercising their right to deny the advantages of the ECT Part III, when the relevant provision should be considered by putative investors alongside with other conditions before making their investments under the ECT? The paper having different research inquiry, does not intend to answer these questions, however, the critic voices contain a remarkable portion of reasonableness.

The Plama Tribunal, justifying its approach to Article 17(1) of the ECT, opines that the provision is a tool for the ECT to merge different policies of the ECT Contracting States towards shell companies.\textsuperscript{155} Put differently, to arrange a middle ground policy between too restrictive and too liberal approaches. Perhaps this view led to the decision requiring states to give prior notice of denial of benefits since ‘in practice an investor must distinguish between Contracting States with different state practices’\textsuperscript{156} \textsuperscript{157} On the other hand, tribunals interpreting the denial of benefits provisions of the US BITs and CAFTA clang to more predictable purpose of these provisions. According to them, the purpose of these provisions is to allow host States to deny benefits to investors falling within the ambit of the clause on a case-by-case basis.\textsuperscript{158} Consequently, these tribunals are concerned with ‘practical difficulties’ that denying states would carry if they are required to invoke the denial of benefits provision of the governing Treaty before the investor initiates arbitration proceedings.\textsuperscript{159} Addressing the point that because the ECT Part III covers only investments made in the energy sector, which is much easier to

\textsuperscript{155} See above n 18, Decision on Jurisdiction, 8 February 2005, para 155.
\textsuperscript{156} Ibid, para 157.
\textsuperscript{157} See above n 51, 95.
\textsuperscript{158} See above n 89, 1 June 2012, Decision on the Respondent’s Jurisdictional Objections, para 4.82; n 76, Award, 31 January 2014, para 376.
\textsuperscript{159} See above n 89, 1 June 2012, Decision on the Respondent’s Jurisdictional Objections, paras 4.56, 4.58.
keep under permanent monitoring by host States, Anthony Sinclair suggests that the 
Plama Tribunal’s approach may be actual in cases involving large projects for which 
host State invites foreign investors to tender. Nevertheless, the ECT also covers 
investors and investments in the energy sector that are less visible. In sum, both 
potential investors and ECT Contracting States should consider the emerged ECT 
jurisprudence before making their investment and when invoking Article 17(1) of the 
Treaty respectively.

The thesis does not intend to support either of jurisdictional trends and approaches 
discussed above. There is no black and white in investment law. Arbitral tribunals in 
turn do not make law, they interpret variously drafted treaties as applicable law. In the 
Ampal case, for instance, the Tribunal had relatively less issues since the provision at 
hand expressly addressed the relevant procedural requirements. Perhaps denial of 
benefits clauses of the future treaties should be more explicit to the procedural 
requirements. For instance, the relevant provision of the Canada–China FIPPA 
provides that a contracting party may deny benefits to an investor that falls within the 
scope of the provision ‘at any time including after the institution of arbitration 
proceedings’. Alternatively in 2011 the United Nations Conference on Trade and 
Development (UNCTAD) stated that it would be more prudent to draft denial of 
benefits clause as automatic (‘benefits shall be denied’). This thesis addressing the central research question analyzed the ECT case law 
evolved to date in comparison with the relevant arbitral findings interpreting denial of 
benefits clauses of other Treaties. Intending to reveal the practical effects of Article 
17(1) of the ECT for both investors and host States, the paper has viewed and 
summarized the ECT jurisprudence as a relatively predictable trend showing what the 
relevant requirements have been to date rather than seeking to establish what they 
should be. Future tribunals interpreting Article 17(1) of the ECT and similar clauses of 
other Treaties not exhaustively defining procedural requirements will add their 
contribution in this field, perhaps not necessarily following the emerged trends.

160 See above n 8, (Sinclair), 386.
161 Canada – China FIPPA, 2014, Articles 16 (2) and 16 (3).
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