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SERIES OF NOTES ON THE ENERGY CHARTER TREATY

Note 9

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DOES THE ENERGY CHARTER TREATY APPLY TO GIBRALTAR?

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INTRODUCTION

1. The question whether the Energy Charter Treaty (ECT) applies to Gibraltar came to the fore most recently in the *Stati* case.¹ The question was at issue because one of the claimants, namely *Terra RafTrans Traiding Ltd.*, was a company incorporated in Gibraltar.
2. After summarising the opposing arguments of the parties concerning the question above,² the *Stati* Tribunal made the following concluding remarks:

[...] the Tribunal considers that it does not have to decide whether the ECT applies to Gibraltar by way of Art. 45(1) ECT, which addresses provisional application of the ECT. [...] In addition, the Tribunal need not consider whether, as Respondent argues, that provisional application of the ECT has ceased or whether the decision of the the [sic] *Petrobart v. Kyrgyzstan* tribunal provides guidance in this respect. *For, in any case, the ECT applies to Gibraltar on the basis that Gibraltar is a part of the European Community, which is itself party to the ECT. According to Art. 52 of the Treaty on the European Union and Art. 355 of the Treaty on the Functioning of the European Union, Gibraltar is included in its territory.*³

¹ *Anatolie Stati, Gabriel Stati, Ascom Group S.A., Terra RafTrans Traiding Ltd. v The Republic of Kazakhstan*; SCC Arbitration V (116/2010). Award of 19 December 2013.

² *Ibid*, paras 718 – 722 and 733 – 739.

³ *Ibid*, para 746. Emphasis added. The Tribunal’s decision not to revisit the question of the application of the ECT to Gibraltar seems to be based on the evidence that Messrs. Stati were “directors and sole shareholders”. The Tribunal found, however, that “all four Claimants qualify as investors under the ECT.”

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3. As the *Stati* Tribunal noted, the issue of the application of the ECT to Gibraltar was first examined in some detail in the *Petrobart* case.⁴
4. Both the *Petrobart* Tribunal and Svea Court of Appeal⁵ in Stockholm accepted Petrobart's argument that Gibraltar, as an overseas territory of the United Kingdom, falls within the ambit of the ECT and that a company incorporated in Gibraltar will be considered an Investor for the purposes of Article 1(7)(a)(ii) of the ECT.
5. The main purpose of this 9th note is twofold: First, to revisit the expert opinion of Professor Adnan Amkhan Bayno concerning the application of the ECT to Gibraltar as a United Kingdom (UK) dependent territory.⁶ This opinion was submitted to the *Petrobart* Tribunal and was subsequently examined and upheld by the Svea Court of Appeal in Stockholm. It is to be noted, however, that the analysis below is an amended version of that opinion, but the conclusion remains the same. The second purpose of this note is to provide a brief description of the basis on which the *Stati* Tribunal reached the conclusion that Gibraltar is a part of the European Union (EU) territory, and consequently subject to the ECT.

THE UNITED KINGDOM, GIBRALTAR AND THE ECT

6. Gibraltar is a UK-dependent territory, for whose international relations the UK is responsible.
7. The UK signed the ECT on 17 December 1994. On signature of the ECT, the UK does not appear to have made any declaration of the kind referred to in Article 40(1),⁷ in which the ECT would be “binding upon it with respect to all the territories for the international relations of which it is responsible, or to one or more of them”.
8. Such a declaration, if it had been made, would have taken effect “at the time the Treaty enters into force for [the UK]”, i.e. upon ratification by the UK and in accordance with the temperate

⁴ *Petrobart Limited v The Kyrgyz Republic*; SCC Arbitration No. 126/2003. Award of 29 March 2005. Available at <http://www.encharter.org/index.php?id=213&L=0#Petrobart>

⁵ *Republic of Kyrgyzstan v Petrobart Limited*, Case No. T5208-05, Judgment of 19 January 2007. Available in English at <http://www.arbitration.sccinstitute.com/Views/Pages/GetFile.ashx?portalId=89&cat=95791&docId=1049825&propId=1578>

⁶ Supplementary Opinion of Professor Adnan Amkhan Bayno dated 18 December 2004. Available at <http://italaw.ca/sites/default/files/case-documents/ita0989.pdf>

⁷ Article 40 of the ECT deals with its application with respect to territories for the international relationship of which a Contracting Party is responsible.

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provisions set out in Article 44 of the ECT.⁸ But no such declaration was made by the UK. It is probable that the reason for the absence of such a declaration is to be found in consideration arising in the context of the dispute between the UK and Spain over Gibraltar.

9. On the face of it, therefore, the existence of Article 40 dis-applies the normal rule that a treaty is binding upon a state in respect “of its entire territory”; and the absence of a declaration in respect of Gibraltar would appear to exclude the Treaty’s operation in respect of that territory.⁹
10. However, at the time of its signature of the ECT on 17 December 1994, the UK made a separate declaration under Article 45(1) of the Treaty, stipulating that “provisional application under Article 45(1) shall extend to the United Kingdom of Great Britain and Northern Ireland and to Gibraltar”.
11. There is no separate ‘territorial application’ provision for provisional application under Article 45, and this declaration accordingly has no express basis in the ECT.
12. But the implication must be that it was the intention of the UK on signing the Treaty that, consistently with the principle reflected in Article 40, its signature should have effect upon Gibraltar, so that Gibraltar was part of the territory referred to by “each signatory” in Article 45(1). It was the express intention of the UK that the provisional application provisions should apply to Gibraltar, and it is difficult to see how they could do so without the UK’s signature as a whole extending to that territory.
13. Provisional application of the ECT is stated to be “pending its entry into force for such signatory”.¹⁰ The entry into force of the Treaty for the UK resulted from the UK’s ratification of the ECT in December 1996. That ratification was in respect of the UK, Jersey and the Isle of Man – but not Gibraltar. It follows that the Treaty is “in force” for the UK, Jersey and the Isle of Man, and that accordingly its provisional application to them has come to an end.

⁸ Article 44 ECT deals with matters that pertain to its entry into force.

⁹ See Article 29, Vienna Convention on the Law of Treaties, 1969.

¹⁰ Article 45(1) (Provisional Application) of the ECT.

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14. But it equally follows that the ECT is not yet “in force” for Gibraltar, in which case its provisional application to that territory still continues.
15. Provisional application is in principle subject to no other terminal date than eventual entry into force, unless there is an express declaration of the kind referred to in Article 45(3) – which is not the case here.
16. It is, therefore, arguable that:
 - a. the ECT was provisionally applied to Gibraltar by the UK’s Declaration of December 1994;
 - b. the ECT has not become “in force” for Gibraltar by virtue of the UK’s 1996 ratification;
 - c. the ECT will not become “in force” for Gibraltar until some further instrument of ratification is executed in respect of Gibraltar;
 - d. until then, Gibraltar stays subject to the provisional application regime, which, although “provisional”, may nevertheless be open ended in duration;
 - e. consequently, Gibraltar is currently within the ECT’s territorial scope under that regime, and a company incorporated in Gibraltar qualifies as an Investor for purposes of Article 1(7)(a)(ii) of the ECT.

GIBRALTAR – A PART OF THE EUROPEAN UNION TERRITORY?

17. This part of the note sheds some light on the basis on which the *Stati Tribunal* considered Gibraltar as an integral part of the territory of another Contracting Party to the ECT, namely, the European Union.
18. The European Communities (now the European Union) is a Contracting Party of the ECT as a Regional Economic Integration Organisation (REIO).¹¹

¹¹ Article 1(3) of the ECT defines REIO as “[...] an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.”

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19. It should also be recalled that Article 1(10) of the ECT defines Area with respect of a REIO, which is a Contracting Party as “[...] the Areas of the member states of such Organization, under the provisions contained in the agreement establishing that Organization.”
20. Article 52(1) of the Treaty on European Union (TEU) makes the Treaties (i.e., the TEU and the Treaty on the Functioning of the European Union (TFEU)) applicable to all EU Member States.
21. The territorial scope of the Treaties is determined by Article 52(2) of the TEU, which reads as follows:

The territorial scope of the Treaties is specified in Article 355 of the Treaty on the Functioning of the European Union.
22. Article 355(2) TFEU provides that the Treaties shall not apply to those overseas territories having special relations with the UK, which, like Gibraltar, are not included in Annex II of the TFEU.
23. Gibraltar does, however, fall under paragraph (3) of Article 355 TFEU, which stipulates:

The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.
24. As such, Gibraltar is the only European territory to which Article 355(3) of the TFEU applies.
25. That this is the case has been confirmed by a declaration made by Spain and the United Kingdom in the context of the EU Treaties which reads as follows:

The Treaties apply to Gibraltar as a European territory for whose external relations a Member State is responsible. This shall not imply changes in the respective positions of the Member States concerned.

CONCLUSIONS

26. First, there are commentators who vehemently disagree with the *Petrobart's* Tribunal on the issue of Gibraltar. However, it is well to remember that the political sensitivity surrounding Gibraltar had led to the convoluted treatment of the issue amongst the ECT drafters. This is clear from the *travaux* and the personal experience of a member of MENA Chambers. However, it can be argued that the intent, at least as far as the UK is concerned, remains – then as now –

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that Gibraltar is covered by the ECT. Commentators who base their analysis purely on comparisons of various ECT provisions may reach a different conclusion. Therefore, ignoring this particular aspect of the negotiation history could result in commentators reaching an incorrect overall conclusion, at least if the aim is to ascertain the real intent of the party in question.

27. Second, the alternative argument in the *Stati* case (which the Tribunal chose to accept and indeed highlight) that the ECT applies to Gibraltar because it is a part of the European Union's territory, albeit a novel argument, has compelling logic to it. But the question remains as to whether this novel take on Gibraltar has sealed its fate as far as the ECT is concerned.

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