

In the matter of:

PERTOBART LIMITED, Claimant

v.

THE REPUBLIC OF KYRGYZSTAN, Respondent

SCC Arbitration No. 126/2003

SUPPLEMENTARY OPINION OF

ADNAN AMKHAN

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Former Head of the Legal Affairs Department,
Energy Charter Secretariat, Brussels.

1. I have been asked by Mr. Fred Wennerholm of Setterwalls Advokatbyrå, acting for the Claimant, to provide comments on the Kyrgyz Republic's Responses to the Arbitral Tribunal's Questionnaire ("Responses").
2. I note that the Respondent too has invited me to respond to its comments on my Opinion dated 30 October 2004. However, I do regret the Respondent's attempt to undermine the credibility of what I have said in my First Opinion, and find the insinuation made therein unprofessional (page 20, para 15 of the Responses).
3. Nevertheless, I have carefully examined the Respondent's arguments in its Responses, particularly those pertaining to the Energy Charter Treaty (the "ECT"). I am still of the opinion that the Claimant is indeed an Investor who made an Investment under the Treaty, and secondly that the Respondent has provided an incorrect interpretation of Article 17 of the ECT.
4. I also confirm that both my First Opinion and this Supplementary Opinion are true to the best of my knowledge.

Is Petrobart an Investor who made an Investment under the ECT?

5. The answer is yes. However, the Respondent is now attempting to deny this for the following reasons: the Claimant is a company incorporated in Gibraltar; Gibraltar is not itself a Contracting Party to the ECT, but rather "... a Crown Colony that looks to the UK for matters of defence and international relations only" (page, 18 at para. 10 of the Respondent's Responses); the United Kingdom did not include Gibraltar in its instrument of ratification; and that the declaration submitted by the United Kingdom at the time of the ECT signature stipulating that the provisional application of the

ECT extends to Gibraltar is superseded by the United Kingdom's instrument of ratification.

6. On the basis of this reasoning, the Respondent concludes that “ ... the Claimant, as a GIBRALTAR legal entity, is not now, and [sic] ever was, entitled to bring this or any arbitration case under ARTICLE 26 of the Treaty.” (page 20, para. 14 of the Respondent's Responses).
7. I will now explain why the Respondent's conclusion does not follow from its arguments summarised above.
8. First, pursuant to Article 38, the ECT was open for signature on 17 December 1994. On that date in Lisbon, the United Kingdom and the Kyrgyz Republic were among the forty nine states which signed the ECT.
9. Pursuant to Article 40 of the ECT, the United Kingdom delivered a declaration to the Depository declaring “...*that with respect to its signature of the Energy Charter Treaty, provisional application under Article 45(1) shall extend to the United Kingdom of Great Britain and Northern Ireland and to **Gibraltar.***”
10. According to Article 45(1) of the ECT “each signatory agreed to **apply** this Treaty provisionally pending its entry into force for such signatory ...”
11. The signatories who accepted the provisional application of the ECT intended to bring the Treaty into immediate operation, and as is made clear by Article 45(3)(b), its provisions relating to investment protection and dispute settlement.

12. In 1997, the United Kingdom deposited its instrument of ratification with the Depository, in which Gibraltar is not specifically mentioned.
13. Pursuant to Article 44, the ECT entered into force on 16 April 1998.
14. This dual mechanism (albeit convoluted) regarding the application of the ECT to the United Kingdom and to its dependent territory of Gibraltar, was constructed purely for political reasons. To clarify, the dual mechanism not only ensured the application of the ECT to Gibraltar, but was reached as a compromise between the United Kingdom and Spain regarding the contentious **political** status of Gibraltar, rather than any attempt to deliberately exclude Gibraltar from the ECT.
15. I became aware of such compromises during my tenure as Head of Legal Affairs of the Energy Charter Secretariat (2000 – 2004), where I was personally involved in similar situations during the Transit Protocol negotiations.
16. I am therefore of the opinion that the correct legal position regarding the application of the ECT to the United Kingdom and its territories is as follows. First, The ECT has entered into force with respect to the components of the United Kingdom specifically mentioned in its instrument of ratification. Second, with respect to Gibraltar (being a territory for the international relations of which the United Kingdom is responsible), the ECT still applies by virtue of provisional application, as stipulated in the United Kingdom's Declaration deposited at the time of signature.

17. Finally, even if *arguendo* one were to assume that the United Kingdom's instrument of ratification did terminate the provisional application of the ECT with respect to Gibraltar, Petrobart will still be considered as an Investor who made an Investment under the ECT. This is because Contract No. 1/98 was entered into on 23 February 1998; at the time when the ECT was applied provisionally by both the United Kingdom and the Kyrgyz Republic and *before* it entered into force on 16 April 1998.

18. It therefore follows that Petrobart, a company incorporated in Gibraltar, is an Investor who has made an Investment to which the ECT applies.

Article 17 of the ECT

19. In this section I shall summarise the scope of application of Article 17 of the ECT, and then briefly comment on whether the Respondent has misinterpreted its scope.

20. Article 17 of the ECT is set out in its Part III, entitled Investment Promotion and Protection, and provides for certain circumstances under which the provisions of Part III do not apply. The legal nature of Article 17 is that of an exception.

21. Article 17, in its relevant part, reads as follows:

“Each Contracting Party reserves the right to deny the advantages of this Part to:

- (i) 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 is organized; or
- (ii) an investment ...”

22. First, by the use of the expression “...reserves the right to deny...”, Article 17 makes clear that the provisions of this Article do not apply automatically, as alleged by the Respondent. In order to benefit from the provisions of this Article, the denying Contracting Party must take a positive step to that effect.
23. Second, I am of the opinion that a denying Contracting Party must attempt to take such a step in a timely fashion: that is, either at the time when the Investment is made or at the time when a legal action is initiated. In the latter case, a Contracting Party wishing to deny the advantages of Part III could argue that it intends to rely on either of the reservations of Article 17 to justify its breach of Part III obligations. That Article 17 should be invoked as a defence in a timely fashion is necessitated both by the principles of legal certainty and legitimate expectation.
24. The denying Contracting Party must also establish that the conditions of each of the reservations are present. Thus, as regards denying the advantages of Part III to a legal entity, it must be established that the said entity is owned or controlled by citizens or nationals of a third state *and* that such a legal entity “has no substantial business activities in the Area of the Contracting Party in which it is organized.” Both conditions are necessary for Article 17(1) to apply. Therefore, if the legal entity in question is either owned or controlled by nationals of another Contracting Party, the denying Contracting Party cannot invoke the second condition as an alternative to justify its denial.
25. Accordingly, the Respondent’s argument that the two persons who it alleges control Petrobart should also be present in Gibraltar in order for Petrobart to be able to initiate the present claim is legally inaccurate.

Ancillary issue raised in the Respondent's Responses

26. The Respondent suggests that the Tribunal should contact the Legal Affairs Department of the Energy Charter Secretariat to enquire whether or not the ECT applies to Gibraltar. Without suggesting whether the Tribunal should or should not follow this course of action, I would like to offer the following brief comment.

27. The Secretariat has neither the expertise nor, more importantly, the mandate to offer any interpretation of the ECT. Rather, the Secretariat's mandate and function is set out in Article 35(5) of the ECT, in which it is made clear that the Secretariat has been established to serve a purely administrative function and not as an institution that has empowered to interpret the Treaty. The power of interpreting the ECT lies with the tribunal seized in a dispute under the ECT, not with the administrative organ of the ECT.

Conclusion

28. Based on my examination of the Respondent's arguments in its Responses:

- (a) I remain convinced that the Claimant is an Investor who made an Investment to which the ECT applies;
- (b) I am of the opinion that the Respondent's attempt to seek the application of Article 17(1) of the ECT to the instant case is based on a mistaken understanding of the interpretation and application of the provisions of the said Article.



Adnan Amkhan

18 December 2004.