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SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 16	19 January 2007	T5208-05
	Stockholm	Division 1602

CLAIMANT
Republic of Kyrgyzstan

Bishkek 720000, Dom Pravitelstva

Counsel: Advokaterna Michael Mohammar and Martin Karlsson

Box 14240, 104 40 Stockholm

RESPONDENT
Petrobart Limited

Suites 7b-8b, 50 Town Range, Gibraltar

Counsel: Advokaterna Fred Wennerholm, Johan Sidklev and Johan Strömbäck

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Arsenalsgatan 6, 111 47 Stockholm

MATTER
Challenge proceedings with respect to arbitral award

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal dismisses the claim.
2. The Republic of Kyrgyzstan shall compensate Petrobart Ltd. for its litigation costs before the Court of Appeal in the amount of SEK four-hundred-fifty-thousand (450,000), out of which SEK 420,000 comprises costs for legal counsel, plus interest according to Section 6 of the Swedish Act on Interest from the date of the judgment of the Court of Appeal until the day of payment.

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BACKGROUND

In 1998, Petrobart Limited (Petrobart), a company registered in Gibraltar, entered into an agreement on supply of liquefied gas with Kyrgyzgaz-munaizat Joint Stock Company (KGM), a state company controlled by the Republic of Kyrgyzstan (the Republic). Petrobart delivered pursuant to the agreement but was not paid. Petrobart sued KGM before a local Kyrgyz court and was granted its claim for payment. Before the judgment was enforced, KGM was declared bankrupt.

In 2000, Petrobart initiated arbitration proceedings under the UNCITRAL rules, requesting that the arbitral tribunal should declare itself having jurisdiction over the Republic and that the Republic should pay Petrobart as provided in the supply agreement. In this respect, Petrobart referenced the Kyrgyz "Foreign Investment Law". The Republic objected to Petrobart's claims and to that Petrobart had jurisdiction *[sic]* and claimed that the arbitral tribunal lacked jurisdiction to try the underlying matter. Through an arbitral award given in Stockholm on 13 February 2003, the arbitral tribunal dismissed Petrobart's claim due to lack of jurisdiction. The tribunal stated, among other things, that Petrobart had not made a foreign investment within the meaning of the Kyrgyz foreign investment law. Petrobart appealed the arbitral award, claiming, among other things, that the Court of Appeal should amend the award so that it was annulled. In its judgment of 13 April 2006, Svea Court of Appeal dismissed the claim (case No. 3739-03). The judgment of the Court of Appeal has not entered into force.

In September 2003, Petrobart initiated yet another arbitration proceeding against the Republic, this time basing its claim on an international treaty, "The Energy Charter Treaty" (ECT). Also in this case, the Republic disputed that Petrobart had jurisdiction *[sic]*. This time, the case was decided under the Rules of Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitral tribunal – former Supreme Court Justice H.D., professor O.B., and Belgian lawyer J.S. – rendered their award in Stockholm on 29 March 2005. The arbitral tribunal granted Petrobart's claim and ordered

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the Republic to compensate Petrobart in an amount exceeding USD 1 million plus interest.

CLAIMS BEFORE THE COURT OF APPEAL

The Republic has claimed that the Court of Appeal shall annul the arbitral award given on 29 March 2005.

Petrobart has disputed any changes to the arbitral award.

The parties have claimed compensation for costs incurred during the proceedings before the Court of Appeal.

GROUNDS REFERENCED BY THE PARTIES

The parties have referenced the following grounds for their claims.

<u>The Republic</u>

1. The arbitral award does not fall within the scope of a valid arbitration clause between the parties (item 1 of the first paragraph of Section 34 of the Swedish Arbitration Act (SFS 1999:116) (the LSF)).
2. The arbitral tribunal has committed errors in its handling of the case that have likely affected the outcome of the case, since the arbitral tribunal has neglected to try its jurisdiction in spite of the Republic's objections thereof, and thus the Republic cannot be held liable therefor (item 6 of the first paragraph of Section 34 of the LSF).

<u>Petrobart</u>

1. The arbitral award falls within the scope of a valid arbitration clause.

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2. The arbitral tribunal has not committed any errors in its handling of the case. If any errors were committed, they have not affected the outcome of the case.

FURTHER GROUNDS OF THE PARTIES

The Republic

During the arbitration proceedings, the parties agreed that the case should be decided on documentary evidence and that the arbitral tribunal should pose questions to the parties and that each party should be entitled to respond to the other party's responses to these questions. In response to the arbitral tribunal's questions, the Republic stated, among other things, that it questioned a statement by Professor A.A., in particular that Petrobart is an investor having made an investment under the ECT. The Republic claimed in this respect that Petrobart did not fall within the scope of the ECT, since the United Kingdom, in charge of Gibraltar's contacts with other countries, had not ratified the ECT on behalf of Gibraltar, albeit the United Kingdom had previously provisionally accepted that the treaty applied to Gibraltar. In its response to the arbitral tribunal, the Republic requested that the arbitral tribunal ask the secretary of the ECT whether the treaty applied to Gibraltar. The arbitral tribunal dismissed the request of the Republic and subsequently rendered its arbitral award on 29 March 2005.

When the jurisdiction of an arbitral tribunal is questioned, the tribunal is required to carefully consider the grounds for the questioning. The Republic should not be forced to partake in arbitration proceedings to which it has not acquiesced. By ratifying the ECT, the Republic only agreed to arbitration agreements with investors from other treaty states. Gibraltar is not a treaty state. This has been properly referenced before the arbitral tribunal, but the tribunal failed to investigate the matter, and thus neglected to test its own jurisdiction. This comprises a procedural error which should lead to the annulment of the arbitral award.

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Thus, the Republic maintains that the arbitral award does not fall within the scope of a valid arbitration clause between the parties because the ECT does not apply to Gibraltar. The Republic further maintains that the arbitral award does not fall within the scope of a valid arbitration clause between the parties because Petrobart is not an investor that has made an investment under the treaty. The supply agreement for liquefied gas does not constitute an investment under the ECT.

The ECT does not apply to Gibraltar

When the United Kingdom provisionally ratified the ECT on 17 December 1994, it was announced that it applied to Great Britain and Northern Ireland as well as to Gibraltar. The United Kingdom finally ratified the treaty on 13 December 1996 on behalf of Great Britain and Northern Ireland, as well as of the Bailiwick of Jersey and the Isle of Man. The final ratification of the treaty did not apply to Gibraltar. The ECT entered into force on 16 April 1998.

It is clear, on the one hand, that Gibraltar is <u>included</u> in a ratification by the United Kingdom in cases where the ratification does not include any territorial statement, and it is also clear, on the other hand, that Gibraltar is <u>not included</u> in a ratification by the United Kingdom in cases where a statement with respect to specific territories is made, as in this case, in which the ratification includes Great Britain and Northern Ireland, as well as the Bailiwick of Jersey and the Isle of Man.

Before the arbitral tribunal, the Republic maintained that the tribunal lacked jurisdiction to try the case because the provisional application of the ECT had lapsed on 13 December 1996 and in all cases by 1998. The arbitral tribunal, however, deemed that it had jurisdiction to try the case because it concluded that the ECT, also after the United Kingdom's final ratification, continued to apply to Gibraltar (arbitral award p. 60 ff.).

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The United Kingdom took extensive parliamentary measures to be able to ratify the ECT on behalf of the Bailiwick of Jersey and the Isle of Man. If the United Kingdom had wished that the ECT should be applicable also to Gibraltar following 1996, it would have been easy to add the wording “and to Gibraltar”.

The arbitral tribunal states that, for the provisional ratification to no longer apply to Gibraltar, a positive action by the United Kingdom would have been required at the time of ratification to signify this fact. Through this, the arbitral tribunal has incorrectly added a qualification to Article 45(1), which is not found in the treaty. The provisional applicability lapsed with respect to Gibraltar when the ECT entered into force with respect to the United Kingdom. Besides, the treaty must be in force not only when the investment is made but also when the dispute is brought into court.

Petrobart has claimed that it was for political reasons that the United Kingdom elected not to explicitly ratify the ECT on behalf of Gibraltar. There are, however, no reasons as to why the United Kingdom should be able to explicitly include Gibraltar in the provisional ratification in 1994, and then be prevented to do so in 1996. The United Kingdom has, as a matter of fact, in 1997 and thereafter ratified a substantial number of international treaties on behalf of Gibraltar.

The fact that the ECT does not apply to Gibraltar has been noted in international jurisprudence, in which the arbitral award in this respect has been harshly criticized.

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The definition of investment

The arbitral tribunal finds, referencing (arbitral award p. 72) Article 1 (6)(f) and 1 (5) of the ECT, that the sale of liquefied gas comprises an “activity in the Energy Sector” and that the parties’ purchase and sale contract against this background shall be deemed an investment under the ECT.

This conclusion is incorrect and has been criticized. As follows from several articles in magazines, contracts as the now relevant shall not fall within the scope of the ECT. Thus, Petrobart is not an investor that has made an investment under the ECT.

Petrobart

Claimed procedural error

In November 2004, the parties received the questions of the arbitral tribunal and at the same time, the Republic was awarded the opportunity to comment on an opinion referenced by Petrobart issued by professor A.A., former Under-Secretary-General for Legal Affairs of the ECT Secretariat. The Republic’s response included, for the first time, the objection that Petrobart, because it was registered in Gibraltar, did not enjoy protection under the ECT. It should be noted that this did not form a response to any question posed by the arbitral tribunal and that the matter had not been addressed in A.A.’s opinion. In its response, the Republic also suggested that the arbitral tribunal should inquire with the ECT Secretariat whether the ECT applied to investors registered in Gibraltar. The arbitral tribunal considered, and subsequently dismissed, the request. It could be noted that the Secretariat would not have been able to respond to such a query; it does not have that authority.

No procedural error has been committed by the arbitral tribunal. In any event, no error has been committed that has affected the outcome of the case.

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A valid arbitration clause governed the arbitration proceedings

On 17 December 1994, the ECT was signed by, amongst others, the Republic and the United Kingdom. Article 45 (1) of the treaty provides that it is applicable to treaty states as of the initial signing, which can take place a long time before final ratification takes place. The relevant section of Article 45 (1) reads: “Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory ---”.

In the event a signatory state should not wish that the ECT should be applicable awaiting the final ratification, the state must make a separate declaration thereon, which follows from Article 45 (2)(a).

In connection with the signing of the ECT by the United Kingdom, it was clarified that the treaty was to apply also to Gibraltar awaiting final ratification. The ECT provides that the provisional applicability can end only in two ways: through ratification (through which the provisional applicability is replaced by permanent applicability) or through depositing a separate instrument stating that the state does not intend to ratify the treaty.

The United Kingdom ratified the ECT 13 December 1996. The ratification instrument does not mention Gibraltar. The consequences of the final ratification are thus that the ECT entered into force with respect to the United Kingdom, whereas the provisional applicability remains with respect to Gibraltar awaiting final ratification, since no particular statement was made with respect to Gibraltar.

In light of the above, it can be noted that Petrobart, as a legal entity registered in Gibraltar, falls within the scope of the ECT and was entitled to initiate the arbitration proceedings against a treaty state in accordance with the arbitration clause in Article 26. The arbitral tribunal has provided extensive

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grounds for its reasoning as to whether the ECT should apply to Gibraltar. The tribunal held that the ECT remains provisionally applicable to Gibraltar.

The definition of investment

Article 1 (6)(f) of the ECT provides that an investment comprises assets such as “any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector”. Article 1 (5) defines “Economic Activity in the Energy Sector” as, among other things but excluding a hereto irrelevant exception, “sale of Energy Materials and Products”. The arbitral tribunal held, entirely correctly, that the issue at hand comprised an investment under the treaty.

GROUNDS

The examination

The Court of Appeal has decided the case following a main hearing. At Petrobart’s request, *Messrs.* H.D., O.B., and A.A. have been heard as witnesses. At the Republic’s request, professor N.A. has been heard as a witness. Documentary evidence has been referenced.

The decision of the Court of Appeal

Is the ECT applicable to Gibraltar?

Article 45 (1) of the ECT provides that the preliminary or provisional applicability of the treaty can lapse if the treaty state declares in writing that it does not intend to ratify the treaty. Otherwise, the provisional applicability normally lapses upon final ratification. As noted by the arbitral tribunal, there is no explicit provision on what applies when the provisional and the final applicability does not cover the same territory. Thus, the treaty must be interpreted in this respect.

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Since it is not possible to determine, from any provision of the ECT, whether the provisional applicability with respect to Gibraltar should lapse in the present situation, it could be expected that, if the intention was that the treaty should not apply to Gibraltar, the United Kingdom would have clarified this. The United Kingdom has not done so. This confirms what the investigation into the case otherwise indicates, namely that the United Kingdom cannot be assumed to have had such intentions, but that it is more likely that political reasons caused Gibraltar to not be explicitly mentioned in the ratification documents of 1998.

In view of the foregoing, the Court of Appeal finds, as did the arbitral tribunal, that the ECT remains provisionally applicable to Gibraltar. Thus, a valid arbitration clause was at hand when the supply agreement was entered into between the parties, as well as when Petrobart initiated the arbitration proceedings.

The definition of investment

The investigation provides that the term investment holds different meanings in various international contexts. The definition of the term in the ECT has a wide meaning. From Mr. A.A.'s witness statement, it is clear that it was an explicit purpose to give the investment term a wide meaning.

As the arbitral tribunal, the Court of Appeal finds that the definitions in Article 1 (6) and 1 (5) must be interpreted to mean that Petrobart has made an investment under the ECT. Thus, neither in this respect is it reasonable to claim that the arbitral award falls outside the scope of a valid arbitration clause between the parties.

Procedural error?

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The Republic has further claimed that the arbitral tribunal failed to test its jurisdiction when the Republic questioned whether the ECT applied to Gibraltar, and that the arbitral tribunal should have, as requested by the Republic, queried the ECT Secretariat thereon.

With respect to the issue on requesting a statement, it is clear from the witness statement of Mr. A.A., that if the Secretariat had been asked, it would not have provided a statement, i.e. the same conclusion as reached by the arbitral tribunal. The decision to dismiss the Republic's request does not constitute a procedural error.

From the arbitral award it is clear that the arbitral tribunal thoroughly tried the Republic's objections with respect to lack of jurisdiction on the grounds the ECT did not apply to Gibraltar. Neither in this respect has a procedural error occurred.

Summary, litigation costs

The Court of Appeal has found that none of the claims put forth by the Republic as grounds for the challenge proceedings shall be upheld. Thus, the claim shall be dismissed.

In view of this outcome, the Republic shall compensate Petrobart for its litigation costs before the Court of Appeal. The claimed amount must be considered reasonable.

The judgment of the Court of Appeal may not be appealed as provided by the second paragraph of Section 43 of the LSF.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Judges of Appeal L.D., P.E., and M.E. (Reporting Judge of Appeal). Unanimous.