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A Possible Objection, Not Yet Raised, to Intra-EU ECT Claims before the ICSID: Terra Raf Trans Traiding Ltd. v. Kazakhstan Versus Eiser v. Spain

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In an interesting post published on Kluwer Arbitration Blog by Eric Leikin and Martina Magnarelli, it is described in a very comprehensive manner the state of play as regards the soundness of Respondents and European Commission's arguments refusing the jurisdiction of arbitral tribunals in intra-EU ECT claims.

Among these arguments (all rejected by the tribunal on duty), the Respondent in *Eiser v. Spain* put forward the following line of reasoning: any Investor coming from an EU Member State is divested of its national character and becomes predominantly an Investor of the EU, because its home country is also an EU Member State and subject to EU law, consequently, the EU Investor and the Respondent, an EU State, are found in the same "Area" – the area of the EU – so that the diversity required by Article 26(1) and (2) does not occur.[1)]

The tribunal in response to this argument replied that there can be no "EU Investors" under Article 1(7)(a)(ii) of the ECT, because there is no trans-national body of European law regulating the organization of business units, which remain subject to member countries' domestic law.[2)]

Now, a counter-argument to the finding of this tribunal may come – funnily enough – not from an intra-EU ECT-based precedent, but from a non-intra-EU ECT-based one, namely an ECT-based arbitration where a Gibraltarian company faced (together with Romanian and Moldavian investors) the Republic of Kazakhstan.

In that case the exception raised by the Respondent was that the ECT did not apply to Gibraltar, because even if the UK – when it signed the treaty on 17 December 1994 – made a declaration to the effect that provisional application under Article 45(1) of the ECT shall extend to Gibraltar, the UK did not reiterate the inclusion of Gibraltar as to the territorial scope of the ECT, when it ratified the ECT on 13 December 1996. Consequently, according to Kazakhstan, the entry into force of the ECT put an end to its provisional application in respect of the UK and its territories, therefore, Gibraltar was to be found cut out of its application (provisional and definitive), and, accordingly, the Gibraltar-based company could not have relied on the ECT as an UK investor could have.[3)]

However, in that arbitration the tribunal came to the conclusion that it did not have to rule on whether (as the Respondent argued) the provisional application of the ECT were ceased or not in

respect of Gibraltar, because the tribunal found that "the ECT applies to Gibraltar on the basis that Gibraltar is a part of the European Community, which is itself party to the ECT." Indeed, pursuant to Art. 52 of the Treaty on the European Union, Art. 355 of the Treaty on the Functioning of the European Union, and declaration number 55 to the Treaty of Lisbon made jointly by the United Kingdom and the Kingdom of Spain, Gibraltar is included in the EU territory. Therefore, the Tribunal concluded that the Gibraltar-based company qualifies as an [EU] investor under the ECT.[4)]

So, if in *Terra Raf Trans Traiding Ltd v. Kazakhstan* the tribunal applied the ECT to Gibraltar, not because it is a UK-dependent territory, but because it is a part of the European Union's territory, then a contrario sensu the ECT shall not apply to an EU investor coming from a EU territory (like for example, Germany or Luxemburg) and investing in the same EU territory (like Spain or Italy), as this investment cannot be qualified as foreigner. This is particularly true in the context of the ICSID Convention because of its Article 25(2)(a). But before delving into the exception to the ICSID jurisdiction ratione personae drawn from *Terra Raf Trans Traiding Ltd v. Kazakhstan* and based on Article 25 of the ICSID Convention, few premises are necessary:

1) according to Article 20 of the Treaty on the Functioning of the EU (TFEU), every person holding the nationality of a Member State shall be a citizen of the Union. Such citizenship of the Union is additional to and does not replace national citizenship,[5)] and there is no procedure in place to renounce only the EU citizenship without also relinquishing the national citizenship of a Member State (which means no "Pey Casado-like trick" is allowed to the extent that you cannot renounce your national citizenship just to file an investment arbitration against your former country). For the purpose of international law, Article 20 of the TFEU may well be regarded as the municipal law pursuant to which a natural person's nationality is to be determined by the arbitral tribunal seized of the matter (according to its discretion, of course).[6)];

2) in a declaration regarding article 25 of the ECT dealing with the Economic Integration Agreements, the European Communities and their Member States recalled that companies or firms formed in accordance with the law of a Member State shall *be treated in the same way as natural persons* who are nationals of Member States. Therefore, also companies are to be deemed holding the citizenship of the European Union, being treated as natural persons for the purposes of the ECT, as they enjoy the right of establishment pursuant to Part Three, Title III, Chapter 2 of the Treaty establishing the European Community;

3) under Article 25(2)(a) of the ICSID *any natural person with double nationality* is excluded from bringing a claim under the Convention if that person had also the nationality of the Contracting State party to the dispute.

From the above it follows that **every EU claimant** has a double nationality (its Member State's and European's nationality), every EU claimant **is equated – under the ECT – with** a natural person (regardless of being a juridical person), namely, **a natural person with dual nationality, who** therefore **cannot bring a claim before the ICSID – because of Article 25(2)(a) – against** either its country of origin or **the UE and/or any territorial constituent part thereof** (like Italy or Germany).

Whenever the Claimant is not a foreign investor to the Area where it invested, being the investor a EU national and belonging that Area to the EU territories, arguably, an ICSID Tribunal lacks

jurisdiction *ratione personae*. Consequently, each and every arbitration pending before the ICSID against the Kingdom of Spain and the Italian Republic, launched by an EU investor relying on the ECT, might be dismissed on this jurisdictional dual-national-exclusion exception, which is, as explained above, based on a salient ECT-based precedent (*Terra Raf Trans Traiding Ltd.et alius v. Kazakhstan*), the ICSID Convention (Article 25.2.a), and the ECT itself (to be precise, the declaration with respect to Article 25 and Article 26 of the ECT).

Despite there is no obligation of *stare decisis* incumbent on arbitral tribunals, the *Terra Raf Trans Traiding* case is relevant in the current (as well as future) ICSID arbitrations because investment arbitration tribunals have repetitively relied upon previous decisions and awards in their findings, thus establishing a de facto case-law and creating a coherent corpus of investment law.[7)] Although the *Terra Raf Trans Traiding* case is not an ICSID case (since it was administered under the auspices of the SCC), its persuasive impact on the current arbitrations pending before the ICSID is not weakened at all. Indeed, what tribunals tend to look at to gauge the relevance of a precedent is the basis of jurisdiction (rather than the procedural rules) of the previous tribunal that rendered it, since each BIT or MIT is to be interpreted autonomously[8)]. And in the *Terra Raf Trans Traiding* case as well as the current ICSID cases pending against Spain and Italy, the basis of jurisdiction is the same MIT, the Energy Charter Treaty. That is why, if the Respondents in those proceedings rely on this SCC ECT-based precedent to object to the jurisdiction of those ICSID tribunals, those tribunals will have two soft-obligations:

– Firstly, to take into consideration that precedent;
– Secondly, in case those arbitrators were of a different opinion, they should expressly motivate the reasons of their departure from that precedent.

The views expressed in this article are those of the author and DO represent those of the law firm Bottega DI BELLA.

References

?1 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, para. 195.

?2 *Eiser v. Spain*, para. 196.

?3 *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan* (SCC Case No. 116/2010), para. 734.

?4 *Stati v. Kazakhstan*, SCC Case No. V (116/2010), paras 746-747.

?5 For a deeper understanding of the EU related implications, please see Crina Baltag, The Energy Charter Treaty: The Notion of Investor, Kluwer Law International, 2012, p.57-67

?6 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award 2004, § 55 and 84.

?7 See e.g. Reinisch August, The Role of Precedent in ICSID Arbitration, Austrian Arbitration Yearbook 495-510 (2008).

?8 *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, para. 28.

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