ICSID Review, Vol. 32, No. 1 (2017), pp. 170–192
doi:10.1093/icsidreview/siv038 Published Advance Access July 15, 2016

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ARTICLE

The Application of Investment Treaties to Overseas Territories and the Uncertain Provisional Application of the Energy Charter Treaty to Gibraltar

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Abstract—In the past decade, five investor–State tribunals constituted under the Energy Charter Treaty (ECT), examined its territorial application to Gibraltar, an overseas territory of the United Kingdom (UK). This article shows that the application of the ECT to Gibraltar and—to a limited degree to other overseas territories—is still fraught with uncertainty. Setting out from this premise, this article first examines the territorial application of investment treaties to overseas territories in general and the application of the ECT to such territories in particular. Special attention is paid to Articles 40 and 45 of the ECT that provide for its territorial and provisional application, respectively. The article then turns to the findings of ECT tribunals and specifically criticizes the approach adopted in *Stati v Kazakhstan*. In this case, the Tribunal failed to adequately explain why the ECT applies to Gibraltar even after the termination of the ECT's provisional application with respect to the UK. In defence of this criticism, this article shows that ECT's plain wording and customary international law do not provide for the provisional application of a treaty to part of a signatory's territory even after the entry into force of this treaty for such signatory.

I. INTRODUCTION

The erstwhile peripheral matter of the territorial application of investment treaties has recently emerged as an element of crucial importance, in certain respects determinant of the vesting of jurisdiction. This can easily be documented by simply referencing the *Sanum* case,[2] the highly debated 'territorial link' of covered

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[2] *Government of the Lao People's Democratic Republic v Sanum Investments Ltd*, [2015] SGHC 15; *Sanum Investments Limited v Lao People's Democratic Republic*, UNCITRAL, PCA Case No 2013-13, Award on Jurisdiction (13 December 2013) (*Sanum v Laos*) paras 110–11. See also China–Laos BIT (signed 13 January 1993); Nils Eliasson, 'Investment Treaty Arbitration and Hong Kong' in Geoffrey Ma and Dennis Brock (eds), *Arbitration in Hong Kong: A Practical Guide* (2nd edn, Sweet & Maxwell 2012) 744–8; Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (OUP 2009) 77.

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investments,[3] or the application of pre-secession investment treaties against seceding States.[4] Within this context, this article reveals yet another form of territorial considerations that has recently arose in the setting of the Energy Charter Treaty (ECT).[5] To date, five investor–State tribunals constituted under this treaty have dealt with its territorial application to Gibraltar, an overseas territory of the United Kingdom (UK). However, none of these tribunals has denied jurisdiction on the basis of ECT's inapplicability to Gibraltar.[6] In spite of that, the application of the ECT to Gibraltar is still fraught with uncertainty. This is mainly due to the relation between Articles 40 and 45 of the ECT that provide for this treaty's territorial and provisional application respectively, and, to a specific declaration advanced by the UK under Article 45. Pursuant to this declaration, the UK applied the ECT to Gibraltar on a provisional basis. However, when the ECT entered into force in respect of the UK, provisional application came to an end. Regardless, the territorial application of the ECT was not extended to Gibraltar pursuant to Article 40 that governs the regular application of this treaty. Therefore the crux of the matter is whether the ECT continues to apply to Gibraltar on a provisional basis even though the treaty has entered into force with respect to the UK. This point has been utterly overlooked by the Tribunal in *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v Kazakhstan*, but it suffices to say that such conclusion appears unorthodox under customary international law (CIL). In fact, CIL does not appear to recognize the provisional application of a treaty for part of a signatory's territory after the entry into force of this treaty for such signatory. It is therefore important to revisit the application of the ECT to Gibraltar for the sake of future cases involving Gibraltar or other overseas territories.

In terms of structure, this article is broken into five sections including this short introduction and a relatively short conclusion. Section II explains the importance of 'territory' as an element of jurisdiction *ratione personae* and reveals the relevance of overseas territories in this regard.[7] In particular, this section prepares the ground for the analysis that follows by discussing the application of bilateral investment treaties (BITs) and the Convention on the Settlement of Investment

[3] This issue arises as one of jurisdiction *ratione materiae*. See *Abaclat and others v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) paras 372–80 and *Abaclat and others v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) Dissenting Opinion of Georges Abi-Saab (4 August 2011) paras 73–119. See also Christina Knahr, 'Investments in the "Territory" of the Host State' in Christina Binder and others (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 42–53; Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2009) 169–71; Michael Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration' (2007) 101(4) AJIL 711, 730–45.

[4] See *CEAC Holdings Limited v Montenegro*, ICSID Case No ARB/14/8, Date Registered (20 March 2014); Cyprus–Yugoslavia BIT (signed 21 July 2005) [Procedural Order No 2 (31 December 2015)]; *MNSS BV and Recupero Credito Acciaio NV v Montenegro*, ICSID Case No ARB(AF)/12/8, Date Registered (6 December 2012); Netherlands–Yugoslavia BIT (signed 29 January 2002) [The Tribunal declared the proceeding closed in accordance with ICSID Arbitration (AF) r 44(1) (28 March 2016)]; *World Wide Minerals v Republic of Kazakhstan*, UNCITRAL, Notice of Arbitration (16 December 2013) (not public see *Investment Arbitration Reporter article*); USSR–Canada BIT (signed 20 November 1989) *ACP Axos Capital GmbH v Republic of Kosovo*, ICSID Case No ARB/15/22, Date Registered (4 June 2015); Germany–Yugoslavia BIT (signed 10 July 1989) [Procedural Order No 1 concerning procedural matters (10 February 2016)].

[5] Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) annex I, Final Act of the European Energy Charter Conference. For the Treaty, see briefly Thomas Roe and Matthew Happold (eds), *Settlement of Investment Disputes under the Energy Charter Treaty* (CUP 2011); Crina Baltag, *The Energy Charter Treaty: The Notion of Investor* (Kluwer Law International 2012); Thomas W Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International 1996).

[6] See s IV.

[7] See generally Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 284–327.

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Disputes between States and Nationals of Other States (ICSID Convention) to overseas territories and by examining the default CIL approach absent any specific territorial provisions. The practical nature of the latter analysis is based on the very filing of investment claims by legal entities incorporated in overseas territories, as is precisely the case of Gibraltarian entities discussed in this article.[8] Section III then examines the territorial application of the ECT in three respects. First, it discusses the territorial application of the ECT as provided for under Article 40. Second, it examines the territorial application of the ECT when it is applied provisionally under Article 45. Lastly, Section III examines CIL on the provisional application of treaties, which is crucial for the possibility to provisionally apply the ECT to Gibraltar even after its entry into force for the UK.

Sections II and III thus set the foundational elements of this article and pave the way for Section IV which examines the rulings of ECT tribunals. In this context, this article shows the inadequate reasoning of the Tribunal in *Stati v Kazakhstan*, which fails to explain, or at least address, the application of the ECT to Gibraltar even after the entry into force of this treaty with respect to the UK. As will be seen, such conclusion is hardly accommodated with Articles 40 and 45 of the ECT and with the CIL on the provisional application of treaties. This analysis is also in line with UK's coherent practice on the territorial extension of its BITs as well as with the territorial application of the ICSID Convention to overseas territories.[9]

II. 'TERRITORY' AS AN ELEMENT OF RATIONE PERSONAE JURISDICTION AND OVERSEAS TERRITORIES

A. *Definitions of 'Territory' and Overseas Territories*

Investment treaties usually contain a definition of 'territory'.[10] Such definitions take various forms and employ differing language. For instance, some treaties define territory as including the 'territorial sea as well as those maritime areas, adjacent to the outer limit of the territorial sea over which the Contracting Party has jurisdiction or sovereign rights, pursuant to international law'.[11] Still others directly refer to

[8] For a discussion of the so-called nationality planning and treaty shopping techniques, see Paul M Blyschak, '*Yukos Universal v Russia*: Shell Companies and Treaty Shopping in International Energy Disputes' (2010–11) 10 Rich J Global L & Bus 179, 187–200; Piero Bernandini, 'Nationality Requirements under BITS and Related Case Law' in Federico Ortino and others (eds), *Investment Treaty Law: Current Issues* (BIICL 2007) 22–3; Douglas (n 7) 313–17; Luiz Eduardo Salles, *Forum Shopping in International Adjudication: The Role of Preliminary Objections* (CUP 2014) 16–46.

[9] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) (ICSID Convention).

[10] See, however, China–Sweden BIT (signed 29 March 1982) art 1(2); China–Denmark BIT (signed 29 April 1985) art 1; China–Peru BIT (signed 9 June 1994) art 1(2).

[11] Denmark–Algeria BIT (signed 25 January 1999) art 1(4); Denmark–Argentina BIT (signed 6 November 1992) art 1(6); Denmark–Bosnia and Herzegovina BIT (signed 24 March 2004) art 1(4); Denmark–Bulgaria BIT (signed 14 April 1993) art 1(4); Denmark–Pakistan BIT (signed 18 July 1996) art 1(6); Denmark–Peru BIT (signed 21 November 1994) art 1(4); Denmark–Philippines BIT (signed 25 September 1997) art 1(6); Denmark–Poland BIT (signed 1 May 1990) art 1(4); Denmark–Russian Federation BIT (signed 4 November 1993) art 1(4); Denmark–Slovenia BIT (signed 12 May 1999) art 1(5); Denmark–Tanzania BIT (signed 22 April 1999) art 1(5); Denmark–Uganda BIT (signed 26 November 2001) art 1(6); Denmark–Ukraine BIT (signed 23 October 1992) art 1(4); Denmark–Venezuela BIT (signed 28 November 1994) art 1(4); Denmark–Vietnam BIT (signed 23 July 1993) art 1(4); UK–China BIT (signed 15 May 1986) art 1; Australia–China BIT (signed 11 July 1988) art 1; United Arab Emirates–China BIT (signed 1 July 1993) art 1(2); Algeria–China BIT (signed 17 October 1996) art 1(2); China–Kuwait BIT (signed 23 November 1985) art 1(6-7); China–Netherlands BIT (signed 26 November 2001) art 1; Belgo–Luxembourg–China BIT (signed 6 June 2005) art 1(4); Madagascar–China BIT (signed 21 November 2005) art 1(4).

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functional economic zones, such as the exclusive economic zone,[12] which also reveals the importance of the United Nations Convention on the Law of the Sea (UNCLOS)[13] in defining the territorial boundaries of investment treaties.[14] For its part, the ECT employs the term 'area' which is meant to refer to:

> (a) the territory under [a Contracting Party's] sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and (b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.[15]

However, these definitions do not explicitly cover overseas territories. Regardless, the (territorial) application of investment treaties to overseas territories becomes vital when considering two factors. First, the majority of such territories form separate jurisdictions that have promulgated their own company laws, while also retaining separate commercial registries.[16] Second, 'territory' is crucial in defining the nationality of legal entities, and thus the ability of overseas legal entities to fall within the ambit of an investment treaty's protective veil. Indeed, investment treaties most commonly define the nationality of legal entities by reference to the criteria of incorporation, *siège social* (the main seat of business) and effective control, or a combination thereof.[17] In relevant space, the ECT defines covered investors as 'a company or other organization organized in accordance with the law applicable in that Contracting Party'.[18] This provision makes it abundantly clear that the nationality of legal entities under the ECT is governed by the law *applicable* in a contracting party, ie in the territory of the contracting party.[19] What nevertheless has to be determined is whether *overseas*

[12] India–China BIT (signed 21 November 2006) art 1(d); China–Germany BIT and Protocol (signed 1 December 2003) art 1(2), art 2; China–Spain BIT (signed 14 November 2005) art 1(4).

[13] United Nations Convention on the Law of the Sea (concluded 10 December 1982) (UNCLOS) especially arts 55–85.

[14] Nico Schrijver and Vid Prislan, 'The Netherlands' in Chester Brown (ed) *Commentaries on Selected Model Investment Treaties* (OUP 2013) 558. See also Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 487–90; Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 108.

[15] ECT (n 5) art 1(10).

[16] See generally Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 90–2.

[17] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2012) 45–7; Bernandini (n 8) 20; Jeswald W Salacuse, *The Three Laws of International Investment* (OUP 2013) 376–7; Salacuse (n 3) 187–8; Engela C Schlemmer, 'Investment, Investor, Nationality, and Shareholders' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 76–8; Campbell Mclachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2007) 143; Noah Rubins and N Stephan Kinsella, *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide* (Oceana 2005) 137–8; Katia Yannaca-Small, 'Who Is Entitled to Claim? Nationality Challenges' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (OUP 2010) 227–41; Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (OUP 2010) 168–72; Christopher Dugan and others (eds), *Investor-State Arbitration* (OUP 2008) 306; Pia Acconci, 'Determining the Internationally Relevant Link between a State and a Corporate Investor: Recent Trends Concerning the Application of the "Genuine Link" Test' (2004) 5(1) JWIT 139, 148–60. See also *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Decision on Jurisdiction (27 September 2001), reprinted in (2001) 16 ICSID Review—FILJ 469, para 107:

> According to international law and practice, there are different possible criteria to determine a juridical person's nationality. The most widely used is the place of incorporation or registered office. Alternatively, the place of the central administration or effective seat may also be taken into consideration.

[18] ECT (n 5) art 1(7)(a)(ii).

[19] See however for the case of shareholder claims, Douglas (n 7) 397–457; Salacuse (n 3) 181–4; Mclachlan and others (n 25) 185–90; Vandevelde (n 16) 174–5; Krista Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2013) 154–64; Dugan (n 17) 315–40; Albert Badia, *Piercing the Veil of State Enterprises in International Arbitration* (Kluwer Law International 2014) 133–62; Markus Burgstaller, 'Nationality of Corporate Investors and International Claims against the Investor's Own State' (2006) 7(6) JWIT 857, 871–7.

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legal entities also fall within the protective veil of the ECT. This issue is examined in length in the next section but before that, the following subsections examine the application of investment treaties to overseas territories through the prism of CIL, State practice on the territorial extension of investment treaties to overseas territories and the application of the ICSID Convention to such territories.

B. *Territory under Customary International Law and Overseas Territories*

Interpreters of investment treaties should always bear in mind that such instruments are nothing short of international treaties.[20] Thus, when investment treaties do not provide firm guidance or are rather ambiguous with regard to their territorial application to overseas territories, Article 29 of the Vienna Convention on the Law of Treaties (VCLT) is of direct relevance.[21] This Article provides that, 'unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory'.[22]

An investment treaty would thus be applicable to the entire territory of a State, be it metropolitan or not, unless a different intention emerges from the treaty or can otherwise be established. Such different intention appears in the BITs examined in the next Section.

C. *Territorial Extension Provisions in BITs*

(i) *The application of UK BITs to the Crown Dependencies and other overseas territories*

The territory of the UK mainly comprises Great Britain and Northern Ireland, the Crown Dependencies of the Isle of Man, Guernsey and Jersey, and a series of overseas territories such as Gibraltar, Bermuda, the UK Virgin Islands, the Cayman Islands and the Turks and Caicos Islands.[23] Arguably, this has the potential of creating uncertainty with respect to the territorial application of UK BITs. However, the UK has been very consistent in delimiting the territorial application of its investment treaties through the inclusion of territorial extension provisions. This traces back to the first BIT of the UK with Egypt which provides that '"territory" in respect of the United Kingdom means: Great Britain and Northern Ireland and any territory to which this Agreement is extended in accordance with the provisions of Article 11'.[24] Article 11 then provides that

[20] José Enrique Alvarez, 'The Public International Law Regime Governing International Investment' (2011) 344 Recueil des Cours 195, 217–18; Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 1–9.

[21] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 29. See also Vienna Convention on Succession of States in Respect to Treaties (concluded 23 August 1978) arts 15, 16 and 34–5 (VCST).

[22] VCLT (n 21) art 29. Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) 387–95; Shaw (n 14) 925–6; Brownlie (n 13) 626–8; Antony Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 178–91; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th rev edn, Routledge 1997) 137; Paul Reuter, *Introduction to the Law of Treaties*, trans José Mico and Peter Haggenmacher (Routledge 1995) 99; Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) vol 2, 639–57; Sinclair (n 21) 87–92; International Law Commission, *Draft Articles on the Law of Treaties with Commentaries* (1966) 2 YILC, art 25(6) (VCLT Commentary).

[23] See generally Ian Hendry and Susan Dickson, *British Overseas Territories Law* (Hart 2011); Jim Bulpitt, *Territory and Power in the United Kingdom: An Interpretation* (Manchester University Press 1983) 164–99.

[24] UK–Egypt BIT (signed 11 June 1975) art 1(e); UK–Burundi BIT (signed 13 September 1990) art 1(e); UK–Belize BIT (signed 30 April 1982); UK–Benin BIT (signed 27 November 1987) art 1(e); UK–Russian Federation BIT (signed 6 April 1989) art 1(e); UK–Antigua and Barbuda BIT (signed 12 June 1987) art 1(e); UK–Dominica BIT (signed 23 January 1987) art 1(e); UK–Hungary BIT (signed 9 March 1987) art 1(4); UK–Tunisia BIT (signed 14 March 1987) art 1(d); UK–

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> At the time of definitive entry into force of this Agreement or at any time thereafter, the provisions of this Agreement may be extended to such territories for whose international relations the Government of the United Kingdom are responsible as may be agreed between the Contracting Parties in an Exchange of Notes.[25]

This concept of territorial application and extension is a recurrent theme of UK BITs that in principle apply to Great Britain and Northern Ireland and can be subsequently extended to the Crown Dependencies and UK's overseas territories.[26] An exception is the UK–Malaysia BIT that does not provide for a

Indonesia BIT (signed 27 April 1976) art 1(e); UK–Malta BIT (signed 4 October 1986) art 1(e); UK–Senegal BIT (signed 7 May 1980) art 1(e); UK–Bolivia BIT (signed 24 May 1988) art 1(e); UK–Mauritius BIT (signed 20 May 1986) art 1(e); UK–Grenada BIT (signed 25 February 1988) art 1(e); UK–Jordan BIT (signed 10 October 1979) art 1(e); UK–Bangladesh BIT (signed 19 June 1980) art 1(e); UK–Cameroon BIT (signed 4 June 1982) art 1(e); UK–Costa Rica BIT (signed 7 September 1982) art 1(e); UK–Haiti BIT (signed 18 March 1985) art 1(e); UK–Korea BIT (signed 4 March 1976) art 1(e); UK–Jamaica BIT (signed 20 January 1987) art 1(e); UK–Lesotho BIT (signed 18 February 1981) art 1(e); UK–Papua New Guinea (signed 14 May 1981) art 1(e); UK–Paraguay BIT (signed 4 June 1981) art 1(e); UK–Poland BIT (signed 8 December 1987) art 1(f); UK–Saint Lucia BIT (signed 18 January 1983) art 1(e); UK–Singapore BIT (signed 22 July 1975) art 1(e); UK–Sri Lanka (signed 13 February 1980) art 1(e); UK–Thailand BIT (signed 28 November 1978) art 2(5); UK–Yemen BIT (signed 25 February 1982) art 1(e); UK–Panama BIT (signed 7 October 1983) art 1(e); UK–Malaysia BIT (signed 21 May 1981) art 1(5); UK–Philippines BIT (signed 3 December 1980) art 1(2)(b). A more developed definition is found in a considerable number of BITs. See UK–Guyana BIT (signed October 1989 art 1(e)(i) ['territory' means: (i) in respect of the United Kingdom: Great Britain and Northern Ireland, including the territorial sea and any maritime area situated beyond the territorial sea of the United Kingdom which has been or might in the future be designated under the national law of the United Kingdom in accordance with international law as an area within which the United Kingdom may exercise rights with regard to the sea-bed and subsoil and the natural resources and any territory to which this Agreement is extended in accordance with the provisions of art 12]. Similarly see UK–Armenia BIT (signed 27 May 1993) art 1(e); UK–Azerbaijan BIT (signed 4 January 1996) art 1(e); UK–Bahrain BIT (signed 30 October 1991) art 1(e); UK–Barbados BIT (signed 7 April 1993) art 1(e); UK–Belarus (signed 1 March 1994) art 1(e); UK–Bosnia BIT (signed 2 October 2002) art 1(e); UK–Bulgaria BIT (signed 11 December 1995) art 1(d); UK–Chile BIT (signed 8 January 1996) art 1(d); UK–Colombia BIT (signed 17 March 2010) art I(4); UK–Romania BIT (signed 13 July 1995) art 1(e), which replaced UK–Romania BIT (signed 19 March 1976); UK–Congo BIT (signed 25 May 1989) art 1(e); UK–Côte d'Ivoire BIT (signed 8 June 1995) art 1(e)(ii); UK–Croatia BIT (signed 11 March 1997) art 1(e); UK–Cuba BIT (signed 30 January 1995) art 1(e); UK–Estonia BIT (signed 12 May 1994) art 1(d); UK–Estonia BIT (signed 12 May 1994) art 1(e); UK–Ethiopia BIT (signed 19 November 2009) art 1(e); UK–Gambia BIT (signed 2 July 2002) art 1(e); UK–Georgia BIT (signed 15 February 1995) art 1(e); UK–Ghana BIT (signed 22 March 1989) art 1(e); UK–India BIT (signed 14 March 1994) art 1(f); UK–Ghana BIT (signed 22 March 1989) art 1(e); UK–India BIT (signed 14 March 1994) art 1(f); UK–Kyrgyz Republic BIT (signed 8 December 1994) art 1(e); UK–Laos BIT (signed 1 June 1995) art 1(e); UK–Latvia BIT (signed 24 January 1994) art 1(e); UK–Lebanon BIT (signed 16 February 1999) art 1(4); UK–Lithuania BIT (signed 17 May 1993); UK–Yugoslavia BIT (signed 6 November 2002) art 1(f); UK–Uzbekistan BIT (signed 24 November 1993); UK–Pakistan BIT (signed 30 November 1994); UK–Grenada BIT (signed 25 February 1988) art 1(e); UK–Mongolia BIT (signed 4 October 1991) art 1(e); UK–Kazakhstan BIT (signed 23 November 1995) art 1(e); UK–Turkmenistan BIT (signed 9 February 1995) art 1(e); UK–Mexico BIT (signed 12 May 2006) art 1; UK–Moldova BIT (signed 19 March 1996) art 1(e); UK–Morocco BIT (signed 30 October 1990) art 1(d); UK–Mozambique BIT (signed 18 March 2004) art 1(e); UK–Nicaragua BIT (signed 4 December 1996) art 1(e); UK–Nigeria BIT (signed 11 December 1990) art 1(e); UK–Oman BIT (signed 25 November 1995) art 1(e); UK–Peru BIT (signed 4 October 1993) art 1(e); UK–Sierra Leone BIT (signed 13 January 2000) art 1(e); UK–Czech and Slovak Republics BIT (signed 10 July 1990) art 1(d); UK–Slovenia BIT (signed 3 July 1996) art 1(e); UK–South Africa BIT (signed 20 September 1994) art 1(e); UK–Swaziland BIT (signed 5 May 1995) art 1(e); UK–Tanzania BIT (signed 7 January 1994); UK–Tonga BIT (signed 22 October 1997) art 1(e); UK–Uganda BIT (signed 24 April 1998) art 1(e); UK–Ukraine BIT (signed 10 February 1993) art 1(d); UK–United Arab Emirates (signed 8 December 1992) art 1(f); UK–Uruguay BIT (signed 21 October 1991) art 1(e); UK–Vanuatu BIT (signed 22 December 2003) art 1(e); UK–Venezuela BIT (signed 15 March 1995) art 1(e); UK–Vietnam BIT (signed 1 August 2002) art 1(e); UK–Zimbabwe BIT (signed 1 March 1995) art 1(e); UK–Nepal BIT (signed 2 March 1993) art 1(e); UK–Trinidad and Tobago BIT (signed 23 July 1993) art 1(e); UK–Albania BIT (signed 30 March 1994) art 1(e); UK–Angola BIT (signed 4 July 2000) art 1(e); UK–Argentina BIT (signed 11 December 1990) art 1(d); UK–Hong Kong BIT (signed 30 July 1998) art 1(a). Somewhat differently, see UK–Turkey BIT (signed 15 March 1991) art 1(e)(ii): ("[I]n respect of the United Kingdom: Great Britain and Northern Ireland and any territory to which this Agreement is extended in accordance with the provisions of Article 12 together with the adjacent maritime areas to the extent to which sovereign rights or jurisdiction in these areas is exercised in accordance with international law").

[25] UK–Egypt BIT (signed 11 June 1975) art 11.

[26] See UK–Argentina BIT (n 24) art 12; UK–Angola BIT (n 24) art 12; UK–Albania BIT (n 24) art 12; UK–Nepal BIT (n 24) art 12; UK–Trinidad and Tobago BIT (n 24) art 14; UK–Zimbabwe BIT (n 24) art 12; UK–Vietnam BIT (n 24) art 12; UK–Venezuela BIT (n 24) art 12; UK–Vanuatu BIT (n 24) art 12; UK–Uruguay BIT (n 24) art 11; UK–United Arab Emirates BIT (n 24) art 12; UK–Ukraine BIT (n 24) art 12; UK–Uganda BIT (n 24)

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territorial extension provision.[27] Of little significance are also some restrictions to the territorial extension provisions inserted in two BITs.[28] What is significant, however, is that by virtue of the above territorial extension provisions, and following an Exchange of Notes, the UK has extended the application of its BITs in various occasions. Such extension has taken place with regard to both the Crown Dependencies and UK's overseas territories.[29] Prior to the 1997

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art 12; UK–Tonga BIT (n 24) art 12; UK–Tanzania BIT (n 24) art 12; UK–Swaziland BIT (n 24) art 12; UK–South Africa BIT (n 24) art 12; UK–Slovenia BIT (n 24) art 13; UK–Czech and Slovak Republic BIT (n 24) art 12; UK–Sierra Leone BIT (n 24) art 12; UK–Peru BIT (n 24) art 12; UK–Oman BIT (n 24) art 11; UK–Nigeria BIT (n 24) art 11; UK–Nicaragua BIT (n 24) art 12; UK–Mozambique BIT (n 24) art 12; UK–Morocco BIT (n 24) art 12; UK–Moldova BIT (n 24) art 12; UK–Mexico BIT (n 24) art 25; UK–Uzbekistan (n 24) art 12; UK–Serbia BIT (n 24) art 13; UK–Pakistan BIT (n 24) art 12; UK–Grenada BIT (n 24) art 11; UK–Mongolia BIT (n 24) art 12; UK–Kazakhstan BIT (n 24) art 12; UK–Turkmenistan BIT (n 24) art 12; UK–Chile BIT (n 24) art 11; UK–Bulgaria BIT (n 24) art 12; UK–Bosnia and Herzegovina BIT (n 24) art 12; UK–Belarus BIT (n 24) art 12; UK–Barbados BIT (n 24) art 12; UK–Bahrain BIT (n 24) art 12; UK–Azerbaijan BIT (n 24) art 12; UK–Armenia BIT (n 24) art 12; UK–Burundi BIT (n 24) art 12; UK–Belize BIT (n 24) art 11; UK–Benin BIT (n 24) art 11; UK–Cameroon BIT (n 24) art 11; UK–Costa Rica BIT (n 24) art 11; UK–Haiti BIT (n 24) art 11; UK–Korea BIT (n 24) art 11; UK–Jamaica BIT (n 24) art 12; UK–Lesotho BIT (n 24) art 11; UK–Papua New Guinea BIT (n 24) art 11; UK–Paraguay BIT (n 24) art 11; UK–Poland BIT (n 24) art 11; UK–Saint Lucia BIT (n 24) art 11; UK–Singapore BIT (n 24) art 11; UK–Sri Lanka BIT (n 24) art 11; UK–Thailand BIT (n 24) art 1(1); UK–Turkey BIT (n 24) art 12; UK–Yemen BIT (n 24) art 10; UK–Russian Federation BIT (n 24) art 11; UK–Antigua and Barbuda BIT (n 24) art 11; UK–Dominica BIT (n 24) art 11; UK–Tunisia BIT (n 24) art 11; UK–Hungary BIT (n 24) art 12; UK–Indonesia BIT (n 24) art 10; UK–Malta BIT (n 24) art 11; UK–Senegal BIT (n 24) art 11; UK–Bolivia BIT (n 24) art 11; UK–Mauritius BIT (n 24) art 11; UK–Grenada BIT (n 24) art 11; UK–Jordan BIT (n 24) art 9; UK–Bangladesh BIT (n 24) art 11; UK–Panama BIT (n 24) art 10; UK–Romania BIT (n 24) art 1(e); UK–China BIT (n 24) art 10; UK–Ecuador BIT (n 24) art 12; UK–Honduras BIT (n 24) art 12; UK–Kenya BIT (n 24) art 12; UK–Hong Kong BIT (n 24) art 12; UK–Philippines BIT (n 24) art 1(2)(b); UK–Congo BIT (n 24) art 11; UK–Côte d'Ivoire BIT (n 24) art 12; UK–Croatia BIT (n 24) art 12; UK–Cuba BIT (n 24) art 12; UK–El Salvador BIT (n 24) art 12; UK–Estonia BIT (n 24) art 12(2); UK–Ethiopia BIT (n 24) 13; UK–Georgia BIT (n 24) art 12; UK–Ghana BIT (n 24) art 12; UK–India BIT (n 24) art 13; UK–Kyrgyzstan BIT (n 24) art 12; UK–Laos BIT (n 24) art 12; UK–Latvia BIT (n 24) art 12; UK–Lebanon BIT (n 24) art 12; UK–Lithuania BIT (n 24) art 14.

[27] UK–Malaysia BIT (signed 21 May 1981); Chester Brown and Audley Sheppard, 'United Kingdom' in Brown (n 13) 718. See also UK–Gambia BIT (n 24) art 1(e):

> ...'territory' means (i) in respect of the United Kingdom: Great Britain and Northern Ireland, including the territorial sea and maritime area situated beyond the territorial sea of the United Kingdom which has been or might in the future be designated under the national law of the United Kingdom in accordance with the international law as an area within which the United Kingdom may exercise rights with regard to the sea-bed and subsoil and the natural resources and any territory to which this Agreement is extended in accordance with the provisions of Article 12.

This BIT does not, however, have an art 12.

[28] UK–Morocco BIT (n 24) art 12:

> On entry into force of this Agreement or at any time thereafter the provisions of this Agreement may be extended, by an agreement between the Contracting Parties in the form of an Exchange of Notes, to the Channel Islands and the Isle of Man, for whose international relations the Government of the United Kingdom are responsible.

UK-Colombia BIT (n 24) art 14:

> At the time of entry into force of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for the international relations of which the Government of the United Kingdom is responsible as may be agreed between the Contracting Parties in an Exchange of Notes, provided that the Contracting Parties shall not agree to extend the provisions of this Agreement in accordance with this Article unless they have complied with their applicable internal constitutional requirements.

[29] For the BITs whose territorial application has been extended, see Exchange of Notes extending the UK–Guyana BIT to the Isle of Man, Gibraltar, the Turks and Caicos Islands, Bermuda and the Bailiwicks of Guernsey and Jersey (22 September 1992); Exchange of Notes extending the UK–Uzbekistan BIT to the Isle of Man and the Bailiwicks of Guernsey and Jersey (12 November 1999); Exchange of Notes extending UK–Pakistan BIT to the Isle of Man and the Bailiwick of Guernsey and Jersey (11 October 1999); Exchange of Notes extending the UK–Grenada BIT to the Isle of Man, Gibraltar, the Turks and Caicos Islands, Bermuda and the Bailiwicks of Guernsey and Jersey (20 July 1992); Exchange of Notes extending the UK–Mongolia BIT to the Isle of Man and the Bailiwicks of Guernsey and Jersey (30 September 1999); Exchange of Notes extending the UK–Kazakhstan BIT to the Isle of Man and the

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'handover', the UK also had extended the application of some BITs to Hong Kong.[30] Furthermore, such territorial extension practice has not led to any controversy. Indeed, investors incorporated in UK overseas territories have filed a considerable number of investment claims, but in every single case, such 'overseas' investors were covered by a relevant territorial extension.[31] What nevertheless stems from UK's territorial extension practice is that, unless such an action occurs, its BITs apply territorially to Great Britain and Northern Ireland alone.

(ii) *Other approaches: Denmark, the Netherlands, Portugal and the United States*

Denmark and the Netherlands, along with the UK that was examined above, have the most consistent practice with regard to the territorial application of their BITs. For Denmark, suffice it to say that it consistently excludes Greenland and the Faroe Islands from the application of its BITs, providing, however, for the extension to these territories, through a subsequent 'Exchange of Notes'.[32]

Bailiwicks of Guernsey and Jersey (29 July 1999); Exchange of Notes extending UK–Turkmenistan BIT to the Isle of Man and the Bailiwicks of Guernsey and Jersey (17 June 1999); Exchange of Notes extending the UK–Nepal BIT to the Isle of Man and the Bailiwicks of Guernsey and Jersey (22 April 1999); Exchange of Notes extending the UK–Trinidad and Tobago BIT to the Isle of Man and the Bailiwicks of Guernsey and Jersey (13 January 1994); Exchange of Notes extending the UK–Antigua and Barbuda BIT, to the Isle of Man, Gibraltar, and the Bailiwicks of Guernsey and Jersey (13 October 1994); Exchange of Notes extending the UK–Dominica BIT to Gibraltar (22 January 1990); Exchange of Notes extending the UK–Tunisia BIT to the Isle of Man, Gibraltar, the Turks and Caicos Islands, Bermuda and the Bailiwicks of Guernsey and Jersey (23 December 1992); Exchange of Notes extending the UK–Hungary BIT to the Isle of Man, Gibraltar the Turks and Caicos Islands, Bermuda and the Bailiwicks of Guernsey and Jersey (7 November 1991); Exchange of Notes extending the UK–Indonesia BIT to Bermuda, the Isle of Man and the Bailiwicks of Guernsey and Jersey (30 July 1999); Exchange of Notes extending the UK–Malta BIT to the Isle of Man and the Bailiwicks of Guernsey and Jersey (21 July 1999); Exchange of Notes extending the UK–Senegal BIT to the Isle of Man and the Bailiwicks of Guernsey and Jersey (21 June 1999); Exchange of Notes extending the UK–Bolivia BIT to the Isle of Man, the Turks and Caicos Islands, Bermuda and the Bailiwicks of Guernsey and Jersey (9 December 1992); Exchange of Notes extending the UK–Mauritius BIT to Gibraltar (7 September 1992); Exchange of Notes extending the UK–Mauritius BIT to the Isle of Man and the Bailiwicks of Jersey and Guernsey (12 August 1992); Exchange of Notes extending the UK–Grenada BIT to the Isle of Man, Gibraltar, the Turks and Caicos Islands, Bermuda and the Bailiwicks of Guernsey and Jersey (20 July 1992); Exchange of Notes extending the UK–Jordan BIT to Hong Kong (14 May 1986); Exchange of Notes extending the UK–Belize BIT to Hong Kong, the Bailiwicks of Jersey and Guernsey and the Isle of Man (14 March 1983); Exchange of Notes extending the UK–Belize BIT to the Turks and Caicos Islands (10 December 1985); Exchange of Notes extending the UK–Belize BIT to the Cayman Islands (4 February 1986); Exchange of Notes extending the UK–Yemen BIT to Hong Kong, the Bailiwicks of Jersey and Guernsey and the Isle of Man (9 June 1985); Exchange of Notes extending the UK–Korea BIT to Hong Kong (4 March 1976); Exchange of Notes extending the UK–Lesotho BIT to Hong Kong, the Bailiwicks of Jersey and Guernsey and the Isle of Man (16 March 1983); Exchange of Notes extending the UK–Papua New Guinea BIT to Hong Kong, the Bailiwicks of Jersey and Guernsey and the Isle of Man (4 May 1983); Exchange of Notes extending the UK–Saint Lucia BIT to Hong Kong, the Bailiwicks of Jersey and Guernsey, the Isle of Man, the Cayman Islands and the Turks and Caicos Islands (23 October 1984); Exchange of Notes extending the UK–Sri Lanka BIT to Hong Kong (4 January 1981); Exchange of Notes extending the UK–Thailand BIT to Hong Kong (28 February 1983); Exchange of Notes extending the UK–Ecuador BIT to the Isle of Man and the Bailiwicks of Guernsey and Jersey (18 May 1999); Exchange of Notes extending the UK–Panama BIT to the Isle of Man and the Bailiwicks of Guernsey and Jersey (5 May 1999); Exchange of Notes extending the UK–Romania BIT to the Isle of Man and the Bailiwicks of Guernsey and Jersey (22 March 1999); Exchange of Notes extending the UK–Philippines BIT to the Bailiwicks of Jersey and Guernsey, the Isle of Man, and Hong Kong (11 April 1990).

[30] *See eg* Exchange of Notes extending the UK–Jordan BIT to Hong Kong (14 May 1986); Exchange of Notes extending the UK–Belize BIT to Hong Kong, the Bailiwicks of Jersey and Guernsey and the Isle of Man (14 March 1983); Exchange of Notes extending the UK–Korea BIT to Hong Kong (4 March 1976).

[31] See *British Caribbean Bank Limited (Turks & Caicos) v The Government of Belize*, UNCITRAL, Award (19 December 2014) para 1; *Dunkeld International Investment Ltd (Turks & Caicos) v The Government of Belize (No 1)*, PCA Case No 2010-13, UNCITRAL, Notice of Arbitration (4 December 2009) paras 6.1–6.2; *Dunkeld International Investment Ltd v The Government of Belize (No 2)*, PCA Case No 2010-21, UNCITRAL, Notice of Arbitration (1 July 2010); *South American Silver Limited (Bermuda) v Bolivia*, UNCITRAL, PCA Case No 2013-15, Notice of Arbitration (30 April 2013) paras 62–4; *Accession Mezzanine Capital LP (Bermuda) and Danubius Kereskedőház Vagyonkezelő Zrt v Republic of Hungary*, ICSID Case No ARB/12/3, Request for Arbitration (28 October 2011) para 10; *EDF (Services) Limited (Jersey) v Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) paras 1 and 64.

[32] Denmark–Algeria BIT (n 11) art 14; Denmark–Argentina BIT (n 11) art 14; Denmark–Bosnia and Herzegovina BIT (n 11) art 13; Denmark–Bulgaria BIT (n 11) art 14; Denmark–Pakistan BIT (n 11) art 14; Denmark–Peru BIT

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Netherlands, on the other hand, always includes a territorial extension provision in its BITs that in principle either extends their application to the ex-Netherlands Antilles or explicitly carves out these regions.[33]

Recently, the United States also started to include a definition of 'territory' that specifically covers US overseas territories.[34] In particular, recent BITs as well as free trade agreements (FTAs) explicitly extend to Puerto Rico and such overseas territories as the US Virgin Islands and the Commonwealth of the Northern Mariana Islands.[35]

Yet other States, whose territory comprises overseas territories, as is the case of Spain and France, do not insert relevant extension provisions in their investment treaties. Likewise, Portugal's BITs, with the exception of one, do not explicitly extend to the Azores and Madeira.[36]

(n 11) art 14; Denmark–Philippines BIT (n 11) art XIV; Denmark–Poland BIT (n 11) art 12; Denmark–Russia BIT (n 11) art 11(2); Denmark–Croatia BIT (signed 5 July 2000) art 13; Denmark–Cuba BIT (signed 19 February 2001) art 15; Denmark–Czech and Slovak Republics BIT (signed 6 March 1991) art 14; Denmark–Egypt BIT (signed 24 June 1999) art 14; Denmark–Estonia BIT (signed 6 November 1991) art 14; Denmark–Ethiopia BIT (signed 24 April 2001); Denmark–Ghana BIT (signed 13 January 1992) art 12; Denmark–Hong Kong BIT (signed 2 February 1994) art 12(2); Denmark–India BIT (signed 6 September 1995) art 16; Denmark–Kyrgyz Republic BIT (signed 1 January 2001) art 14; Denmark–Laos BIT (signed 9 September 1998) art 14; Denmark–Latvia BIT (signed 30 March 1992) art 14; Denmark–Lithuania BIT (signed 30 March 1992) art 14; Denmark–Mexico BIT (signed 13 April 2000) art 21; Denmark–Mongolia BIT (signed 13 March 1995) art 14; Denmark–Morocco BIT (signed 22 May 2003) art 13; Denmark–Nicaragua BIT (signed 12 March 1995) art 14. Such extension provisions are not included in the following treaties: Denmark–Hungary BIT (signed 2 May 1988) art 1(4); Denmark–Indonesia BIT (signed 30 January 1968) arts II, IX; Denmark–Korea BIT (signed 2 June 1988) art 1(5); Denmark–Kuwait BIT (signed 1 June 2001) art 1(8); Denmark–Malaysia BIT (signed 6 January 1992) art 1(5); Denmark–Romania BIT (signed 14 June 1994) arts 3, 9(3); Denmark–Sri Lanka BIT (signed 4 June 1985) art 1(5)–(6); Denmark–Turkey BIT (signed 7 February 1990) art 1(4).

[33] See eg China–Netherlands BIT (n 11) art 14; Armenia–Netherlands BIT (signed 10 June 2005) art 13; See, however, eg Netherlands–Turkey BIT (signed 27 March 1986) art 11; Netherlands–Yemen BIT (signed 18 March 1985) art 12 (extends its application only to the part of the Kingdom in Europe); Netherlands–Malaysia BIT (signed 15 June 1971) art 16 (extends its application to Surinam and the Netherlands Antilles).

[34] For older treaties, see eg USA-Argentina BIT (signed 14 November 1991) art 1(f):

> . . .'territory' means the territory of the United States or the Argentine Republic, including the territorial sea established in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea. This Treaty also applies in the seas and seabed adjacent to the territorial sea in which the United States or the Argentine Republic has sovereign rights or jurisdiction in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea.

See also USA–Croatia BIT (signed 13 July 1996) art 1(1); Lee M Caplan and Jeremy K Sharpe, 'United States' in Brown (n 14) 771–2. See generally Vandevelde (n 17).

[35] USA–Uruguay BIT (signed 4 November 2005) art 1 defines 'territory' as:

> (i) the customs territory of the United States, which includes the 50 states, the District of Columbia, and Puerto Rico; (ii) the foreign trade zones located in the United States and Puerto Rico; and (iii) any areas beyond the territorial seas of the United States within which, in accordance with international law and its domestic law, the United States may exercise rights with respect to the seabed and subsoil and their natural resources.

See also USA–Rwanda BIT (signed 19 February 2008) art 1; North American Free Trade Agreement (signed 17 December 1992) annex 201.1; Central America–Dominican Republic–United States Free Trade Agreement (signed 5 August 2004) annex 2.1; Australia–USA Free Trade Agreement (signed 18 May 2004) annex 1-A; Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Morocco (signed 15 June 2004) art 1.3; Similarly, see Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile (signed 6 June 2003); Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Singapore (signed 6 May 2003); Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Korea (signed 30 June 2007); Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Colombia (signed 22 November 2006); Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Peru (signed 12 April 2006).

[36] Mauritius–Portuguese BIT (signed 12 December 1997) art 1(4):

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D. The Application of the ICSID Convention to Overseas Territories

The territorial application of the ICSID Convention is governed by Article 70 which reads as follows:

> This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

Pursuant to this article, the UK excluded the Channel Islands and the Isle of Man from the application of the ICSID Convention but subsequently extended its application to these territories.[37] Relevant extensions were also made for other overseas territories including Gibraltar.[38] Similarly, the Netherlands extended the ICSID Convention to the ex-Netherlands Antilles and Suriname and Denmark to the Faroe Islands.[39] However, while the ICSID Convention extends to UK overseas territories including Gibraltar, this does not affect the territorial application of investment treaties in general or the ECT in particular. The reason is that ICSID jurisdiction cannot be established merely through ratification of the ICSID Convention but additionally requires the disputing parties' consent 'in writing'.[40] In spite of that, the cases examined in Section IV that involve Gibraltarian entities were non-ICSID claims.

In a nutshell, this section has delineated the relevance of overseas territories with respect to jurisdiction *ratione personae*. At the same time, it has shown how overseas territories fall within the ambit of investment treaties, either pursuant to

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> The term 'territory' means: (a) for the Portuguese Republic, the territory of the Portuguese Republic situated in the European Continent, the archipelagoes of Azores and Madeira, the respective territorial sea and any other zone in which, in accordance with the laws of Portugal and international law, the Portuguese Republic has its jurisdiction or sovereign rights with respect to the exploration and exploitation of the natural resources of the sea bed and subsoil, and of the superjacent waters.

Bosnia-Herzegovina–Portugal BIT (signed 13 March 2002) art 1(4):

> The term "territory" means: ... b) With respect to the Portuguese Republic: the territory of the Portuguese Republic including the territorial sea or any other area, over which the Portuguese Republic exercises, in accordance with international law, sovereignty, sovereign rights or jurisdiction. Likewise, for example, Portugal–Bulgaria BIT (signed 27 May 1993) art 1(5); Portugal–Albania BIT (signed 11 September 1998) art 1; Portugal–Algeria BIT (signed 15 September 2004) art 1; Portugal–Angola BIT (signed 24 October 1997) art 1; Portugal–Argentina BIT (signed 24 October 1997) art 1; Portugal–Brazil BIT (signed 9 February 1994) art 1; Portugal–Cape Verde BIT, art 1 (signed 26 October 1990) art 1; Portugal–Chile BIT (signed 28 April 1995) art 1; Portugal–Republic of Congo (signed 4 June 2010) art 3; Portugal–Croatia BIT (signed 9 May 1995) art 1; Portugal–Cuba BIT (signed 8 July 1998) art 1; Portugal–Egypt BIT (signed 29 April 1999) art 1; Portugal–Gabon (signed 17 December 2001) art 1; Portugal–Germany BIT (signed 16 September 1980) art 1.

[37] See extensions for Guernsey (10 December 1968); Jersey (1 July 1979); Isle of Man (1 November 1983). The UK signed the ICSID Convention on 26 May 1965, ratified it on 19 December 1966, and entered into force on 18 January 1967.

[38] See extensions for Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, South Georgia and South Sandwich Islands, St Helena, Turks and Caicos Islands (19 December 1966). For relevant arbitral practice, see *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Decision on Jurisdiction (14 April 1988), reprinted in (1995) 3 ICSID Rep—FILJ 131, para 54.

[39] See extensions for the Netherlands Antilles and Suriname (22 May 1970). The Netherlands signed the ICSID Convention on 25 May 1966, ratified it on 14 September 1966 and entered into force on 14 October 1966; Extension for Faroe Islands (30 October 1968, effective from 1 January 1969). Denmark signed the ICSID Convention on 11 October 1965, ratified it on 24 April 1968, and entered into force on 24 May 1968. See Christoph Schreuer and others (eds), *The ICSID Convention: A Commentary, A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, CUP 2009) 1275–6.

[40] ICSID Convention (n 9) art 25(1). See also Schreuer (n 39) 85–7.

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the default CIL approach or following the territorial extension of BITs and the ICSID Convention. The remainder of this article now turns to the application of the ECT to overseas territories and explores the intricacies of this treaty.

III. TERRITORIAL APPLICATION UNDER ARTICLES 40 AND 45 ECT

A. Territory under Article 40 ECT

As shown earlier, the definition of 'territory' included in the ECT does not make any reference to overseas territories. However, the matter is dealt with in Article 40. The article provides that:

> (1) Any state or Regional Economic Integration Organization may at the time of signature, ratification, acceptance, approval or accession, by a declaration deposited with the Depository, declare that the Treaty shall 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. Such declaration shall take effect at the time the Treaty enters into force for that Contracting Party.
>
> (2) Any Contracting Party may at a later date, by a declaration deposited with the Depository, bind itself under this Treaty with respect to other territory specified in the declaration. In respect of such territory the Treaty shall enter into force on the ninetieth day following the receipt by the Depository of such declaration.[41]

The article departs from the general rule found in the VCLT and in fact appears to adopt the reverse approach. However, the use of the verb 'may' somewhat confuses the matter inasmuch it does not render relevant territorial declarations mandatory. In other words, under the VCLT an investment treaty would be binding in respect of the entire territory of a Contracting Party and would therefore extend to overseas territories unless a different intention appears from the treaty or is otherwise established. Conversely, ECT's territorial application 'may' be extended to 'all the territories for the international relations of which' a contracting party is responsible.[42] In this regard, it should be noted that, at the time of signature, the only State that made a declaration with respect to Article 40 was Denmark.[43]

At the time of ratification (11 December 1997), the Netherlands did not extend the application of the ECT to the ex-Netherlands Antilles but merely stated its acceptance for the European part of the Kingdom.[44] Similarly, at the time of

[41] ECT (n 5) art 40(1)–(2) (emphasis added).

[42] ibid art 40(1).

[43] *See* Final Act of the European Energy Charter Conference, Declaration 6:

> Denmark recalls that the European Energy Charter does not apply to Greenland and the Faroe Islands until notice to this effect has been received from the local governments of Greenland and the Faroe Islands. In this respect Denmark affirms that Article 40 of the Treaty applies to Greenland and the Faroe Islands.

[44] See ECT (n 5), and I. Verdrag inzake het Energiehandvest, met Bijlagen; II. Protocol bij het Energiehandvest, betreffende energie-efficiëntie en de daarmee verband houdende milieu-aspecten, met Bijlage ('I. Treaty on the Energy Charter, with Annexes; II. Protocol on the Energy Charter on Energy Efficiency and Related Environmental Aspects, with Annex'), <https://zoek.officielebekendmakingen.nl/trb-1998-78.HTML> accessed 9 November 2015. The application of the ECT to the European part of the Kingdom of the Netherlands is also supported by arbitral practice under the ECT, whereby claims have only been filed by metropolitan Dutch companies. See *Azpetrol International Holdings BV, Azpetrol Group BV and Azpetrol Oil Services Group BV v Republic of Azerbaijan*, ICSID Case No ARB/06/15, Award (8 September 2009); *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No ARB/07/14, Excerpts of the Award (22 June 2010); *Alapli Elektrik BV v Republic of Turkey*, ICSID Case No ARB/08/

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ratification (16 December 1997), the UK advanced a territorial declaration pursuant to Article 40, whereby it extended the ECT to the Bailiwick of Jersey and the Isle of Man.[45] Note, however, that the ECT Secretariat has inscribed UK's ratification on 13 December 1996 and the deposit of the instrument of ratification on 16 December 1997. However, the UK Treaty Series indicates that ratification took place on 16 December 1997 whereby the ECT was extended to Jersey and the Isle of Man.[46] This temporal divide has not been noticed by the Tribunals in *Petrobart Limited v The Kyrgyz Republic* and *Stati v Kazakhstan* discussed below. Moreover, shortly after the ratification, the UK extended the ECT to the Bailiwick of Guernsey (11 August 1998).[47] The UK did not, however, advance such territorial declaration for Gibraltar or any other of its overseas territories. Nevertheless, the case of Gibraltar is more complex, for reasons explained in the next subsection.

B. Territoriality and Provisional Application

The crux of the controversy that arises with respect to the application of the ECT to Gibraltar, and potentially to other overseas territories, is UK's declaration under Article 45. More particularly, Article 45 is concerned with its provisional application[48] and before its amendment provided as follows:

> (1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.
>
> (2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.
>
> ...
>
> (3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.[49]

13, Excerpts of the Award (16 July 2012); *AES Corporation and Tau Power BV v Republic of Kazakhstan*, ICSID Case No ARB/10/16, Award (not public) (1 November 2013); *Slovak Gas Holding BV (the Netherlands) et al v Slovak Republic*, ICSID Case No ARB/12/7, Settlement Deed (14 December 2012); *Charanne and Construction Investments v Spain*, SCC, Award (21 January 2016).

[45] ECT (n 5) 78 UKTS (2000) 72. The United Kingdom ratified the ECT on 16 December 1997 and the ECT entered into force on 16 April 1998.

[46] ibid at 1 and 72.

[47] United Kingdom Declaration of Extention to Bailiwick of Guernsey (11 August 1998) <http://treaties.fco.gov.uk/treaties/treatyrecord.htm?tid=3609> accessed 21 May 2015.

[48] See Peter C Laidlaw, 'Comment, Provisional Application of the Energy Charter As Seen in the Yukos Dispute' (2012) 52 Santa Clara L Rev 655; Alex M Niebruegge, 'Provisional Application of the Energy Charter Treaty: The *Yukos* Arbitration and the Future Place of Provisional Application in International Law' (2007) 8 Chicago J Intl L 355, 357; Ulrich Klaus, 'The Gate to Arbitration—The *Yukos* Case the Provisional Application of the Energy Charter Treaty in the Russian Federation' (2005) 2(3) Transnatl Disp Mgmt. See also *Ioannis Kardassopoulos v Republic of Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction (6 July 2007) paras 195–252.

[49] ECT (n 5) art 45(1)–(3). This provision was amended by art 6 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty (entered into force 21 January 2010). This amendment did not however alter the crucial provisions of this Article and does not affect the present analysis.

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This article therefore provides for the provisional application of the ECT for a signatory, pending the treaty's entry into force for such signatory in accordance with Article 44. Pursuant to Article 44, thirty ratifications and the passing of 90 days therefrom were required for the ECT to enter into force.[50] This condition was met four years after the signature of the ECT, and thus the treaty effectively entered into force on 16 April 1998. However, as is shown below, the Tribunals in *Petrobart v Kyrgyzstan* and *Stati v Kazakhstan* have overlooked this detail and instead found that the provisional application with respect to the UK ceased at the time of UK's ratification (16 December 1997) and not when the ECT entered into force pursuant to Article 44. On the contrary, as Articles 44 and 45 reveal, the UK applied the ECT provisionally from the date of signature (17 December 1994) until the entry into force of the ECT on 16 April 1998. Regardless, some further remarks are of crucial importance.

First of all, the UK was not among these states that did not accept the provisional application of the ECT in accordance with Article 45(2).[51] In addition, the UK, unlike the Netherlands, did not express its will to merely provisionally apply the treaty to the metropolitan part of the Kingdom.[52] In this regard, it is vital to note that Article 45, unlike Article 40, does not contain a territorial extension provision. This could arguably lead to a revival of the default position under Article 29 VCLT, whereby absent any representation to the contrary, the ECT would apply provisionally to the entire territory (metropolitan or not) of those States that have accepted its provisional application.

Nevertheless, and while it is not provided for under Article 45, the UK, upon signature, declared that 'provisional application under Article 45(1) shall extend to the United Kingdom of Great Britain and Northern Ireland and to Gibraltar'.[53] This stipulation thus makes it clear that the UK applied the ECT provisionally to Gibraltar from 17 December 1994, whereupon it signed the treaty and made the relevant territorial declaration under Article 45(1). However, what is not certain is whether such provisional application has ceased with respect to Gibraltar after the entry into force of the ECT as well as whether the ECT was applied provisionally to the Crown Dependencies or any other overseas territory of the UK. In this respect, it should be recalled that UK's instrument of ratification extended—pursuant to Article 40—the application of the ECT to the Bailiwick of Jersey and the Isle of Man but contained no reference to Gibraltar whatsoever.[54] In addition, after the entry into force of the ECT, the UK only extended its application to Guernsey.[55] This means that the ECT applied on a provisional basis to Jersey and the Isle of Man between ratification and entry into force, ie for roughly four months, and was never applied provisionally to Guernsey. However, with respect to Gibraltar, for which the ECT applied provisionally from 1994, ie from the date of signature, it is clear that the UK did not include it in its instrument of ratification and has equally not made any

[50] ECT (n 5) art 44(1).

[51] See annex on Provisional Application (PA) to the ECT that lists the Czech Republic, Germany, Hungary, Lithuania, Poland and Slovakia, which were the States that did not accept the provisional application of the ECT. All of these States have now ratified the ECT.

[52] See 108 Tractatenblad Van Het Koninkrij der Nederlanden (1995) <https://zoek.officielebekendmakingen.nl/trb-1995-108.HTML#IDAZSHFB> accessed 3 August 2015.

[53] United Kingdom ECT Declaration of 17 December 1994, <http://treaties.fco.gov.uk/treaties/treatyrecord.htm?tid=3609> accessed 21 May 2015.

[54] *See* ECT (n 5) 78 UKTS (2000) 72.

[55] Declaration of 11 August 1998 (n 47).

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territorial declarations for this territory at a later stage. The wording of Articles 40 and 45 of the ECT is crucial in this regard. Article 40 indicates that territorial extensions have effect from the time 'the Treaty enters into force for that Contracting Party'[56] and Article 45 provides for provisional application pending the 'entry into force for such signatory in accordance with Article 44'.[57] Furthermore, Article 45(3) provides that a signatory 'may terminate its provisional application of this Treaty by written notification . . . of its intention not to become a Contracting Party to the Treaty'. However, the UK did become a party to the ECT. The question that therefore arises is whether the very entry into force of the ECT with respect to the UK has terminated its provisional application in all respects, namely with regard to Great Britain and Northern Ireland, the Isle of Man and Jersey as well as Gibraltar. Or else, whether the entry into force of the ECT for the UK has not affected its provisional application to Gibraltar. To state it otherwise, it is questioned whether a treaty, applied on a provisional basis, can at a later stage enter into force for a signatory but remain provisionally applicable for part of its territory. However, before addressing the position adopted by ECT tribunals, the CIL on the provisional application of treaties has to be taken into consideration. Nevertheless, what becomes clear from the above analysis is that the ECT did not apply provisionally to UK overseas territories other than Gibraltar nor has it been extended to such territories after the entry into force of the ECT. This view is in line with the territorial extension of UK BITs and is also supported by arbitral practice.[58]

C. Provisional Application for Part of Territory and Gibraltar

As already indicated, the UK applied the ECT provisionally to Gibraltar from the date of signature. However, at the time of ratification and thereafter, the UK did not advance a territorial declaration with respect to Gibraltar, as did with respect to the Isle of Man and the Bailiwicks of Jersey and Guernsey. On the same time, the UK has not revoked the provisional application of the ECT to Gibraltar. In this respect, Article 45(3) makes reference to the termination of provisional application by a signatory—and not part of signatory—when such signatory does not intend to become a contracting party. But the UK did become a party to the ECT. In this line, Article 45(1) indicates that '[e]ach signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44'. Again, the ECT entered into force in respect of the UK on 16 April 1998. The wording of Article 45(1), when combined with Article 45(3), suggests that provisional application with respect to a signatory comes to an end when such signatory becomes a party. In this regard, it is undisputed that the UK did become a party to the ECT. What is nevertheless disputed is whether the ECT continued to apply provisionally to Gibraltar even after its entry into force with respect to the

[56] ECT (n 5) art 40(1).
[57] ibid art 45(1).
[58] *See Khan Resources Inc, Khan Resources BV, and Cauc Holding Company Ltd v The Government of Mongolia*, UNCITRAL, Decision on Jurisdiction (25 July 2012) paras 1 and 25. In this case, one of the Claimants (Cauc Holding Company) was a company incorporated in the British Virgin Islands, but unlike the other Claimants that invoked the provisions of the ECT, this Claimant merely invoked contractual provisions. Had the ECT been applicable to the British Virgin Islands, Cauc Holding Company would arguably have also invoked its provisions.

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UK. However, the ECT is silent in this respect and only makes reference to signatories and not to parts of a signatory, as is exactly the case with Gibraltar.

Certainly, some might urge to apply Article 45 to Gibraltar by drawing an analogy with signatories and parts of signatories but such an analogy is somewhat hasty. Instead, it appears more elaborate to first examine whether CIL can be of any guidance. In this respect, the VCLT allows for the provisional application of '[a] treaty or part of a treaty pending its entry into force if... the treaty itself so provides' or '[t]he negotiating States have in some other manner so agreed'.[59] Such provisional application 'of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty'.[60] This does not apply when 'the treaty otherwise provides or the negotiating States have otherwise agreed'.[61] However, the ECT does not appear to provide otherwise, nor has there been any other agreement between the parties to the ECT. In this respect, the VCLT and its Commentary merely refer to the provisional application of a treaty or part *of a treaty* and not to the provisional application for part of a signatory.[62] In addition, prominent authorities on the law of treaties and State practice on the provisional application of treaties do not envisage the scenario encountered with respect to Gibraltar, namely the provisional application of a treaty for part of a signatory even after the entry into force of this treaty for such signatory.[63] Finally, Ambassador Juan Manuel Gómez-Robledo, who in 2012 was appointed Special Rapporteur of the International Law Commission (ILC) for the topic of 'Provisional application of treaties', has to date neither implied nor referred to the possibility of provisionally applying a treaty for part of a signatory's territory even after the entry into force of this treaty for such signatory.[64]

The above remarks therefore are rather supportive of the view that under CIL, the entry into force of a treaty brings provisional application to an end. In addition, as has been enshrined in the VCLT, CIL does not provide for the provisional application of a treaty for part of a signatory's territory even after such treaty has entered into force for this signatory. In fact, the latter scenario appears antithetic to the very rationale of provisional application under the VCLT, and, interestingly enough, the parties to the ECT do not appear to have envisaged this scenario. In light of these remarks, the question that remains to be answered is whether the ECT is still applicable to Gibraltar on a provisional basis or whether such provisional application ceased when the ECT entered into force. However,

[59] See VCLT (n 21) art 25(1).
[60] ibid art 25(2).
[61] ibid. See also Niebruegge (n 48) 357–9; Matthew Belz, 'Provisional Application of the Energy Charter Treaty: *Kardassopoulos v Georgia* and Improving Provisional Application in Multilateral Treaties' (2008) 22 Emory Intl L Rev 727, 733–5.
[62] VCLT (n 21) art 25; VCLT Commentary (n 22) art 22, paras 1–4.
[63] Aust (n 22) 139–41; René Lefeber, 'The Provisional Application of Treaties' in Jan Klabbers and René Lefeber (eds), *Essays on the Law of Treaties* (Kluwer Law International 1998) 84–5; Mahnoush H Arsanjani and W Michael Reisman, 'Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 86–90; Roe and Happold (n 5) 67.
[64] See 'First Report by Special Rapporteur Juan Manuel Gómez-Robledo on the Provisional Application of Treaties' (2013) UN Doc A/CN4/664; 'Second Report by Special Rapporteur Juan Manuel Gómez-Robledo on the Provisional Application of Treaties (2014) UN Doc A/CN4/675; UNGA,' Report of the International Law Commission on the Work of Its Sixty-Third and Sixty-Fourth Sessions (18 January 2013) UNGA A/CN4/657, paras 39–46.

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before turning to the position adopted by ECT tribunals it is crucial to make two further observations.

On 27 July 2004, the British Embassy in Lisbon advanced a *note verbale* to the Depositary of the ECT, the Portuguese Government, providing as follows:

> The UK did apply the Energy Charter Treaty provisionally to the UK and Gibraltar at signature. However, the Government of Gibraltar subsequently informed Her Majesty's Government that they did not wish to seek ratification of the Treaty, since at that time the Treaty would not have had any practical effect for the territory. Gibraltar was therefore not included in the UK's instrument of ratification relating to the Treaty, deposited on 17 December 1997. The Government of Gibraltar do however plan to introduce legislation to ratify the Treaty at a later date. Her Majesty's Government are currently liaising with the Government of Gibraltar on the drafting of the necessary legislation.[65]

Three years after this verbal note, the Legislature of Gibraltar passed a bill for an 'Act to implement in Gibraltar the provisions of the Energy Charter Treaty'.[66] However, for this bill to become law, it needs to be 'assented to by Her Majesty or by the Governor on behalf of Her Majesty'.[67] This does not, however, appear to have happened. In addition, the past tense used in the above verbal note ('did apply') appears to suggest that the ECT ceased to apply to Gibraltar after its entry into force. Nevertheless, as the next section shows, the *Stati* Tribunal adopted the converse view, without taking notice of the issues discussed in this section. To avoid, however, any ambiguity, the crucial point here is not connected to the UK's and Gibraltar's internal procedures relevant to ratifying the ECT. In international law, '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[68] What is crucial is that CIL does not provide for the continued provisional application of a treaty for part of a signatory's territory after the entry into force of this treaty. At the same time, the parties to the ECT have neither expressed their desire nor implied that they wish to derogate from the above rule.

In summary, the following points can be made:

- The ECT applied to Great Britain and Northern Ireland provisionally from 17 December 1994 to 16 April 1998.
- The ECT applied provisionally to the Isle of Man and the Bailiwick of Jersey from 16 December 1997 to 16 April 1998.
- The ECT applies to Great Britain and Northern Ireland, to the Isle of Man and to the Bailiwick of Jersey from 16 April 1998 and to the Bailiwick of Guernsey from 11 August 1998.
- The ECT was applied provisionally to Gibraltar from 17 December 1994.
- The ECT was not applied provisionally and does not apply to other overseas territories of the UK.

[65] Note Verbale 78/2004 of 27 July 2004 (original with the Depositary).

[66] See 3rd Supplement to the Gibraltar Gazette, No 3,582 (8 February 2007) B 01/07, Bill for an act to implement in Gibraltar the provisions of the Energy Charter Treaty, <http://www.gibraltarlaws.gov.gi/bills/bills2007/2007B01.pdf> accessed 26 May 2015.

[67] *See* Constitution of Gibraltar (14 December 2006) art 33(1) <http://www.gibraltarlaws.gov.gi/constitution/Gibraltar_Constitution_Order_2006.pdf> accessed 26 May 2015.

[68] VCLT (n 21) art 27.

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- It is disputed whether the ECT ceased to apply to Gibraltar on 16 April 1998, whereby it entered into force for the UK.

IV. THE FINDINGS OF ECT TRIBUNALS

This section now turns to the findings of ECT tribunals with regard to the application of the ECT to Gibraltar and reveals the inadequate justification employed by most strikingly the Tribunal in *Stati v Kazakhstan*. In addition, this section also refers to the decision of the Svea Court of Appeal that was asked to set aside the Award of the Tribunal in *Petrobart v Kyrgyzstan*.

A. The *Yukos* Disputes

The first cases that will be discussed in this Part are the notorious cases of *Yukos Universal Limited (Isle of Man) v The Russian Federation*, *Hulley Enterprises Limited (Cyprus) v The Russian Federation* and *Veteran Petroleum Limited (Cyprus) v The Russian Federation* ('the Yukos cases').[69] The issue that is relevant for the application of the ECT to Gibraltar arose in connection with the application of Article 17 of the ECT that encapsulates a denial of benefits clause. In general, investment treaties cover (as investors) legal entities whose true and beneficial owners are not nationals of a contracting party.[70] In this regard, denial of benefits provisions, such as those of the ECT, set some additional requirements.[71] In particular, Article 17 of the ECT is included in Part III that contains the substantive rights of protection accorded to foreign investors and reads as follows:

> Each Contracting Party reserves the right to deny the advantages of [Part III] 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.[72]

The interpretation of denial of benefits clauses is highly disputed, but for the present discussion, the vital element is the term 'third State'.[73] In previous ECT cases, this term has been interpreted to refer to a non-ECT member State and not a third party to the dispute. In more detail, in *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, where the Claimant, a Cypriot company, was owned and controlled by a French citizen, Bulgaria alleged that France was a third State.

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

[70] Mark Feldman, 'Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration' (2012) 27(2) ICSID Rev—FILJ 281, 296.

[71] Blyschak (n 8) 208–9; Anthony C Sinclair, 'The Substance of Nationality Requirements in Investment Treaty Arbitration' (2005) 20(2) ICSID Rev—FILJ 357, 378–87.

[72] ECT (n 5) art 17(1) (emphasis added).

[73] See generally *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) paras 146–65; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008) paras 79–95; *Yukos v Russia* (n 69) paras 443–546; *Limited Liability Company Amto v Ukraine*, SCC Case No 080/2005, Final Award (26 March 2008) paras 62–9; *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8, Award (2 September 2011) paras 553–6. See also Matteo M Winkler, 'Arbitration without Privity and Russian Oil: The *Yukos* Case before the Houston Court' (2006) 27 U Pa J Intl Econ L 115, 117; Douglas (n 7) 468–72.

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However, the Tribunal opined that the notion of a third State is meant to refer to non-ECT Member States and not just third parties to the dispute. Given therefore that France was an ECT member, the Tribunal rejected Bulgaria's denial of the benefits objection.[74]

In the context of the *Yukos* cases, the Claimant in *Yukos v Russia*, Yukos Universal Limited (YUL), was a company organized under the laws of the Isle of Man and wholly owned by GML, a company incorporated in Gibraltar. GML was in turn owned by seven Guernsey trusts.[75] In *Hulley v Russia*, the Claimant was a Cypriot company whose sole shareholder was YUL, which, as just indicated, was organized under the laws of the Isle of Man.[76] Lastly, the Claimant in *Veteran v Russia* also was a Cypriot company whose ownership and control were vested with Chiltern, a trust settled in Jersey, whose settlor as well as beneficiary was YUL.[77] The question put to these Tribunals was whether Russia's invocation of the denial of the benefits provision satisfied the first limb of Article 17 that requires ownership or control by a national of a third State.[78] However, given that the UK had extended the application of the ECT to the Isle of Man, Jersey and Guernsey, and applied the ECT provisionally to Gibraltar, the Tribunals concluded that the first limb of Article 17 was not satisfied as the Claimants were owned or controlled by nationals of the UK.[79] However, the reasoning of the Tribunals in the *Yukos* cases raises three concerns. First, there is no justification for the application of the ECT to Gibraltar. The reason rests in the Tribunals' findings that ownership or control was exercised by the seven Guernsey trusts, with Guernsey explicitly covered by UK's declarations. A reference to the intermediate layer of the Gibraltarian entity should nevertheless have been made. Second, had the Tribunals discussed the application of the ECT to Gibraltar, they would have had to clarify whether the ECT continued to apply provisionally to this territory or whether it had ceased after the entry into force of the treaty. Third, when examining the various layers of ownership or control, the Tribunals stopped their analysis when reaching the seven Guernsey trusts that controlled the shares in GML that in turn owned YUL that owned and controlled all three Claimants.[80] The Respondent alleged that the Guernsey trusts were in fact owned or controlled by Russian nationals. The Tribunals, however, decide not to pierce the corporate veil.

B. *Petrobart v Kyrgyzstan*

The first case that in fact directly addressed the application of the ECT to Gibraltar was *Petrobart v Kyrgyzstan*.[81] In this case, there was only one Claimant, a company registered in Gibraltar.[82] In the course of the proceedings, Kyrgyzstan objected to the application of the ECT to Gibraltar and therefore the Tribunal,

[74] *Plama v Bulgaria*, Decision on Jurisdiction (n 73) para 169; *Plama v Bulgaria*, Award (n 73) paras 79–95. *Similarly Amto v Ukraine* (n 73) para 62; *Libananco v Turkey* (n 73) paras 553–6.
[75] *Yukos v Russia* (n 69) paras 1 and 536.
[76] *Hulley v Russia* (n 69) para 535.
[77] *Veteran v Russia* (n 69) para 521.
[78] ibid paras 443–555.
[79] See *Yukos v Russia* (n 69) para 537; *Hulley v Russia* (n 69) para 536; *Veteran v Russia* (n 69) paras 536–7.
[80] *Yukos v Russia* (n 69) para 536–7.
[81] *Petrobart Limited v The Kyrgyz Republic*, SCC Case No 126/2003, Award (29 March 2005) (UK–Gibraltar).
[82] ibid under I.

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unlike in the *Yukos* cases, had to decide the issue on the basis of jurisdiction *ratione personae*.[83] In doing so, the Tribunal based its analysis on Article 45(3) of the ECT, referred to above, and the non-revocation of the declaration made by the UK with respect to Gibraltar. In more detail, the Tribunal noted that, while the UK had extended the provisional application of the ECT to Gibraltar upon signature, the instrument of its ratification did not mention this territory. Then focusing on Article 45(1), which as already mentioned, provides for provisional application 'pending' the ECT's entry into force, and on Article 45(3) which refers to the possibility to terminate such provisional application if a signatory does not intend to become a contracting party, the Tribunal opined that:

> It is obvious that Article 45(1) envisages, at least primarily, the simple case where a signatory first accepts provisional application and subsequently ratifies the Treaty in respect of the same territory with the effect that upon its entry into force the provisional application ceases and is succeeded and replaced by the direct application resulting from the ratification. As regards the unusual situation where the territory accepted for provisional application and for application upon ratification does not coincide, no rule is to be found in the Treaty, and a problem of interpretation therefore arises.[84]

In other words, the Tribunal was correct in identifying that ECT's provisional application to Gibraltar, even after its entry into force for the UK, is a matter not regulated by the ECT. However, this Tribunal analysed the matter further and considered that,

> in principle, on matters of this kind, a rather formal approach based on the wording of the Treaty is appropriate. It is then to be noted that according to the text of the Treaty provisional application ceases if it is terminated either by a special notification under Article 45(3)(a) of the Treaty or by transition from provisional application to a corresponding and final legal commitment resulting from the entry into force of the Treaty. It could indeed be expected that the United Kingdom, if it wished the provisional application of the Treaty to Gibraltar to be terminated as a result of a ratification not including Gibraltar, should have made this clear by making a notification in line with Article 45(3)(a) or a declaration in some other form in connection with the ratification. In the Arbitral Tribunal's opinion, the fact that the ratification, for political or other reasons, did not include Gibraltar does not justify the conclusion that the United Kingdom intended to revoke the application of the Treaty to Gibraltar on a provisional basis. It may be observed that what is at issue here is not only the rights of investors from Gibraltar in other states but also the protection of foreign investors in Gibraltar. The Arbitral Tribunal therefore finds that the Treaty continues to apply on a provisional basis to Gibraltar despite the fact that the United Kingdom's ratification does not cover Gibraltar.[85]

This approach is problematic in at least two respects. First, the Tribunal failed to explain the relationship between Articles 45(1) and 45(3), which is in fact antithetic in nature. Second, the Tribunal applied Article 45(3) to Gibraltar, without any further explanation, although this provision refers to a signatory and

[83] ibid, under VIII.
[84] ibid.
[85] ibid.

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not part of a signatory, as is exactly the case with Gibraltar. In addition, the Tribunal has not addressed the question whether CIL allows for the provisional application of a treaty to part of a signatory's territory even though it admitted that the ECT itself does not provide for any relevant guidance. These points have also not been addressed by previous commentators who referred to the above ruling[86] although Thomas Roe and Matthew Happold note that a combination of Articles 45(1) and 45(3) indicates that

> [t]he treaty's provisional application to Gibraltar did not require express revocation; and the natural inference from the failure to mention Gibraltar in the instrument of ratification ought to have been that the UK did not intent the Treaty to apply to Gibraltar.[87]

Furthermore, neither the Tribunal nor the Claimant's expert Adnan Amkhan made any reference to the verbal note of 2004 mentioned above whose existence was most likely ignored or intentionally not referred to by the latter.[88] However, the Decision of the Tribunal does make reference to the fact that:

> In its Reply to the Request for Arbitration, submitted on 15 October 2003 to the SCC Institute, the Kyrgyz Republic did not argue that the Treaty is inapplicable to Gibraltar. Nor did it do so in its Statement of Defence, submitted to the Arbitral Tribunal on 24 March 2004, or in its Rejoinder of 11 October 2004. The argument was raised for the first time in its brief of 7 December 2004 which contained the Republic's replies to the Arbitral Tribunal's questionnaire.[89]

Could it then be that Kyrgyzstan belatedly raised this objection due to the fact that the UK advanced the afore-mentioned verbal note on 27 July 2004?[90] An answer to this has not been provided. However, both Kyrgyzstan and the expert Adnan Amkhan do refer—albeit in conflicting terms—to the historical background surrounding the UK's decision to provisionally apply the ECT to Gibraltar but not to include it in its instrument of ratification.[91] This is no other than the dispute between the UK and Spain over Gibraltar. This point certainly clarifies the motives of the UK in adopting this dubious approach, and also clarifies the reason behind the non-materialization of the Bill for an 'Act to implement in Gibraltar the provisions of the Energy Charter Treaty'.[92] But this does not suffice to explain why the ECT continues or not to apply to Gibraltar. Regardless, the reasoning of the Tribunal in *Petrobart v Kyrgyzstan* has also been adopted by the Svea Court of Appeal in subsequent set aside proceedings. In particular, the Svea Court of Appeal reached the conclusion that the ECT was still applicable to Gibraltar on a provisional basis and thus decided not to set aside the award.[93]

Nevertheless, the factual matrix of this case reveals yet another interesting aspect. Petrobart's investment was realized through a contract concluded on 23

[86] Roe and Happold (n 5) 69–70; Arsanjani and Reisman (n 63) 100–1; Gerhard Hafner, 'The "Provisional Application" of the Energy Charter Treaty' in Binder and others (n 3) 593–607.

[87] Roe and Happold (n 5) at 70.

[88] See *Petrobart Limited v The Kyrgyz Republic*, SCC Case No 126/2003, Supplementary Opinion of Adnan Amkhan (14 December 2004) paras 5–18; UK–Gibraltar BIT (n 81).

[89] *Petrobart v Kyrgyzstan* (n 81) under I.

[90] See Note Verbale 78/2004 of 27 July 2004 (original with the Depositary).

[91] *Petrobart v Kyrgyzstan* (n 81) 2, under VII; *Petrobart v Kyrgyzstan*, Opinion of Amkhan (n 88) para 14.

[92] See (n 66).

[93] See *The Kyrgyz Republic v Petrobart Limited*, Judgment Case No T5208-05, Review by Svea Court of Appeal, reprinted in (2008) 13 ICSID Rep—FILJ 480, 483–4 and 487.

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February 1998, ie prior to ECT's entry into force.[94] At that stage, there is no doubt that the ECT applied provisionally to Gibraltar. However, the breach appears to have taken place after the entry into force of the ECT.[95] This is an issue of great importance that has not been discussed by the Tribunal. For if the ECT did cease to apply to Gibraltar after its entry into force for the UK, then it remains to be seen whether the 20-year survival clause provided for in Article 45(3)(b) will be triggered.[96] In any case, the realization of the investment before the entry into force of the ECT is a crucial detail. This was not the case in *Stati v Kazakhstan* which is examined in the next section.

C. Stati v Kazakhstan

The Tribunal in *Stati v Kazhakstan* was the last tribunal that to date had to determine the application of the ECT to Gibraltar.[97] In this case, the issue arose in connection to Article 1(7) that provides for the relevant definition of covered investors.[98] Specifically, one of the Claimants, Terra Raf, was a company incorporated in Gibraltar in 1999 and had therefore realized its investment after the entry into force of the ECT in April 1998.[99] The Respondent alleged that the ECT did not apply to Gibraltar since pursuant to Article 45(1), 'the entry into force of the ECT automatically brings provisional application of the ECT to an end'.[100] To support its position, the Respondent also referred to the verbal note of 2004 referred to above, as well as to *Petrobart v Kyrgyzstan*, alleging that in the latter case the investment was realized prior to the entry into force of the ECT.[101] In addressing the matter, the Tribunal adopted a differing view, finding that it did not have to decide the matter on the basis of the provisional application of the ECT to Gibraltar.[102] Rather, the Tribunal found that:

> 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.[103]

The above provisions indeed extend the application of EU Treaties to Gibraltar.[104] That is not to say that the ECT also applies to Gibraltar. In the case under consideration, what is at stake is not the territorial application of EU Treaties but that of the ECT, that as shown above, includes specific provisions for

[94] The point is also raised by Adnan Amkhan. See *Petrobart v Kyrgyzstan*, Opinion of Amkhan (n 88) para 17.
[95] *Petrobart v Kyrgyzstan* (n 81) 1, under VIII.
[96] See s V below.
[97] *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v Kazakhstan*, SCC Case No 116/2010, Award (19 December 2013).
[98] ECT (n 5) art 1(7) (among others, it covers 'a company or other organization organized in accordance with the law applicable in that Contracting Party').
[99] See *Stati v Kazakhstan* (n 97) para 718.
[100] ibid para 734.
[101] ibid paras 735–6.
[102] ibid para 746.
[103] ibid.
[104] See Consolidated version of the Treaty on the European Union, (2012) Official Journal of the European Union, C 326, (signed 13 December 2007, entered into force 1 December 2009) art 52; Consolidated version of the Treaty on the Functioning of the European Union, (2012) Official Journal of the European Union, C 326, art 355(3) ('The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.'); and Declaration 55 by the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland ('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.').

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its territorial application. In the same vein, accepting the ECT's application to Gibraltar via the EU's membership in the ECT would render futile any territorial declaration advanced by the UK. This appears inconsistent with the ECT's plain wording as well as with the practice of other States such as Denmark and the Netherlands which, as mentioned above, do not apply the ECT to their non-metropolitan territories.[105] Furthermore, the EU was not a party to the disputes referred to above nor did it accede to the ECT, since it is equipped with the powers granted in the post-Lisbon era.[106] Lastly, the Tribunal in *Stati v Kazhakstan* did not take into account any of the remarks made in Section III above as well as the intrinsic (temporal) difference between this case and *Petrobart v Kyrgyzstan*.

These considerations amply indicate that the Tribunal in *Stati v Kazakhstan* did not explain why the ECT is applicable to Gibraltar even after its entry into force. On the contrary, the reference to the EU's membership as justification is at best inadequate and fails to address the relation between Articles 40 and 45 of the ECT. It also does not address the possibility under CIL to provisionally apply a treaty to part of a signatory even after the entry into force of this treaty for such signatory. The fallacy of this Tribunal's reasoning is also found in its complete defiance of the verbal note of 2004, of the UK's practice in extending the territorial scope of its BITs and of the territorial application of the ICSID Convention to UK's overseas territories.

V. CONCLUSION

This article has shown the intricacies associated with the interpretation of Articles 40 and 45 of the ECT and has also criticized the inadequate justifications of the Tribunals in *Petrobart v Kyrgyzstan* and *Stati v Kazakhstan*. These Tribunals accepted the application of the ECT to Gibraltar even after the entry into force of this treaty with respect to the UK. However, such conclusion is hardly justified. Indeed, this article has shown that ECT's application to Gibraltar should be addressed on the basis of UK's territorial declarations under Articles 40 and 45 of the ECT, the verbal note of 2004, UK's territorial extension practice under Article 70 of the ICSID Convention and the totality of its BITs as well as by reference to the provisional application of treaties under CIL. Such factors amply indicate the novelty of the issue at hand, namely the possibility to apply a treaty provisionally to part of a signatory even after the entry into force of this treaty for such signatory. This issue has not been adequately addressed by the Tribunal in

[105] Less credible is the argument of mixed agreements advanced by the Respondent. See *Stati v Kazakhstan* (n 97) para 736:

> Respondent reminds the Tribunal that the EU is not a contracting party to the ECT. The United Kingdom signed the ECT as an EU Member State in a 'mixed agreement'. This means that, the Member State signed in respect of those matters where Member States align their policies with the EU. There is a strong presumption that mixed agreements are concluded in territorial areas which fall within the regulatory scope of the application of EU law. Respondent states that Gibraltar is a disputed territory as between the United Kingdom and Spain and, as a result, important aspects of EU policy do not apply to Gibraltar.

[106] See briefly Angelos Dimopoulos, *EU Foreign Investment Law* (OUP 2011); Marc Bungenberg, Jörn Griebel and Steffen Hindelang (eds), *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (Springer 2011); Marc Bungenberg and others (eds), *EU and Investment Agreements: Open Questions and Remaining Challenges* (Nomos/Hart 2013); Philip Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment* (Hart 2014).

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Petrobart v Kyrgyzstan and was utterly overlooked by the Tribunal in *Stati v Kazakhstan*.

In sum, an appraisal of the above factors, and particularly of the CIL on the provisional application of treaties, indicates that the application of the ECT to Gibraltar even after its entry into force for the UK is unorthodox. It therefore appears more consistent to accept that ECT's provisional application to Gibraltar ceased when the ECT entered into force. This means that the ECT applied provisionally to Gibraltar from 17 December 1994 to 16 April 1998. Regardless, it still remains to be examined whether and how, investments realized within the above timeframe are protected, even when a breach occurs after the entry into force of the ECT. In this respect, Article 45(3) makes reference to the termination of provisional application in the following manner:

> (3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty.... (b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory ... with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination ....

Again, this provision merely refers to the termination of ECT's provisional application by a signatory and not by part of a signatory, as is the case of Gibraltar. In addition, Article 45(3) does not apply when the ECT enters into force pursuant to Articles 45(1) and 44 of the ECT. The question that therefore arises is whether the 20-year 'survival clause' enshrined in Article 45(3)(b) can be triggered with respect to Gibraltar even though the ECT entered into force for the UK pursuant to Articles 45(1) and 44 of the ECT. This issue remains moot for determination, but if one were to accept the application of such 'survival clause' to Gibraltar, the plain text of Article 45(3)(b) would merely cover investments realized in Gibraltar and not by Gibraltarian entities. In any case, for the triggering of the 20-year 'survival clause', it would be required that an investment was realized 'during [the] provisional application'[107] of the ECT and the 'effective date' of termination would be 16 April 1998.[108] Regardless, the above remarks do not affect the inapplicability of the ECT to Gibraltar for investors incorporated after the ECT's entry into force for the UK, which is precisely the case of Terra Raf, one of the Claimants in *Stati v Kazakhstan*.

[107] ECT (n 5) art 45(3)(b).
[108] cf *Ioannis Kardassopoulos v Republic of Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction (6 July 2007) para 247.

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