

## SERIES OF NOTES ON THE ENERGY CHARTER TREATY

### Note 6

16 March 2014

## IS INVESTMENT IN “THE DISTRIBUTION OF HEAT TO MULTIPLE PREMISES” COVERED UNDER THE ENERGY CHARTER TREATY?

Introduction.....	1
Relevant ECT Provisions.....	2
Analysis and Answer to the Question .....	3
Annex 1.....	5

### INTRODUCTION

1. The answer to the question above is dependent on the answer to another question, namely, whether or not distribution of heat is an “Economic Activity in the Energy Sector”, as defined in Article 1(5) of the ECT. As may be known to the reader, in order for an investment to qualify as an Investment under the ECT, such investment must be “associated with an Economic Activity in the Energy Sector”.<sup>1</sup>
2. For one reason or another, opposing views have been posited regarding the issue as to whether the distribution of heat is an “Economic Activity in the Energy Sector” for the purposes of the Energy Charter Treaty (“ECT”). The source of the disagreement seems to be one of interpretation, and more specifically, the perceived ambiguity in the manner in which the relevant provisions of the ECT concerning heat distribution have been drafted. This note is an attempt to demystify this alleged ambiguity.

---

<sup>1</sup> See Article 1(6) ECT. See also paragraph (a) of Understanding 2 with respect to Article 1(5) below.

## RELEVANT ECT PROVISIONS

3. There are two paragraphs in the ECT's Article 1 (Definitions) that are relevant to the issue examined in this note: paragraphs (4) and (5). For ease of reference, each of these paragraphs is cited in full below.

### *Article 1(4)*

"Energy Materials and Products", based on the Harmonized System of the Customs Co-operation Council and the Combined Nomenclature of the European Communities, means the items included in **Annex EM**.<sup>2</sup>

### *Article 1(5)*

"Economic Activity in the Energy Sector" means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in **Annex NI**,<sup>3</sup> or concerning the distribution of heat to multiple premises.

### *Understanding 2 with respect to Article 1(5)*

- (a) It is understood that the Treaty confers no rights to engage in economic activities other than Economic Activities in the Energy Sector.
- (b) The following activities are illustrative of Economic Activity in the Energy Sector:
  - (i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium;
  - (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;
  - (iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines;
  - (iv) removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations;
  - (v) decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;
  - (vi) marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and

---

<sup>2</sup> Annex EM lists Energy Materials and Products that are covered by the ECT (emphasis added).

<sup>3</sup> Annex NI is entitled "Non-Applicable Energy Materials and Products for Definitions of "Economic Activity in the Energy Sector" (in Accordance with Article 1(5))". In other words, Annex NI lists energy material and products that have been carved out from Annex EM, i.e. items 27.07, 44.01.10 and 44.02 (emphasis added).

- (vii) research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency.

## ANALYSIS AND ANSWER TO THE QUESTION

4. A hurried look at the ECT provisions quoted above may, perhaps, lure one to sympathise with the disagreement concerning the question under examination in this note. First, it is not readily obvious whether the last phrase of Article 1(5), namely, “[...], **or** concerning the distribution of heat to multiple premises” relates directly to the exception, or whether the conjunction “or” preceded by the comma is a continuation of the list of Economic Activit[ies] in the Energy Sector enumerated in the definition. Second, Understanding 2 seemingly thickens the ambiguity, by not listing “distribution of heat to multiple premises” as an illustrative example of Economic Activity in the Energy Sector.
5. However, by applying the *general rule of interpretation* set out in Article 31 of the VCLT,<sup>4</sup> it is suggested here that it is not difficult to ascertain that “distribution of heat to multiple premises” is an “Economic Activity in the Energy Sector” for the purposes of the ECT. Nevertheless, there is no guarantee that this literal/textual interpretation would be universally accepted. The divergence of views among party representatives might spill over to arbitrators having to decide on the question at hand.
6. It is in this and similar circumstances that reference to *supplementary means of interpretation* as set in Article 32 of the VCLT, if available, could be decisive. In the instant case, the decisive evidence lies in one single Room Document distributed at the Energy Charter Conference (during the ECT negotiations) in its Plenary Session on 11 March 1994.
7. Room Document 53, which is attached to this note as Annex 1, leaves no doubt that the phrase “concerning the distribution of heat to multiple premises” was added to Article 1(5) at the “11<sup>th</sup> hour” of the negotiations and that the intention of the drafters was that the distribution of heat **was** meant to be covered by the definition “Economic Activity in the Economic Sector”.

---

<sup>4</sup> See Note 3 of this *Series*.

# Mena Chambers

---

8. Therefore, the answer to the main question asked at the beginning of this note is in the affirmative: any asset, owned or controlled directly or indirectly by an Investor concerning distribution of heat to multiple premises is an Investment covered by the investment provisions of the ECT.

## **Notice and Disclaimer**

- No part of this note may be reproduced without prior permission of MENA Chambers.
- For documents mentioned in this note, please contact MENA Chambers.

Even though every effort has been made to ensure the accuracy of the contents of this note, MENA Chambers does not assume any responsibility for any actual or perceived inaccuracies.

## ANNEX 1

EUROPEAN ENERGY CHARTER

CONFERENCE SECRETARIAT

Room Document 53

Plenary Session, 7-11 March 1994

Brussels, 11 March 1994

Heat Distribution

---

Working Group III identified the desirability that the investment provisions of the Treaty should cover heat distribution, e.g. district heating schemes.

Heat production is already covered since this would usually be coincident with electricity production, which falls within the definition of Economic Activity in the Energy sector in Article 1(5).

It is suggested that this aim could be achieved by adding the following words at the end of Article 1(5) "or in the distribution of heat to multiple premises".

---

CHARTER CONFERENCE SECRETARIAT

c/o CEC - DG XVII, rue de la Loi 200, 1049 Brussels, Belgium

Tel: (32-2-) 295 7873

Fax: (32-2-) 296 6261