ENERGY DISPUTE RESOLUTION: INVESTMENT PROTECTION, TRANSIT AND THE ENERGY CHARTER TREATY

Edited by
Graham Coop

with the assistance of
Philippe Gurd Gross

ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

British Institute of International and Comparative Law

International Chamber of Commerce
The world business organization

ICSID
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

JURIS

CHAPTER 9

PROVISIONAL APPLICATION OF THE ENERGY CHARTER TREATY: THE NEGOTIATING HISTORY OF ARTICLE 45

*Yas Banifatemi**

Initiating an arbitration against a State on the basis of an investment treaty assumes that the claiming party has ensured that it satisfies the qualifying conditions under the treaty, namely that it is a protected investor under the treaty, that its investment is protected under the treaty, and that the dispute is covered by the temporal application of the treaty. These are, respectively, the requirements *ratione personae*, *ratione materiae* and *ratione temporis* on the basis of which a respondent State may object to an arbitral tribunal's jurisdiction and failing which the arbitration cannot proceed. The very first requirement, of course, is for the treaty to have come into force and to be binding on the host State.

Entry into force of a treaty for a State will often require the accomplishment of a formal process such as ratification, acceptance, approval or accession to the treaty, all of which are defined by Article 2(1)(b) of the Vienna Convention on the Law of Treaties of 1969 (the "Vienna Convention") as the international

* Yas Banifatemi is a Partner at Shearman & Sterling LLP. She is a member of the firm's International Arbitration Group and heads its Public International Law practice. She also teaches investment law and international investment arbitration at Panthéon-Sorbonne University in Paris.

The author acted as counsel for the Claimants in the Energy Charter Treaty arbitrations between the majority shareholders of former Yukos Oil Company and the Russian Federation, which resulted in the three PCA Awards on Jurisdiction and Admissibility rendered on November 30, 2009 and addressing the meaning and scope of Article 45 of the Energy Charter Treaty (*Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. AA226; *Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA227; *Veteran Petroleum Ltd. v. Russian Federation*, PCA Case No. AA228). None of these Awards is discussed in this article, which is limited to a description of the negotiating history of Article 45 of the Energy Charter Treaty.

acts "whereby a State establishes on the international plane its consent to be bound by a treaty". Consent to be bound under international law, however, is not restricted to such acts. Article 11 of the Vienna Convention, which deals with the "means of expressing consent to be bound by a treaty", for example, provides that "[t]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed". Similarly, Article 25 of the Vienna Convention entitled "Provisional application" provides that "[a] treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed".

In keeping with these customary rules of international law, the States negotiating investment treaties may decide that all or part of their treaty will apply provisionally pending its entry into force. Although not frequent in the investment context, this is the approach adopted by the States which negotiated and signed the Energy Charter Treaty ("ECT" or "Treaty") in 1994. In the context of the end of the Cold War and the creation of a cooperation framework in the field of energy between the former Soviet Union, the countries of Central and Eastern Europe and the West,[1] it was indeed crucial for the negotiating States to expedite the implementation of the ECT by allowing for its immediate application. Article 45(1) of the ECT thus provides in particular:

> "Each signatory agrees to apply this Treaty provisionally pending its entry into force for such

[1] *See* Energy Charter Secretariat, *An Introduction to the Energy Charter Treaty*, p. 13: "The roots of the Energy Charter date back to a political initiative launched in Europe in the early 1990s, at a time when the end of the Cold War offered an unprecedented opportunity to overcome the previous economic divisions on the European continent. Nowhere were the prospects for mutually beneficial cooperation between East and West clearer than in the energy sector." *See ibid.*, p. 14: "The fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thus minimising the risks associated with energy-related investments and trade."

> signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."

In cases where an arbitral tribunal is called upon to interpret the meaning and scope of this provision and the fundamental question whether such provision can create binding obligations on a State, including the obligation to arbitrate its disputes with the investors of another Contracting Party under Article 26 of the Treaty,[2] the question arises as to the interpretation means available to the tribunal. Under the standards of treaty interpretation contained in Article 31 of the Vienna Convention, treaties should as a general rule be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose"; recourse to the supplementary means of interpretation contained in Article 32 of the Vienna Convention[3]—and in particular the preparatory work of the treaty and the circumstances of its conclusion—may nevertheless prove valuable in determining the meaning of Article 45 of the ECT.

The review of the negotiating history of Article 45 of the ECT[4] shows that provisional application appeared early on, as draft Article 41 of the draft Basic Protocol to the European Energy Charter of September 11, 1991:

---

[2] In addition to the PCA Awards rendered against the Russian Federation and referred to above, the question also arose in *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction of July 6, 2007.

[3] Article 32 of the Vienna Convention provides as follows:

> "Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

[4] The negotiating history of Article 45 (and that of the other provisions of the ECT) can be consulted at the offices of the Energy Charter Secretariat in Brussels.

> "Subject to Article 2 above the Contracting Parties agree to apply this Agreement provisionally pending its entry into force in accordance with Article 40 [entry into force] above".[5]

Almost immediately, in the draft circulated on October 11, 1991, the United States delegation raised an objection with respect to provisional application, noting that "'provisional' application of the Protocol is not possible in the US, where a treaty or legislation is required before such a document comes into force, and suggests overcoming this obstacle by adding 'to their extent that their laws allow'".[6]

In line with the US objection, a new text was subsequently introduced by the United States, Canada and Norway in the following terms:

> "The *signatories* agree to apply this Agreement provisionally *following signature, to the extent that such provisional application is not inconsistent with their national laws* pending its entry into force in accordance to Article 40 above".[7]

The language evolved on this aspect to reflect the situations where certain signatories would not be in a position to accept provisional application based on their constitutional requirements. The draft of Article 40 (Provisional Application) circulated on June 24, 1992 thus provided that:

> "[The signatories agree to apply this Agreement and any amendments thereto provisionally following signature, to the extent that such provisional application is not inconsistent with their laws *or*

---

[5] European Energy Charter Conference Secretariat, Document 8-91, BP 2, September 11, 1991.

[6] European Energy Charter Conference Secretariat, Document 14/91, BP 3, October 11, 1991.

[7] European Energy Charter Conference Secretariat, Draft 21/91 Annex I BA 4, October 31, 1991 (emphasis in original).

> *constitutional requirements* pending its entry into force in accordance with Articles 37 or 39]".[8]

This draft was commented upon by Japan, which introduced the idea that the assumption could be reversed; in other words, rather than having a provisional application clause with an exception, the parties could envisage a specific notification by each signatory to the Depositary of the Treaty whereby it would inform all other contracting parties that it would apply the Treaty provisionally. Japan thus suggested replacing the whole Article by the following text:

> "(1) Any Signatory of this Agreement may notify the Depositary that it will apply this Agreement provisionally to the extent that the obligations of this Agreement are not inconsistent with its national laws and regulations.
>
> (2) The Depositary shall inform all Contracting Parties and Signatories of this notification made in accordance with paragraph (1) of this Agreement."[9]

Japan's suggestion was not accepted by other negotiating parties.[10] Another of Japan's suggestions, however, was adopted, in relation to the survival of the Treaty's substantive protection following the termination of the Treaty by a Contracting Party. The draft of January 18, 1993 contains Japan's proposal of draft Article 43(d) providing that in the event of termination of the Treaty by a Contracting Party, the Treaty's provisions would continue to be effective for a period of 20 years:

> "The provisions of this Agreement shall continue to be effective for a period of twenty years from the date when the withdrawal of a Contracting Party takes

---

[8] European Energy Charter Conference Secretariat, Document 32/92, BA 14, June 24, 1992 (emphasis in original).

[9] *Ibid.*

[10] *See* European Energy Charter Conference Secretariat, Document 72/92, BA, December 21, 1992.

> effect, in respect of Investments and Returns acquired prior to such date in the Domain of the Contracting Party by investors of other Contracting Parties and in the Domains of other Contracting Parties by investors of that Contracting Party."[11]

The question then arose as to the incorporation of the survival of the Treaty's substantive protection in relation to provisional application as well. The Canadian delegation indeed articulated its concern with respect to "the need to protect investments made during the period of provisional application" in the event that a signatory terminated its provisional application of the Treaty.[12] The draft proposed by the Canadian delegation contained three sub-provisions: draft Article 40(1) contained the principle of provisional application, while draft Article 40(2) provided for the termination of provisional application (taking effect one year from the date on which the signatory's notice of its intention not to become a party to the Treaty was received by the Depositary), and draft Article 40(3) provided that notwithstanding a signatory's termination of its provisional application of the Treaty, Article 1 and Parts IV and V of the Treaty (namely, the provisions on the protection and promotion of investments and on dispute settlement) would continue to apply for a period of twenty years.[13]

These two proposed additions, namely the one-year period for a notice of termination of provisional application and the 20-year survival period of the substantive protection following such termination, were maintained in the compromise text of the Energy Charter Treaty proposed by the Chairman of Working Group II, Mr. Sidney Freemantle, on March 15, 1993.[14] The text of

---

[11] European Energy Charter Conference Secretariat, Document 3/93 Annex VI, BA-32, January 18, 1993.

[12] European Energy Charter Conference Secretariat, Working Group II of February 1-6 1993, Room Document 11, February 2, 1993.

[13] *Ibid*.

[14] European Energy Charter Conference Secretariat, Document 23/93, CONF 50, March 15, 1993.

draft Article 50 included in the March 15, 1993 document, based on the Canadian proposal, remained essentially unchanged until October 11, 1993.[15]

In October 1993, Norway proposed "the deletion of the whole Article because the principle of provisional application [was] not acceptable" to it.[16] The deletion was not accepted, although, at the discussions held during the Plenary Session of December 15, 1993, other countries echoed Norway's concerns relating to the constitutional difficulties that made provisional application not acceptable for them:

> "In the discussion of this Article in the Plenary on 15 December 1993, some delegations raised difficulties on paragraphs (1) to (3) of Room Document 6, and five delegations (CH [Switzerland], H [Hungary], J [Japan], N [Norway] and RO [Romania]) stated that provisional application was not acceptable to them for constitutional reasons. Other delegations emphasised the importance of provisional application for the Treaty's objectives. In the attached text the Chairman proposes adding a new final sentence to paragraph (1) to deal with those difficulties."[17]

The Chairman's proposal was the addition of a last sentence to the first paragraph of draft Article 50 to the effect that where an inconsistency existed between provisional application and the signatories' laws or constitutional requirements, the signatories

---

[15] The only change was the modification of the term Domain(s) of a Signatory or Signatories to Area(s): *see* European Energy Charter Conference Secretariat, Document 64/93, CONF-72, October 11, 1993.

[16] *Ibid.*

[17] European Energy Charter Conference Secretariat, Plenary Session December 14-18, 1993, Room Document 7, December 15, 1993. In Message No. 203 of December 21, 1993, the Secretariat also invited those five delegations, for drafting purposes, to "send more detailed information to the Secretariat explaining their concerns and problems" in relation to provisional application.

"will nevertheless make every possible effort" to apply the Treaty and any amendments to it from the signature date.[18]

The delegations which had voiced their constitutional difficulties with provisional application maintained their position. The sixth version of the draft Treaty of December 20, 1993 this time referred to six delegations having such difficulties:

> "In the discussion of this Article in the December Plenary some delegations raised difficulties on paragraphs (1) to (3) and six delegations (CH [Switzerland], A [Austria], H [Hungary], J [Japan], N [Norway], RO [Romania]) stated that provisional application was not acceptable to them for different reasons but in most cases for constitutional reasons. Other delegations emphasised the importance of provisional application for the Treaty's objectives."[19]

In the same document, the United States suggested the following alternative language for Paragraph 1 of Article 50:

> "Each signatory agrees to apply this Agreement provisionally pending its entry into force for such signatory, to the extent that such provisional application is not inconsistent with its national laws or constitutional requirements."[20]

As a result of this alternative language, which was accepted, provisional application was thus specifically agreed to by "each signatory" and no longer by "the signatories" collectively. At the same time, however, the US delegation, "(supported by some other delegations) also argued that paragraphs (2) and (3) [on the termination of provisional application and the 20-year survival period] go far beyond the normal concept of the provisional

---

[18] European Energy Charter Conference Secretariat, Plenary Session December 14-18, 1993, Room Document 7, December 15, 1993.

[19] European Energy Charter Conference Secretariat, 74/93, CONF-82, December 20, 1993.

[20] *Ibid*.

application and that such language should apply only after entry into force."[21]

Japan, for its part, continued to emphasize its preference for an opting-in mechanism whereby those signatories which wished to apply the treaty provisionally would specifically so notify other Contracting Parties, and proposed a draft protocol on provisional application to that effect. It also emphasized the importance of "some sort of transparency discipline (or exercise)" in the operation of provisional application.[22]

These various positions were taken into account by the Secretariat in the note circulated on February 28, 1994. Bearing in mind both the difficulties signaled by a number of delegations in relation to provisional application and the importance of such a provision for other delegations, a compromise text was proposed which provided that "[e]ach signatory except [Hungary], Japan and Norway agrees to apply this Treaty provisionally pending its entry into force for such signatory" (draft Article 50(1)) and that "[n]otwithstanding paragraph (1) [Hungary], Japan and Norway agree to apply part VII of this Treaty provisionally pending its entry into force in accordance with Article 49" (draft Article 50(2)).[23]

With a view to adopting a more principled approach, the note circulated on March 8, 1994 by the Secretary General for the purposes of the Plenary Session of March 1994 summarized clearly the various positions on provisional application:

> "1. It is agreed that there should be a *strong commitment to Provisional Application of the Treaty* (subject to constitutions, laws etc.) but that a way should be found to allow a few countries (possibly J [Japan], N [Norway], H [Hungary], CH [Switzerland])

---

[21] *Ibid*.

[22] European Energy Charter Conference Secretariat, Document on Meeting of February 11, 1994 with Japan concerning Provisional Application, LW/gg/ note.Japan, February 14, 1994.

[23] European Energy Charter Conference Secretariat, 12/94, CONF 91, February 28, 1994.

> to except themselves from that commitment. On 7 March the Plenary identified two possible ways of dealing with this:
>
> (a) a Provisional Application Article in the Treaty which included *a facility for individual countries to except themselves from its provisions by making a Declaration at the time of signature*;
>
> (b) a *parallel instrument or agreement* on Provisional Application to be signed at the same time as the Treaty by countries which are willing to commit themselves to Provisional Application."[24]

In other words, the first approach would allow all signatories to be bound by provisional application unless they opted out from the mechanism, while the second approach, as advocated by Japan, would allow for an opt-in mechanism. As highlighted by the Secretary General:

> "Both solutions would avoid the CONF 91 approach of mentioning specific countries in the text of the Article. The second approach would automatically create reciprocity since only the signatories of the parallel instrument would benefit from Provisional Application. [But] reciprocity could probably also be made part of the first approach by stating in the Article that 'Declaration countries' would not benefit from Provisional Application by others."[25]

Equally important was the survival of the substantive protection accorded to investments made during the period of provisional application in the event that the signatory State decided not to ratify the Treaty:

---

[24] European Energy Charter Conference Secretariat, Plenary Session of 7-11 March 1994, Room Document 13, March 8, 1994, page 2, point 1 (emphasis added).

[25] *Ibid*.

> "Paragraph 3 of Article 50 in CONF 82 included a commitment to protect, for twenty years, investments made during the period of provisional application from the consequences of later termination/non-ratification by the country concerned. This was dropped from the compromise proposal in CONF 91 but several delegations at the Plenary argued for its reinstatement *to provide certainty for investors*."[26]

The requirement of reciprocity, the importance of which was underscored by the Secretary General, was included in the draft circulated for discussion at the Plenary Session. The compromise text based on the Japanese proposal provided as follows:

> "(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 49 to the extent that such provisional application is not inconsistent with its laws, regulations or constitutional requirements.
>
> (2) Notwithstanding paragraph (1) any signatory may, when signing this Treaty, deposit with the Depositary *a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory depositing such a declaration*. Any such signatory may at any time withdraw that declaration by written notice to the Depositary.
>
> (3) *A signatory which deposits a declaration in accordance with paragraph (2) shall not benefit from provisional application of this Treaty by other signatories*."[27]

In other words, with this new draft, any signatory which had a difficulty with provisional application could opt out by a

---

[26] *Ibid* (emphasis added).

[27] European Energy Charter Conference Secretariat, Plenary Session of 7-11 March 1994, Room Document 15, March 8, 1994 (emphasis added).

declaration deposited with the Depositary, as a consequence of which (*i*) it would not be bound provisionally by the provisions of the Treaty (draft Article 50(2)) and (*ii*) its investors would not benefit from the protection of the Treaty vis-à-vis other Contracting Parties (draft Article 50(3)). This was in keeping with the requirement of reciprocity of rights and obligations under international law and the concern expressed by the negotiators that a signatory not applying the Treaty provisionally not be afforded greater rights than those it was extending.[28]

It bears noting that this draft contains all the principal features finally adopted as Article 45(1) through Article 45(3). It is also significant that the approach chosen was based on Japan's proposal, with its strong focus on a transparency discipline.

The European Community also presented an alternative text aimed at creating a transparent framework and providing protection to investors who had relied on the signatories' intention to apply the Treaty provisionally. The European Community's proposal included in particular a sixth paragraph providing for a 20-year protection for investments made during the period of provisional application in the event of a signatory's termination of such provisional application, as well as the possibility for those signatories which did not wish to commit to such an extended protection to opt out in a separate Annex PA.[29]

---

[28] Reciprocity was not a new concern: in fact, reciprocity as a safeguard in the context of provisional application had been addressed in a Memorandum regarding pending matters before the Legal Sub-Group in March 1993: "The principal question raised was the obligation of a State for which the Agreement is in force toward a State that is applying the Agreement provisionally. Our conclusion was that the State for which the Agreement is in force might choose to adopt a policy of reciprocity insofar as concerns rights owed it by a provisionally-applying State, so that no greater rights were afforded the provisionally-applying State than it was extending." (European Energy Charter Conference Secretariat, Document 93, LEG-20, March 20, 1993).

[29] European Energy Charter Conference Secretariat, Plenary Session of 7-11 March, 1994, Room Document 32, March 9, 1994. The text proposed by the European Community also incorporated, with variations, the existing paragraphs 1 and 2 of draft Article 50. The EC proposal for draft Article 50(1) for example was formulated as follows: "Those signatories whose laws, regulations

These two proposals would remain, although with a few adjustments, in the draft text until its final adoption as Article 45.

The seventh draft text of the Treaty circulated on March 17, 1994, reflected the positions reached during the March Plenary session:

> "(1) [Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 49, to the extent that such provisional application is not inconsistent with its laws, regulations or constitutional requirements.]
>
> (2) (a) [Notwithstanding paragraph (1) any signatory may on signature, make 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 notice to the Depositary.
>
> (b) A signatory which makes a declaration in accordance with paragraph (2)(a) may not claim the benefit of provisional application under paragraph (1).
>
> (c) Notwithstanding paragraph (2)(a), any signatory making a declaration referred to in paragraph (2)(a) shall apply Part VII of this Treaty provisionally pending the entry into force of the Treaty in accordance with Article 49, to the

---

and constitutional requirements so permit shall apply the Treaty provisionally […], to the extent that such provisional application is not inconsistent with their laws and regulations". The EC proposal for draft Article 50(2) in turn provided that "[t]hose signatories whose laws, regulations and constitutional requirements do not so permit shall, on signature, make a declaration that they are not able to accept provisional application. […]". Draft Article 50(3) also contained the reciprocity requirement.

> extent that such provisional application is not inconsistent with its laws or regulations."[30]

This draft thus incorporated the principle of provisional application, its operation and the reciprocity safeguard called for by a number of delegations. Draft Article 50(1) sets out the general rule that each signatory automatically applies the Treaty provisionally to the extent that provisional application is not inconsistent with its constitutional requirements, laws or regulations. Draft Article 50(2) sets out the mechanism according to which signatories that are not able to accept provisional application may opt out by making a declaration, with the consequence that the investors of opting-out signatories would not benefit from the protection of the Treaty and that Part VII on the institutional mechanism would nevertheless be provisionally binding on opting-out signatories to the extent such provisional application is not inconsistent with their laws or regulations. This draft also incorporated in its sub-paragraph (3) the 20-year protection survival for investments made during the period of provisional application, as well as the proposal by the European Community to allow signatories to opt-out of such protection by asking for their inclusion in Annex PA.[31]

In pursuance of the discussions and agreements reached during the March 1993 Plenary Session, the Secretariat issued a Note on April 28, 1994, recalling the "strong commitment" of the negotiating States to provisional application and the possibility offered by Draft Article 50(2) to "countries which did not wish to apply the Treaty provisionally to make a declaration to that effect at the time of signature".[32] The Note went further, by implementing the transparency discipline and asking the negotiating States to make a determination as to whether they

---

[30] European Energy Charter Conference Secretariat, Note from the Secretariat, 17/94, CONF 96, March 17, 1994.

[31] European Energy Charter Conference Secretariat, Document 17/94, CONF 96, March 17, 1994.

[32] European Energy Charter Conference Secretariat, Message No. 239, April 28, 1994.

wished to opt out of provisional application pursuant to Draft Article 50(2)(a) or to opt out of the 20-year protection by asking to be listed in Annex PA:

> "It was emphasized at the March Plenary that all participants should be informed well before signature of which countries would request exceptions to provisional application; Any delegations wishing to make such requests should therefore notify the Secretariat, *on or before 20 May*:
>
> (a) if they intend to make a declaration under Article 50(2)(a) that they will not apply the Treaty provisionally; or
>
> (b) if they cannot accept the 20-year investment protection rule in Article 50(3)(b) and should therefore be listed in Annex PA."[33]

The States' responses to this invitation were reflected in the summary provided in Room Document 1 circulated during the Plenary Session of June 7-10, 1994. After underscoring the importance of transparency and of the information of all delegations about the positions of all countries regarding provisional application, the Secretariat referred to the opting-out mechanisms of Draft Article 50(2)(a) and 50(3)(c):

> "It was emphasised at the March Plenary that delegations should be informed before signature of the Treaty of the positions of all countries regarding provisional application.
>
> Under Article 50(2)(a) countries which do not wish to apply the Treaty provisionally may exempt themselves from doing so by making a declaration to that effect on the date of signature.

---

[33] European Energy Charter Conference Secretariat, Message No. 239, April 28, 1994 (emphasis in original).

> Under Article 50(3)(c) countries which will apply the Treaty provisionally but cannot accept a 20-year protection for investments made during the period of provisional application may list themselves in Annex PA.
>
> The following countries have notified the Secretariat that they intend to take advantage of these exemptions."[34]

Those countries were, unsurprisingly, those that had voiced their concerns throughout the negotiating period, namely Austria, Japan, Norway, Romania and Switzerland as regards a declaration under Draft Article 50(2)(a), and the Czech Republic, Germany, Hungary and Lithuania as regards an inclusion on Annex PA.[35]

Following these exchanges on notification issues, the only further substantial change to draft Article 50 was an addition proposed by the Legal Sub-Group in June 1994 in relation to the principle of reciprocity, to clarify that an opting-out State would not benefit from the Treaty either directly or through its investors. Draft Article 50(2)(b) was thus completed as follows and remained unchanged until its final adoption as Article 45(2)(b):

> "*Neither* a signatory which deposits a declaration in accordance with paragraph 2(a) [regarding its non-acceptance of provisional application] *nor investors of that signatory* may claim the benefits …"[36]

Following this addition, no further changes occurred other than the re-numbering of the draft provision as Article 45 (Provisional application), with the Final Text of the Treaty for adoption circulated on September 14, 1994 through a Note from the Conference Chairman. The same document included an

---

[34] European Energy Charter Conference Secretariat, Plenary Session of 7-10 June 1994, Room Document 1 Rev, June 9, 1994.

[35] *Ibid*.

[36] European Energy Charter Conference Secretariat, LSG Report, June 21, 1994.

Annex on Actions Accompanying Signature of the ECT, which stated *inter alia* that "Article 45(2)(a) allows any signatory to avoid provisional application of the Treaty by making a declaration to that effect on the date of signature".[37]

In keeping with these safeguards and the transparency discipline adopted by the negotiating States, the Secretariat pursued its efforts to draw up a list of signatories which would not apply the treaty provisionally. It was on this basis that on December 19, 1994, two days following the signature of the ECT, the Secretariat issued a "preliminary list of Signatories which will not apply the Energy Charter Treaty provisionally",[38] with a final list to be circulated after consultation with the delegations and the Depositary. This preliminary list referred to three categories of signatories which would not apply the Treaty provisionally, namely (*i*) the "list of signatories which would not apply the Treaty provisionally in accordance with Article 45(1)", this list including Austria, Italy, Portugal, Romania and Turkey; (*ii*) the "list of signatories making a declaration that they cannot accept provisional application of the Treaty in accordance with Article 45(2)(a)", this list including Bulgaria, Iceland, Liechtenstein, Malta, Poland and Switzerland; and (*iii*) the "list of delegations which intended, when they sign the Treaty, to make a declaration that they cannot accept provisional application of the Treaty in accordance with Article 45(2)(a)", namely Norway and Japan.[39] Accordingly, all signatories which had difficulty with the provisional application of the Treaty expressed their position to other signatories at the time of signature, in accordance with the principle contained in Article 45(2)(a).

---

[37] European Energy Charter Conference Secretariat, Document 27/94, CONF 104, September 14, 1994, Annex entitled "Actions Accompanying Signature of the Energy Charter Treaty", page 2.

[38] European Energy Charter Conference Secretariat, Document 41/94, CONF 114, December 19, 1994.

[39] *Ibid.*

The final text of Article 45 as adopted reflects the principles of transparency, reciprocity and legal security that had been underscored during the negotiations.

Article 45(1) expresses the principle of provisional application 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."

Article 45(2) contains the opt-out mechanism ultimately adopted by the negotiators (without prejudice to the signatory's obligation to apply Part VII of Treaty relating to the Treaty's structure and institutions) as well as the required safeguard of reciprocity allowing a State to opt out while not permitting it to receive more advantages than those it would agree to extend itself:

> "(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.
>
> (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).
>
> (c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with

Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations."

Article 45(3) deals with the termination of provisional application and its effects. Notably, signatories remain free to withdraw from provisional application, with such withdrawal taking effect 60 days from the date of the Depository's receipt of the notification; however, the withdrawing signatory remains bound for 20 years by the obligations under Part III (Investment Protection and Promotion) and Part V (Dispute Settlement) with respect to investments made in its Area during provisional application, unless it has opted out of this extension by asking to be listed in Annex PA:

"(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.

(b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V 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, except as otherwise provided in subparagraph (c).

(c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective

> upon delivery to the Depository of its request therefor."

This formulation ensures that provisional application has legal consequences and that the investors' rights accorded by the Treaty with respect to investments made during the period of provisional application do not evaporate when a signatory ceases to apply provisionally the Treaty.

The strong legal framework provided by Article 45 shows how, in the context of the negotiation of a multilateral treaty, the consensus on the necessity of attaining a common goal may bring about a text reflecting all various views and positions while reaching the optimal result based on the highest common denominator. The ECT, including its Article 45, has achieved this rare occurrence in the multilateral framework.