**SERIES OF NOTES ON THE ENERGY CHARTER TREATY**

**Note 8**

**21 April 2014**

# ARTICLE 45 OF THE ENERGY CHARTER TREATY

## Highlights of the Negotiating History of the Provisional Application



## INTRODUCTION

1. This 8th note of the *Series of Notes on the Energy Charter Treaty* is predominantly of a historical interest than of an analytical value. Competent analysis of the most essential aspects of Article 45 of the ECT has been proffered by the Arbitral Tribunals in the *Yukos* cases.[1] There have also been a number of scholarly commentaries regarding the interpretation and application of the ECT's Article 45 entitled Provisional Application (PA).[2]

2. After withdrawal of the Russian Federation of its provisional application of the ECT in 2009, Belarus is the only signatory which applies the ECT in full on provisional basis. It could, however, be added that according to the *Petrobart* award, the ECT also applies provisionally to Gibraltar, as an overseas territory of the United Kingdom.[3]

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

[2] See, e.g., Alex M. Niebruegge, "Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law", 8 *Chicago Journal of International Law*, No. 1, 2007, pp. 355-375. Available at http://harriman.columbia.edu/files/harriman/01764.pdf

[3] See Note 9 in this *Series*.

3. The main aim of this note is therefore to complete the debate concerning the scope of Article 45 of the ECT by providing a chronological summary of some of the main highlights of the negotiating history. This notwithstanding, this note offers three interpretative observations by way of a conclusion.

## HIGHLIGHTS OF NEGOTIATING HISTORY

4. The political objective that the ECT should apply provisionally pending its entry into force was included in the text of the first draft of the ECT.[4] As the negotiation of the ECT text progressed so too did the provisions concerning the provisional application of the Treaty.

### 1991

5. Article 41 of the Basic Protocol (as the ECT was then known) provided for provisional application with the exception mentioned in Article 2.[5]

6. Early on in the negotiations, the delegation of the United States noted that provisional application was not "possible in the US, where a treaty or legislation is required before *such a document comes into force*", and suggested overcoming this obstacle by adding "to the extent that their laws allowed".[6] By making this statement, the US delegation was alluding to the fact that the US cannot apply a treaty at the international level on a provisional basis (before such a treaty enters into force) because domestic legislation authorising the executive to take on such an obligation was required.

7. The subsequent draft of the Basic Agreement (formerly Basic Protocol) contained a new draft of the PA article, which was proposed by the US, Canada and Norway.[7] However, as we shall see later Norway tabled a reservation to the concept of provisional application in spite of the inclusion of the "[…] not inconsistent with their national laws […]" phrase.

[4] See Article 41 of the BP 2 (Basic Protocol) (8/91) of 12 September 1991.
[5] Article 2 at that time dealt with non-application and reciprocity.
[6] See BP 3 (14/91) of 11 October 1991. Emphasis added.
[7] See BA4 (Basic Agreement) (21/91 Annex 1) of 21 October 1991.

**1992**

8. As a result of negotiations in Working Group II on 09 June 1992, the phrase "[…] to the extent not consistent with their laws […]" was replaced with "[…] to the extent that such provisional application is not inconsistent with their laws or constitutional requirement […]".[8] The additional phrase "constitutional requirement" to the so-called "to the extent" clause is further evidence that the provisional application of the Treaty was considered to be a legal concept which facilitated the assumption of treaty obligations binding under international law. Whether or not a state can assume treaty obligations provisionally (i.e. before it enters into force) is normally a matter of constitutional concern. Canada tabled a reservation whereas Norway tabled a scrutiny reservation. Japan, however, proposed replacing the whole article with another containing a notification system (i.e. notification as to whether or not a signatory can apply the Treaty provisionally).

9. The text of the PA article remained unchanged until December 1992. However, Canada pointed out "that this Article is not complete and raised questions in relation to other articles of the BA". Japan reintroduced its proposal to replace the PA article with new provisions.[9]

**1993**

10. During the meetings of Working Group II (01-06 February 1993), Canada circulated Room Document 11, dated 02 February 1993, proposing a new PA article, by adding two additional paragraphs. The main trust of the Canadian proposal was "[…] addressing concerns […] over the need to protect investments made during the period of provisional application of the Basic Agreement." The Canadian proposal was included in the subsequent texts of the Basic Agreements as a footnote.[10]

11. Working Group II held its last meetings on 22-27 February 1993 before handing over the negotiations to the Plenary. The Chairman of the Working Group II submitted his Compromise text of the Charter Treaty to the Plenary.[11] The PA article (then Article 50)

[8] See Article 40, BA 14 (32/91) Revised draft text of 24 June 1992.
[9] See BA 31 (76/92) of 21 December 1992.
[10] See BA 35 (15/93 Annex) of February 1993.
[11] See CONF 50 of 15 March 1993.

incorporated the abovementioned proposal, which specifically indicated that provisional application applies also to the investment and dispute settlement parts of the Treaty.

12. Room Document 6 (Plenary Session), dated 15 December 1993, was circulated to delegations, "[…] bring[ing] together all the provisional application elements of the Treaty […]" which have so far been discussed. In that document, Norway "[…] propose[d] the deletion of the whole Article because the principle of provisional application is not acceptable." Again, this was in spite of the "to the extent" clause, which has not so far been discussed.

13. During the Plenary Session (14-18 December 2013), Room Document 7 was circulated to delegations. In its cover note, this Room Document stated that "[…] some delegations raised difficulties on paragraphs (1) to (3) of Room Document 6, and five delegations (CH, H, J, N, RO) stated that provisional application was not acceptable to them for *constitutional reasons*. No other justifications were identified, and the remaining delegations "[…] emphasised the importance of provisional application for the Treaty objectives." Additionally, the US suggested new language to paragraph (1) replacing "The signatories […]" with "Each signatory […]". Moreover, the US objected to paragraph (2), providing for termination of provisional application, and paragraph (3), providing for the application of the ECT to investment and dispute settlement after the termination of provisional application.[12]

14. On 21 December 1993, the Secretariat circulated message No. 203 addressed to the six delegations, which expressed concern regarding provisional application, requesting clarification and proposed solutions.

**1994**

15. On 28 February 1994, based on the previous "Plenary discussions and subsequent consultations […]", the Secretariat circulated "[…] a possible compromise […]" draft on the PA article.[13]

16. During the Plenary Meeting of 07-11 March 1994, the PA article was discussed.[14] There was an agreement that "[…] there should be a strong commitment to Provisional Application of the

[12] CONF-82 (74/93) of 20 December 1993. In this Plenary Session, the US delegation proposed the replacement of "The signatories […]" with "Each signatory […]".
[13] See Article 50, CONF 91 (12/94).
[14] See CONF 96 (17/94) of 17 March 1994.

Treaty (subject to constitutions, laws etc.) but that *a way should be found* to allow a few countries (possibly J, N, H, CH) to except themselves from *that* commitment."[15] During that time, different mechanisms to accommodate the concerns of countries with heterogeneous set of problems were explored. These discussions were based on the assumption that countries with constitutional problems vis-à-vis provisional application should be clearly identified through one mechanism or another.

17. On 28 April 1994, the Conference Secretariat dispatched message No. 239 notifying the negotiating parties of the mechanism, which has been agreed upon for the purposes of transparency concerning provisional application. This message stated that:

> At the March Plenary it was agreed that the should be a strong commitment to Provisional Application of the Energy Charter Treaty […] In response taken by some delegations, Article 50(2)(a) [now Article 45(2)(a)] would allow countries which did not wish to apply the Treaty provisionally to make a declaration to that effect at the time of signature.

18. The statement concisely summarises the purpose of Article 45(2)(a), which is to allow signatories unable to apply the ECT provisionally before its entry into force to opt-out from such an obligation by depositing a declaration with the Depository.

19. On 07 June 1994, the Secretariat circulated Room Document 1 in the Plenary Session held on 07-10 June 1994. The Room Document stated that "[i]t 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.*"[16] This provides evidence of the importance of notification, which was essential to the transparency exercise required under Article 45(2)(a) of the ECT.

## CONCLUDING OBSERVATIONS

20. First, it is imperative to remember that *provisional application* is a concept of international law.[17] Its legal function is to enable states to apply (assume) treaty obligations immediately upon signature.[18] As regards the ECT, it was in this same sense that the provisional application was introduced by the US delegation, and, indeed, understood by most delegations. This is clear

[15] Emphasis added.
[16] Emphasis added.
[17] See, for example, Article 25 of the Vienna Convention on the Law of Treaties, 1969.
[18] Where a treaty requires ratification, acceptance, approval or accession in order to enter into force.

from the phrase initially tabled by the US delegation: "[…] to the extent that their laws allowed […]", which was later altered during the negotiations into "[…] to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." The change of the phraseology does not affect the international law nature of the concept of provisional application. Accordingly, the pertinent question to ask, as far as Article 45(1) is concerned, is whether a signatory is permitted by its constitution, laws or regulations to assume provisionally the international obligations arising from the ECT, pending the latter's entry into force. Understood thus, it was imperative for the ECT negotiators to have a clear idea as to which of the signatories would be in a position to apply the treaty provisionally upon signature; otherwise, the entire purpose of provisional application would have been defeated. It was with this in mind that the Secretariat circulated Room Document 1 on 07 June 1994, which stated that "[i]t 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*". As a consequence, the transparency required in Article 45(2)(a) must be read in this context. It is to be noted also that the provisional application of the ECT at the international level may have legal consequences at the domestic level. But that is a matter for domestic law to deal with.

21. Second, it is clear from the records, however, that a degree of confusion existed amongst a number of delegations and participants during the negotiations regarding the actual nature and function of the concept of provisional application. This confusion is similar to the one which frequently arises when drawing the distinction between the nature of ratification of a treaty in international law on the one hand and municipal law on the other.

22. Third, the prevailing understanding of the negotiating parties was that any signatory that was *unable* to apply the ECT on provisional basis would submit a declaration to the Depository to that effect. Indeed, this opt-out has been explicitly provided for in Article 45(2)(a) of the ECT.