

## 18. Energy Charter Treaty

Communication from the Secretariat of the Energy Charter Treaty (ECT) transmitted to the Secretariat, 28 July 2022.<sup>285</sup>

### *Article 45 (Provisional Application)*

(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.

(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.

(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.

(4) Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in Article 38.

(5) The functions of the Secretariat shall be carried out on an interim basis by a provisional Secretariat until the entry into force of this Treaty pursuant to Article 44 and the establishment of a Secretariat.

(6) The signatories shall, in accordance with and subject to the provisions of paragraph (1) or subparagraph (2)(c) as appropriate, contribute to the costs of the provisional Secretariat as if the signatories were Contracting Parties under Article 37(3).

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<sup>285</sup> Edited by the United Nations Secretariat.

Any modifications made to Annex B by the signatories shall terminate upon the entry into force of this Treaty.

(7) A state or Regional Economic Integration Organisation which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article.

Several signatories have provisionally applied the ECT, including the European Union and Euratom "to the extent that it has competence for the matters governed by the Treaty".<sup>286</sup>

An interesting notification is that of Liechtenstein (applying automatically, based on their Customs Union Agreement, the Swiss declaration in relation to trade matters).<sup>287</sup>

The Russian Federation terminated [its] provisional application of the ECT in 2009.<sup>288</sup> However, Article 45(3)(b) [provides] for a 20 year sunset clause (protection of existing investments). This was confirmed in the Yukos awards<sup>289</sup> and in later arbitration cases under the ECT.<sup>290</sup> Nevertheless, the Russian Federation continues to be involved in the activities of the Conference and its subsidiary bodies. In 2018, the Russian Federation sent a communication stating they were not to be considered as Signatories of the ECT as of 2009 and the Budget Committee decided to keep the question of the outstanding arrears of the Russian Federation under consideration.<sup>291</sup> On 19 October 2021, the Strategy Group took note of the country's status as no longer being an [Energy Charter Treaty] Signatory.<sup>292</sup> It was subsequently decided to remove the contributions of the Russian Federation from the budget.<sup>293</sup>

[The Energy Charter Conference at its Ad Hoc Meeting on 24 June 2022] decided to suspend Belarus' provisional application of the entire [Energy Charter Treaty].<sup>294</sup>

<sup>286</sup> See: Council Decisions 94/998/EC and 94/1067/Euratom of 15.12.1994.

<sup>287</sup> See: [https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Depository\\_documents/Liechtenstein/ECT\\_\\_\\_PEEREA.pdf](https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Depository_documents/Liechtenstein/ECT___PEEREA.pdf).

<sup>288</sup> See: [https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Founding\\_Docs/Letter\\_Russian\\_Federation\\_2009.pdf](https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Founding_Docs/Letter_Russian_Federation_2009.pdf).

<sup>289</sup> See: <https://www.energychartertreaty.org/details/article/yukos-universal-limited-v-russian-federation-pca-case-no-aa-227/>.

<sup>290</sup> *Yukos Capital S.à.r.l v. Russian Federation, Final Award*, 2017, available at: [https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/38\\_Yukos\\_Capital\\_SARL/2021.07.23\\_Final\\_Award.pdf](https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/38_Yukos_Capital_SARL/2021.07.23_Final_Award.pdf); *Russian Federation v. Yukos Capital S.à.r.l*, Federal Court of Switzerland, Civil Law, Judgment of 20 July 2017, available at: [https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/38\\_Yukos\\_Capital\\_SARL/Judgment\\_of\\_the\\_Swiss\\_Federal\\_Supreme\\_Court\\_on\\_Russia\\_s\\_Set-Aside\\_Application\\_\\_French\\_.pdf](https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/38_Yukos_Capital_SARL/Judgment_of_the_Swiss_Federal_Supreme_Court_on_Russia_s_Set-Aside_Application__French_.pdf); Financial Performance Holdings B.V. (discontinued in 2016); and *Luxtona Limited v. Russian Federation*, Interim award on Jurisdiction, 22 March 2017, available at: [https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/65\\_Luxtona/2017.03.22\\_Interim\\_Award\\_on\\_Respondent\\_s\\_Objections\\_to\\_the\\_Jurisdiction\\_of\\_the\\_Tribunal.pdf](https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/65_Luxtona/2017.03.22_Interim_Award_on_Respondent_s_Objections_to_the_Jurisdiction_of_the_Tribunal.pdf).

<sup>291</sup> See: Document CCDEC/2018/14/NOT (27 November 2018), available at: [https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201814\\_-\\_NOT\\_Report\\_of\\_the\\_Budget\\_Committee.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201814_-_NOT_Report_of_the_Budget_Committee.pdf).

<sup>292</sup> See: Document CCDEC/2021/34/NOT (14 December 2021), available at: <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2021/CCDEC202134.pdf>.

<sup>293</sup> See: Document CCDEC/2021/25/BUD (14 December 2021), available at: <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2021/CCDEC202125.pdf>.

<sup>294</sup> See: Document CCDEC/2022/11/SGN (24 June 2022), available at: <https://www.energycharter-treaty.org/fileadmin/DocumentsMedia/CCDECS/CCDEC202211.pdf>.

According to Article 45(2)(c) of the ECT, Signatories who sent a declaration not accepting provisional application of the Treaty still applied Part VII of the treaty. Those included Iceland (until ratification in 2015), Norway and Australia (until 2021)<sup>295</sup> see notification).

### **Amendment to the Trade-Related Provisions of the ECT (the Trade Amendment)**

#### *Article 6*

#### *Provisional Application*

(1) Each signatory which applies the Energy Charter Treaty provisionally in accordance with Article 45(1) and each Contracting Party agrees to apply this Amendment provisionally pending its entry into force for such signatory or Contracting Party to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

(2) (a) Notwithstanding paragraph (1):

(i) any signatory which applies the Energy Charter Treaty provisionally or Contracting Party may deliver to the Depository within 90 days from the date of the adoption of this Amendment by the Charter Conference a declaration that it is not able to accept the provisional application of this Amendment;

(ii) any signatory which does not apply the Energy Charter Treaty provisionally in accordance with Article 45(2) may deliver to the Depository not later than the date on which it becomes a Contracting Party or begins to apply the Treaty provisionally a declaration that it is not able to accept the provisional application of this Amendment.

The obligation contained in paragraph (1) shall not apply to a signatory or Contracting Party making such a declaration. Any such signatory or Contracting Party may at any time withdraw that declaration by written notification to the Depository.

(b) Neither a signatory or Contracting Party which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory or Contracting Party may claim the benefits of provisional application under paragraph (1).

(3) Any signatory or Contracting Party may terminate its provisional application of this Amendment by written notification to the Depository of its intention not to ratify, accept or approve this Amendment. Termination of provisional application for any signatory or Contracting Party shall take effect upon the expiration of 60 days from the date on which such signatory's or Contracting Party's written notification is received by the Depository. Any signatory which terminates its provisional application of the *Energy Charter Treaty* in accordance with Article 45(3)(a) shall be considered as also having terminated its provisional application of this Amendment with the same date of effect.

Several Contracting Parties are provisionally applying the amendments.

### **The 2022 amendments to the ECT**

It is anticipated that Contracting Parties will also agree on potential provisional application (using similar wording as in the Trade Amendment) in the decision of the Conference to be approved on 22 November 2022.

<sup>295</sup> See: [https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Depository\\_documents/Australia\\_-\\_Notification\\_under\\_Article\\_45\\_3\\_\\_a\\_.pdf](https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Depository_documents/Australia_-_Notification_under_Article_45_3__a_.pdf).