

# RECIPROCITY AND PROVISIONAL APPLICATION UNDER THE ENERGY CHARTER TREATY: LEGAL ASPECTS<sup>1</sup>

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## 1. INTRODUCTION

### 1.1. General

Reciprocity as a concept is inherent in all human behaviors in the sociological context. Indeed, reciprocity may be alleged to have its roots in the basic human activities of any nature observed in daily life; and therefore is a notion as old as the history of mankind. Nevertheless, according to Howard Becker, it is one of the few concepts which remain more obscure and ambiguous, yet is so important that he has even spoken of man as "*Homoreciprocus*".<sup>3</sup> Reciprocal relations play an important role also in economics, since good economic performance is closely linked to such characteristics as trust and reciprocity.<sup>4</sup>

Many people deviate from purely self-interested behavior in a reciprocal manner.<sup>5</sup> This is more so especially in situations where contracts are incomplete, given the fact that the bulk of people's daily

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**Important Note: The views expressed in this paper are those of the author and not necessarily of the Energy Charter Secretariat or any member of the Energy Charter constituency.**

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<sup>3</sup> GOULDNER, ALVIN W; '*The Norm of Reciprocity: A Preliminary Statement*', American Sociological Review, No 25, 1960, p 161-178.

<sup>4</sup> BARBERA, FILIPPO; '*Economic Sociology in Italy*', Economic Sociology, Vol 1, No 2, January 2000, p 12.

<sup>5</sup> FEHR, ERNST / GACHTER, SIMON; '*Fairness and Retaliation: The Economics of Reciprocity*', Institute for Empirical Research in Economics, University of Zurich, Working Paper Series, No 40, March 2000, p 1.

interactions is not governed by explicit, enforceable contracts but by informal agreements<sup>6</sup> wherein reciprocity is embodied<sup>7</sup>; such as employment contracts whereby the workers' wages cannot be set on the performance, and reciprocity has powerful economic effects in these circumstances.<sup>8</sup> This argument made herewith also has repercussions for international treaties, given that both incomplete contracts and international treaties have one feature in common: lack of an authority to endorse their enforcement.

Therefore, the concept is inevitably valid and has been applied to relations among sovereign nations as well, especially in respect of inter-state trade relations. Indeed, as claimed by a study<sup>9</sup>, reciprocity is also a strong force contributing to the existence of incomplete contracts; and drawing on the same similarity mentioned above, one may induce the argument that the same applies to international treaties as well, since they are sometimes able to surface, thanks only to the reciprocal character of international relations among sovereign nations. Over time, reciprocity has come to have a significant impact on the decision-making of responsibly governed states in the global economic, political and security arenas.<sup>10</sup>

The prominent feature of the Energy Charter Treaty (ECT) as an international (and more importantly, the only multilateral) legal framework on investments is that, it aims at providing a "level playing field" to promote and protect investment and trade activities in the energy sector. As such, the concept of reciprocity and the provisional applicability provided under this Treaty are inextricably linked, in order to ensure creating this "level playing field". It is because of the possible outcome of the provisional application of the ECT: should provisional application be construed in a way to allow the member states (or their investors and/or trading companies) take advantage of the provisional application to their unilateral benefits that might induce other parties involved taking reciprocal actions, this can easily

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<sup>6</sup> ARMIN FALK / ERNST FEHR / URS FISCHBACHER; *Informal Sanctions*, Institute for Empirical Research in Economics, Working Paper No 59, September 2000, p 1.

<sup>7</sup> SERGIO G LAZZARINI / GARY J MILLER / TODD R ZENGER; *Order with Some Law: Complementarity vs. Substitution of Formal and Informal Arrangements*, Third Version, December 2001, p 2.

<sup>8</sup> FEHR, ERNST / GACHTER, SIMON; *Fairness and Retaliation: The Economics of Reciprocity*, Institute for Empirical Research in Economics, University of Zurich, Working Paper Series, No 40, March 2000, p 19.

<sup>9</sup> FEHR, ERNST / GACHTER, SIMON; *Fairness and Retaliation: The Economics of Reciprocity*, Institute for Empirical Research in Economics, University of Zurich, Working Paper Series, No 40, March 2000, p 22.

<sup>10</sup> FOREST, JAMES J F; 'When Reciprocity Fails', 16 October 2006 (<http://www.familysecuritymatters.org/>).

hamper the “level playing field” which the ECT envisages to establish, and could thus undermine the very spirit of cooperation and basic aim of the Treaty.

Furthermore, from a practical point of view, provisional application of the ECT has been –and indeed is also currently- at the core of discussions brought before some arbitral tribunals which are entrusted to decide whether the provisionally applying countries under the ECT are bound by the Treaty or not. Depending on the outcome of such arbitral tribunals’ awards, this issue may lead to a situation where reciprocal actions by the relevant stakeholders would be at stake or triggered. Therefore, we believe that the issue merits a detailed analysis of the related concepts from a legal perspective.

To this end, this paper intends to discuss first the concept of reciprocity, and then analyze this concept within the environment of the ECT, followed by a thorough examination of it vis-à-vis provisional application under the Treaty. A detailed analysis is provided from the international law perspective, with implications under international conventions, as well as a separate section on the applicability of international arbitration provisions of the ECT within this framework. Although this paper offers a legal perspective, some commentary in economics is also provided, to the extent the concept of reciprocity requires (such as Section 4.5., regarding the “free riding” that may emerge under the Treaty). Finally, for ease of reference, some related provisions of international conventions and the ECT are provided as an Annex at the end of the paper.

## ***1.2. Reciprocity as an inter-disciplinary concept***

The basic feature of reciprocity is that it emerges in all relations where there is a lack of authority to apply sanctions in relations, be it among people in their relations in the social context, or among sovereigns in the absence of supranational institutions. Therefore, under international law, reciprocity retains particular importance in the absence of an external authority to enforce agreements, and may be construed as to involve returning like behavior with like.<sup>11</sup>

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<sup>11</sup> PARISI, FRANCESCO / GHEI, NITA; *The Role of Reciprocity in International Law*, George Mason University Law and Economics Research Paper Series, 02-08, p 1 (<http://ssrn.com/abstract=307141>).

Although there seems to be an unequivocal consensus on the importance of reciprocity among scholars, they present no systematic definition of reciprocity.<sup>12</sup> Still yet, a basic definition for the norm of reciprocity may be depicted as “tit for tat” (heteromorphic reciprocity) or “tat for tat” (homeomorphic reciprocity) –depending on the form of equivalence<sup>13</sup>, or it may be defined as an in-kind response to beneficial or harmful acts.<sup>14</sup> In sum, beyond reciprocity as a pattern of exchange and beyond folk beliefs about reciprocity as a fact of life, there is another element: a generalized moral norm of reciprocity which defines certain actions and *obligations* as repayments for benefits received.<sup>15</sup>

Reciprocity is not an evil in itself, and indeed there are various types of behaviors that may lead to positive outcomes. This is particularly important in international trade, since there can be no exchange without reciprocity, and it is the only channel through which the material wealth of the world can be made available to all its people and put to its proper use of benefiting mankind.<sup>16</sup> Nevertheless, reciprocity may also lead to retaliatory actions in very much the same way as it may induce positive results. The concept of reciprocity may therefore be taken in two different groups; cooperative reciprocal tendencies may be labeled as “positive reciprocity”, while the retaliatory aspects are called “negative reciprocity”.<sup>17</sup> In other words, it seems that people are prone to punish others who choose a course of action that produces

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<sup>12</sup> GOULDNER, ALVIN W; ‘*The Norm of Reciprocity: A Preliminary Statement*’, *American Sociological Review*, No 25, 1960, p 161-178.

<sup>13</sup> GOULDNER, ALVIN W; ‘*The Norm of Reciprocity: A Preliminary Statement*’, *American Sociological Review*, No 25, 1960, p 161-178. Historically, the most important expression of homeomorphic reciprocity is found in the *negative* norms of reciprocity, that is, in sentiments of retaliation where the emphasis is placed not on the return of benefits but on the return of injuries (Ibid).

<sup>14</sup> FEHR, ERNST / GACHTER, SIMON; *Fairness and Retaliation: The Economics of Reciprocity*, Institute for Empirical Research in Economics, University of Zurich, Working Paper Series, No 40, March 2000, p 2.

<sup>15</sup> GOULDNER, ALVIN W; ‘*The Norm of Reciprocity: A Preliminary Statement*’, *American Sociological Review*, No 25, 1960, p 161-178.

<sup>16</sup> KING, WILLIAM F; ‘*International Arbitration and Reciprocity*’, *The New York Times*, 8 June 1902.

<sup>17</sup> FEHR, ERNST / GACHTER, SIMON; *Fairness and Retaliation: The Economics of Reciprocity*, Institute for Empirical Research in Economics, University of Zurich, Working Paper Series, No 40, March 2000, p 1.

negative effects on their own welfare, even if punishment is costly (negative reciprocity), and reward others who choose a course of action that produces positive effects on their welfare (positive reciprocity).<sup>18</sup>

## 2. Reciprocity and the ECT

The ECT is an international legal framework established by an international treaty dated 1994 to promote long-term cooperation in the energy sector based on the principles enshrined in the European Energy Charter<sup>19</sup>. It is appraised as “the international community’s most significant instrument for the promotion of cooperation in the energy sector, providing the legal basis for an open and nondiscriminatory energy market.”<sup>20</sup> One of its most prominent features might be asserted to have been embodied in the principle that, it envisages –among others– a ‘level playing field’ and reduce to a minimum the non-commercial risks associated with energy sector investments<sup>21</sup> throughout its constituency. A balance among the investors of Contracting Parties, therefore, lies in the very heart and spirit of the ECT, which calls for reciprocity as an important aspect within this structural framework.

The ECT employs a variety of hard-law and soft-law instruments often in a complementary manner<sup>22</sup> and in this respect is referred to as a blend of legal rule and political process<sup>23</sup>. Thus, in the generality of the

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<sup>18</sup> FAILLO, MARCO / SACCONI, LORENZO; *Norm Compliance: The Contribution of Behavioral Economics Models*, Università’ Degli Studi Di Trento – Dipartimento Di Economia, Discussion Paper No 4, 2007, p 5.

<sup>19</sup> The 51 signatories of the European Energy Charter undertook to pursue the objectives laid down in the Charter and to establish cooperation under a legally binding basic agreement, which became the Energy Charter Treaty. The purpose of the Treaty is to promote East-West industrial cooperation through legal guarantees concerning investments, transit and trade (see <http://www.europa.eu/scadplus/leg/en/lvb/127028.htm>).

<sup>20</sup> GAILLARD, EMMANUEL; ‘*Energy Charter Treaty: International Center for Settlement Decision*’, *New York Law Journal*, Vol 223, No 66, 7 April 2005.

<sup>21</sup> SUSSMAN, EDNA; ‘*The Energy Charter Treaty Affords Investor Protections and Right to Arbitration*’, *ABA Energy Committee Newsletter*, Vol 3, No 4, August 2006, p 7.

<sup>22</sup> CHALKER, JAMES; ‘*Making the investment provisions of the Energy Charter Treaty sustainable development friendly*’, *Int Environ Agreements* (2006) 6:435-458, p 439.

<sup>23</sup> BAMBERGER, CRAIG S; ‘*Epilogue: The Energy Charter Treaty as a Work in Progress*’, in *The Energy Charter Treaty: An East-West Gateway for Investment & Trade*, (ed) THOMAS WALDE, Kluwer Law International, 1996, p 602.

ECT provisions, a basic distinction may be drawn between provisions of a hard-law character and those of a soft-law feature. The former relates to provisions that have a binding effect on the member states involving both obligation and enforcement, such as recourse to international arbitration; while the latter invokes those provisions of the ECT “proposing standards of good behavior” and “lacking teeth” in terms of enforcement such as Art. 10 (2), (3) and (7). This article provides MFN treatment as a “best endeavor” to be applied to investors in the “making” of investments<sup>24</sup> (i.e., pre-investment phase<sup>25</sup>) or soft-law provisions relating to competition and environment issues, in the sense of requiring efforts toward, but not the actual achievement of, the stated objectives.<sup>26</sup>

Nevertheless, as one argument goes, soft-law provisions are also of different types under the ECT, leading possibly to diverging legal outcomes. Applicable inter-state arbitration method under Art. 27(2) (which covers pre-investment obligations) with the exclusion of inter-state arbitration from the competition and environment obligations, this view suggests, is an indication that the Treaty takes the legal character of the pre-investment soft-law obligations more seriously than the clearly downgraded competition and environment principles, ultimately delegating the interpretation issue of the soft-law language to the arbitral tribunals.<sup>27</sup>

Whatever the case might be in this respect, and regardless of the varying degree of legal weight attributed to the soft-law provisions of the Treaty, one thing is certain: the Treaty draws a distinctive line separating its legally binding hard-law and much less effective soft-law provisions. In the generality of the discussions mentioned herewith relating to the Treaty’s soft-law provisions, the ECT may therefore be labeled as an “incomplete contract” in view of its soft-law language and this aspect may certainly constitute a framework inherently conducive to reciprocal behaviors among its members.

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<sup>24</sup> CHALKER, JAMES; ‘*Making the investment provisions of the Energy Charter Treaty sustainable development friendly*’, *Int Environ Agreements* (2006) 6:435-458, p 439, 443.

<sup>25</sup> See ENERGY CHARTER SECRETARIAT, *The Energy Charter Treaty and Related Documents – A Legal Framework for International Energy Cooperation*, September 2004, p 14.

<sup>26</sup> BAMBERGER, CRAIG S; ‘*Epilogue: The Energy Charter Treaty as a Work in Progress*’, in *The Energy Charter Treaty: An East-West Gateway for Investment & Trade*, (ed) THOMAS WALDE, Kluwer Law International, 1996, p 595.

<sup>27</sup> WALDE, THOMAS W; ‘*International Investment under the 1994 Energy Charter Treaty*’, in *The Energy Charter Treaty: An East-West Gateway for Investment & Trade*, (ed) THOMAS WALDE, Kluwer Law International, 1996, p 282, 283.

Furthermore, even where binding norms exist among sovereigns, the absence of an overriding enforcement agency is viewed as a major weakness in ensuring states complying with their undertakings and obligations arising from international treaties. This is an issue relating as much to the politics of the moment as to law, and as a result, observance and effectiveness of states' international obligations is determined at least as much by expectations and interests as by the legal requirement to do so.<sup>28</sup> This perception is another indication of possible situations invoking reciprocity in relations among members of the ECT.

Reciprocity has two dimensions under the ECT; the first reflects on the provisions of the ECT and their repercussions, while the second relates to the provisional applicability of the ECT itself. Section 3 of this paper proceeds with this first tier, i.e., the main and substantive provisions of the ECT which invoke or relate to the concept of reciprocity.

### 3. ECT Provisions and Reciprocity

It is possible to identify several provisions of the ECT that may be regarded as relevant regarding the concept of reciprocity. Most favored nation (MFN) treatment and national treatment (NT), fair and equitable treatment<sup>29</sup>, as contained in ECT Article 10, or the principle of non-discrimination and the most constant protection and security of investments<sup>30</sup> may be cited in this respect<sup>31</sup>. Through functioning of such provisions, it may be claimed therefore, that reciprocity is one of the basic features of the ECT

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<sup>28</sup> BRAZELL, LORNA; *'The Energy Charter Treaty: Some Observations on its International Context and Internal Structure'*, in *The Energy Charter Treaty: An East-West Gateway for Investment & Trade*, (ed) THOMAS WALDE, Kluwer Law International, 1996, p 227, 228.

<sup>29</sup> PARISI, FRANCESCO / GHEL, NITA; *The Role of Reciprocity in International Law*, George Mason University Law and Economics Research Paper Series, 02-08, p 29 ([http://ssrn.com/abstract\\_id=307141](http://ssrn.com/abstract_id=307141)).

<sup>30</sup> GAILLARD, EMMANUEL; *'Energy Charter Treaty: International Centre for Settlement Decision'*, New York Law Journal, Vol 233, No 66, April 7, 2005.

<sup>31</sup> For a detailed analysis of ECT provisions setting forth such principles, see WALDE, THOMAS; *'Arbitration in the Oil, Gas and Energy Field: Emerging Energy Charter Treaty Practice'*, Oil, Gas & Energy Law Intelligence (OGEL), Vol I, Issue 4, September 2003.

towards improving entry conditions for investors and reducing barriers to foreign direct investment (FDI). Provisions under the ECT relating to arbitration which endow with binding international dispute settlement in respect of investment disputes may also play a role hereunder.

The issue of reciprocity seems to have caused mixed feelings in the ECT constituency. In the discussions at various forums under the ECT it has been viewed as a non-conforming measure in the light of the generality of ECT provisions, which suggest that the member states should refrain from any actions extending non-discriminatory treatment on the basis of the MFN / NT principle. In the context of the Risk Reduction Dialogue established within the ECT constituency, doubts have been voiced that, the insistence on reciprocal actions may entail the risk of retaliation, leading to an overall deterioration of the investment climate and also to repercussions in other areas, such as trade and transit in energy material. Nevertheless, another argument may also be supported, that the possibility of retaliation may also cause the parties to refrain from non-cooperative actions.

Although reciprocal actions seem not to be welcome by the ECT constituency with the view that they are non-conforming to the principles set forth in the Treaty, the concept has still been embraced as compared to totally restrictive measures. An example of this approach has been witnessed with respect to the Former Yugoslav Republic of Macedonia (FYROM) which first had a ban on foreign ownership of land in the country but later introduced a law permitting land ownership to investors of those countries which give the same right reciprocally to its investors. This new regulation was warmly embraced by the ECT members in the sense that it was a further and positive development in favor of promoting investments compared to an outright restriction, albeit to be applied on a reciprocal basis.

Although it is true that the Treaty does not refer explicitly to the concept of reciprocity, a number of its provisions as well as the Treaty's inherent spirit call for a level playing field among the Contracting Parties to the ECT. Art. 10 of the ECT requires Contracting Parties to maintain "an absolute minimum standard of treatment such as has been established in BIT (Bilateral Investment Treaty) practice"<sup>32</sup> for investors of other contracting parties. The ECT also envisages the freedom to transfer of funds with respect

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<sup>32</sup> BAMBERGER, CRAIG / LINEHAN, JAN / WALDE, THOMAS; *'The Energy Charter Treaty'*, in *Energy Law in Europe*, (eds) MARTHA M ROGGENKAMP / ANITA RONNE / CATHERINE REDGWELL / INIGO DEL GUAYO, Oxford University Press, 2001, p 177.

to investments, both in and out of its 'Area', in a freely convertible currency at the market rate of exchange for spot transactions (Art. 14).<sup>33</sup>

Nonetheless, there are other provisions of the ECT which may be construed as enabling arguments contrary to the principle of reciprocity. Art. 18 of the ECT acknowledges sovereign rights over energy resources and therefore does not necessitate privatization in energy markets. On the other hand, when and if a contracting party decides for a privately owned market structure, it has the obligation to observe the non-discrimination principle set forth under the ECT. This may lead to a situation whereby, countries with a private market structure would not be on a level playing field vis-à-vis countries which operate a state owned market structure in the energy sector. Even if the intention of this clause might not have been as such, in practice this dilemma emerges as a discouraging factor against privatization for a country, which may be willing to privatize its energy resources, yet still concerned about retaining control through national companies.

Another issue has recently come up in the context of the recent EU Third Energy Liberalization Package, which calls for unbundling of companies participating in market activities in the energy sector, and applies this condition not only to domestic companies but also to any foreign company willing to take part in its energy markets. This may lead to a debate as to whether this requirement constitutes an infringement under the ECT, in that, it may create obstacles for foreign companies which are not subjected to the requirement of unbundling of their activities under their domestic jurisprudence. Furthermore, it is a well established and acknowledged feature of the ECT that it does not necessitate any specific market structure for its constituency.

Therefore, no country has under the obligation to set forth a market structure in favor specifically of unbundling or liberal market principles in general, despite the fact that the ECT has certain "soft-law" provisions advising member countries to employ liberal/competitive market principles (such as the

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<sup>33</sup> BAMBERGER, CRAIG / LINEHAN, JAN / WALDE, THOMAS; *'The Energy Charter Treaty'*, in *Energy Law in Europe*, (eds) MARTHA M ROGGENKAMP / ANITA RONNE / CATHERINE REDGWELL / INIGO DEL GUAYO, Oxford University Press, 2001, p 180.

Preamble of the ECT which refers to "... means of measures to liberalize investment and trade in energy"<sup>34</sup>, and Articles 2, 3 and 6 of the ECT). Nevertheless, it may be claimed that this EU requirement may not be taken as a reciprocal action and thus as a non-conforming measure under the ECT, in the sense that, it allegedly calls for a more liberal market structure and works to the cause of promoting investments but not a measure towards introduction of further obstacles on investments.

In fact, the EU and Russia mean different things when they talk about reciprocity, in line with their very different approaches to energy policy: market and rules-based in the EU; state-controlled in Russia. For Europeans, reciprocity means a mutually agreed legal framework that facilitates two-way energy investment. For Russia, reciprocity means top-level talks to identify assets of similar market value, and then swap these assets.<sup>35</sup>

The implications of the reciprocity debate hereunder obviously have bearings on the concept of energy security. Overall, in the light of these divergent approaches between the EU and Russia, which are the main players within the ECT constituency, it may be asserted that there could be negative repercussions on issues of security of supply, and as such, this may provoke concerns on energy security should these divergent views lead to negative reciprocity and thus retaliating actions, hampering energy investments both upstream and downstream, and impeding access to markets in the EU as well as to the vast resources and the infrastructure in Russia.

#### **4. Provisional Application of the ECT and Reciprocity**

Reciprocity has close links with the provisional application of the ECT, in that it may cast shadow on the 'level playing field' envisaged by the Treaty to promote energy investments in its constituency.

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<sup>34</sup> Also see ENERGY CHARTER SECRETARIAT, *The Energy Charter Treaty and Related Documents – A Legal Framework for International Energy Cooperation*, September 2004, p 19, which refers to "... ensuring fair competition within a liberalized energy market". Furthermore, the European Energy Charter Declaration also calls for "liberalized trade in energy" (Ibid, p 216, 217).

<sup>35</sup> BARYSCH, KATINKA; 'Reciprocity will not secure Europe's energy', Centre for European Reform (CER) Bulletin, August/September 2007, Issue 55, also BARYSCH, KATINKA; 'Three questions that Europe must ask about Russia', Briefing Note, Centre for European Reform, 16 May 2007, p 4.

Therefore, we will strive to examine to what extent provisional application impacts upon reciprocity. What follows below is an attempt to analyze the legal features of provisional application and the repercussions thereof on reciprocity.

#### *4.1 Provisional application in the legal context*

Although provisional application is a practice which occurs with some frequency today<sup>36</sup>, it has also been observed in the past centuries, whereby the lack of immediate means of communication was the main reason for provisional treaty application<sup>37</sup>. Indeed, there are recently an increasing number of treaties which include provisions for provisional entry into force. Owing to the urgency of the matters dealt within a treaty or for various other reasons the states concerned may specify in a treaty, which is necessary for them to bring before their constitutional authorities for ratification or approval that it shall come into force provisionally.<sup>38</sup> Such provisions are mainly found in international agreements dealing with economic issues as the contracting states regard the immediate application of these agreements as necessary, as to avoid the delay in the application of the treaties by lengthy provisions on the municipal level involving parliaments.<sup>39</sup>

There have also been cases under certain circumstances that the provisional application would be confined only to certain part of the treaty in order to meet the immediate needs of the situation or to prepare the way for the entry into force of the whole treaty at a later date. In both cases, however, there is

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<sup>36</sup> *Draft Articles on the Law of Treaties with Commentaries*, Yearbook of the International Law Commission, 1966, Vol II, p 210; also, UNITED NATIONS, *Treaty Reference Guide*, United Nations Treaty Collection (<http://untreaty.un.org/English/guide.asp>) (as retrieved on 31 January 2008).

<sup>37</sup> KLAUS, ULRICH; 'The Yukos Case under the Energy Charter Treaty and the Provisional Application of International Treaties', Transnational Economic Law Research Center Policy Papers on Transnational Economic Law, No 11, January 2005, p 2.

<sup>38</sup> *Draft Articles on the Law of Treaties with Commentaries*, Yearbook of the International Law Commission, 1966, Vol II, p 210; also, UNITED NATIONS, *Treaty Reference Guide*, United Nations Treaty Collection (<http://untreaty.un.org/English/guide.asp>) (as retrieved on 31 January 2008).

<sup>39</sup> LOIBL, GERHARD; 'The Energy Charter Treaty: Implementation and Compliance Issues', in *The Energy Charter Treaty: An East-West Gateway for Investment and Trade*, (ed) THOMAS W WALDE, Kluwer Law International, 1996, p 576.

no doubt that such clauses envisaged to be provisionally applied shall have legal effect and bring the treaty into force on a provisional basis<sup>40</sup>, in its whole or partially, depending on the scope of the provisional application clause.

Provisional application is, therefore, not a practice under international law uniquely applying to the ECT. Many examples of provisional application may be found in commodity agreements, while there are also others like the General Agreement on Tariffs and Trade (GATT), signed at Geneva in 1947.<sup>41</sup>

The extent to which a state's acceptance of provisional application of a treaty creates legal rights and obligations is not entirely clear under international law.<sup>42</sup> Nevertheless, there are a number of opinions provided by the scholars, as briefly outlined below:

Various scholars examined the issue of provisional application. Among those scholars touching on the issue of provisional application, Reuter claims that, states are free during negotiations to provide in the treaty itself, or in an annexed agreement, that the treaty applies provisionally, in full or in part, before properly entering into force.<sup>43</sup>

A treaty is applied provisionally pending its entry into force if it so provides or if the negotiating states have in some other manner so agreed. When the treaty has a provisional application clause, the obligation of a state to apply the treaty provisionally is created by its participation in the adoption of the treaty.<sup>44</sup> Therefore, unless the treaty contains a clause in respect of provisional application or a state otherwise expresses its support for provisional application, it will be under no obligation to apply the

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<sup>40</sup> *Draft Articles on the Law of Treaties with Commentaries*, Yearbook of the International Law Commission, 1966, Vol II, p 210.

<sup>41</sup> UN Treaty Collection: *Summary of Practice of the Secretary General as Depositary of Multilateral Treaties*, p 70, 71 ([www.un.org](http://www.un.org)).

<sup>42</sup> HANDKE, SUSANN / DE JONG, JACQUES J; *Energy as a Bond: Relations with Russia in the European and Dutch Context*, Nederlands Institute of International Relations, Clingendael International Energy Programme, September 2007, p 55.

<sup>43</sup> REUTER, PAUL; *Introduction to the Law of Treaties*, (translated by José Mico and Peter Haggemacher), Kegan Paul International Limited, 2nd Edition, 1995, p 68.

<sup>44</sup> AUST, ANTHONY; *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p 139.

agreement before its entry into force.<sup>45</sup> Nevertheless, as at the international level, the decision on whether or not to apply a treaty provisionally is usually carried out in the course of the international process of treaty-making. It will be made by the state organs vested with treaty-making powers.<sup>46</sup>

Provisional application may also apply when a treaty itself has indeed entered into force. The provisional application of a treaty that has entered into force may occur when a state undertakes to give effect to the treaty obligations provisionally although its domestic procedures for ratification / accession have not yet been completed.<sup>47</sup>

Once a treaty has entered into force provisionally or a state has agreed by proper notification to the provisional application of a treaty that has already entered into force, it is binding on the parties (in the former) and the respective state (in the latter) which agreed to bring it into force provisionally. The nature of legal obligations resulting from provisional application would appear to be the same as the legal obligations in a treaty that has entered into force or ratified by a state, as any other result would create an uncertain legal situation.<sup>48</sup>

#### ***4.2 Implications under the VCLT, and Features of Reciprocity under the ECT***

At this point, provisional application requires further detailed analysis as to the meaning of it for the respective state(s). Is a provisionally applying state bound by the provisions of a treaty just because it has

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<sup>45</sup> *Treaty Making – Expression of Consent by States to be Bound by a Treaty*, Edited by: Council of Europe and British Institute of International and Comparative Law, Kluwer Law International, 2001, p 15.

<sup>46</sup> *Treaty Making – Expression of Consent by States to be Bound by a Treaty*, Edited by: Council of Europe and British Institute of International and Comparative Law, Kluwer Law International, 2001, p 15.

<sup>47</sup> UNITED NATIONS, *Treaty Reference Guide*, United Nations Treaty Collection (<http://untreaty.un.org/English/guide.asp>) (as retrieved on 31 January 2008).

<sup>48</sup> UNITED NATIONS, *Treaty Reference Guide*, United Nations Treaty Collection (<http://untreaty.un.org/English/guide.asp>) (as retrieved on 31 January 2008).

signed but not ratified it, in accordance with its domestic laws and procedures? When should an assumption be made that a state has given its consent to be bound by a treaty?<sup>49</sup>

The issue of when treaties enter into force, i.e., when they start producing their effects and become binding on the parties thereto, is determined in accordance with the provisions of the treaty. Thus, the critical question to be asked here is, when a state will be deemed to be bound by the terms of the treaty, or to have given its consent to this effect? Could it be by signature, ratification or delivering its notification to the depositary?

The conditions contained in the respective clauses of treaties which govern entry into force may vary. In order to respond to the practical requirements of states featuring the complexity of international relations, very divergent practices may be observed, creating a comprehensive body of rules under international law. Sometimes the date is fixed by the agreement itself, or entry into force may be subject to fulfillment of certain conditions or calculation of the number of certain instruments, etc.<sup>50</sup>

In terms of consent to be bound, there are also other treaties which provide for instant entry into force upon signature. Concerning the UN Convention on the Law of the Sea, for example, some states could have suffered domestic political problems had they been required to seek the approval of their parliaments to ratify the Agreement. It was agreed therefore that if an existing party to the Convention merely signed the agreement it would be considered as having established consent to be bound unless it notified the depositary, within twelve months of the adoption of the agreement, that it would not avail itself of this simplified procedure.<sup>51</sup>

As the issue concerns interpretation of international treaties, a specific international treaty (the Vienna Convention on the Law of Treaties (VCLT)) setting forth the rules and principles on the

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<sup>49</sup> For a brief analysis of a wide range of countries' domestic legislation as to the issue of provisional application, see *Treaty Making – Expression of Consent by States to be Bound by a Treaty*, Edited by: Council of Europe and British Institute of International and Comparative Law, Kluwer Law International, 2001, p 84-86.

<sup>50</sup> For a wide range of treaties featuring different modes of applications on entry into force, see *UN Treaty Collection: Summary of Practice of the Secretary General as Depositary of Multilateral Treaties*, p 65-70 ([www.un.org](http://www.un.org)).

<sup>51</sup> AUST, ANTHONY; *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p 91.

international treaties themselves might be of critical importance and value, especially given that one of the two countries currently applying the ECT provisionally and currently facing decisions of arbitral tribunals regarding the issue of provisional application (the Russian Federation and Belarus are parties to the VCLT, with Russia having made reservations only to Articles 20 and 66.<sup>52</sup> Nevertheless, it should be born in mind that in respect of states that are parties to the VCLT, the VCLT would not govern their treaty relationships with states that are not parties to the VCLT; in other words, the VCLT would be applicable only in treaty relationships between states that also are parties to this convention.<sup>53</sup>

Therefore, provisions of the VCLT may only shed light on the issue of provisional application or reciprocity in respect of relations of those states which are both parties to the VCLT. The practical outcome of this is as follows: since currently there are only two states under the ECT which are provisionally applying the ECT, any implications derived from the VCLT hereunder would be applicable in the context of relations of these two states vis-à-vis other members of the ECT only in case if both states of the dispute are parties to the VCLT.

There are also opposing views, however, that provisions of VCLT would form a straightjacket in relation to treaty law which is applicable to states irrespective of whether a particular state is a party to the VCLT, since it is viewed as a codification of customary law.<sup>54</sup> This understanding is mainly based on Art. 4 of the VCLT which partly reads as “(w)ithout prejudice to **the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention ...**”.

It goes without saying that this is a clear implication as to the effect of VCLT constituting –at least partly- the international customary law which is to be applicable in all treaty relations. Therefore, even for countries not party to the VCLT, it is highly probable that the analysis of VCLT provisions would carry

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<sup>52</sup> See [www.un.org](http://www.un.org).

<sup>53</sup> SCHEININ, MARTIN; *Human Rights Treaties and the Vienna Convention on the Law of Treaties – Conflicts or Harmony*, p 1 (<http://web.abo.fi/institut/imr/research/martin/ILA%20Scheinin.doc>).

<sup>54</sup> SCHEININ, MARTIN; *Human Rights Treaties and the Vienna Convention on the Law of Treaties – Conflicts or Harmony*, p 3, 4 (<http://web.abo.fi/institut/imr/research/martin/ILA%20Scheinin.doc>). In support of the same approach from a practical view, see Aust, Anthony; *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p 10.

some weight for arbitral tribunals as international customary law while interpreting provisions of the ECT relating to provisional application.

According to Art. 11 of VCLT, expression of consent 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 may be expressed by signature. The precise method is, therefore, for the parties to a treaty to decide among themselves.<sup>55</sup> In present day, usually either the treaty will specify how consent is to be expressed or it will be implicit from its terms.<sup>56</sup>

A state may regard itself as having its consent to the text of the treaty by signature in defined circumstances noted by Art. 12 of the VCLT, that is, where the treaty provides that signature shall have that effect, or where it is otherwise established that the negotiating states were agreed that signature should have that effect, or where the intention of the state to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiations.<sup>57</sup>

Although consent by ratification is probably the most popular of the methods adopted in practice, consent by signature does retain some significance, especially in the light of the fact that to insist upon ratification in each case before a treaty becomes binding is likely to burden the administrative machinery of government and result in long delays. Accordingly, provision is made for consent to be expressed by signature.<sup>58</sup>

However, there are also strong arguments in favor of consent by ratification, both on account of internal/domestic and external concerns: Domestically, it may be argued that, by providing for ratification, the feelings of public opinion have an opportunity to be expressed with the possibility that a strong negative reaction may result in the state deciding not to ratify the treaty under consideration. In the latter

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<sup>55</sup> FITZMAURICE, MALGOSIA; *'The Practical Working of the Law of Treaties'*, in *International Law* (Evans, Malcolm D; Oxford University Press, 2003), p 178.

<sup>56</sup> AUST, ANTHONY; *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p 76.

<sup>57</sup> SHAW, MALCOLM N; *International Law*, Cambridge University Press, Fourth Edition, 1997, p 638, 639.

<sup>58</sup> SHAW, MALCOLM N; *International Law*, Cambridge University Press, Fourth Edition, 1997, p 639.

case, the delay between signature and ratification may often be advantageous in allowing extra time for consideration, once the negotiating process has been completed.<sup>59</sup>

Nevertheless, as one argument goes, in states whose parliament has not been asked to consent to provisional application, such a commitment normally rests on the actual or implied authority of the executive branch, the scope of which is often not clear, and which may be especially problematic as concerns the acceptance of legally binding dispute resolution mechanisms.<sup>60</sup>

The VCLT deals specifically with the binding power of treaties; it provides (in Art. 14) that the consent of a state to be bound by a treaty is expressed by ratification when:

“1.

- (a) *The treaty provides for such consent to be expressed by means of ratification;*
- (b) *it is otherwise established that the negotiating States were agreed that ratification should be required;*
- (c) *the representative of the State has signed the treaty subject to ratification; or*
- (d) *the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.*

2. *The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.”*

This provision was initially drafted in such a way as to consider that treaties in principle require ratification, except in certain cases where the presumption was otherwise, for example if the treaty provides that it shall come into force upon signature. But this view of the International Law Commission was subsequently changed to be replaced by Art. 14 above.<sup>61</sup>

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<sup>59</sup> SHAW, MALCOLM N; *International Law*, Cambridge University Press, Fourth Edition, 1997, p 640.

<sup>60</sup> BAMBERGER, CRAIG / LINEHAN, JAN / WALDE, THOMAS; *The Energy Charter Treaty*, in *Energy Law in Europe*, (eds) MARTHA M ROGGENKAMP / ANITA RONNE / CATHERINE REDGWELL / INIGO DEL GUAYO, Oxford University Press, 2001, p 206.

<sup>61</sup> BROWNLIE, IAN; *Principles of Public International Law*, Oxford University Press, Fifth Edition, 1998, p 611.

Accordingly, since the ECT provides no provision as to the consent of the signatories to be bound only by ratification, but just to the contrary, stipulates that the Treaty, in the absence of a declaration to the effect of inapplicability of provisional application, the logical inference would be that the ECT shall be provisionally applied until ratification takes place.

The VCLT further provides for the “applicability” of “provisional application” of a treaty so long as a treaty allows such a facility through its provisions (Art. 25). In this respect, what may be seen in Art. 45(1) of the ECT is a clear reference to the provisional application of this treaty. According to this provision, signatory states to the ECT would have agreed to the provisional application of the treaty just by signing the ECT unless they opt out of the scope of this provision by issuing a notification that they will not be applying the ECT provisionally, pursuant to Art. 45(2) of the ECT.

Therefore, unless a signatory state to the ECT provides for such a notification, it will automatically fall under the scope of Art. 45(1) of the ECT, which governs “provisional application”. One drawback, nevertheless, is that the same Art. 45(1) stipulates that provisional application of the ECT would mean that the provisions of the ECT be valid only to the extent that they would not be contrary to or conflicting with provisions of domestic legislation of the same member state as a signatory to the ECT.

This provision is also quite ambiguous. What is the function of the opting-out provision and the declaration envisaged thereto, given the conditionality of the provisional application obligation? Where the existing legislation of a Treaty signatory so conflicts with Treaty’s substantive provisions as to make that signatory’s compliance with the Treaty virtually impossible, was the signatory under an obligation at the time of signing to declare itself “not able to accept provisional application”, or is it instead entitled to rely on the conditionality language attached to the provisional application commitment?<sup>62</sup>

If a signatory state simply relies on the conditionality language attached to the provisional application commitment (which is alleged to be the case that, the majority of the ECT signatories would not be in a position to provisionally apply the ECT provisions in accordance with Art. 45(1) unless the competent municipal institutions –i.e. national parliaments– have sanctioned the provisional application,

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<sup>62</sup> BAMBERGER, CRAIG S; *‘Epilogue: The Energy Charter Treaty as a Work in Progress’*, in *The Energy Charter Treaty: An East-West Gateway for Investment & Trade*, (ed) THOMAS WALDE, Kluwer Law International, 1996, p 601.

and that its provisional application is limited only to those rules of the ECT which do not need to be sanctioned by national parliaments but could be accepted by the executive branch of government<sup>63</sup>), may its investors –unlike the investors of signatories actually making a declaration- claim the benefits of provisional application?<sup>64</sup>

If the answer to the last question is in the affirmative, this may be viewed as an infringement of the principle of reciprocity amongst investors of the respective states. Furthermore, it needs to be emphasized here that international law as reflected in Art. 18 of the VCLT requires a signatory state to “refrain from acts which would defeat the object and purpose of a treaty”. It is presently unclear, however, to what extent additional commitments to the ECT’s substantive rights and obligations flow from the treaty’s “provisional” application commitments.<sup>65</sup>

Another question that may emerge hereunder is whether or not the ‘opt-out’ countries’ investors can enjoy benefits of the ECT provisions through invoking the MFN clause under the ECT. The ECT provision which explicitly prohibits the use of ECT provisions applied to investors of the ‘opt-out’ countries seems to be providing for adequate clarity on this issue in a non-affirmative manner. Nonetheless, it will remain to be seen until this issue is to be brought before an arbitral tribunal through arbitration related provisions of the ECT, should such a case ever come up.

There are, then, two possible legal assumptions arising herewith: first, domestic law of the signatory state may be challenging various provisions of the ECT such as MFN or national treatment or the arbitration clauses, etc. In this case, one would easily be able to judge that, domestic law would be expected to preside over the ECT provisions with which it is in conflict. In the second hypothesis, however,

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<sup>63</sup> LOIBL, GERHARD; ‘*The Energy Charter Treaty: Implementation and Compliance Issues*’, in *The Energy Charter Treaty: An East-West Gateway for Investment and Trade*, (ed) THOMAS W WALDE, Kluwer Law International, 1996, p 580.

<sup>64</sup> BAMBERGER, CRAIG / LINEHAN, JAN / WALDE, THOMAS; ‘*The Energy Charter Treaty*’, in *Energy Law in Europe*, (eds) MARTHA M ROGGENKAMP / ANITA RONNE / CATHERINE REDGWELL / INIGO DEL GUAYO, Oxford University Press, 2001, p 206, 207.

<sup>65</sup> BAMBERGER, CRAIG S; ‘*Epilogue: The Energy Charter Treaty as a Work in Progress*’, in *The Energy Charter Treaty: An East-West Gateway for Investment & Trade*, (ed) THOMAS WALDE, Kluwer Law International, 1996, p 601.

the situation presents a rather blurry picture: what if the domestic law also conflicts with the “provisional application” clause itself envisaged by the ECT?

The VCLT does not come to rescue as regards with this issue. One may produce various scenarios in this situation: It may be asserted that under the ECT any signatory state has, at the very beginning while signing the treaty, had the ability to opt out of such automatic application of Art. 45(1), which foresees provisional application, simply by providing a declaration to the effect of not applying this provision and thus not applying the Treaty provisionally. It would thus remain “safe” for a number of considerations unknown to outsiders, among which may be the reason that their domestic law does not allow them to apply a treaty provisionally. In fact, a certain number of countries have preferred to follow this path.<sup>66</sup>

Given this hypothesis, one may suggest that such signatories, which did not have any objection to the provisional application of the ECT, did not have any obstacles under their domestic law preventing entry into a binding commitment under international law, since they had (and, indeed, could have easily used) the option to opt out of such a provision.

Art. 27 of the VCLT may shed some light at this stage, envisaging that “a party may not invoke provisions of its internal law as justification for its failure to perform a treaty.” Furthermore, Art. 26 of the VCLT stipulates that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

Furthermore, Art. 46 of the VCLT specifies that;

*“1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.*

*2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”*

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<sup>66</sup> For a list of those countries (a total of twelve states, all have subsequently completed the ratification process) which made declarations to ensure non-applicability of the provisional application to them, see [www.encharter.org](http://www.encharter.org).

We may now avail ourselves also of the arbitral tribunals' awards in this respect. An ICSID (International Centre for Settlement of Investment Disputes) tribunal, exploring for the first time the issue of jurisdiction under the ECT pursuant to the "provisional application" language<sup>67</sup> in the *Kardassopoulos v. Republic of Georgia* case, has decided that, unless there are laws already expressly dealing with provisional application, **proof of inconsistency by relying on general provisions** may be difficult.<sup>68</sup> Therefore, any domestic legal provision that may challenge the ECT's provisional application needs to explicitly elaborate on the state of such "conflict", and that the generality of domestic legal provisions would, in all likelihood, be taken by tribunals as insufficient.

It is, of course, needless to say that the concept of "precedence" does not hold under international arbitration, and thus, any tribunal deciding to the contrary is, albeit to a remote extent, still in the sphere of likelihood, as the said tribunal's decision is also in line with Art. 46 of the VCLT which is referred to in the preceding paragraph. The issue of provisional application is currently subject to further juridical test or scrutiny, since a case<sup>69</sup> has been brought before an ICSID arbitral tribunal where investors seek for legal redress in an amount of 30 billion US dollars, and the core issue at stake in this judicial process relates to validity of provisional application under the ECT against Russia, which is one of the two countries at present applying the ECT provisionally, pending ratification.<sup>70</sup> The outcome of this case will be important in determining the extent of obligations of Russia as a state provisionally applying the ECT, and therefore shedding further light on interpretation of the provisional application clause embodied in the ECT.

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<sup>67</sup> SUSSMAN, EDNA; 'The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development', ILSA Journal of International & Comparative Law, Vol 14:2, 2008, p 396.

<sup>68</sup> HUTCHEON, ANDREW / SPENCER, JAMES; 'Provisional Application of the Energy Charter Treaty', Global Arbitration Review (The European & Middle Eastern Arbitration Review), 2008, p 26.

<sup>69</sup> For a detailed legal analysis of the various legal theories and court decisions delivered in the course of investors of the same case seeking legal remedies at multiple national jurisdictions, see TANEGA, JOSEPH / GOLOLOBOV, DMITRY; 'Yukos Risk: The Double Edged Sword', NYU Journal of Law and Business, Vol 3:557, 2007, p 557-648.

<sup>70</sup> SUSSMAN, EDNA; 'The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development', ILSA Journal of International & Comparative Law, Vol 14:2, 2008, p 395.

All said above, we may also avail ourselves of the liberty to assert that, this vitally important question can ultimately be settled authoritatively only in the context of relevant cases brought to international arbitration.<sup>71</sup>

Although a treaty only becomes binding upon the contracting parties when it has come into force, it is not always without effect even before its entry into force –typically, during the interval between signature and ratification.<sup>72</sup> On the other hand, a treaty itself may foresee that the treaty will start being applied provisionally in accordance with its provisions to such purpose. Indeed, there is an increasing number of international treaties which include provisions for provisional entry into force.<sup>73</sup> This may also cover a long life span; for example, General Agreement on Tariffs and Trade (GATT) 1947 has been effectively applied for over 40 years on the basis of a Protocol of Provisional Application.<sup>74</sup> Even in the absence of such an explicit arrangement in the treaty, there has long been authority for the view that the principle of good faith suggests that states should refrain, prior to ratification, from acts intended to substantially impair the value of the undertaking as signed.<sup>75</sup>

It is furthermore stated under international law that, in cases of signature or exchange of instruments subject to ratification, acceptance or approval, this obligation only lasts until the state has made its intention clear not to become a party to the treaty; in cases where the state's consent to be bound is final but is ineffective pending the entry into force of the treaty, the obligation only exists provided that such entry into force is not unduly delayed.<sup>76</sup> Nevertheless, it should be noted that this may only be applicable

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<sup>71</sup> HANDKE, SUSANN / DE JONG, JACQUES J; *Energy as a Bond: Relations with Russia in the European and Dutch Context*, Nederlands Institute of International Relations, Clingendael International Energy Programme, September 2007, p 55.

<sup>72</sup> JENNINGS, ROBERT / WATTS, ARTHUR; *Oppenheim's International Law*, Pearson Educaiton Limited (Longman), Volume 1, Ninth Edition, 1996, p 1238.

<sup>73</sup> [www.unesco.org](http://www.unesco.org)

<sup>74</sup> JENNINGS, ROBERT / WATTS, ARTHUR; *Oppenheim's International Law*, Pearson Educaiton Limited (Longman), Volume 1, Ninth Edition, 1996, p 1238.

<sup>75</sup> JENNINGS, ROBERT / WATTS, ARTHUR; *Oppenheim's International Law*, Pearson Educaiton Limited (Longman), Volume 1, Ninth Edition, 1996, p 1239.

<sup>76</sup> JENNINGS, ROBERT / WATTS, ARTHUR; *Oppenheim's International Law*, Pearson Educaiton Limited (Longman), Volume 1, Ninth Edition, 1996, p 1239.

in cases where the treaty itself does not provide for provisional application, and, under such circumstances, state responsibility would be considered to be at stake.

Moreover, no country applying the Treaty provisionally has as yet raised any objection as to the invalidity of the provisional application provision of the ECT under their domestic law.<sup>77</sup> Therefore, one may conclude that a potential defense coming from such countries only at a time of conflict, surfacing as a case in an arbitral tribunal, should raise questions that such an act be construed as being against Art. 26 of the VCLT.

Another important issue that comes into light here is as follows: If and when a signatory country opts out of the provisionally application clause by making a declaration not to apply the ECT provisionally,

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<sup>77</sup> As one of the two countries currently applying the ECT provisionally, Russia, for example, has so far publicly confirmed the provisional application of the ECT (KLAUS, ULRICH; *The Yukos Case under the Energy Charter Treaty and the Provisional Application of International Treaties*, Transnational Economic Law Research Center Policy Papers on Transnational Economic Law, No 11, January 2005, p 6), and has so far made several public statements that they are into certain discussions with the other ECT member states regarding the additional transit protocol while on the way to ratify the Treaty, and even further, has stated clearly that it would not ratify the current ECT at the G-8 summit in July 2006 (indeed, the ratification procedure commenced with the introduction of the project to the Russian State Duma in 1996, and the Parliamentary hearings started in 1998, but the Duma postponed ratification several times due to ongoing negotiations and disputes about the afore-mentioned draft Transit Protocol to the ECT), yet never expressing their concerns over the provisional application of the Treaty but seemingly using the ratification as a negotiation tool in inserting further provisions into the Treaty believed to be of importance from their viewpoints (see KLAUS, ULRICH; *The Yukos Case under the Energy Charter Treaty and the Provisional Application of International Treaties*, Transnational Economic Law Research Center Policy Papers on Transnational Economic Law, No 11, January 2005, p 3, and SHIH, WEN-CHEN; *Energy Security, GATT / WTO and Regional Agreements*, Society for International Economic Law (SIEL) Working Paper No 10/08, 25 June 2008, p 40, and furthermore, KONOPLYANIK, ANDREY; *Regulating Energy Relations: Acquis or Energy Charter?*, in *Pipelines, Politics and Power*, (ed) KATINKA BARYSCH, Centre for European Reform, p 107-111) (nevertheless, it is also asserted that the ECT has in fact never been submitted to the Duma for ratification (see RUBINS, NOAH / NAZAROV, AZIZJON; *Investment Teraties and the Russian Federation: Baiting the Bear?*, *Business Law International*, Vol 9, No 2, May 2008, p 104)). It is also noteworthy that Russia, while not having made any declaration in respect of Art. 45 of the ECT regarding its intention not to apply the Treaty provisionally, later on 14 July 1998 sent a letter of declaration to the Portugese Republic as Depository under the ECT that it does not accept provisional application of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

there is an important consequence of such declaration: Pursuant to the Art. 45(2)(b) of the ECT, such country's investors (as well as the country itself) would no longer be able to enjoy the "benefits of provisional application". At face value, this provision seems to be addressing the reciprocity concern. We may then derive from the contrary of this provision that the provisionally applying country, together with its investors, would benefit from the rights (as well as obligations for the signatory state) under the ECT.

However, the issue, then, is the following: could a country applying the Treaty provisionally later provoke the excuse that this provisional application can not be applied to itself based on its domestic law not allowing for provisional application? Even if this is assumed to be the case, the ECT does not foresee any further category for a state that is a signatory but which has not made a declaration towards being a non-provisionally applying country, and yet later claiming the inapplicability of provisional application based on domestic law grounds. Could one then assume that such a country would automatically fall under the same category of states having made such declaration? As may be noticed clearly, the issue invites further interpretation should such a case ever appear before an arbitral tribunal.

With these two provisions taken together, one may conclude that, although the ECT allows for domestic law to supercede any provisions of the ECT in the case of a conflict, any signatory state not having an objection to the provisional applicability of such a treaty despite being free to opt out through notification yet afterwards having such claims as to the concerns over incompatibility with its domestic law relating to provisional application, could well be interpreted as contrary to the two above-mentioned provisions of the VCLT.

On the other hand, another hypothesis might be that, a signatory state may have the legitimate understanding and trust that the provisionally applying treaty itself governs that the treaty would be applicable only to the extent that its provisions would not be in conflict with its domestic legislation; so that the signatories availed themselves of this comfort provided by the treaty and did not consider the opt-out facility under the very same treaty.

Furthermore, it may well be the case for a provisionally applying country to later declare that it would cease to apply the treaty provisionally. The ECT does not provide for such a facility, yet one could assume that a state may have such a right pursuant to international law (VCLT, Art. 25(2)), since Art. 26(6)

of the ECT stipulates that disputes under the ECT shall be decided 'in accordance with this Treaty and applicable rules and principles of international law'. A question herewith, however, is whether or not a state should be taken as having declared its intention not to be bound with the treaty in an explicit way. What if a state does not issue any such clear notification, and simply does not ratify the agreement? Shall we construe any such action as an indication of that state wishing not to be bound by the treaty in question?

It would not be fair to expect a crystal clear answer here, and thus we believe there is enough room for attracting a number of possibly divergent comments and interpretations. Yet it is still clear that the so-called "exit strategy" provided under the VCLT suggests for a state as a law abiding country to take the issue of failing to comply with the treaty at stake seriously, addressing openly the consequences of shifting domestic preferences or changing circumstances.<sup>78</sup>

However, even under such circumstances, it should be underlined that a withdrawing state still would, pursuant to the Art. 45 (3) of the ECT, be obliged to apply Parts III (Investment Promotion and Protection) and V (Dispute Settlement) for a further twenty-year period in relation to investments made while the Treaty has been provisionally applied.<sup>79</sup> Nevertheless, the Treaty has a second opt-out mechanism made available to those countries concerned about this extended application of the arbitration clause made during the provisional application phase.

Although it may be confusing a bit, it should be emphasized that these two separate opt-out provisions are totally different from each other. The first layer relates to the opt-out regarding the provisional application provision itself (as referred to under Art. 45(2) of the ECT), while the second type of opt-out (as provided by Art. 45(3)(c) which appears in the Annex PA of the Treaty) concerns extended application of the arbitration clause of the ECT to those investments made during the provisional application phase of the Treaty in such countries which did not make any declaration for opt-out of the first type and therefore have bearings on those countries which are provisionally applying the Treaty (i.e., Russian Federation and Belarus). It is worth noting here that a total of twelve countries have indeed made

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<sup>78</sup> HELFER, LAURENCE R; 'Exiting Treaties', Virginia Law Review, Vol 91:1579, 2005, p 1590.

<sup>79</sup> HANDKE, SUSANN / DE JONG, JACQUES J; *Energy as a Bond: Relations with Russia in the European and Dutch Context*, Nederlands Institute of International Relations, Clingendael International Energy Programme, September 2007, p 56.

the first tier opt-out declaration at the time of becoming signatories to the ECT to the effect that they would be exempted from applying the Treaty on a provisional basis.<sup>80</sup>

Furthermore, five countries which had concerns over applying the arbitration clause for this extensive period despite any possible withdrawal from the provisional application of the Treaty, had elected at the time of signing the Treaty not to extend the twenty-year continuing protection to existing investors if they withdraw while provisionally applying the Treaty<sup>81</sup>. It should be emphasized, however, that by now they are no longer in the status of applying the Treaty provisionally, as they subsequently have completed the internal ratification procedures in accordance with their domestic legislation. It is further noteworthy to mention that the first tier 'opt-out' countries would not be subject to the same (twenty-year) treatment of facing such long-term binding effect under the arbitration clause, either (since they had already made a declaration not to apply the Treaty provisionally in its entirety, until they would have completed the ratification procedures in accordance with their respective domestic legislation).

Before concluding this section, it is useful to further dwell upon the possible reasoning behind the following issue: while the second-tier opt-out countries are made transparent by including them in an annex to the Treaty (Annex PA), the first-tier countries, i.e., information regarding those member states which made a declaration opting out from the provisional application itself, does not appear anywhere in the Treaty's text. Information on these countries is only available by way of relying upon the depositary's records, or by checking available information provided in the public website of the Energy Charter Secretariat. It is indeed provoking thoughts as to the reasoning behind this divergence in treating these two

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<sup>80</sup> Signatories of the Energy Charter Treaty which made a Declaration that they cannot accept Provisional Application of the Treaty in accordance with Article 45(2)(a) were Australia, Bulgaria, Cyprus, Hungary, Iceland, Japan, Liechtenstein, Malta, Norway, Poland, Switzerland, and Turkmenistan. At present, all but three countries have completed the ratification process (those three countries are Australia, Iceland and Norway).

<sup>81</sup> BRAZELL, LORNA; *'The Energy Charter Treaty: Some Observations on its International Context and Internal Structure'*, in *The Energy Charter Treaty: An East-West Gateway for Investment & Trade*, (ed) THOMAS WALDE, Kluwer Law International, 1996, p 239. Indeed, there are six, not five, countries which made such declaration (for the list of such countries, see Annex PA, Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents - A Legal Framework for International Energy Cooperation*, September 2004, p 113. These countries were the Czech Republic, Germany, Hungary, Lithuania, Poland and Slovakia, and as noted herewith in the text, all of them have later completed the ratification process; thus, provisional application is no longer an issue at present for such countries.

separate tiers of 'opt-out' provisions. Both 'opt-out' declarations were under consideration by the countries only at the time of signing, and as such, no arguments may be placed in terms of differences among them as to the issue of timing. If the second tier opt-out countries have been listed through an annex to the Treaty for the sake of transparency, then why has the same concern as valid as with this second-tier not been taken into consideration? In fact, it should be noted here that this issue has indeed come up through the course of negotiations, as one negotiating party made a statement proposing that countries that would be provisionally applying the Treaty be required to notify the Depositary while the Depositary would subsequently be informing the member states thereof. Given the absence of such a requirement in the existing form of the Treaty, it seems that this suggestion was not embraced by the negotiating parties for reasons unknown to us.

This may pose practical difficulties in terms of lack of relative transparency, in that, investors of a member state may not have the same comfort in assessing risks in trade or investment related issues vis-à-vis another member state without making sure whether the respective state is a provisionally applying country or not, as compared to the relative ease of accessing to information on the first-tier countries through Annex PA. For example, Australia, Norway and Iceland are currently the three countries which have not yet completed ratification procedures under their respective domestic legislation, and, since they have previously made such declaration as envisaged under Art. 45(2) of the ECT, they are not applying the Treaty provisionally in accordance with the terms of the ECT. Yet, this information is not easily accessible because the list of countries having the declaration under Art. 45(2) does not appear anywhere in the Treaty's text, although the second-tier 'opt-out' countries are in fact listed in Annex PA of the ECT. As such, this lack of relative transparency may pose difficulties for investors or traders in assessing the risks involved in their businesses and therefore may be taken as increasing barriers to trade and investment in the energy sector.

As a final remark for this section, an important feature of the provisional application comes onto the stage which may have important bearings on the issue of reciprocity: provisional application may be at stake to varying degrees in terms of their scope in different countries, since a provisionally applying country's domestic legislation which conflicts with the ECT provisions may be very divergent than another provisionally applying country in their coverage or magnitude of relative importance. In such a case, investors (or traders) of a country may be at a very disadvantaged position as compared to investors of the

other country. This may be viewed as possibly invoking concerns on reciprocity, or leading to reciprocal behaviors in the negative (retaliatory) manner, specifically and mainly in relation to those soft-law provisions of the Treaty referred to in preceding paragraphs.

#### ***4.3. Applicability of the international arbitration clause***

Having considered the likelihood of available scenarios for possible interpretations as to validity of the “provisional application” clause itself, we may now continue with other subsequent issues that need to be discussed thereto. With the assumption that the provisional application clause be applicable, could we reach the conclusion that the reference to arbitration or other important undertakings stipulated under the ECT would be applicable to a “provisionally applying” sovereign?

The answer to such a question would, undoubtedly, depend on whether or not the respective state has legislation to the contrary or not. Foremost, if the country at stake would later present a legislation that is at odds with the availability of arbitration having jurisdiction in a specific dispute, then the legal outcome would be that the relevant provision of the ECT allowing for international arbitration would be void by way of an application of the ECT provision, which sets the stage for provisional application as valid only to the extent that it conforms to domestic law. Walde supports the approach that the signature of the ECT should be viewed, in light of Articles 26 and 45, as the irrevocable promise of a government that arbitration could only be rebutted if the signatory government, with the burden of proof rested upon it, did not have constitutional and legal authority to enter into arbitration agreements with foreign private parties. Such a clear prohibition, however, would rarely be found.<sup>82</sup>

Another important aspect of this issue emerging hereunder is that, the ECT does not specify which laws of the provisionally applying state would be taken into consideration. Would it be the laws of the country at the time of becoming a signatory to the ECT, or would it cover the concept of law “at any specific time of discussion for the conflict”, thereby implying inclusion of any future changes to domestic

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<sup>82</sup> BAMBERGER, CRAIG / LINEHAN, JAN / WALDE, THOMAS; *The Energy Charter Treaty*, in *Energy Law in Europe*, (eds) MARTHA M ROGGENKAMP / ANITA RONNE / CATHERINE REDGWELL / INIGO DEL GUAYO, Oxford University Press, 2001, p 207, 208.

law? If the latter approach is to be embraced, this may give way to objections that a provisionally applying state would have the right to abuse such position simply by engineering legislative changes to ensure it makes its laws of a peremptory nature vis-a-vis the ECT provisions, and thereby effectively being able to invalidate those conflicting provisions of the ECT at any given time. Such an outcome would then be subject to criticism that it falls under the prohibition of VCLT Art. 26 that provides for the principle of “pacta sunt servanda”, as the international legal system is grounded on this fundamental principle that treaties must be obeyed, and that every treaty in force is binding upon the parties to it and must be performed by them in good faith.<sup>83</sup> This principle is further strengthened by Art. 18 of the VCLT, which provides that;

*“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty*

*when:*

*(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or*

*(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”*

The same analogy also naturally extends to the various other provisions of the ECT, such as the MFN or the national treatment clauses.

The issue of provisional application is particularly important as it relates further to the concept of reciprocity. In this respect, we may think of the relative stance of investors of a country which has ratified the ECT and thus fully obliged with all its legal consequences vis-a-vis investors of a provisionally applying country. The former will not enjoy the same level of benefits, or secure the same scope of protection, from the ECT as compared to investors of a provisionally applying country. It therefore remains suspicious as to the concept of reciprocity among member states of the ECT constituency, and may well pave the way for critics advocating a level playing field.

The same would be valid among two provisionally applying countries as well. If one of the countries has its domestic law challenging the applicability of certain ECT provisions, while the other not having

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<sup>83</sup> HELFER, LAURENCE R; ‘*Exiting Treaties*’, Virginia Law Review, Vol 91:1579, 2005, p 1580.

such domestic provisions to the same effect, then it would certainly impede the latitude of the ECT provisions in these respective countries. As a result, investors of those countries would not be reaping the benefits of a level playing field. This would, naturally and obviously, be contrary to the very concept of reciprocity. To cite a hypothetical example: If the domestic legislation of a state applying the Treaty provisionally contains a clause forbidding international arbitration, while that of another signature has no similar impediment, there would result a critical divergence from the “level playing field” in relation to their investors’ relative stance against each other. Such an outcome would be highly detrimental to the very spirit of the ECT. This issue is to be discussed further in the subsequent paragraphs.

#### ***4.4. Provisional Application of Art. 26 of the ECT***

The Treaty’s investment regime is largely modeled on the then prevalent US-UK BIT model and introduces the most extensive investment protection regime with direct investor-state arbitration. Art. 26 of the ECT enables investors to submit their disputes to international arbitral tribunals, namely, ICSID, UNCITRAL or SCC. One of the central questions arising on provisional application after 1994, was whether the direct investor-state investor arbitration mechanism in Art. 26 of the ECT is embraced by the provisional application regime of Art. 45 of the ECT. The combination of Art. 26 and 45 of the ECT, the unconditional and direct submission to investor-state arbitration under provisional application, though, was a novelty for international treaty and arbitration practice. As one argument goes, Art. 26 of the ECT is also subject to the same Art. 45(2), in that the domestic law would prevail over the Treaty’s language and can not reverse the priority of national law over ECT rules in the course of provisional application, although this may be unsatisfactory regarding the intensions of the Treaty, namely, to guarantee a stable investment climate even during the phase of provisional application.<sup>84</sup>

Nonetheless, neither Art. 45 of the ECT nor any other provision of the ECT explicitly exclude Art. 26 from provisional application. Looking at the interpretation of arbitral tribunals on this issue might be provoking further thought on this issue and helpful. In the *Plama v. Bulgaria* case, for example, the arbitral

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<sup>84</sup> KLAUS, ULRICH; ‘*The Yukos Case under the Energy Charter Treaty and the Provisional Application of International Treaties*’, Transnational Economic Law Research Center Policy Papers on Transnational Economic Law, No 11, January 2005, p 7.

tribunal (established under the ICSID rules) stated in a general reference that Art. 26 of the ECT is to be applied provisionally. Furthermore, in *Kardassopoulos v. Republic of Georgia*, while the tribunal clearly felt that provisional application is not the same as entry into force, by consenting to provisional application of the ECT the states fell under the obligation to apply all of the Treaty's provisions immediately on their signing of the ECT as if they were already in force, including provisions on arbitration. The tribunal also clarified that, if provisional application were to limit the application of the ECT to after the ECT definitively entered into force, it would "exclude from the scope of the ECT" the provisional period before entry into force and "such a result would strike at the heart of the clearly intended provisional language."<sup>85</sup>

#### 4.5. The "Free Rider" issue

Under the ECT, there are a number of ways that one may come to the conclusion of reciprocity being challenged, and this does not only relate to the concept of provisional application. One example refers to the possibility of non-member states "*free riding*". Pursuant to Art. 1 of the ECT, there is an explicit reference to investments being "owned or controlled directly or indirectly", which enables investors of non-member states to incorporate their investment vehicles in an ECT contracting party and thereby gain treaty protection.<sup>86</sup> Thus, this emerges as an interesting possible example of reciprocity coming to the front line and provoking further discussions that relate to the undue benefits to outsiders.

This is further strengthened by Art. 10(7) of the ECT, which provides that investors will enjoy, through the MFN clause, the equivalent favorable treatment applied in any third state.

In the energy sector, the aim of reciprocity is generally referred to as that of maintaining a **level playing field** amongst the parties concerned.<sup>87</sup> It should be noted that reciprocity may not simply be taken at face value by way of provisions thereto. In order to secure the ultimate goal of "ensuring a level playing

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<sup>85</sup> ICSID Decision on Jurisdiction for the *Kardassopoulos v. Georgia* Case, ICSID Case No ARB/05/18, p 59 (<http://ita.law.uvic.ca/documents/Kardassopoulos-jurisdiction.pdf>).

<sup>86</sup> HERLIHY, DAVID / MACAULAY, BRUCE; '*Strategic Choices Under the ECT, Energy Charter Treaty*', Volume 2, Issue 2, p 27. Also, see LOFTIS, JAMES L / BEELEY, MARK J; '*The Rise of Energy Charter Treaty Arbitration*', *The Global Arbitration Review* 2007, p 7.

<sup>87</sup> See Jones, Christopher W; *EU Energy Law, Vol 1 (The Internal Energy Market)*, Claeys & Casteels, 2004, p 149.

field”, the practical application and outcomes of such provisions must be addressed. An interesting example in this respect may be taken from energy sector practice within the EU. Concerning the opening of markets among the member states of the EU, the eligible customer threshold determined as a percentage of either total consumption or total number of consumers would not ensure reciprocity, since the same figure may lead to different levels of market opening in different countries, due to differing energy demand structures between member states. This would obviously be contrary to the concept of reciprocity.<sup>88</sup>

Nevertheless, a negative approach to reciprocal actions seems to have been embraced by the ECT member states in a consensus, which assumes that a market opening, albeit a unilateral one, will – through increased efficiency and lower consumer prices - benefit also the country offering the opening, i.e., a reciprocal opening would further increase overall welfare but is not a requirement. This argument, however, needs to be carefully scrutinized, in the sense that, while the unilateral application of liberal principles to market structures and access may be to the benefit of a country by increasing competition and welfare and reducing cost, the country could also suffer from crowding out of local firms leading to greater unemployment, balance of trade and payment deterioration, etc., i.e. costs to the economy and the public which would normally be offset by the reciprocal application of the same market and investment liberties in other countries.

## 5. Concluding Remarks

The very basic feature of the ECT is that it envisages a ‘level playing field’ among its constituency. The concept of reciprocity comes to the front in this respect, as the Treaty calls for non-discrimination and MFN / NT in relations among the member states. Through an overlook at these provisions, it may be inferred that the Treaty does not embrace reciprocal actions, yet there is no specific provision clearly prohibiting the use of reciprocal actions. As a result, whether reciprocal applications are categorically excluded or ruled out in the light of the overall spirit of the Treaty provisions still remain suspicious. Moreover, it is also acknowledged that reciprocity may not always be leading to negative outcomes, and whether the existence of reciprocity is welcome or not would depend on the nature of the specific

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<sup>88</sup> JONES, CHRISTOPHER W; *EU Energy Law*, Vol 1 (The Internal Energy Market), Claeys & Casteels, 2004, p 150, 151.

circumstance: in cases where reciprocity is based on initiatives toward achievement of applications for higher degree of market principles, a reciprocal action may even be encouraged since this would serve to the realization of the Treaty's overall cause.

The issue of provisional application of the ECT is further complicating the picture as it relates to possible reciprocal actions under the Treaty. The complex design of the Treaty's provisions relating to provisional application is further contributing to the challenge of reaching at a concrete solution on this issue. In the absence of a clear answer that could possibly be derived from the Treaty's provisions as well as from the principles of international public law, the issue of provisional application and its repercussions within the context of reciprocal actions would therefore inevitably remain to be solved by way of having recourse to the binding decisions –and interpretations thereto– of arbitral tribunals in the future.

## ANNEXES

*(Relevant Provisions of the VCLT and the ECT)*

### **Annex-I**

Vienna Convention on the Law of Treaties, 1969

(Done at Vienna on 23 May 1969. Entered into force on 27 January 1980.

United Nations, *Treaty Series*, vol. 1155, p. 331)

#### *Article 11*

*Means of expressing consent to be bound by a treaty*

The 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.

#### *Article 12*

*Consent to be bound by a treaty expressed by signature*

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or

(c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

(b) the signature ad referendum of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

#### *Article 18*

##### *Obligation not to defeat the object and purpose of a treaty prior to its entry into force*

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

#### *Article 25*

##### *Provisional application*

1. 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.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the 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.

#### *Article 26*

##### *"Pacta sunt servanda"*

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

*Article 27*

*Internal law and observance of treaties*

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

*Article 46*

*Provisions of internal law regarding competence to conclude treaties*

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

*Article 47*

*Specific restrictions on authority to express the consent of a State*

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

*Article 53*

*Treaties conflicting with a peremptory norm of general international law ("jus cogens")*

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm

accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

*Article 65*

*Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty*

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.
3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.
5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

**ANNEX-II**

THE ENERGY CHARTER TREATY

## *Article 1*

### *Definitions*

As used in this Treaty:

(6) "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
- (d) Intellectual Property;
- (e) Returns;
- (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

(7) "Investor" means:

(a) with respect to a Contracting Party:

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

(b) with respect to a "third state", a natural person, company or other organization which fulfils, *mutatis mutandis*, the conditions specified in subparagraph (a) for a Contracting Party.

#### *Article 10*

##### *Promotion, Protection and Treatment of Investments*

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to Make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.

In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

(2) Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).

(3) For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.

(4) A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to Investors of other parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3). That treaty shall be open for signature by the states and Regional Economic Integration Organizations which have signed or acceded to this Treaty. Negotiations towards the supplementary treaty shall commence not later than 1 January 1995, with a view to concluding it by 1 January 1998.

(5) Each Contracting Party shall, as regards the Making of Investments in its Area, endeavour to:

(a) limit to the minimum the exceptions to the Treatment described in paragraph (3);

(b) progressively remove existing restrictions affecting Investors of other Contracting Parties.

(6)

(a) A Contracting Party may, as regards the Making of Investments in its Area, at any time declare voluntarily to the Charter Conference, through the Secretariat, its intention not to introduce new exceptions to the Treatment described in paragraph (3).

(b) A Contracting Party may, furthermore, at any time make a voluntary commitment to accord to Investors of other Contracting Parties, as regards the Making of Investments in some or all Economic Activities in the Energy Sector in its Area, the Treatment described in paragraph (3). Such commitments shall be notified to the Secretariat and listed in Annex VC and shall be binding under this Treaty.

(7) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

(12) Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations

#### *Article 18*

##### *Sovereignty Over Energy Resources*

(1) The Contracting Parties recognize state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law.

(2) Without affecting the objectives of promoting access to energy resources, and exploration and development thereof on a commercial basis, the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources.

(3) Each state continues to hold in particular the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, the optimalization of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and reclamation within its Area, and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises

(4) The Contracting Parties undertake to facilitate access to energy resources, inter alia, by allocating in a non-discriminatory manner on the basis of published criteria authorizations, licences, concessions and contracts to prospect and explore for or to exploit or extract energy resources

#### *Article 26*

##### *Settlement of Disputes Between an Investor and a Contracting Party*

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3)

(a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b)

(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a)

(i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

(5)

(a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and

(iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

(7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or

authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted.

Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

*Article 39*

*Ratification, Acceptance or Approval*

This Treaty shall be subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Depositary.

*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 Depositary 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 Depositary.

(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 Depositary 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 Depositary.

(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 Depositary 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). 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 Organization 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.

#### *Article 47*

##### *Withdrawal*

(1) At any time after five years from the date on which this Treaty has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depositary of its withdrawal from the Treaty.

(2) Any such withdrawal shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depositary, or on such later date as may be specified in the notification of withdrawal.

(3) The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.

(4) All Protocols to which a Contracting Party is party shall cease to be in force for that Contracting Party on the effective date of its withdrawal from this Treaty.