

Provisional Application of the Energy Charter Treaty: the Conundrum

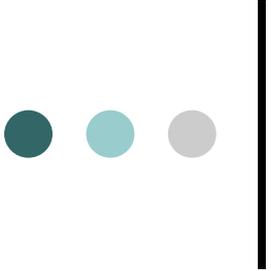
Michael Polkinghorne

White & Case LLP

Laurent Gouiffès

Lovells LLP

Energy Dispute Resolution: Investment Protection, Transit and the
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Introduction

1. Provisional application: a riddle wrapped in a mystery inside an enigma

1.1 General framework of provisional application: the riddle

1.2 Scope of provisional application: the mystery

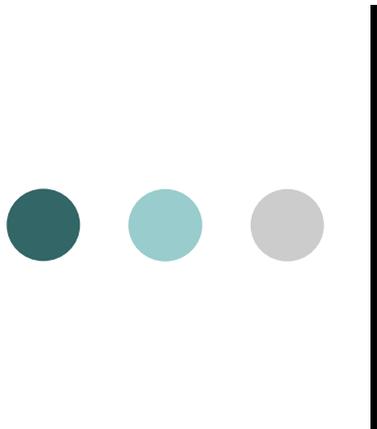
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1. Provisional Application Issues

*A riddle wrapped in a mystery inside
an enigma.*



1.1 - General Framework of Provisional Application: the Riddle

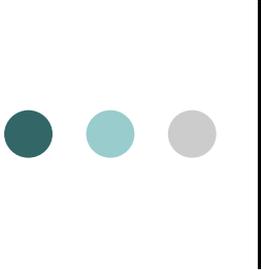
○ A. Public International Law

- The purpose of provisional application
- Article 25 (1) of the Vienna Convention on the Law of Treaties:

A treaty or a part of a Treaty is applied provisionally pending its entry into force if:

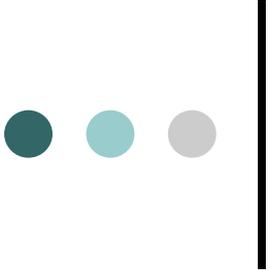
(a) the treaty itself so provides; or

(b) the negotiating States have in some other manner so agreed.



1.1 - General Framework of Provisional Application: the Riddle

- Examples of provisional application of international agreements:
 - General Agreement on Tariffs and Trade (1948)
 - Convention for European Economic Cooperation (1948)
 - Treaties on arms control and disarmament (e.g. 1992 Chemical Weapons Convention)
 - Agreement on the International Dolphin Conservation Program (1998)
- Provisional participation in international organizations



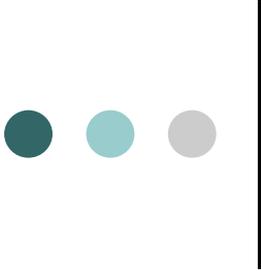
1.1 - General Framework of Provisional Application: the Riddle

○ B. Energy Charter Treaty

● Article 45 of the ECT:

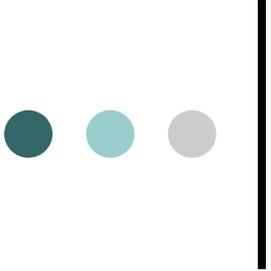
● 45(1): Principle

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.



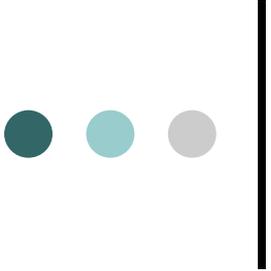
1.1 - General Framework of Provisional Application: the Riddle

- 45(2): Declaration
 - General obligation not to defeat the object and purpose of the ECT (Article 18 Vienna Convention)
 - Specific obligation to apply part VII of the ECT
- 45(3): Termination
 - Annex PA
- 45(4) to 45(7): Other provisions



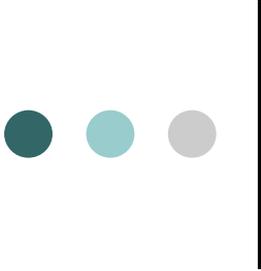
1.2 - Scope of Provisional Application: the Mystery

- ICSID tribunal in *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18) interpreted Article 45 to mean that provisional application relates to the entire ECT
 - Full panoply of substantive and procedural investor protections, including host State's consent to international arbitration
- Express references to Parts III and V appear to confirm this interpretation as they would arguably otherwise have no meaning



1.3 - Provisional Application in Domestic Law: the Enigma

- Provisional application of treaties under Fredonian law
- The ECT signed in 1994 – Fredonia recognized and accepted concept of a treaty's provisional application such that it is not inconsistent with Fredonian law
 - Article X of the Fredonian Constitution
 - Fredonia is a party to the Vienna Convention on the Law of Treaties
 - Fredonian Law on Procedure for the Conclusion, Execution and Denunciation of the International Treaties of Fredonia of 1975, effective until 1995
 - Article Y of Fredonian Law on International Treaties of Fredonia (FL IT), effective since 1995

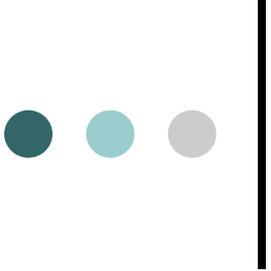


1.3 - Provisional Application in Domestic Law: the Enigma

- Article Y(2) of the FL IT

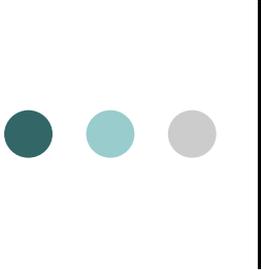
- “If the provisional treaty, which has to be ratified (...) provides for provisional application, (...) the treaty has to be introduced to the Parliament not later than six months after the provisional application began. With a decision taken in form of a law according to Article Z of this Law (...), the period of the provisional application may be prolonged.”

- The ECT submitted on 26 August 1996 for ratification
- No law extending ECT provisional application passed by the Fredonian Parliament



1.3 - Provisional Application in Domestic Law: the Enigma

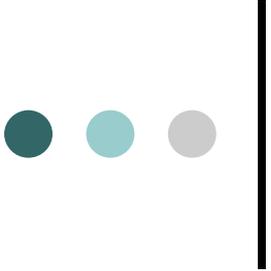
- "Domestic Law Exception"
- Article 46 of the Vienna Convention
- Article 45(1) of the Energy Charter Treaty
 - "...to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."
- Was the Energy Charter Treaty ratification process not in compliance with Article Y(2) of FL IT?
- As the provisional application of the ECT began on 17 December 1994, did the Fredonian Government have to submit the ECT for ratification to the Fredonian Parliament by 17 January 1996?



1.3 - Provisional Application in Domestic Law: the Enigma

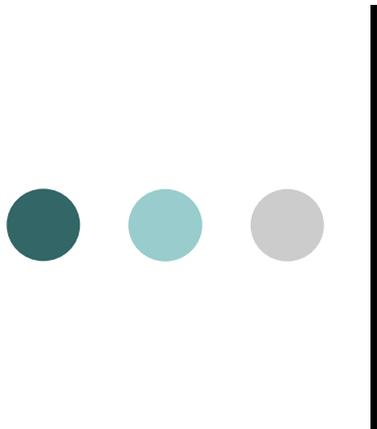
○ *Kardassopoulos v. Georgia* :

- "There is no necessary link between paragraphs (1) and (2) of Article 45. A declaration made under paragraph (2) may be, but does not have to be, motivated by an inconsistency between provisional application and something in the State's domestic law; there may be other reasons which prompt a State to make such a declaration. The Tribunal is therefore unable to read into the failure of either State to make a declaration of the kind referred to in Article 45(2) any implication that it therefore acknowledges that there is no inconsistency between provisional application and its domestic law." (para. 227)
- "Equally, a State whose situation is characterized by such inconsistency is entitled to rely on the proviso to paragraph (1) without the need to make, in addition, a declaration under paragraph (2)." (para. 228)



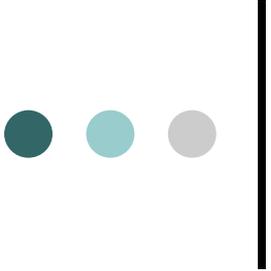
1.3 - Provisional Application in Domestic Law: the Enigma

- Interplay between articles 45(1) and 45(2)(a) of the Energy Charter Treaty
 - To what extent can an ECT signatory State later resist provisional application on basis of domestic law exception in absence of opt-out declaration under Article 45(2a)?
 - Need one a clear(er) prohibition?
 - Can a state rely on its own failure to meet municipal timing standards?
 - In context of Article 45(1), Article 45(2a) may be construed as only relating to an inability arising from domestic law and not to any undefined and unlimited political objection; under such interpretation the signatory State must make an opt-out declaration and cannot rely on the domestic law exception¹



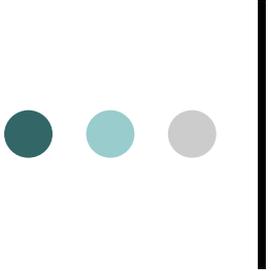
2. Termination of Provisional Application

It ain't over till it's over.



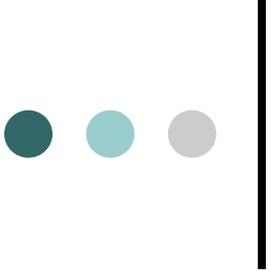
2.1 - Conditions of Termination

- Termination under Article 25(2) of the Vienna Convention on the Law of Treaties:
 - Unless the Treaty otherwise provides or the negotiating States otherwise agree, the provisional application 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



2.1 - Conditions of Termination

- Termination under Article 45(3)(a) of the Energy Charter Treaty
 - Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty
 - Takes effect 60 days after receipt of the notification



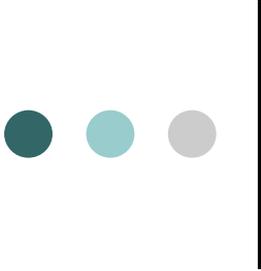
2.1 - Conditions of Termination

- Withdrawal under Article 47 of the Energy Charter Treaty
 - 47(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 Depository of its withdrawal from the Treaty.
 - 47(2) to 47(4):
 - 1 year after notification
 - 20-year protection period

2.2 - Effects of Termination

○ A. Institutional effects:

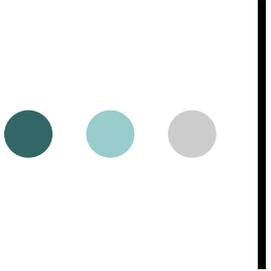
- Fredonia's status in the Energy Charter Conference after the termination
- Any difference for those signatory states who have made opt-out declaration under Article 45(2)(a)
- What is the object and purpose of the ECT and how can the signatory state defeat it violating Article 18 of the Vienna Convention on the Law of Treaties?



2.2 - Effects of Termination

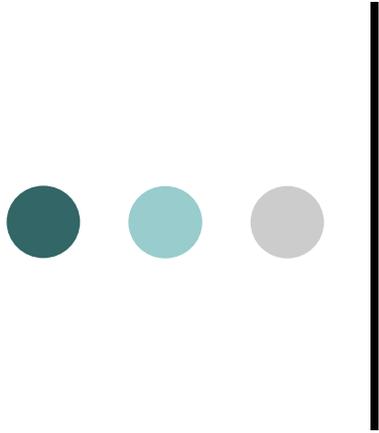
○ B. Substantive effects:

- Substantive protection (part III) and dispute resolution mechanism (part V) remain in effect for 20 years from the effective date of the termination notice.
- However, is post-termination provisional application of the ECT subject to the “domestic law exception”?
- Because, for example, of Article Y (2) of FLIT, it is unclear whether Fredonia:
 - a) was bound by the ECT since 17 January 1996; and/or
 - b) continues, after the termination notice, to be bound, for 20 years, under Parts III and V of the ECT with respect to foreign investments made in Fredonia prior to 20 August 2009



2.3 – Termination Notice

- What did/must it say?
- What did/must it terminate?



Michael Polkinghorne

White & Case LLP

mpolkinghorne@paris.whitecase.com

Laurent Gouiffès

Lovells LLP

laurent.gouiffes@lovells.com

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