

THE *YUKOS* SAGA RELOADED:  
 FURTHER DEVELOPMENTS IN THE INTERPLAY  
 BETWEEN DOMESTIC LEGISLATIONS AND  
 PROVISIONALLY APPLIED TREATIES

BORJA ALVAREZ SANZ\*

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I. INTRODUCTION

Just like in the Star Wars saga, many episodes of the *Yukos* dispute remain to be seen. The first two episodes—namely, the

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\* Borja Alvarez Sanz, LL.M. Candidate, 2017, New York University School of Law, Fulbright Scholarship (sponsored by the *Ramón Areces* Foundation), Dean’s Graduate Award, Assistant Editor of the *EUROPEAN JOURNAL OF INTERNATIONAL LAW* (EJIL), Graduate Editor of the *NYU JOURNAL OF INTERNATIONAL LAW AND POLITICS* (NYU JILP), and associate at *Cuatrecasas, Gonçalves Pereira*—currently on leave of absence. This Commentary was submitted for publication on Feb. 19, 2017. The author thanks Jenya Grigorova, Ph.D., José Ángel Rueda García, Ph.D., and the Senior Editor of the *NYU JILP*, Aaron Gavin, for their helpful comments. All opinions and errors remain strictly my own and should not be attributed to any current or previous employer or to any other person.

three parallel *Yukos* Interim Awards dated 2009<sup>1</sup> and the corresponding *Yukos* Final Awards rendered in 2014<sup>2</sup> in favor of the investors—addressed several important issues of international investment protection<sup>3</sup> and received unprecedented attention from the international legal community.<sup>4</sup> The third episode was released in April 2016,<sup>5</sup> when the Russian Federation

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1. *Hulley Enters. Ltd. (Cyprus) v. Russ.*, PCA Case No. 2005-03/AA226, Interim Award on Jurisdiction and Admissibility, (Nov. 30, 2009), <https://www.pcacases.com/web/sendAttach/419>; *Yukos Universal Ltd. (Isle of Man) v. Russ.*, PCA Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility, (Nov. 30, 2009), <https://pcacases.com/web/sendAttach/421>; *Veteran Petroleum Ltd. (Cyprus) v. Russ.*, PCA Case No. 2005-05/AA228, Interim Award on Jurisdiction and Admissibility, (Nov. 30, 2009), <https://www.pcacases.com/web/sendAttach/423>. The *Yukos* Arbitral Tribunal was composed by L. Yves Fortier QC (Chair), Charles Poncet, and Stephen M. Schwebel.

2. *Hulley Enters. Ltd. (Cyprus) v. Russ.*, PCA Case No. 2005-03/AA226, Final Award, (July 18, 2014), <https://www.pcacases.com/web/sendAttach/418>; *Yukos Universal Ltd. (Isle of Man) v. Russ.*, PCA Case No. 2005-04/AA227, Final Award, (July 18, 2014), <https://pcacases.com/web/sendAttach/420>; *Veteran Petroleum Ltd. (Cyprus) v. Russ.*, PCA Case No. 2005-05/AA228 Final Award, (July 18, 2014), <https://www.pcacases.com/web/sendAttach/422>. The Final Awards granted total damages compensation of more than \$50 billion (USD) and \$60 million (USD) in costs of legal representation.

3. These include, among others: (i) the condition of protected “investor” under the Energy Charter Treaty (ECT) of companies organized in accordance with the laws of a Contracting Party pursuant to Article 1(7)(a)(ii), *see, e.g., Hulley Enters. Ltd. (Cyprus)*, PCA Case No. 2005-03/AA226, Interim Award on Jurisdiction and Admissibility, ¶¶ 411–17; (ii) the proper interpretation of the tax carve-out in Article 21(1) of the ECT as capturing only *bona fide* taxation measures, *see, e.g., Hulley Enters. Ltd. (Cyprus)*, PCA Case No. 2005-03/AA226, Final Award, ¶¶ 1430–45; or (iii) the assessment of the investor’s contributory fault in the damages assessment, *see, e.g., id.* ¶¶ 1594–1637. Materially unaffected by the District Court’s Judgment, these holdings of the *Yukos* Awards maintain persuasive value.

4. *See generally* Mark Kantor, *Yukos* Special Editorial, TRANSNAT’L DISP. MGMT., Aug. 2015, [www.transnational-dispute-management.com/article.asp?key=2253](http://www.transnational-dispute-management.com/article.asp?key=2253); Chester Brown, *The End of the Affair?: Hulley Enterprises Ltd (Cyprus) v Russian Federation; Yukos Universal Ltd (Isle of Man) v Russian Federation; Veteran Petroleum Ltd (Cyprus) v Russian Federation*, UNCITRAL, PCA Nos AA 226, 227, 228, *Final Awards*, 18 July 2014, 17 J. WORLD INV. & TRADE 126, 139 (2016).

5. The reason for such a substantial time gap between the *Yukos* Interim Awards (2009) and Russia’s challenge of the *Yukos* Tribunal’s jurisdiction after the rendering of the *Yukos* Final Awards (2014) is to be found in the requirements for set-aside applications under Dutch law. *See* Franco Ferrari & Friedrich Rosenfeld, *Yukos Revisited—A Case Comment on the Set Aside Deci-*

struck back and succeeded in its annulment claim filed with the District Court of The Hague, the competent court of the seat of the *Yukos* arbitration.

The champagne that had flowed to celebrate the billionaire awards suddenly lost its fizz when, deciding in Russia's favor, the Court set aside the six *Yukos* Awards for lack of jurisdiction of the Arbitral Tribunal (*Yukos* Tribunal). The judgment rendered by the District Court (Judgment)<sup>6</sup> concluded that the rules on provisional application of the Energy Charter Treaty (ECT),<sup>7</sup> signed but never ratified by Russia,<sup>8</sup> did not oblige Russia to arbitrate investment disputes arising under the treaty. The Court reasoned that, as long as the treaty was under provisional application for Russia, the host state had not consented to investor-state arbitration and no valid arbitration agreement existed. In other words, Russia was not bound by the dispute settlement rules of the ECT.

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*sion in Yukos Universal Limited (Isle of Man) et al. v. Russia*, 36 PRAXIS DES INTERNATIONALEN PRIVAT 478, 480 n.17 (2016) (noting that the Dutch Code of Civil Procedure (DCCP), both in its 1986 version as well as in its current 2015 version, requires any challenge to an arbitral tribunal's decision upholding jurisdiction as well as the application to set aside any interim arbitral award be made together with the challenge of the subsequent final or partial final award).

6. The Judgment of the District Court of The Hague [*Rechtbank's-Gravenhage*] was rendered on April 20, 2016. The Court decided jointly the three annulment requests: (i) *Russ. v. Veteran Petroleum Limited* (C/09/477160/HA ZA 15-1); (ii) *Russ. v. Yukos Universal Limited* (C/09/477162/HA ZA 15-2); and (iii) *Russ. v. Hulley Enterprises Limited* (C/09/481619/HA ZA 15-112). Rb.-Gravenhage 20 april 2016, ECLI:NL:RBDHA:2016:4230, (*Russ./Veteran Petroleum Ltd., Yukos Universal Ltd., Hulley Enters. Ltd.*) (Neth.), <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230>. The jurisdiction of the District Court was established on the basis of the seat of the three arbitration proceedings at The Hague. *See* Art. 1064 para. 2 (1986) (Neth.).

7. Energy Charter Treaty, *opened for signature* Dec. 17, 1994, 2080 U.N.T.S. 95 (entered into force Apr. 16, 1998) [*hereinafter* ECT].

8. Russia signed the ECT on December 17, 1994 but never ratified it. On August 20, 2009, Russia officially informed the ECT Depository (the Portuguese Republic) that it did not intend to become a Contracting Party to the ECT. Pursuant to Article 45(3)(a) of the ECT, Russia applied the ECT on a provisional basis until October 19, 2009. *See Russian Federation, ENERGY CHARTER*, <http://www.energycharter.org/who-we-are/members-observers/countries/russian-federation/> (last updated Aug. 4, 2015). The investments concerned in the *Yukos* dispute were made prior to such date.

This Commentary focuses on the Judgment's reasoning and draws attention to one of its implications: the role that domestic legislation plays in ascertaining the existence of international obligations imposed by provisionally applied instruments. Part II presents the issue of provisional application decided by the District Court of The Hague. Part III examines the Judgment's reasoning to set aside the *Yukos* Awards. Part IV discusses the implications of the Judgment as to the role that domestic legislations should play to determine the existence of internationally binding obligations arising out of treaties under provisional application. The Commentary advances an approach to address this interplay between domestic and international law informed by the recently released Draft guidelines, tentatively adopted by the International Law Commission (ILC), on the provisional application of treaties (ILC Draft Guidelines),<sup>9</sup> and concludes by referencing some of the recent and further expected developments of the *Yukos* saga.

## II. THE ISSUE OF ECT PROVISIONAL APPLICATION BEFORE THE DISTRICT COURT OF THE HAGUE

The District Court's Judgment put the issue of provisional application at the center of the international community's attention. It is commonly known that the mechanism of provisional application allows contracting states "to give effect to a treaty pending its entry into force by applying its provisions to relevant facts, acts and situations."<sup>10</sup> The Vienna Convention on the Law of Treaties (VCLT)<sup>11</sup> codifies this mechanism in

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9. Int'l Law Comm'n, Text of the Draft Guidelines Provisionally Adopted by the Drafting Committee at the Sixty-Seventh and Sixty-Eighth Sessions, U.N. Doc A/CN.4/L.877 (2016) [*hereinafter* ILC Draft Guidelines].

10. 9 ANNELIESE QUAST MERTSCH, PROVISIONALLY APPLIED TREATIES: THEIR BINDING FORCE AND LEGAL NATURE 7–8 (Malgosia Fitzmaurice et al. eds., 2012) (indicating that there are usually two type of situations where recourse is had to provisional application: "First, there is a gap between the conclusion of the treaty negotiations on the one hand and the entry into force of the treaty on the other. . . . Second, States are unwilling, for one reason or another, to await the treaty's entry into force and seek to apply the treaty provisions at an earlier point in time." (citations omitted)).

11. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 33 (entered into force Jan. 27, 1980) [*hereinafter* VCLT].

Article 25,<sup>12</sup> although in a manner criticized as “fairly general and particularly laconic”<sup>13</sup> and “lack[ing] legal precision.”<sup>14</sup> Because of this ambiguity, the binding force of provisionally applied treaties has been heavily debated.<sup>15</sup> One of the main points of disagreement is whether states can invoke their domestic law to limit the effect of a treaty under provisional application.<sup>16</sup>

Indeed, this was the issue before the District Court of The Hague in the *Yukos* case. The conflict arose because of the unclear wording of Article 45(1) of the ECT, which lays down the so-called “ECT Limitation Clause”<sup>17</sup>: “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.*”<sup>18</sup>

The *Yukos* Tribunal and the District Court differed about whether the provisional application of the ECT obliged Russia to arbitrate ECT investment disputes. The *Yukos* Tribunal reasoned in 2009 that the Limitation Clause provides such an obligation. However, as the next part describes, the District

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12. *Id.* art. 25(1) (“A treaty or 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.”).

13. ALBANE GESLIN, *LA MISE EN APPLICATION PROVISOIRE DES TRAITÉS*, 112 (A. Pédone et al. eds., 2005) (“caractère très générale et particulièrement laconique”).

14. Martin Rogoff & Barbara E. Gauditz, *The Provisional Application of International Agreements*, 39 *ME. L. REV.* 29, 41 (1987); *see also* MERTSCH, *supra* note 10, at 22 (correctly explaining that “[the] analysis of the content of Article 25 [VCLT] shows that the Article provides the technical framework . . . . Neither provisional application nor its legal effects and implications are actually defined”).

15. *Compare* MERTSCH, *supra* note 10, at 73 (discussing “[t]he view that provisionally applied treaties are non-legally binding”), *with id.* at 119 (discussing “[t]he view that provisionally applied treaties are legally binding”).

16. Views against the non-binding effect of provisionally applied treaties “are based on certain features . . . such as the power of unilateral termination, Article 25(2) [VCLT], or the use of limitation clauses” under which “it is internal law that determines the extent to which a treaty is provisionally applied in the international sphere.” *Id.* at 73.

17. Limitation clauses restrict or delimit the effect to be given to treaties under provisional application by “determining the extent to which [such application] takes place.” *Id.* at 95.

18. ECT, *supra* note 7, art. 45(1) (emphasis added).

Court adopted the opposite approach and decided that Russia had not consented to arbitrate investment disputes arising under the treaty.

On this ground, the *Yukos* Awards were vacated, transforming the outcome in *Yukos* from more than \$50 billion (USD) to zero. The Judgment represented the first annulment of an arbitral award by the District Court of The Hague in nearly 20 years<sup>19</sup>—a notable highlight to add to this record-breaking case of a “mammoth scale.”<sup>20</sup>

### III. THE DISTRICT COURT JUDGMENT: UNDER ARTICLE 45(1) OF THE ECT, RUSSIA WAS NOT BOUND BY THE PROVISIONALLY-APPLIED ECT DISPUTE-SETTLEMENT RULES

In its claim to set aside the *Yukos* Awards, Russia invoked six grounds for annulment.<sup>21</sup> The District Court upheld Russia’s first assertion and vacated the *Yukos* Awards for lack of jurisdiction. In its reasoning, the Court (i) identified the applicable standard of review under Dutch law for this jurisdictional question, (ii) interpreted the unclear ECT Limitation Clause, and (iii), on the basis of the interpretation given to Article 45(1) of the ECT by the Court, determines whether the ECT dispute settlement rules (Article 26 of the ECT) were compatible with Russian domestic laws.

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19. See B. Knowles, K. Moyeed & N. Lamprou, *The US\$50 Billion Yukos Award Overturned—Enforcement Becomes a Game of Russian Roulette*, KLUWER ARB. BLOG (May 13, 2016), <http://kluwarbitrationblog.com/2016/05/13/the-us50-billion-yukos-award-overturned-enforcement-becomes-a-game-of-russian-roulette>.

20. Evidencing the mammoth scale of the *Yukos* dispute, see Brown, *supra* note 5, at 127.

21. Russia’s counsel articulated in the annulment claim (i) three *jurisdictional* grounds; and (ii) three grounds arising out of *violations of the mandate* entrusted to the *Yukos* Tribunal, based on the five causes set out in Articles 1065(1)(a) – (e) of the DCCP, 1986. See Pleading Notes of Prof. A.J. van den Berg for the hearing before the District Court of Feb. 9, 2016, <http://docplayer.net/21595726-Unofficial-translation-pleading-notes-prof-a-j-van-den-berg-versus.html>; Oral Argument Presentation of Prof. A.J. van den Berg before District Court of the Hague, Feb. 9, 2016, <http://www.italaw.com/sites/default/files/case-documents/italaw7256.pdf>.

A. *Applicable Standard of Review: Non-restrained Approach to Assess the Yukos Tribunal's Findings on Jurisdiction*

At the outset, the District Court clarified that it approached the annulment claim under a *de novo* standard of review to decide whether there existed a valid arbitration agreement.<sup>22</sup> Given the fundamental character of the right of access to courts, and relying on previous decisions by Dutch courts,<sup>23</sup> the Court warned that its assessment on jurisdiction was not subject to restraint and that no deference was to be given to the conclusion of the *Yukos* Tribunal upholding jurisdiction. Further, the Judgment noted that the burden of proving the Tribunal's jurisdiction rested with the defendants—the *Yukos* investors—pointing out that this requirement was also imposed on them in the original arbitration proceedings.<sup>24</sup>

B. *Interpretation of Article 45(1) of the ECT: The Court's Piecemeal Approach Towards the Limitation Clause on Provisional Application*

The Court interpreted the meaning of the “ECT Limitation Clause” governing the treaty's provisional application and specifically focused on the wording: “Each signatory agrees to apply this Treaty provisionally . . . to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.”

During the proceedings, the parties advanced two possible interpretations of the provision, which were discussed *in extenso* by both the *Yukos* Tribunal and the District Court of The Hague:

- The “all-or-nothing” approach: the Limitation Clause requires establishing only whether the provisional application of the ECT as a whole is *per se* consistent with the Russian constitution, laws, or

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22. See Rb.-Gravenhage 20 april 2016, ECLI:NL:RBDHA:2016:4230, ¶ 5.4 (Russ./Veteran Petroleum Ltd., Yukos Universal Ltd., Hulley Enters. Ltd.) (Neth.), <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230>.

23. *Id.* The District Court explicitly mentioned the Dutch Supreme Court's decision in *Ecuador v. Chevron & Texaco*, HR 26 September 2014, NJ 2015, 318 m.nt. HJ Snijders, ECLI:NL:HR:2014:2837 (Ecuador/Chevron & Texaco).

24. See Rb.-Gravenhage 20 april 2016, ECLI:NL:RBDHA:2016:4230, ¶ 5.4.

regulations. This was the position of the *Yukos* investors, upheld by the *Yukos* Tribunal;<sup>25</sup> or

- The “piecemeal” approach: the Limitation Clause requires establishing whether *each provision of the ECT*, including the dispute settlement rules of Article 26 of the ECT, is compatible with the Russian constitution, laws, or regulations. This was the position defended by Russia and followed by the District Court.<sup>26</sup>

The District Court favored the “piecemeal” approach for four main reasons:

*First*, the Court drew attention to the ordinary meaning<sup>27</sup> of the phrase “to the extent” in Article 45(1) of the ECT.<sup>28</sup> In the Court’s view, the phrase “to the extent” ordinarily implies varying degrees of application<sup>29</sup>—a *provision-by-provision* analysis—in the assessment of compatibility required by the Limitation Clause. This weighed in favor of the “piecemeal” option which permits that some ECT obligations be determined as compatible with Russian law, and therefore binding on Russia,

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25. *See, e.g.*, *Hulley Enters. Ltd. (Cyprus) v. Russ.*, PCA Case No. 2005-03/AA226, Interim Award on Jurisdiction and Admissibility, ¶¶ 290–92, 301–29 (Nov. 30, 2009), <https://www.pccases.com/web/sendAttach/419>. Some commentators have expressed their views in support of the “all-or-nothing” approach. *See* Alex M. Niebruegge, *Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law*, 8 CHI. J. INT’L L. 355, 368–69 (2008); Peter C. Laidlaw, *Provisional Application of the Energy Charter As Seen in the Yukos Dispute*, 52 SANTA CLARA L. REV. 655, 682–83 (2012).

26. Prior to the Judgment, some commentators had criticized the “all-or-nothing” approach adopted by the *Yukos* Tribunal on the basis of the wording of the ECT Limitation Clause, thereby suggesting adherence to the “piecemeal” approach. *Cf.* THOMAS ROE & MATTHEW HAPPOLD, *SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY* 76–77 (2011).

27. VCLT, *supra* note 11, art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

28. The District Court explicitly rejected the reasoning of the *Yukos* Tribunal focused on the use of the word “such” and held that substituting “such” by the provisional application [*of this Treaty*] did not solve the interpretative problem posed by the Limitation Clause. *Cf.* Rb.-Gravenhage 20 april 2016, ECLI:NL:RBDHA:2016:4230, ¶ 5.12.

29. *Id.* ¶¶ 5.10–11 (using several well-known English dictionaries to interpret the incise “to the extent” and reasoning that “‘to the extent’ in the common parlance signifies a degree of application”).

while others be deemed incompatible, and thus lacking binding effect. In support of this view, the Court also remarked that, had the Contracting Parties wanted to establish an “all-or-nothing” clause of provisional application, the word “if,” absent in the ECT Limitation Clause, would have better served this purpose.<sup>30</sup> Such an option would not have implied differentiation between treaty provisions in the required assessment of compatibility. The language of “if” ordinarily leads to a binary, “all-or-nothing” outcome (i.e., either the ECT applies provisionally or it does not). By contrast, the wording used in Article 45(1) of the ECT did not impose a binary result, but rather invited a “piecemeal” assessment of compatibility.

*Second*, the District Court attached crucial significance to the fact that Article 45(1) of the ECT mentioned different sources of domestic law.<sup>31</sup> Among these sources, the ECT not only refers to sources of law enacted by parliamentary bodies (such as the “constitution” and “laws”), but also to sources dictated by the executive branch (such as “regulations”). Russia argued that the inclusion of the term “regulations” supported the proposition that the Limitation Clause was not drafted to require assessment of whether the principle of provisional application was itself inconsistent with Russian law and, thus, invalidated the “all-or-nothing” approach. This because any rule prohibiting the State’s commitment to provisionally apply a treaty would be laid down in primary sources of law (“constitution” or “laws”) due to its essential importance. It would be unreasonable to lay down such a paramount constitutional rule in secondary legislation (“regulations”). Thus, if the Limitation Clause was meant to require an “all-or-nothing” determination on the compatibility of provisional application generally with a Contracting Party’s domestic law, the inclusion of “regulations” would be superfluous since “regulations” are not expected to include a rule relevant to that determination. Therefore, the mention of “regulations” in Article 45(1) of the ECT necessarily contradicted the position of the *Yukos* investors and the holding of the *Yukos* Tribunal.

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30. *Id.* ¶ 5.12 (indicating that, in the interpretation given by the *Yukos* Tribunal to the Limitation Clause, “the word ‘if’ [instead of ‘to the extent that’] would be more fitting”).

31. *Id.* ¶ 5.13.

The District Court agreed with Russia. It held that since it was “inconceivable that a ban on the provisional application of a treaty can [sic] be laid down in delegated legislation,” the ECT should be referring to a different (conceivable) inconsistency.<sup>32</sup> In all likelihood to the incompatibilities that may arise between some specific provisions of the ECT and Russian regulations.<sup>33</sup> This, again, supported the “piecemeal” approach.

*Third*, the Court noted that the “piecemeal” approach advanced by Russia did not conflict with the *pacta sunt servanda* principle or the principle that a signatory may not invoke its national laws to excuse its failure to perform treaty obligations—Articles 26<sup>34</sup> and 27<sup>35</sup> of the VCLT, respectively. The Court reasoned that both principles are fully applicable in the case of treaties that have entered into effect, but may be subject to limits in the case of treaties under provisional application.<sup>36</sup> Article 25(1) of the VCLT,<sup>37</sup> after all, explicitly allows signatories to limit the provisional application of a treaty.<sup>38</sup> On this basis, the District Court concluded that “while it is possible that provisions of domestic law can stand in the way of the

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32. *Id.*

33. *Id.* (“But it is conceivable that a test of compatibility of individual treaty provisions is laid down in delegated legislation.”); *see also id.* ¶ 5.22 (quoting Mr. Baramberg, Chairman of the legal advisory committee to the Conference on the ECT: “[T]he effect [of adding the term “regulations” to the Limitation Clause] is to suggest that relatively minor impediments in the form of regulations, no matter how insignificant they may be, can be the occasion for failing to apply the Treaty provisionally when in fact those regulations could be brought into conformity without serious effort.”).

34. VCLT, *supra* note 11, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

35. *Id.* art. 27 (“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.”).

36. Rb.-Gravenhage 20 april 2016, ECLI:NL:RBDHA:2016:4230, ¶ 5.19 (“[T]he principles in Articles 26 and 27 VCLT, referred to by the [*Yukos*] Tribunal, do not automatically lead to the interpretation of Article 45 as applied by the [*Yukos*] Tribunal. . . . [A]lthough these principles similarly extend to treaties that have entered into force based on provisional application, they are not limitless. Signatories to a treaty can explicitly limit the provisional application of treaty provisions, as becomes apparent from Article 25 VCLT . . .”).

37. *See* VCLT, *supra* note 11, art. 25(1).

38. *See* Rb.-Gravenhage 20 april 2016, ECLI:NL:RBDHA:2016:4230, ¶ 5.19.

performance of one or more provisions of the ECT, *the basis for doing so is encased in the ECT itself—i.e., at treaty level.*<sup>39</sup>

Finally, the Judgment laid down three concluding remarks directly contradicting the reasoning contained in the *Yukos* Interim Awards:

- Significance should not be attached to the conclusion reached by the *Kardassopoulos* case<sup>40</sup> about the same ECT Limitation Clause. The *Kardassopoulos* case dealt with acts performed by Georgia prior to the ECT's entry into force and, thus, examined the question of provisional application. The *Kardassopoulos* tribunal, incidentally presided by the same *Yukos* chair, Mr. L. Yves Fortier, concluded in the affirmative and reasoned that “the language used in Article 45(1) [was] to be interpreted as meaning that each signatory State is obliged, even before the ECT has formally entered into force, to *apply the whole* ECT as if it had already done so.”<sup>41</sup> Thus, through applying the ECT *in its entirety* (rather than by conducting an assessment on a *provision-by-provision* basis), *Kardassopoulos* supported the “all-or-nothing” approach.

However, the District Court ruled that, since the arguments in *Kardassopoulos* were similar to those in the *Yukos* Interim Awards (already rejected by the Court), the former case provided no basis for a different interpretation of the Limita-

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39. *Id.* (“[A] state that relies on a conflict between a treaty provision and national laws, on sound grounds and referencing the Limitation Clause does not act contrary to the *pacta sunt servanda* principle, nor to the principle of Article 27 VCLT.”).

40. See *Ioannis Kardassopoulos (Greece) v. Rep. of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶ 205–23 (Jul. 6, 2007). In particular, the District Court held that “for the interpretation of the Limitation Clause, significance should also not be attached to the circumstance that the Tribunal’s opinion is supported by the opinion of another tribunal . . . in another ECT-based arbitration, namely the *Kardassopoulos* case.” Rb.-Gravenhage 20 april 2016, ECLI:NL:RBDHA:2016:4230, ¶ 5.20.

41. *Ioannis Kardassopoulos*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶ 211 (emphasis added).

tion Clause than the one sustained in the Judgment.<sup>42</sup>

- References to “state practice” made by the parties and the *Yukos Tribunal*<sup>43</sup> were to no avail.<sup>44</sup> In the Court’s view, under the reach of Article 31(3)(b) of the VCLT,<sup>45</sup> the “state practice” factor is only relevant to assess a treaty provision “if the states involved have explicitly or implicitly accepted it.”<sup>46</sup> But here, neither party had argued or proved the existence of “a (wide) application practice supported by all states involved.”<sup>47</sup>
- Even though the Court decided that resort to the ECT *travaux préparatoires* was not required under Article 32 of the VCLT for the meaning of the Limitation Clause was not ambiguous or obscure and did not lead to a result manifestly absurd or unreasonable,<sup>48</sup> the Court underlined that one of the ECT drafters’ explanations for adding the term “regulations” in Article 45(1) of the ECT was to support the “piecemeal” approach.<sup>49</sup>

### C. *The Final Stage: Article 26 of the ECT is Inconsistent with Russian Domestic Laws*

After accepting the “piecemeal” approach, the Court determined the compatibility of the investor-state dispute settlement rules of Article 26 of the ECT with Russian laws.

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42. See Rb.-Gravenhage 20 april 2016, ECLI:NL:RBDHA:2016:4230, ¶ 5.20.

43. See, e.g., *Hulley Enters. Ltd. (Cyprus) v. Russ.*, PCA Case No. 2005-03/AA226, Interim Award on Jurisdiction and Admissibility, ¶¶ 321–27 (Nov. 30, 2009), <https://www.pccases.com/web/sendAttach/419>.

44. See Rb.-Gravenhage 20 april 2016, ECLI:NL:RBDHA:2016:4230, ¶ 5.21.

45. See VCLT, *supra* note 11, art 31(3)(b) (“There shall be taken into account [for the purposes of the interpretation of a treaty], together with the context: . . . (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”).

46. See Rb.-Gravenhage 20 april 2016, ECLI:NL:RBDHA:2016:4230, ¶ 5.21.

47. *Id.*

48. *Id.* ¶ 5.22.

49. *Id.*; see *supra* text accompanying note 33.

The District Court emphasized that the Limitation Clause applies not only when there exists an explicit *prohibition* of arbitration of investment disputes under Russian law (as argued by the *Yukos* investors), but also in cases where “there was no legal basis [in Russian law] for such a method of dispute settlement.”<sup>50</sup>

Under this broad—and much criticized<sup>51</sup>—interpretation of the “not inconsistent with” clause in Article 45(1) of the ECT, the judgment assessed the compatibility of investor-state arbitration with Russian domestic legislation. Contrary to the conclusion reached by the *Yukos* Interim Awards, the District Court held that Russian law only provided authorization for arbitration of civil-law disputes. This interpretation excluded controversies like *Yukos*, which arose out of the exercise of public authority by Russia.<sup>52</sup>

The Court further examined the particular provisions of Russian law that the *Yukos* Tribunal had invoked as providing it with jurisdiction to decide the dispute—namely Articles 9 and 10 of the Russian Law on Foreign Investments.<sup>53</sup> For the Court, the key question was not whether such provisions *al-*

50. Rb.-Gravenhage 20 april 2016, ECLI:NL:RBDHA:2016:4230, ¶ 5.33.

51. See VOLTERRA FIETTA, *Yukos Setting Aside Judgment*, LEXOLOGY 3–4 (Jun. 14, 2016), <http://www.lexology.com/library/detail.aspx?gæ668b79-2563-42a1-b890-cc55cec54412> (“The case will be of concern to public international lawyers. Without explanation or support in public international law, the Court eviscerated the concept of provisional application as a general proposition of law. Contrary to the object and purpose of the ECT, not to mention the plain meaning of its text, the Court decided to transform the negative concept ‘not inconsistent with’ . . . into a concept not found in Article 45(1) of a requirement that there be positive recognition or support in the relevant domestic law . . . . Such casuistry renders the concept of provisional application meaningless. Graham Coop, partner of Volterra Fietta and former General Counsel to the Energy Charter Secretariat, commented: ‘The ECT is not a masterpiece of drafting clarity, it is true. However, it does seem that the Court’s approach largely empties Article 45 of much of its potential utility . . . .’”).

52. Rb.-Gravenhage 20 april 2016, ECLI:NL:RBDHA:2016:4230, ¶ 5.41.

53. Article 9 of the 1991 Law on Foreign Investments stated that: “(1) Investment disputes . . . shall be resolved by the Supreme Court of the RSFSR [Soviet Russia] or the Supreme Arbitrazh Court of the RSFSR, unless another procedure is established by an international treaty in force in the territory of the RSFSR. (2) Disputes of foreign investors and enterprises with foreign investments against RSFSR State bodies . . . shall be resolved by the RSFSR courts, or, upon agreement of the parties, by an arbitral tribunal . . . .” *Id.* ¶ 5.46 (quoting the 1991 Russian Law on Foreign Investments).

lowed for investor-state arbitration (which, arguably, they did) but whether they *directly provided* an independent legal basis for arbitration. The Court held they did not.<sup>54</sup>

First, Article 9(1) of the Law on Foreign Investments designated the Russian courts as the primary body of adjudication for investment disputes and only allowed for a deviation where “established by an international treaty in force”.<sup>55</sup> Second, Article 10 embodied a “blanket provision,” a general reference to the possibility that treaties and federal laws *may* confer jurisdiction either to courts or to arbitral tribunals, but without making a choice between both options.<sup>56</sup> In all, no independent legal basis for the *Yukos* Tribunal’s jurisdiction could be derived from Russian domestic law.

Against this backdrop, the Court concluded that Russia had not consented to arbitrate investment disputes under Article 26 of the ECT<sup>57</sup> and, thus, annulled the six *Yukos* Awards.

#### IV. THE INTERPLAY BETWEEN DOMESTIC LAWS AND PROVISIONALLY APPLIED INTERNATIONAL INSTRUMENTS AT STAKE

In the view of the District Court, the “ECT Limitation Clause” determines that national laws play a controlling role in ascertaining whether an ECT Contracting Party is bound, on a provisional basis, by each ECT obligation. Such a significant role deserves attention from international legal scholars because the standard may lead to a notable degree of uncertainty in the task of determining the existence of internationally binding obligations. Further, states may be tempted to invoke, or even modify as it best suits them, domestic laws in order to be exempted from obligations imposed by treaties under provisional application.

In our view, any solution to this issue should move beyond the interpretative “trap” of Article 45(1) of the ECT<sup>58</sup> and pro-

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54. *Id.* ¶¶ 5.51 and 5.58.

55. *Id.* ¶¶ 5.46–.51.

56. *Id.* ¶¶ 5.52–.58.

57. *Id.* ¶ 5.95.

58. It should be noted that even before the rendering of the *Yukos* Interim Awards, in the aftermath of the *Kardassopoulos* dispute, commentators warned about the problematic interpretation of the ECT Limitation Clause. See Matthew Belz, *Provisional Application of the Energy Charter Treaty: Kardasso-*

vide a principled answer to the underlying issue: *under what conditions should a state be allowed to invoke its domestic laws to modulate (or even eliminate) the obligations imposed on it by a treaty under provisional application?*<sup>59</sup>

To address this question the following preliminary ideas are advanced. The ILC Draft Guidelines intend to clarify the law and practice of the provisional application of treaties as per Article 25 of the VCLT.<sup>60</sup> Currently, ILC Draft Guideline 7 provides that “[t]he provisional application of a treaty or a part of a treaty produces the *same legal effects as if the treaty were in force . . . unless the treaty provides otherwise or it is otherwise agreed.*”<sup>61</sup> Under this provision, two situations may be distinguished.

First, the *ordinary case* where the treaty under provisional application produces the same legal effects as if it were in force, including the fundamental principle that a state may not invoke the provisions of its internal law as justification for its failure to perform a treaty; and

Second, the *exceptional situation* where a “treaty provides otherwise or it is otherwise agreed” so that the legal effects ordinarily stemming from treaties in force are limited by the contracting parties.

Limitation clauses restrict or delimit such legal effects and, thus, should be generally understood to place the relevant treaty in the second exceptional situation. However, two further scenarios arise under the exceptional situation and the question remains: how does the limitation clause restrict or delimit the legal effect of the treaty at hand? Either (a) the limitation clause places domestic laws in a superior position to *each (and all) of the treaty provisions* or (b) the controlling role reserved to domestic laws is *itself limited*, for instance, to issues such as whether the state may be bound by a treaty under provisional application.

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*poulos v. Georgia and Improving Provisional Application in Multilateral Treaties*, 22 EMORY INT’L. L. REV. 727, 753–60 (2008).

59. This was essentially the question considered by the *Yukos* Tribunal in the *Yukos* Interim Awards. Cf. e.g., *Hulley Enters. Ltd. (Cyprus) v. Russ.*, PCA Case No. 2005-03/AA226, Interim Award on Jurisdiction and Admissibility, ¶¶ 311–15 (Nov. 30, 2009), <https://www.pcacases.com/web/sendAttach/419>.

60. See ILC Draft Guidelines, *supra* note 9, Draft Guideline 2.

61. *Id.* Draft Guideline 7.

States may well opt between such scenarios and shape their limitation clauses accordingly. In effect, years before the provisional release of the ILC Draft Guidelines, the Expert Opinions of Profs. James R. Crawford and Michael Reisman presented in the *Yukos* arbitration proceedings advanced that the parties to a treaty may provide for a provisional application that modulates the scope of the binding obligations imposed on them.<sup>62</sup> States may choose to base such modulations on the consistency of *each treaty provision* with their respective national laws. This would be supported not only by the principle of sovereignty but also by the broad terms of Article 25(1)(a) of the VCLT—“if the treaty itself so provides.”

However, elemental notions of international law require that such a substantial modulation of the legal effects of the treaty be drafted in clear and unambiguous terms. As stated by Prof. J. Crawford, to provide for such modulation the treaty language needs to overcome the “strong presumption of the separation of international from national law” as well as the “strong underlying value against self-judgement.”<sup>63</sup> Only where such strong presumptions are clearly rebutted may the binding effect of each treaty provision under provisional application be decided by resorting to the states’ domestic laws.

The *rationale* behind such requirement is well synthesized in the following passage of the *Yukos* Tribunal in the *Yukos* Interim Awards:

Provisional application as a treaty mechanism is a question of public international law. International law and domestic law should not be allowed to combine, through the deployment of an “inconsistency” or “limitation” clause, to form a hybrid in which the content of domestic law directly controls the content of an international legal obligation. This would create unacceptable uncertainty in international affairs.

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62. See Expert Opinions submitted alongside the *Yukos* arbitration proceedings by (i) Prof. James R. Crawford, SC (Jun. 22, 2006 and May 3, 2007); and by (ii) Prof. W. Michael Reisman (Jun. 28, 2006). *Hulley Enters. Ltd. (Cyprus)*, PCA Case No. 2005-03/AA226, Interim Award on Jurisdiction and Admissibility, ¶¶ 215–27 (Prof. J. Crawford); ¶¶ 228–42 (Prof. M. Reisman); ¶¶ 316–20 (acceptance by the *Yukos* Tribunal of the propositions advanced in such expert opinions).

63. *Id.* ¶ 316 (quoting the Expert Opinion of Prof. James R. Crawford, ¶ 15 (May 3, 2007)).

Specifically, it would allow a State to make fluctuating, uncertain and un-notified assertions about the content of its domestic law, after a dispute has already arisen. Such a State . . . “*would be bound by nothing but its own whims and would make a mockery of the international legal agreement to which it chose to subject itself.*” A treaty should not be interpreted so as to allow such a situation unless the language of the treaty is clear and admits no other interpretation.<sup>64</sup>

Under this view, the interpretative dilemma posed by Article 45(1) of the ECT would be replaced by the analysis of whether its terms *are sufficient to rebut* such strong presumptions and make Russian law prevail over the ECT investor-state dispute settlement rules. Given the unclear drafting of the ECT Limitation Clause, the decision by the District Court of The Hague to concede Russian domestic law a controlling role over the treaty under provisional application would be questionable. The Court’s extremely broad interpretation of the terms “not inconsistent with [domestic laws]”<sup>65</sup> would also be subject to criticism. Beyond these criticisms, some commentators have pointed out some other, more general, effects arising out of the Judgment.<sup>66</sup> In particular, energy investors in Russia (holding pre-October 2009 investments<sup>67</sup>) and Belarus<sup>68</sup> may wish to think twice before choosing the Netherlands as the

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64. *Id.* ¶ 315 (emphasis added).

65. See discussion *supra* note 51 and accompanying text.

66. See Graham Coop, *What are the Implications of the Yukos Set-aside?* GLOBAL ARB. REV. 3 (Nov. 2, 2016), <http://globalarbitrationreview.com/article/1070125/what-are-the-implications-of-the-yukos-set-aside>.

67. It should be noted that despite Russia’s notice of termination of the ECT provisional application in the Russian territory with effect from October 20, 2009, in accordance with Article 45(3)(a) of the ECT, energy investments made in Russia prior to such date would remain protected until 2029 by operation of the ECT “sunset” clause contained in Article 47(3) of the ECT. ECT, *supra* note 7, arts. 45, 47.

68. Belarus signed the ECT on December 17, 1994 but never ratified it. Thus, the ECT remains under provisional application in the Belarusian territory. See *Belarus*, ENERGY CHARTER, <http://www.energycharter.org/who-we-are/members-observers/countries/belarus/> (last updated July 31, 2015). Australia and Norway also signed and never ratified the ECT. However both states explicitly declared, as permitted under Article 45(2) of the ECT, that they could not accept the ECT provisional application. Though, as noted by Graham Coop, “[i]f either of these states withdraws that declaration [of non acceptance of provisional application], thereby accepting provisional appli-

seat for their investment arbitrations under the ECT<sup>69</sup> and, even more, “consider restructuring their investments” in order to enjoy investment protection under treaties other than the ECT.<sup>70</sup>

In any case, the Judgment of the District Court does not represent the end of this dispute. Forthcoming episodes of the *Yukos* saga will surely confront the ECT Limitation Clause conundrum,<sup>71</sup> starting with the ongoing appeal of the Judgment before the Court of Appeals of The Hague.<sup>72</sup> Following the appeal before the Court of Appeals, the decision will still be subject to cassation before the Dutch Supreme Court.<sup>73</sup> Up to five years may elapse until the Dutch Courts ultimately decide the matter.<sup>74</sup>

Additionally, until a definitive response on the annulment is provided by the Dutch curial jurisdiction, and even irrespective of the Dutch Courts’ response,<sup>75</sup> further controversy could develop if other nations entertain enforcing the *Yukos* Final Awards. Interestingly enough, the *Yukos* investors have sought enforcement in several jurisdictions, in what has been aptly described as a “game of Russian roulette.”<sup>76</sup>

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cation, it will be in the same situation with respect to the ECT as Belarus is now (and as Russia was until October 2009).” Coop, *supra* note 66.

69. See Coop, *supra* note 66.

70. *Id.*

71. See Ferrari & Rosenfeld, *supra* note 5, at 484 (concluding that “[a]lthough it is never easy to make predictions, in respect of the *Yukos* case one prediction will certainly come true: the *Yukos* saga is far from being over”).

72. See *Former Yukos Shareholders Appeal The Hague District Court Ruling*, NEW EUROPE ONLINE/KG (Jul. 19, 2016, 11:14 AM), <https://www.neweurope.eu/article/former-yukos-shareholders-appeal-50-blm-award-reversal>.

73. See J. de Korte & S. Putter, *The Setting Aside of the YUKOS Awards*: Full Update, PRACTICAL LAW (Apr. 27, 2016) <http://uk.practicallaw.com/8-627-1331?q=theSetting+aside+of+the+Yukos+awards:+full+update>.

74. Knowles, Moyeed & Lamprou, *supra* note 19.

75. Certain national jurisdictions may decide in particular circumstances to enforce the annulled *Yukos* Final Awards on the basis of the discretion conceded to national courts under Article V(1)(e) of the New York Convention. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(e), *opened for signature* June 10, 1958, 330 U.N.T.S. 38 (entered into force June 7, 1959) (“[r]ecognition and enforcement of the award may be refused . . .” (emphasis added)).

76. See Knowles, Moyeed & Lamprou, *supra* note 19.

Finally, adding a new episode to the *Yukos* saga, specialized media have reported in February 2017 that, in one of the cases of the “second wave” of *Yukos* disputes, the majority of an UNCITRAL arbitral tribunal seated in Geneva has upheld jurisdiction and found that Russia was bound by the ECT Limitation Clause on provisional application.<sup>77</sup> This may become an additional weapon in the hands of the *Yukos* investors that are challenging the Judgment before the Dutch courts in this case.

Pending these future developments on the ECT Limitation Clause, the conflicting stances sustained by such arbitral decisions and the District Court of The Hague demonstrate the need to continue developing in the ILC forum a set of guidelines that clarifies the legal effects of treaties under provisional application, particularly with respect to limitation clauses.

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77. A few days before the submission of the present Commentary, it has been reported that, in a yet unpublished jurisdictional decision, an UNCITRAL arbitral tribunal (Campbell McLachlan QC (Chair), J. William Rowley QC, and Brigitte Stern) “has [by a majority ruling, B. Stern dissenting] upheld jurisdiction over the claim against Russia brought by Luxembourg company Yukos Capital SARL” and found “that Russia is bound by the provisional application of the ECT.” Alison Ross, *Second Wave Yukos Tribunal Rules on Provisional Application*, GLOBAL ARB. REV. (Feb. 16, 2017), <http://globalarbitrationreview.com/article/1081418/second-wave-yukos-tribunal-rules-on-provisional-application>.

