

## SYMPOSIUM ON TREATY EXIT AT THE INTERFACE OF DOMESTIC AND INTERNATIONAL LAW

### ENDING INTERNATIONAL INVESTMENT AGREEMENTS: RUSSIA'S WITHDRAWAL FROM PARTICIPATION IN THE ENERGY CHARTER TREATY

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When states withdraw from bilateral investment treaties or denounce multilateral treaties related to foreign investment, a range of intersecting questions arise in domestic and international law. Recent developments have demonstrated potential incongruities between domestic and international approaches to investment protection, including as regards the effectiveness of withdrawal and the implications for existing investments. This essay reflects on international and domestic disputes involving the withdrawal of the Russian Federation from participation in the [Energy Charter Treaty](#) (ECT) to highlight these interactions.<sup>1</sup> These issues have become particularly pertinent today because more than 1,500 international investment agreements (IIAs) are [nearing expiry](#) of their initial term, providing an opportunity for termination.<sup>2</sup> Moreover, some states have begun to terminate or denounce investment treaties, while many more are engaging in a process of renegotiation and reform.<sup>3</sup> The Russian case study also highlights the potentially far-reaching effects of a state simply signing a treaty, even many years after the state has expressed its decision to withdraw from it, and notwithstanding tensions with the domestic legal framework.

#### *The Yukos Litigation*

Multiple international and domestic disputes have arisen from Russia's alleged treatment of OAO Yukos Oil Company,<sup>4</sup> including cases (not addressed here) in the [European Court of Human Rights](#),<sup>5</sup> [France](#),<sup>6</sup> the [United](#)

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<sup>1</sup> See [The Energy Charter Treaty](#), INTERNATIONAL ENERGY CHARTER.

<sup>2</sup> See UN Conference on Trade and Development, [International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal](#) (UNCTAD IIA Issues Note No.4, June 2013).

<sup>3</sup> See, e.g., Tania Voon & Andrew D. Mitchell, [Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law](#), 31 ICSID REV. 413 (2016). See also Tania Voon et al., [Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights](#), 29 ICSID REV. 451 (2014).

<sup>4</sup> See Chester Brown, [The End of the Affair?](#), 17 J. WORLD INV. TRADE 126, 127–128 (2016).

<sup>5</sup> See [Oao Neftyanaya Kompaniya v. Russia](#), App. No. 14902/04 (Eur. Ct. H.R. 2011).

<sup>6</sup> See, e.g., Douglas Thomson, [Rocket Funds Released in Yukos Battle](#), GLOB. ARB. REV. (June 27, 2017). See also Cour d'appel [CA] [regional court of appeal] Paris, cviii, June 27, 2017, [16/01314](#) (Fr.).

States,<sup>7</sup> and elsewhere.<sup>8</sup> The investment treaty arbitrations involving Yukos have attracted considerable analysis, particularly because the tribunal hearing the “first wave” of ECT claims (by the Yukos controlling shareholders Hulley Enterprises,<sup>9</sup> Yukos Universal,<sup>10</sup> and Veteran Petroleum<sup>11</sup>) awarded them a combined sum exceeding US \$50 billion plus costs: the [highest known](#) investment treaty award to date.<sup>12</sup> The factual aspects of the claims and reasoning underlying the findings of breach are addressed elsewhere.<sup>13</sup> Here, we focus on the jurisdictional aspects of the disputes, to explore how domestic and international tribunals have understood the interface between domestic and international law in connection with Russia’s participation in the ECT.

### *Russia’s Provisional Application of the ECT*

On December 17, 1994, Russia signed the ECT, which entered into force on April 16, 1998, but it never ratified it. Russia’s nonratification of the ECT leads to the question of provisional application. Article 45(1) of the ECT states: “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>14</sup>

On August 20, 2009, Russia officially informed the depository of the treaty that it did not intend to ratify the ECT.<sup>15</sup> Article 45(3)(a) provides for provisional application to end sixty days after such notification. Article 45(3)(b) provides a “survival” mechanism: a state that terminates provisional application pursuant to Article 45(3)(a) remains bound, for twenty more years, by the investment protection obligations in Part III and the dispute settlement provisions in Part V of the ECT. Although states may opt out of the obligations in Article 45(3)(b) by indicating their nonacceptance, Russia did not do so (Article 45(3)(c); Annex PA).

The Yukos ECT disputes center on Russia’s provisional application of Part V of the ECT, and in particular Article 26, which provides in Paragraph 4 for investor–state dispute settlement (ISDS). Under Article 26(3)(a), contracting parties give their “unconditional consent to the submission of a dispute to international arbitration or conciliation.” Some exceptions apply: in Russia’s case, such consent is not given “where the Investor has

<sup>7</sup> *Hulley Enterprises et al. v. Baker Botts*, No. 17-1466 (D.D.C Aug. 18, 2017) ([In Re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in a Foreign Proceeding, Memorandum Opinion and Order](#)).

<sup>8</sup> See, e.g., *RosInvestCo U.K. v. Russia*, SCC Arbitration V (079/2005), Final Award (Sept. 12, 2010); *Russia v. RosInvestCo U.K.*, Hovrätt [Court of Appeals], Case No. T 10060-10 (Sept. 5, 2013) (Swed.) (setting aside the *RosInvestCo* award); *Renta 4 v. Russia*, SCC Arbitration V (024/2007), Award on Preliminary Objections (Mar. 20, 2009); *Russia v. GBI SICAV*, Hovrätt [Court of Appeals], Case No. T 9128-14 (Jan. 18, 2016) (Swed.) (declaring that the *Renta 4* investment treaty tribunal lacked jurisdiction).

<sup>9</sup> *Hulley Enterprises Limited (Cyprus) v. Russia*, Case No. AA 226, Final Award (Perm. Ct. Arb., Jul. 18, 2014); *Hulley Enterprises Limited (Cyprus) v. Russia*, Case No. AA 226, Interim Award on Jurisdiction and Admissibility (Perm. Ct. Arb., Nov. 30, 2009).

<sup>10</sup> *Yukos Universal Limited (Isle of Man) v. Russia*, Case No. AA 227, Final Award (Perm. Ct. Arb., Jul. 18, 2014); *Yukos Universal Limited (Isle of Man) v. Russia*, Case No. AA 227, Interim Award on Jurisdiction and Admissibility (Perm. Ct. Arb., Nov. 30, 2009) [hereinafter *Yukos Universal Limited*, Interim Award].

<sup>11</sup> *Veteran Petroleum Limited (Cyprus) v. Russia*, Case No. AA 228, Final Award (Perm. Ct. Arb., Jul. 18, 2014); *Veteran Petroleum Limited (Cyprus) v. Russia*, Case No. AA 228, Interim Award on Jurisdiction and Admissibility (Perm. Ct. Arb., Nov. 30, 2009).

<sup>12</sup> See UN Conference on Trade and Development, [Recent Trends in ILAs and ISDS](#) (UNCTAD IIA Issues Note No.1 Feb. 2015).

<sup>13</sup> See generally, e.g., Brown, [supra note 4](#).

<sup>14</sup> See also [Vienna Convention on the Law of Treaties](#) art. 25, May 22, 1969, 1155 UNTS 331.

<sup>15</sup> See [Russian Federation](#), INTERNATIONAL ENERGY CHARTER.

previously submitted the dispute” to Russia’s courts or administrative tribunals or in accordance with any applicable, previously agreed dispute settlement procedure.<sup>16</sup>

Thus, notwithstanding Russia’s 2009 decision not to ratify the ECT, Russia has consented to ISDS for an additional twenty years with respect to investments made during the period of provisional application. However, this consent applies only to the extent that such application is not inconsistent with its constitution, laws, or regulations, and provided that the claim has not already been submitted to Russian courts or another dispute settlement procedure. The question of consistency between Russia’s provisional application of the ECT and its domestic legal system is therefore central to identifying Russia’s obligations towards investments made between its signature in 1994 and the termination of provisional application in 2009. That question is likely to remain paramount for any subsequent ECT claims against Russia until October 19, 2029.<sup>17</sup>

### *Investment Treaty Tribunals’ Acceptance of Jurisdiction over the Yukos ECT Claims*

In the first wave of Yukos cases, the “central issue” in the jurisdictional phase was whether the tribunal’s jurisdiction could be founded on Russia’s provisional application of the ECT.<sup>18</sup> Russia contended that Article 26 of the ECT is not binding because it is inconsistent with its constitution and laws.<sup>19</sup>

The tribunal referred to the words “to the extent that such provisional application is not inconsistent with its constitution, laws or regulations” in Article 45(1) of the ECT as a “Limitation Clause.”<sup>20</sup> Russia maintained that this clause, “by giving priority to the Constitution, ensures that provisional application of the ECT does not infringe upon the prerogatives of the Legislature (in Russia, the State Duma).”<sup>21</sup> The tribunal found that a signatory need not, in order to invoke the limitation clause, have made a declaration of nonacceptance of provisional application.<sup>22</sup> The key question therefore became whether

the Limitation Clause of Article 45(1) represents an “all-or-nothing” proposition, that is—whether it concerns the inconsistency of *the principle* of provisional application with the Constitution, laws or regulations of Respondent, or whether it requires a “piecemeal” approach which requires the analysis of the consistency of *each provision of the ECT* with the Constitution, laws and regulations of Respondent.<sup>23</sup>

Russia favored the “piecemeal” approach, whereas the claimants and the tribunal supported the “all-or-nothing” approach.<sup>24</sup> The tribunal interpreted the words “such provisional application” as referring to provisional application of “this Treaty” (meaning the ECT as a whole), as specified in the first clause of Article 45(1).<sup>25</sup> The tribunal considered that allowing a signatory to “avoid the provisional application of a treaty ... on the basis that one or more of the provisions of the treaty is contrary to its internal law” would undermine the principle of *pacta sunt servanda* and Article 27 of the [Vienna Convention on the Law of Treaties](#) (VCLT), which states that “[a]

<sup>16</sup> [Energy Charter Treaty](#) art. 26(3)(b), art. 26(2)(a), art. 26(2)(b) and annex ID, Dec. 17, 1994, 2080 UNTS 95.

<sup>17</sup> See, e.g., [Yukos Universal Limited](#), Interim Award, *supra* note 10, at paras. 338, 339.

<sup>18</sup> *Id.* at para. 244.

<sup>19</sup> *Id.* at para. 247.

<sup>20</sup> *Id.* at para. 246.

<sup>21</sup> *Id.* at para. 293.

<sup>22</sup> *Id.* at paras. 262, 284, 290. See similarly [Ioannis Kardassopoulos v. Georgia](#), ICSID Case No. ARB/05/18, Decision on Jurisdiction, para. 228 (Jul. 6, 2007).

<sup>23</sup> [Yukos Universal Limited](#), Interim Award, *supra* 10, at para. 248(c).

<sup>24</sup> *Id.* at paras. 292, 301, 311.

<sup>25</sup> *Id.* at paras. 305, 308. See similarly [Kardassopoulos](#), *supra* note 22, at paras. 210, 211.

party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>26</sup> The tribunal added:

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.<sup>27</sup>

The tribunal suggested that Russia did not “seriously challenge” the authorities cited by the claimants to the effect that “principle of provisional application *per se*” is not “unknown or unrecognized by Russian law.”<sup>28</sup> Making that assessment as at the time of Russia’s signature of the ECT,<sup>29</sup> the tribunal held that “the principle of provisional application is perfectly consistent with the Constitution, laws and regulations of the Russian Federation.”<sup>30</sup> The tribunal also took account of an explanatory note submitted by the Russian government to the Duma at that time, which stated that Russia had made no declarations regarding nonacceptance of provisional application because the ECT’s “provisions on provisional application were in conformity with the Russian legal acts.”<sup>31</sup>

Although the tribunal’s jurisdictional analysis could have ended there, it nevertheless addressed Russia’s submission that Article 26 of the ECT is inconsistent with Russian law.<sup>32</sup> The tribunal rejected that submission on the basis that Russia’s foreign investment law is “crystal clear” in recognising ISDS where agreed by the disputants,<sup>33</sup> again noting statements to this effect in the government’s explanatory note.<sup>34</sup> Russia argued that only the Duma could grant consent to arbitration under Article 26, by ratifying the ECT.<sup>35</sup> However, the tribunal considered that Russia’s federal law on international treaties of 1995 makes clear that Russia’s consent to be bound by such a treaty may be expressed by signature of the treaty and that this decision rests with the executive arm of government.<sup>36</sup>

Three other disputes make up a “second wave” of ECT claims against Russia in connection with Yukos, one of which (brought by Financial Performance Holdings) has been withdrawn.<sup>37</sup> Separate tribunals in the remaining two disputes (brought by Yukos Capital and Luxtona respectively) have ruled that they have jurisdiction on the basis of Russia’s provisional application of the ECT.<sup>38</sup> These two rulings have not yet been made public and therefore the reasoning of the tribunals (and a dissent by at least one arbitrator) on provisional application is unavailable. However, their conclusion is consistent with the jurisdictional decisions in the first wave of cases, notwithstanding domestic court review of those decisions as discussed below.

<sup>26</sup> *Yukos Universal Limited*, Interim Award, *supra* note 10, at para. 313.

<sup>27</sup> *Id.* at para. 315.

<sup>28</sup> *Id.* at paras. 329, 330.

<sup>29</sup> *Id.* at para. 343.

<sup>30</sup> *Id.* at para. 338.

<sup>31</sup> *Id.* at para. 345.

<sup>32</sup> *Id.* at para. 346.

<sup>33</sup> *Id.* at para. 370.

<sup>34</sup> *Id.* at para. 374.

<sup>35</sup> *Id.* at para. 380.

<sup>36</sup> *Id.* at paras. 381–83.

<sup>37</sup> Douglas Thomson & Alison Ross, *Second-Wave Yukos Case Withdrawn “Out of the Blue”*, GLOB. ARB. REV. (Oct. 3, 2016).

<sup>38</sup> Jarrod Hepburn, *Russia Turns to Canadian and Swiss Courts, Seeking to Set Aside a Pair of Yukos “Second-Wave” Energy Charter Rulings—But Swiss Bid is Deemed Premature*, INV. ARB. REP. (Aug. 10, 2017).

*Domestic Court Review of Tribunals' Jurisdiction over the Yukos ECT Claims*

On April 20, 2016, The Hague District Court in the Netherlands (as the seat of the investment treaty arbitrations) quashed the three jurisdictional and three merits awards in the first wave of Yukos-related ECT claims.<sup>39</sup> An appeal to the Court of Appeal of The Hague is pending.<sup>40</sup> The District Court disagreed with the investment tribunal that the reference in ECT Article 45(1) to “this Treaty” means that Russia’s provisional application of the ECT must relate to the treaty as a whole rather than only parts of the treaty.<sup>41</sup> Instead, the Court pointed out that the limitation clause in Article 45(1) applies expressly to the “constitution,” “laws,” and “regulations”: “It is ... inconceivable that a ban on the provisional application of a treaty can be laid down in delegated legislation.”<sup>42</sup> The Court also disagreed with the tribunal that a “piecemeal” approach would be inconsistent with *pacta sunt servanda* or VCLT Article 27.<sup>43</sup>

Having determined that the limitation clause in ECT Article 45(1) requires consideration of whether provisional application of particular ECT provisions is compatible with Russian law, the District Court went on to examine whether ISDS under ECT Article 26 “harmonise[s] with the [Russian] legal system.”<sup>44</sup> The Court stated that this “issue ... should be answered according to Russian law.”<sup>45</sup> The Court considered that relevant legislative provisions “indicat[e] that public-law disputes regarding expropriation can only be adjudicated by the Russian courts”<sup>46</sup> and that these provisions

do not provide for the option of arbitration for disputes arising from a legal relationship between the Russian Federation and (foreign) investors, in which the public-law nature of the Russian Federation’s actions in that relationship is predominant and in which an assessment of the exercise of public-law authorities by Russian Federation state bodies is concerned. ... [I]t is beyond doubt that such a dispute exists in the current cases.<sup>47</sup>

The Court concluded that ECT Article 26 “does not have a legal basis in Russian law.”<sup>48</sup> Moreover, pursuant to the principle of the separation of powers in Russia’s constitution, treaties that depart from Russian law are incorporated in and take precedence over domestic law but require ratification by the legislature and not merely signature by the executive.<sup>49</sup> Therefore, Russia “was not bound by the provisional application of the arbitration regulations of Article 26 ECT.”<sup>50</sup>

As regards the second wave of Yukos ECT claims, on July 20, 2017, the Swiss Federal Supreme Court declined to hear a challenge to the interim jurisdictional ruling regarding the provisional application of the ECT by the investment treaty tribunal in the Yukos Capital claim, because that tribunal has reserved for the merits phase

<sup>39</sup> *Russia v. Veteran Petroleum Limited*, Case No C/09/477162/HA ZA 15-2, (Hague District Court, April 20, 2016).

<sup>40</sup> See Luke Eric Peterson, *In Second-Wave Yukos Arbitration, McLachlan and Rowley See Russia as Provisionally Bound by Energy Charter Treaty*, INV. ARB. REP. (Feb. 16, 2017).

<sup>41</sup> *Veteran Petroleum*, *supra* note 39, at para. 5.12.

<sup>42</sup> *Id.* at para. 5.13.

<sup>43</sup> *Id.* at para. 5.19.

<sup>44</sup> *Id.* at para. 5.33.

<sup>45</sup> *Id.* at para. 5.34.

<sup>46</sup> *Id.* at para. 5.48.

<sup>47</sup> *Id.* at para. 5.41.

<sup>48</sup> *Id.* at para. 5.65.

<sup>49</sup> *Id.* at paras. 5.87, 5.91, 5.93.

<sup>50</sup> *Id.* at para. 5.95.

two other jurisdictional objections by Russia.<sup>51</sup> A similar domestic challenge to the jurisdictional decision regarding the Luxtona claim continues in Canada.<sup>52</sup> The interpretation of the provisional application provisions therefore remain unresolved at both domestic and international levels.

### *Conclusion*

According to Fenghua Li, ECT Article 45 strikes a balance in connection with provisional application between increasing participation in the treaty by safeguarding a state's sovereignty, and imposing on the state reciprocal obligations under the treaty by allowing enforcement of those obligations through ISDS.<sup>53</sup> Yet the investment tribunal decisions in the Yukos ECT disputes so far appear to recalibrate that balance, diminishing the distinction between provisional application and ratification of a treaty: in the first wave of cases, both because of the tribunal's adoption of an "all-or-nothing" approach to provisional application, and because of the way the tribunal understood Russian law regarding the ratification process and ISDS. Several other investment treaty arbitrations concerning provisional application of the ECT have had similar outcomes.<sup>54</sup>

Many IIAs include survival mechanisms extending their application to existing investments by ten or twenty years following their termination, expanding the significance of entering such a treaty. Moreover, like the ECT, several IIAs also address provisional application<sup>55</sup> and often contain limitation clauses precluding inconsistency with domestic law.<sup>56</sup> These clauses might be expected to prevent states from facing unanticipated obligations or claims during the period of provisional application and, following exit from the treaty, any subsequent survival period. The investment treaty awards concerning the provisional application of the ECT suggest that these expectations may be false. Should tribunals continue to follow this line of reasoning, states such as Russia may have difficulty changing their obligations under existing treaties but may instead need to revisit domestic legal frameworks and drafting practices in future IIAs<sup>57</sup> and rely on domestic courts to reconsider the appropriate approach in set-aside or enforcement proceedings. The Yukos cases, and particularly the huge award against Russia, may also cause states to reconsider their participation in the ECT or other IIAs that impose substantive obligations concerning provisional application, or even those that contain standard survival clauses.

<sup>51</sup> Bundesgericht [BGer] [Federal Supreme Court] July 20, 2017, [Russia v. Yukos Capital Sàrl](#) para. 3.3 (Switz.).

<sup>52</sup> Hepburn, [supra](#) note 38.

<sup>53</sup> Fenghua Li, [The Yukos Cases and the Provisional Application of the Energy Charter Treaty](#), 6 *CAMB. INT'L L.J.* 75, 84–85 (2017).

<sup>54</sup> See, e.g., disputes mentioned in [id.](#) at note 69.

<sup>55</sup> For example, several IIAs involving Europe or European countries.

<sup>56</sup> Gerhard Hafner, [The "Provisional Application" of the Energy Charter Treaty](#), in *INTERNATIONAL INVESTMENT LAW FOR THE 21<sup>ST</sup> CENTURY* 593, 597, 601 (Christina Binder et al eds., 2009).

<sup>57</sup> See, e.g., Joel Dahlquist, [Russia Sets Out New Guidelines for Contents of Future Investment Treaties](#), *INV. ARB. REP.* (Oct. 26, 2016).