The *Yukos* cases and the provisional application of the Energy Charter Treaty

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At the centre of the controversy surrounding the reversal of awards in the Yukos cases is the provisional application laid down in Article 45 of the Energy Charter Treaty (ECT), which allows a signatory to unilaterally undertake to give affirmative legal effect to the obligations under the ECT on a voluntary and provisional basis. The paper examines the two disparate approaches adopted by the Arbitral Tribunal and the Hague District Court in interpreting the provisional application, namely the 'all-or-nothing' approach which necessitates an analysis and determination of whether the principle of provisional application per se is inconsistent with national laws of a signatory and the 'piecemeal' approach that requires provisional application to be dependable on the consistency of each provision of the ECT with national laws. The paper further scrutinises the effect that should be given to the provisional application of the ECT and maintains that the controversy has the potential to generate intricate tensions between the finality and rectification of arbitral awards and between international arbitral autonomy and judicial scrutiny instrument, and will have a conclusive impact on the fate of the petition of the Russian Federation.

Keywords: *provisional application, Energy Charter Treaty, the 'all-or-nothing' approach, the 'piecemeal' approach*

1 INTRODUCTION

After a decade-long legal battle against the Russian Federation (Russia), three ex-shareholders of the defunct OAO Yukos Oil Company (the ex-shareholders collectively as 'Yukos') have succeeded in obtaining three different parallel awards rendered by the Tribunal¹ constituted under the auspices of the Arbitration Rules of the United

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1. The Tribunal consisted of Yves Fortier (President), Charles Poncet (appointed by Claimant) and Stephen Schwebel (appointed by Respondent). In terms of procedure, the three claims were brought separately by each shareholder and not subsequently consolidated, but the parties appointed the same arbitrators to each Tribunal. The Tribunal heard the three claims in parallel and discussed the claims as a single set of proceedings, save in exceptional circumstances where a particular claimant requested specific treatment. The Tribunal decided the three claims *en masse* in three substantially similar awards.

Nations Commission on International Trade Law (UNCITRAL).² The Tribunal ordered Russia to pay over 50.2 billion dollars for its violation of Article 13(1) of the Energy Charter Treaty (ECT)³ by taking a series of measures that amounted to a ‘devious and calculated’ indirect expropriation.⁴ The largest compensation awarded in the history of arbitration, however, is only half of what Yukos had sought, and it has to face another long battle, since Russia is not expected to voluntarily abide by the rulings. In addition to the attempt to resist the recognition and enforcement of the awards,⁵ Russia also filed three Writs of Summons⁶ on 28 January 2015 with the Hague District Court (the Court),⁷ which sought to set aside the Interim Awards in which the Tribunal confirmed its jurisdiction to hear and decide the case, as well as the Final Awards (collectively, the ‘Yukos awards’) issued pursuant to the Dutch Code of Civil Procedure (DCCP).⁸

2. *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No AA 226, Final Award, 18 July 2014; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227, Final Award, 18 July 2014; *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No AA 228, Final Award, 18 July 2014 (collectively, the *Yukos* cases).

3. Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 (ECT).

4. *Yukos Universal Limited (Isle of Man) (n 2)* [1037].

5. While Yukos sought the recognition and enforcement of the awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force on 7 June 1959) 330 UNTS 38 in Germany, France, Belgium and the USA, Russia also took stringent countermeasures against any potential court order to freeze or seize its State assets. The Russian Parliament passed a bill in October 2015 allowing retaliatory seizure of foreign-owned assets on Russian territory in response to the seizure of Russian assets abroad, which signalled that Russia had taken the first substantive step to avoid the enforcement of the awards. See ‘Russian Law Allowing Seizure of Foreign-Owned Assets Passed by Federation Council’ (*The Moscow Times*, 28 October 2015) <www.themoscowtimes.com/business/article/russian-law-allowing-seizure-of-foreign-owned-assets-passed-by-federation-council/540597.html> accessed 9 October 2016. In addition, a cross-party group of State Duma deputies had introduced a draft bill that would authorise the Russian Constitutional Court to overturn international court decisions if the tendentious rulings ran counter to the provisions of the Russian constitution and required Russia to pay compensation out of the State budget. See ‘Russian Bill Proposed to Overturn Yukos Compensation Ruling’ (*The Moscow Times*, 18 November 2015) <www.themoscowtimes.com/news/article/russian-bill-proposed-to-overturn-yukos-compensation-ruling/549984.html> accessed 9 October 2016.

6. *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No AA 228, Writ of Summons, 28 January 2015 (the Writ). In the Writ, Russia requested to set aside the Interim Award on Jurisdiction and Admissibility of 30 November 2009 and the Final Awards of 18 July 2014, respectively.

7. The UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985) 24 ILM 1302 (1985), though not binding but having influenced legislation in an increasing number of States, expressly recognises an application for setting aside an award before the courts of the place of arbitration as the exclusive recourse against award. In practice, it is not common for the courts of the State under the law of which the award was made to set aside the award. In a few instances, international arbitral awards have been set aside by courts other than those of the seat of arbitration. See *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F 3d 274 (5th Cir 2004).

8. Though the new Dutch Arbitration Act (which still forms part of the DCCP) entered into force on 1 January 2015, it applies to arbitration commenced on or after 1 January 2015. Hence, the *Yukos* cases setting aside proceedings are subject to the 1986 version of the DCCP.

The *Yukos* cases presented a paradigmatic example of the setting aside of international investment arbitral awards. Russia invoked various grounds to challenge the *Yukos* awards including, inter alia, the Tribunal's lack of jurisdiction due to the absence of a valid arbitration agreement.⁹ Russia signed the ECT in 1994 but had never ratified it.¹⁰ Russia notified the ECT Depository of its intention not to become a party to the ECT in 2009.¹¹ However, by way of exception, Article 45 of the ECT provided for a 'provisional application' of the ECT. Provisional application became the linchpin for the competence of the Tribunal, as the Tribunal based its jurisdictional assessment on Articles 45 and 26 of the ECT. Accordingly, as far as the first ground put forward by Russia was concerned, the Court scrutinised two essential issues in assessing whether the Tribunal was competent to deal with the claims, namely: (a) whether the ECT could be provisionally applicable pursuant to Article 45 of the ECT; and (b) whether the arbitration provision of Article 26 of the ECT was not inconsistent with Russia's constitution, laws or other regulations.

By virtue of a highly anticipated judgment of 20 April 2016, the Court accepted Russia's reading of Article 45 of the ECT on provisional application and set aside the *Yukos* awards on the grounds that the Tribunal lacked jurisdiction in light of the invalid arbitration agreement.¹² Though the Court recognised the doctrine of *compétence de la compétence* which empowers Arbitral Tribunals to decide on their own jurisdiction, the fundamental character of the right of access to the courts meant that ultimately the courts were entrusted with determining the existence of a valid arbitration agreement in accordance with Article 1065 of the DCCP.¹³ As the findings on provisional application had led it to reverse the *Yukos* awards, the Court considered it unnecessary to take into account the other grounds invoked by Russia in the proceedings.¹⁴

This paper aims to examine the diverging decisions made by the Tribunal and the Court on the provisional application of the ECT. It then explores, by reconciling a diversity of interests emerging in the setting aside proceedings, a more rational and acceptable counterpoise between international arbitral autonomy and judicial scrutiny instrument.

2 THE TRIBUNAL'S 'ALL-OR-NOTHING' APPROACH TO INTERPRETING PROVISIONAL APPLICATION

Article 45(1) of the ECT explicitly provides that '[e]ach signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with

9. Other grounds that Russia invoked included the failure to comply with the Tribunal's mandate, the improper composition of the Tribunal and the violation of public policy, as well as the substantial involvement of an assistant and failure of the Arbitral Tribunal to state reasons. The last two have scarcely been employed by applicants for the setting aside of proceedings.

10. *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227, Interim Award 30 November 2009 (*Yukos* Interim Award) [37].

11. *Ibid* [39]. According to art 45(3)(a) of the ECT, the notification takes effect upon the expiration of 60 days from the date on which it is received by the ECT Depository. Notwithstanding the withdrawal from the ECT, investment-related obligations under Part V of the ECT remain in force for a period of 20 years following the effective date of the termination of provisional application (see art 45(3)(b)).

12. Judgment of Hague District Court, 20 April 2016; Case No C/09/477160/HA ZA 15-1; C/09/477162 / HA ZA 15-2; C/09/481619 / HA ZA 15-112 (Judgment of Hague District Court).

13. *Ibid* [5.4].

14. *Ibid* [5.97]–[5.98].

Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations'. The restriction was labelled by the Tribunal as the 'limitation clause'.¹⁵ As the Tribunal observed, by signing the ECT, Russia agreed that the ECT 'as a whole' would be applied provisionally pending its entry into force unless 'the principle' of provisional application itself was inconsistent with its constitution, laws or regulations.¹⁶ The conclusion indicated that the Tribunal adopted an 'all-or-nothing' approach in interpreting the effect of the limitation clause in Article 45(1) of the ECT. The analysis of the Tribunal can be divided into three parts.

First, the starting point for the Tribunal was the ordinary meaning of the terms used in Article 45(1). In the view of the Tribunal, the adjective 'such' in the phrase 'such provisional application' played a pivotal role in the interpretation of the limitation clause.¹⁷ Given that 'such' was defined as 'that or those; having just been mentioned' or 'of the character, quality, or extent previously indicated or implied', the meaning of the phrase 'such provisional application' was necessarily context-specific, being derived from the particular use of provisional application to which it referred.¹⁸ Accordingly, while the phrase 'such provisional application' used in Article 45(1) referred to the provisional application previously mentioned in that article, namely the provisional application of 'this Treaty',¹⁹ the phrase 'such provisional application' used in Article 45(2)(c) contrarily referred to the provisional application of only Part VII of the ECT.²⁰

Secondly, following the interpretation of the pre-determiner 'such', the phrase 'the provisional application of this Treaty' would entail two possible interpretations, that is, 'the provisional application of the entire Treaty' or 'the provisional application of some part of the Treaty'. The Tribunal determined that according to Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), the former interpretation accorded better with the ordinary meaning that should be ascribed to the terms.²¹ Such a finding on the scope of provisional application in Article 45(1) was also thoroughly consistent with the rationale articulated by the Tribunal in *Ioannis Kardassopoulos v The Republic of Georgia*.²² On the contrary, the partial provisional application would be possible only if the signatories had expressly assumed an obligation to apply some part of the ECT provisionally.²³ Furthermore, the partial provisional application, as the Tribunal noted, would 'run squarely against the object and purpose of the Treaty, and indeed against the grain of international law'.²⁴

Thirdly, having decided that the limitation clause in Article 45(1) contained an 'all-or-nothing' proposition, the Tribunal moved on to investigate whether the principle of provisional application per se was inconsistent with Russia's constitution, laws or regulations. In the Tribunal's opinion, the *pacta sunt servanda* rule and Article 27 of the VCLT prevented a State from invoking its domestic legislation as a justification for failure to perform a treaty.²⁵ It would undermine the principle that provisional

15. *Yukos Interim Award* (n 10) [246].

16. *Ibid* [301].

17. *Ibid* [304].

18. *Ibid* [305].

19. *Ibid* [304].

20. *Ibid* [306].

21. *Ibid* [308].

22. *Ioannis Kardassopoulos v The Republic of Georgia* (Decision on Jurisdiction) ICSID Case No. ARB/05/18 (6 July 2007) [205]–[211], [219].

23. *Yukos Interim Award* (n 10) [311].

24. *Ibid* [312].

25. *Ibid* [313].

application of a treaty created binding obligations if a State were permitted to modify the obligation of provisional application, making it dependent on the content of its domestic law relating to the specific provisions of the ECT.²⁶ As provisional application was a question of public international law, a hybrid formed by international and domestic law in which the content of domestic law directly controlled the content of an international obligation would give rise to unacceptable uncertainty in international affairs.²⁷ Hence, what Article 45(1) required was the determination of whether the principle of provisional application per se was contrary to Russia's constitution, laws or regulations. The compatibility of the principle of provisional application with the constitution, laws or regulations of Russia did not raise much controversy, since Article 23(1) of the Russian Federal Law on International Treaties unequivocally allowed for the provisional application of treaties, despite the silence of Russia's constitution on the issue.²⁸

The Tribunal therefore concluded that the whole of the ECT applied provisionally in Russia until such provisional application was terminated pursuant to Article 45(3)(a).²⁹

3 THE COURT'S 'PIECEMEAL' APPROACH TO INTERPRETING PROVISIONAL APPLICATION

3.1 Whether Article 45 required the scrutiny of each separate provision of the ECT

While the Tribunal adopted the 'all-or-nothing' approach, the Court upheld the 'piecemeal' approach asserted by Russia, holding that the wording used in Article 45 required each separate provision of the ECT to be scrutinised individually in order to determine whether they were in contradiction to Russia's constitution, laws or regulations. The Court, similarly to the Tribunal, based its conclusion on the rules of interpretation of treaties laid down in Articles 31 and 32 of the VCLT. These articles required that the interpretation of the limitation clause should contemplate the meaning assigned to the phrases in common parlance, with due observance of their context and in light of the object and purpose of the ECT.³⁰ When it came to the interpretation of Article 45(1), however, the Court shifted its emphasis from the word 'such' to the word 'extent'. The ordinary meaning of 'extent' dovetailed with Russia's description of the phrase 'to the extent', which was defined as 'width of application', 'range (as of inclusiveness or application) over which something extended' and 'the limit to which something extended'.³¹ The term 'to the extent' in the German and French versions of the ECT also signified a degree of application.³² The Court thus decided that the term 'to the extent' in common parlance was to mean that the scope of provisional application depended on the reconcilability of each individual provision of the ECT and Russia's constitution, laws or regulations.³³

26. Ibid [314].

27. Ibid [315].

28. Ibid [332].

29. Ibid [338].

30. Judgment of Hague District Court (n 12) [5.9].

31. Ibid [5.10].

32. Ibid [5.11].

33. Ibid [5.12].

In reviewing the Tribunal's decision, the Court noted that the word 'if', instead of the phrase 'to the extent', was more fitting for the Tribunal's interpretation.³⁴ It also pointed out that use of the word 'such' in relation to 'this Treaty' did not provide clarity on the question as to whether the provisional application could be in relation to the ECT as a whole or only parts of the ECT.³⁵ The Court further considered that the word 'regulations' was of considerable importance in the contextual interpretation. This was because a ban on the provisional application of treaties, which possessed a principal nature, could be ordinarily contained in a constitution and might be enshrined in laws, but could not be laid down in regulations which were of inferior legal force and effect. However, a ban on the provisional application of an individual provision of the ECT could be laid down in regulations.³⁶ Accordingly, a test of compatibility should be directed to each individual provision of the ECT in question.

In addition, the Court opined that Article 45(2) was also relevant for a contextual interpretation of the limitation clause. In the opinion of the Court, the Tribunal failed to elucidate clearly the reason why the same phrase 'such provisional application' necessarily had divergent meanings in Article 45(1) and in Article 45(2), respectively.³⁷ Since the provisional application in Article 45(2) remained restricted to Part VII of the ECT, it was not evident that the principle of provisional application per se was designated as a relevant criterion.³⁸ On the contrary, the lack of a 'constitution' as an assessment criterion in Article 45(2) fortified the argument that the scope of the provisional application in Article 45(2) was exclusively on the condition of the compatibility of Part VII of the ECT with relevant domestic laws or regulations.³⁹ It thus became apparent that the Tribunal interpreted the limitation clause in a way that considerably deviated from the meaning that should be assigned to the words in Article 45(2), but there was no proper ground for this deviation.⁴⁰

Although the foregoing solid literal analysis was sufficient for the Court to conclude that the provisional application was hinged on the compatibility of separate provisions of the ECT with national laws, the Court further built on this conclusion by shedding light on a number of key issues. First, a State that relied on a conflict between a treaty provision and national law, on sound grounds and with reference to the limitation clause, did not contradict the *pacta sunt servanda* principle, nor the principle of Article 27 of the VCLT.⁴¹ Hence, the partial provisional application was not contrary to the object and purpose of the ECT and the nature of international law.⁴² Secondly, significance should not be attached to the fact that the Tribunal's opinion was buttressed by the opinion in the *Ioannis Kardassopoulos* case, particularly given that that case was chaired by the same arbitrator.⁴³ Thirdly, State practice was not to be taken into account as none of the parties had argued that there was a universal application of State practice, nor had any evidence arisen to prove such practice.⁴⁴ Fourthly, the *travaux préparatoires* to the ECT were irrelevant because the explanation of the Court

34. Ibid.

35. Ibid.

36. Ibid [5.13].

37. Ibid [5.14].

38. Ibid [5.15].

39. Ibid.

40. Ibid [5.17].

41. Ibid [5.19].

42. Ibid.

43. Ibid [5.20].

44. Ibid [5.21].

did not give rise to ambiguous or obscure meaning or to a result that was manifestly absurd or unreasonable pursuant to Article 31 of the VCLT.⁴⁵ Fifthly, Russia was not obliged to submit a prior declaration in accordance with Article 45(2) for reliance on the limitation clause.⁴⁶

3.2 Whether Article 26 of the ECT was consistent with Russia's constitution, laws and regulations

As the Tribunal derived its competence from the arbitration provision set forth in Article 26 of the ECT, the compatibility of Article 26 with the Russian constitution, laws and regulations became essential in assessing whether there was valid consent to international investment arbitration. First and foremost, the Court stated that incompatibility could take place not only when the provision of the ECT concerned was prohibited in national laws, but also extended to the circumstances where there was no legal basis in Russian law for international investment arbitration or where such a method of dispute resolution did not harmonise with the legal system or was irreconcilable with the starting points and principles that had been laid down in or could be derived from legislation.⁴⁷

In the Dutch legal system, foreign law was designated as law, but not as a fact.⁴⁸ Accordingly, the Court examined the contents of the relevant Russian laws. In addition to evidence, two expert reports regarding the relevant Russian laws were also scrutinised by the Court, namely the Kostin Report⁴⁹ and the Asoskov Report.⁵⁰ The Court found that: (a) according to Article 1(2) of the International Arbitration Law (1993) and Article 16 of the Russian Civil Code (1995), Russia only allowed for arbitration for disputes arising from contractual and other civil law relationships, excluding disputes arising from public-law legal relations;⁵¹ (b) under Article 9(1) of the Law on Foreign Investments (1991), disputes arising from legal relations between foreign investors and Russia which were predominantly public law in nature should be resolved by Russian courts, save in exceptional circumstances where another procedure had been established by international treaties;⁵² and (c) as a 'blanket provision' or a *mutatis mutandis* clause, Article 10 of the Law on Foreign Investments did not create a separate legal basis for arbitration of disputes over obligations of Part III of the ECT, but rather made the option conditional on the existence of a provision in treaties and federal laws to that effect.⁵³ Although the Russian government made an explanatory memorandum in 1996 which stated that the legal regime of foreign investments envisaged under the ECT was consistent with Russian law,⁵⁴ the memorandum originated from the executive, and could not be ascribed to the legislature and the government's standpoint.⁵⁵ The memorandum merely contemplated the compatibility of the

45. Ibid [5.22].

46. Ibid [5.24]–[5.31].

47. Ibid [5.33].

48. Dutch Code of Civil Procedure 1986, s 25.

49. Opinion on Certain Issues of Arbitrability by Professor Alexey Kostin, 21 February 2006.

50. Expert Report by Anton Vasoskov, 30 October 2014.

51. Ibid [5.36]–[5.41].

52. Ibid [5.46]–[5.51].

53. Ibid [5.52]–[5.58].

54. The Explanatory Memorandum to the Ratification Act, see *ibid* [5.59].

55. Ibid [5.60].

ECT with Russian law in general terms, without mentioning Article 26 of the ECT.⁵⁶ The Court consequently concluded that there was no legal basis in Russian law for the arbitration clause of Article 26.

Finally, the Court determined two crucial issues so as to close the argument with respect to the provisional application. First, notwithstanding Article 2 of the Federal Law on International Treaties which stipulated that signature of a treaty constituted a form of expressing the consent of Russia to be bound by the Treaty, Russia was not bound by the ECT by just signing the ECT. This was because the prerequisite of Article 2 was that the Treaty provided that signature would have that effect,⁵⁷ but Article 45(1) of the ECT did not contain such a clause.⁵⁸ Secondly, constitutional limitations⁵⁹ required that treaties that deviated from or supplemented Russia's national laws, such as Article 26 of the ECT, could not be applied based merely on their signature, but required prior ratification.⁶⁰ Given that Russian law did not offer an independent basis for the settlement of disputes between itself and foreign investors in international arbitral proceedings, and that the arbitration clause of Article 26 limited Russia's sovereignty, such a deviation in Article 26 could not be effective in Russia only through the signature of the executive;⁶¹ otherwise, it would contradict the constitutional separation of the executive, legislative and judicial powers in Russia.⁶²

On the basis of the above findings, the Court ruled that the 'notice of arbitration' served by Yukos did not form a valid arbitration agreement,⁶³ and thus set aside the awards.⁶⁴

4 WHAT EFFECT SHOULD BE GIVEN TO THE PROVISIONAL APPLICATION OF THE ECT IN THE *YUKOS* CASES?

The controversy surrounding the interpretation of provisional application of the ECT in the *Yukos* cases has demonstrated intricate tensions between the finality and rectification of arbitral awards and between international arbitral autonomy and the judicial scrutiny instrument. The key to a more rational and acceptable counterpoise between international arbitral autonomy and the judicial scrutiny instrument lies not in reevaluating the delicate relationship between arbitration and court as the Hague District Court in this particular case is entitled with competency, but in the approaches of interpretation that accord more appropriately with general international law and consequently should be consistently observed by both tribunals and courts. As the legal effect of the provisional application remains, the focal point of the debate thus shifts to the issue regarding the effect that should be given to the provisional application of the ECT in the *Yukos* cases.

As the conclusion of a treaty passes through three stages, namely signature, ratification and entry into force, provisional application comes into play to fill the gap relating

56. Ibid.

57. Ibid [5.68].

58. Ibid [5.72].

59. Russian Constitution, arts 10, 15(1), (4) and 106. See Judgment of Hague District Court (n 12) [5.75]–[5.78].

60. Judgment of Hague District Court (n 12) [5.93].

61. Ibid.

62. Ibid.

63. Ibid [5.95].

64. Ibid [5.97].

to the lack of affirmative legal obligations imposed on a signatory between signature and entry into force stages. Article 25 of the VCLT provides the legal basis for the provisional application of treaties. However, the VCLT neither implies any restriction of the ambit of the treaty, nor does it define the method through which a provisional application clause is applicable.⁶⁵ Though a signatory is obliged under the VCLT to refrain from acts which would defeat the object and purpose of the treaty prior to its entry into force,⁶⁶ it has been acknowledged that this obligation does not impose affirmative legal duties upon a signatory to do certain acts or to carry out specific provision of the treaty.⁶⁷ The notion of ‘provisional application’ stipulated in the VCLT thus remains an amorphous doctrine that exhibits an ambiguous characteristic without legal precision.⁶⁸

Provisional application has been designed in a more elaborate way in Article 45 of the ECT. However, this ‘limitation clause’ and Article 26 of the ECT have led to a tension between international law and national law, giving rise to delicate situations.⁶⁹ In the *Yukos* cases, the diverging approaches to determining the competence of the Tribunal have revealed that the crux of the provisional application of the ECT rests upon the question as to whether the limitation clause should be construed as denoting that the application of the ECT as a whole provisionally hinges on the compatibility of the principle itself with national laws, or whether the provisional application of the ECT is restricted to the specific provisions of the ECT that are not inconsistent with national law. The Tribunal was of the opinion that the limitation clause could be interpreted either as the provisional application of ‘the entire Treaty’ or ‘some parts of the

65. G Hafner, ‘The “Provisional Application” of the Energy Charter Treaty’ in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009) 594.

66. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 18.

67. The formulation of art 18 is phrased in negative terms, emphasising ‘not to do certain acts’. Based on the wording, the Arbitral Tribunal in the *Iloilo Claims* case declined to impose the binding obligation of keeping order upon the US in the Philippines during the period between the signature of a treaty and its entry into force. See *Several British Subjects (Great Britain) v United States*, US–Great Britain Claims Commission, Award, 19 November 1925 (the *Iloilo Claims* case). See M Rogoff, ‘The International Legal Obligations of Signatories to an Unratified Treaty’ (1980) 32 Maine LR 263, 297.

68. M Rogoff and B Gauditz, ‘The Provisional Application of International Agreements’ (1997) 39 Maine LR 29, 40–51.

69. In *Plama Consortium Limited v Republic of Bulgaria*, the Tribunal held that in accordance with art 25 of the VCLT, art 26 of the ECT provisionally applied from the date of a State’s signature, unless that State declared itself exempt from provisional application under art 45(2)(a). See *Plama Consortium Limited v Republic of Bulgaria* (Decision on Jurisdiction) ICSID Case No ARB/03/24 (8 February 2005), [140]. In *Petrobart Limited v Kyrgyz Republic*, the Tribunal determined that pursuant to art 45, the ECT was already in effect upon its signature by virtue of it being applied provisionally. See *Petrobart Limited v Kyrgyz Republic* (Award) SCC Case No 126/2003 (29 March 2005) 22. As the Tribunal in *Ioannis Kardassopoulos* case observed, ‘this Treaty’ in art 45(1) of the ECT meant the ECT ‘as a whole and in its entirety and not just a part of it’. Art 45(3)(b) confirmed that Parts III and V (concerning dispute settlement) applied during the period of provisional application and that the operation of those parts gave rise to an obligation. See *Ioannis Kardassopoulos* (n 22) [210], [213]. In these three cases the provisional application in the ECT has been interpreted as establishing the relationship between international law and national law in a hierarchical manner, but such an approach is apparently different from the one adopted by the Court in the *Yukos* cases.

Treaty'.⁷⁰ The Tribunal's conclusion was not thoroughly convincing. The Tribunal based its conclusion on the fact that this interpretation corresponded better with the ordinary meaning that should be given to the terms, but it failed to take into account the Treaty's object and purpose.⁷¹

The preamble of the ECT enunciates the intention of the signatories to implement and broaden their co-operation 'as soon as possible' by negotiating a treaty and protocols in good faith and to 'place the commitments' contained in the Treaty on a secure and binding international legal basis.⁷² Article 45 further aims to accommodate different needs of the signatories, providing for three devices to safeguard their sovereignty, namely: (i) the limitation clause;⁷³ (ii) non-acceptance of provisional application where Part VII is exempted from the declaration;⁷⁴ and (iii) the termination of provisional application and its remaining effect for 20 years.⁷⁵ On the one hand, it can be inferred from the preamble, coupled with three devices offered by Article 45, that the partial application of the ECT should be allowed so as to make the ECT rapidly effective in accordance with Article 44, while still providing the signatories with flexibility to protect their sovereignty.

On the other hand, the ECT preamble also emphatically proclaims as its object the placing of the commitments of the ECT on a secure and binding international legal basis. This may provide a discernible foundation for the argument that the ECT assigns particular significance to international law and the international legal nature of the commitments contained therein. Such an assumption is not conclusive, but it is not entirely untenable. This is because Article 45 of the ECT, as observed by the Tribunal in the *Ioannis Kardassopoulos* case, is more than aspirational in character.⁷⁶ The signatories have agreed to the provisional application in Article 45(1). Even though provisional application may be subjected to a declaration to a different effect under Article 45(2), it remains a legal obligation.⁷⁷ Accordingly, provisional

70. *Yukos* Interim Award (n 10) [308].

71. VCLT, art 31(1). In general, it is not necessary to distinguish the object and purpose of the whole treaty from the object and purpose of specific provisions. If there is a perceived object and purpose of a specific provision, it will be 'informed by, and will be in consonance with, the object and purpose of the entire treaty'. See WTO, *European Communities: Customs Classification of Frozen Boneless Chicken Cuts – Report of the Appellate Body* (27 September 2005) WT/DS269/AB/R and WT/DS286/AB/R, and Corr.1, DSR 2005:XIX, 9157 [238]. However, art 31(1) of the VCLT does not exclude considering the object and purpose of particular treaty terms, if doing so assists the interpreter in determining the treaty's object and purpose on the whole (*ibid*). In some cases, interpreters also take into account the object and purpose of a treaty and the object and purpose of specific provisions of another treaty. For example, the Tribunal in *Tokios Tokelés v Ukraine* not only examined the object and purpose of the Ukraine–Lithuania BIT by referring to the preamble, but also scrutinised the object and purpose of art 25(2)(b) of the ICSID Convention. See *Tokios Tokelés v Ukraine* (Decision on Jurisdiction) ICSID Case No ARB/02/18[31], [32], [46].

72. VCLT, preamble.

73. ECT, art 45(1).

74. *Ibid* art 45(2)(c).

75. *Ibid* art 45(3)(b).

76. See *Ioannis Kardassopoulos* (n 22) [209].

77. *Ibid* [209], [250]. It is also worth noting that art 22 of the Draft Article on the Law of Treaties adopted the terminologies 'entry into force provisionally' which was replaced by the words 'apply provisionally' in the final text of the VCLT. Such a modification signalled that 'provisionally' referred to the time of the treaty's application, rather than its legal force or effectiveness during that time period. Therefore, James Crawford was of the view that a claim based on provisional application was a form of consent in the ECT. See *Yukos* Interim Award, [217]–[218].

application itself is an international obligation and it offers an avenue for the commitments in the ECT to remain binding international legal obligations even when a State has not ratified the ECT.

Furthermore, it is evident that the ECT has been designed to reduce to a minimum non-commercial risks⁷⁸ by ensuring that investments enjoy the ‘most constant protection and security’.⁷⁹ International investment arbitration enables investors to challenge a wide range of unreasonable or discriminatory measures adopted by sovereign States, thereby providing an authoritative and binding tool to secure the commitments contained in the ECT. If there were no access to international investment arbitration, a signatory that has no objection to the provisional application of the ECT would be able to escape its obligation under the ECT by intentionally not ratifying the ECT, whilst retaining the unilateral benefit accorded by the ECT during the period of provisional application.⁸⁰ This consequence, however, is in contradiction with the concept of reciprocity which is not precluded by the ECT, impeding the ‘level playing field’ that the ECT envisages to establish and thereby devastating the very spirit of cooperation and cardinal aim of the ECT.⁸¹

On balance, the paradoxical stances towards provisional application lie primarily in the imbalance between the pursuit of investment protection and State sovereignty. A balanced approach to scrutinising the relationship between investment protection and State sovereignty is still insufficiently developed. The Tribunal and the Court shed light on the different aspects of the identification of methods of understanding diverse interests in investment arbitration. The provisional application in Article 45 should be viewed as striking an equilibrium, in the period between signature and entry into force of the treaty, between the aim of widening States’ participation in the ECT and that of preventing States from reaping benefits accorded by the ECT upon signature without undertaking obligations that accompany ratification.

5 CONCLUSION

In support of its petition to set aside the *Yukos* awards, Russia addressed all grounds permitted under Article 1065(1) of the DCCP, alleging that the awards should be

78. Energy Charter Secretariat, ‘An Introduction to the Energy Charter Treaty’ in *The Energy Charter Treaty and Related Documents* (September 2004) 13 <www.ena.lt/pdfai/Treaty.pdf> accessed 9 October 2016.

79. ECT, art 10(1).

80. There is no provision in the ECT limiting the time period of provisional application. A signatory may have no intention to give legal effect to the obligations under the ECT by ratifying, approving or acceding to the ECT.

81. Though the ECT does not embrace reciprocal actions, it also does not explicitly prohibit the application of such actions. The principle of non-discrimination contained in the preamble of the ECT and the national treatment, the most favoured nation treatment and the fair and equitable treatment contained in art 10 demonstrate that reciprocity is one of the features of the ECT. The *travaux préparatoires* to the ECT may also demonstrate that the final text of art 45 reflects reciprocity which had been underscored during the negotiations. It appears that a signatory which has not made a declaration to opt out the provisional application, yet afterward claiming the incompatibility of provisional application with its domestic law, can be interpreted as contrary to the VCLT. However, the provisional application and its repercussions within the context of reciprocal actions remain controversial. See S Çal, ‘Reciprocity and Provisional Application under the Energy Charter Treaty: Legal Aspects’ in U Hammer and M Roggenkamp (eds), *European Energy Law Report VI* (Intersentia, Belgium 2009) 188–226.

reversed and revoked on each ground separately and on all grounds collectively. The Court accepted Russia's interpretation of Article 45 of the ECT which maintained that the wording of Article 45 necessitated a scrutiny of each separate provision of the ECT to determine its compatibility with the constitution, laws or regulations of the State concerned. On the basis of the 'piecemeal' approach, the Court held that Russia, which never ratified the ECT, was only bound by those ECT provisions reconcilable with Russian laws. Since Russian laws did not provide unconditional consent to arbitration of disputes between foreign investors and States, Article 26 of the ECT could not be provisionally applied and accordingly the notice of arbitration made by the claimants in the *Yukos* cases failed to constitute a valid arbitration agreement.

The Tribunal's and the Court's contrasting stances towards provisional application of the ECT lie primarily in the imbalance between the pursuit of investment protection and State sovereignty. Although Article 45 of the ECT reveals a compromised counterpoise by reconciling the legitimate expectations of investors with national interests, the ambiguity of the legal meaning of and role given to provisional application generates controversy surrounding the extent to which the provisional application of a particular treaty is feasible. The Court's judgment was not the first court judgment to set aside arbitral awards in the diverse *Yukos* cases.⁸² However, given the political and economic significance of the cases, it will certainly have a significant impact on the endeavours of *Yukos* to seek the recognition and enforcement of the final awards which are underway in a number of jurisdictions.⁸³ More importantly, the final outcome of the *Yukos* cases will clarify and shape the status and characterisation of provisional application, and further serve as a tentative basis for holding signatories accountable for appropriate protection of investment made during the period of provisional application of the ECT.

82. In a judgment of 18 January 2016, the Svea Court of Appeal found that the Stockholm Chamber of Commerce Arbitral Tribunal had no jurisdiction to adjudicate the expropriation claim brought by four Spanish investors who held American Depositary Receipts in respect of *Yukos Oil Company* against Russia. The arbitration case was based on the 1990 bilateral investment treaty between Spain and the then Union of Soviet Socialist Republics. See Judgment of the Svea Court of Appeal, Case No T 9128-14; English translation is available at <www.arbitration.sccinstitute.com/Views/Pages/GetFile.ashx?portalId=89&cat=79572&docId=2629145&propId=1578> accessed 9 October 2016.

83. For example, in Summer 2015 *Yukos* initiated enforcement proceedings before US courts. See Respondent Motion to Dismiss Petition to Confirm Award filed with US District Court of District of Columbia, 20 October 2015, Case 1:14-cv-01996-ABJ.