

# **The Yukos Saga Continues: The Bold Decision of the Dutch Court to Set Aside the US\$50 Billion Yukos Award**

**By Matthieu Grégoire**

**The Hague Commercial Court yesterday issued a decision setting aside the US\$50 billion arbitral award made against the Russian Federation by an eminent arbitral tribunal established under the Energy Charter Treaty (ECT) in respect of unlawful expropriation.**

**The Dutch Court concluded that the dispute resolution provisions of ECT did not apply to the Russian Federation, on the basis that it had signed but not ratified the treaty. This alerter sets out the reasons for that decision and considers what the ramifications might be.**

## **INTRODUCTION**

- I. The decision to set aside the Yukos awards is significant. The Dutch Court explicitly challenged the findings of the arbitral tribunal as to its own jurisdiction to hear claims brought under the ECT. The ECT sets common standards of protection afforded to investors, including protections against unlawful expropriation and unfair and inequitable treatment. Importantly for the purposes of the decision of the Dutch

Court, Article 26 of the ECT provides that any disputes arising under the treaty may be settled by international arbitration.

2. The arbitral tribunal found that the ECT applied provisionally in its entirety, and therefore that it had jurisdiction, by virtue of Article 26, to hear the investors' claims against the Russian Federation.
3. The Dutch court disagreed, finding that Article 26 did not apply provisionally, and set aside the awards given by the tribunal.
4. The decision is likely to generate significant debate over the provisional application of treaties in circumstances where they are signed but not ratified. Pending the likely appeal of this decision, it may serve to deter claimants from bringing claims under the ECT where recourse under other investment treaties is available.

## **BACKGROUND TO THE YUKOS ARBITRATION**

5. Yukos Oil Company was a major Russian oil producer, of which Mr. Khodorkovsky was the CEO. In and after 2003, it was alleged by Russian tax authorities that Yukos had been involved in systemic and large-scale tax evasion in the Russian Federation. There followed a series of substantial tax assessments and fines, eventually leading to the forced sale of Yukos' assets and its bankruptcy in August 2006.
6. Yukos shareholders initiated several parallel arbitrations under the UNCITRAL rules, on the grounds that the Russian Federation's conduct amounted to unlawful expropriation and gave rise to other breaches of the substantive protections of the ECT.
7. A tribunal was appointed, and was eventually composed of Messrs L. Yves Fortier, Charles Poncet and Stephen Schwebel. The Hague was

designated as the place of the arbitration, which commenced on 31 October 2005.

## ISSUES OF JURISDICTION OF THE ARBITRAL TRIBUNAL AND FINDINGS OF THE ARBITRAL TRIBUNAL

### Jurisdiction

8. The question of whether the tribunal had jurisdiction to hear the claim arose out of failure of the Russian Federation to ratify the ECT, despite having signed it on 17 December 1994.
9. Article 45 of the ECT provides that it may have provisional application in certain circumstances, as follows:
  - (1) *Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.*
  - (2) *[...]*
  - (3) (a) *Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.*  
  
*[...]*
10. At issue was whether, in the circumstances, Russia was provisionally to apply the ECT with respect to the claimants' investments, or whether its

provisional application was inconsistent with the constitution, laws or regulations of the Russian Federation, for the purposes of Article 45(1), the so-called 'Limitation Clause'.

### **The Partial Award on Jurisdiction**

11. After multiple hearings and procedural orders, the tribunal made an interim award on 30 November 2009, addressing the question and concluding that Article 45(1) negates provisional application of the Treaty only where provisional application in and of itself was inconsistent with the constitution, laws or regulation of the signatory State. Its overall conclusion was that there was no such inconsistency.
12. Consequently, the tribunal found that the ECT applied provisionally in its entirety to the Russian Federation, which was therefore bound by the investor-State arbitration provisions invoked by the Yukos investors.

### **Award made by the Arbitral Tribunal**

13. On 18 July 2014, having found that it had jurisdiction to rule over Russia's alleged breaches of the ECT, the tribunal held that even though Russia had not explicitly expropriated Yukos or its shareholders, the measures that the Respondent had taken had had an effect "*equivalent to nationalization or expropriation*". The tribunal awarded both loss of the value of the shareholding and loss of dividends for an amount it assessed at US\$50,020,867,798.

### **WHY THE HAGUE COMMERCIAL COURT HAS SET THE AWARD ASIDE**

14. The Russian Federation applied to set aside the interim and final awards in the place of arbitration, The Hague. It alleged, inter alia, that there was

no valid arbitration agreement and that the tribunal had exceeded its remit in asserting jurisdiction. The tribunal agreed with the Russian Federation and set the arbitral awards aside on 20 April 2016.<sup>1</sup> The basis for that decision is as follows.

### **Article 45 of the ECT**

15. The Russian Federation's case was that the extent of the provisional application of the ECT would depend upon the consistency of each individual treaty provision with the constitution, laws or regulations of the signatory state.
16. The Yukos shareholders, however, supporting the tribunal's view, argued that the ECT would apply in its entirety provided that provisional application of the treaty was not in and of itself inconsistent with national law.
17. Applying Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the interpretation of the ECT accepted by the Dutch Court was supportive of the position adopted by the Russian Federation, insofar as it concluded that the Russian Federation would only be bound by such treaty provisions as were reconcilable with Russian law.

### **Article 26 of the ECT**

18. The Dutch court went on to address the question of whether Article 26 ECT, which contains its dispute settlement provisions, was consistent with Russian law. The Yukos shareholders argued that Article 26 could

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<sup>1</sup> An English version of the decision is available at the following : [http://res.cloudinary.com/lbresearch/image/upload/v1461144564/yukos\\_engelse\\_vertaling\\_203116\\_1029.pdf](http://res.cloudinary.com/lbresearch/image/upload/v1461144564/yukos_engelse_vertaling_203116_1029.pdf)

only be incompatible with Russian law if the Treaty provision concerned is prohibited under national law.

19. The Dutch court disagreed. It found that provisional application of Article 26 would be contrary to Russian law were there to be “*no legal basis for such a method of dispute settlement or – when viewed in a wider perspective – if it does not harmonise with the legal system or is irreconcilable with the starting points and principles that have been laid down in or can be derived from legislation*” (paragraph 5.23).

### **The Compatibility of Article 26 of the ECT with Russian Law on Foreign Investments**

20. Neither Yukos, nor Russia, argued that the issue of compatibility or incompatibility should be answered according to anything other than Russian law. In the Dutch legal system, foreign law is not treated as a question of fact, but of law.
21. The Dutch court therefore considered whether, as a matter of Russian Law, Article 26 was compatible with the dispute settlement provisions of the Russian Law on Foreign Investments.<sup>2</sup> It found that Russian law did not provide an independent legal basis for the arbitration of disputes between investors and states, such as provided for in Article 26 ECT and therefore its provisional application would be incompatible with Russian law.

### **Could Article 26 nevertheless be applied provisionally?**

22. The Dutch court further considered whether Article 26 could be applied provisionally based only upon the fact the ECT had been signed. The

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<sup>2</sup> Article 9 of the Law on Foreign Investments 1991 and Article 10 of the Law on Foreign Investments 1999; for further detail as to the relevant provisions of Russian law and the basis of that conclusion, see paragraphs 5.43 to 5.58 of the decision.

finding of the tribunal had been that the signing of a treaty would be sufficient to establish consent to international arbitration in these circumstances.

23. In the view of the Dutch court, however, neither the Federal Law on International Treaties of the Russian Federation nor the Vienna Convention would provide an independent basis for the unlimited provisional binding force of the ECT.
24. Rather, whether the arbitration clause could be applied provisionally without ratification was, in the view of the court, a question that must primarily be answered by reference to the 1993 Russian Constitution.
25. On that matter the Dutch court accepted that as a matter of Russian constitutional law, treaties that deviate from or supplement national Russian laws cannot be applied based only upon their signature, ratification being required.

### **Conclusion of the Dutch Court**

26. The Dutch court concluded, accordingly, that the tribunal had wrongly declared itself competent in the arbitration. In the absence of jurisdiction, the interim and final awards in the Yukos Arbitration were set aside.

### **WHAT ARE THE CONSEQUENCES?**

27. The decision is remarkable in that the court addressed substantially the same issues as had previously been considered by the tribunal, which was composed of eminent international public law and arbitration practitioners. Yet it came to the opposite overall conclusion.

28. The effect of the Court's decision upon enforcement of the award in other jurisdictions is presently unclear. Enforcement proceedings have been brought in various jurisdictions. Under the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, recognition or enforcement of an award may be refused irrespective of what the Dutch courts have to say on the matter.
29. Specifically, Article V(1)(e) recognition and enforcement may be refused at the request of the party against whom it is invoked, where that party furnishes proof that the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. Domestic courts retain a discretion, accordingly, and have, in certain cases, been willing to enforce awards notwithstanding that have been set aside.
30. Doubtless the decision will be the subject of an appeal in the Netherlands. The Yukos Saga is therefore poised to continue.

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**Barrister**

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