



Issue : Vol. 2 - issue 3
Published : June 2005

Transnational Dispute Management

transnational-dispute-management.com

The Gate to Arbitration - The Yukos Case and the Provisional Application of the Energy Charter Treaty in the Russian Federation

by U. Klaus

About TDM

TDM (Transnational Dispute Management): Focussing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates,

Open to all to read and to contribute

Our aim is for TDM to become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

Please contact **Editor-in-Chief** Thomas Wälde at twwalde@aol.com if you would like to participate in this global network: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

Editor-in-Chief
Thomas W. Wälde
twwalde@aol.com
Professor & Jean-Monnet Chair
CEPMLP/Dundee and Principal
Thomas Wälde & Associates

© Copyright TDM 2005
TDM Cover v1.0

The Gate to Arbitration

-

The Yukos Case and the Provisional Application of the Energy Charter Treaty in the Russian Federation

*Ulrich Klaus*¹

Introduction

In February 2005 Yukos' investors initiated official investment arbitration proceedings under Art. 26 of the Energy Charter Treaty (hereafter referred to as ECT). The investors seek financial compensation (US \$28.3 bn) from the Russian Federation (hereafter referred to as RF). In addition to the political and economic implications, the arbitration proceedings also face legal challenges and uncertainties. One of these uncertainties lurks at the very beginning of the arbitration process, the provisional application of the ECT in the RF. As the RF has signed, but not ratified the ECT so far, it applies the treaty (only) on a provisional basis (Art. 45 ECT). Due to this fact, direct investor-state arbitration proceedings under Art. 26 ECT this time begin in the ambiguous and unknown terrain² of a provisionally applied ECT.

The purpose of this paper is to analyse and clarify if provisional application of the ECT in the RF has any impacts on the admissibility of Yukos arbitration proceedings under Art. 26 ECT. To accomplish this, the analysis will include public international law on international treaties³, the ECT's provisions⁴, and national Russian law.⁵

In general, the legal concept of provisional application is not of significant importance to international investment arbitration. In the Yukos case, however, provisional application could emerge as the "gate to arbitration".

¹ The author is a PhD candidate (Dr. jur.) of Prof. Dr. Christian Tietje at the Transnational Economic Law Research Center, University of Halle-Wittenberg. The article is based on a short policy paper of the author: Ulrich Klaus, The Yukos Case under the Energy Charter Treaty and the Provisional Application of International Treaties, Policy Papers on Transnational Economic Law, No. 11/1-2005, available at: http://www2.jura.uni-halle.de/telc/policy_papers.html.

² See, on comments on ECT's provisional application: *Emmanuel Gaillard*, Menatep's counsel -- The Energy Charter will protect Group Menatep (Interview), Interfax, February 15, 2005, available at: http://www.interfax.ru/e/B/exclusive/29.html?mode=9&title_style=exclus&others=2&id_issue=10749912; *Luke Eric Peterson*, Jilted Yukos shareholders turn to Energy Charter Treaty arbitration, in INVEST-SD: Investment Law and Policy Weekly News Bulletin, November 18, 2004, 4-5, available at: http://www.iisd.org/pdf/2004/investment_investsd_nov18_2004.pdf.

³ See, on provisional application in general: *Anthony Aust*, Modern Treaty Law and Practice (2000), 139-142; *Albane Geslin*, La mise en application provisoire de traités (2005); *Horst-Günther Krenzler*, Die vorläufige Anwendung völkerrechtlicher Verträge (1963); *René Lefeber*, The provisional application of treaties, in *Jan Klabbers* (ed.), Essays on the Law of Treaties (1998), 81-96; *Martin A. Rogoff / Barbara E. Gauditz*, The Provisional Application of International Agreements, Maine Law Review, Vol 39 (1987), 29-81; Анатолий Н. Талалаев, Венская конвенция о праве международных договоров Комментарий (1997), 61-63 (Anatolij N. Talalajev, The Vienna Convention on the Law of International Treaties – Commentary); *United Nations – General Assembly*, Examples of precedents of provisional application: pending their entry into force, of multilateral treaties, especially treaties which have established international organizations and/or regimes - Report of the Secretary-General (1973).

⁴ See, on provisional application of the ECT: *Craig Bamberger/Jan Linehan/Thomas Wälde*, The Energy Charter Treaty in 2000: In a New Phase, VI b, available at: <http://www.dundee.ac.uk/cepmlp/journal/html/vol7/article7-1.html>; *Richard Happ*, Dispute settlement under the Energy Charter Treaty, German yearbook of international law, Bd. 45 (2003), 331, 339; *Thomas Wälde*, Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation, Arbitration International, Vol. 12 (1996), 429, 462.

⁵ See, on provisional application in the RF: *William E. Butler*, The Law of Treaties in Russia and the Commonwealth of Independent States: Text and Commentary (2002), 125-131; Виктор П. Звекон, Комментарий к Федеральному закону "О международных договорах Российской Федерации" (1996), 72-79 (Victor P. Svekov, Commentary on the Federal Law "About international treaties of the Russian Federation").

A. The Yukos Case – Legal proceedings

The “Yukos Case” is actually split up into several legal proceedings, reflecting the changing defence strategy of Yukos and its main investor, Group Menatep, since late 2003. The proceedings may be divided into three main legal objectives:

- 1) The fight against additional tax claims (since 12/2003)
- 2) The effort to prevent the company’s legal and economic disintegration (since 12/2004)
- 3) The effort of Yukos’ investors to get financial compensation (since 11/2004)

With additional tax claims against Yukos coming up in December 2003, Yukos tried to fend these tax claims in Russian courts. After being turned down, Yukos brought the tax claim issue before the European Court of Human Rights (ECHR) in April 2004, where it is still pending.⁶ The prospects of success for the ECHR case remain uncertain, as there are doubts as to whether the ECHR is the proper legal forum for a billion dollar claim.⁷ In December 2004, with the auctioning of Yukos’ main oil-producing subsidiary, Yuganskneftegas, imminent, Yukos filed for bankruptcy protection in the United States under Chapter 11 of the U.S. Bankruptcy Code. Despite these efforts to prevent its legal and economic disintegration, the auction took place, and Yuganskneftegas was sold. In the end, the US-bankruptcy case failed to bring substantial relief for Yukos and was terminated in March 2005.⁸

Given the waning chances of success concerning the tax claims and Yukos’ disintegration as a company, the legal strategy now focuses intensively on financial compensation for Yukos’ investors under international investment protection regimes.⁹ The claimants in the ECT investment arbitration proceedings are Hulley Enterprises Limited and Yukos Universal Limited, two Cyprus-based subsidiaries of the largest Yukos investor, the Group Menatep. The mandatory three-month dispute negotiation phase (Art. 26 (2) ECT) between the investor and the RF elapsed without any results (and without any public reaction from the RF). Therefore, the claimants requested that arbitration should take place according to the 1976 arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) as provided for in Art. 26 (4) b ECT.¹⁰ At the moment, the ECT seems to be the core of the investors’ efforts and thus far remains the only investment compensation claim lodged. Investors could also follow Yukos’ ECHR example, however, and invoke Art. 1 of the Protocol No. 1 to the European Convention of Human Rights. Furthermore, legal action concerning investment protection could also be based on one of the bilateral investment treaties the RF has concluded.¹¹

⁶ The claim is based on Art. 6 of the European Convention of Human Rights (Fair Trial) and Art. 1 of Protocol No. 1 to the Convention (protection of property). The RF ratified the European Convention on Human Rights in May 1998.

⁷ See e.g. Yukos’ argumentation on this issue in connection with the US-bankruptcy case: Yukos Oil Company’s Pre-Trial Statement, February 15, 2005, 12, available at: <http://www.yukosbankruptcy.com/pdf/pleadings/main/132.pdf>; more optimistic with regards to enforcement: *Herbert Smith (ed.)*, Expropriation, Investor Rights and The Energy Charter Treaty: Some Legal Aspects of The Yukos Saga, available at: <http://www.herbertsmith.com/NR/rdonlyres/96AF24B2-FABB-48B5-A4C0-F077EA4BDD27/630/IntLawRussianebulletin13dec04.htm>.

⁸ See Yukos’ press statement: YUKOS to drop U.S. bankruptcy appeal, March 22, 2005, available at: <http://www.yukos.com/vpo/default.asp>.

⁹ See, on international investment protection for Yukos: *Dmitry Butrin/Denis Skorobogatko/Anna Volkova*, YUKOS Asks for Asylum in Court, *Kommersant Online Edition*, February 28, 2005, available at: <http://www.kommersant.com/page.asp?id=550693>; *Herbert Smith (ed.)* (note 7).

¹⁰ *Gaillard* (note 2).

¹¹ See, on bilateral investment treaties and Yukos: *Luke Eric Peterson*, Menatep’s Yukos claim is largest in investment treaty history; others in offing?, in *INVEST-SD: Investment Law and Policy Weekly News Bulletin*, February 22, 2005, 4-5, available at: http://www.iisd.org/pdf/2005/investment_investsd_feb22_2005.pdf.

As other legal means seem exhausted or not yet initiated, international arbitration under the ECT currently appears to be the only promising chance for investors to satisfy their claims. For ECT arbitration to be available to Yukos, however, the ECT's arbitration regime must be applicable in the RF under the provisional regime of the ECT.

B. Provisional application of the ECT

I. ECT and the concept of provisional application

The legal concept of provisional application means that an international treaty's substantial provisions are applied even if the treaty itself has yet to enter into force. This concept may be applied either to all signatory states or only to a specific country which is waiting to ratify the treaty. Thus, a treaty may create obligations for its signatories despite the fact that the legislature, the constitutionally responsible body, has not yet ratified the treaty. The concept of provisional application has long been acknowledged in public international law¹² and was finally codified in Art. 25 of the Vienna Convention on the Law of Treaties 1969 (hereafter referred to as VCLT). In past centuries, the lack of an immediate means of communication was the main reason for provisional application. Nowadays, mostly economic agreements and treaties are applied provisionally because they arise from urgent economic needs which call for the quick resolution of circumstances that cannot wait for the complicated ratification procedure to be completed.¹³ In the 20th century, provisional application became increasingly widespread¹⁴, with the General Agreement on Trade and Tariffs (GATT) being the most prominent and enduring member in this category.¹⁵ The concept of provisional application, however, evokes a certain degree of uncertainty. Provisional application is a status of handling a treaty as if it were in force although formally it is not.¹⁶

Among other aims, the ECT is designed to be a legally binding forum for investment promotion and protection in the energy sector, including an investment dispute settlement mechanism.¹⁷ The quick economic integration of energy markets in the former East and West was considered vital to the restructuring and reform of the former communist economies, and to safeguard the energy supply to energy-dependent western nations. Therefore, in Art. 45 (1), the ECT prescribes its provisional application, including an opt-out clause for those members unwilling to apply the treaty provisionally in Art. 45 (2) ECT.

“(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory (...), to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

(2) a) Notwithstanding paragraph (1) any signatory may, when signing, deliver (...) a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. (...)”

¹² *Krenzler* (note 3), 16.

¹³ *Krenzler* (note 3), 19; *Rogoff / Gauditz* (note 3), 29-32; *Ian M. Sinclair*, *The Vienna Convention on the Law of Treaties* (1973), 51.

¹⁴ *Talalajev* (note 3), 61; for examples see: *Lefeber* (note 3), 81, 82; *United Nations / General Assembly* (note 3), 10-38.

¹⁵ *Frieder Roessler*, *The provisional application of the GATT*, *Journal of World Trade*, Vol. 19 (1985), 289; *Rogoff / Gauditz* (note 3), 64-73.

¹⁶ See, on the discussion and hesitations about the concept: *Aust* (note 3), 139; *Lefeber* (note 3), 89; *Talalajev* (note 3), 63; *Ralf Günther Wetzel/Dietrich Rauschnig*, *The Vienna Convention on the Law of Treaties – Travaux Préparatoires* (1978), *Waldock Report IV on Article 25*, 207.

¹⁷ See, on the ECT in general: *Craig Bamberger*, *The Energy Charter Treaty – a description of its provisions* (1995); *Thomas Wälde (ed.)*, *The energy charter treaty an East West gateway for investment and trade* (1996).

This resulted in provisional application of the treaty by all signatory states between its signature in December 1994 and its entry into force in April 1998 (Art. 44 ECT), unless a member state expressly declared that it was unable to apply the ECT provisionally (Art. 45 (2) a) ECT).¹⁸ After April 1998, provisional application was restricted to those signatory states which had signed but not yet ratified the treaty and had not invoked Art. 45 (2) ECT.

II. Provisional application of Art. 26 ECT

One of the central questions arising on provisional application after 1994 was whether the direct investor-state investment arbitration mechanism in Art. 26 ECT is comprised by the provisional application regime in Art. 45 ECT.¹⁹ At first glance this thought may seem surprising as Art. 45 ECT does not contain any special restrictions with regards to Art. 26. The combination of Art. 26 and 45 ECT, the unconditional and direct submission to investor-state arbitration under provisional application, though, was a novelty for international treaty and arbitration practice.²⁰ However, neither Art. 45 ECT nor any other provision of the ECT exclude Art. 26 ECT from provisional application. On the contrary, as *Happ*²¹ already indicates, the provisions in Art. 45 (2) (b) and particularly Art. 45 (3) (b) – (c), which provide for the ongoing protection of investments after the termination of provisional application, are very strong arguments for the provisional application of Art. 26 ECT. In *Plama v. Bulgaria*, the arbitration tribunal (ICSID) stated in a general reference that Art. 26 ECT is to be applied provisionally, but did not elaborate on this.²² The reference indicates, however, that provisional application of Art. 26 ECT is acknowledged in general.

Art. 45 (3) ECT

“(3) (...) (b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).

(c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefore.”

Therefore, Art. 26 ECT is to be applied provisionally as any other provision of the ECT. However, even if it is understood that Art. 26 ECT is included in the provisional application regime of Art. 45 CT, the exact scope of Art. 45 ECT must still be defined.

III. The provisional application of the ECT in the RF

As the RF signed the ECT but did not register a declaration of non-application according to Art. 45 (2), the ECT and therefore Art. 26, too, should be applicable on a provisional basis in

¹⁸ Art. 45 (2) Declaration: Australia, Bulgaria, Cyprus, Hungary, Iceland, Japan, Liechtenstein, Malta, Norway, Poland, Switzerland and Turkmenistan.

¹⁹ *Bamberger/ Linehan/ Wälde* (note 4), VI b; *Happ*, (note 4), 339; *Wälde* (note 4), 462-464.

²⁰ *Bamberger/ Linehan/ Wälde* (note 4), VI b; И. З. Фархутдинов, Международное инвестиционное право. Теория и практика применения (2005), 377 and 395-401 (*Insur S. Farkhutdinov*, International Investment Law – Theory and practice of application); *Wälde* (note 4), 462.

²¹ *Happ* (note 4), 339.

²² *Plama Consortium Limited v. Republic of Bulgaria*, (ICSID Case No. ARB/03/24 – February 8, 2005), para. 140, available at: <http://www.worldbank.org/icsid/cases/plama-decision.pdf>.

the Russian Federation. A more precise look at Art. 45 ECT reveals the dilemma of the ECT's regime of provisional application. Art. 45 (1) ECT states that each signatory applies the ECT

“pending its entry into force for such signatory (...), to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.”

This particular provision is the centre of uncertainties related to provisional application as it makes the application of ECT provisions dependent upon national regulations. Following the plain meaning of Art. 45 (1) ECT, the provision gives internal Russian law priority over provisionally applied ECT's provisions. The scenario is further complicated by the prolonged ratification process in the State Duma. To evaluate the admissibility of a Yukos arbitration under Art. 26, 45 ECT, the following four issues must be analysed:

- 1) Is the ECT indeed still “pending its entry into force for the” Russian Federation (Art. 45 (1) ECT) when ratification in the State Duma has failed thus far?
- 2) What is the plain meaning of the wording in Art. 45 (1) ECT?
- 3) Does a systematic, historic, and/or teleological analysis²³ of Art. 45 (1) ECT limit the regime of the unconditional priority of internal law in general or particularly regarding Art. 26 ECT?
- 3) Do any Russian norms contradict a direct investor-state dispute settlement mechanism as provided for in Art. 26 ECT under provisional application?

C. ECT – Still pending its entry into force in the RF?

This question may be farfetched, as the provisional application of the ECT in the RF as such seems undisputed.²⁴ The question arises, though, as it is not always clear what exactly happened so far during the ECT ratification process in the Russian State Duma. Did ratification not “fail” twice in the State Duma, in 1996 and 2001? Can a treaty be provisionally applied if it “failed” ratification? This question must be analysed, as a formal rejection of the ratification in the State Duma would per se have stopped the ECT's provisional application.²⁵

The ratification procedure commenced with the introduction of the project to the Russian State Duma in summer 1996. The State Duma held parliamentary hearings but did not adopt the respective law on the ECT's ratification. On the other hand and more importantly, it did not formally reject it either (so far²⁶). In other words, ratification of the ECT in the Russian Federation is still pending. At the time of writing, the Bill No. 96043844-2 on the ECT ratification is still “caught” in the proceedings of the responsible Duma Committee on Energy, Transport and Communications. It is the Committee's oldest project, dating back to August 1996²⁷, and has not been included in the Committee's preliminary agenda for 2005.²⁸

²³ See on the rules for interpretation in the ECT's case: *Thomas Wälde*, Energy Charter Treaty-based Investment Arbitration – Controversial Issues, in: *The Journal of World Investment & Trade*, Vol. 5 (2004), 373, 377.

²⁴ See, statement on the provisional application in the RF, *Ministry of Foreign Affairs of the Russian Federation*, Information on the Energy Charter Treaty, February 4, 2004, available in Russian at: <http://www.ln.mid.ru/ns-dipecon.nsf/fc2e4121e6d9ec5343256a0c003fb7d2/b7de8762722bfc9043256a29003c4e0c?OpenDocument>.

²⁵ Butler (note 5), 130.

²⁶ See, latest comments on a possible rejection in the Duma: *RIA Novosti online*, State Duma may refuse to ratify Energy Charter Treaty, March 30, 2005, available at: http://en.rian.ru/rian/index.cfm?prd_id=160&msg_id=5482974&startrow=1&find=energy%20charter.

²⁷ See, the committee's list on bills, available in Russian at: <http://www.duma.gov.ru/energy/zakon/zakonopr.html>.

²⁸ See, the committee's agenda for 2005, available in Russian at: <http://www.duma.gov.ru/energy/zakon/progv05.html>.

As the ECT is still pending its entry into force in the RF, the basic pre-condition for provisional application in the RF exists. The exact meaning Art. 45 (1) and the scope of provisional application in the context of public international law, other ECT provisions, and its possible limitations with regards to the priority of national law, however, still need to be defined.

D. The plain meaning of Art. 45 (1) ECT

The terms of Art. 45 (1) ECT state that the signatories must apply the ECT provisionally, “to the extent that such provisional application is not inconsistent with its constitution, laws or regulations”. What exactly does this provision express?

In the author’s view, the wording may be interpreted in one of two ways. Either the intention is that the ECT must be applied provisionally if provisional application of international treaties as such is allowed under national law and the respective provisions and procedures have been complied with. In this version, national law would only be checked for the compatibility of the legal concept of provisional application and not whether the substantial provisions of the ECT comply with national regulations. In other words, once provisional application of the respective international treaty is permitted, the treaty would be applied provisionally even if some of its provisions contradict current national law. The second possible interpretation is that both of these elements must be examined. In this case, the admissibility of provisional application as such as well as the compliance of the treaty’s substantial provisions with the national regulations must be checked.

The second interpretation seems more plausible; the purposes of a limitation in provisional application, as in Art. 45 (1) ECT, is to avoid possible internal conflicts between the treaty’s provisions and national regulations during a transitional period. A check of national law only with regards to its consistency with the legal concept of provisional application would be insufficient to achieve this aim. Therefore in the author’s view, the concept of provisional application as well as the substantial provisions must be consistent with national regulations.

E. Possible limitations to the scope of Art. 45 (1) ECT

After having clarified the exact meaning of Art. 45 (1) ECT, it must be determined whether public international law or the other ECT provisions place any limitations on this provision.

I. Possible limitations in general

1. Art. 45 (1) ECT and the Vienna Convention on the Law of Treaties

In public international law, the concept of provisional application is laid down in Art. 25 VCLT. Art. 25 (1) VCLT itself is not concerned with the weight and scope of the provisional application of treaties, though. It merely points to the existence of the concept of provisional application and states that:

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

(a) the treaty itself so provides; or

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

Two other provisions of the VCLT may help clarify the scope of provisional application regarding the priority regime, Art. 27 (internal law and observance of treaties) and Art. 46

(provisions of internal law regarding competence to conclude treaties) VCLT. These two provisions expressly deal with the conflict between international treaties and national law and therefore could possibly influence or even reverse the priority regulation set in Art. 45 (1) ECT.

Art. 27 VCLT

“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.”

Art. 46 VCLT

“(1) A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”

Whereas Art. 27 deals with the possible conflict between the substantial provisions and obligations of a treaty and internal law, Art. 46 is designed to determine who has the capacity to enter into the treaty. Both provisions clearly state that treaty law takes precedent over internal law, with the small exception of Art. 46 (1). These two articles express the general rule of public international law: that international treaties take precedence over national law, with a narrow rule of exception in Art. 46 VCLT.²⁹ According to this general rule of the VCLT, which is also applicable during provisional application, Russian laws that would limit the scope of the provisional application of the ECT in the Yukos Case cannot be invoked by the RF.

However, neither Art. 25 nor Art. 26, 46 VCLT state that the signatories may not change the general priority rule and let national law take precedence over the treaty’s provisions. The wording of Art. 25 ECT points to the freedom of the negotiating parties to determine the mode of provisional application themselves, and international treaty practice shows that there are unique and highly differentiated regimes of provisional application.³⁰ The precedence of national law over an international treaty would of course normally be counterproductive to the aim of creating a stable multilateral legal regime for national states by means of international treaties. However, for the usually limited time of provisional application, this may make sense if the signatories wish to avoid political and legal conflicts with respect to internal regulations for a transitional period. There is already precedence of internal law during provisional application being used in treaty practice.³¹ The disadvantage of legal uncertainty for other signatory states or, as with the ECT, for private investors about the legal status of a treaty dependent on internal and possibly unknown regulations is balanced by the normally limited time of provisional application.³²

In any case, due to the special terms of Art. 45 (1) ECT, this provision takes precedence over Arts. 27 and 46 VCLT according to the rule of *lex specialis*. The result is that VCLT provisions on provisional application and on the priority regime do not change or even reverse the precedence of national law over ECT provisions as provided for in Art. 45 (1) ECT.

2. Art 45 (1) ECT and Art. 45 (2) (a) ECT

²⁹ Aust (note 3), 144.

³⁰ See e.g.: *United Nations – General Assembly* (note 3), 10-40; compare also the complex structure of Art. 45 (1)-(7) ECT.

³¹ See for examples: Lefeber (note 3), 89.

³² Wälde (note 4), 462.

The scope of the provisional application as defined in Art. 45 (1) ECT could be modified by other provisions of the ECT.³³ The rules for the interpretation of the ECT are defined in Art. 31-33 VCLT (interpretation of treaties). These rules emphasise that primary attention should be given to the very “terms of the treaty in their context and in the light of its object and purpose” (Art. 31). An historic approach including the travaux préparatoires is of only secondary importance.³⁴

Art. 45 (2) (a) ECT provides a very simple possibility for signatory states to opt out of provisional application in Art. 45 (1) ECT. When signing the treaty in 1994, a signatory state was only required to deliver a declaration to the depository state, stating that it is unable to accept provisional application.³⁵ It is arguable that a signatory that knows or assumes its legislation is incompatible with provisional application is under an obligation (e.g., under Art. 18 VCLT - Obligation not to defeat the object and purpose of a treaty prior to its entry into force) to opt out according to Art. 45 (2) (a) ECT.³⁶ This, so the argumentation, would on the other hand bar such signatories from invoking national precedence according to Art. 45 (1). However, according to Art. 45 (2) (a) ECT “any signatory may, when signing, deliver” such a declaration. The wording of Art. 45 (2) (a) ECT clearly indicates that opting out is optional, not mandatory. Moreover, those who do not opt-out automatically fall under the treaty’s regular provisional application regime according to Art. 45 (1) ECT, as in the case of Russia. Furthermore, any argument that calls for the limitation of Art. 45 (1) ECT in light of the opt-out option in Art. 45 (2) (a) ECT presumes that opting out under Art. 45 ECT is one-dimensional. Such an interpretation would be very difficult in light of the clear language of Art. 45 (1) ECT, however. The structure of Art. 45 (1) and (2) (a) ECT rather provides for two parallel ways out of provisional application: an outspoken and clear one in Art. 45 (2) (a) ECT and a more silent one in Art. 45 (1) ECT. The “silent” way out in Art. 45 (1) ECT does not develop any actual relevance until a provisions applicability has to be clarified, as with Art. 26 ECT in the Yukos case.

The opting out provision in Art. 45 (2) ECT, too, does not limit the scope of Art. 45 (1) ECT.

II. Possible limitations to Art. 45 (1) ECT with regards to Art. 26 ECT

Even if there are no general limitations to the scope of Art. 45 (1) ECT, there may be reasons to limit the precedence of national law regarding the direct investor-state investment arbitration mechanism in Art. 26 ECT under provisional application.

1. Art. 45 (1) and Art. 45 (3), 26 ECT

Art. 45 (1) ECT could be modified in Art. 45 (3) ECT, particularly regarding Art. 26 ECT. Art. 45 (3) ECT deals explicitly with the termination of provisional application (Art. 45 (3) (a) ECT) and its effects on the treaty’s investment protection and investment dispute settlement provisions (Art. 45 (3) (b) and (c) ECT), including Art. 26 ECT. As stated above³⁷, the regulations of Art. 45 (3) ECT evidently include Art. 26 ECT in the regime of Art. 45 (1) ECT. Art. 45 (3) ECT may even be “strong” enough to limit Art. 45 (1) ECT regarding Art. 26 ECT.

According to Art. 45 (3) (a) ECT, the RF may cease provisional application of the ECT at any time. In this case, foreign investments in Russia made between 1994 and the time of a

³³ *Bamberger/ Linehan, / Wälde* (note 4), VI b; Happ (note 4), 339 (see especially note 40).

³⁴ See on Art. 31 VCLT and the ECT: *Wälde* (note 23), 377-378.

³⁵ See above (note 18).

³⁶ *Bamberger/ Linehan, / Wälde* (note 4), VI b.

³⁷ See B. II.

possible retreat, according to Art. 45 (3) (b), would still benefit from the investment protection regime of the ECT, as Russia did not opt out of this clause according to Art. 45 (3) (c) ECT, either. The high standard of investment protection envisaged by Art. 45 (3) (b) possibly limits the priority regime of national law in Art. 45 (1) ECT. In the author's opinion, however, the clear wording of Art. 45 (1) ECT again prevents such a teleological limitation. Looking at the complex structure of Art. 45 ECT, such a limitation would otherwise have been codified explicitly in Art. 45 (1) or (3). The fact that the negotiating parties did not do so indicates that the scope of Art. 45 (1) remains untouched by Art. 45 (3) ECT.

2. Art. 45 (1) and the “Human Rights Approach” of Art. 26 ECT

As *Wälde*³⁸ points out, there is a certain human rights approach manifested in the concept of direct state-private investment arbitration in Art. 26 ECT, different from the traditional commercial arbitration between the two. Again, this may call for a higher standard of legal predictability for investors. Does it really limit Art. 45 (1) ECT, though? The limited legal predictability for investors is restricted to the period of provisional application. An investor looking at Art. 45 (1) ECT can also see that there may be national restrictions to Art. 26 ECT and decide on the investment considering this legal risk. The ECT creates a high degree of legal predictability in investor-state investment arbitration once the treaty enters into force. On the other hand, it limits legal predictability during provisional application by acknowledging possible national constraints.

III. Conclusions on possible limitations to Art. 45 (1) ECT

The different provisions in public international law and in the ECT discussed above do not limit the regime of provisional application as defined in Art. 45 (1), giving the national law precedence over the treaty's provisions.³⁹ For investors, this situation may be unsatisfactory regarding the intentions of the treaty; namely, to guarantee a stable investment climate and a compulsory investor-state dispute settlement mechanism. However, this unstable environment for investment protection during provisional application is the result of the negotiating parties' ambiguity. A simple alternative would have been to omit the reference to national law in Art. 45 (1) ECT. The signatory states could then have accepted (unconditional) provisional application or opt-out according to Art. 45 (2) (a) ECT. If they would accept provisional application to such an Art. 45 (1) ECT, Art. 25, 46 VCLT would guarantee the precedence of the ECT's provisions, including Art. 26 ECT, over national (Russian) law.⁴⁰

F. Provisional application of Art. 26 ECT in the RF

The effect of the above is that Russian law must be consulted to determine whether direct investor-state arbitration is possible under a provisionally applied ECT.

I. Art. 45 (1), 26 ECT and Russian Law on provisional application

Given that Russian law takes precedence over the provisionally applied ECT, it must first be considered whether provisional application as such is consistent with Russian law. If the concept of provisional application of treaties in general or the provisional application of the ECT in particular is inconsistent with Russian law, according to Art. 45 (1), the ECT cannot

³⁸ *Wälde* (note 4), 437 and 445.

³⁹ See, on this conclusion: *Wälde* (note 4), 463.

⁴⁰ See, on the complexity of negotiations and options (Art. 26 ECT): *Wälde* (note 4), 442-450.

be applied provisionally. At first glance, this may seem confusing, but it is the logical consequence of Art. 45 (1) ECT.

The Constitution of the RF (CRF)⁴¹ regulates the negotiation and conclusion of international treaties (Art. 86 (b) CRF) but leaves their ratification to the Federal Assembly (State Duma and Council of the Federation - Arts. 71, 105, and 106 (d) CRF). The concept of “provisional application” is not dealt with in the corresponding provisions of Art. 15 CRF.

“(4) Generally accepted principles and rules of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If an international treaty of the Russian Federation establishes rules, other than provided for by the law, the rules of the international treaty shall be applied.”

The details are regulated by the Federal Law on International Treaties of the RF (16 June 1995 – FL IT)⁴². Art. 23 FL IT (Provisional application of international treaties in the RF) expressly deals with the provisional application of international treaties in the RF.

“(1) An international treaty (...) may be applied by the RF provisionally, if such has been provided for in the treaty (...).

(2) Decisions concerning the provisional application (...) shall be adopted by the government body, which adopted the decision to sign the international treaty according to the regime (...) in Art. 11 FL IT.

If an international treaty, which has to be ratified (...), provides for its provisional application (...), the treaty has to be submitted to State Duma not later than six month after the provisional application began. With a decision, taken in the form of a federal law according to Art. 17 FT IT (...), the period of provisional application may be extended.”

Thus, Russian law acknowledges the provisional application of treaties and is therefore consistent with this concept as laid down in Art. 45 (1) ECT.

The existence of the concept of provisional application as such is insufficient, however, to meet the conditions of Art. 45 (1) ECT (Consistency with national law). Furthermore, the procedural requirements laid down in Art. 23 (2) FL IT must be complied with in the case of the ECT. Assuming that the respective Russian provisions on competence in negotiating and signing the treaty have been complied with in the case of the ECT, the most important provision of Art. 23 (2) FL IT is the six-month period for submitting an international treaty to the State Duma. Actually, there could occur some problems here regarding the ECT. The RF signed the treaty at the official ceremony in Lisbon in December 1994, but the bill concerning the ratification of the ECT was not registered until August 1996.⁴³ As provisional application for the RF according to Art. 45 (1) ECT began with its signature in December 1994, the six-month period formally expired in June 1995. Neither Art. 23 FL IT nor any other provision of the FL IT contains any direct consequence for either not submitting the law to the State Duma at all or submitting it after the six-month period. However, failure to submit the treaty, so the argument⁴⁴, does not end provisional application automatically, as such a termination would countermand the purpose of Art. 23 FL IT and Art. 18 VCLT. This view may be problematic as to the constitutional grounds for the six-month provision. When does provisional application end if the responsible organ decides to delay the submission to the State Duma indefinitely? At this point, legal predictability and stability would rather call for an automatic

⁴¹ Constitution of the Russian Federation, December 12, 1993.

⁴² Federal Law "On International Treaties of the Russian Federation", July 15, 1995, 101-FS.

⁴³ See: <<http://www.duma.gov.ru/energy/zakon/zakonopr.html>>.

⁴⁴ Butler (note 5), 130; Svekov (note 5), 74-75.

end to provisional application after six months. The solution to this problem suggested by Svekov⁴⁵ seems more reasonable. As long as the failure to submit the treaty for ratification within the six-month period does not express an explicit intention of not becoming a member of the treaty (compare Art. 45 (3) ECT), or at least to end provisional application, provisional application should not be terminated only on the basis of a formal provision. Even if the submission of the ECT took place more than one year after the six-month period had ended, neither the Russian executive nor the State Duma ever expressed any intention not to be bound by the ECT as a whole or to provisional application.⁴⁶ Therefore, up to now, provisional application of the ECT in the RF does continue despite the failure to submit the treaty to the State Duma in the allotted time.

The rules on provisional application in the RF have therefore been complied with in the case of the ECT, which means that these substantial provisions and procedures are consistent with Art. 45 (1) ECT.

II. Art. 45 (1), 26 and Russian law on direct consent to international arbitration

The last hurdle for Art. 26 ECT under Art. 45 (1) ECT could be a provision in Russian law that prohibits the state's direct submission to international arbitration under provisional application, Art. 26 (3) (a) ECT

“(3) (a) (...) (E)ach Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.”

The general concept of the state's submission to international arbitration is known to Russian law.⁴⁷ Furthermore Russian law is familiar with the states direct submission to international investor-state arbitration in international treaties. Most Bilateral Investment Treaties (BIT) the RF has concluded contain a direct consent to international arbitration.⁴⁸ Even the model-BIT for the RF⁴⁹ states in Art. 8 (2) that an investment dispute between the state and the investor on the investors request, may be brought before an ad-hoc arbitration tribunal according to the UNCITRAL rules or the ICSID. Another example of direct consent, as *Walden* indicates, could be seen in Art. 10 Federal Law on Foreign Investments.⁵⁰ These examples of direct consent to international arbitration on the investor' request in BITs of course are only a strong indicator that Russian law generally allows such a direct consent. There still could exist a general ban which exempts the BITs. But neither the Russian provisions on international treaties⁵¹ nor on international arbitration⁵² and foreign investments⁵³ contain any clauses which would prevent the state's direct consent to international arbitration.

Furthermore, Russian law on international treaties and on international arbitration does not contain any provisions that limit the competences of the Russian executive to negotiate and

⁴⁵ Svekov (note 5), 75.

⁴⁶ On the contrary: *Ministry of Foreign Affairs of the Russian Federation* (note 24).

⁴⁷ С. И. Крупко, *Инвестиционные споры между государством и иностранным инвестором* (2002), 9-15 and 106-109 (Svetlana I. Krupko, *Investment disputes between the state and foreign investors*).

⁴⁸ Krupko (note 47), 120-123, 127-133 with examples; *Thomas Walde*, *Expert Opinion – In the case before the US Federal Bankruptcy Court - Yukos/RF*, Index 1 with examples of Russian BIT's. (to be published in TDM soon).

⁴⁹ Decree of the Government of the RF, June 9, 2001, No. 456, “On Agreements between the Government of the RF and the Governments of Foreign Countries on the Promotion and Reciprocal Protection of Investments”.

⁵⁰ *Walde* (note 48), summary.

⁵¹ Federal Law "On International Treaties of the Russian Federation", July 15, 1995, 101-FS.

⁵² Federal Law „On International Commercial Arbitration“, July 7, 1993, No. 5338-I.

⁵³ Federal Law "On Foreign Investments in the Russian Federation“, July 9, 1999, 112-FS.

sign international treaties which contain a direct submission to international arbitration under provisional application.

This leads to the conclusion, that the Russian Government under Russian law was allowed to give its direct consent to international arbitration under a provisionally applied ECT.

G. Conclusions

As a result of this analysis, the answer on the initial question is: Yes, the gate for Yukos' investment arbitration is open. When signing the ECT in 1994, the RF declared its unconditional consent to international arbitration under Art. 26 ECT. Even the precedence of national law during provisional application in the RF according to Art. 45 (1) ECT does not change this result, as Art. 26 ECT is consistent with Russian law. The respective Yukos' arbitration tribunal, in the author's opinion, therefore should decide positively on the question concerning its jurisdiction in this case.

If the tribunal decides to start arbitration under Art. 45(1), 26 ECT, the question of provisional application will occur again with regards to the ECT's substantial provisions, mainly Art. 10 (Promotion, Protection and Treatment of Investments) and 13 (Expropriation) ECT. Following this articles results, these substantial provisions would have to be consistent with Russian Law, too, according to Art. 45 (1) ECT. A preliminary analysis of Russian provisions results in a positive result on this question. But a detailed answer would be beyond the scope of this paper and should be left to further research.

The results of the Yukos tribunal could become a very interesting precedent for investor-state arbitration in general and especially the arbitration under provisional application. International arbitration under Art. 26 ECT definitely is a chance for Yukos' investors to claim their financial losses. But due to the eminent political and economic implications of this claim, this road to investment arbitration could be closed in the near future. The ECT, already having a weak standing in the RF, could experience a fatal blow, if the Duma decides not to ratify the ECT having the Yukos claim in mind. But even if the prospects for the ECT in the RF are not the best, there remains some hope for ECT arbitration even after the end of provisional application. Such a possibility arises when it comes to the question about the time of the acceptance of the arbitral agreement on the investor's side. As already said before, the RF has given its unconditional consent to arbitration when signing the ECT (Art. 26 (3) ECT). The investor's acceptance could be seen in the final request for arbitration or at an earlier stage in the investment itself. If the latter is the case, investments made between 1994 and the end of provisional application could benefit from ECT investment arbitration regime. But so far, this discussion in the case of Russia remains an academic one.