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Yukos and the Provisional Application of the GATT: An (im)perfect Analogue?

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The 1947 General Agreement on Tariffs and Trade (GATT) is often portrayed as one of the longest lived provisionally applied international treaties. The GATT was signed in October 1947 as a temporary/"stopgap measure" that would later operate under the auspices of the International Trade Organization (ITO), the third pillar of the Bretton Woods system (with the other two being the IMF and the World Bank). At least that was the plan. However, the ITO was never established. This led to the provisional application of the GATT for forty-seven years, *i.e.* until the World Trade Organization (WTO) was established in 1994. The instrument through which the provisional application of the GATT was made possible was the Protocol of Provisional Application (PPA).

The PPA provided that Part II of the GATT (which includes a series of substantive protections, including various non-discriminatory standards) would apply provisionally on or after 1 January 1948 "to the fullest extent not inconsistent with existing legislation". Now this stipulation sounds familiar. In fact, this was a 'limitation clause' similar to that found in Article 45(1) of the Energy Charter Treaty (ECT), which provides for the provisional application of the ECT "to the extent that such provisional application is not inconsistent with" a signatory's "constitution, laws or regulations".

Readers will recall that the tribunal in the *Yukos* cases found that while this 'limitation clause' permitted a *renvoi* to the municipal law of the host State [290], it did not allow for a "piecemeal" application of the limitation clause. The ECT either applied as a whole or it did not ("all-or-nothing") [313-329]. On that basis, the Yukos tribunal determined that since the principle of provisional application was not inconsistent with Russian law there was nothing under Russian law preventing the application of the ECT on a provisional basis [330-338]. In the alternative, the tribunal determined that even if the piecemeal approach was followed, the provisional application of the investor-state arbitration clause in Article 26 of the ECT was not inconsistent with Russian law [370-392].

Conversely, the Hague District Court embarked on a piecemeal application, focusing specifically on the compatibility of ECT's provisional application insofar as the investor-state arbitration clause was concerned (Article 26) [5.33]. On that basis, the

District Court found that since investor-state arbitration was not expressly authorised under Russian law, it followed that investor-state dispute settlement could not operate on a provisional basis, *i.e.* absent ratification of the ECT [5.65-5.66].

At the heart therefore of the Yukos debate is whether the provisional application of ECT's investor-state arbitration clause is consistent with Russia's "constitution, laws or regulations". The Yukos tribunal and the Hague District Court arrived at opposite conclusions by examining the same provisions of the Russian Federal Law on International Treaties (FLIT) and the Law on Foreign Investments (FIL) of 1991 and 1999.

What neither the Yukos tribunal nor the Hague District Court did was to formulate a test or standard of review applicable to 'limitation clauses'. To begin with, it may be debatable whether such an exercise would have been permissible. Still, one needs to delimit the boundaries of 'inconsistency' or else the application of 'limitation clauses' becomes a wholly subjective exercise.

An analogue can be found in the GATT, where the contracting parties determined that a measure would be caught by the 'limitation clause' only if "the legislation on which it is based is by its terms or expressed intent of a mandatory character – that is, it imposes on the executive authority requirements which cannot be modified by executive action". This standard of review was subsequently applied by several GATT Panels. For example, in *Canada – Import, distribution and sale of alcoholic drinks by provincial marketing authorities*, a GATT Panel determined that the measure in question was not caught by the 'limitation clause' because "by its terms, enabled [Canada] to authorize Canadian brewers to sell beer but it did not mandatorily require it to do so and that Canada had not claimed that the Act, by its terms or expressed intent, prevented the liquor board from withdrawing the authorizations granted" [5.9]. In other words, under the GATT's PPA, if the legislation –in force on the date of signature– on which a measure was based was mandatory, in the sense that it imposed on the executive authority requirements which could not be modified by executive action (but for which legislative action was required), then the provisional application of the GATT would be considered "inconsistent with existing legislation". Therefore, if the measure in question violated the GATT, but such measure was mandatory in the afore-mentioned sense, it would be caught by the 'limitation clause' and the GATT would be inapplicable.

If one were to apply the GATT standard of review in the context of Yukos, then the question could be whether the relevant Russian statutes, specifically the FLIT and FIL, impose on the executive an obligation not to accept the provisional application of an investor-state arbitration clause, or otherwise prevent the executive from agreeing to provisionally apply an investor-state arbitration clause (by delegating, for example, this power to the legislative). Either way, under the GATT standard, the terms or expressed intent of the legislation at issue must specifically proscribe executive action.

In this respect, the FLIT provides that the decision to sign a treaty rests with the executive (Article 11). Article 23(1) provides that "[a]n international treaty or a part thereof may, prior to its entry into force, be applied by the Russian Federation

provisionally if the treaty itself so provides or if an agreement to such effect has been reached with the parties that have signed the treaty". In turn, Article 23(2) provides that "[d]ecisions on the provisional application of a treaty … shall be made by the body that has taken the decision to sign the international treaty according to the procedure set out in Article 11 of this Federal Law", *i.e.* the executive. Moreover, Article 6(1) provides that "[c]onsent of the Russian Federation to be bound by an international treaty may be expressed by means of: signature of the treaty".

On the other hand, the 1991 FIL provides that:

Investment disputes, including disputes over the amount, conditions and procedure of the payment of compensation, shall be resolved by the Supreme Court of the RSFSR or the Supreme Arbitrazh Court of the RSFSR, unless another procedure is established by an international treaty in force in the territory of the RSFSR. [Article 9]

Similarly, the 1999 FIL provides that:

A dispute of a foreign investor arising in connection with its investments and business activity conducted in the territory of the Russian Federation shall be resolved in compliance with the international treaties of the Russian Federation and federal laws in a court, an arbitration court or international arbitration (arbitration tribunal). [Article 10]

Arguably, the above provisions do not clearly determine whether provisional application of an investor-state arbitration clause is inconsistent with Russia's "constitution, laws or regulations". At the same time, if one were to accept the GATT standard of review, it is likely that the above provisions would fall short of establishing an obligation preventing the executive from agreeing to provisionally apply an investor-state arbitration clause.

However, as the complexity of life teaches us, analogies may not always be apposite. After all, in the context of GATT's provisional application, what was at stake was measures affecting trade in goods –not investor-state dispute settlement, and the contracting parties had themselves formulated a standard of review applicable to the PPA's 'limitation clause'. Still, GATT's standard of review of 'limitation clauses' could prove to be an analogue the courts and tribunals engaged in the *Yukos* saga may want to weigh in on. Likewise, the GATT jurisprudence may prove to be attractive to the International Law Commission's work on the topic of 'provisional application of treaties', which has recently turned its mind to the *Yukos* saga, but pushed away any conclusions as "premature" [65].

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