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Provisional Application of the Energy Charter Treaty: Article 45(1) “Limitation Clause”

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On November 30, 2009, an arbitral tribunal issued three interim awards for Yukos Universal Limited, Hulley Limited Enterprises, and Veteran Petroleum Limited v. the Russian Federation under the Energy Charter Treaty (“ECT”). These interim awards addressed the issue of jurisdiction over the Russian Federation, analyzing the Provisional Application under Article 45(1) and (2), labeling the following italicized portion of Article 45 as the “Limitation Clause”:

> (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. [italics added]
>
> (2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository 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. Any such signatory may at any time withdraw that declaration by written notification to the Depository.
>
> (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).
>
> (c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.

In determining whether it could assert its jurisdiction over the Russian Federation, the arbitral tribunal addressed how to apply this Limitation Clause. The overall question was whether the arbitral tribunal should read Article 45(1) and 45(2) as requiring a piecemeal approach as the Russian Federation suggested (i.e. comparing each ECT provision with that of the signatory’s constitution and laws searching for inconsistencies) or follow the Claimant’s principle of provisional application approach (i.e. merely looking at the signatories’ constitution and laws to

see whether the principle of provisional application itself would be inconsistent)?

When interpreting the relationships between the ECT Articles 45(1) and 45(2), the Russian Federation argued that two separate regimes existed: (a) inconsistency of laws, literally taken to mean a piecemeal comparison of each ECT provision (Article 45(1)), or (b) making a separate declaration opting out of the provisional application (Article 45(2)). The pertinent point being that the two articles were entirely separate.

In contrast, the Claimants viewed the ECT Article 45(1) as substantive, which can only be invoked by fulfilling the declaration requirement found in ECT Article 45(2). In other words, the ECT Article 45 did not create two separate regimes, but one regime with two provisions giving its substantive and procedural aspects.

To resolve this jurisdictional issue, the arbitral tribunal conducted the following analysis:

Before addressing the overall question, the arbitral tribunal considered the sub-issue of whether a declaration needed to be made, in accordance with Article 45(2) in order to invoke Article 45(1). If not, would a signatory need to give any type of notice or declaration to the other signatories to benefit from Article 45(1)'s Limitation Clause?

The arbitral tribunal relied upon Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT") to interpret the ECT provisions. Both parties argued plain meaning and looked to the travaux preparatiores, which these VCLT articles discuss. However, since the arbitral tribunal concluded that it was unambiguous that the Russian Federation's interpretation (i.e. two regimes) was correct, looking to the travaux preparatoires was unnecessary and inappropriate. The Limitation Clause is, therefore, self-executing. Interestingly enough, the arbitral tribunal did acknowledge that following the travaux preparatoires could lead to a conclusion that only one regime existed had they been applicable.

Second, the arbitral tribunal looked at the plain meaning of the Article 45(1) coupled with the practice of other signatory states to conclude that no formal declaration of any kind was required.

Finally, the arbitral tribunal considered whether or not the Limitation Clause required a principles analysis or a piecemeal clause by clause comparison. It is at this point that the Claimants won the most important point: the award states "In the Tribunal's opinion, by signing the ECT, the Russian Federation agreed that the Treaty as a whole would be applied provisionally pending its entry into force unless the principles of provisional application itself were inconsistent 'with its constitution, laws or regulations". In other words, it is only necessary to consider whether or not the signatories' laws and constitution conflicted with the principle (i.e. the concept) of provisional application in this treaty.

Concluding that this is not the case with respect to the Russian Federation, the arbitral tribunal noted that the principle of provisional application of treaties was recognized under Russian law. Therefore, the Russian Federation could not utilize Article 45's Limitation Clause.

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