

Notes

Arbitration Unbound: How the Yukos Oil Decision Yields Uncertainty for International-Investment Arbitration*

I. Introduction

Multilateral treaties are becoming a prominent method for enabling international investments as globalization increases. However, negotiating the provisions of a multilateral treaty is difficult because multiple countries must agree on the terms while each seeks adequate protection for its own affairs and each may have different priorities. One example of a multilateral treaty signed by fifty-two nations is the Energy Charter Treaty (ECT). This treaty facilitates energy investments in foreign countries by binding multiple nations to the provisions of the treaty. With this collaborative agreement, research and development in the energy industry across the world is possible. International investments are necessary to keep up with the demand for energy, and therefore a uniform law is crucial to handle any disputes that may emerge.

A huge dispute arose under the ECT between an oil company and the Russian Federation. This resulted in the largest arbitration in history with \$50 billion awarded to the oil company against Russia. Many celebrated the tribunal's award as a symbol that Russia's unethical domination tactics would not be tolerated, and the award gave investors assurance that international arbitration would adequately protect them against expropriation. However, Russia successfully appealed the award to a Dutch district court. In a surprising opinion that was recently released, the court quashed the entire arbitration award, claiming that the tribunal lacked jurisdiction to decide the case despite the arbitration provision in the ECT.

This Note argues that the Dutch district court's opinion leads to poor policy in international law and will deter the effectiveness of international arbitration in multilateral treaties. Whether the Dutch court was influenced by Russian pressures or not, the result will chill future investments in energy because investors cannot count on the protection that the arbitration provision usually provides.

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II. The Emergence of the Energy Charter Treaty

International law is “virtually exploding”¹ and, correspondingly, the need for uniformity in laws and regulations is crucial. Multilateral treaties deposited with the Secretary-General of the United Nations are the primary source of international law.² Currently, over 550 multilateral treaties are deposited with the Secretary-General.³ Once a treaty is adopted, the Secretary-General distributes certified true copies of the treaty for states to sign.⁴ Once a country consents to be bound by the terms of the multilateral treaty, most commonly through a definitive signature, ratification, acceptance or approval, or accession, it becomes a party to the treaty.⁵ For example, if the treaty determines that states provide signatures subject to ratification, there is no time limit after signing within which a state must ratify, but once ratified it is legally binding.⁶ Some treaties also provide for provisional application, which ceases upon a nation’s entry into force.⁷

One example of a multilateral treaty that requires ratification and includes a provisional application is the ECT. The ECT entered into force in 1998 and “provides a multilateral framework for energy cooperation that is unique under international law[,] . . . dealing specifically with inter-governmental cooperation in the energy sector.”⁸ The purpose of the treaty is to promote sustainable development and energy security through open and competitive energy markets, and to respect state sovereignty.⁹ It is also designed to address the increasing need for uniform rules in the energy industry.¹⁰ Recent historical events played a large role in the initiation of the ECT. The dissolution of the former Soviet Union in 1991 threatened energy transit systems, and, therefore, stability was needed to promote future

1. Anne Peters, *The Growth of International Law Between Globalization and the Great Power*, 8 AUSTRIAN REV. INT’L & EUR. L. 109, 109 (2003).

2. TREATY SEC. OFF. LEGAL AFF., UNITED NATIONS, TREATY HANDBOOK iv (rev. ed. 2012) [hereinafter TREATY HANDBOOK] <https://treaties.un.org/doc/source/publications/THB/English.pdf> [<https://perma.cc/8D7W-HLHQ>].

3. *Id.* at 1. To view current multilateral treaties deposited with the Secretary-General, see *Multilateral Treaties Deposited with the Secretary-General*, UNITED NATIONS, <https://treaties.un.org/pages/participationstatus.aspx> [<https://perma.cc/DC26-HMAD>].

4. TREATY HANDBOOK, *supra* note 2, at 21.

5. *Id.* at 8.

6. *Id.* at 9.

7. *Id.* at 11.

8. ENERGY CHARTER SECRETARIAT, THE ENERGY CHARTER TREATY AND RELATED DOCUMENTS: A LEGAL FRAMEWORK FOR INTERNATIONAL ENERGY COOPERATION 13 (2004), http://diaviou.auth.gr/sites/default/files/pegatraining/1_ECT.pdf [<https://perma.cc/5JRR-3NL2>].

9. ENERGY CHARTER SECRETARIAT, INTERNATIONAL ENERGY CHARTER: AGREED TEXT FOR ADOPTION IN THE HAGUE AT THE MINISTERIAL CONFERENCE ON THE INTERNATIONAL ENERGY CHARTER ON 20 MAY 2015, at 5 (2015), http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_EN.pdf [<https://perma.cc/4V6K-NPTF>].

10. Saamir Elshihabi, *The Difficulty Behind Securing Sector-Specific Investment Establishment Rights: The Case of the Energy Charter Treaty*, 35 INT’L LAW. 137, 143 (2001).

investments from Western nations in Russia.¹¹ The Dutch Prime Minister called for a pan-European Energy Charter to address the concerns of investors seeking to invest in the former Soviet Union, leading to the establishment of the European Energy Charter in 1991.¹² This Charter lacked binding legal force, so the ECT was drafted and then signed in 1994.¹³ The Treaty provides a dispute resolution mechanism, which increases confidence by investors, ensures investment, strengthens the financial community, and promotes international cooperation in a globalized economy.¹⁴ As of today, the ECT has been signed by fifty-two states, the European Union, and the European Atomic Energy Community (EUROTOM)—thus, the signatories consist mainly of European countries, Japan, and Australia, but notably not the United States.¹⁵

The ECT is designed to encourage foreign investments by including standard investment-protection provisions. These protections to the investor include general, discrimination, and expropriation protections.¹⁶ Additionally, the treaty includes freedom-of-transfer provisions and war and civil-disturbance protections, and states that any disparities must be construed in favor of the investor.¹⁷ The dispute-resolution mechanisms under the ECT also favor investors because they establish the right to arbitrate, rather than limiting investors to litigation in local courts.¹⁸

A. *The Necessity and Possibility of Broad Membership in the ECT*

With fifty-two signatories, the ECT is the most expansive multilateral investment treaty.¹⁹ However, multilateral treaties of any size are difficult to implement and sustain. So when foreign investment increased dramatically beginning in the late 1980s, the number of bilateral investment treaties (BITs) also increased. Before 1989, approximately 400 BITs had been concluded, but from 1990 to 2005, roughly 2,000 BITs were concluded.²⁰ One scholar attributes this dramatic increase to the “victory of market ideology” and to

11. Edna Sussman, *A Multilateral Energy Sector Investment Treaty: Is it Time for a Call For Adoption by All Nations?*, 44 INT'L LAW. 939, 954 (2010).

12. Elshihabi, *supra* note 10, at 143.

13. *Id.* at 143–44.

14. Sussman, *supra* note 11, at 954.

15. *Id.*; *Constituency of the Energy Charter Conference Members of the Energy Charter Conference*, INT'L ENERGY CHARTER (Mar. 19, 2015), <http://www.energycharter.org/who-we-are/members-observers/> [<https://perma.cc/JTN6-3XX4>].

16. Energy Charter Treaty, art. 10, para. 1, art. 13, para. 1, Dec. 17, 1994, 2080 U.N.T.S. 100.

17. *Id.* at art. 12, paras. 1–2, art. 14, para. 1.

18. *Id.* at art. 26, para. 3.

19. See THOMAS ROE & MATTHEW HAPPOLD, SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY 8 (2011) (showing that the ECT is “the most widely ratified investment protection agreement” and that it has “global reach”).

20. Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 179 (2005).

the “loss of alternatives to foreign investment as a source of capital” because of the debt crisis of the 1980s.²¹ These reasons transformed the prior hostility towards foreign investments into a desire to attract it. This led to investment provisions being included in multilateral treaties or trade agreements.²² Therefore, a multilateral agreement that would eliminate the need for thousands of separate BITs is an attractive option. However, negotiating and accepting such a multilateral agreement is not an easy task, and many failed attempts have already been made. For example, the 1990s Multilateral Agreement on Investment failed because even countries with identical provisions in BITs could not agree on provisions in the multilateral agreement.²³ Eventually, the parties abandoned negotiations.²⁴ The ECT is different in one crucial aspect—its focus is entirely on the energy sector rather than a broad multilateral agreement encompassing multiple sectors.²⁵

As the population continues to grow, the demand for energy also grows. Energy infrastructure investments are predicted to increase drastically: “to keep up with development needs, around US\$45 trillion may need to be invested in the next 15 years.”²⁶ Because of this explosion in energy demand, uniform international law and protections in the energy sector are necessary to promote investments and global cooperation in joint ventures for energy development. Otherwise, countries will continue to separately protect their own energy resources in BITs, limiting energy research and development.

While countries could continue negotiating joint ventures country by country, a multilateral treaty would ensure that each country gets a fair bargain. This global cooperation benefits the energy industry more than others. For example, if two countries enter into a BIT, and investors from those countries want to work with a third country that is not a party to that BIT, the investors would not have adequate protection in the third country and would likely not pursue further engagement. This detrimentally reduces efficiency in research and development of energy technology.

Provisions designed to protect a country’s sovereignty over energy resources are evident in the North American Free Trade Agreement (NAFTA). In that agreement, Mexico insisted on protections to respect energy principles manifested in its constitution and reserved the right to

21. *Id.* at 177–78.

22. *Id.* at 182.

23. *Id.* at 191.

24. *Id.* at 192.

25. *See supra* notes 8–9 and accompanying text.

26. THE GLOB. COMM’N ON THE ECON. & CLIMATE, BETTER GROWTH, BETTER CLIMATE: THE NEW CLIMATE ECONOMY SYNTHESIS REPORT, ENERGY 4 (2014), http://newclimateeconomy.report/2014/wp-content/uploads/sites/2/2014/08/NCE_Chapter4_Energy.pdf [<https://perma.cc/J7J7-8UWK>].

control investments in almost all energy sectors.²⁷ Mexico's restrictions resulted in few options for foreign investors in the energy sector through NAFTA.²⁸ Additionally, the United States' BITs traditionally created strategic exceptions for the energy industry, leaving a void in this investment sector.²⁹ For example, in a U.S. BIT with Argentina, "the United States reserves the right to make or maintain limited exceptions to national treatment in the following sectors: . . . energy and power production; . . . use of land and natural resources."³⁰ This protocol places Argentina at a disadvantage because the United States may deny national treatment to Argentine investors after Argentina invested in energy, power, and natural resources.³¹

Because of the gap that BITs left in the energy sector, the need for unified energy investment options was abundant and, therefore, the ECT was negotiated—to bind parties to fundamental norms in international energy investments.³²

B. *Major Provisions of the ECT*

The provisions in the fifty articles of the ECT aim to reach the goal stated in Article 2: to "establish[] a legal framework in order to promote long-term cooperation in the energy field."³³ There are two main differences between the ECT and traditional BITs: first, its provisions focus on the characteristics of the energy sector, and second, it uses specific language about rights or prohibitions rather than general language normally used in BITs.³⁴ Some of the main provisions in the ECT are protections regarding trade-related investments,³⁵ unfair competition,³⁶ expropriation,³⁷ subrogation,³⁸ transparency,³⁹ and compensation for losses.⁴⁰ Most notable

27. See North America Free Trade Agreement ann. 602.3, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993) (reserving the right to control investment in oil, natural and artificial gas, and basic petrochemicals to the Mexican government).

28. Elshihabi, *supra* note 10, at 140.

29. *Id.* at 141–43.

30. Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., Protocol 2, Nov. 14, 1991, 31 I.L.M. 128.

31. Elshihabi, *supra* note 10, at 141.

32. *Id.* at 143–44.

33. Energy Charter Treaty, *supra* note 16, at art. 2, para. 1.

34. Elshihabi, *supra* note 10, at 145.

35. Energy Charter Treaty, *supra* note 156, at art. 5.

36. *Id.* at art. 6.

37. *Id.* at art. 13.

38. *Id.* at art. 15.

39. *Id.* at art. 20.

40. *Id.* at art. 12.

for this Note, the ECT provides for settlement of dispute provisions between an investor and a contracting party⁴¹ and includes a provisional application.⁴²

C. *Dispute Resolution Under the ECT*

Dispute settlement is governed by Part V, Articles 26 through 28 of the ECT.⁴³ Article 26 allows the investor party to submit its dispute to the courts or tribunals in the country of the contracting party, or it can submit a dispute based on a previously-agreed-upon procedure.⁴⁴ However, an investor party will likely avoid bringing a claim to the local courts of the opposing party. Therefore, the ECT also gives investors the right to arbitrate so they do not have to “resort to local courts [,] which may fail to be neutral or [be] subject to influence from the government.”⁴⁵ Article 26 states that, with few limitations, “each 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.”⁴⁶ If the investor chooses to submit the dispute to international arbitration, it must consent to submit the dispute to either the International Centre for Settlement of Investment Disputes (ICSID), an arbitrator or arbitration tribunal as established under the United Nations Commission on International Trade Law (UNCITRAL), or to a proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.⁴⁷ The tribunal that is established must decide the issues in accordance with the ECT and the “applicable rules and principles of international law.”⁴⁸ The awards are binding upon the parties.⁴⁹

Another provision, which gave rise to much discussion and controversy, is the Provisional Application of Treaty Obligations provision in Article 45 of the ECT. It states in relevant part “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.”⁵⁰ Article 44 states that the “[t]reaty shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance or approval thereof, or of accession thereto, by a State.”⁵¹ Basically, this means that treaty obligations take effect even before a nation’s formal ratification or

41. *Id.* at art. 26.

42. *Id.* at art. 45.

43. *Id.* at art. 26–28.

44. *Id.* at art. 26, para. 2.

45. Sussman, *supra* note 11, at 956.

46. Energy Charter Treaty, *supra* note 156, at art. 26, para. 3(a).

47. *Id.* at art. 26, para. 4(a)–(c).

48. *Id.* at art. 26, para. 6.

49. *Id.* at art. 26, para. 8.

50. *Id.* at art. 45, para. 1.

51. *Id.* at art. 44, para. 1.

accession to the treaty. Provisional applications are often used in situations where implementing a treaty is urgent to the country, the treaty is certain to obtain approval, or the negotiators wish to circumvent political obstacles to approval.⁵² However, a state may choose to forego the provisional application—Article 45 states that “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.”⁵³ Also, any signatory may terminate its provisional application of the treaty by written notification.⁵⁴ However, the signatory remains obligated to apply Parts III and V of the Treaty—Investment Promotion and Protection, and Dispute Settlement—with respect to any investments made in the state during the provisional application for twenty years.⁵⁵ At least, this was how parties and scholars interpreted the treaty before the Yukos Oil case, discussed below.⁵⁶ When a state provisionally applies a treaty that has entered into force “the intention of the State would generally be to ratify, approve, accept or accede to the treaty once its domestic procedural requirements have been met.”⁵⁷ The Russian Federation was subject to the ECT under Article 45 because it signed the Treaty in 1994 and began the ratification process in 1996, but ratification has been postponed several times, and it did not register a declaration of nonapplication.⁵⁸

III. Major Dispute Arising Under the ECT

Russia’s provisional application of the ECT led to the largest arbitration award in history, against the Russian Federation in 2005.⁵⁹ The immense award was brought against the Russian Federation from three parallel arbitrations for the expropriation of OAO Yukos Oil Company (Yukos Oil): *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*,⁶⁰ *Yukos*

52. Andrew Michie, *The Provisional Application of Arms Controls Treaties*, 3 J. CONFLICT & SECURITY L. 345, 346 (2005).

53. Energy Charter Treaty, *supra* note 156, at art. 45, para. 2.

54. *Id.* at art. 45, para. 3(a).

55. *Id.* at art. 45, para. 3(b).

56. *See infra* Part III.

57. TREATY HANDBOOK, *supra* note 2, at 11.

58. Alex M. Niebruegge, Comment, *Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law*, 8 CHI. J. INT’L L. 355, 356 (2007).

59. Matthew Belz, Comment, *Provisional Application of the Energy Charter Treaty: Kardassopoulos v. Georgia and Improving Provisional Application in Multilateral Treaties*, 22 EMORY INT’L L. REV. 727, 727 (2008).

60. *Hulley Enters. Ltd. (Cyprus) v. Russian Fed’n*, Case No. AA 226, Final Award (Perm. Ct. Arb. 2014), <http://www.pccases.com/web/sendAttach/418> [<https://perma.cc/6VZN-CLYP>].

Universal Limited (Isle of Man) v. The Russian Federation,⁶¹ and *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*.⁶² The claimants owned over 70% of Yukos Oil.⁶³ In its final awards on July 18, 2014, the tribunal ordered Russia to pay over US\$50 billion in compensation for the expropriation of Yukos Oil⁶⁴—this figure included damages for the value of the claimants' shares in Yukos Oil, the value of lost dividends, and interest on both.⁶⁵

A. *Background of the Yukos Oil Case*

The majority shareholders of Yukos Oil brought this claim under the ECT to conduct arbitration under UNCITRAL rules.⁶⁶ Yukos Oil was Russia's largest company in the oil and gas sector and one of the most successful oil and gas companies by market capitalization in the world.⁶⁷ What makes this arbitration even more interesting is that it was, and continues to be, riddled with political overtones. The chairman of Yukos Oil in the 1990s launched the company into success by adopting Western technologies. Eventually, however, he "fell out of favor" with Russia's President Putin.⁶⁸ The chairman was subsequently arrested in 2003 and served ten years in jail on charges of tax fraud and embezzlement.⁶⁹ There are vast claims that the Russian government bankrupted the company with punitive tax demands based on the chairman's politics.⁷⁰ Yukos Oil even argued before the tribunal that Russia expropriated Yukos Oil's assets by "driving the company into bankruptcy through bogus tax claims in a vendetta

61. *Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n*, Case No. AA 227, Final Award (Perm. Ct. Arb. 2014), <http://pcacases.com/web/sendAttach/420>. [<https://perma.cc/Z2VJ-JKR4>].

62. *Veteran Petroleum Ltd. (Cyprus) v. Russian Fed'n*, Case No. AA 228, Final Award (Perm. Ct. Arb. 2014), <https://pcacases.com/web/sendAttach/422> [<https://perma.cc/U397-ANQC>]; Belz, *supra* note 59, at 727 n.3; Martin Dietrich Brauch, *Yukos v. Russia: Issues and Legal Reasoning Behind US\$50 Billion Awards*, INV. TREATY NEWS (Int'l Inst. for Sustainable Dev., Winnipeg, Can.), Sept. 2014, http://www.iisd.org/itn/wp-content/uploads/2014/09/iisd_itn_yukos_sept_2014_1.pdf [<https://perma.cc/VGT6-W5LQ>].

63. Brauch, *supra* note 62.

64. *Yukos Universal*, Case No. AA 227, paras. 1825–26.

65. Brauch, *supra* note 62.

66. *Focus Europe: The Arbitration Scorecard*, AM. LAW. (June 1, 2007), <http://www.americanlawyer.com/id=900005482789/Focus-Europe-The-Arbitration-Scorecard> [<https://perma.cc/DWX9-4KXC>].

67. *Yukos Universal*, Case No. AA 227, para. 108(4).

68. Stanley Reed, *Dutch Court Overturns \$50 Billion Ruling Against Russia in Yukos Case*, N.Y. TIMES (Apr. 20, 2016), <http://www.nytimes.com/2016/04/21/business/international/yukos-russia-50-billion-ruling.html> [<https://perma.cc/38AT-JGQC>].

69. *Id.*

70. See, e.g., Gregory L. White & Jeanne Whalen, *Arrest of Yukos Chairman Imperils Russia's Revival*, WALL STREET J. (Oct. 27, 2003), <http://www.wsj.com/articles/SB106708186126770800> [<https://perma.cc/5EHZ-VM2M>] (linking the arrest of Yukos's chairman to President Putin's concerns over the chairman's rising political power and discussing other instances where wealthy businessmen were "driven into exile" because they interfered with politics).

against [its] founder.”⁷¹ Eventually, Yukos Oil’s assets were nationalized and acquired by two other Russian state-owned companies.⁷²

The claimants alleged that Russia breached the ECT in its criminal prosecutions against the company, tax reassessments, fines and asset freezes, an annulment of a merger, and harassment of executives, among other things.⁷³ According to the claimants, the Russian Federation’s acts breached its obligations under Article 10(1) and Article 13(1) of the ECT as a “deliberate and sustained effort to destroy Yukos, gain control over its assets and eliminate [its Chairman] as a potential political opponent.”⁷⁴ Russia argued that the ECT is not binding because Russia has not yet ratified it, even though it had applied the ECT provisionally.⁷⁵ The provisional application of the ECT applies as long as it is not in conflict with domestic law.⁷⁶ When Russia signed the Treaty, it did not declare that its domestic laws were in conflict with the provisional application of the ECT.⁷⁷ Therefore, the critical issue in the arbitration was whether or not “the Russian Federation waived its right to assert that provisional application conflicted with its domestic law post-signature of the Treaty.”⁷⁸

The tribunal’s interim awards ruling, rather than the final awards ruling, issued on November 30, 2009, discussed the tribunal’s jurisdiction and whether the provisional application applied to the Russian Federation.⁷⁹ The tribunal held that the provisional application applies until sixty days after Russia notifies the depository of its intent not to ratify the Treaty, and that investments made during the provisional application period are protected under the ECT for twenty years after the provisional application period ends.⁸⁰ Further, Russia’s argument that the provisional application provision is inconsistent with its domestic law also failed. The tribunal held that “either the entire Treaty is applied provisionally, or it is not applied provisionally at all” and that the principle of the provisional application itself was consistent with Russian law.⁸¹ To decide whether each and every provision of the

71. *Focus Europe: The Arbitration Scorecard*, *supra* note 62.

72. Brauch, *supra* note 62.

73. *Yukos Universal*, Case No. AA 227, at para. 108; Brauch, *supra* note 62.

74. *Yukos Universal*, Case No. AA 227, at para. 108.

75. *Hulley Enters. Ltd. (Cyprus) v. Russian Fed’n*, Case No. AA 226, Interim Award on Jurisdiction and Admissibility, para. 247, (Perm. Ct. Arb. 2009), <http://pcacases.com/web/sendAttach/419> [<https://perma.cc/QN2R-5JDB>].

76. Energy Charter Treaty, *supra* note 156, at art. 45, para. 1.

77. *Hulley Enters. Ltd.*, Case No. AA 226 at para. 247.

78. Morgan R. Davis, Comment, *How Central Asia Was Won: A Revival of “The Great Game,”* 36 N.C. J. INT’L L. & COM. REG. 417, 466 (2011).

79. *Hulley Enters. Ltd. (Cyprus) v. Russian Fed’n*, Case No. AA 226, Interim Award on Jurisdiction and Admissibility (Perm. Ct. Arb. 2009), <http://pcacases.com/web/sendAttach/419> [<https://perma.cc/QN2R-5JDB>].

80. *Id.* at paras. 338–39.

81. *Id.* at paras. 311–12.

Treaty is consistent with domestic law would “run squarely . . . against the grain of international law.”⁸² By finding in favor of Yukos Oil, the arbitration tribunal sent “a signal to all member-states that provisional application of the ECT is not without consequence.”⁸³

In the final awards ruling, the tribunal discussed the Russian Federation’s liability under Article 10(1) of the ECT—the fair and equitable treatment standard—and Article 13(1) of the ECT—expropriation of claimants’ investment in Yukos Oil.⁸⁴ The tribunal held that the Russian Federation indirectly expropriated Yukos Oil and therefore breached Article 13(1) and that it does not need to consider whether it also breached Article 10 after deciding Russia already breached the ECT.⁸⁵ The proper compensation for a breach of Article 13 under the Treaty is the fair market value of the Investment expropriated minus contributory negligence amounts.⁸⁶ As noted, the total award amounted to over US\$50 billion.⁸⁷ Various scholars and investors have contemplated the reality of collecting US\$50 billion: some are optimistic that most of the award will be enforced and collected in European jurisdictions within ten years, while others are more skeptical.⁸⁸ However, there is no indication that Russia will voluntarily pay the award.

Many, not just the Yukos Oil shareholders, celebrated this decision. According to the head of Shearman & Sterling’s International Arbitration Group, “this is a great day for the rule of law: a superpower like the Russian Federation is held accountable for its violations of international law by an independent arbitral tribunal of the highest possible caliber.”⁸⁹ The jubilation of the award was not long-lasting.

B. *Russian Withdrawal from the ECT*

In 2009, Prime Minister Putin rejected Russia’s participation in the Energy Charter Treaty, likely as a response to the Yukos Oil lawsuit.⁹⁰ The Prime Minister terminated the provisional application of the ECT by stating

82. *Id.* at para. 312.

83. Davis, *supra* note 778, at 465.

84. Yukos Universal Ltd. (Isle of Man) v. Russian Fed’n, Case No. AA 227, Final Award, paras. 1448–1574 (Perm. Ct. Arb. 2014), <http://pcacases.com/web/sendAttach/420> [<https://perma.cc/Z2VJ-JKR4>].

85. *Id.* at paras. 1579–85.

86. *Id.* at paras. 1591–92, 1633.

87. Brauch, *supra* note 61.

88. *Id.*

89. *Enforcement Proceedings Launched Relating to Historic \$50 Billion Award for Yukos Majority Shareholders*, SHEARMAN & STERLING LLP, <http://www.shearman.com/en/services/practices/international-arbitration/yukos-enforcement-proceedings> [<https://perma.cc/FHB5-B3GE>].

90. Sussman, *supra* note 11, at 964–65.

Russia's intention not to become a contracting party to the ECT.⁹¹ This means that Russia intends not to ratify the Treaty. However, the Yukos Oil tribunal found that Russia is bound to the whole treaty by the Treaty's provisional application clause and that the arbitration provisions remain in force until 2029 for any investments prior to 2009.⁹² Thus, the Treaty covers Russia's investments prior to 2009, but not investments made after 2009.⁹³ Also, there is some controversy about whether Russia's withdrawal from the ECT is even possible.⁹⁴ Interestingly, Russia continued participating in Energy Charter meetings and events after it withdrew until July 18, 2014, when the final decision of the Yukos Oil case was released.⁹⁵

C. *Initial Implications of the Yukos Oil Case and Russia's Rejection of the ECT*

Since Russia's withdrawal, some scholars ponder "whether without Russia the ECT can be a vehicle for a meaningful future multilateral treaty" and whether negotiations to alter the ECT to address Russia's concerns are possible.⁹⁶ Scholars are right to be concerned about Russia's potential withdrawal from the ECT. Russia is the world's largest energy supplier; it produces more gas than any other country and exports more oil than any other country except Saudi Arabia.⁹⁷ However, it seems that Russia's withdrawal will not have much of an impact on energy trade outside of Russia because the ECT is still the only binding energy agreement. Also, Russia does not want to step out of the energy investment arena completely; Russia is now proposing a new Energy Charter to replace the ECT.⁹⁸ President Putin proposed this new document to "de facto replace the Energy Charter," but this proposal is seen by many as a tactical move to justify Russia's rejection

91. *Id.*

92. Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n, Case No. AA 227, Interim Award on Jurisdiction and Admissibility, para. 339 (Perm. Ct. Arb. 2009), <http://pcacases.com/web/sendAttach/421> [<https://perma.cc/G3GL-3HWM>].

93. *Id.*

94. See *Russia's Withdrawal from the Energy Charter Treaty*, NORTON ROSE FULBRIGHT, (Aug. 2009), <http://www.nortonrosefulbright.com/knowledge/publications/22691/russias-withdrawal-from-the-energy-charter-treaty> [<https://perma.cc/RE6D-RDLY>] (noting disagreement as to whether the Treaty allows Russia to instantaneously withdraw its provisional application or requires that Russia ratify the treaty and then wait five years to withdraw).

95. Daria Nochevnik, *Russia and the Energy Charter Process: Which Way Forward?*, EUR. ENERGY REV. (Aug. 3, 2015), <http://www.europeanenergyreview.eu/russia-and-the-energy-charter-process-which-way-forward/> [<https://perma.cc/K8ZE-BMQJ>].

96. Sussman, *supra* note 11, at 965.

97. *Russia's Withdrawal*, *supra* note 94.

98. Kirsten Westphal, *The Energy Charter Treaty Revisited: The Russian Proposal for an International Energy Convention and the Energy Charter Treaty*, GER. INST. FOR INT'L & SEC. AFFAIRS 4 (2011) https://www.swp-berlin.org/fileadmin/contents/products/comments/2011C08_wep_ks.pdf [<https://perma.cc/3JBB-NFG2>].

of the ECT.⁹⁹ The proposed document largely resembles the ECT, with only a few changes.¹⁰⁰ Overall, Russia takes issue with the current version of the ECT, but is open to continuous participation in a treaty that binds nations in international energy investments. But Russia's involvement in battling the enforcement of the arbitration that arose under the current energy treaty is far from over.

IV. Annulment of the US\$50 Billion Award by the Dutch District Court

President Putin is fighting the US\$50 billion judgment against the Russian Federation and having success. On April 20, 2016, the Hague District Court annulled the tribunal's decision in the *Yukos Oil* case—an immense victory for Russia.¹⁰¹ Although only the Dutch text is authoritative, this Note will refer to the English translation of the Hague District Court's opinion. The Dutch District Court has jurisdiction to review the arbitration award because The Hague was the seat of arbitration.¹⁰²

A. *Overview of the Court's Decision*

The court held that the tribunal lacked jurisdiction under the ECT to make the decision because it was incompetent to take cognizance of the claims and issue the ensuing award. Therefore, the court quashed and reversed all three interim awards and corresponding final awards in the *Yukos Oil* arbitration.¹⁰³

The Russian Federation asked that the court quash the awards of the *Yukos Oil* arbitration and based its claims on five grounds under the Dutch Code of Civil Procedure that, according to the court, each lead to reversal of the awards:

- (1) *a* (absence of valid arbitration agreement), in connection with which the Tribunal was not competent to take cognizance of and given an award on the defendant's claims;
- (2) *c* (the Tribunal overstepped its remit);
- (3) *b* (there were irregularities in the Tribunal's composition), . . . ;
- (4) *d* (the *Yukos Awards* lack substantiation in several critical aspects);
- (5) *e* (the *Yukos Awards* are contrary to

99. *Id.*

100. *See id.* (describing the Russian proposals as sharing many points with and being “in accord” with the principles of the Energy Charter Treaty, if one views the proposals favorably).

101. Reed, *supra* note 68.

102. Rb's-Gravenhage [The Hague District Court] 20 April 2016 (Die Russische Federatie/Yukos Universal Ltd.) (Neth.), <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:4229> [https://perma.cc/N8FC-RVDR], translated in The Hague Dist. Court, *Judgment of 20 April 2016 in Russian Federation v. Yukos Universal Ltd.*, DE RECHTSpraak paras. 5.97–6.9 (Apr. 20, 2016) [hereinafter The Hague District Court], <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:4230> [https://perma.cc/4RHA-YHZ5].

103. The Hague District Court, *supra* note 102, at para. 5.3.

Dutch . . . public policy and public morality, including in this case the fundamental right of the Russian Federation to a fair trial), since the Awards show the Tribunal's partiality and biases.¹⁰⁴

In analyzing the competence of the tribunal, the court looked at the interpretation and requirements of Article 45 of the ECT, dealing with the provisional application,¹⁰⁵ in connection with Article 26 of the ECT,¹⁰⁶ providing for arbitration.

1. The Court's Analysis of Article 45.—The court rejected the tribunal's "all or nothing" approach with regard to the phrase "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations" of Article 45 (the "Limitation Clause") in favor of the piecemeal approach.¹⁰⁷ Therefore, it concluded that the Russian Federation was only bound by the individual treaty provisions not contrary to Russian law—meaning every provision must be analyzed independently for reconciliation with domestic law.¹⁰⁸

To reach this interpretation of Article 45, the court analyzed the word "such" in the phrase "such provisional application" in context with Article 45(1) and 45(2)(c).¹⁰⁹ Article 45(1) reads: "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."¹¹⁰

Article 45(2) states:

(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.

104. *Id.* at para. 4.2.

105. *Id.* at paras. 5.6–5.31.

106. *Id.* at paras. 5.32–5.95.

107. *Id.* at paras. 5.7–5.18.

108. *Id.* at para. 5.23.

109. *Id.* at paras. 5.7–5.18.

110. Energy Charter Treaty, *supra* note 156, at art. 45 para. (1).

The phrase in paragraphs 45(1) and 45(2)(c) are identical, except that paragraph 1 includes “constitution” in the phrase “to the extent such provisional application is not inconsistent with its *constitution*, laws, or regulations” and paragraph 2(c) does not.¹¹¹ The court rejected the tribunal’s conclusion that “such provisional application” referencing “this Treaty” clarifies that the provisional application applies to the Treaty as a whole.¹¹² Paragraph 2(c) clearly applies provisionally only to Part VII, as it references in the text, whereas the tribunal treated the phrase in paragraph 1 as referring to the whole Treaty. The court looked at the interaction between the two paragraphs and concluded that the Limitation Clause means that the provisional application depends on compatibility of individual treaty provisions with domestic laws.¹¹³

The court went on to analyze the defendants’ (the claimants in arbitration) claim that Article 45(1) and (2) required Russia to submit a declaration to not accept the provisional application, and it failed to do so.¹¹⁴ Although the court concluded that the issue could not be raised in the reversal proceedings, it discussed the issue anyway to state that Article 45 does not require any submission of a declaration to rely on the Limitation Clause.¹¹⁵

2. *The Court’s Analysis of Article 26.*—Because the court decided that only the provisions of the ECT that are consistent with Russian domestic law bind the signatory, it analyzed whether Article 26—the Settlement of Disputes Provision—was contrary to Russian law. The panel of arbiters obtained jurisdiction based on the arbitral provision in Article 26,¹¹⁶ so if that provision were void the tribunal would have lacked proper jurisdiction.

The defendants in the district court, the Yukos Oil shareholders, argued that a provision of the ECT can only be incompatible with Russian law “if the Treaty provision concerned is *prohibited* in national law . . . T]here cannot be incompatibility if Russian law does not expressly provide for the treaty provision concerned.”¹¹⁷ The court disagreed with this narrow interpretation of the Limitation Clause in Article 45—again, by focusing on the phrase “to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.”¹¹⁸ Rather, “the arbitral provision contained in Article 26 is also contrary to Russian law if there is no legal basis for such method of dispute settlement, or—when viewed in a wider

111. *Id.* at art. 45 para. (2)(c) (emphasis added).

112. The Hague District Court, *supra* note 102, at para. 5.12.

113. *Id.* at paras. 5.14–5.18.

114. *Id.* at para. 5.24.

115. *Id.* at paras. 5.26–5.31.

116. *See supra* notes 33–42 and accompanying text.

117. The Hague District Court, *supra* note 102, at para. 5.33.

118. *Id.*

perspective—if it does not harmonise with the legal system.”¹¹⁹ The court based its opinion in large part on expert reports provided by both parties regarding relevant Russian laws.¹²⁰ The court examined provisions in Russia’s Law on Foreign Investments and various other laws to conclude that the arbitral provision is contrary to domestic Russian law.

The court analyzed Article 9 and Article 10 of the Russian Law on Foreign Investments, both the 1991 and 1999 versions, because the tribunal stated that its jurisdiction depended on those laws.¹²¹ The court held that Article 9 concerns civil law disputes arising from public law legal relations between foreign investors and Russia, but that it favors proceedings before the local Russian court.¹²² Therefore, the provision did not offer an independent legal basis for arbitration.¹²³ In another convoluted argument, the court also stated that Article 10 of the Russian Law on Foreign Investments did not provide an independent basis for arbitration under the ECT because it only creates an option for arbitration, which is conditional on arbitration provisions in treaties and federal law.¹²⁴

The court then claimed that its holding regarding inconsistency with local law “is not altered” by the Russian government’s remarks in its memorandum for the intended ratification of the ECT.¹²⁵ This explanatory memorandum stated, in relevant part:

The provisions of the ECT are consistent with Russian legislation.

The legal regime of foreign investments envisaged under the ECT is consistent with the provisions of the existing Law [. . .] on Foreign Investment in [Russia], as well as with the amended version of the Law currently being discussed in the State Duma. [sic]

[The regime of the ECT for foreign investments] does not require the acknowledgment of any concessions or the adoption of any amendments to the abovementioned Law. [sic]¹²⁶

Because the explanatory memorandum was primarily aimed at prompting the Duma, the Russian Parliament, to ratify the ECT, and because the parliament never ratified the ECT, it cannot be endorsed as the Russian government’s views.¹²⁷ The court reasoned that these were very general statements, that they did not address the specific provisions of the ECT, and that the statements should be viewed with Parliament’s intent on whether to

119. *Id.*

120. *Id.* at para. 5.34.

121. *Id.* at para. 5.42.

122. *Id.* at para. 5.51.

123. *Id.*

124. *Id.* at para. 5.56–5.58.

125. *Id.* at para. 5.59.

126. *Id.* (alteration in original).

127. *Id.* at para. 5.60.

ratify in mind.¹²⁸ Therefore, the arbitration clause of Article 26 has no legal basis in Russian law, leading to the conclusion that it cannot be applied provisionally.

3. *The Court's Limited Scope of the Provisional Application.*—The court then analyzed the tribunal's decision that because Russia signed a treaty containing a provisional application clause it consented to arbitration of disputes. Because the court already held that the Limitation Clause is not considered an "all or nothing" provision, it, concluded that the signatory does not need to provisionally apply the arbitration if the application would be contrary to its domestic laws.¹²⁹ Article 26 could not be provisionally applied without ratification because the principle of separation of powers in the Russian constitution necessitates that the Russian Parliament must ratify treaties "that supplement or amend Russian law by adopting a federal law."¹³⁰ The court again relied on experts to make its determination about Russia's constitution and the separation-of-powers doctrine within it to conclude that the provisional application of the arbitration clause was incompatible with the constitution.¹³¹ Because the provisional application of the arbitration clause conflicts with Russian law, the Russian Parliament must ratify the treaty for its provision to apply. The court's final conclusion that "based only on the signature of the ECT, the Russian Federation was not bound by the provisional application of the arbitration regulations of Article 26 ECT" is the reason that the tribunal "wrongly declared itself competent in the Arbitration to take cognizance of the claims and issue the ensuing award."¹³²

V. Strengths and Weaknesses of the Dutch Court's Analysis

The court's decision has some positive qualities to it, but it has far more holes in its reasoning. Its holding that the provisional application of the Treaty applies to individual pieces, rather than to the whole Treaty, is somewhat rational, but only if coupled with a notice requirement. However, the explanation the court offers using textual and structural interpretations is far from clear. The court's analysis is extremely confusing (though that might be based on quick or sloppy translations) and seems to be searching for textual explanations to support a policy- (or politically) based explanation. The court is establishing a protection for countries that only provisionally apply the Treaty rather than fully ratify the Treaty to create a difference between provisionally applying versus ratifying the Treaty. The rationale seems to be as follows: allowing countries to apply the ECT provisionally is only meaningful if the provisional application is piece by

128. *Id.*

129. *Id.* at para. 5.72.

130. *Id.* at para. 5.73.

131. *Id.* at para. 5.94.

132. *Id.* at paras. 5.65–5.95.

piece. Otherwise, there is no difference between provisional application and ratification. While this would encourage more countries to provisionally apply the Treaty while deciding whether or not to ratify it, this protection needs to be coupled with notice to investors about which provisions are, or more importantly are not, consistent with domestic law. The signatory should be required to declare *ex ante* which parts of the Treaty, if any, it will not apply provisionally because they are inconsistent with domestic law.

It is irrational that a country can sign the Treaty and later, when convenient for the signatory and without prior notice to investors and other countries: (1) reject the provisional application of the Treaty without first filing a public declaration, and (2) argue piece by piece which provisions of the ECT are contrary to domestic law *ex post facto*. First, the investor presumably invested in a country in part because it was afforded the protections of the arbitration provision and other provisions of the ECT. The investors now are stripped of that protection because a signatory can provisionally apply only pieces of the Treaty and because the signatory can reject the provisional application of those pieces without notice to investors. Certain investors may, with good reason, choose not to invest in a country that they know has rejected the arbitration provision of the ECT. Therefore, this should be disclosed and not sprung upon an investor after a dispute has arisen.

The court's unnecessary arguments on the issue regarding whether or not the Treaty requires a declaration to withdraw from provisional application are not convincing. The court bases its analysis on the fact that paragraph 2 of Article 45 begins with "notwithstanding," severing it from paragraph 1, and states that a signatory "may" deliver a declaration. The court found that paragraph 2 does not contain a procedural rule requiring a declaration to prevent the provisional application of the Treaty in paragraph 1.¹³³ While generally those terms would be dispositive of a discretionary choice to submit a declaration, the defendants argued that "if Article 45 paragraph 1 ECT would allow a Signatory to dodge provisional application at any given time and with immediate effect, the detailed provisions of Article 45 paragraph 3 ECT would not have any effect."¹³⁴ Article 45(3)(a) and (b) detail the specific ramifications that occur as a result of a signatory's termination of the provisional application under 45(1)(a)—namely that the termination will take effect sixty days after the Depository receives the notification, and that the Treaty will remain effective for investments already made for twenty years following the date of termination.¹³⁵ To have a termination date from which to measure twenty years and to determine how long the Treaty remains effective, the signatory should be required to file a declaration. While the

133. *Id.* at para. 5.27.

134. *Id.* at para. 5.29.

135. Energy Charter Treaty, *supra* note 156, at art. 45, para. (3)(a)–(b).

court placed great importance on the how paragraphs related to each other when analyzing whether the Limitation Clause relates to the whole Treaty or to individual parts, the court, in this analysis, dismisses the relations between paragraphs and emphasizes textual arguments. The court must have addressed this question for the sake of a potential appeal, but the arguments are shaky.

Further, this dicta discussion outlining the reasons why a signatory does not need to present a written declaration of termination to the Depository is poor policy and cannot be reconciled with the court's holding that the provisional application refers to parts of the Treaty rather than the whole Treaty. If the Limitation Clause in the provisional application applies to the entire Treaty, as the tribunal held, then naturally no declaration is necessary because the country would not sign if any part of the Treaty was contrary to its laws. However, because the court held that the Limitation Clause refers to individual parts of the Treaty, it certainly follows that a declaration is necessary; otherwise no one would know which parts apply and which do not. The Yukos Oil shareholders assumed that they were protected by the arbitration provision in the ECT, but apparently they were not because Russia argued that the provision was inconsistent with national laws. The court's arguments against the declaration are particularly frustrating because in 2009, Russia made the "required" declaration when it terminated the provisional application of the ECT by stating its intent not to become a party. By doing so, Russia conceded that an announcement is necessary. Yet, the court found that the statement to withdraw is unnecessary, so Russia's declaration meant nothing. This will have a chilling effect on international investments because investors will not be able to predict whether they are protected by the arbitration provision or not—the court destroys the uniformity that the Treaty and international law work toward.

Russia argued that by not ratifying the ECT, it was not bound by the investment-protection provisions. This is an illogical and hypocritical argument considering Russia pushed to ratify the Treaty and wanted to circumvent its national parliament with the provisional application to gain investments in the country.¹³⁶ Because of Russia's desire for inward investments, it "used the possibility of the ECT provisional application and repeatedly returned to the consideration of this issue at the level of the State Duma."¹³⁷ The State Duma is the lower house of the Federal Assembly, the parliament of the Russian Federation.¹³⁸

136. See Irina Mironova, *Russia and the Energy Charter Treaty*, INT'L ENERGY CHARTER (Aug. 7, 2014), <http://www.energycharter.org/what-we-do/knowledge-centre/occasional-papers/russia-and-the-energy-charter-treaty/> [https://perma.cc/SG95-AJFH] (noting that the issue of the ECT's ratification was before the Duma several times).

137. *Id.*

138. *The State Duma of the Federal Assembly of the Russian Federation*, POLITIKA, <http://www.politika.su/e/fs/gd.html> [https://perma.cc/4SAT-PSFW].

The explanatory memorandum provides reliable evidence that the Russian government fought for the provisional application and ratification of the Treaty.¹³⁹ The court makes a valid point that, because Parliament did not ratify the Treaty, it could be inferred that the reason it did not ratify was that the Treaty is contrary to domestic law. However, the court does not provide the rationale behind the Russian Parliament's refusal to ratify.¹⁴⁰ The court would have a stronger argument if it could show that the Parliament's refusal was based on incompatibility with national law, weakening the government's statements in the memorandum. Otherwise, the Russian government's statements about the Treaty's compatibility with Russian law should be given more deference—the Russian government should serve as an authority of what is or is not contrary to domestic laws, especially in the face of Parliament's silence on the topic.

The piecemeal approach that the Hague District Court takes cultivates the difficulties already present in international law and international arbitration. This approach would allow every single country to dissect the content of the ECT and choose what they like. This is totally contrary to the essence of the Treaty. The purpose of the Treaty in the first place was to establish a legal framework to promote long-term cooperation among signatories, thereby creating international legal order and a level playing field.¹⁴¹ The purpose of the arbitration provision before international tribunals was to increase investors' confidence, which would lead to investment and economic growth.¹⁴² The court's decision has demolished these primary purposes of the ECT.

VI. Effects of This Decision on International Law

The effects of this decision have the potential to be far reaching. However, the former Yukos Oil shareholders are definitely going to challenge the decision. The shareholders immediately announced plans to appeal to the controlling Dutch appellate court,¹⁴³ and the lead counsel for the Yukos Oil shareholders stated: "I am confident that today's decision will be reversed."¹⁴⁴ The arbitration and the district court case already had huge political and global consequences, and the outcome of the inevitable appeal will exacerbate these issues.

139. For the court's discussion on the explanatory memorandum, see *supra* notes 125–28 and accompanying text.

140. See The Hague District Court, *supra* note 102, at para. 5.60.

141. See *supra* Part II.

142. See *supra* subpart II(C).

143. Neil Buckley, *Russia Wins Legal Victory Over Yukos*, FIN. TIMES (Apr. 20, 2016), <http://www.ft.com/intl/cms/s/0/2a23a352-06ce-11e6-a70d-4e39ac32c284.html#axzz46knwwoyD> [<https://perma.cc/TCM9-5S4K>].

144. Reed, *supra* note 68.

The Yukos Oil shareholders have been fighting to enforce damages around the world since the tribunal released the final opinion of the arbitration. Each step of the appeal affects whether or not courts will enforce the arbitration award. Over the past two years, the former shareholders have begun enforcement proceedings in France, Belgium, Germany, the United States, and the United Kingdom.¹⁴⁵ Russia has been fighting each enforcement attempt since the tribunal's opinion, and will likely continue to do so with more legal strength since the district court's decision. In one case in 2015, France seized four hundred million US dollars in Russian assets carrying out the arbitration decision at the behest of the Yukos Oil shareholders;¹⁴⁶ however, just prior to the release of the Dutch district court opinion, a French court invalidated that seizure.¹⁴⁷ Enforcement proceedings have also begun in Belgium and Austria, but Russia made clear it would move to overturn those asset seizures, and "will continue to fight in every court and every jurisdiction."¹⁴⁸ The Yukos Oil shareholders have announced that despite the Dutch district court decision, they will continue efforts to seize Russian assets.¹⁴⁹ While it is up to the national courts to interpret the rulings, Russia is adamant that the seizure of assets should now cease.¹⁵⁰

The outcome of the appeal will be extremely significant and have large implications for politics and future energy investment arbitration around the world. At least when it comes to investments in Russia, the arbitration provision that is meant to protect investors has lost its strength and enforcement power. Without this, the protections investors seek are virtually eliminated. If Russia is so powerful that other countries are frightened to enforce the awards or to uphold arbitrations in general, then the protections are worthless.

This Note does not intend to dive into the complexities of Russian politics, but it seems feasible that Russia's power and intimidation measures could deter district court judges in other countries from enforcing awards and asset seizures—particularly judges enforcing asset seizures in Eastern European countries that are still at the mercy of Russia's dominance.

145. *Id.*

146. Uliana Pavlova, *France Seizes \$1 Billion in Russian State Assets*, POLITICO (Apr. 11, 2016), <http://www.politico.eu/article/france-seizes-1-billion-in-russian-state-assets/> [https://perma.cc/UZ33-82TS].

147. Angela Charlton, *French Courts Caught Up in Yukos Vs. Russia Assets Fight*, AP NEWS (Apr. 16, 2016), <http://bigstory.ap.org/article/fbcd99bdf13043c39702b65378566454/french-courts-caught-yukos-vs-russia-assets-fight> [https://perma.cc/U939-DCQR].

148. Cynthia Kroet & Uliana Pavlova, *Dutch Court Overturns \$50 Billion Yukos Arbitration Ruling*, POLITICO (Apr. 20, 2016), <http://www.politico.eu/article/dutch-court-overturns-50-billion-yukos-arbitration-ruling/> [https://perma.cc/59QZ-KGG8].

149. Maarten Van Tartwijk, *Dutch Court Quashes \$50 Billion Award to Former Yukos Owners*, WALL STREET J. (Apr. 20, 2016), <http://www.wsj.com/articles/dutch-court-quashes-50-billion-award-to-former-yukos-owners-1461141241> [https://perma.cc/RJ76-9872].

150. Buckley, *supra* note 1433.

Notably, in 2015 after the seizure proceedings in France, Austria, and Belgium, Russia threatened to retaliate against any European nations that uphold Yukos Oil's requests to seize Russian assets—the Russian Foreign Minister stated that Russian entities will go to Russian courts asking to seize the property owned by state-owned foreign companies.¹⁵¹

Some reporters claim that the breakdown of Yukos Oil and the arrest of its CEO in 2003 marked the period when the Russian government “began to take back control of the country's energy industry and sought to re-assert itself internationally as a force to be reckoned with rather than a crumbling post-communist shell.”¹⁵² The arbitration decision that was supposed to be final and binding marked a triumph against Russian expropriation, but time will soon tell how the Dutch district court's decision and the inevitable appeal will shape global politics and international arbitration.

VII. Conclusion

This district court case highlights what makes international arbitration, and international law in general, extremely complicated and filled with problems. If companies and nations want to conduct business internationally, then a system for dispute resolution under uniform international law is necessary. This applies in all areas of the law—from international investments to international insolvency proceedings. A country has to know what it is getting itself into when it signs a multilateral treaty, and a company should know what it signs up for when it enters into an international contract, each with international arbitration provisions. Not only has the Dutch district court decision ignored principles of international law and gutted the primary purposes of the ECT, it also has the potential to set an unfavorable precedent. The protection that the arbitration provision served to investors has been rendered meaningless, and the piece-by-piece approach to the application of international law allows no room for predictability for the parties involved. This decision will have a chilling effect on international investments in the energy sector—exactly the opposite of the intended goal of the Energy Charter Treaty.

—Lena U. Serhan

151. Robert Coalson, *Russia Threatens Tit-For-Tat Response to European Asset Inquiries*, RADIO FREE EUROPE, RADIO LIBERTY (May 10, 2016), <http://www.rferl.org/content/russia-european-asset-seizures/27081579.html> [https://perma.cc/ELN4-8YA3].

152. Mike Corder, *Dutch Court Quashes \$50 Billion Yukos Shareholders' Award*, AP NEWS (Apr. 20, 2016), <http://bigstory.ap.org/article/11f45a28420443c59df7dc6d6888c166/dutch-court-quashes-50-billion-yukos-shareholders-award> [https://perma.cc/GBK7-X3Y4].