Public International Law - steel frame or safety net?

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CONTENTS

2. Guest Editorial

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The Hague on 20 april 2016 saw the latest chapter in the saga of the bankrupted Russian oil company Yukos, when the District Court quashed six arbitration awards of Permanent Court of Arbitration tribunals. These awards had sustained Yukos shareholders in their claim that the Russian Federation through certain tax measures had de facto expropriated the shares without compensation, ordering Russia to pay 50 billion USD in damages.

As the bulletin of renowned London chambers put it with seeming exasperation: “Yukos illustrates the extent to which the steel frame of public international law runs through investment arbitration. The entire edifice of the Yukos award essentially crumbled on a single point of public international law: a point of treaty interpretation” (http://www.20essexst.com/news/yukos-decision-impact).

This was a reference to the law of treaties framework which the Hague Court applied in a precise and convincing manner to the question of the arbitration’s validity (judgment in English translation http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:4230). The shareholders had requested arbitration under the Energy Charter Treaty (ECT), which however had been signed by Russia, but not ratified. A primary issue therefore was the provisional application of the ECT. The ECT states that “each signatory agrees to apply this Treaty provisionally… to the extent that such provisional application is not inconsistent with its constitution, laws or regulations” (art 45.1). The arbiters had interpreted this as a test of the compatibility of the principle of provisional application as such – and hence of the application of the ECT as a whole - with Russian law, and had found no impediments. The Dutch court on the other hand interpreted the phrase to mean that each ECT provision is to be assessed individually (paras 5.6-5.31). When the Court went on to consider provisional application of the arbitration clause (art 26.4.b), it did not find the necessary legal basis for subjecting Russia to arbitration in Russian law; especially since the dispute stemmed from a public-law relation between the Russian state and another party. A specific legal basis for the case at hand was also lacking, as Russia had not ratified the ECT. The District Court thus concluded that the PCA tribunals earlier had mistakenly assumed competence.

Different aspects of this case will be the subject of expert comments for some time to come (the shareholders have lodged an appeal). One point of interest to mention here is the ‘boundary role’ of public international law, loosely comparable to that of public law in domestic systems. Moral, political and economic evaluations of a concrete case can veil the fact that when a legal scenario includes states, notably in their public quality, relations are not ‘transnational’ and the prevailing framework will be that of public international law. This means a system set i.a. to safeguard classic international public interests expressed in tenets such as the requirement of state consent for a binding dispute settlement procedure.