# judgment

**COURT OF APPEAL OF THE HAGUE**

Civil-Law Section

Case number : 200.197.079/01

District Court case/cause-list number : C/09/477160 / HA ZA 15-1; C/09/477162 / HA ZA 15-2 and C/09/481619 / HA ZA 15-112

**judgment of 18 February 2020**

in the case of:

1. the legal entity under the laws of Cyprus **VETERAN PETROLEUM LIMITED,**
having its registered office in Nicosia, Cyprus,
hereinafter referred to as: VPL,

2. the legal entity under the laws of the Isle of Man **YUKOS UNIVERSAL LIMITED**,
having its registered office in Douglas, Isle of Man
hereinafter referred to as: YUL,

3. the legal entity under the laws of Cyprus **HULLEY ENTERPRISES LIMITED**,
having its registered office in Nicosia, Cyprus,
hereinafter referred to as: Hulley,

appellants,
hereinafter also jointly referred to as: HVY (plural noun),
attorney: *mr*. M.A. Leijten, practising in Amsterdam,

*v.*

**THE RUSSIAN FEDERATION,**
with its seat of power in Moscow, Russian Federation,
hereinafter referred to as: the Russian Federation,
respondent,
attorney: *mr.* J.A. Dullaart, practising in Naaldwijk.

Table of contents

## 1. The proceedings - the course of the proceedings; decision on the objections of the Russian Federation

*1. The proceedings - the course of the proceedings*

1.1 For the course of the proceedings up to the interim judgment of 18 December 2018, the Court of Appeal refers to that judgment and the preceding interim judgment of 25 September 2018. In the latter interim judgment, the Court of Appeal held that HVY's objection to a number of statements by the Russian Federation in the Defence on Appeal was in part well-founded and in part unfounded. In that interim judgment, the Court of Appeal furthermore specified that the parties could comment on the further course of the proceedings.

1.2 The parties submitted deeds expressing their views on the further course of the proceedings. The Court of Appeal thereupon ruled, in the interim judgment of 18 December 2018, that HVY would be granted an opportunity to submit a deed by which they could respond to certain statements, specified in the interim judgment, that the Russian Federation had made in the Defence on Appeal, as well as - in the same context - to exhibits submitted at first instance by the Russian Federation. The Court of Appeal also held that the Russian Federation would then be granted an opportunity to respond to the exhibits accompanying the deed that HVY were to submit. The Court of Appeal also took a number of decisions in that interim judgment in respect of the period within which exhibits could be submitted for the parties' oral pleadings and the time allotted for such pleadings.

1.3 HVY submitted the deed referred to in the previous paragraph on 26 February 2019.

1.4 By letter of 18 March 2019, the Russian Federation objected against HVY's Deed of 26 February 2019 and requested the Court of Appeal to deny this Deed, or at least to grant a further postponement for the Deed to be submitted by the Russian Federation. HVY responded to that objection by letter of 26 March 2019. The Court of Appeal denied both requests by the Russian Federation by letter of 29 March 2019. More particularly, the Court of Appeal, in response to the Russian Federation's assertion that HVY failed to remain within the parameters set by the Court of Appeal in its interim judgment of 18 December 2018, ruled the following:

> "To the extent necessary for the decision of this case, the Court of Appeal will, when rendering its (final) judgment, determine whether HVY has gone beyond said parameters and may disregard certain assertions of HVY on that ground. The Court of Appeal may also give the parties the opportunity to express further views on certain points, if it believes the right to be heard gives reason to do so."

1.5 The Russian Federation responded to the exhibits submitted with HVY's Deed by a Deed on 25 June 2019.

1.6 On 23, 24 and 30 September 2019 the parties had their cases argued before the Court of Appeal, HVY's by the aforementioned *mr.* Leijten, and by *mr.* A.W.P. Marsman and *mr.* E.R. Meerdink, attorneys practising in Amsterdam, and the Russian Federation's by Prof. *mr.* A.J. van den Berg, attorney practising in Brussels, and by Prof. *mr.* M.E. Koppenol-Laforce, attorney practising in Rotterdam and *mr.* R.S. Meijer, attorney practising in Amsterdam, based in each case on the written arguments submitted to the Court of Appeal. HVY and the Russian Federation entered additional exhibits into evidence on this occasion. A record of this hearing, which is part of the procedural documents, was drawn up. Finally, judgment was requested.

*2. Decision on objections by the Russian Federation to the Deed of 26 February 2019 and the exhibits submitted with the Deed of 9 September 2019*

1.7 During the oral pleadings, the Russian Federation objected to the exhibits submitted with the Deed of 9 September 2019 in support of the oral pleadings. The Court of Appeal does not need to decide on this objection as it did not use these exhibits for its assessment. Superfluously, the Court of Appeal notes that the exhibits submitted with this Deed can reasonably be considered as a response to the exhibits submitted by the Russian Federation with the Deeds of 15 August 2019 and 26 August 2019; in addition, the Exhibits submitted by HVY are not of such a volume that the Russian Federation could not reasonably be required to respond to them during the oral pleadings.

1.8 The following applies to the objection by the Russian Federation to the Deed of 26 February 2019. In so far as the Court of Appeal has taken the contents of this Deed or the exhibits into account in its assessment, these are assertions or exhibits that do not fall outside the parameters set by the Court of Appeal in its interim judgment of 18 December 2018. In particular, HVY were free to submit further opinions of Prof. Schrijver and Prof. Klabbers in the context of their response to the opinions of Prof. Nolte and Prof. Pellet submitted with the Defence on Appeal (see interim judgment of 18 December 2018, para. 3.1). Incidentally, HVY could also have submitted these exhibits on occasion of the oral pleadings.

## 2. Introduction and background

2.1 The present case is, briefly summarised and to the extent relevant in this appeal, about the following. For the sake of clarity, the Court of Appeal partly reiterates paragraphs 2.2 through 2.8 of the interim judgment of 25 September 2018.

2.2 HVY are, or at least were, shareholders in Yukos Oil Company (hereinafter: Yukos), an oil company based in the Russian Federation, which was declared bankrupt on 1 August 2006 and deregistered from the Russian Commercial Register on 21 November 2007.

2.3 HVY initiated arbitration proceedings against the Russian Federation in 2004 under Article 26 of the Energy Charter Treaty (Treaty Series 1995, 108, hereinafter: the ECT, or the Treaty), claiming that the Russian Federation had expropriated their investments in Yukos in violation of the ECT and had failed to protect those investments. HVY claimed that the Russian Federation should be ordered to pay damages. The place of arbitration was The Hague.

2.4 The arbitral tribunal appointed pursuant to the UNCITRAL Arbitration Rules (hereinafter: the Tribunal) ruled in three separate Interim Awards on Jurisdiction and Admissibility of 30 November 2009 on a number of preliminary defences raised by the Russian Federation, including in relation to the Tribunal's jurisdiction. In the Interim Awards, the Tribunal rejected certain defences of jurisdiction and admissibility and ruled with respect to other preliminary defences that the decision on them would be stayed until the merits phase of the proceedings.

2.5 In three separate *Final Awards* of 18 July 2014, the Tribunal rejected the Russian Federation's remaining defences on jurisdiction and/or admissibility, found that the Russian Federation had breached its obligations under Article 13(1) ECT and ordered the Russian Federation to pay HVY damages amounting to USD 8,203,032,751 (to VPL), USD 1,846,000,687 (to YUL) and USD 39,971,834,360 (to Hulley), plus interest and costs. In brief, the Tribunal ruled that the Russian Federation, by taking a number of tax and recovery measures against Yukos, had been steering towards the bankruptcy of Yukos for no other purpose than the elimination of Mr Mikhail Khodorkovsky, chairman of Yukos and one of its shareholders (hereinafter: Khodorkovsky), as a potential political opponent of President Putin, and the acquisition of Yukos' assets.

2.6 By separate summonses of 10 November 2014, the Russian Federation summoned Hulley, VPL and YUL before the District Court of The Hague and requested the District Court to set aside the Interim Awards and Final Awards rendered by the Tribunal in each of their cases. These three cases were joined by the District Court at the request of the Russian Federation.

2.7 On 20 April 2016, in one judgment rendered in the three joined cases, the District Court set aside the Interim Awards and the Final Awards because of the absence of a valid arbitration agreement. HVY filed an appeal against this judgment.

2.8 By law of 2 June 2014 to amend Book 3, Book 6 and Book 10 of the Dutch Civil Code and the Fourth Book of the Dutch Code of Civil Procedure in connection with the modernisation of the Arbitration Law (Bulletin of Acts and Decrees 2014, 200), which entered into force on 1 January 2015 (see Bulletin of Acts and Decrees 2014, 254), Dutch arbitration law was revised. Pursuant to Article IV(4) in conjunction with Article IV(2) of this law, the Fourth Book of the Dutch Code of Civil Procedure (DCCP) as it was before the entry into force of the law remains applicable to the present proceedings. Where this judgment refers to provisions on the setting-aside or revocation of arbitral awards, articles from Book IV DCCP in the version applicable until 1 January 2015 are concerned.

2.9 Although the Tribunal has rendered three separate Interim Awards and three separate Final Awards in three separate arbitrations in the cases of Hulley, VPL and YUL, these rulings do not differ materially from each other in respect of the matters at issue in these setting-aside proceedings. For the sake of brevity, the Court of Appeal will therefore hereinafter also refer to 'the' arbitration, 'the' Interim Award and 'the' Final Award. As the paragraphs in the Interim Awards have different numbering, the Court of Appeal will refer to the numbering of the Interim Award and the Final Award in the case of Hulley; this also applies to references to other procedural documents. The Interim Awards and the Final Awards will also be jointly referred to as the 'Yukos Awards'.

2.10 In applying and interpreting the ECT and the Vienna Convention on the Law of Treaties (the Treaty of 1969, Treaty Series 1985, 79, hereinafter: VCLT), the Court of Appeal will base itself on the authentic versions of these treaties in the English language. Where appropriate, the Court of Appeal will also take into account other authentic language versions when interpreting the ECT. For the sake of readability of this judgment, the Court of Appeal will also use the official Dutch translations of the ECT and the VCLT in the text (published in Treaty Series 1995, 250 and Treaty Series 1972, 51, respectively), but this does not alter the fact that the ruling of the Court of Appeal is based on the authentic English- and French-language versions of the ECT and the VCLT (as published in Treaty Series 1995, 108 and Treaty Series 1972, 51, respectively), as well as the authentic German- and Italian-language versions of the ECT (as published on the website www.energycharter.org).

2.11 The exhibits that have been entered into evidence by the parties in these setting-aside proceedings bear the designation ‘RF’ (Russian Federation) or ‘HVY’ followed by a number. This judgment also refers to exhibits entered into evidence by the parties during the arbitration. As regards these exhibits, those from the ‘Claimant’ (HVY) are marked with ‘C’, those from the 'Respondent' (the Russian Federation) in the jurisdiction phase are marked with R, and those from the ‘Respondent’ in the merits phase are marked with 'RME', in each case followed by a number. When the number is preceded by a ‘D’, this means that it is an expert report. Appendices to the expert reports submitted by the parties sometimes have a separate letter code, such as ‘S’ (for Prof. Stephan), ‘M’ (for Prof. Mishina), ‘ASA’ (Prof. Avtonomov), ‘AVA’ (Prof. Asoskov) etc.

## 3. The jurisdiction of the Tribunal (Article 1065(1)(a) DCCP; the views of the parties, the Tribunal, and the District Court

### 3.1 Introduction and legal context

3.1.1 As the District Court ruled that the Tribunal wrongfully declared itself competent to examine the dispute and the grounds for appeal are directed against that ruling, the Court of Appeal will first describe in broad strokes which positions the parties have taken concerning the jurisdiction of the Tribunal, as well as what the Tribunal and subsequently the District Court decided on the basis of those arguments. All these arguments and considerations will be addressed in more detail later.

3.1.2 The fundamental nature of the right to access to the courts entails that answering the question of whether a valid arbitration agreement was concluded is ultimately up to the court and that the court will not exercise restraint when assessing a claim seeking the setting aside of an arbitral award on the grounds that a valid arbitration agreement is lacking.[1] The Court of Appeal may leave the question of which party bears the burden of proof of the existence or absence of a valid arbitration agreement unanswered. The question of whether a valid arbitration agreement has been concluded in the present case depends on the interpretation of Articles 26 and 45 ECT in light of the law of the Russian Federation, not on factual points of dispute. In so far as any factual points of dispute exist between the parties in the context of this ground for setting-aside, these do not – as will be shown below – raise any questions regarding the allocation of the burden of proof.

### 3.2 The Russian Federation’s position

3.2.1 In the arbitration and in the present setting-aside proceedings, the Russian Federation invoked the Tribunal's lack of jurisdiction on the basis of Article 1065(1)(a) DCCP. To that end it puts forward – in sum – the following. The Russian Federation has signed the ECT but never ratified it. While Article 45(1) ECT provides that each signatory shall provisionally apply the Treaty, this applies only 'to the extent that such provisional application is not inconsistent with its constitution, laws or regulations' ('the Limitation Clause'). Article 26 ECT, in so far as it identifies arbitration as one of the agreed possible forms of dispute settlement under the Treaty, is inconsistent with the law of the Russian Federation. Article 26 ECT is inconsistent with the Russian Constitution (hereinafter: the Constitution), in particular with the principle of the separation of powers enshrined therein, and with the rule expressed in several statutory provisions that public-law disputes cannot be subjected to arbitration. In addition, the law approving the ECT was not submitted to the State Duma within six months of the signing of the ECT, as required by Article 23(2) of the Russian Federal Law on International Treaties (hereinafter: FLIT). Finally, under Russian law, a shareholder cannot claim the damage suffered by the company.

3.2.2 The Russian Federation further argues that the requirement set by Article 26 ECT that there is an 'Investment' within the meaning of Article 1(6) ECT has not been met and that HVY are not 'Investors' within the meaning of Article 1(7) ECT either. This is essentially an internal Russian dispute between the 'oligarchs' (a number of Russian businessmen who were involved in the privatisation of Yukos and to whom the Court of Appeal will hereinafter refer as 'Khodorkovsky et al.') and the Russian Federation. According to the Russian Federation, Khodorkovsky et al. are the ultimate stakeholders of HVY, which are themselves no more than sham companies. In this case, no foreign capital had been invested in the Russian Federation, whereas the ECT is intended for the protection of foreign investments only.

3.2.3 Furthermore, according to the Russian Federation, the illegality of HVY's investments in Yukos precludes protection by the ECT. HVY's investments are illegal because HVY were exclusively set up and established in tax havens to evade Russian taxes. HVY's investments are also illegal because their investments in Yukos and, with that, control over Yukos were acquired and consolidated through corruption and fraud during and after the time of Yukos' privatisation.

3.2.4 Finally, the Russian Federation argues that the Tribunal has no jurisdiction because Article 21(1) ECT (the so-called 'carve-out') provides that taxation measures are not covered by protection under the ECT ("… nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties"). Although it is true that Article 21 ECT creates an exception to this (the so-called 'claw-back') in the sense that paragraph 5(a) provides that 'Article 13 shall apply to taxes', but according to the Russian Federation, HVY do not complain about 'taxes' but about 'Taxation Measures'. Finally, the Russian Federation argues that the Tribunal wrongly neglected to seek advice from the national tax authorities (of the Russian Federation, the United Kingdom and Cyprus) as it believes is required by Article 21(5)(b) ECT.

**3.3 HVY's position**

3.3.1 In the first place, HVY are of the opinion that the Russian Federation has forfeited its right, by estoppel or acquiescence, to invoke lack of jurisdiction of the Tribunal. After all, the Russian Federation applied the ECT provisionally for years without ever manifestly invoking its view that Article 26 ECT is 'inconsistent' with Russian law. In addition, the rule from the IMS/DIO judgment[2] implies that the Russian Federation may not invoke limitations of jurisdiction contained in its own legislation to argue that a valid arbitration agreement was not concluded, if the other party did not know, and could not reasonably be expected to have known, those limitations. HVY further argue that the Russian Federation cannot invoke a possible inconsistency of Article 26 ECT with its national law, as the Russian Federation has failed to make a statement on the basis of Article 45(2)(a) ECT that it does not accept provisional application.

3.3.2 According to HVY, the Limitation Clause must be interpreted as applicable only if the law of a Signatory does not provide for the principle of provisional application of treaties. The Limitation Clause does not mean that a Signatory may exempt itself from provisional application of the ECT whenever a provision of the Treaty is inconsistent with a rule of national law. In the appeal in the present setting-aside proceedings, HVY have added as an alternative position that, even if it must be assumed that the Limitation Clause does not relate to the *principle* of provisional application, the question is, in any event, whether the *provisional application* of any provision of the ECT is incompatible with a rule of national law, not whether any provision of the ECT is in itself inconsistent with national law. Apart from that, Article 26 ECT is not incompatible with any provision of Russian law according to HVY. On the contrary, the Russian Laws on Foreign Investment of 1991 and 1999 (hereinafter: LFI 1991 and LFI 1999 respectively) explicitly provide that investment disputes between a foreign investor and the Russian Federation may be subjected to international arbitration. The FLIT entered into force after the signing of the ECT, and, for that reason alone, Article 23(2) of that law, which provides that a provisionally applied treaty must be submitted to the State Duma for approval within six months, does not apply to the ECT. Incidentally, non-compliance with this requirement has no impact on the provisional application of the ECT. Moreover, under Article 15(4) of the Constitution, a provisionally applied treaty takes precedence over a federal law, so for that reason alone there can be no question of Article 26 ECT being incompatible with Russian law.

3.3.3 HVY are 'Investors' within the meaning of Article 1(7) ECT and their shareholdings in Yukos are 'Investments' within the meaning of Article 1(6) ECT. HVY were validly incorporated under the law of their place of business and established in States that are Signatories to the ECT, not being the Russian Federation. HVY's shareholdings in Yukos clearly fall within the definition of 'Investment'. The ECT does not impose any additional requirements on the terms 'Investor' or 'Investment', such as the requirement of legality or the requirement that capital has been invested from outside the Host State. HVY dispute that Khodorkovsky et al. have ultimate control over HVY or that HVY are sham companies that were incorporated to evade Russian taxes. HVY also deny that their investments in Yukos and, with that, control over Yukos were acquired or consolidated using corruption and fraud.

3.3.4 Finally, HVY take the view that Article 21 ECT does not relate to the jurisdiction of an arbitral tribunal on the basis of Article 26 ECT but to the material scope of protection of the ECT. The provision also does not apply because it only regards *bona fide* taxation measures and these were not concerned in this case. The taxation measures taken against Yukos were aimed solely at eliminating Khodorkovsky as a political rival to President Putin and at appropriating Yukos' assets. Moreover,

Article 21(5)(a) ECT provides that Article 13 ECT does in fact apply to 'taxes'. This is not intended to mean anything different than the 'Taxation Measures' referred to in Article 21(1) ECT.

### 3.4 The Tribunal's decision

3.4.1 To the extent relevant here, the Tribunal decided the following in the Interim Award:

(i) the Russian Federation has not (as a result of estoppel) forfeited its right to invoke the Limitation Clause (Interim Award nos. 286-288);

(ii) the Russian Federation may invoke the Limitation Clause, notwithstanding the fact that it has not made a declaration on the basis of Article 45(2)(a) ECT or otherwise indicated that it would not apply Article 26 ECT provisionally (Interim Award nos. 260-269; nos. 282-285);

(iii) the Limitation Clause constitutes an exception to the provisional application of the ECT only if the *principle* of provisional application is incompatible with Russian law, not if a *specific* ECT treaty provision is incompatible with Russian law (Interim Award nos. 301-329);

(iv) the question of potential incompatibility with Russian law must be assessed as of the moment the ECT was signed (Interim Award no. 343);

(v) the principle of provisional application is not incompatible with Russian law (Interim Award nos. 330-338);

(vi) superfluously: Article 26 ECT is not incompatible with Russian law: Article 9 LFI 1991 and Article 10 LFI 1999 provide that disputes between a foreign investor and the Russian Federation are arbitrable (Interim Award no. 370); the definitions of 'foreign investor' and 'foreign investment' in both LFIs are consistent with the definitions of 'Investor' and 'Investment' in Article 1 ECT (Interim Award no. 371); there is no '*derivative action*', HVY claim compensation of their own direct loss (Interim Award no. 372); under the FLIT, the Russian Federation agreed to be bound by Article 26 ECT, albeit provisionally; this did not require ratification (Interim Award nos. 382-384); the requirement of Article 23(2) FLIT is merely an internal requirement and any failure to respect it does not terminate provisional application (Final Award no. 387);

(vii) it was not until 20 August 2009 that the Russian Federation notified the depositary of the ECT of its intention not to ratify the ECT; until then, it was a member of the 'Energy Charter Conference', a national of the Russian Federation was Deputy Secretary-General of the 'Energy Charter Secretariat', and the Russian Federation participated in the meetings of the 'Energy Charter Conference'; in these arbitration proceedings, the Russian Federation cannot claim the benefits of provisional application of the ECT while disclaiming the obligations which that status imposes (Interim Award no. 390);

(viii) HVY meet the definition of 'Investor' in Article 1(7) ECT, as it is sufficient for this purpose that a company is validly organised in accordance with the laws of a State party to the ECT (Interim Award nos. 411-417);

(ix) in order to qualify as an 'Investment' within the meaning of Article 1(6) ECT, it is sufficient for HVY to have '*legal ownership*' of the shares they hold in Yukos; HVY have lawfully acquired and paid for their shares in Yukos; no '*injection of foreign capital'* is required (Interim Award nos. 429-434).

3.4.2 In the Final Award, the Tribunal ruled as follows on Article 21 ECT, as well as on the unclean hands argument:

(i) the 'claw-back' of Article 21(5)(a) ECT is applicable in the sense that the Russian Federation's conduct that was at issue in the arbitrations has not been removed from the assessment of Article 13 ECT (Final Award nos. 1410-1416);

(ii) referral to the competent tax authorities under Article 21(5)(b) ECT would be pointless ("an exercise in futility") (Final Award nos. 1417-1428);

(iii) moreover, the 'carve-out' applies exclusively to *bona fide* taxation measures, i.e. measures designed to generate general revenue for the State, not measures which, as was the case with Yukos, served a completely unrelated purpose, such as the destruction of a company or the elimination of a political opponent (Final Award nos. 1430-1445);

(iv) the unclean hands argument does not preclude the Tribunal's jurisdiction, nor does it have the effect of rendering HVY's claims 'inadmissible' (Final Award nos. 1343-1373).

**3.5 The District Court's decision**

3.5.1 Briefly summarised, the District Court ruled as follows:

(i) Article 45(1) ECT must be taken to mean that the Russian Federation is bound solely by those provisions of the ECT that are compatible with Russian law (para. 5.23);

(ii) there would appear to be no latitude in these proceedings to rule on the question of whether the Tribunal could have accepted jurisdiction based on another argument that the Tribunal itself had rejected (para. 5.25);

(iii) the Russian Federation was not obliged to make a prior declaration as referred to in Article 45(2) ECT in order to enable it to successfully invoke the Limitation Clause (para. 5.31);

(iv) the provisional application of the arbitration clause contained in Article 26 ECT is not inconsistent with Russian law only to the extent that it is forbidden by that law, but also in the event that such a method of dispute resolution lacks a legal basis or is inconsistent with the legal system or is incompatible with the basic assumptions and principles laid down by or that can be deduced from legislation (para. 5.33);

(v) there can also be inconsistency with Russian law if that law makes no provision for the possibility of arbitration, as provided for by Article 26 ECT; given that arbitration is limited to civil disputes, Russian law does not allow arbitration that requires an assessment of actions under public law by the Russian Federation; the current case involves an exercise of powers under public law by the authorities of the Russian Federation (para. 5.41); Article 9(1) LFI 1991 and Article 10 LFI 1999 fail to provide an alternative (paras. 5.51 and 5.58);

(vi) Article 9(1) LFI 1991, which should be read in conjunction with Article 43 of the Russian Fundamentals of Legislation on Foreign Investments in the USSR of 5 July 1991 (hereinafter: the Basic Principles Act), deals with civil law disputes arising from legal relationships between foreign investors and the Russian Federation in which the public law aspect prevails; this provision confers primacy on proceedings before the Russian courts and allows other methods of dispute resolution only if so provided by a treaty; this implies that Article 9 LFI 1991 fails to provide an independent legal basis for arbitration between HVY and the Russian Federation (paras. 5.43 and 5.51);

(vii) Article 10 LFI 1999 is a 'blanket provision' in that it renders the possibility of arbitration subject to the existence of a provision to that effect in a treaty or a federal law (para. 5.56); Article 10 LFI 1999 thus provides no separate legal basis for dispute resolution between an investor and a State by means of international arbitration as provided for by Article 26 ECT (para. 5.58);

(viii) the Explanatory Memorandum to the ECT ratification bill, which was drafted by the executive to encourage the Duma to proceed with ratification, does not carry sufficient weight to substantiate HVY's position; on the contrary, the legislative history of many bilateral investment treaties concluded by the Russian Federation supports the view that Russian law does not provide for the arbitration of disputes such as in the present case (paras. 5.59-5.64);

(ix) the arbitration clause of Article 26 ECT thus has no legal basis in Russian law and is incompatible with the basic assumptions set out in that law (para. 5.65);

(x) the District Court, like the Arbitral Tribunal, has yet to examine whether the fact of having signed a treaty that contains a provisional application clause is enough to establish that the Russian Federation agreed to international arbitration;

(xi) neither the FLIT nor the VCLT provide an independent basis for unlimited provisional commitment to the Treaty; whether a signatory State is bound by a treaty on the basis of the provisional performance thereof is determined by that treaty and not by the FLIT or the VCLT (para. 5.71);

(xii) by signing the ECT, the Russian Federation was only (provisionally) bound by the arbitration clause of Article 26 to the extent that the clause was compatible with Russian law (para. 5.72);

(xiii) pursuant to Article 15(4) of the Constitution and the principle of the separation of powers, a treaty can only set aside conflicting legislation if it has been approved by the legislature, i.e. ratified (para. 5.91);

(xiv) the case law of the Constitutional Court, from which it emerges that even provisionally applicable treaties are part of the Russian legal system, is without prejudice to the fact that a treaty such as the ECT can limit the scope of provisional application to treaty provisions that are compatible with the Constitution and other legislation and regulations (para. 5.92);

(xv) Article 26 ECT adds a new form of dispute resolution to existing Russian law, namely one in which an international arbitral tribunal can potentially rule on actions in the exercise of powers under public law; the Constitution and the principle of separation of powers enshrined therein preclude a representative of the executive power from committing the Russian Federation to Article 26 ECT (para. 5.93);

(xvi) in the absence of the legislature's consent, the Limitation Clause in any event precluded the provisional application of Article 26 ECT for any longer than the six months specified by Article 23(2) FLIT, i.e. the period within which a signed treaty being provisionally applied must be submitted for the legislature's approval; said period is not a domestic requirement, but rather a clause that addresses conflicts between the provisional application of treaty provisions and domestic Russian law, including the Constitution (para. 5.94);

(xvii) in summary, it follows from Art. 45(1) ECT that the Russian Federation, by merely signing the ECT, did not commit itself to the provisional application of (the arbitration rules of) Article 26 ECT; the Russian Federation thus never made an unconditional offer to engage in arbitration, as implied by Article 26 ECT, and, as a result, no valid arbitration agreement was formed by HVY's *'notice of arbitration'* (para. 5.95).

3.5.2 The grounds for setting-aside adduced by the Russian Federation to argue that the Tribunal lacked jurisdiction, including its assertion that HVY and their investments in Yukos did not qualify as 'Investors' or 'Investments' within the meaning of Article 1(7) and 1(6) ECT, the Russian Federation's reliance on Article 21 ECT and the assertion that HVY, as shareholders, were unable to claim compensation for damage suffered by Yukos, were not addressed by the District Court.

3.5.3 On the basis of the above, the District Court, pursuant to Article 1065(1)(a) DCCP, set aside the Yukos Awards in the dispute between HVY and the Russian Federation and ordered HVY to pay the costs of the proceedings.

## 4. The grounds of appeal

### 4.1 Introduction

4.1.1 The Court of Appeal will deal with the grounds of appeal on the basis of a thematic discussion of the points in dispute, in which the following subjects will be discussed in turn:

(i) the standards the Court of Appeal should apply in interpreting the ECT (para. 4.2);

(ii) the provisional application of treaties (para. 4.3);

(iii) the question of whether the Court of Appeal can deny the application for setting-aside in so far as it is based on the lack of jurisdiction of the Tribunal, if it finds that the jurisdiction of the Tribunal follows from arguments that the Tribunal has not addressed (para. 4.4);

(iv) the question of whether HVY can advance arguments in support of the jurisdiction of the Tribunal in the present setting-aside proceedings which they did not put forward in the arbitration (para. 4.4);

(v) the interpretation of Article 45(1) ECT, particularly of the Limitation Clause, and the interpretation of Article 45(2)(a) ECT (para. 4.5);

(vi) whether in the Court of Appeal's interpretation of the Limitation Clause, the provisional application of Article 26 ECT is inconsistent with the 'constitution, laws or regulations' of the Russian Federation (para. 4.6);

(vii) whether, based on the Russian Federation's interpretation of the Limitation Clause, the provisional application of Article 26 ECT is inconsistent with the 'constitution, laws or regulations' of the Russian Federation (para. 4.7);

(viii) HVY's reliance on *estoppel* and *acquiescence*, the rule from the *IMS/DIO* case (para. 4.8).

**4.2 (i) The rules to be taken into account in the interpretation of the ECT**

4.2.1 It is, rightly, not in dispute between the parties that the provisions of the ECT must be interpreted on the basis of the rules set out in Articles 31 and 32 VCLT. These provisions read as follows:

> "Art. 31
>
> *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

4.2.2 When applying the rules set out in these provisions, the Court of Appeal takes the following guidelines as a starting point.[3] Interpretation of a treaty is always aimed at discerning the contracting parties' intention, to the extent that this intention is adequately expressed in the text of the treaty. Textual interpretation has the most important role in the interpretative process, because the wording is deemed to be an authentic expression of the intention of the parties. The International Court of Justice (hereafter: ICJ) has therefore considered that treaty interpretation should be based 'above all upon the text of the treaty'.[4]

4.2.3 This does not mean that treaty interpretation is merely a grammatical exercise. The text of a treaty must be understood in its context as well as in light of its object and purpose, in respect of which Article 31(2) VCLT defines how (in any case) the context of the treaty is to be understood. The interpretation of a treaty provision in accordance with the treaty's object and purpose cannot result in an interpretation that is contrary to the clear text of the provision in question. Article 31(1) VCLT prescribes one rule of interpretation, compromising of three integral elements (text, context and 'object and purpose'); interpretation is a process in which these elements are applied - in good faith - in one joint exercise. That the interpretation must be performed in good faith means that it must comply with the fundamental principle of reasonableness and must not lead to a meaning that is manifestly absurd or unreasonable.

4.2.4 As to the application of Article 31(3)(b) VCLT, the Court takes the following as a starting point.[5] Article 31(3)(b) VCLT provides that, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation shall be taken into account. This subsequent practice is not subject to form requirements, so in principle any action (or inaction) may be relevant. The practice must go beyond a single instance and must be committed as application of the treaty. In order to be accepted as relevant practice, it is not required that each contracting party participate in that practice, but it must be demonstrable that states that have not been active in that respect have accepted the practice of the other contracting parties. It is also necessary that the contracting parties be aware of the practice in question, which means that internal documents or acts that have not come to the knowledge of the other contracting parties cannot be regarded as a

practice within the meaning of Article 31(3)(b) VCLT. Finally, subsequent practice which has not established agreement of the parties and therefore does not qualify as practice under Article 31(3)(b) VCLT may, however, still be relevant as an additional means of interpretation under Article 32 VCLT. Pursuant to Article 31(3)(c) VCLT, it is also necessary to take into account any 'relevant rules of international law' applicable in the relations between the contracting parties. The rules of international law as referred to in Article 31(3)(c)VCLT include (in any event) the law of the treaties, customary international law and internationally recognised principles of law.[6]

4.2.5 The interpretative means set out in Article 32 VCLT[7] are supplementary to the rules of Article 31 VCLT, coming up only after Article 31 VCLT has been applied. Firstly, these supplementary means can be used to confirm the meaning arrived at through the application of Article 31 VCLT. Secondly, the supplementary means of interpretation in Article 32 VCLT are used if interpretation in accordance with Article 31 VCLT leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable. Supplementary means include the treaty's preparatory work (also referred to hereafter as the '*travaux préparatoires*' or '*travaux'*). Such means can only include sources that can be assessed objectively, which means that personal recollections or memoirs may not be counted as part of the *travaux préparatoires*; the same applies to documents or records, such as internal notes or presentations to a legislative body in the context of a national ratification process, that were not introduced during the negotiations and as such were not brought to the attention of the other participants in the treaty negotiations.

**4.3 (ii) The provisional application of treaties**

4.3.1 Article 39 ECT provides that '[t]his Treaty shall be subject to ratification, acceptance or approval by signatories. (…)'. Article 44 ECT contains provisions on the entry into force of the Treaty, from which it follows that the Treaty will not enter into force for a state until that state has deposited an 'instrument of ratification, acceptance or approval' to that effect.

4.3.2 On behalf of the Russian Federation, Mr O.D. Davydov, then Deputy Chairman of the Government of the Russian Federation, signed the ECT on 17 December 1994. He had been instructed to do so by a decision of the Government of the Russian Federation of 16 December 1994, signed by Mr V. Chernomyrdin, Chairman of the Russian Federation Government.[8] On 26 August 1996, the Treaty was submitted to the Duma for approval. The Duma did not approve the ECT and the Russian Federation accordingly never deposited an instrument of ratification, acceptance or approval. On 20 August 2009, the Russian Federation notified the Depositary of the ECT, Portugal, of its intention not to become a Party to the Treaty. The ECT has thus not entered into force for the Russian Federation in accordance with Article 44 ECT.

4.3.3 Article 45(1) ECT provides that the Treaty shall be applied provisionally by each signatory pending its entry into force for that state in accordance with Article 44 ECT. The obligation to apply the Treaty provisionally applies to a signatory 'to the extent that such provisional application is not inconsistent with its constitution, laws or regulations'.

4.3.4 Provisional application of treaties is an accepted concept in international law and is codified in Article 25 VCLT. Provisional application is in practice used, inter alia, in situations where states wish

to respond to urgent economic needs by means of a treaty, as was the case with the ECT.[9] A provisionally applied treaty has the same binding force as a treaty that has entered into force following ratification[10], which does not alter the fact that the obligation to apply the treaty provisionally (as in the case of the ECT pursuant to the Limitation Clause) may be subject to certain limitations. There are no additional requirements for the provisional application of a clause such as Article 26 ECT in which arbitration has been agreed. Whatever else may be said about the Russian Federation's assertion that such an arbitration clause must have been agreed unambiguously, Article 26 ECT in any case satisfies that requirement. The fact that the scope of the Limitation Clause and its application in the light of the national law of the Russian Federation can be subject to debate does not make this any different.

4.3.5 Therefore, the fact that the Russian Federation has not ratified the ECT does not in itself mean that Article 26 ECT does not bind the Russian Federation; this may indeed be the case by virtue of the obligation to apply the Treaty provisionally on the basis of Article 45 ECT. The question is whether this provisional application is not limited in the sense that the Limitation Clause precludes the provisional application of Article 26 ECT.

**4.4 (iii) and (iv) New grounds for jurisdiction and jurisdictional arguments in the setting-aside proceedings**

4.4.1 The Arbitral Tribunal identified two possible interpretations of the Limitation Clause: (a) whether the *principle* of provisional application is contrary to Russian law (HVY position) or (b) whether a *separate provision* of the ECT (in this case Article 26) is contrary to Russian law (the Russian Federation's position). The Arbitral Tribunal accepted position (a) as the correct one.

4.4.2 In these setting-aside proceedings - and for the first time on appeal - HVY defended the existence of a third possibility, which they put forward as an alternative argument in case their primary standpoint (the question whether the *principle* of provisional application is contrary to Russian law) would not be accepted. This alternative position is that the Limitation Clause concerns the question whether the *provisional application* of one or more provisions of the ECT is irreconcilable with the law of a contracting party, in the sense that the law of that state allows provisional application of a treaty in principle, but excludes certain (categories or types of) provisions of the treaty from provisional application (Statement of Appeal No. 232, 233, 301 and 321 et seq.; HVY deed 26 February 2019 nos. 141 and 174; pleading notes HVY hearing of 23 September 2019, part I, no. 68 et seq.; pleading notes HVY hearing of 30 September 2019, part V (Reply) No. 20). Thus the question arises whether HVY is entitled to plead this alternative argument, which they did not put forward in the arbitration, for the first time in these setting-aside proceedings, and whether the Court of Appeal, as the setting aside court, should be allowed to rule that the Arbitral Tribunal had jurisdiction to hear HVY's claims on the basis of this alternative argument, although the Arbitral Tribunal itself did not base its jurisdiction on it. The parties take opposing views on this matter.

4.4.3 Article 1065(1)(a) DCCP provides that an arbitral award may be set aside 'if a valid arbitration agreement is lacking'. The wording of the law therefore does not relate to the arbitral tribunal's assessment of its jurisdiction, but to the question of whether or not a valid arbitration agreement between the parties *exists*. It is also established case law that the court ultimately has the final say on the question of whether a valid arbitration agreement was concluded and that this question is subject

to a full review by the court. This is related, among other things, to the fact that by means of an arbitration agreement, the parties waive their right to bring the dispute to the ordinary courts pursuant to Article 17 of the (Dutch) Constitution: a valid arbitration agreement deprives the ordinary court of jurisdiction to hear the dispute, provided that this lack of jurisdiction is invoked prior to all defences (Article 1022(1) DCCP). It would not be compatible with this system to only allow the setting aside court to review whether the arbitral tribunal had assumed jurisdiction on *proper grounds*, but not to uphold that jurisdiction on grounds that the arbitral tribunal, for whatever reason, (in the court's view, wrongly) did not discuss.[11] After all, this could lead to the unacceptable result that an arbitral award would have to be set aside, thereby reviving the jurisdiction of the ordinary court, simply because the arbitral tribunal based its jurisdiction on incorrect reasoning, while failing to discuss one or more determinative arguments in favour of its jurisdiction. In such a case, despite there being a valid arbitration agreement actually depriving the national courts of jurisdiction, the national courts would still have to rule on the parties' dispute, for the sole reason that the arbitral tribunal, which does not have the last word with regard to its jurisdiction, used incorrect reasoning.

4.4.4 It cannot be seen that acceptance of HVY's position would lead to a less effective administration of justice in arbitration. It would be damaging to the effective administration of justice in arbitration if an arbitral award would have to be set aside because the arbitral tribunal relied upon an incorrect basis for assuming jurisdiction, even when in fact jurisdiction does exist. Ultimately, in such a case the parties would then have to take their dispute to the state courts again, without any need or justification.

4.4.5 This also means that, in principle, there is no objection if the defendant in setting-aside proceedings pleads new arguments in support of the arbitral tribunal's decision that it has jurisdiction. After all, it cannot be held against the defendant, as is the case (and rightly so) if the claimant put forward a ground for setting aside that it did not plead in the arbitration, that if that argument had been argued earlier, the arbitral tribunal could have taken a decision on the matter at an early stage, which would, in as much as possible, have prevented unnecessary procedural steps from being taken.[12] After all, the latter pleaded argument would only lead to the same conclusion already drawn by the Arbitral Tribunal. Moreover, as is clear from the judgment in Smit/Ruwa, referred to in the previous footnote, even in that case it could not be ruled out in advance that new arguments for the absence of a valid arbitration agreement may be pleaded in the setting-aside proceedings: this should be decided on the basis of the circumstances of the specific case (para. 3.4.2). This certainly does not support the application of a stricter standard in a reversed situation (where a new argument supporting jurisdiction is invoked). The considerations in the judgment of 2 April 2019 of the 'Cour d'Appel de Paris'[13], raised by the Russian Federation on this matter, related to a situation different from the one at hand. In that case, the arbitral tribunal had decided it partially lacked jurisdiction. The French court ruled that the claimants in the arbitration, who still sought a declaration that the arbitral tribunal had full jurisdiction, were not allowed to plea arguments in favour of the arbitral tribunal's jurisdiction that they had not pleaded in the arbitration. The reason was that it would be contrary to the purpose of the relevant legal provision ("qui est d'éviter qu'une partie se réserve des armes pour le cas où la sentence lui serait défavorable") for a party to be able to reserve its arguments for the event that the arbitral award would turn out to be unfavourable. In the present case, there would be no such situation of 'abuse', since HVY, unlike the claimants in the French proceedings, argue precisely that the Yukos Awards be upheld.

4.4.6 Even if it must be assumed that there are circumstances in which new arguments are inadmissible in the setting-aside proceedings, for example because this is contrary to the due process of law, there is in any event no reason to do so in this case. Firstly, this case concerns a purely legal argument, i.e. the interpretation of the Limitation Clause, which HVY timely brought forward in these proceedings - in their Statement of Appeal - and on which the Russian Federation had the opportunity to comment. Secondly, the alternative position put forward by HVY is an extension of the position that HVY did advance in the arbitration. Indeed, HVY's primary position is that the application of the Limitation Clause is about whether Russian law *completely* excludes the provisional application of treaty provisions, whereas the alternative position is about whether Russian law excludes the provisional application of *certain* treaty provisions or types or categories of such provisions.

4.4.7 The conclusion is that the Court of Appeal will take into account HVY's alternative position with regard to the interpretation of the Limitation Clause in its opinion as to whether a valid arbitration agreement is lacking within the meaning of Article 1065(1)(a) DCCP.

**4.5 (v) The interpretation of Article 45(1) ECT, in particular of the Limitation Clause, and the interpretation of Article 45(2)(a) ECT**

*a. Introduction*

4.5.1 Article 45(1) through (3) ECT read as follows:

> "Article 45 Provisional application
>
> 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.
>
> 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.
>
> 3. (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depositary.

(b) In the event that a signatory terminates provisional application pursuant to 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 Depositary of its request therefor."

4.5.2 The principal issue is now the interpretation of the phrase 'to the extent that such provisional application is not inconsistent with its constitution, laws or regulations' (the Limitation Clause) in Article 45(1) ECT. In summary, the positions taken by the parties and the considerations of the Arbitral Tribunal and the Court are as follows.

*b. The position of the Russian Federation*

4.5.3 The Russian Federation takes the view that the issue is whether a separate provision of the ECT (in this case Article 26) is inconsistent with Russian law. The use of the term 'regulations' points to this, because it is not plausible that the *principle* of provisional application would be regulated by 'regulations', rules of a lower hierarchy than statutes. The use of the terms 'to the extent' also indicates this, as these terms are not consistent with an explanation in which the issue is simply whether or not the principle of provisional application is recognised within the state in question. In the latter case 'if' would have been used instead of 'to the extent', but that did not happen. In addition, the Russian Federation relies on the *travaux préparatoires*. In its opinion, the *travuax préparatoires* show that the negotiating states foresaw that the Limitation Clause could lead to partial provisional application of the Treaty, and that national rules of lesser importance could cause those provisions of the Treaty that are inconsistent with this provisional application, to be disregarded. Furthermore, the Russian Federation invokes state practice, including the '1994 EU Joint Statement', which supposedly endorses its position.

*c. The position of HVY*

4.5.4 HVY primarily argue that the issue at stake is whether the principle of provisional application is contrary to Russian law. According to HVY, the Russian Federation ignores the words 'such provisional application' and wants to rewrite the Limitation Clause as follows: "to the extent that ~~such provisional application~~ the Treaty's provisions are not inconsistent with its constitution, laws or regulations". Such a provision was proposed by the Japanese delegation during the Treaty negotiations, but was not accepted. It is impossible for an investor considering investing in a contracting party to assess whether the national laws or regulations of that state contain any provision which is incompatible with a provision of the ECT. On the other hand, it is fairly easy to investigate whether a state is familiar with the principle of provisional application of treaties. In addition, situations of conflicts between ECT provisions and national law are regulated in provisions other than

Article 45(1) ECT. Article 32 ECT contains provisions giving certain states time to adapt their legal regimes to the provisions of the ECT. In the appeal of these setting-aside proceedings, HVY added that even if it should be assumed that the Limitation Clause does not relate to the *principle* of provisional application, the question is in any event whether the *provisional application* of one or more provisions of the ECT is incompatible with national law, not whether any provision of the ECT is in itself inconsistent with national law.

*d. The considerations of the Arbitral Tribunal*

4.5.5 The Arbitral Tribunal considered that the (primary) position of HVY is correct. According to the Arbitral Tribunal, the term 'such' in the phrase 'such provisional application' is crucial. The term 'such' refers to the preceding part, so that what is meant is 'the provisional application of this Treaty', which the Arbitral Tribunal interprets as a reference to 'the entire Treaty'. According to the Arbitral Tribunal, Article 45(1) ECT therefore prescribes an "all or nothing" approach: either the entire Treaty is applied provisionally, or it is not provisionally applied at all. It is therefore a question of whether the *principle* of provisional application is compatible with the national law of a contracting party. An interpretation which would make provisional application conditional on the compatibility of each provision of the ECT with national law would be contrary to the object and purpose of the ECT and contrary to the very essence of international law. If the contracting parties had intended the latter, they would have had to agree this explicitly, but this has not happened.

*e. The considerations of the District Court*

4.5.6 The District Court followed the interpretation of the Russian Federation. The District Court points out that the words 'to the extent' also occur in a number of other authentic language versions of the ECT 'in dem Maβe', 'dans la mesure où') and in the (non-authentic) Dutch version ('voor zover') and reflect a scope or differentiation (para. 5.11). This points more towards the correctness of the interpretation argued by the Russian Federation. The Arbitral Tribunal wrongly attributed decisive meaning to the term 'such'. The use of this term has little meaning, as it is obvious that the term refers to the Treaty; a different interpretation cannot be imagined. This does not say anything about whether provisional application concerns only the Treaty as a whole, i.e. the principle of provisional application, or only parts of it, and thus individual provisions of the Treaty (para. 5.12). On the other hand, the court does consider it relevant that Article 45(1) ECT not only relates the inconsistency of provisional application to 'constitution' and 'laws' but also to 'regulations'. It is inconceivable that a ban on the provisional application of a treaty, given its fundamental nature, would be laid down in delegated legislation (para. 5.13). Contrary to the Arbitral Tribunal, the District Court attaches importance to Article 45(2)(c) ECT which, in almost the same terminology as the Limitation Clause, makes the scope of provisional application dependent on the compatibility of Part VII of the Treaty with (lower) legislation ('laws and regulations'). Article 45(2)(c) ECT concerns the specific treaty provisions in part VII and not the principle of provisional application (para. 5.14-5.15). The District Court does not follow the argument of the Arbitral Tribunal that the interpretation of the Limitation Clause is completely contrary to the object and purpose of the ECT and the essence of international law. The Arbitral Tribunal did not specify the extent to which a limited application of the provisions of the Treaty would be contrary to that purpose. Parties are free to expressly limit the provisional

application of a treaty by referring to provisions of national law (para. 5.19). The District Court does not take state practice into consideration, since none of the parties have asserted that it concerns a (broad) practice that is supported by all the states involved (para. 5.21). There is no ground for the use of the *travaux* to supplement the interpretation of the Limitation Clause, as the interpretation given to it by the District Court does not lead to an ambiguous or obscure meaning, nor to a result that is manifestly absurd or unreasonable (para. 5.22). The District Court also, superfluously, refers to the opinion of Mr Bamberger, Chairman of the Legal Advisory Committee of the European Energy Charter Conference (hereafter: Bamberger), who, in response to a question from the Secretary-General of the ECT Conference, provided the following explanation for the addition of the term 'regulations':

> "the effect is to suggest that relatively minor impediments in the form of regulations, no matter how insignificant they may be, can be the occasion for failing to apply the Treaty provisionally when in fact those regulations could be brought into conformity without serious effort."

4.5.7 With regard to the term 'not inconsistent', the District Court considered that the provisional application of Article 26 ECT is not only contrary to Russian law if this provision is prohibited by that law, but also if such a method of dispute resolution has no legal basis, does not harmonise with the legal system or is irreconcilable with the starting points and principles that have been laid down in or can be derived from legislation (para. 5.33).

*f. The opinion of the Court of Appeal*

4.5.8 In the following, so as to determine the interpretation of the Limitation Clause, the Court of Appeal will scrutinise the following elements of Article 31(1) VCLT: (i) the ordinary meaning of the terms of the Limitation Clause, (ii) the context of those terms and (iii) the object and purpose of the Treaty. Subsequently, the Court of Appeal will discuss (iv) the 'state practice' (Article 31(3)(b) VCLT). Then (v), with reference to these joint elements, the Court of Appeal will determine the interpretation of the Limitation Clause in accordance with the interpretation rules of Article 31 VCLT, during which the Court of Appeal (superfluously) will pay attention to the *travaux préparatoires* at (vi). Subsequently, the Court of Appeal will (at vii) discuss the explanation of 'not inconsistent' in the Limitation Clause. The conclusion follows at (viii).

*(i) The ordinary meaning of the terms of the Limitation Clause*

4.5.9 When determining the meaning of the Limitation Clause, the Court of Appeal takes the starting point that the interpretation of this provision must do justice as much as possible to the ordinary meaning of the terms used in it, not only in the sense that in principle this interpretation may not result in certain words needing to be understood differently than their ordinary meaning indicates, but also that this interpretation may not result in certain words being superfluous or remaining without meaning. "(….) [W]ords must be given effect".[14] The primary position of HVY (and the Arbitral Tribunal), as well as the position of the Russian Federation (and the ensuing decision of the District Court), do not satisfy this criterion.

4.5.10 As far as the primary position of HVY and the opinion of the Arbitral Tribunal are concerned, the District Court rightly pointed out that the words 'to the extent' are not accorded their ordinary meaning in this 'all-or-nothing' interpretation. Indeed, the words 'to the extent' ('in dem Maβe', 'dans la mesure où' in the equally authentic German and French treaty texts) indicate that there are gradations possible to the extent the ECT is not provisionally applicable on grounds of inconsistency with national law, in the sense that certain parts or provisions of the Treaty should be applied provisionally and others should not. The use of those terms is not obvious in the 'all or nothing' approach, where the only issue is whether or not national law recognises the principle of provisional application. HVY and the Arbitral Tribunal explain that the term 'to the extent' is essentially given the meaning of 'if', but that that word is not used. This view of HVY and the Arbitral Tribunal can also be refuted by noting that the Limitation Clause does not contain the word 'principle' (of provisional application) or words of similar purport. If the (primary) position of HVY and the Arbitral Tribunal were correct, it would have been obvious that the Limitation Clause would read: "if the principle of provisional application is not inconsistent with its constitution, laws or regulations", but that formulation (or a similar formulation) has not been used. The District Court also rightly considered that the analysis by the Arbitral Tribunal of the word 'such' adds little, because in any case it is clear that it refers to the provisional application of the ECT. The conclusion of the Arbitral Tribunal that this necessarily refers to 'the entire Treaty' is not supported by the wording of the Limitation Clause (and is not consistent with the words 'to the extent').

4.5.11 On the other hand, the Russian Federation's interpretation accepted by the court is also inconsistent with the wording of the Limitation Clause. HVY rightly point out that in the interpretation of the Russian Federation and the District Court the words 'such provisional application' have no meaning, or a meaning other than that which follows from the ordinary meaning of these words. According to the Russian Federation, the question is whether one or more treaty provisions are inconsistent with national law. If the contracting parties had intended this, it would have been obvious that the Limitation Clause would have read: "to the extent that one or more provisions of this Treaty are not inconsistent with its constitution, laws or regulations", but this is not how the Limitation Clause reads. The wording of the Limitation Clause, as it does read, clearly indicates that the issue is whether 'such provisional application' is irreconcilable with the law of a contracting party.

4.5.12 The alternative assertion of HVY concerning the interpretation of the Limitation Clause is that the question is whether the *provisional application* of any provision of the ECT is incompatible with a rule of national law, not whether any provision of the ECT is in itself contrary to national law. According to HVY, it should be examined whether there are provisions of national law that exclude the provisional application of certain (categories or types of) treaty provisions. HVY refer in this respect to the opinions of Professor Schrijver, Professor Klabbers[16] and Professor Pellet[17], who remark that some countries exclude the provisional application of treaties altogether, but that it is also possible that the exclusion of provisional application relates only to certain types of treaty provisions.

4.5.13 The Court of Appeal observes that this alternative interpretation of HVY does justice to both the words 'to the extent' and 'such provisional application' in accordance with their ordinary meaning. If national law makes provisional application of certain types of provisions of the Treaty impossible, this leads to a limited provisional application, specifically to the extent that the provisions of the Treaty are not covered by that prohibition. This interpretation is also in accordance with the words

'regulations' in 'constitution, laws or regulations'. A large number of states with a variety of legal regimes and legal traditions are party to the ECT. It certainly cannot be excluded in advance that rules that exclude certain (categories of) treaty provisions from provisional application may (in any case in part) be found in regulations of a lower hierarchy than an statute adopted by parliament, for example in (lower) regulations based on such a statute. Until recently, an example of this could be found in Spanish law, where the provisional application of treaties was regulated by a Decree of the Minister of Foreign Affairs until 2014.[18]

4.5.14 The conclusion is that the alternative interpretation of HVY is most consistent with the ordinary meaning of the wording of the Limitation Clause.

*(ii) and (iii) The context, object and purpose of the Treaty*

4.5.15 In accordance with Article 31(2) VCLT, the context of Article 45(1) ECT is in any case comprised by the text of the Treaty, including the preamble and annexes. This context is discussed below, in part with reference to the arguments that the parties have derived from it. In this framework, the Court of Appeal will also pay attention to the interpretation of Article 45(2)(a) ECT, as the parties also disagree on the purport of this provision.

4.5.16 Parties, the Arbitral Tribunal and the District Court paid attention to the meaning of Article 45(2)(a) ECT. Article 45(2)(a) provides:

> "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."

HVY have argued that this provision is an extension of Article 45(1) ECT and that a contracting party which has not made a declaration in accordance with paragraph (2)(a) is not entitled to invoke the Limitation Clause. The Court of Appeal does not endorse this interpretation. The language of neither paragraph (1) nor that of paragraph (2) indicates that paragraph (2) is an elaboration of, or a further condition for, paragraph (1). To the contrary, the term 'notwithstanding' with which paragraph (2) commences indicates that paragraph (2) is intended to derogate from paragraph (1), namely from the primary obligation contained in paragraph (1), which is that the Treaty must be applied provisionally. Incidentally, the Limitation Clause being only able to apply if a state makes the declaration under paragraph (2)(a) is also inconsistent with the wording of the Limitation Clause. As considered above, the words 'to the extent' in the Limitation Clause unequivocally leave open the possibility that only part of the Treaty is applied provisionally, while paragraph (2)(a), which does not use language suggesting a partial provisional application, could hardly be understood differently than that the declaration it refers to excludes provisional application altogether. HVY's interpretation would therefore create a discrepancy between paragraph (1) and paragraph (2)(a), which would be avoided if paragraph (1) and paragraph (2)(a) were considered separately. This leads to the conclusion that the relationship between paragraph (1) and paragraph (2)(a) of Article 45 ECT should be understood as follows: paragraph (1) provides that signatories provisionally apply the Treaty, with the exception of

cases falling within the scope of the Limitation Clause, while paragraph (2) allows states - in particular those not familiar with the principle of provisional application – to prevent any discussion of the scope of the Limitation Clause in an individual case by denouncing provisional application entirely.

4.5.17 This interpretation is also not inconsistent with Article 45(2)(b) ECT, which provides that a state making a declaration as referred to in Article 45(2)(a) ECT cannot benefit from the provisional application in accordance with paragraph (1) and the same applies to the investors of that state. HVY see a discrepancy between paragraph (1), because a state that has not made a declaration in accordance with paragraph (2)(a) supposedly would be able to benefit from provisional application by other states, but could nevertheless, by invoking the Limitation Clause, omit provisional application on its part in whole or in part. This argument does not hold. The emphasis in paragraph (1) is unmistakably on the obligation to apply the Treaty provisionally. The fact that in certain cases an exception can be made on the basis of the Limitation Clause does not affect this primary obligation. This situation is not comparable to the case of Article 45(2)(a) ECT, in which a state categorically excludes provisional application by making a declaration to that effect. Although it is conceivable in theory that a state that is unfamiliar with the principle of provisional application does not make a declaration in accordance with paragraph (2)(a), but in a particular case invokes the Limitation Clause in order to benefit from provisional application by the other contracting parties, this would not be in accordance with the obligation set down in Article 26 VCLT for that state to perform a treaty in good faith. No decisive weight can therefore be attached to that eventuality.

4.5.18 For the interpretation of the Limitation Clause, this context implies that the 'all or nothing' approach (HVY's primary position, the decision of the Arbitration Tribunal) also given its relation to Article 45(2)(a) and (b) ECT is not obvious. If the national law of a signatory does not provide for the principle of provisional application, that state will be able to make the declaration of Article 45(2)(a) ECT and it is not possible to see what additional meaning the Limitation Clause has. Because in the (primary) view of HVY the Limitation Clause hardly has any independent meaning, this explanation is not obvious. The latter might be different if the declaration under paragraph 2(a) would have to be regarded as a condition for invoking the Limitation Clause, but, as held, that interpretation should be rejected.

4.5.19 The District Court also paid attention to Article 45(2)(c) ECT. Article 45(2)(c) reads as follows:

> “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.”

Part VII of the Treaty contains provisions on the powers of the Energy Charter Conference, as well as on the secretariat of, and voting at, an Energy Charter Conference and the costs associated with this conference. The District Court derived an argument from this provision against the primary position of HVY (the 'all or nothing' approach), by considering that Article 45(2)(c) ECT uses virtually the same

words ('to the extent that such provisional application is not inconsistent with its laws or regulations') as the Limitation Clause while, given the context, Article 45(2)(c) ECT cannot pertain to the *principle* of provisional application. The Court of Appeal endorses the judgment of the District Court in this respect. Indeed, it cannot be assumed that Article 45(2)(c) ECT pertains to the principle of provisional application. The fact that Article 45(2)(c) ECT nevertheless uses almost the same wording as in the Limitation Clause then indeed argues against the Limitation Clause referring to this principle.

4.5.20 HVY have also invoked Article 32 ECT. Article 32 ECT ('Transitional arrangements') provides that, "in recognition of the need for time to adapt to the requirements of a market economy", certain contracting parties may temporarily suspend compliance with certain of their Treaty obligations, mentioned in Article 32(1), provided that specific conditions are taken into account. HVY argue that the situation in which inconsistencies arise between the ECT provisions and national law is regulated in Article 32 ECT. By virtue of Article 32 ECT a state must disclose which provisions of the ECT it wishes to suspend. According to HVY, the carefully negotiated mechanism of Article 32 ECT is not compatible with an interpretation of Article 45(1) ECT following which a signatory does not have to apply one or more treaty provisions during the period of provisional application without disclosing this to the other states and investors.

4.5.21 This argument does not hold. Article 32 ECT unmistakably pertains to a different situation than Article 45(1) ECT. Article 32 ECT provides states that have to adapt to the requirements of a market economy with the possibility of suspending their obligations under a number of specific Treaty provisions temporarily (in principle until no later than 1 July 2001) and subject to certain conditions. Article 45(1) ECT, on the other hand, applies during the period in which a state must provisionally apply the Treaty and allows an exception to that obligation only if provisional application of a Treaty provision is incompatible with the internal laws of that state. Accordingly, the two provisions are not comparable either in their scope or in their objectives, which means that no conclusions can be drawn from Article 32 ECT with regard to the interpretation of Article 45(1) ECT.

4.5.22 HVY argue that, in the interpretation of the Russian Federation and the District Court, it will be unclear to a potential investor considering investing in a state that is provisionally applying the ECT, which parts of the Treaty that state is not applying due to their incompatibility with internal laws. According to HVY, it is impossible for an investor to investigate all laws and regulations of the envisaged host state for possible conflicts with provisions of the Treaty. According to HVY, this lack of clarity runs counter to the ECT's objective of attracting investment by providing a stable and secure investment environment and by promoting transparency, legal certainty and investment protection. This disadvantage does not, or does to a much lesser extent, attach to their own (primary and alternative) interpretation, as it is easy to ascertain what the laws and regulations of the host country entail in respect of the provisional application of treaties.

4.5.23 In its assessment of this argument, the Court of Appeal takes the following context into account. The Preamble of the ECT includes the following:

> "Wishing to implement the basic concept of the European Energy Charter initiative which is to catalyse economic growth by means of measures to liberalize investment and trade in energy."

Article 2 ECT ('Purpose of the Treaty') reads as follows:

> "This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."

4.5.24 The recitals of the European Energy Charter 1991, referred to in the 'Preamble' of the ECT and Article 2 ECT, include, inter alia:

> "Recognising the role of entrepreneurs, operating within a transparent and equitable legal framework, in promoting cooperation under the Charter."

Chapter II ('Implementation') of the European Energy Charter 1991 under 4 ('Promotion and protection of investments states:

> "In order to promote the international flow of investments, the signatories will at national level provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade."

4.5.25 Part III of the Treaty, which is entitled 'Investment Promotion and Protection', contains provisions aimed at protecting investors and their investments in another contracting party, such as Article 13 ('Expropriation') and Article 14 ('Transfers related to investments'). More specifically, Article 10 ECT, which features in Part III, provides:

> "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its area. (....)."

4.5.26 The context of Article 45 ECT presented above shows that one of the aims of the ECT is to stimulate investment in the energy sector, inter alia, by providing stable and transparent investment conditions. The fact that the Treaty must be applied provisionally implies that the contracting parties intended that the obligation to create such investment conditions would arise immediately upon signature. Against this background, the interpretation of the Limitation Clause defended by the Russian Federation is less compatible with the objective of the Treaty than HVY's (primary or alternative) interpretation. The interpretation of the Russian Federation would result in the situation where an investor considering investing in a state provisionally applying the ECT always has to take into account that the provisions of the ECT, including those aimed at protecting its investment, are impaired by national laws and regulations, for example by the regulations of local or regional authorities. It is practically impossible for such an investor, even if he seeks legal advice, to assess whether the laws of the state in which it wishes to invest deviate from the ECT in any manner. This is not in line with the transparent investment conditions the Treaty pursues. This could after all lead the

investor to abandon its planned investment, which would be contrary to the ECT's objective of encouraging investment from the moment of signing of the Treaty. It must be noted here that the period during which the Treaty may be provisionally applied by a state is in principle unlimited, and thus the Treaty may be provisionally applied for a considerable period of time, even aside from the 'remaining in effect' of twenty years of certain parts of the ECT for states which have not renounced this (Article 45(3)(b) ECT). The lack of clarity identified above could therefore persist for a longer period of time.

4.5.27 HVY's primary and alternative positions on the interpretation of the Limitation Clause are not disadvantaged by such a lack of clarity. It may be assumed that, with the help of expert legal advice, a potential investor can ascertain relatively easily what the national rules on provisional application of treaties are in the country in which it is considering to invest and to what extent they preclude provisional application of the ECT. Contrary to what the Russian Federation argues, it is irrelevant for the interpretation of Article 45(1) ECT whether HVY could have easily determined in this specific case whether or not arbitration under Article 26 ECT is contrary to Russian laws and regulations. What is relevant is that there are numerous conceivable situations in which a possible conflict between the provisions of the ECT and national law would not be identifiable in a relatively simple manner. That thus speaks against the interpretation of the Russian Federation.

*(iv) 'state practice' (Article 31(3) VCLT)*

4.5.28 Pursuant to Article 31(3) VCLT, when interpreting a treaty provision, account must be taken of:

> "(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;"

(hereinafter for the sake of brevity: 'state practice'). Both parties have relied on state practice in support of their assertions. The District Court disregarded these, because attributing significance to state practice is subject to the condition that this subsequent practice is evidence of an agreement on the interpretation of the Treaty between the parties, but it has not been established or demonstrated that there is a (broad) practice supported by all states involved (para. 5.21). HVY have not filed a grievance against this finding. However, the Russian Federation is of the view that state practice supports the District Court's interpretation, as it argues there is a broad consensus on the interpretation of Article 45(1) ECT. In this regard, the Russian Federation refers to the many declarations made by states under Article 45(2) ECT and to the Defence on Appeal nos. 108-121, the Writ of Summons nos. 155-170 and the Statement of Reply nos. 92.

4.5.29 In the Writ of Summons (no. 160), the Russian Federation specifically referred to the position of Finland (as evidenced by the bill to ratify the ECT and a memorandum of November 1994) and the European Union (in a joint declaration by the EU and its Member States of 15 and 16 December 1994, the '1994 EU Joint Statement'), a declaration by the European Commission of 21 September 1994 and a declaration by the 'Council of Europe' (apparently this is a reference to: the European Council) of 13 July 1998. However, it does not appear that these are declarations of parties (or signatories) that have been accepted by the other parties to the ECT and the Russian Federation does not substantiate this

further. In addition, although these statements do provide some support for the assertion that the 'all or nothing' approach (HVY's primary position) was not shared by these countries or institutions, it cannot be inferred from this that HVY's subsidiary position was considered incorrect as well. The passage appearing in the 1994 EU Joint Statement:

> "(a) it [Article 45(1) ECT, Ct] does not create any commitment beyond what is compatible with the existing internal legal order of the Signatories"

is compatible both with the position of the Russian Federation and with the alternative position of HVY. This also applies to the declaration made by Italy mentioned in the Writ of Summons under No 169. Only the Finnish Government's proposal to its Parliament[19] endorses the Russian Federation's interpretation, but it does not follow as such that this interpretation was also accepted by other contracting parties.

4.5.30 The same applies to the statements by the European Commission and the European Council cited by the Russian Federation. To the extent that the Russian Federation further asserts that several signatories of the Convention have not made a declaration under Article 45(2)(a) ECT that they do not accept provisional application but nevertheless consider themselves entitled to apply only those provisions of the ECT which are consistent with their internal laws and regulations, the Court of Appeal does not need to address this point. As held above, and – as will become apparent below – as the *travaux préparatoires* confirm, it is not necessary for a signatory to have made a declaration pursuant to Article 45(2)(a) ECT. This is in line with the position of the Russian Federation, which is shared by the Court of Appeal in this respect. The same applies to the relevant passage from the joint declaration of the European Union.

4.5.31 In its Defence on Appeal, the Russian Federation firstly invoked an expert report by Professor Heringa[20], who concluded on the basis of documents drawn up by Dutch civil servants at the time that (i) the Netherlands was relying on the Limitation Clause, (ii) assumed that it would provisionally apply only part of the Treaty and (iii) took the view that no prior declaration was required for invoking Article 45(1) ECT. A number of passages from these documents are quoted in the Defence on Appeal. However, here too it is the case that the opinion of Dutch civil servants, aside from the fact that this does not evidence any treaty practice accepted by other contracting parties, may run counter to HVY's primary position, but does not give a definite answer to the question of whether HVY's alternative position or the position of the Russian Federation was shared. The conclusion of Professor Heringa in § 34:

> "My conclusion is both that the scope of Article 45 ECT as an instrument of provisional application is limited by the degree of inconsistency with national law, both under Dutch law, as well as from the perspective of the Dutch negotiators and from the EU perspective. Both Article 45 ECT and Dutch constitutional law do the same, namely assume that provisional application will have been applied only where this is permitted under national constitutional law, so that for the Netherlands this provision made the treaty fully in conformity with national law."

is compatible with both views.

4.5.32 The Russian Federation refers to comments made by certain countries (the United States, Italy, the United Kingdom, Finland and Japan) during the ECT negotiations. However, such observations do not qualify as state practice but as *travaux préparatoires*, for which Article 32 VCLT contains a separate regulation and to which the Court of Appeal will return below. Therefore, these comments do not belong in a discussion of the rules of interpretation prescribed by Article 31(3) VCLT. It should also be noted that these comments in essence show that provisional application of *parts* of the Treaty was considered, a view compatible both with the position of the Russian Federation as with the alternative position of HVY.

*(v) The interpretation of the Limitation Clause in accordance with the interpretation rules of Article 31 VCLT*

4.5.33 On the basis of the foregoing considerations, the Court of Appeal concludes that, out of the three options advanced by the parties in this case, HVY's alternative position with regard to the interpretation of Article 45(1) ECT is, on the basis of the arguments set out above, most consistent with the ordinary meaning of the terms of the Limitation Clause and with the context and the object and purpose of the Treaty. An established state practice in the sense of Article 31(3) VCLT has been insufficiently shown, but in so far as this may be the case, it at most contradicts the primary but not the alternative position of HVY. This means that the Limitation Clause should be understood to mean that a signatory which has not made the declaration referred to in Article 45(2)(a) ECT is bound to apply the Treaty provisionally, except to the extent that provisional application of one or more provisions of the ECT is inconsistent with national law in the sense that the laws or regulations of that state preclude provisional application of the Treaty for certain provisions of the Treaty (or types or categories of provisions). Accordingly, the Limitation Clause cannot be invoked if a provision of the ECT is in itself contrary to any rule of national law.

*(vi) Article 32 VCLT; the travaux préparatoires*

4.5.34 The interpretation thus established by the Court of Appeal in accordance with Article 31 VCLT does not leave the meaning of Article 45(1) ECT or the Limitation Clause ambiguous or obscure. Nor can it be said that this interpretation leads to a result that is manifestly absurd or unreasonable. There is therefore no reason to apply the supplementary rules of interpretation in Article 32 VCLT, for example by consulting the *travaux préparatoires*.

4.5.35 Superfluously, the Court of Appeal holds that the *travaux préparatoires* confirm its judgment regarding the interpretation of Article 45(1) ECT. In this respect the Court of Appeal considers it particularly relevant that the Limitation Clause, which was initially lacking in the clause that stipulated that the Treaty (then still referred to as the 'Basic Protocol') had to be applied provisionally, was added at the instigation of the United States. According to a document dated 2 August 1991 from the ECT Conference Secretariat[21], it was submitted on behalf of the United States:

" "Provisional" application of the Protocol is not possible in the U.S., where a treaty or legislation is required before such a document can come into force.

This could be fixed with: “to the extent that their laws allow or some similar language." "

At a meeting on 14 December 1993[22], a representative of the United States of America remarked:

"Mr Chairman, my delegation does not have quite the same difficulty as some other delegations do with the concept of provisional application. We have no *a priori* opposition in principle to the concept in appropriate cases.

(….)

Quite apart from the question of the ultimate resolution of whether there should be institutions, the difficulty of participating of the financing of a provisional organization is particularly acute for the United States. We cannot under our law do it for more than a certain period and so, certainly, we could not provisionally apply the Treaty in respect to the United States in that connection."

In a letter (by fax) of 24 February 1994 to the ECT Conference[23] a representative of the United States further commented on a draft for a separate agreement on the provisional application of the ECT which was circulating at that time:

"As I noted during the last plenary, we do not have any legal difficulty with provisional application per se, so long as it is carefully qualified to ensure that no party is obliged to do, or refrain from doing, anything for which that party’s constitution or law requires an appropriately ratified treaty. Our law, for example, generally speaking prohibits expenditure of funds to pay the U.S. share of the expenses of an international organization absent the express approval of the Congress. For such reasons language along the lines of “to the extent permitted by its constitution or laws" is essential to any provisional application obligation; such language is conspicuously absent from the draft text."

4.5.36 Italy notified the European Energy Charter Conference[24] on 27 July 1994:

"Italy cannot consent to the provisional application of the Treaty since Article 80 of the Italian Constitution lays down, inter alia, that international treaties which provide for arbitration, confer judicial powers or impose financial burdens must be ratified by Parliament."

Japan made the following comment in response to a document from the ECT Secretariat dated 8 March 1994[25]:

> "We have a constitutional problem in relation to paragraph (2) of CONF 91, which lacks the phrase "in accordance with their laws and regulations". We cannot apply Article 37 of Part VII unconditionally after signature, because our domestic legislation prohibits the Japanese Government from committing itself beyond its competence to make payments regarding treaties which have not yet been concluded."

4.5.37 This overview shows that the provision, which eventually became the Limitation Clause, was included because the constitution of some states did not allow these states to provisionally apply certain obligations contained in the ECT (obligations of a financial nature, arbitration). These states could only be bound by such provisions by means of a ratified treaty. These states did not suggest that obligations to contribute financially to an international organisation, or to bind themselves to dispute resolution through arbitration, would by themselves be contrary to their internal laws and regulations; they merely could not commit to these obligations by means of a provisionally applicable treaty. It is particularly striking that the United States pointed out that, without a ratified treaty, it could only contribute to the financing of a (new) international organisation *for a limited period of time*. This highlights that, at least for the United States, Japan and Italy, the problem lay in the provisional application, which was subject to certain limitations in their national laws. Moreover, the *travaux* do not give sufficiently clear indications that the states participating in the negotiations related the Limitation Clause to an inconsistency between certain obligations contained in the Treaty and their national law. This also applies to Bamberger's comments to be discussed below.

4.5.38 In its judgment (para. 5.22), the District Court attached importance to the answer given by Bamberger to a question from the chairman of the conference on 7 March 1994. The chairman asked Bamberger whether it was necessary to include the word 'regulations' in Article 45(1) ECT. Bamberger answered:

> "Chairman, we've heard this question arise in a number of contexts. In one context, the Legal Sub-Group suggested that "in accordance with its law", in the singular, was sufficiently broad to cover the constitutional, statutory and regulatory laws of a country, but of course it does depend on the context. It seems that this desire, however, to specify "regulations" does arise often, and apparently it is because it is not, because some negotiating Parties are, do not consider that it is clear from the reference, so I am hesitant to try to give overly authoritative advice on something that really is probably very dependent on context.
>
> **Chairman Jones**: May I put the question the other way around? Is there any harm in including the word "regulations"? I mean, for clarity, if a number of people are unsure, let's include it I suppose?
>
> **Mr Bamberger**: Well of course, Chairman, the effect is to suggest that relatively minor impediments in the form of regulations, no matter how insignificant they may be, can be the occasion for failing to apply the Treaty provisionally when in fact those regulations could be brought into conformity without serious effort. On the other hand, one can argue that the word "laws" would cover regulations, but it simply doesn't put as much stress on the regulatory aspect, and so it is less likely to be viewed that way."[26]

This discussion first of all reveals that the discussion in the 'Legal Sub-Group' about the inclusion of the word 'regulations' had not led to a clear outcome and that it was ultimately decided to include the term in the text of the Limitation Clause for the sake of completeness, but without any compelling necessity being perceived. Furthermore, it appears that when Bamberger noted that the term 'regulations' raises the suggestion that 'relatively minor impediments' might stand in the way of the provisional application of the Treaty, he was expressing his expert view as to what that term suggests. It does not show that the word 'regulations' was included in the text of the Treaty *because* it was considered desirable to have less important inconsistencies with national law also prevent provisional application. Moreover, it is clear that Bamberger spoke on his own behalf as an expert lawyer and not on behalf of the members of the 'Legal Sub-Group'. Against this background, Bamberger's remark is not decisive for the interpretation of the Limitation Clause. To sum up, the quoted passage confirms that the addition of the word 'regulations' was based on the desire to be as complete as possible in the reference to national law, but that it was not based on any more profound considerations.

4.5.39 The *travaux préparatoires* further confirm that the Limitation Clause is not about whether a contracting party is familiar with the *principle* of provisional application. The *travaux* contain no indication that the negotiators thought of this. On the contrary, the United States, which initiated the Limitation Clause, stated to have no issues with the principle of provisional application. There were states that had problems with the principle of provisional application, but they insisted on the inclusion of Article 45(2)(a) ECT (see below).

4.5.40 Finally, the *travaux préparatoires* confirm that making a declaration in accordance with Article 45(2)(a) ECT is not a condition for invoking the Limitation Clause. After all, the *travaux* (as reflected, among others, in the opinion of Professor Schrijver of 8 March 2017[27]) show that the opt-out provided for in Article 45(2)(a) ECT was only added at a relatively late stage, after drafts for Article 45(1) ECT had been circulating for some time, in order to enable a number of states, which, despite the Limitation Clause, continued to have issues with provisional application of the Treaty, to renounce provisional application altogether by submitting a declaration to the Depositary. This confirms that Article 45(2)(a) ECT was seen as an additional possibility for avoiding provisional application and not as a condition for invoking the Limitation Clause.

*(vii) The meaning of 'not inconsistent'*

4.5.41 The meaning of the words 'not inconsistent' follows from the Court of Appeal's interpretation of the Limitation Clause. This interpretation concerns whether national laws or regulations exist that exclude provisional application for certain treaty provisions, or types or categories of such provisions. If the latter is the case, provisional application of those treaty provisions, or types or categories of such provisions, is 'inconsistent' with national law.

4.5.42 The parties also debated the question of how 'inconsistent' should be interpreted if the interpretation of the Limitation Clause of the Russian Federation should be followed, according to which the interpretation is whether a provision of the ECT is in itself not inconsistent with any rule of national law. The District Court took this interpretation as its starting point and in that context devoted

considerations to the interpretation of the term 'inconsistent', which HVY challenged on appeal. Considering that the Court of Appeal will in the following - superfluously - examine whether, assuming the interpretation given by the Russian Federation to the Limitation Clause, the provisional application of Article 26 ECT is inconsistent with the 'constitution, laws or regulations' of the Russian Federation, the Court of Appeal will now discuss the interpretation given by the District Court to the term 'inconsistent' and the grounds of appeal that HVY have directed against it, in light of the interpretation of the Limitation Clause in accordance with the position of the Russian Federation.

4.5.43 The District Court assessed (in para. 5.33) whether the provisional application of the arbitration clause of Article 26 ECT 'is in accordance with the Russian Constitution, laws or other regulations'. It rejected HVY's view that Article 26 ECT is incompatible with Russian law only if that treaty provision is prohibited and that there is no inconsistency if Russian law does not expressly provide for that treaty provision. The District Court held that inconsistencies can also be considered to rise when such a method of dispute resolution has no legal basis, does not fit into the legal system, or is not compatible with the principles and points of departure laid down in, or knowable from the laws of the Russian Federation. In doing so, the District Court attached importance to the fact that provisional application finds its legitimacy in the signing of the Treaty and that the sovereignty of the signatory parties is at stake in a number of provisions. In para. 5.41, the District Court considered that there even may be an inconsistency with Russian law if that law does not itself provide for the possibility of arbitration as provided for in Article 26 ECT. In para. 5.51, the District Court considered that Article 9(1) LFI 1991 does not provide an 'independent legal basis' for settling disputes between an investor and a state through international arbitration as provided for in Article 26 ECT. In para. 5.58, the District Court comes to the same conclusion with regard to Article 10 LFI 1999.

4.5.44 HVY are contesting this decision on appeal. According to HVY, 'inconsistent' with implies 'incontrovertible inconsistency' (Statement of Appeal no. 407) and the District Court wrongly looked for an 'independent legal basis'. According to HVY, two provisions are 'inconsistent' if they cannot be applied simultaneously (Statement of Appeal no. 385), that is to say, where the application of one provision results in a breach of the other (Statement of Appeal No. 389), also referred to as the 'impossibility of joint compliance' (Statement of Grounds of Appeal No. 393). In the Deed of 26 February 2019, HVY clarified this by stating that an explicit prohibition under national law is not necessarily required (No. 151).

4.5.45 The Russian Federation takes the view that the question of whether 'inconsistent' means that there must be an *undeniable* inconsistency cannot be addressed in these proceedings, as HVY did not advance such an argument in the arbitration (Defence on Appeal no. 374). As it happens, there is an undeniable conflict between Article 26 ECT and Russian law (Defence on Appeal No. 375). The District Court responded to the position that HVY had taken in first instance (and that they apparently abandoned again on appeal), which entails that Article 26 ECT is only 'inconsistent' with national law if a provision of national law explicitly prohibits such arbitration. That position was rightly rejected by the District Court (Defence on Appeal No 377). It is correct that 'inconsistent' requires an inconsistency with national law, not that there must be *undeniable* inconsistency (Defence on Appeal no. 378). An inconsistency with national law also arises when there is no specific legal provision, but there is inconsistency with the legal system, in which regard general principles under constitutional law, such as the separation of powers and the primary authority of the federal legislation are also

important (Defence on Appeal no. 381). Moreover, the Russian Federation is of the view that the discussion about the words 'not inconsistent with' is meaningless, because all kinds of explicit statutory provisions show that arbitration of the claims of HVY is manifestly inconsistent with Russian law (Deed of 25 June 2019 No. 120).

4.5.46 The Court of Appeal observes that the parties essentially agree that the test to be applied for the purposes of the Limitation Clause (interpreted in accordance with the position of the Russian Federation) is whether a particular treaty provision is *inconsistent* with a provision of national law. The Court of Appeal endorses this principle. HVY are no longer maintaining the position taken by them in the Statement of Appeal, that this inconsistency must be *incontrovertible*; that position is also incorrect, as the Limitation Clause does not impose that requirement, nor is it contained in the use of a double negation ('not inconsistent'). The Court of Appeal holds that the question of 'inconsistency' cannot be answered in a general sense, but depends on the specific context of the relevant ECT provision and national law. An 'inconsistency' will in any event arise when an ECT provision and a particular rule of national law cannot be applied simultaneously because the application of one rule brings about the violation of the other. Based on the opinions of Professor Schrijver and Professor Klabbers[28] and the case law cited there, from which the experts of the Russian Federation have not distanced themselves, and in accordance with the decision of the arbitral tribunal in the Yukos Capital case[29], the court is of the view that this criterion is in accordance with generally accepted standards of international law for situations concerning priority between two conflicting treaty provisions.[30] The fact that this case law relates to treaties other than the ECT and to conflicts between different treaty standards and not to conflicts between a treaty norm and national law, does not detract from its importance in the interpretation of the concept of 'inconsistency' in Article 45(1) ECT. This does not exclude the possibility that, as considered above (para. 4.5.45), there may also be an inconsistency within the meaning of Article 45(1) ECT in cases other than where a treaty norm and a rule of national law cannot be applied simultaneously without the application of one rule bringing about a violation of the other, for example if an ECT provision is incompatible with a generally accepted view on the law in the state concerned.

4.5.47 As noted, the District Court held that Article 26 ECT is 'inconsistent' with national law even if such a method of dispute resolution has no legal basis in Russian law. Additionally, the District Court held that incompatibility with Russian law may exist even if that law does not itself provide for the possibility of arbitration as provided for in Article 26 ECT. Applying this criterion, the District Court then held that Article 9(1) LFI 1991 does not provide an 'independent legal basis' for arbitration between HVY and the Russian Federation and in para. 5.58 that the same applies to Article 10 LFI 1999 (para. 4.5.43 above). HVY rightly contest this decision of the District Court. The text of Article 45(1) ECT does not provide any basis for this interpretation, nor does it follow from the context of the Treaty. On the contrary, the District Court's judgment means that the ECT provisions can only be provisionally applied if there is already a legal basis for this in national law. This would deprive the provisional application of Article 45(1) ECT of much of its practical use and would not be consistent with the desire expressed in that provision by the contracting parties to provisionally apply the ECT to the furthest extent possible. In so far as the District Court has attached importance to the circumstance that the signatories' sovereignty is at stake by way of a number of the provisions of the ECT (para. 5.33), this is incorrect. It is unclear why that circumstance would influence the interpretation of the

term 'inconsistent' in the Limitation Clause. After all, it is part and parcel of a treaty that it restricts a state's sovereignty to a certain extent, and this also applies when a state applies a treaty provisionally.

*(viii) Conclusion on the interpretation of the Limitation Clause in Article 45(1) ECT and of 45(2)(a) ECT*

4.5.48 It must be concluded that the Limitation Clause is to be interpreted as meaning that a signatory which has not made the declaration referred to in Article 45(2)(a) ECT is obliged to apply the Treaty provisionally except to the extent that provisional application of one or more provisions of the ECT is contrary to national law, in the sense that the laws or regulations of that state preclude the provisional application of treaty provisions or types or categories of such provisions. This interpretation corresponds with that of the arbitral tribunal in the Yukos Capital case.[31] On the basis of the Russian Federation's interpretation of the Limitation Clause, there is 'inconsistency' within the meaning of Article 45(1) ECT in any event if a treaty provision and a particular rule of national law cannot be applied simultaneously because the application of one rule brings about the violation of the other. Whether, besides this, an 'inconsistency' also exists depends on the specific context of the legislation at issue. In any event, there is no 'inconsistency' if national law does not provide a basis for, or does not provide for, the relevant provision of the ECT.

## 4.6 (vi) Application of Limitation Clause in this case (based on the Court of Appeal's interpretation of that provision)

4.6.1 Taking the interpretation of Article 45(1) ECT as accepted by the Court of Appeal in para. 4.5.48 above as a starting point, the Court of Appeal decides that the provisional application of the ECT is not inconsistent with the 'constitution, laws or regulations' of the Russian Federation. It has not been asserted or evidenced that Russian law comprises a rule that precludes the provisional application of Article 26 ECT. Art 23(1) FLIT reads:

> "An 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."

It follows that this provision does not comprise any limitation as to the treaty provisions, or types or categories of such provisions, that can be applied provisionally. The Russian legal scholars Osminin[32] and Karzov[33] confirm that there are no restrictions on the provisional application of treaties that have to be ratified. Nothing else follows from Article 23(2) FLIT, to which the Court of Appeal will return below in a different context, because it does not contain a restriction with regard to the nature of the provisions that may or may not be applied provisionally. This means that the Russian Federation was obliged to apply Article 26 of the ECT provisionally and that the District Court wrongly decided otherwise. To that extent, HVY's grounds of appeal are successful.

4.6.2 Nevertheless, the Court of Appeal will examine, superfluously, whether Article 26 of the ECT is inconsistent with any provision of the law of the Russian Federation, on the basis of the interpretation given by the Russian Federation and the District Court to the Limitation Clause.

**4.7 (vii) Application of the Limitation Clause in this case (based on the Russian Federation's interpretation of that provision)**

4.7.1 The Russian Federation put forward the following three independent grounds which, in its view, lead to the conclusion that arbitration about HVY's claims is inconsistent with Russian law (Defence on Appeal, no. 153):

(a) it is inconsistent with the principle of the separation of powers enshrined in Russia's (constitutional) law if the Government, on behalf of the Russian Federation, were to unilaterally agree to the provisional application of Article 26 ECT; treaties containing arbitration clauses must be ratified;

(b) under Russian law, disputes concerning powers under public law, such as tax and expropriation disputes, cannot be submitted to arbitration;

(c) under Russian law, shareholders are not entitled to bring an action in consequence of a reduction in the value of their shares on account of damage caused to the company.

4.7.2.1 The Court of Appeal understands the argument of the Russian Federation is that, on these grounds, Article 26 ECT is inconsistent with its 'constitution, laws or regulations' within the meaning of Article 45(1) ECT (Defence on Appeal, no. 184), and that it does not argue that the person who has signed the Treaty on its behalf, even apart from Article 45(1) ECT, has exceeded his/her competence by signing a treaty that is to be applied provisionally. This would also be inconsistent with the undisputed fact that the Russian Federation has applied the ECT provisionally, at least in part, for many years.

4.7.2.2 At first instance, the Russian Federation also put forward the following arguments. Article 2(c) FLIT explicitly states that signature of a treaty shall only be considered as consent of the Russian Federation to be bound by a treaty "if the treaty provides that signature shall have that effect." According to the Russian Federation, the ECT does not contain a provision to that effect.[34] This argument fails because Article 45(1) ECT does definitely contain such a provision. It provides that '[e]ach signatory', i.e. any state that signed the Treaty, agrees to apply the Treaty provisionally.

4.7.3 Although the District Court did not address ground (c), the Court of Appeal must decide on it in connection with the devolutive nature of the appeal and will discuss this ground in this chapter on inconsistency with Russian law, given its coherence.

*(a) The separation of powers*

4.7.4 The Russian Federation's position (as set out, inter alia, in the Defence on Appeal, nos. 154-184) on this point can be summarised as follows. The Constitution is explicitly based on the principle of the separation of powers. The powers of the executive branch are limited by the Constitution and federal legislation, and the powers of the government in entering into treaty obligations are limited. Treaties derogating from the law must be ratified by a federal law, and without ratification, a treaty does not take precedence over federal laws. This follows from Article 12 of the 1978 Law 'On the Procedure for the Conclusion, Performance and Denunciation of International Treaties of the USSR', as well as from Article 6(2) and (15) of the FLIT. Therefore, the Russian government can only introduce general arbitration rules if there is an adequate legal or constitutional basis for such rules. Provisional application of a treaty that derogates from federal law requires parliamentary consent. The Government cannot independently take powers from the judiciary and allocate them to third parties. The power of the government to agree to the provisional application of a treaty is explicitly limited, since Article 23(2) FLIT stipulates that a decision to provisionally apply treaties that derogate from federal laws for more than six months requires parliamentary consent. Only ratified treaties take precedence over federal laws, according to the Russian Federation.

4.7.5 The Russian Federation's argument is based on the premise that Article 26 ECT constitutes a form of dispute resolution that derogates from or supplements the federal laws of the Russian Federation. The findings below with regard to the second basis (referred to above in para. 4.7.1 under (b)) will show that this premise is incorrect. These findings will show in particular that Article 9 LFI 1991 and Article 10 LFI 1999 allow international arbitration on investment disputes in so many words. This means that basis (a) fails for that reason alone. However, the Court of Appeal will also consider whether basis (a) succeeds if it is assumed that Article 26 ECT constitutes a form of dispute resolution that indeed derogates from or supplements the federal laws of the Russian Federation.

4.7.6 The Russian Federation's position is essentially that the possibility of provisionally applying a treaty is limited in the sense that treaties that derogate from or supplement federal law, or at least the provisions thereof that constitute such a derogation or supplement, cannot be provisionally applied.

4.7.7 With regard to the provisional application and ratification of treaties of the Russian Federation, the following is provided for in the Constitution and the FLIT. It is important to note that the Russian Parliament has two houses: the State Duma and the 'Council of Federation' (also known as the 'Federation Council').

Article 15(4) of the Constitution reads:

> "Universally recognized principles and norms of international law as well as international agreements of the Russian Federation shall be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied."

Article 106 of the Constitution provides:

"Federal laws adopted by the State Duma on the following issues must compulsorily be examined by the Council of Federation:

(…)

d) ratification and denunciation of international treaties of the Russian Federation."

Article 15 FLIT provides, inter alia:

"1. The following international treaties of the Russian Federation shall be subject to ratification:

a) international treaties whose implementation requires modification of existing legislation or the enactment of new federal laws, or that set out rules different from those provided for by law;

2. An international treaty shall likewise be subject to ratification if the parties have agreed to subsequent ratification when concluding the international treaty."

Article 17 FLIT ('Decisions to ratify international treaties of the Russian Federation') provides, inter alia:

"1. The State Duma shall consider proposals for the ratification of international treaties and, after preliminary discussion in committees and commissions of the State Duma, make relevant decisions.

Federal laws adopted by the State Duma for the ratification of international treaties of the Russian federation shall be subject, in accordance with the Constitution of the Russian Federation, to mandatory consideration in the Federation Council."

Article 23 FLIT ('Provisional application of international treaties by the Russian Federation') reads:

"1. An 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.

2. Decisions on the provisional application of a treaty or a part of a treaty by the Russian Federation 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.

If an international treaty - the decision on the acceptance of the binding character of which in respect of the Russian Federation is, under this Federal Law, to be passed in the form of a Federal Law - provides for the provisional application of a treaty or a part thereof, or if an agreement as to such provisional application was reached among the parties in some other manner, then this treaty shall be submitted to the State Duma within six months from the start of its provisional application.

The term of provisional application may be prolonged by way of a decision taken in a form of a federal law according to the procedure set out in Article 17 of this law for the ratification of international treaties.

3. Unless the international treaty otherwise provides, or the respective States otherwise agree, the provisional application of a treaty by the Russian Federation or a part thereof shall be terminated upon notification to the other States that apply the treaty provisionally of the intention of the Russian Federation not to become a party to the treaty."

4.7.8 The fact that the ECT must be ratified in order to enter into force is not in dispute, this already follows from Article 39 ECT. That the Russian Federation has not ratified the ECT is also a fact. The ECT was submitted to the Duma on 26 August 1996 but has not been ratified.

4.7.9 The FLIT entered into force on 21 July 1995, therefore after the Russian Federation had signed the ECT. This Act does not contain any transitional provisions. The Russian Federation takes the position that only Article 23(2) FLIT has been granted retroactive effect. The Russian Federation further argued that at the time the ECT was signed there was no specific legal or constitutional regulation on the provisional application of treaties and that before the FLIT entered into force, it was necessary to verify, based on general legal or constitutional provisions, whether the Government had the power to agree unilaterally to provisionally apply a treaty on behalf of the Russian Federation (Defence on Appeal, no. 171).

4.7.10 The Court of Appeal takes as a starting point that at the time of Russian Federation's signing of the ECT, in so far as relevant in this matter, and with the exception of Article 23(2) FLIT, no substantially different rules applied than those currently laid down in the FLIT. There are no indications that this law introduced new rules in the field of the provisional application of treaties. Rather, it is plausible that in the area of provisional application the FLIT intended to seek alignment with previously existing practice. This practice meant that treaties were broadly applied on a provisional basis and that this was also the case with treaties that contained derogations from existing legislation (see paras. 4.7.15-4.7.16 below). The Russian Federation has been a party to the VCLT since 1986.[35] Article 25 VCLT regulates the provisional application of treaties; paragraphs 1 and 2 of that Article 25 are identical in substance to Article 23(1) and (3) FLIT respectively. Pursuant to Article 15(4) of the Constitution, the treaties of the Russian Federation are an integral part of its legal system. Article 25 VCLT was thus already part of the Russian legal order before the entry into force of the FLIT.

4.7.11 In addition, the FLIT entered into force before the ECT was submitted to the State Duma on 26 August 1996 and thus before the ratification process had properly begun. The time of entry into force of the FLIT is also before the time that HVY addressed its request for arbitration to the Russian Federation, thus indicating that it accepted the offer of arbitration contained in Article 26 ECT. Therefore, the Court of Appeal cannot but conclude that the FLIT is applicable to the question at issue here, i.e. whether the provisional application of the ECT, despite the fact that the ECT has not been ratified by the Russian Federation, entails that the Russian Federation is bound by the arbitration clause of Article 26 ECT.

4.7.12 In addition, to the extent that the FLIT contains even fewer limitations on the provisional application of treaties than those that applied before its entry into force, the FLIT must be applied on the basis of the principle that a state is free to remove national obstacles that preclude or limit provisional application at the time of signing a Treaty, but not to introduce new obstacles.[36] Implementation in good faith of the treaty in question then entails that the old limitation is not invoked against the other states or, as in this case, against investors who have been granted certain rights by the Treaty (such as Article 26 ECT), but that the new more favourable regime is applied. It is in line with this principle that the question of whether a valid arbitration agreement has been concluded because HVY addressed a request for arbitration to the Russian Federation in 2004 will be assessed on the basis of the situation existing at that time (in so far as this is more favourable to HVY than at the time the ECT was signed by the Russian Federation). Therefore, in so far as it must even be held that there was a period between the time of the signing of the ECT and the entry into force of the FLIT during which Article 26 ECT could not be provisionally applied, this does not preclude that provisional application was in principle possible from 1995 pursuant to the rules introduced by the FLIT.

4.7.13 As regards the applicability of Article 23(2) FLIT, the following is important. The Russian Federation argues that this paragraph was given retroactive effect by Presidential Decree of 7 August 1995 (quoted in the Defence on Appeal, no. 174, footnote 237).The question whether this provision has indeed been given ‘retroactive effect’, which HVY dispute, may remain unanswered. As the FLIT does not contain transitional provisions, it is obvious that, at the time of its entry into force, this law applied to treaties that at that time were already being provisionally applied but had not yet been ratified. This also seems to be the most plausible tenor of the Presidential Decree of 7 August 1995. This means that the ECT should have been submitted to the State Duma within six months of 21 July 1995, which did not happen.

4.7.14 The position of the Russian Federation that Article 26 ECT cannot be provisionally applied because the ECT is a treaty that must be ratified under Russian law is incorrect in the opinion of the Court of Appeal. There is no rule in Russian law that the government's power to agree to the provisional application of treaties is limited in the sense that provisional application cannot relate to treaties that are subject to ratification because they contain provisions that derogate from or supplement federal legislation. There is no such limitation in the Constitution or the FLIT. In particular, Article 23(1) FLIT includes no reservation whatsoever in this respect, because it makes provisional application subject only to the condition that provisional application has been agreed by the signatories. Similarly, Article 23(2) FLIT does not place any limitations on the decision-making regarding provisional application, where it provides, without reservation, that the body that made the decision to sign the treaty in question also decides whether that treaty is to be applied provisionally.

4.7.15 Moreover, it does not appear that, prior to the entry into force of the FLIT, there were any limitations on the possibility of provisionally applying a treaty. The 1978 Law ‘On the Procedure for the Conclusion, Performance and Denunciation of International Treaties of the USSR’ contained no provisions on provisional application and thus no provisions limiting provisional application. The Russian Federation also has not identified specific limitations on provisional application, as it argues that prior to the entry into force of the FLIT, a determination had to be made on the basis of general

legal or constitutional provisions whether the Government was competent to agree unilaterally on behalf of the Russian Federation to provisionally apply a treaty (Defence on Appeal, no. 171). Provisional application of treaties that contain provisions that derogate from existing legislation was also common before the FLIT's entry into force. The Court of Appeal will confine itself here to referring to the following treaties.

4.7.16 The 'Maritime Boundary Agreement' of 1 June 1990, which established the border in the Bering Sea between the Russian Federation and the United States, has been provisionally applied since 15 June 1990,[37] even though it is a treaty that must be ratified. Ratification is required pursuant to Article 12 of the Law of 1978 'On the Procedure for the Conclusion, Performance and Denunciation of International Treaties of the USSR', as the 'Maritime Boundary Agreement' so provides in its Article 6 and because that treaty relates to the 'territorial demarcation of the U.S.S.R.'.[38] Another example is the 'Agreement establishing an International Science and Technology Centre', signed on 27 November 1992 and declared provisionally applicable by means of an additional Protocol of 27 December 1993.[39] As this agreement, in its Articles XI and XII, granted certain immunities to the 'Centre', which was headquartered in the Russian Federation (see Article IX A), and its employees, it derogated from existing Russian law to that extent and had to be ratified pursuant to Article 12 of the Law of 1978 'On the Procedure for the Conclusion, Performance and Denunciation of International Treaties of the USSR'.

4.7.17 The Russian Federation responded to this by stating, in essence, that it is conceivable that a treaty was 'accidentally' applied from time to time that derogated from the law, that this does not mean that this is in accordance with the Constitution and, moreover, that the Russian Federation never agrees to the provisional application of arbitration. However, the Court of Appeal finds it implausible that the (years-long) provisional application of treaties that derogate from the law is the result of inadvertency. It is plausible that if, as the Russian Federation asserts, the provisional application of such treaties had been unconstitutional, this would have been noted, but there has been no evidence of that. More specifically, there has been no evidence that the Russian Federation terminated the provisional application of the 'Maritime Boundary Agreement' or that it ratified that treaty at a later date. The Russian Federation's treaty practice of never agreeing to the provisional application of international arbitration, if correct, is irrelevant. What is important here is that treaties that derogated from Russian law were applied provisionally. It is irrelevant here on which point they derogated from Russian law.

4.7.18 The fact that, in the present case, the government of the Russian Federation validly resolved to sign the ECT is not in dispute (see paras. 4.3.2 and 4.7.2.1 above). The government's resolution of 16 December 1994 does not indicate any limitations on the provisional application of the ECT (or any specific ECT provisions).

4.7.19 The fact that the FLIT is based on a different system than the one now being defended by the Russian Federation is also evident from Article 23(2) FLIT. After all, Article 23(2) FLIT does *not* provide that provisional application is not possible if the treaty must be ratified (because it contains provisions that derogate from or supplement existing federal laws, cf. Article 15 FLIT), but only that, in that case, the treaty must be submitted to the State Duma for approval within six months and that

the period of provisional application must be extended by federal law. Article 23(2) FLIT thus allows treaty provisions that derogate from or supplement federal laws to be applied provisionally for six months following the signing of the treaty without submission to the State Duma. Incidentally, the parties agree that, even if the treaty is not submitted to the State Duma within six months, the provisional application remains in force until the Russian Federation has informed the other contracting parties that it will not ratify the treaty. This is also consistent with Article 25(2) VCLT. The provisional application of a treaty that contains provisions that derogate from or supplement federal legislation can therefore cover a much longer period than six months in certain circumstances. That is difficult to reconcile with the position regarding the strict separation of powers advocated by the Russian Federation in these proceedings.

4.7.20 The Russian legal scholars Osminin[40] and Karzov[41] confirm that there are no restrictions on the provisional application of treaties that must be ratified. Karzov states:

> "The Russian Federation belongs to a third group of State, which also includes, among others, Spain and Switzerland. In these States, the relevant authorized bodies of State power are not limited in their right to make independent decisions with respect to provisional application of international treaties, including those that require adoptation of a law in order to be entered into."
>
> (emphasis added by the Court of Appeal)

In the same vein Zvekov and Osminin[42]:

> "From this it follows that exception(s) to the federal law on the basis of provisional application are possible."

4.7.21 The Russian Federation itself also confirmed in a memo[43] to the UN International Law Commission that, under Russian law, provisionally applied treaties have the same status as treaties that have entered into force:

> "The Russian Federation's consent to the provisional application of a treaty means that the treaty becomes part of the legal system of the Russian Federation and is subject to application on an equal basis with treaties that have entered into force."

while this memo also stated:

> "Under the above-mentioned federal law [the FLIT, added by the Court of Appeal], the decision on the provisional application by the Russian Federation of a treaty is taken by the Government of the Russian Federation or the President of the Russian federation (depending on within whose competence the questions constituting the subject of the treaty reside)."

4.7.22 The quotes taken from the preparation of the Constitution and the FLIT presented by the Russian Federation (Defence on Appeal, nos. 426-432) do not relate to any provisionally applied treaty. To the extent the publications of legal scholars cited by the Russian Federation (Defence on Appeal, nos. 433-434) could at all be said to reflect the view that a provisionally applied treaty cannot take precedence over a federal law, that position has now been superseded by various judgments of the Russian Federation Constitutional Court. The question of whether 'international agreement' in Article 15(4) Constitution should also be understood to include a provisionally applied treaty was, after all, answered in the affirmative by the Constitutional Court in its Resolution 8-P of 27 March 2012.[44] The Constitutional Court held as follows under 4 and 4.1:

> "Agreement to provisional application of an international treaty means that it becomes part of the legal system of the Russian Federation and must be applied on the same basis as international treaties that have entered into force (unless otherwise expressly stated by the Russian Federation), since otherwise provisional application would be meaningless.
>
> (…)
>
> Being guided by the Vienna Convention on the Law of Treaties and provisions of the Federal Law "On International Treaties of the Russian Federation" in their literal interpretation, public authorities and officials of the Russian Federation consistently pursue the legal policy which provides that provisions of a provisionally applied international treaty become part of the legal system of the Russian Federation and, like international treaties of the Russian Federation that have entered into force, have priority over Russian laws in the absence of the officially published text, including instances when they alter the regulatory content of rights, freedoms and duties of man and citizen.
>
> (…)
>
> From the point of view of the requirements set forth in Article 15 (part 4) of the Constitution of the Russian Federation in conjunction with its Articles 2, 17 (part 1) and 19 (part 1), provisionally applied international treaties of the Russian Federation by their legal consequences, effect on rights, freedoms and duties of man and citizen in the Russian Federation are essentially equivalent to international treaties that have entered into force, ratified and officially published in accordance with the procedure established by federal legislation."

4.7.23 The Russian Federation and its experts have argued, inter alia, that the question put to the Constitutional Court was whether a provisionally applied treaty could be held against a citizen, even though it had not been published, in the way this is done with a ratified treaty. This is correct by itself but fails to appreciate that the Constitutional Court decided that a provisionally applied treaty "affecting the rights and freedoms of man and citizen and establishing rules other than those provided by law" must be published *because* it has the same effect as a treaty that has entered into force. The Russian Federation's position that said decision shows no more than that in terms of the publication requirements, a provisionally applied treaty is at the same level as a ratified treaty, fails to appreciate that the Constitutional Court's judgment unmistakeably has a more general purport. After all, it reasoned its decision, that provisionally applied treaties should be published, by considering that such

treaties "have priority over Russian laws". In that regard, the Court points out that, should a provisionally applied treaty not be applied on the same footing as a treaty that has entered into force, "provisional application would be meaningless". Finally, it cannot be derived from this judgment that a part was played by the fact that the old rates (that because of the treaty had been replaced by new rates, which was the target of the dispute) had been laid down in a government decision. Nothing in the Constitutional Court's reasoning indicates this. See in this regard the comments by Kurdyukov, in which the Russian Federation's narrow interpretation of this judgment is not endorsed. [45] Finally, one might point out in this regard that Vyatkin, who took the floor on the State Duma's behalf during the Constitutional Court's hearing of this matter, defended exactly the same system when he commented[46]:

> "In case of a discrepancy between a federal law and a provisionally applicable treaty, we nevertheless consider that the international treaty shall apply, as the meaning of provisional application is, precisely, to apply the treaty immediately."

4.7.24 In Resolution 6-P of 19 March 2014,[47] the Constitutional Court confirmed this case law. The matter in question regarded a constitutional review, carried out by the Constitutional Court, of the treaty providing in the association of the Crimea. Article 1 of that treaty provides that the republic of the Crimea will be deemed a part of the Russian Federation as from the date of the signing of the treaty; Article 10 of the treaty provides that the treaty will be provisionally applied from the date of the signing. Although this undoubtedly concerned a treaty that had to be ratified - and that was subsequently indeed ratified - because the treaty provisions derogated from existing legislation, for example because the treaty established new borders, the Constitutional Court considered, referring to its Resolution 8-P of 27 March 2012, that this provision is in conformity with the Constitution and that, pursuant to the provisional application of that treaty, both the republic of the Crimea and the city of Sevastopol were part of the Russian Federation *as from the date of the signing of the treaty* (para. 3). That ratification followed only three days later naturally does not detract from the fundamental significance of the Constitutional Court's resolution.

4.7.25 The Russian Federation and its experts have attempted in vain to detract from these clear resolutions of the Constitutional Court. Where they take the position that non-ratified treaties that are being provisionally applied do not have priority over federal legislation, that position has been indisputably rebutted by the case law of the Constitutional Court. This is also true for example for the Russian Federation's reliance on the quotes derived from the handling of the FLIT, inter alia of state secretary Krylov (Defence on Appeal, nos. 429-430). Moreover, in those quotes, *provisionally applied* treaties and their possible priority over federal laws are not mentioned. This is relevant because the legal system of the Russian Federation also has treaties that are in force without having to be ratified. Indeed, such unratified treaties do not have priority over federal laws. This means nothing for the effect of a treaty that is being provisionally applied, *pending ratification*. Also the decisions of the Supreme Court and the Constitutional Court on which the Russian Federation relies, some of which the District Court has mentioned in para. 5.91, do not regard the provisional application of treaties (or `interstate treaties') such as the ECT. As professor Stephan explains in his first Expert Report[48] and second Expert Report[49] and as is clear also from the judgment of the Supreme Court in the `Chinese border case', to be discussed herein below, the Russian Federation has three types of international (public law) agreements: `interstate treaties' concluded on behalf of the Russian Federation with other

states, `intergovernmental treaties' concluded by the government of the Russian Federation with the government of another state, and 'interagency treaties' concluded between federal bodies of the Russian Federation. Article 15(4) of the Constitution relates only to 'international agreements of the Russian Federation', that is to say, the first category ('interstate treaties'). In the 'Chinese border case', the Constitutional Court held[50]:

> "By virtue of the hierarchy of legal acts, priority over the laws of the Russian Federation is accorded to international treaties of the Russian Federation concluded on behalf of the Russian Federation (interstate treaties), consent to be bound by which was given in the form of a federal law."

Treaties for which ratification is not prescribed may take effect by their signing by the President, the government or a state body; however, their status is lower than that of a ratified treaty, in the sense that after their entry into force, they do not have priority over legislation. The matter at hand regards a treaty that has to be ratified in order to take effect, and the question whether that treaty can be provisionally applied prior to its entry into force ('prior to its entry into force', see Article 23(1) FLIT). The court decisions the Russian Federation invokes do not regard this latter category of treaties, unlike said Resolutions 8-P and 6-P of the Constitutional Court. The Court of Appeal will discuss some of the judgments on which the Russian Federation relies in more detail.

4.7.26 The 'Chinese border case'[51] regards an 'intergovernmental treaty' that was entered into between the government of the Russian Federation and the Chinese government. The treaty had entered into force through an exchange of memoranda and as such, did not need to be ratified. As was observed above, such a treaty has lower status than a treaty concluded on behalf of the Russian Federation ('interstate treaty'), such as the ECT. The Supreme Court held that such a treaty does not have priority over the federal laws of the Russian Federation. That judgment has no significance for the matter at hand. Not only did it regard a different type of treaty; the treaty also did not provide in provisional application (naturally since, after all, it did not require ratification). Also Resolutions No. 8 and No. 5 of the Supreme Court, of 31 October 1995 and 10 October 2003, respectively,[52] do not pertain, insofar as can be checked based on the parts of those resolutions submitted by the Russian Federation, to the question whether a provisionally applied 'interstate treaty' has priority over federal legislation. Incidentally, it is the Constitutional Court rather than the Supreme Court that has the last word where the interpretation of the Constitution is concerned (Article 125 of the Constitution).

4.7.27 The Russian Federation has also invoked Ruling No. 2531-O of the Constitutional Court of 6 November 2014.[53] However, that matter concerned the compatibility of a provision of Russian law with the WTO treaty was ratified by the Russian Federation. As such, the ruling was not about the provisional application, pending ratification, of a treaty and it does not contain anything that is inconsistent with Resolutions 8-P and 6-P of the Constitutional Court mentioned above.

4.7.28 The Russian Federation has argued that Article 15(4) of the Constitution is not relevant (Defence on Appeal, no. 420). According to the Russian Federation, Article 15(4) of the Constitution is a conflict of laws rule that prescribes that obligations pursuant to treaties have priority where there is inconsistency with federal laws. This conflict of laws rule finds no application if a treaty provision,

such as in this case the Limitation Clause, ensures that such inconsistency cannot arise, according to the Russian Federation. The District Court has used a comparable argument to set aside the Constitutional Court's case law. The District Court considers that this case law, providing that also treaties that are applicable on a provisional basis are integral parts of the Russian legal system, does not detract from the fact that a treaty such as the ECT may limit the scope of the provisional application (para. 5.92).

4.7.29 These arguments of the Russian Federation and the District Court fail to convince. Article 15(4) of the Constitution is clearly more than just a 'conflict of laws rule', because it puts the fact that a treaty is an integral part of the Russian legal system first. Incidentally, this opinion of the Court of Appeal does not mean that, even if only because of the priority awarded to it in Article 15(4) of the Constitution, a provisionally applied treaty cannot be inconsistent with the law of the Russian Federation in the meaning of the Limitation Clause, because that priority rule already resolves any conflict with national legislation so that by definition, there can be no inconsistency with national laws. However, in the Court of Appeal's view the case law of the Constitutional Court does show that the Russian Federation's argumentation about the separation of powers is not correct. After all, the Constitutional Court considers admissible that the government obliges the Russian Federation to provisionally apply treaty provisions pending ratification, even if those treaty provisions derogate from federal legislation, and that those treaty provisions have priority at that point. That is incompatible with what the Russian Federation has argued and it shows that the separation of powers does not have the consequences the Russian Federation attaches to it.

4.7.30 As was considered above, the Court of Appeal assumes that the term of six months within which a provisionally applied treaty must be submitted to the State Duma started the day the FLIT entered into force (21 July 1995). See likewise Zvekov and Osminin.[54] Although the ECT was not submitted to the State Duma within the six-month term, this has no consequences for the provisional application of the ECT. If the rules in Article 23(2) FLIT are not observed, this does not, as the Russian Federation also acknowledges (Defence on Appeal, no. 174 footnote 239), end the provisional application, since this - in conformity with the regime of Article 25(2) of the VCLT and Article 23(3) FLIT - only ends after the Russian Federation has informed other signatories that it does not intend to become a party to the treaty in question. Therefore, neither the authority to agree on provisional application, nor the provisional application itself, is affected by non-observance of the term prescribed in Article 23(2) FLIT. This means that the provisional application of the ECT is not limited by the effect of the Limitation Clause of Article 45(1) ECT in combination with Article 23(2) FLIT. After all, it is untenable that the mere fact that the six-month term of Article 23(2) FLIT has not been satisfied means that a provision of the ECT (such as Article 26 ECT) is not consistent with Russian law in the meaning of Article 45(1) ECT. Now that under Russian law, the provisional application continues until the moment the Russian Federation has let the other signatories know that it does not intend to become a party to the treaty in question, which was done in this case in August 2009, it cannot reasonably mean anything else than that the provisional application of the ECT prior to that moment is not 'inconsistent' with Russian law within the meaning of Article 45(1) ECT. It is also not in dispute that in the period of 17 December 1994 to 19 October 2009, the Russian Federation provisionally applied the ECT, in any case parts thereof. In fact, during the 'Energy Charter Conference' on 17-18 December 2002, the Russian delegation confirmed that, although the Russian Federation had not yet ratified the ECT, 'as a Signatory Country' it was applying the ECT from the day

the Treaty entered into force, which in view of the context could only be understood to mean that the Russian Federation was provisionally applying the ECT from the date of the signing.[55] Apparently, that the six-month term was exceeded did not preclude this, in its opinion. Under those circumstances, the Russian Federation, which pursuant to Article 26 VCLT must carry out the ECT in good faith, is not at liberty, in order to evade its obligation under a single provision of the ECT (Article 26), to argue that said term was not satisfied and that therefore, it is not held to provisionally apply specifically that provision. The Arbitral Tribunal has correctly rejected the arguments put forward by the Russian Federation to that purpose (Interim Award, no. 390).

4.7.31 Insofar as it should nevertheless be assumed that, by introducing the six-month term, Article 23(2) FLIT limits the provisional application of the ECT further than was the case at the time of the signing of the ECT by the Russian Federation, the Russian Federation cannot rely on this. After all, the good faith that states must observe upon implementing a treaty precludes that, after signing a treaty in which provisional application is agreed, a state introduces new obstacles for provisional application (see in this regard para. 4.7.12).

4.7.32 The above means that the Russian Federation's reliance on the separation of powers cannot hold. It is undoubtedly correct that its Constitution contains the principle of the separation of powers; by itself, however, that principle has insufficient bearing on the question of what powers have been assigned to which state body. In this particular case, the federal legislator has not limited the power, as expressed in the FLIT, of the President or of the government under the President's supervision, to agree that a treaty will be provisionally applied, although the legislator could have limited this. It cannot be successfully argued, therefore, that in agreeing on that provisional application, the government has exceeded its powers.

*(b) Are disputes about public law powers arbitrable?*

4.7.33 The Russian Federation takes the position that Article 26 ECT makes it possible to subject investment disputes that pertain to taxes, enforcement and expropriation to arbitrations, whereas under Russian law, such disputes are not arbitrable. This supposedly precludes provisional application of Article 26 ECT. In its assessment of this position, the Court of Appeal takes as its point of departure that the meaning of the concept 'inconsistent' should be interpreted as any case where a treaty provision and a specific rule of national law cannot be applicable simultaneously, because application of the one rule constitutes a violation of the other, and that a possible other inconsistency depends on the context (see para. 4.5.48).

4.7.34 The Russian Federation has argued that HVY's claim regards powers under public law. That is the case irrespective of the legal grounds on which HVY base their claim, the ground in this case being a breach of the ECT. Public law disputes are not arbitrable under Russian law. The Russian Federation indicates a number of legal provisions in which the national court is designated the exclusive disputes resolving body (disputes about acts of court bailiffs, tax and enforcement disputes) and legal provisions that allegedly show that only *civil law* disputes are arbitrable (Article 27 of the Code of Civil Procedure, Article 1(2) of the International Commercial Arbitration Act, Articles 21 and 23 of the Code of Civil Procedure in Commercial Matters (Arbitrazh) and Article 1(2) of the Arbitration Act).

4.7.35 The question whether arbitration pursuant to Article 26 ECT is inconsistent with Russian law is answered in the negative by the Court of Appeal. It is not correct that a dispute between a foreign investor and the host country is of a public law nature. According to Krupko, the view that prevails in the doctrine and case law is that such disputes are civil-legal in nature, even if there is no unanimity about this.[56] Veliaminov and Volova endorse this view[57] and the Court of Appeal follows it as being the prevailing doctrine in the Russian Federation.

4.7.36 However, even if the Court of Appeal should assume that under Russian law, arbitration is open only for civil law disputes, and that the current dispute is not such a civil law dispute, international arbitration under Article 26 ECT is not 'inconsistent' with Russian law.

4.7.37 Article 26 ECT provides international arbitration in accordance with the UNCITRAL rules for investment disputes related to violation of the rules of the ECT. An Arbitral Tribunal appointed pursuant to Article 26 ECT should decide a dispute put before it "in accordance with this Treaty and applicable rules and principles of international law". It cannot be perceived, nor does this follow from the Russian Federation's assertions, that such a form of international arbitration cannot exist *alongside* the legal provisions referred to by the Russian Federation. That for national situations, Russian law makes the option of arbitration accessible for civil law disputes alone is not inconsistent with the circumstance that for the cases regulated in the ECT, the ECT makes international arbitration accessible beside and in addition to the options offered under Russian national law. That Russian law can readily exist side by side with international investment arbitration is confirmed, moreover, by the fact that the Russian Federation is a party to many bilateral investment treaties ('bilateral investment treaties' or 'BITs') in which international arbitration was agreed as a (possible) form of dispute resolution.[58] The model BITs from 1992 and 2001/2002 drawn up by the Russian Federation, which it uses as a point of departure in its negotiations on bilateral investment treaties with other states,[59] include international arbitration in accordance with the UNCITRAL rules or the ICSID rules as one of the options for resolving disputes between an investor and the host state (Article 6 and 8, respectively, of those model BITs). The BITs referred to earlier and those model BITs include no limitations as to the nature (either civil or public law) of the dispute that may be subjected to arbitration, nor can a limitation be read therein in the sense that arbitrators can only decide the quantum of the damages. The treaty practice of the Russian Federation shows no restraint as to international arbitration of disputes about investment treaties, therefore. The Russian Federation's argument that said BITs were ratified and that as such, they constitute derogations by federal law from the supposed injunction on arbitration of public law disputes, is artificial and misses the relevant point. A state that agrees on international arbitration on investment disputes so regularly, and explicitly takes such a form of dispute resolution as a point of departure in its negotiations with other states, cannot reasonably maintain that this form of arbitration cannot exist side by side with the provisions of national law that limit such arbitration to civil law disputes, or is otherwise inconsistent with Russian law.

4.7.38 Also the Explanatory Note the government submitted to the State Duma on 26 August 1996, by way of explanation to the bill for ratification of the ECT,[60] and which pursuant to Article 16(4) FLIT had to include "a report on its conformity with the legislation of the Russian Federation", does

not evidence any issue with the arbitration clause of Article 26 ECT or with provisional application of that provision. Where relevant, the Explanatory Note reads:

> "At the time of the signing of the ECT, its provisions on provisional application were in conformity with the Russian legal acts. For that reason, the Russian side did not make declarations as to its ability to accept provisional application (such declarations were made by 12 of the 49 signatories).
>
> (…)
>
> The provisions of the ECT are consistent with Russian legislation."

The first sentence from this quote reads, in the - according to the Russian Federation - correct translation:

> "At the time of signing of the Energy Charter Treaty, the provision regarding provisional application was not in contravention of the Russian legal acts."[61]

These passages allow no other interpretation than that the government held the view that the provisions of the ECT, which necessarily include the provisions about international investment arbitration of Article 26 ECT, were 'consistent' with Russian law and that there was no reason to limit the provisional application of the ECT in any way by making a statement. Although naturally, this position of the government does not bind the State Duma, it constitutes a strong indication that the current position of the Russian Federation about the incompatibility of such arbitration with Russian law is not correct. Although in the Explanatory Note, it is not mentioned in so many words that Article 26 ECT is 'consistent' with Russian law, it can hardly be imagined that such a text would have been included in the Explanatory Note if the government had believed that Article 26 ECT was indeed inconsistent therewith. The Russian Federation's argument that this passage in the Explanatory Note pertain to the situation after ratification is contradicted by the clear text of the passage, which takes 'the time of the signing' (of the Treaty) as the point of reference.

4.7.39 Even just based on the above, it cannot be held that Article 26 ECT is inconsistent with Russian law in the meaning of the Limitation Clause of Article 45(1) ECT, even if the Russian Federation interpretation of this is taken as a point of departure. About the specific provisions of national law invoked more particularly by the Russian Federation, the Court of Appeal also considers the following.

4.7.40 The Russian Federation has referred to Article 27 of the Code of Civil Procedure, which provides that disputes ensuing from civil law relationships may be put to an Arbitral Tribunal if the parties consent to this. However, Article 25 of the same Code provides[62]:

> "Courts shall also review cases with foreign citizens, stateless persons, foreign enterprises, and organizations participating in them, provided that no alternative is stated in interstate agreements, international agreements or agreements between the parties."

And Article 1(2) reads[63]:

> "If an international treaty of the Russian Federation has established the rules for the civil court procedures different from those stipulated by the law, the rules of the international treaty shall be applied."

These provisions allow for no other conclusion than that treaties may entail rules that have as a consequence that disputes other than civil law disputes may be subjected to arbitration.

4.7.41 The Russian Federation also relies on Article 1(2) of the International Commercial Arbitration Act, which provides that disputes arising from *contractual or other civil law obligations*, ensuing from maintaining foreign commercial and other international economic relationships, may be subjected to international commercial arbitration if the commercial business of at least one of the parties is established abroad. Apart from the fact that, as evidenced by its Article 1(1), this act only applies if the arbitration takes place in the Russian Federation, and the Russian Federation itself admits that the act is not applicable to the current international investment arbitration (pleading notes in rejoinder of *mr.* Van den Berg, no. 37), Article 1(5) of this act reads[64]:

> "If an international treaty of the Russian Federation establishes rules other than those which are contained in the Russian legislation relating to arbitration (third-party tribunal), the rules of the international treaty shall be applied."

Also in this case, therefore, an exception was explicitly made for arbitration based on a treaty.

4.7.42 The same is true of Articles 21 and 23 of the Code of Civil Procedure in Commercial Matters (Arbitrazh), which the Russian Federation invokes to argue that only civil law disputes can be subjected to arbitration. Also here, the Russian Federation fails to appreciate that that same Code provides in its Article 3(3)[65]:

> "If the rules of the court proceedings, established by an international treaty of the Russian Federation, differ from those stipulated by the legislation of the Russian Federation, the rules of the international treaty shall be applied."

This also shows that the national rules on the question of what disputes are arbitrable do not preclude that a treaty may offer more options for dispute resolution by means of arbitration..

4.7.43 The Russian Federation and its expert professor Asoskov have also relied on Article 1(1) of the 'Provisional Regulation on Arbitral Tribunal for Resolving Economic Disputes' and on Article 1(2) of the 'Law on Arbitral Tribunals', which succeeded the 'Provisional Regulation'; both only relate to 'domestic arbitration', however,[66] and as such, are not relevant for this dispute. Also the Russian

Federation's invocation of Article 17 of the Act of 27 December 1991 on the principles of the tax system of the Russian Federation (No. 2118-1), Article 138(1) of the Tax Act (1998), Article 90 of the Federal Act regarding Enforcement Proceedings (1997, No. 119-FZ) and Article 428 of the Code of Civil Procedure (1964) (pleading notes of *mr.* Van den Berg in re. Article 45 ECT, part II, no. 125) fails. Said provisions say nothing about the question whether an international investment dispute can be subjected to international arbitration if a treaty provides this.

4.7.44 Insofar as the Russian Federation argues that, where in the above laws, reference to a treaty only applies to ratified treaties, the Court of Appeal does not follow. As is clear from what was considered above, a provisionally applied treaty has the same effect in the Russian legal system as a ratified treaty. Professor Asoskov notes that the provisions in which an exception is made based on an applicable treaty constitute no more than a repetition of the rule in Article 15(4) of the Constitution. Be that as it may, these exceptional provisions at least make clear that international arbitration of other than purely civil law disputes based on a treaty is not inconsistent with the provisions of Russian law mentioned above.

4.7.45 The Russian Federation also invokes the resolution of the Constitutional Court of 26 May 2011, no. 10-P.[67] However, that matter regarded a dispute about real estate located in the Russian Federation, in which the question whether international investment arbitration is admissible on the basis of a treaty did not play a role. As such, said resolution of the Constitutional Court is not relevant for the question asked in the matter at hand. The same is true of the resolution of the Constitutional Court of 15 January 2015, No. 5-O[68], in which that Court noted (in a national context) that `the current legal system does not permit the arbitration of disputes arising out of administrative and other public law relations' (para. 2.2). It does not follow from that judgment that international investment arbitration based on a treaty is inconsistent with Russian law.

4.7.46 HVY have argued, moreover, that Russian law not only does not preclude international investment arbitration based on a treaty, but that the LFI 1991 and the LFI 1999 explicitly make such arbitration possible.

Articles 5, 9 and 10 LFI 1991 read:

**LFI 1991**

"Article 5

*Legal Protection of Foreign Investments in the RSFSR*

Relations linked with foreign investments in the Russian Federation are regulated by the present Law, as well as by other legislative acts and international agreements in force on the territory of the Russian Federation. Should international agreements, in force on the territory of the Russian

Federation, determine other rules than those, contained in the RSFSR legislation, the rules of an international agreement shall apply.

Article 9

*Procedures for Settling Disputes*

Investment disputes, including disputes over the size, terms or procedure for paying compensation shall be settled by the Supreme Court of the Russian Federation or in the RSFSR Supreme Court of Arbitration, if no other procedure is envisaged by some international agreement in force on the territory of the Russian Federation.

Disputes of foreign investors and enterprises with foreign investment with state bodies of the Russian Federation, enterprises, public organizations and other juridical persons of the RSFSR, disputes among investors and enterprises with foreign investment on matters linked with their economic activities, as well as disputes between participants of an enterprise with foreign investment and the enterprise itself are subject to settlement in courts of the Russian Federation or, on agreement between sides, in a Court of Arbitration.

(…)

An international agreement in force on the territory of the Russian Federation may envisage the use of international means for settling disputes, arising from foreign investments on the territory of the Russian Federation.

**LFI 1999**

Article 10

*Guarantee of Proper Settlement of Disputes Related to Investment and Business Activities of Foreign Investors in the Russian Federation*

Any dispute involving a foreign investor and related to the investment and business activities of such investor in the Russian Federation shall be settled in compliance with the international treaties of the Russian Federation and federal laws in court, an arbitration court or international arbitration (arbitration tribunal).”

(all emphasis added by the Court of Appeal)

The LFI 1999 succeeded the LFI 1991. According to the Russian Federation, with the LFI 1999 the legislator did not intend to make substantive amendments pertaining to dispute resolution by means of arbitration. The Court of Appeal will also take this as a point of departure.

4.7.47 The District Court has considered that, now that Article 9(1) LFI 1991 allows for different forms of dispute resolution (other than litigation before the `Supreme Court of the Russian Federation' or the `RSFSR Supreme Court of Arbitration', as provided in that Article) only where a treaty provides this, this provision offers no *independent legal basis* for arbitration between HVY and the Russian Federation (para. 5.51). The District Court has decided in the same way with regard to Article 10 LFI 1999 (para. 5.56 and 5.58). As was considered above, the District Court's decisions in this regard are erroneous (para. 4.5.47). It is not relevant whether the arbitration between HVY and the Russian Federation had a ground in the LFI 1991 or the LFI 1999. After all, the grounds for the arbitration can be found in Article 26 ECT. What matters is whether such a form of arbitration is *inconsistent* with Russian law. Both the LFI 1991 and the LFI 1999 show that this is not the case, since both laws explicitly leave open the option for a dispute between a foreign investor and the Russian Federation to be resolved in a different way than by a Russian court. Article 9 LFI 1991 refers in this regard to the option of "international means for settling disputes" and Article 10 LFI 1999 to "international arbitration (arbitration tribunal)". There can be no misunderstanding about the fact that arbitration pursuant to Article 26 ECT and in conformity with the UNCITRAL rules should be understood to fall under both descriptions.

4.7.48 The Russian Federation has raised several arguments against the applicability of Article 9 LFI 1991 and Article 10 LFI 1999, which fail to convince. Insofar as the Russian Federation argues that the Articles referred to do not apply because they make the requirement of a *ratified* treaty ('international agreement in force'), whereas the ECT was not ratified by the Russian Federation, the Court of Appeal refers to what was considered above (paras. 4.7.22 et seq.): in the Russian legal system, a provisionally applied treaty has the same legal force as a ratified one. The Russian Federation also refers to Article 7(3) LFI 1991, which provides that "decisions of state bodies to confiscate foreign investments may be appealed against in RSFSR courts". According to the Russian Federation, this means that disputes about expropriation cannot be subjected to international arbitration. The Court of Appeal does not follow this argument. It cannot be perceived how an investor's choice to challenge a decision to expropriate before the national courts may detract from the very extensive possibilities offered by Article 9 LFI 1991 (both in the first paragraph and in the final paragraph) and Article 10 LFI 1999, to subject investment disputes to international arbitration where a treaty provides this. After all, for the grounds and scope of such arbitration, the law refers to what the treaty in question provides in this respect, independent from what is provided in Article 7 LFI 1991. Incidentally, in the arbitration proceedings HVY did not appeal an 'expropriation decision' but rather, claimed damages based on the contention that the Russian Federation, inconsistently with the ECT, had expropriated their investments in Yukos without offering damages, and had failed to protect those investments. The Yukos Awards also show that a formal 'expropriation' of (the shares in) Yukos never took place. After all, the Arbitral Tribunal considered that the Russian Federation did not formally expropriate Yukos or the shares of its shareholders, but rather, that the measures the Russian Federation had taken vis-à-vis Yukos had had "an effect equivalent to nationalization or expropriation" (Final Award, no. 1580).

4.7.49 The Russian Federation also argues that the LFI 1991 and the LFI 1999 do not relate to investments such as the one at hand, in which - or so the Russian Federation believes - no foreign capital was injected into the Russian Federation and which was effectively made by Russian subjects

(the Russian Federation refers to Khodorkovsky et al.). This argument cannot hold, if only because the jurisdiction of the Arbitral Tribunal should be assessed on the basis of the question whether Article 26 ECT offers grounds for this, rather than based on the question whether the LFI 1991 and the LFI 1999 offer grounds for this. What is relevant here is that both laws confirm that a dispute such as the current one is arbitrable. The question whether in a specific case, arbitration of an international investment dispute has been agreed on the basis of a treaty, must be answered based on the conditions that such a treaty makes of the Arbitral Tribunal's jurisdiction. The arguments put forward by the Russian Federation about the nature of the investment and the investors belong in a discussion about Article 1(6) and (7) ECT, therefore, and will be discussed there. The same applies to the contention that there is no `investment' if shares are transferred to evade tax. Incidentally, no support for the Russian Federation's assertion can be found in the text of either law. No limitation to `foreign investor' or `foreign capital' may be read therein; apart from professor Yarkov's opinion, who admits that his interpretation of the two investment laws is not supported by the case law or the literature, there are no leading sources in which this interpretation is supported. Moreover, professor Stephan rightly points out that the limitations the Russian Federation wishes to read into both laws were introduced in 2018, which is a strong indication that those limitations did not exist before.[69]

4.7.50 The Russian Federation argues that pursuant to the LFI 1991 and the LFI 1999, only private law disputes may be subjected to arbitration. However, these laws also, in terms of the question of which investment disputes between the Russian Federation and a foreign investor can be subjected to arbitration, refer to an applicable treaty. Based on the LFI 1991 and the LFI 1999 it is the treaty in question, therefore, which provides what investment disputes between the Russian Federation and a foreign investor are eligible for arbitration. Articles 9 LFI 1991 and 10 LFI 1999 do not limit that option to private law disputes alone. The Court of Appeal observes that, as was established above (para. 4.7.35), in accordance with the prevailing Russian views an international investment dispute should be considered a dispute under civil law.

4.7.51 Moreover, Articles 9 LFI 1991 and 10 LFI 1999 start out from a broad interpretation of what may be considered an investment dispute under those laws; no limitation to private law disputes or subjects can be read therein. Article 9 LFI 1991 lists "investment disputes, including disputes on the size, terms or procedure for paying compensation" (emphasis added by the Court of Appeal), thus making clear that investment disputes are not limited to disputes about the modalities of damages to be paid. The model BIT that was established in 1992 also has no limitations in that respect.[70] This is confirmed by Article 10 LFI 1999, which includes a broad description of the disputes that are arbitrable and in which there is no reference whatsoever to the modalities of damages to be paid: "Any dispute involving a foreign investor and related to the investment and business activities of such investor in the Russian Federation" (emphasis added by the Court of Appeal). This is also in accordance with the purpose of the LFI 1991 and the LFI 1999, which shows from their preamble and reads "to attract (...) foreign material and financial resources, advanced foreign technology and managerial experience". In this regard it is also significant that the heading for Article 10 LFI 1999 includes the words 'Guarantee of Proper Settlement of Disputes Related to Investments' (emphasis added by the Court of Appeal). Often, a foreign investor will not want to be dependent on the judiciary of the host country and will prefer international arbitration, or at least the option to choose this. It is self-evident, therefore, that the LFI 1991 and the LFI 1999, to stimulate investments in the Russian Federation, would wish to accommodate these interests. The narrow interpretation argued by

the Russian Federation, and which would entail that a dispute such as the one between HVY and the Russian Federation would not be arbitrable, or only with regard to the modalities of damages to be paid, would make no essential contribution to attracting investments. In addition to this, it should be considered that in many cases, investment disputes between a foreign investor and a host state are likely to be such disputes as the matter at hand, in which (forms of) expropriation, nationalisation and taxation play a part. According to the Russian Federation, the two investment laws allow no arbitration specifically for such cases, because the public law acts of the Russian Federation are in dispute therein. This is diametrically opposed to the purpose of the two laws, however, and to the 'guarantee' that Article 10 LFI 1999 unmistakeably intends to offer.

4.7.52 The Russian Federation has referred to legal authors who supposedly endorse that both investment laws make arbitration open for civil law disputes alone.[71] However, the authors cited by professor Asoskov do not support the Russian Federation's position. Both Boguslavsky's and Orlov's, and Doronina's and Semilutina's comments mention the second paragraph of Article 9 LFI 1991, which does not refer to any treaty and is not relevant in this regard. Paragraphs 1 and 3 of said Article refer to an applicable treaty, which directly concerns this matter. Professor Asoskov adds in regard to Article 9(3) LFI 1991 that the words `international means of resolution of disputes' were included in the law to allow the Russian Federation to join the ECHR and, in relation thereto, to be able to recognise the jurisdiction of the ECtHR. He fails to mention any sources that support that contention, however; incidentally, it is unlikely that such a subject would be regulated in a law relating to foreign investments. Insofar as the Russian Federation here too tries to argue that the reference to international treaties is no more than a repetition of Article 15(4) of the Constitution, without special significance, the Court of Appeal does not follow it. Both in the LFI 1991 and in the LFI 1999, 'international means for settling disputes' (Article 9 LFI 1991) and 'international arbitration' (Article 10 LFI 1999) are referred to in so many words, which indicates that such a (treaty-based) form of dispute resolution for international investment disputes was acknowledged and automatically deemed possible.

4.7.53 Prof. Asoskov has also referred to comments by R. Nagapetyants[72] and by Dolgov and Perskaya[73], who contend that arbitration in investment treaties has remained limited to establishing the modalities of damages. Nagapetyants' comment explicitly relates to the treaty practice of the Soviet Union and is not decisive, therefore, for the legal situation at the time the Russian Federation signed the ECT. Dolgov and Perskaya state in their comments of 1993 that if the Russian Federation concludes treaties about investment protection with other states, the arbitration agreed therein remains limited to 'civil law matters only', more in particular to the modalities of damages to be paid. Dolgov and Perskaya do not state on the purport of the LFI 1991 or the question whether arbitration about investment disputes, in the event that a treaty does *not* limit arbitration to private law disputes (such as the ECT), is inconsistent with the law of the Russian Federation. Incidentally, professor Asoskov admits that halfway through 1992, the practice for concluding BITs changed; he refers to Regulation no. 395 in which a new model BIT was established.[74] For disputes between an investor and a host state, Article 6 of this model BIT inter alia provides in UNCITRAL arbitration for "disputes (...) arising in connection with capital investments, including disputes over the size, terms or order of the payment of compensation". Professor Asoskov's contention that this development from 1992 cannot detract from the interpretation of the LFI 1991 is not plausible. It is more likely that the LFI 1991 opened the way for arbitration of investment disputes as formulated in the 1992 model BIT. Insofar professor Asoskov also means to assert that 'including' really means 'limited to', that is not just

inconsistent with the clear wording of Article 6 of the model BIT (and Article 9 LFI 1991), but also with his own contention that a change in policy took place in 1992.[75]

4.7.54 The Russian Federation has also invoked the Fundamental Principles Act, which the Russian Federal Socialist Soviet Republic of the time supposedly implemented by means of the LFI 1991. This is why, in interpreting the LFI 1991, allegedly what is provided in Article 43 of the Fundamental Principles Act should be taken into account[76]. To what extent the Fundamental Principles Act indeed affects the interpretation of the 1991 LFI can remain undecided, however, since paragraph (1) of Article 43 of that act provides:

> "Disputes between foreign investors and the State are subject to consideration in the USSR in courts, unless otherwise provided by international treaties of the USSR."

Also the Fundamental Principles Act provides, therefore, that an international treaty may prescribe that investment disputes between investors and the USSR can be resolved by means other than by a Russian court. Moreover, no limitation to private law disputes can be read therein. The Russian Federation's position that Article 43(1) of the Fundamental Principles Act only refers to ratified treaties should be rejected based on the considerations argued above: in the Russian legal system, a provisionally applied treaty has the same effect as a ratified treaty.

4.7.55 The Russian Federation finally relies on the explanatory notes to a number of BITs (Defence on Appeal, no. 223), in which it is expressed that the treaties in question, which contain an arbitration clause, had to be ratified on account of (inter alia) that circumstance. The District Court considered that said notes can only be understood to mean that the LFI 1991 and the LFI 1999 contain no grounds for investment arbitration. The passage the Russian Federation has quoted (in the Defence on Appeal, no. 223 and footnote 319) from the explanatory note to the Act for approval of the BIT with Argentina reads:

> "Considering that the Agreement contains provisions different from those provided by the Russian legislation, it is subject to ratification in accordance with clause 15(1)(a) of the Federal Law (…) 'on International Treaties of the Russian Federation' (…) The key issues by virtue of which the above Agreement is subject to ratification are as follows (…) the settlement in an international arbitration court of investment disputes between one Party and an investor of the Other Party, as well as disputes between the Parties concerning the interpretation and application of the Agreement (…) the federal Law No. 1545-1 of July 4, 1991 'On Foreign Investment in the RSFSR' does not provide for a mechanism of settlement of such type of dispute by international arbitration."

According to the Russian Federation, the explanations to other BITs include similar passages (Defence on Appeal, no. 224); these were partly quoted by professor Asoskov in his Expert Report of 10 November 2017.[77] In the explanation to the Act for approval of the BIT with Yemen, slightly different wording is used:

> "Pursuant to Article 15 of the Federal Law 'On International Treaties of the Russian Federation', the Agreement is subject to ratification because it contains provisions which are not provided for by Russian legislation."[78]

4.7.56 The Court of Appeal puts first and foremost that, unlike what the Russian Federation argues, it is not obvious on the one hand to assign no significance to the explicit comment, in the 'Explanatory Note' to the ECT, that the provisions of the ECT are 'consistent' with Russian law, and on the other, to attach significance to comments in the explanatory documents to other (bilateral) investment treaties, which were not declared provisionally applicable. The Court of Appeal does not follow the Russian Federation in its arguments also otherwise. Pursuant to Article 15(1)(a) FLIT, to which the cited explanations refer in so many words, ratification is required (inter alia) if the treaty "(...) sets out rules different from those provided by law" (which is not the same as being 'inconsistent with' Russian law). Subsequently, it is noted in those explanations that the LFI 1991 "does not provide for a mechanism of settlement of such type of dispute by international arbitration" or - in a slightly different formulation - that the treaty `contains provisions which are not provided for by Russian law'. Apparently, the government took the fact that the LFI 1991 does not *provide* (a specific mechanism of) arbitration, whereas the BITs in question do, as a reason to nominate that BIT for ratification insofar as there were `rules different from those provided by law'. That is in accordance with HVY's position (and the Court of Appeal's view), that although the LFI 1991 and the LFI 1999 open the *option* of international investment arbitration (and as such, confirm that international investment arbitration is not inconsistent with Russian law), they do not offer the *grounds* for this - which, after all, should be found in the investment treaty in question, in this case, in Article 26 ECT. In short, the circumstance that the BITs had to be ratified, because international investment arbitration had been agreed therein, does not demonstrate the notion that such arbitration is inconsistent with Russian law. Professor Asoskov's argument that one of the reasons for ratification was "inconsistency with the Russian legislation of the dispute resolution provided for in the BITs" (emphasis added by the Court of Appeal) therefore finds no support in those explanatory notes.

4.7.57 The Court of Appeal should note in conclusion that, even if it should be held that the LFI 1991 and the LFI 1999 offer no grounds to subject a dispute such as the one between HVY and the Russian Federation to international investment arbitration in a treaty, in any case it cannot be deduced from those laws that such a form of arbitration is 'inconsistent' with Russian law. As was considered above, this also does not follow from other sources of Russian law. It has not become established that Article 26 ECT cannot be applied without being inconsistent with any rule of Russian law. Nor is there any evidence of a legal conviction, generally held in the Russian Federation, that international arbitration of international investment disputes is not permitted.

4.7.58 The conclusion is that Article 26 ECT is not inconsistent with Russian law in the meaning of the Limitation Clause.

*(c) Are shareholders entitled to file a claim in re. the depreciation of their shares under Russian law?*

4.7.59 In the context of the question whether the Arbitral Tribunal had jurisdiction over HVY's claims, the Russian Federation has argued that HVY as (former) shareholders of Yukos cannot file a claim under Russian law in respect to the depreciation or loss of their shares resulting from damage inflicted upon the company (Yukos); the provisional application of Articles 1 and 26 is inconsistent with this legal rule. According to the Russian Federation, Article 45 ECT does not entail that HVY can rely on the ample powers, attributed to shareholders in Articles 1 and 26 ECT, to file claims for depreciation or loss of their shares (Defence on Appeal, no. 250). As a consequence of this, no legitimate arbitration agreement was formed (Defence on Appeal, no. 251).

4.7.60 The Arbitral Tribunal has rejected this defence, considering that HVY are filing a claim based on the violation of their own rights, rather than Yukos' rights, based on the ECT, and that HVY's claim is not derivative but is a claim for HVY's own and direct loss, of their shares and the value thereof.[79] HVY have argued that it is not a derivative claim and that the argument of the Russian Federation cannot, therefore, preclude the competence of the Arbitral Tribunal.

4.7.61 The District Court did not arrive at this ground for setting-aside; since the grounds for appeal succeed (at least partly), however, the Court of Appeal will discuss it here, in relation to the devolutive nature of the appeal.

4.7.62 Said ground (c) cannot result in the setting aside of the Yukos Awards. The contention that HVY as (former) shareholders of Yukos cannot file a claim under Russian law, for damage inflicted upon the company (Defence on Appeal, no. 242), has nothing to do with the question whether Article 26 ECT should be provisionally applied and whether a valid arbitration agreement was formed in the meaning of Article 1065(1)(a) DCCP. For an answer to the question whether pursuant to Article 26 ECT, the Arbitral Tribunal had jurisdiction to hear the dispute between the parties, said contention is therefore not relevant.

4.7.63 Secondly, the Arbitral Tribunal's decision is correct. After all, the Arbitral Tribunal has understood HVY's claim thus, that they argue that the Russian Federation has expropriated (not explicitly but indeed, *de facto*) their shares.[80] The Arbitral Tribunal has awarded HVY's claims also on this ground. The Court of Appeal endorses this interpretation of HVY's assertions, which incidentally, the Russian Federation has not challenged. On that basis, the Arbitral Tribunal has rightly decided that HVY have not filed a claim for damage inflicted upon the company (Yukos).

4.7.64 Incidentally, to the extent that it should be held that the ECT makes shareholder claims possible which those shareholders cannot file under Russian law, it does not follow from this that in this respect, the ECT is inconsistent (in the meaning of the Limitation Clause) with Russian law. It cannot be perceived why the fact that the ECT offers shareholders an option to file a claim in an international investment dispute, that they might not have in the national context, would be inconsistent with the law of the Russian Federation. The Russian Federation also has not substantiated why this would be so.

4.7.65 The conclusion must be, therefore, that ground (c) also cannot result in the setting aside of the Yukos Awards.

### 4.8 (viii) HVY's invocation of 'estoppel' and 'acquiescence', the rule from *IMS/DIO*

4.8.1 In view of the above, there is no need for the Court of Appeal to address HVY's invocation of the IMS/DIO-decision[81] and of *estoppel* and *acquiescence*.

### 4.9 Conclusion as to the grounds for appeal

4.9.1 The conclusion of the Court of Appeal is that the grounds for appeal succeed at least partly. The reasoning given by the District Court cannot carry it decision that no valid arbitration agreement was formed.

4.9.2 This means that the Court of Appeal will now, subsequent to the devolutive nature of appeal, check whether the other contentions raised by the Russian Federation, to argue that the Arbitral Tribunal had no jurisdiction, are well-founded. To this purpose, the Court of Appeal will discuss the arguments of the Russian Federation as derived from Article 1(6) and (7) ECT and Article 21 ECT.

## 5. Other grounds in respect of the Tribunal's jurisdiction

### 5.1 Investment/Investor, Article 1(6) and (7) ECT

*a. Introduction*

5.1.1 The next ground put forward by the Russian Federation to support its position that the Tribunal should have declined jurisdiction pertains to the interpretation of Article 1(6) and (7) ECT. These provisions define the terms 'Investment' and 'Investor'. According to the Russian Federation, the Tribunal misinterpreted these terms, with the result that it wrongly accepted jurisdiction to hear HVY's claim. Article 1(6) ECT defines the term 'Investment' as follows:

"(…) every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

(…)"

Article 1(7) ECT defines the term 'Investor' as follows:

"(a) with respect to a Contracting Party:

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law; (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

(b) with respect to a "third state," a natural person, company or other organization which fulfils, *mutatis mutandis*, the conditions specified in subparagraph (a) for a Contracting Party."

*b. The Tribunal*

5.1.2 In both the Interim Award and the Final Award, the Tribunal has addressed the question of whether HVY can be considered investors within the meaning of Article 1(7) ECT and whether HVY have made an investment within the meaning of Article 1(6) ECT.

5.1.2.1 In the Interim Award, the Tribunal interpreted Article 1(7) ECT on the basis of the 'ordinary meaning' referred to in Article 31(1) VCLT and found that HVY qualify as investors within the meaning of Article 1(7) ECT because HVY are companies incorporated under the laws of Cyprus (Hulley and VPL) and the Isle of Man (YUL). The Tribunal rejected the Russian Federation's argument that the qualification as an investor within the meaning of the ECT is determined not only by the facts surrounding the formal incorporation of HVY, but that what is also determinative is that HVY are controlled exclusively by Russian nationals, that HVY are shell companies and that the companies they operate are economically owned and controlled by Russian nationals, such that HVY should not be classified as nationals of Cyprus or the Isle of Man, respectively, but of the Russian Federation, the 'host state'. In this context, the Tribunal considers that it is not familiar with any principles of international law that require an examination into how a company operates, when the applicable treaty only requires that it be incorporated in accordance with the laws of a contracting party. The principles of international law do not allow an arbitral tribunal to add new, additional requirements that the drafters chose not to include in the treaty.[82]

5.1.2.2 The Tribunal further established in the Interim Award that HVY's legal ownership of the shares in Yukos qualifies as an investment within the meaning of Article 1(6) ECT. It recalls that pursuant to Article 31 VCLT, a treaty must be interpreted in good faith in accordance with the ordinary meaning of its terms. The Tribunal reads in Article 1(6) ECT the broadest possible definition of an interest in a company, without any indication that the drafters of the treaty intended to restrict ownership to beneficial ownership. The Tribunal thus rejected the Russian Federation's assertion that the mere legal ownership of shares is insufficient to qualify as an investment within the meaning of the ECT. In the view of the Tribunal, contrary to what the Russian Federation argues, there is also no requirement for an injection of foreign capital in order to qualify as an investment. Furthermore, the Tribunal rejected the assertion of the Russian Federation that the ECT is not intended to protect investments made in a contracting state by nationals of that same contracting state with capital generated in that state.[83]

5.1.2.3 In the Interim Award, the Tribunal failed to discuss the unclean hands defence raised by the Russian Federation, a defence which also relates to Article 1(6) and (7) ECT. The same applies to the assertion of the Russian Federation that the legal personality of HVY should be disregarded because they are an instrument of a criminal enterprise.[84] These issues were referred to the merits stage by the Tribunal.

5.1.2.4 In the Final Award, the Tribunal has ruled as follows on the unclean hands defence. International arbitral case law assumes that investment treaties are subject to a legality requirement, according to which the investment in question must have been made in accordance with the law of the host state, even if that requirement is not expressly referred to in the treaty. The Tribunal endorses this principle and holds as follows:

> "1352 (…) An investor who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host state, has brought itself within the scope of application of the ECT through wrongful acts. Such an investor should not be allowed to benefit from the Treaty."

The Tribunal expressly does not take a position on whether failure to comply with this requirement of legality should lead to lack of jurisdiction of the Tribunal or result in an investor being deprived of the protection granted by an investment treaty.[85]

5.1.2.5 The Tribunal further ruled that the right to invoke the protection of the ECT can only lapse if there is 'illegality' in the making of the investment, but not 'illegality' in the implementation phase of the investment. In the latter case, the substance of the investor's claim must be dealt with, according to the Tribunal.[86]

5.1.2.6 The Tribunal also addressed the more general assertion of the Russian Federation that a claimant "who comes before an international tribunal with unclean hands is barred from claiming on the basis of a *general principle of law*." The Tribunal considers that no such principle of law exists and that HVY are therefore not prevented on that ground from bringing a claim before the Tribunal.[87]

5.1.2.7 In the arbitral proceedings, the Russian Federation argued that there are 28 cases in which HVY acted illegally and in bad faith. The Tribunal classified these cases into four categories[88]:

1. Conduct of HVY in relation to the acquisition of Yukos and regarding the way in which control of Yukos and its subsidiaries has been consolidated.
2. Conduct of HVY relating to the Taxation Treaty between Cyprus and Russia.
3. Conduct of HVY relating to the use by HVY/Yukos of Russian low-tax regions.
4. Conduct of HVY frustrating the implementation of Russian tax measures.

5.1.2.8 The Tribunal considers that the conduct of HVY in the first category, if established, could result in HVY not being able to bring a claim under the ECT. This does not apply to acts that fall

under categories 2-4, which, in the Tribunal's view, all relate to events that took place after HVY had already made their investment.[89]

5.1.2.9 The Tribunal then considered the conduct in the first category. It considered that the alleged conduct in question took place before 1999, whereas HVY acquired the Yukos shares in the years 1999-2001. The alleged conduct in question is that of third parties, such as Bank Menatep and Khodorkovsky et al. The Tribunal agrees with the Russian Federation that when assessing the legality of an investment, it is not only the last transaction that matters, because the making of an investment often involves a chain of acts. All conduct in this chain must be legal and *bona fide*. However, the Tribunal finds that in this case the Russian Federation has not demonstrated that the illegal conduct is sufficiently connected with the purchase of the shares by HVY.[90]

5.1.2.10 The Tribunal's final conclusion is that the Russian Federation's unclean hands accusation does not result in the Tribunal's lack of jurisdiction or the inadmissibility of HVY's claims, nor does it mean that HVY are not entitled to invoke the material protection of the Treaty.[91]

*c. The Russian Federation's position and the Court of Appeal's suppositions*

5.1.3 The position of the Russian Federation in these setting-aside proceedings is - in essence - that the Tribunal had no jurisdiction because HVY and their shares in Yukos do not fall under the protection of the ECT, so the Yukos Awards should be set aside pursuant to Article 1065(1)(a) DCCP. HVY are, according to the Russian Federation, fake foreign investors. To this end, the Russian Federation submits, in summary, the following.

1. The ECT is aimed at foreign investments and does not protect investment disputes between the state and its own citizens.

> a. HVY are sham companies that are economically owned and controlled by Russian citizens.
>
> b. HVY are not investors and did not make investments within the meaning of Article 1(6) and (7) because the ECT does not protect 'U-turn' investments. This follows from the subject and object of the ECT, the context, the principles of international law and is confirmed by subsequent state practice.
>
> c. HVY did not make any investment within the meaning of the ECT because they did not make any foreign economic contribution in the Russian Federation.
>
> d. The Russian nationals referred to under (a) above abused the corporate structure of HVY for illegal purposes, including tax evasion. This justifies piercing the corporate veil to expose these Russian nationals behind HVY.

2. The ECT does not protect HVY and their shares in Yukos because of the criminal and unlawful background and conduct of HVY and the Russian citizens.

5.1.4 These core assertions are further elaborated by the Russian Federation in the Defence on Appeal nos. 654-780, as well as in the documents submitted by the Russian Federation in the first instance proceedings and the other documents submitted in the appeal proceedings. According to the Russian Federation, the terms 'investment' and 'investor' should not only be interpreted in accordance with the literal meaning accorded to them by the contracting states. It also considers that the context of these provisions as included in the Treaty, the object and purpose of the Treaty, subsequent case law, state practice and (the principles of) international law should be taken into account. Taking these interpretative criteria into account, the conclusion should be that there is no investment or investor within the meaning of the ECT and that the conditions under which arbitration is permitted under Article 26 ECT are not met, according to the Russian Federation.

5.1.5 For the rules applicable in the interpretation of the treaty provisions at issue pursuant to the VCLT, the Court of Appeal refers to paras. 4.2.2 - 4.2.5 above.

5.1.6 As considered there, the point of departure for the interpretation of Article 1(6) and (7) ECT is the text of these provisions and the ordinary meaning that accrues to the wording. The Court of Appeal finds that it is not in dispute that HVY are companies that are “organized in accordance with the law applicable in that Contracting Party” (the internal affairs doctrine). Thus - from a textual point of view - the requirements set out in Article 1(7) for an investor within the meaning of the ECT have been met. The definition of investment as referred to in Article 1(6) ECT is – from a textual point of view – also fulfilled. Investment is defined as “every kind of asset, owned or controlled directly or indirectly by an Investor”. The paragraph gives a non-exhaustive list of 'assets', which includes shares (Article 1(6)(b) ECT). The Yukos shares, which are owned by HVY, therefore qualify as 'Investment' within the meaning of the ECT. Finally, the requirement set out in Article 26 ECT that there is a dispute between a Contracting Party (the Russian Federation) and investors from another Contracting Party (HVY, companies incorporated under the laws of Cyprus and the Isle of Man) “relating to an Investment of the latter in the Area of the Former” has – from a textual point of view – been satisfied. After all, the dispute relates to an investment (shares in Yukos) of HVY in the territory of the Russian Federation because Yukos is a company incorporated under Russian law.

5.1.7 The Court of Appeal will discuss below the various arguments put forward by the Russian Federation in support of its claim that the Tribunal did not pay sufficient attention to the other interpretation rules referred to in Article 31 VCLT and that in applying these interpretation rules it must be concluded that the Tribunal did not have jurisdiction.

*d. Foreign investment, foreign investor*

5.1.7.1 The Russian Federation takes the position that HVY are 'sham companies' that do not conduct substantial business activities in Cyprus and the Isle of Man, respectively, and that are (ultimately) controlled by Russian nationals (Khodorkovsky et al.). They are incorporated and controlled by Russian nationals, who use HVY to channel money out of the Russian Federation. HVY are ultimately (economically) owned by Russian nationals and should therefore be considered Russian investors investing in the territory of the Russian Federation, according to the Russian Federation.[92] According to the Russian Federation, which refers in this respect to one of the expert reports of Prof. Pellet[93], the

undisputable aim of the ECT is to promote only *foreign* investments. In this context, the Russian Federation has, inter alia, invoked the object of the ECT as expressed in Article 2 of the Treaty:

> "This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."

Additionally, the Russian Federation has highlighted the objectives of the Energy Charter, which states that its aim is to promote the international flow of investment and to provide a stable, transparent legal framework for foreign investment.[94] If the provisions in Article 1(6) and (7) ECT are placed in the context of the other treaty provisions, it also becomes clear, according to the Russian Federation, that the ECT only covers foreign investors and foreign investment.[95] The Russian Federation refers in particular to Article 26 ECT, which provides that the jurisdiction of an arbitral tribunal shall be limited to disputes between a contracting party and an investor of another contracting party.[96] It also considers that other ECT provisions make clear that the investments must be made by foreigners and not by nationals who divert their investments through sham companies. This follows, for example, from the words "investors of other Contracting Parties" (Articles 10, 11, 14, 24, 45 and 47 ECT) and "investment in the territory of another Contracting Party" (Articles 12, 13 and 15 ECT), according to the Russian Federation.[97]

5.1.7.2 In its assessment of these assertions, the Court of Appeal holds the following. As already considered above, the ECT opted for "the law of the country under the laws of which the investor is organised" in order to determine the nationality of an investor. This is a common criterion in investment treaties, which is easy to apply and predictable. A drawback of this criterion is that the place of incorporation does not guarantee that the investor has a genuine link with the country under whose law the company is incorporated. There are therefore investment treaties in which the *siège social*, i.e. the place where the activities take place, is used as a connecting factor for determining the nationality of companies. And there are investment treaties that use additional criteria or conditions to determine the nationality of a company, such as the criterion of who controls the company or the requirement that a company actually conducts business activities in the country of which it is a national. These criteria, combined with the internal affairs doctrine and the *siège social*, may ultimately help to limit the scope of the treaty to companies which have a genuine link with the country in which they are established.[98] The drafters of the ECT could have chosen to include such additional conditions in Article 1(7) ECT which would have made it possible to determine whether HVY have a genuine link with Cyprus or Isle of Man, respectively. They did not do so.

5.1.7.3 As regards the Russian Federation's reliance on the object of the Treaty, the Court of Appeal considers as follows. Indeed, the object of the ECT includes (also) - as the Russian Federation rightly argues - (in short) the promotion of international cooperation in the field of energy and the protection of international investments. Contrary to what the Russian Federation assumes, however, the ECT determines exactly when there is an investor and an investment and when an investment dispute has an international character that falls within the scope of Article 26 ECT. It follows from the wording of Article 26 ECT that this is the case if the legal person making the investment is incorporated under the

law of *one* (contracting) state and the investment referred to in Article 1(6) ECT takes place in *another* (contracting) state. It follows neither from the context of Articles 1 and 26 ECT nor from the object of the Treaty that the drafters of the treaty intended to impose further requirements as to the foreign character of the investment or investor, or the international character of the dispute. The Russian Federation also invoked the arbitral award in the case of Cem Cengis Uzan v. Turkey, a case rendered under the ECT.[99] This case, however, concerned a very specific situation which does not arise with regard to HVY: the investor was a Turkish national living in Turkey at the time of his investment (and therefore not covered by the ECT at that time), but who moved to another country at a later date (and thus possibly came within the scope of the ECT). The Court of Appeal therefore considers this judgment to be irrelevant in this context.

5.1.7.4 The Russian Federation has also invoked the Understanding in Article 1(6) ECT which specifies how to determine whether an investment in one contracting party is directly or indirectly controlled by an investor from another contracting party.[100] According to the Russian Federation, it follows from this 'Understanding' that the intention of the drafters of the treaty was not to adopt a formal approach, but to provide for the possibility of verifying that effective control is exercised by an investor from *another* contracting party. However, the reliance on this 'Understanding' is misplaced. Article 1(6) ECT provides that investment means any form of asset that is owned *or* controlled by an investor. It is established that the Yukos shares are owned by HVY. There is therefore no need to establish who controls the shares. Therefore, the 'Understanding' invoked by the Russian Federation in relation to the control criterion is not relevant here.

*e. Control of the investing company (U-turn)*

5.1.8.1 The Russian Federation has invoked the 'denial of benefits clause' in Article 17 ECT. In so far as relevant, that provision reads as follows:

> "Each Contracting Party reserves the right to deny the advantages of this Part to:
>
> (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized. (…)"

5.1.8.2 Investment treaties with a broad definition of the term 'investor' often contain a 'denial of benefits clause', with which the protection of the treaty is denied to certain categories of investors, for example investors who do not engage in any significant business activities in the country of which they are nationals. States can address abuse through such a clause; treaty shopping through sham companies can be countered.[101]

5.1.8.3 According to the Russian Federation, Article 17 ECT provides additional context for a proper understanding of Article 1 ECT. Article 17 ECT denies the protection of part of the Treaty to an investor controlled by nationals of a non-contracting state who does not engage in business activities in the state in which it is incorporated. According to the Russian Federation, it appears from Article 17 ECT that the drafters of the treaty intended to exclude sham companies from the protection of the ECT

even if these companies formally meet the definition of Article 1 ECT. If investments controlled by third country nationals are not worthy of protection, then investments controlled by nationals of the host country (referred to as the U-turn construct) should *a fortiori* fall outside the scope of ECT protection, according to the Russian Federation.[102]

5.1.8.4 In the view of the Court of Appeal, this assertion fails. It does not follow from the text of Article 17 ECT that investments via the U-turn construct (which according to the Russian Federation includes the investments of HVY) fall outside the protection of the ECT. Article 17 ECT gives contracting parties the right to deny the protection of part of the treaty to a well-defined category of investors, i.e. investors who are established in a contracting state only on formal grounds, but are to a large extent materially linked to a non-contracting state. This circumstance does not mean that Article 1 ECT is to be understood as meaning that it is to be read as an exception for another category of investor, namely sham companies and/or investors controlled by nationals of the contracting party in which they make investments.

5.1.8.5 The Russian Federation has also invoked a rule of customary international law which, in its view, prohibits a national from bringing an international law action against his own state. According to the Russian Federation, this also applies to companies in which nationals of the defendant state have a controlling interest.[103] According to the Russian Federation, this rule has been confirmed by several arbitral tribunals.[104]

5.1.8.6 The Court of Appeal rejects the assertion that there is a rule of customary international law in the sense referred to by the Russian Federation. The arbitral awards cited by the Russian Federation do not sufficiently support this assertion. The awards cited by the Russian Federation cover situations in which the claimant has acquired a foreign investment in the international arbitration procedure with the (primary) purpose of gaining access to international arbitration, or equivalent situations in which a domestic investment acquires an international character after the conflict with the state where the investment was made has already arisen. In the case of Phoenix v. Czech Republic, for example, the following was at issue. Phoenix had acquired two Czech companies in 2002, which at that time were involved in litigation with the Czech government. Phoenix, a company incorporated under Israeli law, initiated international arbitration proceedings against the Czech Republic under the BIT between Israel and the Czech Republic. After having obtained information from the parties concerning the acquisition of the two Czech companies and the terms of the purchase agreement, the arbitrators found that “the whole operation was not an economic investment, based on the actual or future value of the companies, but indeed, simply a rearrangement of assets within a family, to gain access to ICSID [International Centre for Settlement of Investment Disputes, Court of Appeal] jurisdiction to which the initial investor was not entitled”. According to the tribunal, this means that the claimant is abusing the system of international investment arbitration and that, for this reason, the tribunal has no jurisdiction. It has neither been asserted nor found that HVY acquired their investments with the main object of bringing international arbitration under the ECT. The rule referred to in Phoenix does not apply here.

5.1.8.7 The Russian Federation further argues that it is a guiding principle of international law that where there is a separation between a formal or legal owner on the one hand and a material or economic owner on the other hand, international law confers legal standing on the latter. According to the Russian Federation, if the drafters of the treaty had intended to depart from this principle, they should have done so explicitly. In this respect, the Russian Federation refers, inter alia, to the decision in Occidental v. Ecuador[105], in which the relevant appeals committee ruled:

> "259. In cases where legal title is split between a nominee and a beneficial owner international law is uncontroversial: (…) the dominant position in international law grants standing and relief to the owner of the beneficial interest - not to the nominee. (…)
>
> 262. The position as regards beneficial ownership is a reflection of a more general principle of international investment law: claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties not protected by the relevant treaty. And tribunals exceed their jurisdiction if they grant compensation to third parties whose investments are not entitled to protection under the relevant instrument."

5.1.8.8 The Court of Appeal is of the view that the aforementioned rule from Occidental v. Ecuador (as interpreted by the Russian Federation), is not applicable to the case of HVY for the sole reason that it has not been asserted nor found that there is a 'split' of the 'legal title' and it has not been explained in sufficient detail why Khodorkovsky et al. are to be considered as 'beneficial owners', or why HVY holds the Yukos shares 'on behalf of' Khodorkovsky et al. in the sense referred to in Occidental v. Ecuador. Nor does it follow from the arbitration case law submitted by HVY (which relates to the ECT) that there is a general principle of law according to which - very generally - an arbitral tribunal must decline jurisdiction if it is not the material (economic) owner, but the formal (paper) owner who brings the claim. For example, in Charanne v. Spain[106], Spain argued that the arbitral tribunal had no jurisdiction because the claimants (a Dutch and a Luxembourg company) were empty shells and the final beneficiaries of the company run by the claimants were two Spanish nationals. However, the arbitral tribunal considered that the ECT made no requirement of the capacity of claimant other than that it was established under the law of a country which is a party to the ECT. The Tribunal continued:

> "415. While it is perfectly conceivable to lift the corporate veil and ignore the legal personality of an investor in the case of fraud directed at jurisdiction, as could be an instrumental transfer of the assets of the investment after the emergence of the dispute, there is no basis for importing to the ECT a general rule according to which the nationality of the investor should be analysed according to an economic criterion, when the ECT itself refers to the legal criterion of incorporation of the company under the law of a Contracting Party. (…)
>
> 416. To adopt the argument of Spain would amount to denial of benefits whenever an investor, legal entity incorporated under the applicable law of a Contracting Party in accordance with Article 1(7)(a)(ii), was controlled by citizens or nationals of the State receiving the investment. However, the drafters of the ECT did not intend to include this hypothesis in the denial of benefits clause of Article 17, which relates to the situation of a legal entity controlled by shareholders of a third

country (a third country being a country not party to the ECT). Regardless of whether a denial of benefits under Article 17 is a matter of merits or jurisdiction – question that the Tribunal does not have to assess in this award – is an illustration of the fact that the drafters of the ECT did not want to exclude from the scope of its application the investors as legal entities controlled by nationals of the Contracting State receiving the investment."

5.1.8.9 Nevertheless, there are arbitral awards that confirm (to a certain extent) that U-turn constructs do not deserve protection. The Russian Federation refers in this respect to the arbitral award in the case Alapli v. Turkey.[107] In that case - which also concerned infringement of the ECT - the majority of the arbitrators considered that the arbitral tribunal did not have jurisdiction. One of the arbitrators found it decisive that Alapli (a Dutch legal entity) had not made a "meaningful contribution to Turkey"; "[s]tatus as a national of the other contracting state is not in itself enough". A second arbitrator, on the other hand, considered that the decisive factor was that Alapli's investment "had as its main purpose to gain access to ICSID arbitration at a time when there were already important disagreements between the Turkish company and the Turkish authorities". Considering the division of the arbitrators, the Court of Appeal is of the view that Alapli v. Turkey offers insufficient connecting factors to assume that there is an international principle of law whereby investment treaties do not or should not protect U-turn constructs. The award TSA Spectrum v. Argentina[108] cited by the Russian Federation does not provide connecting factors for this either. The Russian Federation invokes the following finding from that arbitral award:

"145. This text may be interpreted in a strict constructionist manner to mean that a tribunal has to go always by the formal nationality. On the other hand, such a strict literal interpretation may appear to go against common sense in some circumstances, especially when the formal nationality covers a corporate entity controlled directly or indirectly by persons of the same nationality as the host State."

However, the Russian Federation ignores the context of this finding: the arbitral tribunal examined whether the claimant was to be considered a national of a contracting state within the meaning of Article 25(2)(b) ICSID, in particular whether the claimant – a legal person under the law of Argentina – was to be considered a national of another contracting state within the meaning of this provision of the treaty. There is therefore no question here is of whether the arbitral tribunal formulates a general principle of law in the sense referred to by the Russian Federation.

5.1.8.10 It can be inferred from the arbitration case law cited by HVY that there is no generally accepted principle of law in the sense referred to by the Russian Federation. For example, in the Arbitral Award in Saluka v. Czech Republic[109], the arbitral tribunal assumes that for the question of whether a company is an investor within the meaning of an investment treaty (in this case the BIT between the Netherlands and the Czech Republic), except "where corporate structures have been utilised to perpetrate fraud or other malfeasance" (para 230), it is not relevant who controls this company when there is no "clear language in the Treaty" from which it follows that this is relevant for the qualification as an investor under the treaty. The arbitral tribunal considers:

> "The parties to the Treaty could have included in their agreed definition of "investor" some words which would have served, for example, to exclude wholly-owned subsidiaries of companies constituted under the laws of third States, but they did not do so. The parties having agreed that any legal person constituted under their laws is entitled to invoke the protection of the Treaty, and having so agreed without reference to any question of their relationship to some other third State corporation, it is beyond the powers of this Tribunal to import into the definition of "investor" some requirement relating to such a relationship having the effect of excluding from the Treaty's protection a company which the language agreed by the parties included within it."

HVY have also pointed to a number of ECT cases. In the arbitral award in the case Plama v. Bulgaria[110] the arbitral tribunal has held that, for the purposes of qualifying as an "investor" within the meaning of Article 1(7) ECT, it is irrelevant who is the owner of the investing company and/or by whom it is controlled. In Isolux v. Spain[111], it was argued by Spain that Isolux (a company incorporated under Dutch law) was a sham company which was actually controlled by its Spanish shareholders and therefore was not an investor within the meaning of Article 1(7) ECT. The arbitral tribunal rejected that assertion and considered that, apart from "fraud in the adjudication of justice":

> "670. (…) the Arbitral Tribunal notes that the ECT does not contain, as some Treaties do, a carve-out clause to exclude application of the requirement to be organised pursuant to the laws of other Contracting Party where a legal person is controlled by nationals of the other Contracting State. (…)"

In short, the Court of Appeal agrees with HVY that there is no general principle of law according to which investment treaties do not provide protection to companies wholly controlled by nationals of the host country.

5.1.8.11 Finally, 'in order to confirm' all of its aforementioned assertions, the Russian Federation has invoked Article 31(3)(b) VCLT, which states that any subsequent use in the application of a treaty text which has given rise to agreement between the parties to the treaty on its interpretation must be taken into account. According to the Russian Federation, a large number of ECT contracting parties have in subsequent investment treaties excluded investments via the U-turn construct from the scope. The Russian Federation argues that this is consistent with and reinforces the exclusion of U-turn investments from the scope of the ECT.[112] However, little weight should be given to the state practice referred to by the Russian Federation, since the Court of Appeal has ruled that the correct interpretation of the ECT does not exclude U-turn investments. For this reason alone, the assertion of the Russian Federation fails. Moreover, the circumstances to which the Russian Federation refers do not comply with the provisions of Article 31(3)(b) VCLT because they do not relate to state practice in the application of the Treaty (the ECT), but to choices made by states in concluding new treaties.[113]

*f. Economic contribution to host country*

5.1.9.1 The Russian Federation is of the opinion that it follows from various ECT provisions that a foreign investor must *actively* make an investment within the territory of a Contracting State. It refers, inter alia, to the words “the investor *making* an investment” and “the investment is *made*.” It follows from this that there is only an investment within the meaning of the ECT if an investor contributes funds of foreign origin to the territory of a contracting state, or at least makes an economic contribution to the host state.[114]

5.1.9.2 In this respect, the Russian Federation has also invoked international arbitral case law, more specifically the 'Salini criteria'. These criteria are derived from the arbitral award of 23 July 2001 concerning Salini v. Morocco.[115] In that case, the arbitral tribunal was faced with the question whether the case involved an 'investment' within the meaning of the ICSID. It should be noted that the ICSID - unlike the ECT - did not contain a definition of the term investment, so the arbitral tribunal had to determine the meaning of that term itself. The arbitral tribunal considered as follows:

> “The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (…) In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.
>
> In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.”

5.1.9.3 In *Salini*, therefore, the arbitral tribunal established four criteria to be met in order for an investment to qualify as an 'investment' within the meaning of the ICSID. One of these criteria is that there must be a “contribution to the economic development of the host State”. In subsequent arbitral case law, the ‘Salini criteria’, or at least the requirement that the investment must make a contribution to the economic development of the host state, have been repeated regularly.[116] This case law (almost) always concerned the concept of investment in the sense of the ICSID. However, there are also arbitral tribunals that have ruled that a contribution to the economic development of the host state is not a requirement. For example, the arbitral tribunal in the Saba Fakes v. Turkey case[117] considered the following as regards the term 'investment' in the sense of the ICSID:

> “111. The Tribunal is not convinced (…) that a contribution to the host State’s economic development constitutes a criterion of an investment within the framework of the ICSID Convention. Those tribunals that have considered this element as a separate requirement for the definition of an investment, such as the *Salini* Tribunal, have mainly relied on the preamble to the ICSID Convention to support their conclusions. The present Tribunal observes that while the preamble refers to the “*need for international cooperation for economic development*,” it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording. In the Tribunal’s opinion, while the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment. The promotion and protection of

> investments in host States is expected to contribute to their economic development. Such development is an expected consequence, not a separate requirement, of the investment projects carried out by a number of investors in the aggregate."

5.1.9.4 The Court of Appeal notes that there may be a rule of unwritten law that an investment within the meaning of the ICSID can only exist if the investor makes an economic contribution to the host state. This in no way implies the existence of an internationally recognised principle of investment law according to which any investment treaty provides protection only to investments making an economic contribution to the host state, regardless of whether the treaty contains a definition of the term investment. The Russian Federation has not demonstrated the existence of such a legal principle. Although it has referred to a single arbitral award in which the existence of such a principle of law has been assumed,[118] the Court of Appeal considers that this is not sufficient to establish the existence of a principle of law in the sense invoked by the Russian Federation. The Russian Federation further argues the existence of arbitral case law and recent treaties which establish the existence of an international investment on the basis of objective criteria such as: contribution, duration and risk.[119] However, it has not demonstrated that such criteria also apply to an investment within the meaning of Article 1(6) ECT.

5.1.9.5 The drafters of Article 1(6) ECT could have defined the term 'investment' more narrowly than they did, for example by requiring capital to flow from one contracting state to another, or requiring the foreign investor to make an economic contribution to the host state. It is clear from the wording of the Treaty, however, that only an 'asset based' definition, i.e. a non-exhaustive list of assets, will determine whether an investment within the meaning of the ECT is involved. Against this background, the fact that Article 1(6) ECT refers to an investor "making" an investment and (in the 'Understanding') to an investment "being made" does not provide sufficient guidance to read in this paragraph the requirement that the foreign investor must make an economic contribution to the host state.

*g. Piercing the corporate veil*

5.1.10.1 The Russian Federation has argued for piercing of the corporate veil as Khodorkovsky et al. cannot hide behind the corporate structure of HVY which they themselves have abused to commit fraud, bribery, and other crimes. According to the Russian Federation, it is a fundamental principle of international law that misuse of the corporate structure justifies piercing the corporate veil. It relies, inter alia, on a judgment of the ICJ in the Barcelona Traction case.[120] The ICJ considered in that case, among other things:

> "56 (…) Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as absolute. It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in

> municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations."

However, these findings did not relate to the jurisdiction of the ICJ, but to the question whether the claimant (Belgium) could bring an action against Spain in favour of the (Belgian) shareholders of Barcelona Traction, a company incorporated under Canadian law. The Court of Appeal is of the view that it is not possible to infer from Barcelona Traction a fundamental principle of law in the sense intended by the Russian Federation.

5.1.10.2 The Russian Federation also referred to the case of Cementownia v. Turkey.[121] The central question in that case was whether Cementownia, a company incorporated under Polish law, had acquired the shares in two Turkish companies and, if so, whether the purpose of that acquisition was to gain access to international arbitration. The arbitral tribunal considered that case:

> "156. Here the Claimant's conduct is not even close to proper conduct. Had Cementownia actually proven that on May 30, 2003 it legally acquired the shares of CEAS and Kepez, there would still be the question of whether this was treaty shopping of the wrong kind (…)."

Nor, in the view of the Court of Appeal, does this case support the assertion of the Russian Federation that there is an international principle of law that the corporate veil should be pierced because the legal form has been abused for fraud. The same applies to the cases of Phoenix Action v. Czech Republic and Alapli v. Turkey, which have already been discussed by the Court of Appeal (para. 5.1.8.6 and 5.1.8.9).[122] These cases do not concern "piercing the corporate veil", but the situation that the claimant acquired the shares in a company in the arbitration proceedings with the main purpose of gaining access to international arbitration.

5.1.10.3 The Russian Federation has further argued that if pursuant to Article 1(7) ECT the nationality of an investor is determined under its domestic law, the application of principles of piercing the corporate veil under domestic law leads to the same result as under international law. It argues that piercing the corporate veil under Cypriot and Isle of Man law is possible if (briefly put) the legal personality is used for an improper purpose.[123]

5.1.10.4 In the view of the Court of Appeal, Article 1(7) ECT does not provide a basis for the application of rules of national law relating to piercing the corporate veil. The treaty provision does not contain any basis for this. In addition, the doctrine of piercing the corporate veil is not even relevant here because it is not HVY's liability (but that of the Russian Federation) that is at issue. Apparently, the Russian Federation wants HVY to be 'thought away', as it were, because the shareholders/factual policy makers/beneficiaries of HVY abuse the companies for criminal activities. This apparently concerns the question whether the doctrine of piercing the corporate veil can be used to challenge the jurisdiction of the Tribunal in the situation where - according to the Russian Federation - HVY shareholders have been guilty of criminal activities. To what extent the criminal

activities alleged by the Russian Federation interfere with the jurisdiction of the Tribunal, the Court of Appeal will deal with this below.

*h. Legality of the investment*

5.1.11.1 The Russian Federation has argued that it is a fundamental principle of investment arbitration that an investment must be legal and *bona fide*. This principle includes, in its view, the doctrine of unclean hands, which is an established principle of international law and public order. In investment arbitration it is generally accepted that the protection under the treaty does not extend to investments made in breach of the law of the host state, even if the treaty in question does not contain a provision expressly excluding such investments from the scope of the treaty.[124] The Russian Federation considers that it has provided detailed evidence of the illegal nature of both the making of the investment by HVY and its implementation. The Tribunal should therefore have declined jurisdiction.[125]

5.1.11.2 In the view of the Court of Appeal, it can be inferred from international arbitration case law that there is a principle of international law which entails that international investments made in breach of the law of the host state do not deserve protection. This also applies even if the relevant investment treaty does not expressly provide for it. For example, in the case of Phoenix v. Czech Republic[126], the arbitral tribunal considered:

> "101. In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process. And it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT."

And in the case of Fraport v. Philippines[127], the arbitral tribunal considered:

> "332. The Tribunal is also of the view that, even absent the sort of explicit legality requirement that exists here, it would (…) still be appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment."

However, in order to lose the protection of an investment treaty, it must concern cases where - as is for example considered in Oxus Gold v. Uzbekistan[128] – "the illegality affects the "making", i.e. arises when initiating the investment itself and not just when implementing and/or operating it." Or in Hamester v. Ghana[129] in which the arbitral tribunal distinguishes between"(1) legality as at the

initiation of the investment ("made") and (2) legality during the performance of the investment". Therefore, to the extent that the Russian Federation invokes illegal conduct by HVY in the period after HVY made their investment in Yukos, this cannot lead to a lack of jurisdiction of the Tribunal. More specifically, this concerns HVY's conduct related to the Tax Treaty between Cyprus and Russia, HVY's conduct related to tax avoidance by Yukos and HVY's conduct that prevented the collection of taxes (Final Award, nos. 1291-1310). None of this conduct affects the jurisdiction of the Tribunal.

5.1.11.3 Where it is established that illegality is involved in the making of the investment, a distinction should be made in terms of consequences between (a) investment treaties in which the definition of the term 'investment' includes a phrase to the effect that the investment must have been made 'in accordance with the law', or words of a similar nature, and (b) investment treaties in which this is not the case. In the case of treaties of the former category, the prevailing doctrine seems to be that illegality leads to the fact that no investment has been made within the meaning of the investment treaty, so that the arbitral tribunal does not have jurisdiction to hear the investor's claim.[130] However, the ECT does not fall into the first category of treaties, so the Court of Appeal can leave aside what has been considered in respect of those treaties.

5.1.11.4 Where a treaty does not contain a legality requirement (the second category of treaties), arbitral case law is divided on what should be the consequence when an investor acts 'illegally' in making the investment. In Phoenix v. Czech Republic, for example, the arbitral tribunal considered:

> "102. The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law. The fact that an investment is in violation of the laws of the host State can be manifest and will therefore allow the tribunal to deny its jurisdiction. Or, the fact that the investment is in violation of the laws of the host State can only appear when dealing with the merits, whether it was not known before that stage or whether the tribunal considered it best to be analysed as the merits stage, like in the case of Plama.
>
> (…)
>
> 104. There is no doubt that the requirement of the conformity with law is important in respect of the access to the substantive provisions on the protection of the investor under the BIT. This access can be denied through a decision on the merits. However, if it is manifest that the investment has been performed in violation of the law, it is in line with judicial economy not to assert jurisdiction."

The arbitral tribunal applies a fairly pragmatic rule of thumb in this case: bearing in mind grounds of procedural economy, only obvious illegality leads to lack of jurisdiction.[131] In the case Plama v. Bulgaria[132], the arbitral tribunal ruled that the claimants 'misrepresentation' at the time the investment was made meant that:

> "146 (…) this Tribunal cannot lend its support to Claimant's request and cannot, therefore, grant the substantive protections of the ECT."

Thus, in that case the arbitral tribunal ruled that the claimant could not derive any material protection from the ECT because of the malpractices it had committed in making the investment. In any event, the arbitral tribunal considered that these malpractices (in this case) could not affect its jurisdiction:

> "112. Contrary to Respondent's argument, the matter of the alleged misrepresentation by Claimant does not pertain to the Tribunal's jurisdiction: that was already decided in the Decision on Jurisdiction. Rather, the matter concerns the question as to whether Claimant is entitled to the substantive protections offered by the ECT."

In the case of Blusun v. Italy[133], the arbitral tribunal did not consider whether the fact that the investments were contrary to the law should lead to the arbitral tribunal's lack of jurisdiction. The arbitral tribunal merely confirmed that the ECT does not protect investments made in breach of the law. Under the heading 'issues of jurisdiction and admissibility', the arbitral tribunal considered:

> "264. As to the lawfulness of the Project, it is true that the ECT does not lay down an explicit requirement of legality, but the Tribunal concludes that it does not cover investments which are actually unlawful under the law of the host state at the time they were made because protection of such investments would be contrary to the international public order. This conclusion is consistent with numerous other decisions and awards. In particular, the Plama tribunal found that because: '…the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law ... the substantive protections of the ECT cannot apply to investments that are made contrary to law'."

On the other hand, the arbitral tribunal considered in Ampal v. Egypt[134]:

> "301. It is a well-established principle of international law that a tribunal constituted on the basis of an investment treaty has no jurisdiction over a claimant's investment which was made illegally in violation of the laws and regulations of the Contracting State."

5.1.11.5 On the basis of the foregoing, the Court of Appeal is of the view that the Russian Federation has not sufficiently demonstrated that there is a generally accepted principle of law which implies that an arbitral tribunal must (always) decline jurisdiction where it concerns the making of an 'illegal' investment. As stated above, Article 1 (6) ECT does not contain a legality requirement; it does not require that an investment must have been made in accordance with the law of the host state. Nor does the text of the ECT contain any restrictions on access to arbitration as referred to in Article 26 ECT. The Court of Appeal considers that in this case the ordinary meaning of the wording of Article 1(7) ECT prevails. As a result, the Court of Appeal does not lack jurisdiction if it is shown that there was 'illegal conduct' at the time of, or in making, the investment. The fact that such illegality may lead to the claimant's action being denied is irrelevant in the context of the present ground for setting-aside (Article 1065(1)(a) DCCP).

5.1.11.6 Superfluously, the Court of Appeal considers the following. Even if it should be assumed that 'unlawful conduct' at the time of making the investment under the ECT does lead to a lack of jurisdiction on the part of the Tribunal, the Court of Appeal is of the view that this it is of no avail to the Russian Federation. With regard to the accusations of the Russian Federation summarised by the Tribunal in no. 1283 of the Final Award, the Tribunal considered:

> "1370. In the present case (…) Respondent has failed to demonstrate that the alleged illegalities to which it refers are sufficiently connected with the final transaction by which the investment was made by Claimants. The transactions by which each Claimant acquired its investment were their purchases of Yukos shares. As established in the Interim Award, these purchases were legal and occurred starting in 1999. On the other hand, the alleged illegalities connected to the acquisition of Yukos through the loans-for-shares program occurred in 1995 and 1996, at the time of Yukos' privatization. They involved Bank Menatep and the Oligarchs, an entity and persons separate from Claimants, one of which – Veteran –had not even come into existence. With respect to Respondent's other allegations, regarding profit skimming and the oppression of minority shareholders, it is also clear to the Tribunal that they are not part of the transaction or transactions by which each Claimant acquired their interest in Yukos."

5.1.11.7 The Court of Appeal is of the view that the Tribunal has thus correctly held that the conduct complained of is too far removed from the transactions by which HVY acquired their shares in Yukos. The Court of Appeal therefore rejects the Russian Federation's assertion that HVY's direct involvement in the illegal acquisition of the Yukos shares in 1995/1996 precludes the jurisdiction of the Tribunal. In this respect, the Russian Federation argues that (i) YUL paid bribes on behalf of Khodorkovsky et al. to the Red Directors (the directors of Yukos before it was privatised), that (ii) Khodorkovsky et al. admitted that they were responsible for these payments by YUL and that (iii) the Yukos shares belonging to HVY were derived from illegal activities of Khodorkovsky et al.[135]The accusation under (iii) was mainly based by the Russian Federation on a report by Prof. Kothari. Prof. Kothari has analysed how the Yukos shares in the period 1995-2000 ultimately came into the hands of HVY, and in doing so he assumes that all Yukos shares from the 1995/1996 auctions were 'tainted shares'.[136] In his 2015 report, he analyses through which intermediaries HVY acquired their shares and concludes that there "[is] a substantial link connecting the shares obtained during the 1995-96 auctions, and the shares on which Claimants based their claim in the ECT arbitration."[137]

5.1.11.8 The Court of Appeal assumes that the shares acquired by HVY in 1999-2001 were acquired by other persons/companies through illegal conduct in 1995/1996. However, this does not mean that HVY itself was acting illegally at the time of *their* investment. There is an insufficient connection between the (alleged) illegalities in 1995/1996 and the making of the investment by HVY. This does not change if the - possible - involvement of HVY in the payment of bribes to the Red Directors is taken into account. This circumstance is also insufficiently linked to the investment made by HVY itself. The Russian Federation argues[138] that the contested agreements with the Red Directors were made by Khodorkovsky et al. prior to the privatisation, that the (according to the Russian Federation: 'fake') contracts drawn up were signed by GML (the parent company of YUL) and that Khodorkovsky

et al. used the bank accounts of YUL to pay at least USD 613.5 million to the Red Directors. These assertions, to the extent that they should be assumed to be correct, do not show a sufficient link between the investment of HVY (more specifically of YUL) and the alleged bribery of the 'Red Directors'. In any event, the illegality is not so evident that it should lead to a lack of jurisdiction on the part of the Tribunal.

5.1.11.9 The Court of Appeal also rejects the assertion of the Russian Federation that it is important for the jurisdiction of the Tribunal that - as argued by the Russian Federation - (i) certain (unlawful) aspects of the privatisation by Khodorkovsky et al. at the time were not included, that - as the Court of Appeal understands - (ii) for this reason, the Russian Federation did not initially take action against the 'illegal manipulation of the privatisation of Yukos' and that (iii) the fact that there was no criminal prosecution in Russia for this does not mean that Khodorkovsky et al. are innocent.[139] In the context of the appeal of lack of jurisdiction, it can remain undecided whether these assertions are correct and whether there have been (serious) breaches of law during the privatisation of Yukos, because possible illegal conduct by Khodorkovsky et al. at the time of the privatisation of Yukos are too far removed from the investment by HVY.

*i. Conclusion*

5.1.12 The conclusion is that the Russian Federation's reliance on Article 1(6) and (7) ECT fails. The Tribunal has correctly considered that these provisions do preclude its jurisdiction.

**5.2 Tax measures, Article 21 ECT**

*a. Introduction*

5.2.1 To substantiate the annulment grounds 'lack of jurisdiction' and 'violation of mandate', the Russian Federation has referred to Article 21 ECT. The Russian Federation argues moreover that the Tribunal's violation of mandate comprises a public policy violation. These last two issues will be dealt with in paras. 6.3.1-6.3.5 and in paras. 9.3.2. In this part of the judgment, the Court of Appeal will discuss Article 21 ECT exclusively in the context of jurisdiction.

5.2.2 Article 21(1) ECT reads:

> "Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency."

Paragraph 5 of the same article reads, in so far as relevant:

"a. Article 13 shall apply to taxes.

b. Whenever an issue arises under Article 13, to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply:

(i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Article 26(2)(c) shall make a referral to the relevant Competent Tax Authorities."

*b. The Russian Federation's position*

5.2.3 In the context of the ground for setting-aside 'lack of jurisdiction', the Russian Federation argues the following. Article 21(1) ECT contains an exception for taxation measures (the 'carve-out') and provides that no provision in the Treaty creates rights or imposes obligations in relation to taxation measures. This is a comprehensive exception. Since the measures contested by HVY qualify as taxation measures, the ECT does not apply and therefore no valid arbitration agreement exists. The taxation measures taken by the Russian Federation were a legitimate exercise of the authority of the Russian Federation and therefore fall outside the scope of Article 26 ECT. The taxation measures are not brought back within the scope of the ECT by the 'claw-back' of Article 21(5) ECT because the concept of 'tax' in paragraph 5 is narrower than the concept of 'Taxation Measures' in paragraph 1.

*c. Does Article 21 ECT affect the Tribunal's jurisdiction?*

5.2.4 In the arbitral proceedings, the Russian Federation invoked Article 21 ECT in connection with the question of whether the Tribunal had jurisdiction over the dispute.[140] The Tribunal postponed the decision on that defence to the merits stage of the arbitration. The Tribunal then held that it had jurisdiction to rule on HVY's claim based on Article 13 ECT for two separate reasons.[141] First, the Tribunal considered that any measure covered by the 'carve-out' of Article 21(1) ECT is also covered by the 'claw-back' of Article 21(5) ECT. Second, the Tribunal considered that Article 21(1) ECT only covers *bona fide* taxation measures. Whether Article 21(1) ECT affects the jurisdiction of the Tribunal was left unanswered by the Tribunal. This also follows from the final judgment in so far as it reads as follows: "dismisses the objections to jurisdiction and/or admissibility, based on Article 21 of the Energy Charter Treaty."[142] To the extent that the Tribunal ruled on jurisdiction, the jurisdiction concerned "claims under Article 13."[143]

5.2.5 In assessing whether the provisions of Article 21 ECT affect the jurisdiction of the Tribunal, the Court of Appeal holds the following. Article 21(1) ECT does not contain any reference to the jurisdiction of arbitrators but merely states that the Treaty does not create any rights or impose any obligations in relation to taxation measures. The Russian Federation's argument that "nothing in the ECT applies to taxation measures" (Defence on Appeal no. 788), is therefore incorrect. Article 21(1) ECT does not affect the jurisdiction of the Tribunal, as this jurisdiction is (only) determined by the conditions of Article 26 ECT. As it must be assumed in the present proceedings that those conditions

are fulfilled, the provisions of Article 21(1) ECT do not lead to the conclusion that the Tribunal lacks jurisdiction if a situation covered by Article 21(1) ECT arises.

5.2.6 The Court of Appeal finds further support for that finding in the following circumstances. First, Article 21 ECT is contained in 'Part IV: Miscellaneous Provisions' of the ECT. That part of the Treaty contains several more general provisions, but does not deal with the settlement of (investment) disputes. The jurisdiction of the Tribunal, as considered previously, is determined by Article 26 ECT, which forms part of 'Part V: Dispute Settlement'. Also in view of the fact that Article 21 ECT is not part of Part V of the Treaty, the Russian Federation's argument that the 'unambiguous meaning' of the wording of Article 21(1) ECT is that an arbitral tribunal has no jurisdiction to adjudicate on taxation measures cannot be followed. This cannot be inferred from the text itself nor can it be inferred that the exception of Article 21(1) ECT takes precedence over the provisions of Article 26 ECT.

5.2.7 The parties do not dispute that the provisions of paragraphs 2-5 of Article 21 ECT relate to substantive rights (Defence on Appeal no. 788). Those paragraphs are exceptions to Article 21(1) ECT in respect of those substantive rights, which in itself also contains an exception. This is also reflected in the provisions of paragraph 5(b)(i), which prescribe the circumstances under which an arbitral tribunal must seek advice from the competent tax authorities. It is not conceivable that an arbitral tribunal which allegedly has no jurisdiction pursuant to Article 21(1) ECT has to seek such advice or that the jurisdiction of an arbitral tribunal depends on the outcome of such a substantive investigation. It also follows from this that Article 21 ECT does not affect the jurisdiction of the Tribunal.

5.2.8 The Court of Appeal therefore does not endorse the Russian Federation's argument that it clearly follows from the words of Article 21(1) ECT that an arbitral tribunal has no jurisdiction if a claim relates to taxation measures and that there is therefore no room for further interpretation. The very context of the provision indicates that it is not a provision that affects the jurisdiction of an arbitral tribunal. Nor does the Court of Appeal share the conclusion of the Russian Federation that Article 26 ECT and other provisions of the ECT only apply if and when that reference is made to the tax authorities (Defence on Appeal no. 789).That argument implies that such a reference precedes the determination of the jurisdiction of an arbitral tribunal, i.e. that it is only after and by such a reference that jurisdiction is, or is not, established. As has been considered above, it is not logical that such a reference should be made by an arbitral tribunal whose jurisdiction has not yet been established. The Russian Federation's assertion is therefore inconsistent with a good faith interpretation of Article 21(1) ECT.

5.2.9 The fact that the 'carve-out' is intended to prevent conflicts with existing treaties to prevent double taxation (Defence on Appeal no. 790) also does not lead to the conclusion that Article 21(1) ECT relates to the jurisdiction of an arbitral tribunal. After all, such a conflict is also avoided if a competent arbitral tribunal disregards claims relating to taxation measures at the merits stage.

5.2.10 The argument that decisions concerning certain BITs were handed down in relation to jurisdiction, is not decisive because the Court of Appeal must assess the text and context of Article 21 ECT and not those of other treaties. For this reason, the reliance by the Russian Federation on the arbitral award of 3 February 2006 in EnCana v. Ecuador fails.[144] That arbitration was based on the 'Canada-Ecuador Agreement for the Promotion and Reciprocal protection of Investments of 29 April

1996'. The first paragraph of Article XII of that BIT provides: "Except as set out in this Article, nothing in this Agreement shall apply to taxation measures." Furthermore, the article has a different structure from Article 21 ECT; in particular, it does not contain the substantive exceptions included in Article 21(2)-(5) ECT. In the arbitral award in Plama v. Bulgaria of 27 August 2008[145], the arbitral tribunal considered: "Article 21 of the ECT specifically excludes from the scope of the ECT's protection taxation measures of a Contracting State, with certain exceptions (…)". However, the arbitral tribunal in that case did not decline jurisdiction, but ruled that there was no claim to protection under the Treaty. Thus the reliance on that award fails as well. The conclusion of the above is that Article 21(1) ECT does not affect the jurisdiction of the Tribunal.

*d. Is Article 21 ECT applicable?*

5.2.11 If it should be assumed that Article 21 ECT does affect the jurisdiction of the Tribunal, the question arises if the article applies at all. HVY have argued that Article 21 ECT is not applicable in its entirety because the 'carve-out' of Article 21 ECT relates only to *bona fide* taxation measures. According to HVY, the tax measures imposed by the Russian Federation, however, were not intended to generate general revenue for the State, but served an entirely unrelated purpose, namely the destruction of Yukos and the elimination of a political opponent.

5.2.12 The Tribunal ruled that the taxation measures imposed by the Russian Federation were not *bona fide*. As the Court of Appeal concluded above that Article 21(1) ECT does not relate to the jurisdiction of the Tribunal, the question of whether Article 21 ECT applies at all to HVY's claims cannot relate to the jurisdiction of the Tribunal either. Superfluously, the Court of Appeal considers the following.

5.2.13 The Court of Appeal agrees with HVY that the mere fact that a measure is designated as a taxation measure or even is a taxation measure, does not mean that Article 21(1) ECT applies. This would open up the possibility of circumventing the applicability of the Treaty by classifying a measure as a taxation measure or using a taxation measure for *mala fide* reasons for another purpose, thereby undermining the protection afforded to investors under the Treaty. Such an interpretation would be inconsistent with the Court of Appeal's obligation to interpret the Treaty in good faith. This means that the court before which an application for the setting aside of an arbitral award is brought must examine whether the measures on which judgment is sought are *bona fide* taxation measures that are genuinely and exclusively aimed at the collection of tax due in a normal, diligent and predictable manner and do not also serve any other purpose.

5.2.14 Contrary to what the Russian Federation argues (Statement of Reply no. 302), the above does not mean that a tax assessment could no longer be a 'Taxation Measure', but expresses the fact that protection under the treaty is not lost when such a tax measure is (also) taken for a purpose other than *bona fide* taxation. The question of whether there can be a distinction between the intentions of an individual tax official on the one hand, and the taxing State on the other, may be left unanswered because the Russian Federation does not argue that such a distinction has existed in this case (Statement of Reply no. 303). Likewise, the question of whether the intention or motives of a State are irrelevant under international law in general may be left unanswered (Statement of Reply no. 304).

What matters is that, where appropriate, a *bona fide* interpretation of Article 21 ECT does not allow such motives to be disregarded. This could lead to an erosion of the protection afforded by the Treaty.

5.2.15 The Court of Appeal agrees with several decisions of arbitral bodies other than the Tribunal that Article 21(1) ECT only concerns *bona fide* taxation measures.[146] The Court of Appeal rejects the broader standard proposed by the Russian Federation entailing that a measure is covered by the exclusion for 'taxation' if it is "sufficiently clearly connected to a taxation law or regulation (or to a procedure, requirement or practice of the tax authorities in apparent reliance on such law or regulation)" (among others, Writ of Summons no. 297). The mere fact that there is a basis in Russian law for the tax measures, or that in international practice anti-tax avoidance rules similar to those invoked by the Russian authorities exist, is therefore not sufficient to consider those taxation measures as *bona fide* (Defence on Appeal no. 836). The issue at stake is the application of such (anti-tax avoidance) rules in the specific case, including whether those measures were not taken for a purpose other than to collect taxes. The fact that the Tribunal also concluded that a basis for taxation was to be found in Russian law is therefore not decisive as such, nor does it affect the Tribunal's conclusion that there was no *bona fide* taxation. The Court of Appeal rejects the argument of the Russian Federation that this interpretation of Article 21(1) ECT runs counter to the purpose of a referral to the concerned tax authorities (Defence on Appeal no. 818). An arbitral tribunal should be able to rule on the *bona fide* or *mala fide* nature of a taxation measure without referral to the concerned tax authorities. Generally speaking, it is also unlikely that the concerned tax authorities will consider that a tax measure they have adopted was not *bona fide*.

5.2.16 In assessing whether the taxation measures in this case were *bona fide*, the Court of Appeal takes as a starting point that, after extensive investigation, the Tribunal concluded that the measures taken by the Russian Federation were not exclusively intended to collect taxes but rather to provoke the bankruptcy of Yukos and remove Khodorkovsky from the political arena.[147] In Part VIII of the Final Award, the Tribunal set out in considerable detail how Yukos was organised, what the background to that organisation was, what taxation measures were taken and what fines were imposed. The Tribunal considers in its "concluding observation" that "the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets".[148] In so doing, the Tribunal did not turn a blind eye to the possibility that tax law-related accusations could be directed at Yukos, but nevertheless held that the tax measures were not *bona fide*. The Tribunal based that conclusion on the following facts[149]:

- The attribution to Yukos of the revenues earned by its trading companies, even though there was no precedent in Russia for such attribution based on the theory of "actual owner", and the refusal at the same time to give Yukos any of the benefits of the VAT filings made by the trading companies, with the result that Yukos was assessed USD 13.5 billion or 56 percent of the total tax claims levied against Yukos;
- The imposition on Yukos of the "willful offender" fines, at the very least as they related to VAT;
- The refusal of the tax authorities to give Yukos the benefit of Article 3(7) of the Russian Tax Code to resolve doubts as to the interpretation of Article 112(2) of the Russian Tax Code in favor of the taxpayer, with the resulting imposition of nearly USD 4 billion in "repeat offender" fines; and

- The imposition of "repeat offender" fines on Yukos when the conduct that was punished occurred prior to the determination by the courts that the conduct was wrongful; for example, the "repeat offender" fine assessed against Yukos for the 2001 tax year is based on the finding by the courts in 2004 that the conduct in 2000 was wrongful.

5.2.17 To the extent that the Russian Federation has contested these conclusions of the Tribunal in these setting-aside proceedings, they have been addressed elsewhere in this judgment and the Russian Federation's arguments have been rejected. This also means in this context that the Russian Federation's arguments fail and that the Tribunal was right to decide that the taxation measures were not *bona fide*.

5.2.18 The fact that the ECtHR came to the conclusion that there was no violation of the ECHR in the imposition of the additional assessments is not sufficient for the Court of Appeal to conclude that the taxation measures were *bona fide*. Not only did the ECtHR assess a different question than that before the Court of Appeal, but the ECtHR also used an assessment framework that allows the State in question a wide margin of discretion.

5.2.19 In these proceedings, HVY expressly invoked the circumstances established by the Tribunal and endorsed the Tribunal's conclusions on this point. The Court of Appeal takes the view that those facts and the conclusions reached by the Tribunal on that basis have not been sufficiently contested by the Russian Federation to support the conclusion that the Tribunal's decision is incorrect. This will be further elaborated elsewhere in this judgment with regard to the various circumstances put forward by the Russian Federation.

5.2.20 It is concluded that Article 21(1) ECT does not apply to the measures on which HVY based their claims in the arbitration. Superfluously, the Court of Appeal finds as follows.

*e. Article 21(5)(a) ECT*

5.2.21 The Tribunal held that measures falling outside the scope of treaty protection by virtue of the 'carve-out' of Article 21(1) ECT should be brought back within the scope of treaty protection by virtue of the 'claw-back' of paragraph 5. The Russian Federation argues that this decision is incorrect. The Court of Appeal rejects that argument. The term 'Taxation Measures' used in paragraph 1 is defined in Article 21(7)(a) ECT, in the sense that this paragraph defines (not exhaustively) what is covered by the term. The term 'taxes' is not defined separately, but 'provisions relating to taxes' are in any case part of the term 'Taxation Measures'. The text of the Treaty does not, therefore, exclude the possibility that 'taxes' and 'Taxation Measures' refer to the same measures. This also follows from the fact that, as HVY also pointed out, the terms 'taxation measures' and 'tax' are used interchangeably in other language versions of the ECT (Statement of Appeal no. 754 and Defence on Appeal no. 809). For example, in Article 21(1) ECT, the French text speaks of 'mesures fiscales', in paragraph 5(a) of 'impots' and in Article 5(b) again of 'mesure fiscale' where the English text refers to a 'tax'. In the German text, paragraph 1 refers to 'steuerliche Maβnahmen', paragraph 5(a) to 'Steuern', paragraph 5(b) to 'Steuer', but paragraph 5(b)(i) again to 'Maβnahme'. The Italian version speaks of 'misure(a) fiscali' in both Article 21(1) ECT and Article 21(5)(a) and (b). If a distinction had been intended

between 'Taxation Measures' in Article 21(1) ECT and 'taxes' in paragraph 5, it could be expected that this distinction would be reflected in all language versions. The fact that a distinction is made between 'Taxation Measures' and 'tax' in other language versions of other articles and paragraphs does not detract from this because what is important is that an 'inconsistent' (Statement of Reply no. 295) use would not be obvious if an actual distinction were intended. The description of the term 'Taxation Measures' in Article 21(7) ECT does not make this any different. Even if it is assumed, as the Russian Federation does, that the term 'Taxation Measures' has a broad scope, encompassing all legislative, executive and judicial measures, this does not rule out that the same applies to the term 'taxes' in Article 21(5) ECT.

5.2.22 The fact that other investment treaties do not contain claw-back provisions obviously does not lead to a different conclusion, since this case concerns the interpretation of the claw-back in Article 21(5) ECT.
The object of Article 21(5)(a) ECT is to ensure that, in the event that taxation measures accrue the character of an expropriation, treaty protection can be invoked by the expropriated party. To this end, it is also inappropriate to distinguish between the concept of 'Taxation Measures' in paragraph 1 and the concept of 'taxes' in paragraph 5. Nor does the mere fact that there is a difference in wording in the English language version justify a different conclusion in this case in light of the object of the Treaty. Moreover, the *travaux préparatoires* do not contain any indication that the drafters of the ECT intended Article 21(5) ECT to have a different scope from Article 21(1) ECT. Thus, the Tribunal came to the well-founded conclusion that measures which fall outside the scope of protection of the Treaty as a result of the 'carve-out' are included again due to the 'claw-back'. For this reason, too, the Tribunal was able to rule on the measures that led to the damages claimed by HVY.

### 5.3 Opinion in respect of the Tribunal's jurisdiction (Article 1065(1)(a) DCCP)

5.3.1 In conclusion, all grounds argued by the Russian Federation for the absence of a valid arbitration agreement, do not support such a conclusion. There is no reason to set aside the Yukos Awards pursuant to Article 1065(1)(a) DCCP.

5.3.2 The Court of Appeal will now discuss the other grounds for setting-aside put forward by the Russian Federation. In doing so, it will follow the sequence used by the Russian Federation.

## 6. Violation of the mandate (Article 1065(1)(c) DCCP)

### 6.1 Legal context

6.1.1 The Russian Federation argued as a second ground for setting aside that the Tribunal did not comply with its mandate as set out in Article 1065(1)(c) DCCP. This ground for setting aside implies, first, that an arbitral tribunal must comply with both the rules of law relating to the proceedings and the procedural rules agreed upon by the parties, as well as the rules of the Tribunal as notified to the parties. When assessing whether the procedural rules have been complied with, restraint must be exercised. Within these limits, it is left to the discretion of the arbitrators to determine the procedures of the proceedings.[150]

6.1.2 It is the duty of the civil court to interpret the agreed rules of legal procedure and, on that basis, to examine whether or not an arbitral tribunal has applied those rules correctly. Where the agreed rules are laid down in a regulation declared applicable which is applied internationally, such as the UNCITRAL Arbitration Rules, their interpretation must be based on the text, as they are to be understood in their context by objective standards and must also take account of international practice.[151]

6.1.3 An arbitral tribunal may violate its mandate by going beyond the ambit of the legal dispute – in the sense of awarding more than or something different from what was requested, or not deciding on one or more (counter)claim – or not basing the decision on the correct standard. As far as the standard on which the decision is based is concerned, the court is only authorised to verify whether the arbitrators have applied the correct standard. The civil court is not at liberty to examine the substance of the case to determine whether the arbitrators have applied the standard correctly. After all, that would amount to a disguised appeal, for which the setting-aside proceedings may not be used.[152]

6.1.4 This ground for setting aside also implies that the Tribunal may not fail to consider an essential argument or defence, i.e. an argument or defence directly affecting the arbitral award. Therefore, failure to address all of the arguments put forward in the Yukos Awards does not constitute a failure by the Tribunal to comply with its mandate. The question of how explicitly the Tribunal should address an argument or defence so that the Yukos Awards are not subject to setting aside depends on the nature of the argument or defence in the light of the whole of the legal dispute presented to the arbitrators.[153] The court should observe restraint in its assessment.[154] In doing so, it makes no difference whether the court tests against the grounds of Article 1065(1)(c) or (d).

6.1.5 Article 1065 DCCP entails that no setting aside shall take place on the ground that the arbitral tribunal did not comply with its mandate if the departure from the mandate is not of a serious nature. The existence of this exception, now expressed in Article 1065(4) DCCP, was already accepted under the old law applicable to this case.[155]

**6.2 The Russian Federation's position**

6.2.1 The arguments raised by the Russian Federation in relation to the alleged violation of the mandate relate to the following issues:

(i) Noncompliance with Article 21(5)(b) ECT (para. 6.3);

(ii) Determination of damages (para. 6.4);

(iii) Deciding by guesswork and going beyond the ambit of the legal dispute (para. 6.5)[156];

(iv) Role of the assistant to the Tribunal (para. 6.6).

**6.3 (i) Article 21(5)(b) ECT**

6.3.1 As regards the obligation of the Tribunal to refer the dispute to the relevant competent tax authorities in order to determine whether the tax measures constitute an expropriation, the Court of Appeal finds as follows. The Russian Federation takes the view that the Tribunal erred in failing to comply with the mandatory requirement of Article 21(5) ECT which provides that if the question arises as to whether a tax measure is an expropriation, the arbitral tribunal shall refer that question to the relevant tax authorities. The Treaty does not provide for the 'futility exception' made by the Tribunal. The Russian Federation explicitly drew the Tribunal's attention to the necessity and usefulness of obtaining an opinion in a timely fashion, and obtaining said opinion would have been quite possible during the arbitration. Since the Tribunal nevertheless omitted to do so, the parties were deprived of the opportunity to invoke the opinion of the tax authorities or to comment thereon in any other way. This is also contrary to public policy. HVY contests these arguments of the Russian Federation. The Court of Appeal finds as follows.

6.3.2 The Russian Federation by itself rightly points out that the obligation to submit the relevant question to the appropriate tax authorities is mandatorily imposed on the Tribunal in Article 21(5) ECT and that a 'futility exception' is not included. The Tribunal was therefore, in principle, obliged to submit the dispute regarding the tax measures imposed in Russia to the Russian tax authorities in any event. However, the Court of Appeal did not consider the failure to do so to be sufficiently serious to justify setting aside the arbitral award. The reason for this is that it has not become plausible that the Russian Federation has suffered any disadvantage as a result of this failure. It must be assumed that during the detailed handling of the dispute by the Tribunal, the Russian Federation put forward or was able to put forward all relevant information which the Tribunal could also have obtained by seeking the opinion of the Russian tax authorities. In any event, the Russian Federation has not argued that it did not have such a possibility.

6.3.3 The Russian Federation argued in its written arguments on appeal (no. 20 of the written arguments of 24 September 2019) that the Tribunal committed several ‘blunders’ as a result of failing to submit the dispute to the tax authorities concerned. In its summons (nos. 379 et seq.), the Russian Federation referred in the first place to the opinion of the Tribunal on the “allocation of the income of the shell trading companies in Lesnoy and Trekhgorny to Yukos”. However, it appears from the Final Award that a full discussion on this issue took place at the Tribunal and the views of the Russian Federation were considered, in particular the view that taxation in relation to the ‘shell companies’ was legitimate[157] and in line with international standards and practices.[158] However, it is precisely this latest information which, according to the Russian Federation, the Tribunal could also have obtained from its tax authorities. Under these circumstances, it cannot be assumed that the failure to submit the dispute to the Russian tax authorities had any material effect. Also with regard to the ‘second manifest error’ identified by the Russian Federation, it must be deduced from the Final Award that the views of the Russian Federation were put forward and weighed.[159] It is difficult to see – and the Russian Federation fails to indicate so – what additional information the Tribunal could have obtained from the Russian tax authorities that would have led to a different judgment. Therefore, it cannot be concluded that there has been any material prejudice to the Russian Federation due to the fact that the Tribunal did not refer to the Russian tax authorities the question whether the tax measures taken in Russia constituted an expropriation.

6.3.4 The Russian Federation also argued that the dispute should have been referred to the tax authorities of Cyprus and the United Kingdom. This argument does not hold, as Article 21(5)(b) ECT only requires an opinion to be sought from the 'relevant competent tax authority' if the question concerned is 'whether a tax constitutes an expropriation'. However, HVY did not argue that tax measures taken by Cyprus or the UK constitute an expropriation.

6.3.5 The Russian Federation further argues that the Tribunal's conduct is contrary to the so-called prognosis prohibition. The prognosis prohibition is a Dutch procedural concept which means that the judge may not anticipate the outcome of a possible hearing of witnesses. Even if it must be assumed that arbitrators in an international arbitration are bound by this prohibition, there was no anticipation of the testimony of witnesses. Article 21(5)(b)(iii) ECT provides that an arbitral tribunal may take into account any conclusions of the national tax authorities. This provision is completely different from the obligation not to refrain from hearing witnesses on the basis of an anticipation. The latter is aimed at finding the truth, the former at advising on tax measures. Therefore, a relevant parallel with the ruling of this Court of Appeal of 14 October 2004, invoked by the Russian Federation, cannot be drawn.[160] The same applies to the decisions relied on by the Russian Federation in respect of breach of the right to be heard (Statement of Reply no. 350). The right to be heard is a fundamental principle of procedural law which cannot be reconciled with the Tribunal's duty to refer the dispute to the competent tax authorities and the (discretionary) power to take account of the conclusions reached by the tax authorities. There is therefore no breach of the mandate justifying the setting aside of the arbitral award.

**6.4 (ii) Determination of damages**

6.4.1 The Russian Federation argues that the Tribunal violated its mandate by awarding damages on the basis of its own new and extremely flawed method of calculation, which differed from the debate between the parties and on which the parties were not heard, thus leading to a surprise decision. This resulted in the award of tens of billions of dollars of damages without any economic basis. The Tribunal (a) failed to apply the same corrections to the equity value as it did to the dividends and (b) counted damage twice, namely as dividend and as equity value. According to the Russian Federation, the Tribunal thus also violated Article 1039(1) DCCP and Article 24(1) of the UNCITRAL Rules. Moreover, the Tribunal violated its mandate by using a different valuation date for the calculation of the damages than required by Article 13 ECT.

6.4.2 The Court of Appeal will first summarise how the Tribunal reached its decision on the amount of damages. Subsequently, the Court of Appeal will discuss the objections of the Russian Federation against this, also on the basis of the defence put forward by HVY.

6.4.3 In connection with the discussion on damages it is important that the Court of Appeal has decided the following on the liability of the Russian Federation under the ECT. First, the Tribunal found that "the primary object of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets" (Final Award nos. 756 and 1579). According to the Tribunal, two wrongdoings by the Russian Federation stand out: holding Yukos liable for the payment of over USD 13 billion in VAT on oil that had been exported and that should have been exempt from VAT, and the auction of Yugansneftegaz (hereinafter: 'YNG') for a price well below its value.

Without these actions, Yukos would have been able to pay the tax claims of the Russian Federation and would not have been declared bankrupt and liquidated (Final Award no. 1579). According to the Tribunal, the Russian Federation had not explicitly expropriated Yukos or the shares of its shareholders, but the measures taken by the Russian Federation against Yukos had “an effect equivalent to nationalization or expropriation” (Final Award no. 1580). For the sake of brevity, the Court of Appeal will hereinafter refer to ‘expropriation’ where it means: measures “equivalent to nationalization or expropriation”, in line with the approach apparently taken by the Tribunal as well. The Tribunal held that the Russian Federation is liable under international law for breach of Article 13 ECT, so that it did not have to decide whether the Russian Federation is also liable under Article 10 ECT (Final Award no. 1585). Finally, the Tribunal decided that HVY contributed 25% of the damage suffered as a result of the destruction of Yukos by the Russian Federation, so that 25% of the damage should remain at their expense (Final Award no. 1637).

6.4.4 As far as relevant here, the Tribunal followed the steps below in its reasoning leading to the determination of the damages accruing to HVY:

a. The date of the expropriation of HVY's investment (“the date of the expropriation of Claimants' investment”) is 19 December 2004, the date on which YNG was auctioned off and as a result of which a substantial and irreversible expropriation of HVY's property took place (Final Award nos. 1761-1762).

b. If, as in this case, a wrongful expropriation has taken place, the valuation date ("the date of the taking") provided for in Article 13 ECT does not apply. In the case of an unlawful expropriation, the investor may choose between the date of the expropriation (19 December 2004) or the date of the arbitral (final) award as the valuation date for the calculation of the damages (Final Award nos. 1765 and 1769). For the purpose of determining the damage, the Tribunal assumes that the date of the Final Award is 30 June 2014. The Tribunal must therefore determine the total damage on both possible dates, with HVY being entitled to the highest amount, less 25% for 'contributory fault' (Final Award no. 1777). (As the Tribunal ultimately concluded that the calculation as at 30 June 2014 provides the highest amount of damages and awarded the damages on this basis, only the findings and calculations relating to this valuation date will be set out below, Court of Appeal).

c. HVY is entitled to the following damage components: (1) the value of the shares in Yukos on the valuation date, (2) the value of the dividends which Yukos would have paid to HVY up to the valuation date had the expropriation not taken place (“but for the expropriation of Yukos”), and (3) “pre-award simple interest on these amounts” (Final Award no. 1778). A possible listing of the Yukos shares on the New York Stock Exchange and a possible merger between Yukos and Sibneft should be excluded from the damage estimate (Final Award nos. 1779-1780).

d. In nos. 1782-1790, the Tribunal discusses the first damage component, the value of Yukos shares. HVY had proposed three different methods of valuation, the DCF (Discounted Cash Flow) method, the comparable companies method and the comparable transactions method. In addition, HVY and their expert (Mr Kaczmarek of Navigant, hereinafter: ‘Kaczmarek’) had made a number of

secondary calculations in support of their three main methods. These different valuations are shown in a table in the Final Award (no. 1782).

e. The expert of the Russian Federation, Prof. Dow (hereinafter: 'Dow'), did not provide an own method for valuing Yukos, but he did provide a corrected version of the 'comparable companies method'. The thus corrected calculation of Dow amounts to USD 67,862 billion as at 21 November 2007. Dow has stated that this "could be a useful evaluation". Assuming a 90/10 equity/debt capital structure of Yukos, this corresponds to an equity value of Yukos as at 21 November 2007 of approximately USD 61,076 billion (Final Award no. 1783).

f. "The "corrected" comparable companies figure is the best available estimate for what Yukos would have been worth on 21 November 2007 but for the expropriation" (Final Award no. 1784). The other methods put forward by HVY, including the DCF method and the secondary calculations, are not considered sufficiently reliable by the Tribunal for several reasons (Final Award no. 1785-1786).

g. The Tribunal then considered (Final Award no. 1787):

> "By contrast to all of the other methods canvassed above, the Tribunal does have a measure of confidence in the comparable companies method as a means of determining Yukos' value. While Professor Dow stated at the Hearing that he had not performed an analysis sufficient to fully endorse the figure resulting from his corrections to Claimants' comparable companies approach, he agreed that it "could be a useful valuation." The Tribunal for its part finds that the comparable companies method is, in the circumstances, the most tenable approach to determine Yukos' value as of 21 November 2007, and therefore the starting point for the Tribunal's further analysis."

h. To adjust the value of Yukos to the relevant valuation date in November 2007, the Tribunal used the 'RTS Oil and Gas index'. This index is based on shares traded on the Moscow Stock Exchange, including the shares of nine oil and gas companies. Both parties referred to the RTS Oil and Gas index as a reliable indicator of changes in the value of Russian oil and gas companies (Final Award no. 1788).

i. The value of Yukos as at 21 November 2007 (USD 61.076 billion) should therefore be indexed as at the valuation date (30 June 2014) using the RTS Oil and Gas index (Final Award no. 1789).

j. For the calculation of the damage consisting of lost dividends, the Tribunal takes as a starting point the 'Yukos lost cash flows (i.e., free cash flow to equity)' calculated by Kaczmarek as at 21 November 2007. The 'lost cash flows' between 2004 and 21 November 2007 are presented in Kaczmarek's first report as based on 'actual historical information', in contrast to the cash flows included in Kaczmarek's DCF model for the period from 21 November 2007 to the end of 2015, which are based on 'forecasts and projections' using information from before that period (Final Award no.

1793). In his second report, Kaczmarek included ‘lost cash flows’ for the period 2004-2011 that are presented as based on ‘actual historical information’, in contrast to the cash flows included in Kaczmarek's DCF model for the period 2012 to the end of 2019 that are based on ‘forecasts and projections’ using information from before that period (Final Award no. 1794).

k. For the period 2012 to 2014, the Tribunal could determine the relevant numbers using Kaczmarek's method by using data found elsewhere in Kaczmarek's reports. On the basis of these data and method, which are explained in more detail in no. 1796 Final Award and which are specified in Tables T4-T6 attached to the Final Award, the total amount of lost dividends from 2004 to 30 June 2014 according to Kaczmarek's model totals at USD 67,213 billion (Final Award no. 1795-1797). For the Tribunal, this was the starting point for calculating the dividends that HVY would have received in the (hypothetical) situation that the expropriation had not taken place (Final Award no. 1798).

l. Although Kaczmarek's figures are partly based on historical data (“and thus are not plagued by some of the errors associated with forecasts and projections”), some of the criticisms made by Dow of Kaczmarek's DCF model also apply to the calculation of dividends, such as the reproach that HVY underestimated Yukos' transport and operating expenses (Final Award nos. 1799-1801).

m. Using the spreadsheets provided by Dow in his second report, the corrected ‘free cash flow to equity’ for the relevant years can be calculated. Although Dow did not explicitly endorse this corrected version as his view of Yukos’ ‘free cash flow to equity’, it is clear that the figure expressed herein is more in line with his view. Based on this corrected method, the total of Yukos’ dividends for the period from 2004 to the first half of 2014 amounts to USD 49,293 billion (see Table T3 of the Final Award, the total of the second column) (Final Award no. 1802).

n. A number of additional corrections need to be made in addition to Dow’s corrections because they did not take into account all the risks to Yukos’ cash flow that would have been incurred if it had been able to continue its business. Corrections should be made for: the risk of substantially higher taxes, the risk in relation to Yukos’ dividend policy, as well as the risks associated with the complex and opaque offshore structure set up to channel money earned by Yukos abroad. As a result of these adjustments, the total of Yukos' dividends for the period from 2004 to the first half of 2014 amounts to USD 45 billion (Final Award nos. 1803-1812).

o. The value of Yukos as at 21 November 2007 (USD 61,076 billion) indexed with the RTS Oil and Gas index is USD 42,625 billion as at 30 June 2014. The value of HVY's 70.5% share therein is USD 30,049 billion (Final Award nos. 1821 and 1822).

p. Yukos’ dividends for the period from 2004 up to and including the first half of 2014 amount to USD 45 billion, USD 51,981 billion with accrued interest. HVY's 70.5% share therein amounts to USD 36,645 billion (Final Award nos. 1823 and 1824).

q. The total damage of HVY as a result of the violation of Article 13 ECT as of 30 June 2014 thus amounts to (USD 30,049 billion + USD 36,645 billion =) USD 66,694 billion (Final Award no. 1825). Reduced by 25% due to contributory fault, the damage amounts to USD 50,020,867,798 (Final Award no. 1827).

6.4.5 In its assessment of the complaints of the Russian Federation, the Court of Appeal considers first and foremost that the arbitrators have a wide margin of discretion under international law when it comes to estimating damages. Once the arbitrators find evidence that the claimant has suffered damage, which according to the Tribunal was the case here (Final Award no. 1772), they have a large degree of freedom to estimate the exact amount of the damage. The Court of Appeal refers in this respect to ground 9.1.4 of this judgment. In addition, the Tribunal in this case had to take a hypothetical situation as a basis for the damage estimate. After all, this concerns a damage estimate based on a comparison of the current situation of HVY and the hypothetical situation that Yukos would not have been expropriated and that it would have been able to continue its business and pay dividends. It goes without saying that determination of that hypothetical situation necessarily involves an estimation in which the Tribunal has significant discretion.

6.4.6 In this case it is also important to note that although the Russian Federation has extensively criticised HVY's damage calculations, it has not itself proposed an alternative valuation of Yukos (Final Award no. 1783). It is thus foreseeable that the Tribunal, which took on board many of the criticisms of the Russian Federation of HVY's calculations, would calculate the damages itself, as it did in this case, on the basis of the assumptions of HVY which it considered acceptable and applying the criticisms made by the Russian Federation. The Russian Federation's argument that it proposed two alternative damage models (Defence on Appeal no. 900; Statement of Reply annex 1 nos. 25-27) does not alter the foregoing. These were the proposal (i) to treat HVY as if they had invested in Lukoil, which the Russian Federation considered to be a company similar to Yukos, and (ii) to take as a starting point that HVY had legally avoided paying more than three quarters of the taxes, fines and costs imposed. Thus, both methods do not propose an own valuation of Yukos, as the Tribunal rightly considered. It should be noted that, whatever the two alternative approaches, they do not correspond with the method proposed by HVY and finally adopted by the Tribunal. This method implied that HVY was entitled to (1) the value of the shares in Yukos on the valuation date, (2) the value of the dividends which Yukos would have paid to HVY up to the valuation date if the expropriation had not taken place ("but for the expropriation of Yukos") (plus 'pre-award interest'). Since HVY founded their damage estimate on this method, the Russian Federation should have been aware that the Tribunal would follow HVY therein and had every opportunity to submit its own calculations using this method. The Russian Federation did not do so, however.

6.4.7 The Russian Federation argues that the Tribunal chose a valuation date that was not put forward by any of the parties (30 June 2014) and that both parties had argued that the calculation of the damages from a date other than 21 November 2007 would require further analysis by an expert. This argument fails. HVY have indeed argued that they were entitled to choose between the date of the expropriation (according to them 21 November 2007) and the date of the Final Award, depending on which would provide the highest damages. The Russian Federation could therefore have taken into account that the Tribunal would have arrived at the latter date and, by estimating the date of the Final Award, could have anticipated it with its own calculations. Even if, as the Russian Federation states,

the parties considered that the calculation of the damage as of a date other than 21 November 2007 would require an expert, this did not have to prevent the Tribunal from carrying out the necessary calculations itself if it considered itself able to do so.

6.4.8 The Russian Federation argues that the Tribunal found that HVY had failed to substantiate the extent of their damage and that the burden of proof rests with HVY. In the absence of such evidence, the Tribunal should have rejected the claim for damages. The Russian Federation refers to the judgment of the Permanent Court of International Justice (PCIJ) of 13 September 1928 concerning *Factory at Chorzow*[161]. The Tribunal should at least have asked for further comments from the parties. By failing to do so, the Russian Federation was deprived of its right to be heard, resulting in a surprise decision. According to the Russian Federation, the Tribunal violated its mandate by not allowing the Russian Federation to defend its rights and present its arguments (Article 1039(1) DCCP), by ignoring Article 24(1) UNCITRAL Rules (according to which each party has the burden of proving the facts in support of its claim) and by violating the fundamental right of the Russian Federation to be heard (Article 1056(1) DCCP). The Russian Federation also invoked the ground for setting aside in Article 1065(1) DCCP (flawed reasoning) and Article 1065(1)(e) DCCP (public order) in connection with its objections to the damages calculation. The Court of Appeal will also address this ground for setting aside in this section because the arguments put forward by the Russian Federation in relation to those grounds are to a large extent intertwined with those put forward in relation to Article 1065(1)(c) DCCP (violation of mandate). For the rest, the Court of Appeal refers to grounds 8.3 and 9.3.1.

6.4.9 The Russian Federation's argument fails. The Court of Appeal refers to what has been considered above, where it has been noted that the Tribunal was free to estimate the extent of the damage itself if the existence of damage is established and the Tribunal considered that it had sufficient evidence to do so. It is undeniable that the Tribunal considered that both conditions were met in the present case. In this respect, this case also differs from the *Factory at Chorzow* judgment cited by the Russian Federation, in which the PCIJ considered that it did not have the information necessary to enable it to decide on the *existence* and *extent* of the alleged damage and, therefore, that the damage had not been proven[162] Nor is it correct that the Tribunal found that HVY had failed to substantiate the extent of their damage. The Tribunal did not follow HVY's damage calculations in all respects, but it did take certain elements thereof as a starting point, such as the 'comparable companies method'.

6.4.10 The argument of the Russian Federation that it should have been heard because the Tribunal used an "own, newly developed method" to determine the extent of the damage fails. First, the Russian Federation does not make sufficiently clear what this 'newly developed method' of the Tribunal would consist of. The decision of the Tribunal that the damage suffered consists of (i) the (proportional) value of Yukos, (ii) the lost dividends and (iii) the interest thereon, is fully in line with the position of HVY (as the Russian Federation also acknowledges, summons no. 391 and written arguments of counsel Koppenol-Laforce no. 7; see also Final Award no. 1711; Kaczmarek I Report in the arbitration no. 14). The ‘comparable companies method’, which the Tribunal took as the starting point for the determination of the value of Yukos, was one of the alternative calculation methods as proposed by Kaczmarek and Dow stated that he could, in principle – after applying certain corrections – endorse the result achieved by that method (referred to by him as the ‘multiples analysis of Mr Kaczmarek’) as “a result that I would be prepared to consider useful” (Transcript Hearings day 12 pp. 45-46). Also

from what hereinafter will be considered with regard to further criticism from the Russian Federation, it appears that there was no 'new method' at all. The Russian Federation also refers to a (third) report by Dow of 8 November 2014, submitted by summons[163], of which the Russian Federation (according to its own arguments) has given its own summary in the Summons (Summons no. 409). The Court of Appeal considers this report, in which Dow gives an opinion on the method used by the Tribunal to determine the damage, to be a substantiation of the arguments made in the summons and, as such, will take it into account in its judgment where appropriate.

6.4.11 The Russian Federation argued (summons nos. 408 and 409) that there were gaps in the case file which the Tribunal was not allowed to fill without consulting the parties. This argument also fails. The fact that none of the parties offered a valuation of Yukos on the Tribunal's valuation dates and that the Tribunal had rejected all the valuations proposed by HVY for other dates did not prevent the Tribunal from independently establishing this valuation on the date it considered appropriate, using the information provided by the parties themselves. Moreover, as a possible valuation date, HVY had indeed argued for the date of the Final Award (Final Award nos. 1694) and the Russian Federation contested that view (Final Award nos. 1739, 1740 and 1764).

6.4.12 The Russian Federation subsequently accused the Tribunal of determining the value of Yukos as at 21 November 2007 on the basis of an amount of USD 67.862 billion. Dow had calculated this amount as the result of Kaczmarek's 'comparable companies model', after Dow had made a number of corrections thereto, but he did not regard this as a correct value of Yukos and did not present it as such. This argument, too, is unfounded. Even if Dow continued to object to the amount corrected by him, this did not mean that the Tribunal should also have those objections and *therefore* could not take that amount as a starting point. It appears that the Tribunal did not have those objections, nor did it understand that Dow's remaining objections would have an appreciable impact on value. This is not incomprehensible given the content of Dow's second Expert Report (submitted in the arbitration proceedings) and the course of the proceedings.

6.4.13 In its second Expert Report, Dow corrected the outcome of the 'comparable companies method' as applied by Kaczmarek on four points, the result of which is summarised in paragraph 417, table 67 (the Tribunal refers to this in the Final Award no. 1783). The value of Yukos in 2007 is shown there as USD 67.862 billion. This amount was repeated by Dow in the same report on p. 195 in table 73.

6.4.14 According to the transcript of the 'hearing' of day 12, Dow, questioned by one of HVY's lawyers, stated the following[164]:

> "Q. If we go back to [page] 195 [of the second report of Dow, Court of Appeal], the Yukos and YukosSibneft valuation in 2007, there we also have a figure for the comparable analysis. For Yukos, in figure 73, you have $67.8 billion; and for YukosSibneft you have $93.7 billion. Would those figures constitute a valid result in terms of valuation in the same manner as for YNG?
>
> A. They are not presented in that context, but I think I'd have to agree that they could be a useful valuation, yes.

Q. How useful, in your view? (Pause)

A. Well, the thing is I don't like to provide a valuation on the hoof, as it were. So the numbers in those tables are not numbers I've thought about in that context. I guess looking at them on the hoof, as that's what we're doing here, I am a bit concerned that the YukosSibneft number is very different to the Yukos number, since the theory of Mr Kaczmarek's analysis of how YukosSibneft created value is limited to some synergies which he doesn't think are very big. In addition I would have to do a bit more analysis, I think, to try and study, if we look at figure 73, the 67 billion for Yukos, how that relates to what it was in 2004, how oil prices have changed over that period. So I haven't done enough analysis on these to endorse them in that sense, and I don't think it would be responsible of me to endorse them for a purpose that they weren't reported in that figure as being useful for."

6.4.15 These passages show that although Dow stressed that Kaczmarek's 'comparable companies method', as corrected by him, did not result in a valuation that had his full backing (which the Tribunal recognised in the Final Award no. 1787), he considered the result to be a 'useful valuation' at the same time. Dow's answer during the hearing, quoted above, does not indicate that he still had any concrete points of criticism; it merely shows that he would like to carry out a further analysis of one or two points with respect to the value of Yukos. Under these circumstances, the Tribunal was able to consider that it would take the value calculated by Dow as its starting point. Had Dow been of the opinion that further corrections should be made to the value calculated by Kaczmarek, or had he wished to establish a valuation of Yukos that had his full backing, there was nothing to prevent him from doing so in his report. Since Dow did not do so, the Russian Federation cannot reproach the Tribunal for using the Kaczmarek value corrected by Dow. In any case, this is not a surprise decision. The USD 67.862 billion value of Yukos as at 21 November 2007 was discussed during the hearing on day 12 and the Russian Federation can hardly be surprised by the fact that the Tribunal took as its starting point a result from the report of its own expert.

6.4.16 The Russian Federation is furthermore of the opinion that the Tribunal should not have calculated the value of Yukos as at 30 June 2014 by applying the RTS Oil and Gas index, at least not without consulting the parties. Neither of the parties had proposed or endorsed this approach, so the Tribunal should have given the parties the opportunity to comment thereon, according to the Russian Federation. The Court of Appeal does not follow the Russian Federation in this respect. The Tribunal considered that both parties referred to the RTS Oil and Gas index as a reliable measure of changes in the value of Russian oil and gas companies, and that they also used the index in their calculations to move certain valuations from one date to another (Final Award no. 1788). During the hearing, Dow also confirmed that the RTS Oil and Gas index was a reliable index of changes in the value of shares in Russian companies and that he had used it himself (Transcript Hearings day 12 pp. 67-68). In so far as the Russian Federation argues that the Tribunal rejected the application of this index on the grounds that it was invoked by HVY too late in the proceedings[165], the Court of Appeal does not concur. Such an opinion cannot be invoked from the passage cited by the Russian Federation (Final Award no. 1786), in which the Tribunal rejects some 'secondary evaluations' for this reason. Nor does the Court

of Appeal follow the argument of the Russian Federation (Defence of Appeal no. 911) that the Tribunal misrepresented the facts by finding that both parties had indicated the RTS Oil and Gas index as a reliable indicator. Indeed, it follows from the statements made by the Russian Federation's expert Dow at the hearing of the Tribunal, also quoted by the Russian Federation, that he considered said Index 'by definition' as a reliable index of 'Russian share companies' changes'. Even if it is true that he could not foresee how the Tribunal would subsequently apply this index, this does not invalidate this statement about the nature of the index as such. Against this background, the Tribunal was free to adjust the value of Yukos in 2007 to 30 June 2014 using the RTS Oil and Gas index.

6.4.17 Also with regard to the calculation of the lost dividends, the Tribunal has, according to the Russian Federation, developed its 'own method' to fill gaps in the case file. First, the Russian Federation criticises the fact that the Tribunal used the figures from Kaczmarek's DCF model for this calculation. This criticism is unfounded. The fact that the Tribunal rejected Kaczmarek's DCF models because they not reliable enough to determine the value of Yukos does not mean that the Tribunal was not allowed to use certain data from them for the calculation of the lost dividends. The Tribunal expressly points out that it used data from Kaczmarek's reports for the calculation of dividends for the period 2004-2011, which were based on historical data and were therefore not based on forecasts and projections. The fact that the Tribunal had rejected the DCF models because they were based on predictions and projections did not prevent it from using the historical data for the calculation of the lost dividends. The Russian Federation also argues that the data in one of Kaczmarek's models are too high. However, the Russian Federation loses sight of the fact that the Tribunal only used the dividends calculated according to the Kaczmarek model as a starting point for further calculations and that, precisely because it could not completely separate the historical data from the DCF method, rightly criticised by Dow according to the Tribunal, it finally - following Dow's criticism and after applying some of its own corrections (see Final Award nos. 1799-1802 and 1811) - applied a discount of over USD 22 billion to those figures. The fact that Dow had indicated that he did not endorse the Kaczmarek method did not, of course, prevent the Tribunal from applying both the method and the corrections thereto proposed by Dow. Contrary to what the Russian Federation argues[166], the Tribunal determined the lost dividends based on its own assessment and did not rely on a ‘valuation’ of the value of Yukos by Dow.

6.4.18 The Russian Federation subsequently argues that the historical information was not information regarding Yukos, as Yukos no longer existed, but information derived from the results of the main Yukos subsidiaries which now had a new owner. Kaczmarek is said to have derived these figures from various sources, then 'strung these together' and then admitted that they were constructed in hindsight. This argument fails, because the Tribunal apparently considered that the (historical) data derived from the former subsidiaries were reliable enough to be used as a starting point for estimating the lost dividends. The Tribunal was free to do so in view of the freedom it had in estimating the extent of the damage. For the rest, it is a substantive assessment of the evidence available which cannot be tested in these setting-aside proceedings.

6.4.19 The Russian Federation also argues that the Tribunal should have asked the parties to provide information on the hypothetical results for the period 2012 to 30 June 2014 as no historical information was available for that period. This reproach fails. The parties could and should have taken into account that the Tribunal would have wanted to calculate the amount of lost dividends up to the

Final Award, because HVY had argued that the damage should be calculated up to and including that date to the extent that it would exceed the damage as of the date of the expropriation. The Russian Federation could therefore have given its own view on the calculation of dividends for the period 2012 to 30 June 2014. Its failure to do so did not have to prevent the Tribunal from carrying out the necessary calculations independently on the basis of the information in the file, something which the Tribunal apparently considered itself capable of doing.

6.4.20 In the Summons (nos. 425-428), the Russian Federation makes substantive criticism of the way in which the Tribunal calculated the amount of the lost dividends. The Russian Federation's criticism amounts to the Tribunal having based its opinion on data that were not supported by Dow, whereas Kaczmarek's figures contained numerous errors and led to implausible results. First, this criticism fails to recognise that the issue in this setting-aside case is not whether the opinion of the Tribunal on the damage is open to criticism or whether it calculated the damage correctly. At issue is whether one or more of the grounds for setting aside of Article 1065(1) DCCP have occurred. The latter is not demonstrated by this argument of the Russian Federation. Second, the Russian Federation fails to recognise the freedom the Tribunal had in estimating the damage. In the present case, the issue at stake was to determine the dividends that Yukos would have paid in the hypothetical event that it was not expropriated and liquidated, and thus would have been able to continue running its business and paying dividends. The determination of that damage is inevitably only an approximation; it is unavoidable that data will be used for that purpose which, although suitable, is not optimal. Apparently, the Tribunal felt that further debate would not contribute to the formation of its opinion and that it could estimate the damage in this respect on the basis of the data available.

6.4.21 The Russian Federation also accuses the Tribunal of having adjusted the dividends downwards due to three additional risk factors (cf. ground 6.4.4(n) above). According to the Russian Federation, these were unsubstantiated surprise decisions. Be that as it may, given that those additional risks undeniably led to a reduction in the amount of lost dividends, the Russian Federation has no interest in this complaint. Apart from that, the Tribunal took those risks into account in response to the Russian Federation's remark that expropriation not only deprives the owner of the value of the property, but also of the risk adherent to ownership (Final Award no. 1803). To the extent that the Russian Federation complains that the Tribunal has failed to justify it calculated a higher dividend than Dow did for the years 2012, 2013 and 2014, the Court of Appeal points out that the figures included in the 'Dow' column are the figures of Kaczmarek incorporating *all* of Dow's corrections (see bottom of Appendix T3), whereas the Tribunal has not accepted all of Dow's corrections (Final Award no. 1802).

6.4.22 The Russian Federation further argues that the Tribunal's 'new damages method' has resulted in the award of billions of dollars of unjustified damages by significantly overestimating the lost dividends. In summary, the argument of the Russian Federation boils down to the following. The value of Yukos has been indexed by the Tribunal using the RTS Oil and Gas index and this value follows the changes in the equity value of the companies included in this index. The lost dividends calculated by the Tribunal are nonetheless significantly higher than the dividends paid during the same period by the companies included in that index. However, the growth in a company's equity value is inversely proportional to the extent to which it pays dividends: the more dividend paid, the less the increase in equity and vice versa. As a result, all other factors being equal, a company whose equity value grows by the same percentage as that of the peer companies (included in the same index) cannot

pay out a higher percentage of dividends than those peer companies. Kaczmarek has also acknowledged the link between dividends paid and equity value. The Tribunal made a fundamental error by effectively double counting part of Yukos' (hypothetical) dividends not only as dividends, but also as part of HVY's stake in Yukos' (hypothetical) equity value. As a result, the Tribunal awarded more than USD 20 billion in lost dividends and more than USD 1.4 billion in equity value without any economic basis. The Tribunal's decision to determine dividends and equity value independently of each other could not be foreseen and was taken without giving the parties the opportunity to be heard. This resulted in a surprise decision, which constituted a violation of the mandate within the meaning of Article 1065(1)(c) DCCP, as well as a violation of public order under Article 1065(1)(e) DCCP, according to the Russian Federation.

6.4.23 The Court of Appeal is of the opinion that there has not been a surprise decision. As considered above, HVY had claimed damages consisting of two components: (i) the value of Yukos (as at the date of expropriation or the date of the Final Award, whichever awards the highest damages) and (ii) the lost dividends up to that date. If the Russian Federation or its expert Dow were of the opinion that these numbers necessarily influence each other, in particular in the situation where the RTS Oil and Gas index is applied to the value of Yukos, they had every opportunity to bring this to the attention of the Tribunal. Indeed, they should have taken into account that the Tribunal would award the damages on the basis claimed by HVY and that the RTS Oil and Gas index would be applied to calculate the value on the relevant valuation date (see ground 6.4.16 above). Even if it were the case that the Tribunal wrongly overlooked such a connection, this would at most be a substantive error in the (reasoning of the) damage calculation, which in itself cannot lead to the setting aside of the Yukos Awards, but not a surprise decision.

6.4.24 The other arguments put forward by the Russian Federation in this respect entail substantive criticism of the decision of the Tribunal. Such criticism, even if well-founded, does not provide a ground for setting aside.[167] In addition, the criticism made by the Russian Federation is largely highly theoretical in nature, whereas it assumes in its argument that 'all other factors are equal'. It is unclear why this should be assumed. It is also unclear why it should be assumed that the equity value of the companies included in the RTS Oil and Gas index would grow at the same rate as Yukos. Contrary to what the Russian Federation apparently assumes, no such finding is implied by the Tribunal's decision to apply the RTS Oil and Gas index to the value of Yukos. The Tribunal merely used this index to 'translate' the value of Yukos as at 21 November 2007 to its value as at 30 June 2014, whereby the value was adjusted downwards from USD 61.076 billion as at 21 November 2007 to USD 42.625 billion as at 30 June 2014 (Final Award no. 1821). The application of this index, which according to the Tribunal is based on the prices of shares traded on the Moscow stock exchange, cannot be linked to the far-reaching conclusions on the ratio between the equity value and dividend currently argued by the Russian Federation.

6.4.25 Finally, the Russian Federation argues that the Tribunal violated its mandate by awarding damages based on the value of Yukos at the date of the Final Award, although Article 13 ECT provides that compensation for the expropriation of an investment is equal to the "fair market value of the Investment expropriated at the time immediately before the Expropriation". Moreover, according to the Russian Federation, the Tribunal's choice of the date of the Final Awards is arbitrary and punitive, so that the Yukos Awards must also be set aside under Article 1065(1)(e) DCCP).

6.4.26 This argument fails. The Tribunal held that although Article 13 ECT provides that in the event of expropriation, the compensation for an expropriated investment is the value 'immediately before the expropriation', this provision does not cover an unlawful expropriation such as the expropriation of Yukos, in which case the investor may choose between the date of the expropriation (19 December 2004) and the date of the (final) arbitral award as the valuation date for the calculation of the loss (Final Award nos. 1765 and 1769). This is a legal (substantive) opinion on how to determine the extent of the damage in the present case. This opinion, whether correct or incorrect, says nothing about whether the Tribunal has complied with its mandate or has given proper reasons for its judgment. The fact that this opinion results in the amount of damages fluctuating according to the date of the Tribunal's award does not necessarily imply that the Tribunal's judgment is arbitrary or 'punitive' in nature.

6.4.27 The manner in which the Tribunal has determined the amount of damages does not constitute a violation of its mandate and therefore cannot lead to the setting aside of the Yukos Awards. Nor has the Tribunal violated Article 1039(1) DCCP or Article 24(1) of the UNCITRAL Rules.

**6.5. (iii) Decision by guesswork, going beyond the ambit of the legal dispute**

6.5.1 The Russian Federation argues that the Tribunal based its decision on speculation of its own about what the Russian Federation might have done in a fictitious scenario rather than on what it actually did. The Russian Federation adduces four decisions of the Tribunal, in that regard, namely:

a. The Russian Federation would in any event have imposed the fines and VAT assessments on Yukos even if Yukos had timely submitted correct VAT returns warranting a rate of 0%;

b. The bankruptcy of Yukos was unavoidable: (i) if Yukos had repaid the 'A Loan' to the banking consortium on time, the Russian Federation would have found some other reason to provoke the bankruptcy of Yukos, and (ii) even if Yukos had not made threats to potential buyers prior to the YNG auction, the auction proceeds would not have been any higher;

c. The Russian Federation would have given behind-the-scenes instructions to Rosneft regarding the commencement of Yukos' bankruptcy and Rosneft's bids for Yukos' assets in the subsequent bankruptcy auctions;

d. The Tribunal has speculated as to the allocation of the income of Yukos' sham companies to Yukos itself.

In taking these decisions, the Tribunal not only (a) violated its mandate (Article 1065(1)(c) DCCP), but also (b) failed to provide sound reasons for its decisions (Article 1065(1)(d) DCCP) and (c) violated the right of the Russian Federation to be heard, its right to equal treatment and its right to an impartial and independent arbitral tribunal, and thus violated public order (Article 1065(1)(e) DCCP). In this section, the Court of Appeal will discuss the above mentioned judgments in the context of all

three grounds for setting aside. For the rest, the Court of Appeal refers to para. 8.5.1 and paras. 9.4.1-9.5.2 of this ruling.

*a. The VAT assessments and fines*

6.5.2 The Tribunal held in no. 694 of the Final Award, “having considered the evidence and arguments canvassed above” that the Russian Federation was determined to do whatever it takes to impose VAT assessments on Yukos. As regards the fines, the Tribunal ruled in a similar sense in no. 750 of the Final Award. According to the Russian Federation, in both cases the Tribunal speculated on a situation that did not occur. In the opinion of the Court of Appeal, that argument is based on an incorrect reading of the Tribunal's decision. The Tribunal was only asked what would have happened if Yukos had taken certain measures in relation to the VAT returns, i.e. to submit correct (timely and documented) tax returns or to pay the tax claim under protest. The Tribunal ruled that, in that hypothetical case, the Russian Federation would still have imposed the fines and VAT assessments. Answering such a 'what if' question does not violate a rule by which the Tribunal was bound; it is however a link in the necessary causality reasoning by which the Tribunal was bound in order to respond to the accusation that the Russian Federation made against HVY ("Yukos acted self-destructively in relation to VAT") (Final Award no. 679). The Tribunal's ruling was based on a weighting of the views of the parties and the opinions of experts on the basis of which the Tribunal finally concluded that the assessments of VAT on Yukos were improper. This ruling is in line with the 'concluding observations' set out by the Tribunal in nos. 755-759 of the Final Award, in which the Tribunal again summarises the grounds for its conclusions and the grounds elaborated elsewhere in the Final Award. Having concluded, on a number of grounds, that the taxation of Yukos and the imposition of fines were improper, the Tribunal was also able to conclude, on the basis of "the evidence and arguments canvassed above", that it would not have made any difference if Yukos had submitted the correct VAT documentation.

6.5.3 The Russian Federation has also argued that the Tribunal has based itself on an own opinion of what Russian legislation should be (Summons nos. 566-568). This argument is based on what the Tribunal held in no. 686 of the Final Award. In that section, the Tribunal accepts the practical justification proposed by the expert Konnov for the requirement of a monthly/quarterly return, but also notes that there would be no such justification if the VAT returns had already been examined and approved by the authorities at the time they were (initially) claimed by the trading companies. Contrary to what the Russian Federation argues, the Tribunal is not giving an opinion on what the Russian legislation should be, but is only commenting on the statement on that legislation put forward by the expert. It cannot be concluded from this that the Tribunal was biased or prejudiced. It is therefore not contrary to public order or public morals. Moreover, the final conclusion in no. 694 of the Final Award is based on several circumstances, as a result of which it cannot be assumed that said conclusion was independently supported by the passage of the Tribunal's reasoning highlighted by the Russian Federation. In its Statement of Reply (no. 718), the Russian Federation argued that the last sentence of no. 668 of the Final Award is also based on speculation. In that last sentence, the Tribunal reformulates the preceding sentence of that finding ("Put another way ..."). The Tribunal concludes that although revenues were always considered to be Yukos' revenues, this did not happen when it came to the attribution of benefits and the 'substance over form doctrine' was apparently not strictly applied. That this opinion is based on speculation cannot be upheld in the light of the subsequent

paragraphs, nor does the Russian Federation (sufficiently substantiated) explain why, in the light of those paragraphs, the Final Award is not reasoned on this point as referred to in Article 1065(1)(d) DCCP.

*b. The (un)avoidability of Yukos' bankruptcy*

6.5.4 In no. 1631 of the Final Award, the Tribunal held that the 'A-loan' "represented only a fraction of the claims against Yukos which could have been used to petition the company into bankruptcy". The Tribunal therefore found that it would be difficult to conclude that, even if the "A-loan" had been paid, another ground for Yukos' bankruptcy could not have been found. Again, this decision is in response to the Russian Federation's defence that Yukos was responsible for its own bankruptcy. In assessing such a defence, it is obvious to examine whether it would have been probable that, when disregarding Yukos' actions complained of, the damaging event would have occurred after all. An assessment of the probability of possible other scenarios is unavoidable and (therefore) by no means impermissible. If a situation arises in which several other creditors are present, it is also not impermissible or contrary to any general principle of procedural law to conclude that an alternative scenario for the bankruptcy was equally likely.

6.5.5 In no. 732 of the Statement of Reply, the Russian Federation argued that the Tribunal also speculated in no. 1625 of the Final Award (footnote 1003 erroneously refers to nos. 1023-1065) by finding that, disregarding the public threats ('a lifetime of litigation') of Yukos, the downfall of Yukos could not have been prevented. That argument, too, is based on an erroneous reading of the Tribunal's assessment. The Tribunal extensively described and assessed the downfall of Yukos in the Final Award (see further para. 8.6.3) and concluded that the actions of the Russian Federation were intended to bring about this downfall of Yukos. In nos. 1627-1628, the Tribunal subsequently lists a number of activities by the Russian authorities that 'significantly' depressed the auction price of the YNG shares. In the light of all these activities, the Tribunal then concludes in no. 1629 of the Final Award that Yukos' own activities did not contribute 'in a material way' to Yukos' downfall. Again, this is not speculation, but the investigation of an alternative scenario and an estimate of what would have happened in that alternative scenario. Given the Russian Federation's defence, this was part of the Tribunal's mandate. In doing so, the Tribunal based its estimates on facts that were extensively discussed in the arbitrations.

*c. Rosneft's role*

6.5.6 The role of Rosneft was raised in the arbitrations by HVY and dealt with by the Tribunal, inter alia, in the context of the question whether the acts on which HVY's claim was based were attributable to the Russian Federation. In doing so, HVY took the view that the Russian Federation acted through, inter alia, "State-owned entities, first and foremost State-owned company Rosneft" (Final Award no. 1451). No. 1454 of the Final Award specifically identifies three acts by Rosneft that HVY consider to be attributable to the Russian Federation. HVY took the view (Final Award no 1455) that Rosneft's acts were attributable to the Russian Federation due to the fact that the Russian Federation owned and controlled Rosneft and that there were personnel links between Rosneft and the Russian Federation.

6.5.7 The Tribunal's assessment of the arguments put forward by the parties was based on the provisions of Article 8 of the ILC Articles on State Responsibility. In doing so, the Tribunal referred to Prof. Crawford's comments on Article 8, which states that the mere fact that an entity was originally incorporated by a State is not sufficient for its acts to be attributable to the State. Such an attribution requires that those entities "are exercising elements of governmental authority [and] the instructions, direction or control [of the State] must relate to the conduct which is said to have amounted to an internationally wrongful act."
The Tribunal subsequently found that more than 70% of the shares in Rosneft are held by the Russian Federation, that Rosneft's executives are appointed by the Russian Federation and that many of the members of Rosneft's Board of Directors occupy 'senior executive positions' in the government, some of which are 'close to President Putin'. However, the Tribunal did not consider all this to be sufficient to attribute Rosneft's acts to the Russian Federation (Final Award no. 1468).

However, in no. 1472 of the Final Award, the Tribunal considered it 'critical' that President Putin stated at the press conference of 23 December 2004 in relation to the acquisition of the YNG shares of Baikal that "the state (...) is looking after its own interests". Thus, according to the Tribunal, President Putin has accepted and confirmed that the acquisition of the shares by Rosneft, in which the Russian Federation held 100% of the shares at the time, was "an action in the State's interest" and has drawn the conclusion that this acquisition by Rosneft was controlled by the State. The Tribunal concluded that this acquisition, like the auction of the YNG shares, was attributable to the Russian State. In the view of the Court of Appeal, that conclusion was not supported by unsound reasoning. Contrary to what the Russian Federation argues, this is not an inadmissible conclusion on the basis of the facts established by the Tribunal. Among those facts were the statements made by President Putin at a press conference that also dealt with the sale of the YNG shares. In those circumstances, it cannot be concluded that the Tribunal's conclusion is inadequately reasoned.

6.5.8 With regard to Rosneft's activities "in contracting with the SocGen bank creditors of Yukos, and in bidding at the bankruptcy auction of Yukos itself", the Tribunal found in no. 1474 of the Final Award that it does not necessarily follow from what it had previously held that those activities can also be attributed to the Russian Federation. However, the Tribunal deemed it possible that these activities were also carried out on the basis of *sub rosa* instructions from the Russian Federation led by high-ranking figures from the entourage of President Putin, who controlled Rosneft at the time. The Tribunal found that this must reasonably have been the case or, if it was not, it was not necessary because Rosneft was implementing President Putin's policies by itself.

6.5.9 Contrary to what the Russian Federation argues, the Tribunal is not applying guesswork here, but gives a plausibility opinion in the absence of hard evidence. Such a plausibility opinion is not contrary to any fundamental principle of procedural law, as long as it is based on facts on which the parties have had an opportunity to comment. That this has not been the case has not been sufficiently substantiated by the Russian Federation. It is not for the Court of Appeal to substitute its opinion for the plausibility opinion of the Tribunal. Nor did the Tribunal, in this opinion, abandon the criterion it had previously given. It concluded that it is sufficiently plausible that there was 'direction of the Russian State', which is in line with the criterion cited by the Tribunal above. Therefore, the Court of Appeal cannot conclude that the plausibility finding of the Tribunal is inadequately reasoned within

the meaning of Article 1065(1)(d) DCCP. It follows from the facts set out by the Tribunal in its reasoning and from the reasoning on which it based those facts.

*d. Allocating the income of the sham companies*

6.5.10 The Russian Federation reads in the Yukos Awards that the Tribunal rejected the allocation of the income of the sham companies to Yukos applied by the Russian tax authorities (Final Award nos. 615 et seq.) because the judgment in the *Korus Holding* case, the allocation case invoked by the Russian Federation, was rendered shortly after the Russian courts issued their judgments upholding the tax assessments against Yukos. The Russian Federation argues that this decision is inadequately reasoned and is based on speculation (Statement of Reply nos. 707 et seq.; Defence on Appeal nos. 1144 et seq.).

6.5.11 In the arbitration proceedings, HVY took the view that the reallocation of the income of all the operating companies to Yukos had no basis in Russian law.

6.5.12 The Tribunal concluded that there was no precedent for the practice of the Russian tax authorities and considered that the earlier judgments invoked by the Russian Federation did not apply (Final Award no. 620). With regard to the comparison with the *Korus Holding* case, the Tribunal held that it dates back to 2006, well after the assessments were levied on Yukos. In addition, the Tribunal found support for HVY's point of view in the contrast between the first and second judgments regarding *Investproekt* (Final Award no. 622). The Tribunal then considered that although it saw some merit in the Russian Federation's argument that the "anti-abuse" doctrine would be eroded if the tax authorities could not allocate income to "the person responsible for the wrongdoing" (Final Award no. 625) and that it had noted with interest anti-abuse provisions in other countries, there was nevertheless no precedent in the Russian context for allocating income to Yukos at the time of the assessments. Finally, the Tribunal considered that it "could have been persuaded" by the arguments of the Russian Federation if the tax authorities had simply allocated only the income-based taxes to Yukos. However, the tax authorities allocated to Yukos the income of the operating companies, while at the same time refusing to allocate the VAT returns to the operating companies to Yukos. The Tribunal concluded that there was no *bona fide* exercise of powers by the tax authorities (Final Award nos. 626 and 627).

6.5.13 The Russian Federation's argument that the Tribunal rejected the allocation of the income of the sham companies to Yukos because the *Korus Holding* judgment was delivered after the Russian courts upheld the tax assessments against Yukos shows an incomplete interpretation of the Tribunal's reasoning. In that argumentation, the rejection of the *Korus Holding* judgment is only a limited part of the conclusion that the allocation was without precedent in the Russian context. In doing so, the Tribunal considered the object and background of the anti-abuse legislation, but nevertheless held that there was no ground for allocation to Yukos in the given circumstances. This opinion of the Tribunal was also based on the fact that the tax authorities, on the one hand, allocated the turnover of the operating companies to Yukos and, on the other hand, refused to allocate the VAT returns of the operating companies to Yukos. It therefore follows from the Tribunal's reasoning that it also recognised the similarity of the *Korus Holding* judgment to the Yukos case but that it nevertheless came to a different conclusion on the basis of the other circumstances. Under these circumstances, it cannot be concluded that the decision lacks sound reasoning (no. 709 Statement of Reply).

6.5.14 The Court of Appeal also rejects the Russian Federation's argument of unacceptable speculation and "result-oriented decision-making". That argument, which is divided into four parts, is in fact a substantive contestation of the correctness of the Tribunal's opinion. It is not, however, the task of the Court of Appeal to substitute its opinion for that of the Tribunal, as has already been pointed out on several occasions, nor can it be concluded that there is a lack of any sound reasoning in the judgment.

*e. Conclusion*

6.5.15 In the light of the foregoing, the Court of Appeal is of the opinion that the arguments put forward by the Russian Federation in the context of its accusation of 'decision by guesswork' fail. In this respect, the Tribunal did not violate its mandate (Article 1065(1)(c) DCCP), nor did it fail to provide sound reasoning for its judgement (Article 1065(1)(d) DCCP) or violate public order (Article 1065(1)(e) DCCP). More specifically, there is no violation of the provisions of Article 1033(1) DCCP, Article 1039(1) DCCP, Article 10(1) UNCITRAL Rules or Article 15(1) UNCITRAL Rules. It cannot be inferred from what the Russian Federation has put forward that the arbitrators have not been impartial or independent, nor can it be inferred that a decision was based on speculations or suspicions. Nor can it be concluded that the Tribunal went beyond the ambit of the legal dispute or violated Article 24(1) UNCITRAL. The Russian Federation has argued that the 'decision by guesswork' has relieved HVY of its burden of proof under Article 24 UNCITRAL Rules. In so doing, the Russian Federation disregards that the Tribunal did give an opinion on the evidence on the basis of the facts put forward by HVY. The fact that it had to assess alternative scenarios in order to assess the defence of the Russian Federation does not mean that the Tribunal deviated from this division of the burden of proof.

**6.6 (iv) The role of the assistant Valasek**

6.6.1 The Russian Federation is of the opinion that the Yukos Awards should be set aside because of (briefly put) the disproportionate role played by Mr Martin Valasek (hereinafter: 'Valasek'), the assistant to the Tribunal, in their creation. According to the Russian Federation, the Tribunal has thereby violated the rule that arbitrators must perform their substantive task personally. The Tribunal did not comply with its mandate as set out in Article 1065(1)(c) DCCP and this constitutes a ground for setting aside of the Yukos Awards. Furthermore, the Russian Federation is of the opinion that the Yukos Awards were in fact rendered by an additional arbitrator and thus by four (instead of three) arbitrators. This constitutes a ground for setting aside as referred to in Article 1065(1)(b) DCCP, i.e. that the Tribunal was composed in violation of the applicable rules.

6.6.2 In this connection, the Russian Federation draws attention to the following circumstances:

a. Valasek billed a disproportionately large number of hours in the second phase of the arbitral proceedings, namely 2,625 hours as opposed to (on average) 1,661 hours per arbitrator. Valasek cannot have made a substantial contribution to the administration and organisation of the Tribunal. This administration was taken care of by the two

secretaries of the Tribunal, who together declared 5,232 hours. At the time, Valasek was introduced as an assistant to the Tribunal, without mentioning that he would also perform substantive duties. On the basis of the number of billed hours, the Russian Federation concluded that Valasek must have made a major substantive contribution to the arbitration.

b. As the Tribunal refused to provide further details on the particular work of Valasek, the Russian Federation had a scientific study carried out by two linguistic experts, Dr C. Chaski (hereinafter: 'Chaski') and Prof. W. Daelemans (hereinafter: 'Daelemans'). Each of these experts examined three chapters of the Yukos Awards separately. In doing so, they examined by digital means, on the basis of the presence of authorship characteristics derived from earlier writings of Valasek and the three arbitrators, whether Valasek wrote certain pieces of text, or whether this text originated from one of the arbitrators. The experts concluded that it is more than 95% certain that Valasek has written at least 60-70% (Chaski) or at least 41% (Daelemans) of Chapters IX, X and XII of the Final Award.

6.6.3 HVY have disputed that Valasek played a role in the decision-making. To the extent that he played a substantive role in the creation of the Yukos Awards, this was done under the supervision of the Tribunal; the Tribunal had final responsibility, as the chairman of the Tribunal himself stated. HVY also contested, with reasons, that Valasek has written large parts of Chapters IX, X and XII. To this end, they called in the experts Prof. M. Coulthard and Prof. T. Grant, who criticised the study methods applied by Chaski and Daelemans. Prof. Coulthard and Prof. Grant have pointed out that the Yukos Awards are a joint product of several authors and therefore the study methods used by Chaski and Daelemans are unsuitable for indicating with any precision which passage/paragraph originates from which author. HVY also argued that Chaski and Daelemans differed on which parts of the text can be attributed with a high degree of certainty to Valasek.

6.6.4 In this chapter, the Court of Appeal will, because of the close connection between the two, not only discuss the accusation that the Tribunal did not comply with its mandate but also the argument that the Tribunal was not properly composed as a result of Valasek's involvement and work.

6.6.5 In view of HVY's substantiated contestation, it is not established that the Russian Federation's arguments regarding the substantive role of Valasek are correct. The Court of Appeal considers the studies by Chaski and Daelemans to be problematic in the sense that indeed – as argued by HVY – the text of a judgment by multiple parties is not always written by a single author and that the assumption that the others "usually at most respond with a single proposal for deletion or insertion" is by no means always valid.[168] The Court of Appeal will, however, presume below that Valasek has indeed made significant contributions to the drafting of Chapters IX, X and XII of the Final Award by providing (draft) texts that the arbitrators have incorporated, in whole or in part, in the arbitral awards. Under those circumstances, the offer of evidence[169] by the Russian Federation to hear Valasek, Chaski and/or Daelemans as witnesses/experts on this matter is no longer relevant. These offers of evidence will therefore be disregarded. In so far as the offer of evidence relates to a contribution by Valasek to the "decision-making process", it does not, as will be further elaborated below, relate to sufficiently substantiated factual arguments and is therefore disregarded.

6.6.6 It does not follow from the reports of Chaski and Daelemans that Valasek has participated in the decision-making process that falls within the domain of the arbitrators or that it has otherwise taken over tasks that fall within their domain. For example, it is not established that Valasek has advised the Tribunal with regard to parties being right or wrong[170] or that the arbitrators have delegated (parts of) the decision-making to Valasek. Nor does this follow from the drafting work by Valasek assumed by the Court of Appeal. Nor can it be established on the basis of the results of the studies that the draft texts submitted by Valasek influenced the decisions of the arbitrators[171]; after all, it is not established that the decision making by the arbitrators took place *after* Valasek had submitted his texts. It is part of the expertise of Chaski and Daelemans to analyse, using a scientific method, which author (most likely) wrote a certain text, but not to determine whether that author wrote that text on his own authority on the instructions and responsibility of someone else.

6.6.7 The circumstance[172] that the secretariat of the Permanent Court of Arbitration did not want to comply with a request of the Russian Federation for a global specification of Valasek's activities does not make this any different. Nor can it be deduced from the statement of the Permanent Court of Arbitration that the granting of the request is at odds with 'the confidentiality of the deliberations' that Valasek participated in the 'deliberations'.

6.6.8 The Court of Appeal further rejects the argument of the Russian Federation that the ordering and summarizing of the party positions and the relevant legal sources requires 'only a fraction of the time' or 'incomparably much less time'[173] than the decision-making process that is the task of the arbitrators. This is certainly the case, according to the Russian Federation, in these proceedings in which the parties had provided their own summaries of their arguments and annexed all relevant legal sources to the procedural documents.[174] In the opinion of the Court of Appeal, it is precisely in a case such as the present one, which is huge, that the structuring process is very time-consuming, even if, as in the present case, the parties have structured their arguments and underlying documents as efficiently as possible. The argument that it concerns 'precise but simple handiwork'[175] certainly does not apply to a case of this size.

6.6.9 The Court of Appeal also rejects the view of the Russian Federation that a 'clear' and 'essential' distinction can always be made between the drafting of memos with summaries of legal and factual points of view (which according to the Russian Federation can (perhaps) be outsourced to a secretary/assistant) and the drafting of decisive parts of an arbitral award (which according to the Russian Federation must be written by the arbitrators).[176] The Yukos Awards consist to a large extent of summaries of factual and legal positions of the parties. It is quite conceivable that one or more memos (including those permissible in the opinion of the Russian Federation) by Valasek have formed the basis for (certain) parts of the Yukos Awards.

6.6.10 Of course, the findings written by an assistant or secretary (or texts supplied for the purpose of the arbitral awards) may be coloured and/or incomplete, even if the arbitrators have given detailed instructions on the content of these findings in advance. However, it is up to the arbitrators to check these texts for correctness and completeness. Moreover, the submission of findings/texts does not imply that the relevant assistant/secretary has also independently taken decisions which are part of the essential task of the arbitrators. Contrary to what the Russian Federation argues, the use by the

Tribunal of draft texts from Valasek is therefore not tantamount to the "outright scrapping of the *intuitu personae* principle or the delegation prohibition applicable to arbitrators".[177] What matters in the end is that the arbitrators have decided to assume responsibility for the draft versions of Valasek, whether in whole or in part and whether or not amended by them. The Russian Federation does not argue that the Tribunal has accepted these drafts without a second thought.

6.6.11 Finally, the Russian Federation has extensively substantiated that it follows from the literature and from the arbitration rules that the arbitrators must carry out the substantive work themselves and may not delegate it to a secretary. Secretaries may only provide organisational assistance and may not be charged with the drafting of parts of an arbitral award. This division of tasks may be less strict in ordinary courts, but in the case of arbitration this applies because arbitrators are appointed in a personal capacity, according to the Russian Federation. According to the Russian Federation, any deviation from the aforementioned rules requires the informed consent of the parties to the proceedings. In this case, this was neither requested nor obtained. Valasek was introduced as a contact person, but the parties were never informed that Valasek would also perform substantive tasks. In addition, Valasek did not even have the role of secretary, but of assistant, a position not even described in the various arbitration rules.

6.6.12 The Court of Appeal is not required to rule in this case on the question of the division of tasks between arbitrators and secretaries/assistants in general. In these setting-aside proceedings, the only issue at stake is whether the Tribunal was composed in violation of the rules applicable to these arbitral proceedings (Article 1065(1)(b) DCCP)) or whether the Tribunal failed to comply with its mandate (Article 1065(1)(c) DCCP)).

6.6.13 It has not been established that the Tribunal was composed in violation of the applicable rules. The circumstance that Valasek has written parts of the arbitral awards cannot lead to the conclusion that the Tribunal was composed in violation of statutory rules or rules agreed between the parties. The same applies to the statutory rule that the Tribunal must consist of an odd number of arbitrators (Article 1026 DCCP). From the Yukos Awards, signed by the arbitrators C. Poncet, S.M. Schwebel and L.Y. Fortier, it follows that the Yukos Awards have – exclusively – been rendered by the three arbitrators appointed by the parties. The reliance on Article 1065(1)(b) DCCP thus fails.

6.6.14 With regard to the violation of the mandate, the following applies. The arguments of the Russian Federation comprise (summarised) two parts, namely (a) Valasek carried out substantive work and (b) this was not discussed with the parties beforehand and the parties did not agree thereto.

6.6.14.1 As stated above, the Court of Appeal assumes that Valasek has drafted parts of the Yukos Awards by providing texts that have been incorporated by the arbitrators in the Yukos Awards. This undeniably involves substantive work. This does not mean that, by delegating these activities, the arbitrators have acted in violation of their mandate to such an extent that this should lead to the setting aside of the Yukos Awards. The applicable arbitration rules (the UNCITRAL Rules) do not contain any particular provisions on this point. Contrary to the opinion of the Russian Federation, there is also no unwritten rule to the effect that a secretary or assistant is not allowed to write parts of the award. As long as no concrete party agreements have been made in this respect and the (substantive) decisions are taken by the arbitrators themselves without the influence of third parties, it is left to the

discretion of the Tribunal to what extent it wishes to use an assistant or secretary for the drafting of the arbitral award.[178] The Court of Appeal is of the opinion that the reticent review provided by Article 1065(1)(c) DCCP also applies here; the violation of the mandate must be serious. In a case such as the present, a violation of the mandate within the meaning of Article 1065(1)(c) DCCP can only be said to have occurred if the substantive decisions relevant to the arbitral awards had been delegated to Valasek and/or if Valasek had had final responsibility for (certain parts of) those awards. Should such a situation arise, there is no question of the arbitrators personally fulfilling the core tasks of their mandate. The submission by Valasek of draft texts written under the responsibility of the arbitrators and accepted by them does not justify the conclusion that the Tribunal has (seriously) violated its mandate. Although the Russian Federation suggests that Valasek (partly) took substantive decisions, it follows from the above that it did not sufficiently substantiate this argument. The mere circumstance that Valasek drafted parts of the Yukos Awards and billed many hours in the arbitration proceedings is not sufficient for this purpose.

6.6.14.2 In the light of the foregoing, the Court of Appeal further considers that the Yukos Awards should not be set aside on the ground that the Tribunal did not fully inform the parties in advance of Valasek's role in the creation of the Yukos Awards. Assuming the correctness of the Russian Federation's argument that Valasek was only introduced as an assistant and contact person, it can be concluded that the Tribunal failed to fully inform the parties on this point of the nature of Valasek's work. However, under the circumstances, this does not constitute such a serious violation of the mandate that it should lead to the setting aside of the arbitral awards.

6.6.15 The conclusion is that the complaints of the Russian Federation regarding the role of Valasek fail.

**6.7 Conclusion in respect of violation of the mandate (Article 1065(1)(c) DCCP)**

6.7.1 The arguments put forward by the Russian Federation to argue that the Tribunal has failed to comply with its mandate, have failed.

6.7.2 Therefore, there is no ground to set aside the Yukos Awards for that reason.

**7. Was the Tribunal improperly composed (Article 1065(1)(b) DCCP)?**

7.1 The Court of Appeal has already decided above (para. 6.6.13) that the composition of the Tribunal was not contrary the applicable rules.

7.2 Again, therefore, there is no ground for setting aside the Yukos Awards.

**8. Did the Yukos Awards fail to state the reasons for the award (Article 1065(1)(d) DCCP)?**

**8.1 Legal context**

8.1.1 One of the grounds for setting aside put forward by the Russian Federation is that the Yukos Awards did not state the reasons for the award as referred to in Article 1065(1)(d) DCCP.

8.1.2 This ground for setting-aside corresponds to the provisions of Article 1057(4)(e) DCCP, which require the arbitral award to state the reasons for the decision. In its judgment of 22 December 2006,[179] the Supreme Court held as follows regarding setting aside on this ground:

> "In its decision of 25 February 2000, no. R 99/034, NJ 2000, 508 [Benneton/Eco Swiss, Court of Appeal], the Supreme Court ruled that according to Article 1065(1), introduction and at (d), DCCP, an arbitral award may be set aside on the ground that the award did not state the reasons for the award, and that setting aside on this ground is only possible when reasoning is absent, and therefore not in cases of unsound reasoning. The court is not competent to review the substance of an arbitral award on this ground for setting-aside. The Supreme Court specified this view in its judgment of 9 January 2004, no. R 02/066, *NJ* 2005, 190 [Nannini/SFT, Court of Appeal], by ruling that absence of reasoning must be equated with a case where, although reasoning has been provided, no well-founded explanation for the decision in question can be identified in it. This criterion must be applied with restraint by the court, in the sense that it should intervene in arbitral decisions only in clear-cut cases. Only if reasoning is absent, or if the reasons stated in the arbitral award are so flawed that the award must be equated with an award that did not state any reasons at all, may the court set aside this award on the ground specified in Article 1065(1), introduction and at (d), DCCP, that the award did not state the reasons for the award."

It follows from this finding that unsound reasoning is insufficient for setting aside on the ground that the Yukos Awards did not state the reasons for the award. It also follows from this that the criterion that, while the arbitral tribunal's award does state reasons for the award, no well-founded explanation for the relevant decision can be identified in it, should be applied with restraint. The Court of Appeal will assess the arguments put forward by the Russian Federation in this light.

**8.2 The Russian Federation's position**

8.2.1 The Russian Federation takes the view that the Tribunal did not state reasons on various crucial aspects of its decision in the Final Award. In that respect, the Russian Federation put forward the following arguments:

(i) No well-founded reasons are stated for the determination of the damages (para. 8.3);

(ii) The Tribunal ignored all proof showing that Yukos' Mordovian companies were sham companies (para. 8.4);

(iii) Mere speculation ('decision by guesswork') does not constitute adequate reasoning and the Tribunal went beyond the ambit of the legal dispute (para. 8.5);

(iv) The Tribunal's conclusions regarding the YNG auction are inherently contradictory (para. 8.6).

**8.3 (i) No well-founded reasons are stated for the determination of the damages**

8.3.1 The Court of Appeal refers to its findings regarding the determination of damages in the context of the accusation discussed above that the Tribunal had not complied with its mandate (paras. 6.4.1-6.4.27). From these findings, it follows that, with its decision on the damages, the Tribunal (a) did not go beyond the parties' legal dispute, (b) did not violate the right to be heard, (c) did not count losses twice and (d) in fact did provide well-founded arguments for the nature and scope of the adjustments made to the methodology of Kaczmarek and Dow.

8.3.2 Even apart from the foregoing, the Russian Federation's complaints about the reasons stated for the Tribunal's decision on the damage, if they are at all correct, can at most lead to the conclusion that the reasoning is unsound, not that well-founded reasoning is altogether absent. However, unsound reasoning does not constitute a ground for setting aside based on Article 1065(1)(d) DCCP.

**8.4 (ii) Proof regarding the Mordovian companies**

8.4.1 The Russian Federation argued that the Tribunal failed to provide sound reasons for its incorrect decision that there was no proof whatsoever showing that the Mordovian companies were sham companies.[180] In order to properly place this complaint against the arbitral awards, the Court of Appeal will first describe the context below.

*a. Context*

8.4.2 In the period 2000-2004, Yukos used affiliated companies in low-tax regions in the Russian Federation in order to lower the group's tax burden. These included around twenty-five operating companies in Mordovia, Evenkia, Kalmykia, Baikonur, Trekhgorny, Lesnoy and Sarov, where a favourable tax regime was in place in order to promote business activities in these economically disadvantaged parts of the Russian Federation. These regions were permitted to exempt taxpayers established there from payment of federal profit tax in order to encourage these taxpayers to invest in the regions concerned. To that end, certain conditions, to be determined by the region itself, had to be met. One such condition was an obligation for the exempted taxpayer to invest in the region concerned.[181]

8.4.3 The situation in Mordovia was as follows. By law of 9 March 1999, Mordovia created the possibility of offering tax benefits to companies in this region. The Mordovian government laid down the conditions under which the tax benefits could be enjoyed. In 2000 and 2001, a taxpayer could be fully exempted from the share of the profit tax that would have been added to the federal budget; in those years, the profit tax was 30% and 35%, respectively, and always 11% of the proceeds from these taxes went to the federal budget. From 2002 onwards, tax exemption was only possible up to a rate of 4%. As from 1 January 2004, the tax exemption was largely cancelled. Yukos made arrangements with the Mordovian tax authorities to qualify for these tax arrangements. Based on these arrangements, Yukos invested in Mordovia, in return for which it saved a substantial amount in taxes. In 2001-2003, the Mordovian tax authorities had audits conducted at various Mordovian companies and discovered only tax violations of a subordinate nature during those audits.[182]

8.4.4 At the end of 2003, the Russian Federation's tax authorities took the position that Yukos and its operating companies were abusing the tax exemptions that had been agreed with the tax authorities in the low-tax regions. Inter alia, they took the view that the sales prices charged by Yukos' oil-producing business units to the (sham) companies in the low-tax regions were not in line with market conditions and that the high tax benefits were disproportionate to the relatively low investments made by Yukos in the relevant regions. The federal tax authorities subsequently re-attributed the profits that had been generated by the companies in the low-tax regions with the sale of crude oil to third parties, as well as the obligation to pay VAT, to Yukos. As a result, substantial additional tax assessments were imposed on Yukos for the years 2000-2003, along with fines for its failure to comply with its statutory (tax) obligations. More specifically, the federal tax authorities retroactively attributed the transactions in which the Yukos companies in the low-tax regions sold oil to foreign countries, subject to a VAT rate of 0%, to Yukos as 'actual exporter' and took the position that Yukos had to request a return of VAT. These assessments and fines were (largely) confirmed by the Russian court, which held, briefly put, that Yukos was acting in bad faith: the use of companies in low-tax regions was illegal since it served the purpose of tax evasion instead of economic growth in these regions.

*b. The arbitration proceedings*

8.4.5 HVY argued in the arbitration proceedings that the substantial additional assessments were fabricated and that the Russian Federation thus effectively brought about the expropriation of Yukos. They argued, inter alia, that the Russian Federation wrongly took the position that it was only at the end of 2003 that it became aware that Yukos was abusing the tax exemptions. According to HVY, Yukos was constantly monitored by Russian tax authorities, which knew exactly how Yukos was using the possibilities to obtain tax exemptions in the low-tax regions. HVY also feels that they did not act in breach of Russian tax law. According to HVY, the Russian tax authorities wrongly attributed retroactively the relevant part of the profits of the companies in the low-tax regions to Yukos itself. Even if it were true that the sales prices were too low, the Russian tax authorities should have demanded payment back of taxes from the companies in the low-tax regions. They should not have attributed the profits to Yukos in order to call Yukos to account for back taxes, according to HVY.

8.4.6 In the arbitration proceedings, the Russian Federation took the position that the Russian tax authorities had acted lawfully with their imposition of tax assessments on Yukos from December 2003 onwards. According to the Russian Federation, Yukos' conduct was in breach of the (unwritten) bad faith taxpayer doctrine applicable in Russia, based on which the Russian tax authorities have the authority to intervene if a taxpayer's actions solely serve to lower the taxes to be paid: "A person's actions aimed solely at tax evasion may not be regarded as actions made in good faith." According to the Russian Federation, Yukos had abused the tax exemption in the low-tax regions by using sham companies without any business activities of their own, incorporated for the sole purpose of enabling Yukos to evade taxes. According to the Russian Federation, Yukos was aware that its 'tax optimisation plan' was unlawful and that it ran a high risk of being classified as a 'bad faith taxpayer'. The Russian Federation furthermore takes the view that it is incorrect that the Russian tax authorities were aware of Yukos' tax optimisation plan and had approved that plan. Even if that were the case, the Russian Federation was free to nevertheless intervene at a later date.[183]

8.4.7 The Tribunal's decision, in so far as relevant in connection with the ground for setting-aside at issue here, is essentially as follows. Even back in 2003, Russian law included the (unwritten) good faith taxpayers doctrine. The Tribunal did not render any decision on the question of whether Yukos – under Russian law – acted in breach of this doctrine. According to the Tribunal, this was not part of its mandate.
The Tribunal then establishes that the good faith taxpayers doctrine had never been invoked against Yukos prior to December 2003.[184] The Tribunal further considers that the application of the good faith taxpayers doctrine seems particularly suitable for assessing the circumstances regarding Yukos' tax optimisation plan.

However, this does not change the fact, according to the Tribunal, that HVY argued that the decision of the Russian tax authorities to withdraw the tax exemptions was unlawful because of the way in which the doctrine was applied. In this respect, HVY argued (1) that the 're-attribution' to Yukos of the transactions of the companies in the low-tax regions had no basis in Russian law and (2) that there had been a breach of 'due process'.[185] Only the decision regarding the second accusation is important to the Court of Appeal. On this point, the Tribunal (in summary) decided as follows. Under Russian law, it is assumed that taxpayers act in good faith. The burden of proof of bad faith falls on the tax authorities. The question that presents itself is whether the tax authorities provided this proof in the Russian proceedings. In connection with this, the Tribunal pointed out that Russian tax law requires a tax audit to include the evidentiary documents of any possible violations committed by the taxpayer. In the Russian proceedings at the time, Yukos complained about the absence of evidentiary documents, but the Russian court did not address that complaint (or hardly so). While the Russian Federation argued in these arbitration proceedings that there was ample evidence of Yukos' tax evasion, the Tribunal rejected that defence:

> "639. (…) the Tribunal observes that nearly all of the evidence on this point relates to the entities in Lesnoy and Trekhgorny. The Tribunal has not found any evidence in the massive record that would support Respondent's submission that there was a basis for the Russian authorities to conclude that the entities in Mordovia, for example, were "shams". Indeed, instead of pointing to any specific evidence on which the tax authorities might have based their finding that the Mordovian entities were shams, Respondent reversed the burden and asserted that "there is no evidence that the Mordovian shells ever had any greater substance than the Lesnoy shells"; and that "[f]actually, Yukos did not even attempt to demonstrate that any genuine trading activities had ever been conducted in Mordovia." While the incomplete record before the Tribunal may not, in point of fact, establish that the Mordovian trading companies conducted genuine trading activities in Mordovia, the Tribunal notes that the Russian courts systematically denied Yukos' motions to join to the proceedings its trading companies and the Government of the Republic of Mordovia. This leads the Tribunal to conclude that the Russian courts may have prevented Yukos from adducing evidence bearing on the nature of its activities in Mordovia. The record, insofar as the Tribunal has been able to find, does not reveal reasons, still less persuasive reasons, for denial by the Russian courts of joinder of the Mordovian government and the trading companies."

The Tribunal then established the following in respect of the question of whether the Russian Federation had furnished the proof of Yukos' bad faith. First, the Tribunal held that the Russian tax

authorities had failed at the time to contradict Yukos' assertion that no documents substantiating Yukos' bad faith had been submitted as part of the 'tax audit'. Second, the Tribunal held that the Russian Federation had failed in the arbitration proceedings to provide proper proof of its assertion that the violations discovered in Lesnoy and Trekhgorny had also occurred in Mordovia. The Tribunal went on to state:

> "640. (…) While it is true, and suggestive, that Claimants did not introduce evidence at the Hearing showing that trading companies which operated in Mordovia were not "shams", it is first and foremost the conduct of the tax authorities that the Tribunal must examine in the context of the tax assessments that these authorities imposed on Yukos. Focusing exclusively on Claimants' failure to demonstrate that the Mordovian entities were not "shams" would empty of meaning the important principle that the tax authorities had the burden of proving the taxpayer's bad faith under Russian law. (…)"

The Tribunal decided that the Tax Ministry had lumped all subsidiaries together in its assessment of Yukos' conduct, and had failed to provide proof showing that *all* companies had violated tax law. Of course, HVY could have submitted evidence to the proceedings showing that the operating companies carried out genuine business activities. However, as neither party had submitted sufficient evidence and the Yukos archive was in the hands of the Russian Federation, the Tribunal persisted with the rule that the Russian Federation had to provide proof of its assertion. The Russian Federation had not provided this proof, according to the Tribunal.

*c. The Russian Federation's position*

8.4.8 In these setting-aside proceedings, the Russian Federation argued that the Mordovian companies were sham companies, created for the sole purpose of circumventing taxes. Yukos used front men who acted as directors of the sham companies solely in name. The companies had (almost) no assets or employees and all their assets and their affairs were managed by Yukos itself from Moscow. Finally, the Russian Federation argued that there was an extreme mismatch between the tax benefits generated by Yukos through the tax structure and the local investments made by Yukos in the regions concerned.

8.4.9 The Russian Federation argues that the Tribunal agreed with its assertion that the companies in Lesnoy and Trekhgorny, managed entirely by Yukos from Moscow, were sham companies and that the use of the tax facilities in those regions was illegal. According to the Russian Federation, the situation in Mordovia was no different from that in Lesnoy and Trekhgorny. The Russian Federation therefore finds it incomprehensible that the Tribunal, in respect of the Mordovian companies in no. 639 of the Final Award, wrote:

> "The Tribunal has not found any evidence in the massive record that would support Respondent's submission that there was a basis for the Russian authorities to conclude that the entities in Mordovia, for example, were "shams"."

8.4.10 According to the Russian Federation, this decision is incomprehensible, since it has demonstrated that in Mordovia the same illegal conduct was being practised as in Lesnoy and Trekhgorny. It argues that it provided ample evidence in the arbitration proceedings, with many of the documents relating both to Lesnoy and Trekhgorny, and to Mordovia. For example, the same Yukos managers were involved in the companies in the three regions and there was one single, integrated and consistent approach for evading corporation tax. Finally, the Russian Federation points out that the ECtHR also reached the conclusion, in two separate judgments, that all Yukos companies in the low-tax regions were 'shams'.[186]

8.4.11 The Russian Federation set out in detail in, inter alia, the Defence on Appeal what evidence it submitted in the arbitration for its assertion that Yukos was evading taxes in Mordovia as well. According to the Russian Federation, HVY never substantively and specifically contradicted the evidence, neither in the arbitrations, nor in the ECtHR proceedings, and these setting-aside proceedings.[187]

8.4.12 According to the Russian Federation, the Tribunal's decision as set out above in para. 8.4.9 is incomprehensible and ill-founded, and can be equated with a decision for which no reasons have been stated at all. Moreover, according to the Russian Federation, this is about a crucial element of the decisions, constituting the groundwork of the outcome of the arbitral awards. It is emphasised that the Tribunal did not decide that the evidence was found to be insufficiently convincing, which the Tribunal had the discretion to decide, but that the Tribunal had completely ignored existing evidence. The Russian Federation takes the view that the arbitral awards should be set aside for their lack of reasoning.[188]

*d. The Court of Appeal's judgment*

8.4.13 The Court of Appeal takes the view that this complaint is based on an incorrect interpretation of the Final Award. While the Tribunal held in the Final Award that it had not found any proof in the massive record that could have led the Russian authorities to conclude that the Mordovian companies were shams, the Russian Federation fails to recognise that 'the massive record' does not refer to the arbitration record, but to the record that was the subject of the tax proceedings conducted by Yukos in Russia. This is about the lack of evidence in that record. The Russian Federation's numerous references to evidence submitted by it in the arbitration proceedings are therefore irrelevant. This would only be different if the documents concerned had also been submitted in the proceedings conducted by Yukos in Russia. The Russian Federation did not argue that this was the case.

8.4.14 The Court of Appeal will explain the above decision in more detail. In summary, in nos. 628-648 of the Final Award, the Tribunal discusses the question of whether the Russian authorities violated the principle of 'due process' in the proceedings conducted in Russia. The Tribunal explained that, under Russian law, the Russian tax authorities have the burden of proving their contention that there was 'bad faith'. They were also obliged to provide the taxpayer with the necessary information and documents that formed the basis of the conclusion that (briefly put) taxes were being evaded. The Tribunal observed that the courts did not address Yukos' complaints regarding the absence of documents and evidence in the proceedings conducted in Russia. Nor could the Tribunal establish, on the basis of the documents submitted (as the Court of Appeal understands it: from the Russian tax

proceedings), whether there was sufficient evidence of 'bad faith' with regard to all the companies. The Tribunal considered that proof had been furnished with regard to the companies in Lesnoy and Trekhgorny, but that proof regarding the artificial nature of the Mordovian companies was lacking. In the Tribunal's opinion, the Russian Federation wrongly effectively tried to reverse the burden of proof with regard to the Mordovian companies by arguing that there was no proof that the Mordovian companies were not shams.

8.4.15 In short, the decision contested by the Russian Federation is all about the question whether there was 'due process' in the proceedings conducted in Russia. This also follows from no. 641 et seq. Final Award, where the Tribunal criticises the 'relevant audit reports and decisions' of the tax authorities, as well as from the conclusions drawn by the Tribunal in no. 648 Final Award, which undeniably relate to the Tax Ministry's conduct. The contested decision is not about the question of whether it was established *in the arbitration proceedings* that the Mordovian companies are sham companies and – further to that – whether there was such a form of bad faith that the Russian tax authorities could rightly conclude that Yukos was making improper use of the tax exemptions in the low-tax regions. The Tribunal in fact expressly did not give an opinion on whether there was any bad faith on the part of Yukos and the companies in these regions. In this regard, the Court of Appeal refers to the findings in nos. 499 and 614 Final Award cited above. It follows from those findings that the Tribunal would not render a decision on the question whether the tax optimisation plan was in breach of the bad faith taxpayer doctrine (no. 499) and that the Tribunal in and of itself deemed it conceivable that the Russian tax authorities could reach the conclusion on sound grounds that there could be bad faith (no. 614).

8.4.16 Additionally, even if the Tribunal had the evidence submitted in the arbitrations in mind in the finding cited above in para. 8.4.9, that finding does not support its conclusions in no. 648 Final Award, which is essentially that the Tax Ministry had presented too little proof to justify the conclusion that *all* trading companies were abusing the low-tax regime, that the Russian Federation refused to admit the Mordovian authorities and the trading companies to the proceedings (against Yukos), that the burden of proof rested with the Russian Federation and that the attribution to Yukos had no precedent at that time. These conclusions undeniably relate to HVY's accusation (summarised by the Tribunal in no. 628 Final Award) that the Russian Federation violated 'due process' and can support the conclusion that this accusation is valid.

8.4.17 On the basis of the above, the Court of Appeal concludes that the complaint about the reasons stated for the decision that no evidence had been provided to show that the Mordovian companies are shams, fails.

**8.5 (iii) Decision by guesswork and going beyond the ambit of the legal dispute**

8.5.1 The Russian Federation, in this respect, refers to its argument that a number of issues the Tribunal decided on are based on guesswork and the Tribunal thus went beyond the ambit of the legal dispute. That argument has been discussed and rejected above (para. 6.5.1 et seq.). The Court of Appeal's findings in this regard also apply here. The issue at hand is not that the Final Award did not state reasons for the award, because that is not the case here, or that, while reasons were given, no well-founded explanation for the relevant decision can be identified in it.

**8.6 (iv) Inherently inconsistent opinions in respect of the YNG auction**

8.6.1 The Russian Federation argued that no reasons were stated for the Tribunal's decision regarding the proceeds of the auction of the YNG shares and that the arbitral awards should be set aside for that reason based on Article 1065(1)(d) DCCP. The Russian Federation also argued that there had been unacceptable speculation about the alleged manipulation of that auction, in violation of the principles of the right to be heard, equality of arms, impartiality and open-mindedness. According to the Russian Federation, the arbitral awards must be set aside for these reasons based on Article 1065(1)(e) DCCP.

8.6.2 According to the Russian Federation, the Tribunal's decision that the YNG shares were sold for far too low a price at the auction of 19 December 2004 (Final Award no. 1020) conflicts with the Tribunal's decision on Yukos' total market value (including YNG) on the same day. The Russian Federation is of the opinion that the Tribunal did not give reasons why the purchase price of USD 9.35 billion for 76.79% of the shares reached at the auction was too low. That price was in fact 300 million higher than YNG's fair value at that time, which was USD 9.05 billion. The Russian Federation explains this as follows. According to the Tribunal, Yukos' total equity value in December 2004 was USD 21.176 billion. Yukos' expert (Kaczmarek) stated in the arbitration proceedings that YNG represented 55.6% of the equity value at the time, i.e. USD 11.77 billion. The value of 76.79% of YNG shares was thus USD 9.04 billion, according to the Russian Federation.

8.6.3 The Tribunal explained how YNG was valued in October 2004 and the events that took place ahead of the auction:[189]

- On 12 August 2004 the bailiff asked Dresdner Bank to determine the value of YNG. The valuation report of 6 October 2004 values YNG as a stand-alone enterprise between USD 18.6 and 21.1 billion. If tax liabilities and other debts would be taken into account, the value would amount to between USD 14.7 and 17.3 billion. Dresdner Bank further noted that the manner in which the sales process is set up usually has a relevant influence on the price; a quick auction, for example, means that it will not be possible to obtain the full price.
- A few days later, on 11 October 2004, the bailiff set the minimum selling price at 60% of the value determined by Dresdner Bank (USD 8.65 billion). The price of Yukos shares then started to fall sharply.
- A warning was given on behalf of GML that the buyer of YNG shares had to count on a 'lifetime of litigation'.
- On 29 October 2004, YNG received a USD 2.35 billion additional tax assessment for 2001. On that same day YNG was also held liable for an amount of USD 1.03 billion for tax fraud for the year 2002.
- On 3 December 2004, an additional tax assessment of USD 1.22 billion was imposed for the year 2003.
- On 18 November 2004, the YNG auction was announced.
- Yukos tried in vain to prevent the auction by means of Russian preliminary relief proceedings.
- On 13 December 2004, GML took out a full-page advertisement in the Financial Times entitled "Buyer Beware". Furthermore, Chapter 11 proceedings were initiated in Texas. On 16 December

2004, a US court granted Yukos' request for a 'temporary restraining order'. As a result, prospective buyers were prohibited from participating in the auction.
- A few days before the auction was due to take place, two companies had registered to take part in the auction: Gazpromneft and Baikal.
- The auction was held on 19 December 2004. Baikal purchased the YNG shares on that day for the sum of USD 9.35 billion. Gazpromneft made no bid.

8.6.4 The Tribunal explained why it took the view that Baikal had paid a price for the shares that was 'far below the fair value of those shares' at the auction of 19 December 2004:

> "1020. Having considered all of the factors that it has reviewed, the Tribunal concludes that the price of USD 9.35 billion which Baikal paid at the auction for the 76.79 percent stake of Yukos in YNG was far below the fair value of those shares.1021. In the opinion of the Tribunal, the imposition during the few weeks prior to the auction of massive tax liabilities on YNG (which were cancelled in the months after the acquisition of YNG by Rosneft) appear designed specifically to depress the value of YNG. The amount of the tax liabilities imposed which were subtracted from the Dresdner valuation cannot be justified. In addition, in the view of the Tribunal, the failure by YNG to pay its mineral extraction tax was inextricably linked to the asset freeze of Yukos' cash. 1022. The Tribunal also finds that the Russian authorities deliberately ignored the advice of Dresdner that haste in carrying out the auction could decrease the price. The Tribunal notes that the *Quasar* tribunal criticized Respondent's decision to hold the auction only one month after its announcement, and found that "the auction procedure was highly irregular in a number of ways that all relate to the extraordinary speed with which it was conducted." 1023. While the Tribunal accepts, as did the *RosInvestCo* and *Quasar* tribunals, that the actions of Claimants in warding off prospective buyers through a media campaign and the TRO [temporary restraining order, Court of Appeal] may have deterred some potential buyers and may have resulted in a low winning bid, these actions, at the end of the day, had no relevant impact on the bankruptcy of Yukos. The circumstances surrounding the appearance and disappearance of Baikal make the auction process seem all the more questionable to the Tribunal. The Tribunal now turns to these events."

8.6.5 It follows from the foregoing that the Tribunal stated detailed reasons for its decision that Baikal had paid a price on 19 December 2004 that was far below the 'fair value' of the shares. Consequently, reasons have in fact been stated. Nor can it be said that the Tribunal's reasoning lacks any well-founded explanation for this opinion.

8.6.6 The Russian Federation's complaint against the arbitral awards is essentially that this reasoning is not *adequate* because it is inconsistent with Yukos' value as at 19 December 2004 as determined by the Tribunal. Regarding this assessment of the value, the Tribunal held (to the extent relevant here) that HVY's calculations were the starting point for the determination of the damage and that the 'comparable companies method' suggested by the expert engaged by HVY, Kaczmarek, was the most appropriate method for valuing Yukos.[190] Based on this method, Kaczmarek's calculations (adjusted using the RTS Oil and Gas index because Kaczmarek had taken 21 November 2007 as the reference date) and Dow's criticism (the expert engaged by the Russian Federation) of Kaczmarek's

calculations, the Tribunal concluded that Yukos' 'equity value' on 19 December 2004 was USD 21.176 billion.[191]

8.6.7 In the Final Award, the Tribunal does not appear to have taken as the starting point that Kaczmarek assumed in his calculations that YNG represented 55.6% of the equity value at the time and that the fair value of the YNG shares sold at auction amounted to USD 9.04 billion. To that extent, there is therefore no inconsistency in the Tribunal's reasoning. Whether this was Kaczmarek's assumption can be left unanswered as it does not seem that the Tribunal adopted those assumptions. The Tribunal certainly did not want to take Kaczmarek's conclusions into account on all points.

8.6.8 The following can also be stated in this respect. The Tribunal based its decision that the price paid at the auction was far below the 'fair value' of those shares on facts and circumstances that occurred in the days and weeks prior to the auction and which, in its opinion, had a negative effect on the price paid for the YNG shares on 19 December 2004. Those facts and circumstances, which, in the opinion of the Tribunal, are largely attributable to the Russian Federation, resulted in the price of the shares being far below the value appraised by Dresdner Bank.[192] It is the value appraised by Dresdner Bank that the Tribunal considered to be the value of the shares, against which it should be assessed whether a fair price for YNG was obtained at the auction. That is not incomprehensible, as the executing bailiff instructed Dresdner Bank for that report, precisely for the purpose of that auction. That there is inconsistency is therefore based on an incorrect interpretation of the Final Award. Moreover, acceptance of the Russian Federation's argument could only lead to the conclusion that the reasoning of the Final Award is flawed. However, flawed reasoning does not constitute a ground for setting aside.

8.6.9 The conclusion is that the complaint about the reasons stated for the Tribunal's decision that the purchase price of the YNG shares was far too low, fails.

### 8.7 Conclusion in respect of lack of reasoning (Article 1065(1)(d) DCCP)

8.7.1 The foregoing leads to the conclusion that there are no grounds for setting aside the Yukos Awards in connection with the provisions of Article 1065(1)(d) DCCP.

## 9. Public policy (Article 1065(1)(e) DCCP)

### 9.1 Legal context

9.1.1 According to the Russian Federation, the Yukos Awards were made in violation of public order and good morals.

9.1.2 An arbitral award is incompatible with public policy if its content or execution is incompatible with mandatory rules of law of such a fundamental nature that compliance with such rules must never be allowed to be hindered by limitations of a procedural nature; the starting point is that this ground for setting aside must, by its nature, be applied with restraint.[193] A violation of fundamental procedural law principles can lead to the setting aside of an arbitral award for incompatibility with public policy

or good morals. However, not every violation of a procedural rule applicable in arbitration proceedings necessarily leads to setting aside. Even if the violation of procedural rules leads to a violation of the principles of due process, this ground for setting aside must, by its nature, be applied with restraint.[194]

9.1.3 There is no room for a restrained application of this ground for setting-aside, when it must be assessed if the fundamental right to be heard as laid down in Article 1039(1) DCCP was violated when the arbitral award was made. After all, this right is of no less significance in arbitration proceedings than in proceedings before the regular court.[195] The right to be heard in arbitration proceedings means, among other things, that the parties must be given adequate opportunity to respond to the findings of an expert, that they must be given a timely opportunity to express their views on documents and other information on which arbitrators base their award[196] and to supplement their factual assertions with regard to any legal grounds potentially to be assembled by the arbitral tribunal of its own motion that might come as a surprise to the parties.

9.1.4 Except in so far as the parties have agreed otherwise or if this would be contrary to public policy, an arbitral tribunal is free to apply the rules pertaining to the law of evidence, meaning that, in principle, an arbitral tribunal is not bound by the general provisions of the law of evidence, which apply in proceedings before an ordinary court (Article 1039(5) DCCP).[197] There is no rule of law that obliges arbitrators to give the parties the opportunity to comment on the intended valuation of the damages by the tribunal. It is therefore not contrary to public policy if the arbitrators decided on the amount of the damages without giving the parties the opportunity referred to above. This is only different if there are special circumstances, to be alleged by the Russian Federation in this case, which may lead to the finding that the conduct of arbitrators is contrary to due process. Moreover, the valuation of the damages is inevitably based to a large extent on the intuitive judgment and experience of the arbitrators, so that a violation of public policy will not be found easily.[198]

9.1.5 For an arbitral award to be set aside on the ground that an arbitrator/arbitral tribunal was not impartial and independent, a stricter standard applies than in the case of challenging an arbitrator under Article 1033 DCCP. The Yukos Awards can only be set aside on grounds of violation of public policy in connection with an alleged lack of impartiality or independence of the Tribunal if facts and circumstances have come to light which suggest that either an arbitrator, when making the award, was in fact not impartial or not independent, or that his impartiality or independence at the time is in such serious doubt that, also taking the other circumstances of the case into account, it would be unacceptable to require the Russian Federation to accept the Yukos Awards.[199]

9.1.6 The Court of Appeal will assess the grounds put forward by the Russian Federation in light of the aforementioned criteria.

**9.2 The Russian Federation's position**

9.2.1 The Russian Federation has substantiated its claim that the Yukos Awards were made in violation of public policy and good morals with the following arguments:

(i) Violation of the right to be heard by taking a surprise decision when estimating the damages and by failing to comply with Article 21(5) ECT (para. 9.3);

(ii) The Tribunal decided by guesswork and went beyond the legal dispute (para. 9.4);

(iii) With regard to VAT assessments, the Tribunal based itself on its own views on what Russian law should entail, rather than on what it actually entails (para. 9.5);

(iv) The Tribunal's decision on the YNG Shares in inconsistent with its own valuation of Yukos and is based on mere speculation (para. 9.6);

(v) HVY committed fraud in the arbitrations (para. 9.7);

(vi) HVY came with unclean hands, which the Tribunal chose to ignore (para. 9.8).

**9.3 (i) The right to be heard; surprise decision**

9.3.1 The Court of Appeal found above (paras. 6.4.1-6.4.27) that the Tribunal did not make any impermissible surprise decisions when estimating the damages and that the Tribunal did not violate the right to be heard. The Court of Appeal refers thereto.

9.3.2 The Russian Federation also argues that the Tribunal violated the parties' right to be heard and their right to equality of arms by disregarding the mandatory provision of Article 21(5) ECT. Failure to comply with this obligation deprived the Russian Federation of its right to be heard regarding the conclusions arrived at by the competent tax authorities (Defence on Appeal no. 1185). This argument also fails. Since the Tribunal did not request the opinion of the competent tax authorities, there were no conclusions from those tax authorities on which the parties would have been able to comment. Whatever the case may be as regards to the decision of the Tribunal not to seek an opinion under Article 21(5) ECT (see paras. 6.3.1-6.3.4 of this judgment in this respect), it did not result in a violation of the right to be heard.

**9.4 (ii) Decision by guesswork and going beyond the legal dispute**

9.4.1 The Russian Federation, in this respect, refers to its argument that the Tribunal used guesswork and went beyond the legal dispute in deciding four issues: the VAT assessments, the 'A Loan', the allocation of the trading companies' income to Yukos and the role of Rosneft. That argument has been discussed and refuted above (para. 6.5.1 et seq.). The Court of Appeal's findings in this regard also apply here. The Russian Federation did not substantiate its assertion that there was a violation of the right to be heard and of the right to equal treatment in relation to the issues raised in this regard. Nor has such violation become evident in any way whatsoever. This also applies to the accusation that the Tribunal did not act impartially and independently. The above findings of the Court of Appeal with regard to these four issues demonstrate that the Tribunal's findings lend no support to that conclusion.

**9.5 (iii) The VAT assessments**

9.5.1 The Tribunal is accused of having based its decision that the VAT assessments imposed on Yukos were unjustified on its own understanding of what Russian law should have entailed, rather than what Russian law actually entailed according to the documentation submitted to the Tribunal. In this respect, too, the Tribunal allegedly violated the right of the Russian Federation to be heard, and its right to an impartial and independent arbitral tribunal.

9.5.2 The Court of Appeal already held above (para. 6.5.3) that this accusation is without merit, and refers firstly to that decision. It has not become evident that the Tribunal violated the right to be heard in this respect or that it acted otherwise than impartially and independently. Nor has the Russian Federation substantiated this accusation. Consequently, this argument also fails.

**9.6 (iv) Contradictory conclusions in respect of the YNG auction**

9.6.1 The Russian Federation has argued that – based on the correctness of its complaint regarding the finding that the price paid for the YNG shares at the auction was too low – the Tribunal's decision that the auction in question was manipulated was only based on:

a) The Tribunal's own suspicion that the successful bidder had been incorporated by the Russian Federation to facilitate the subsequent purchase of YNG by Rosneft.

b) The unfounded assumption that the fate of Yukos would not have been different if Yukos had not obtained a court order prohibiting participation in the auction and if Yukos had not threatened everyone who wished to participate in the auction with a 'lifetime of litigation'.

The Russian Federation is of the opinion that the decision was not based on facts but on speculation. In its view, this is contrary to principles of procedural law, thus constituting a breach of public policy.[200]

9.6.2 The complaint that the Tribunal's decision that the auction was manipulated was based on speculation builds on the complaint discussed above regarding the reasons stated for the decision that the purchase price of the YNG shares obtained at the auction was too low. The Court of Appeal held above (paras. 8.6.1-8.6.9) that the latter complaint is unsuccessful. For this reason alone, the former complaint does not succeed either.

**9.7 (v) HVY committed fraud in the arbitration proceedings**

9.7.1 The Russian Federation argues that HVY actively deceived the Tribunal and repeatedly concealed directly relevant evidence. More specifically, the Russian Federation refers to the following aspects: (a) HVY concealed their true relationship with Khodorkovsky et al., and the widespread criminality with which their alleged investment in Yukos was permeated, from the Tribunal (and the Court of Appeal), (b) HVY failed to disclose GML's letter of 2011 and other documents that presumably must be in existence, which clearly constitutes a breach of Procedural Order 12 of the Tribunal, (c) HVY withheld documents covering the entire chain of transactions concerning the shares

in Yukos, thereby also concealing HVY's direct relationship with Khodorkovsky et al. and the illegal acquisition of the shares in Yukos by Khodorkovsky et al., (d) HVY made false statements in the documents they submitted to the Tribunal, by arguing for a separation between themselves and Khodorkovsky et al. and emphasising the legality of their acquisition of shares in Yukos, despite the fact that the documents in their possession showed that this was not the case; the acquisition of the shares was in fact illegal, invalid and thus void, and (e) Khodorkovsky et al. made secret payments to Andrei Illarionov, one of HVY's key witnesses in the arbitration.[201]

9.7.2 In its interim judgment of 25 September 2018, the Court of Appeal upheld HVY's objection to the submission of these assertions by the Russian Federation (see paras. 5.1-5.8 of that judgment). Consequently, the Court of Appeal does not have to rule on these arguments.

**9.8 (vi) 'Unclean hands'**

9.8.1 Under the heading 'unclean hands', the Russian Federation argues that the enforcement of the Yukos Awards will lead to a violation of public policy regarding fraud, corruption and other serious illegalities. According to the Russian Federation, the ultimate outcome of the Yukos Awards boils down to the justification and continuation of HVY's fraudulent, corrupt and illegal activities, an outcome which is in itself – and certainly in conjunction with the manner in which the arbitration proceedings were conducted – contrary to the fundamental principles of public policy and good morals as referred to in Article 1065(1)(e) DCCP (Defence on Appeal nos. 1201-1207).

9.8.2 In this respect, the Russian Federation also refers to Chapter III.C of the Defence on Appeal (Defence on Appeal no. 1205, footnote 2043), but it appears that the facts described therein do not form the basis of the claim for the setting-aside of the Yukos Awards pursuant to Article 1065(1)(e) DCCP, or at least there is no further substantiation to that effect. That chapter, incidentally, partly concerns the conduct of parties other than HVY. Moreover, in its interim judgment of 25 September 2018, the Court of Appeal upheld HVY's objection to a number of accusations set out therein (described in para. 5.1 of the interim judgment).

9.8.3 The 'fraudulent, corrupt and illegal activities' to which the Russian Federation refers in this connection comprise the conduct classified by it in 28 categories, which are described, inter alia, in Chapter III.B of the Defence on Appeal, as well as in the Statement of Reply at first instance, no. 28 (in which the 28th case of illegal conduct was apparently omitted in error). See also above para. 5.1.2.7. The Russian Federation refers to this conduct as conduct of Yukos and HVY, but in the relevant assertions the conduct concerned is often that of Khodorkovsky et al. The categories of conduct in question are as follows:

(a) Conduct relating to the acquisition of Yukos and the subsequent consolidation of control over Yukos and its subsidiaries:

In 1995-1996, Khodorkovsky et al. acquired a majority stake in Yukos through fraud, bribery, conspiracy and violence, and in 1996-2003 they used YUL to pay bribes to officials responsible for the privatisation of Yukos;

(b) Conduct relating to the Double Taxation Agreement (or 'DTA') between Cyprus and Russia:

Khodorkovsky et al. concealed their control over Yukos by transferring the shares to companies in Cyprus, and Hulley and VPL abused the DTA in order to fraudulently evade dividend tax in the Russian Federation;

(c) Conduct relating to the tax optimisation structure:

Khodorkovsky et al. illegally misused Russian shell companies to commit tax fraud to the tune of billions and abused regulations in Russian regions where a lower tax rate applied to the income from the sale of oil produced by Yukos;

(d) Acts obstructing the enforcement of the Russian tax assessments:
Once their tax fraud had been discovered, Khodorkovsky et al. systematically took measures to thwart the enforcement of tax laws and to conceal evidence of their illegal activities; at the same time, they used HVY to withdraw more than USD 67 billion from Yukos, in particular by distributing dividends and buying back their own shares.

9.8.4 The 28 cases of illegal conduct described in Chapter III.B of the Defence on Appeal were also referred to in the arbitration under the term unclean hands. This was related to the Russian Federation's assertion that HVY did not come to the arbitration with 'clean hands' and that the Tribunal therefore lacked jurisdiction, or that HVY's claims were inadmissible, or at least that those claims should not be allowed.

9.8.5 The Tribunal examined the unclean hands accusation in Chapter IX.B of the Final Award. The findings of the Tribunal in this respect, as well as the reproaches directed against those findings by the Russian Federation, have been discussed or rejected by the Court of Appeal above in paras. 5.1.11.1-5.1.11.9. The Court of Appeal refers thereto in this respect. In so far as relevant here, the essence of the Tribunal's decision was that (i) conduct that took place after HVY made their investment in Yukos does not affect the protection afforded to HVY by the ECT (Final Award no. 1365), (ii) the other alleged illegal acts were committed before HVY became shareholders in Yukos (in 1999, 2000 and 2001), and therefore were not carried out by HVY but by other parties such as Bank Menatep and the 'oligarchs' (Final Award no. 1367) and (iii) the Russian Federation had not demonstrated that the alleged illegalities were sufficiently connected to HVY's investment (the purchase of Yukos shares) (Final Award no. 1370).

9.8.6 In the Defence on Appeal, the Russian Federation refers to illegal conduct of Khodorkovsky et al, Yukos and HVY, as asserted by it. It notes that some of this conduct was acknowledged by the Tribunal (and has also been acknowledged by the ECtHR and the English 'High Court'). According to the Russian Federation, the Tribunal (i) failed to recognise numerous clear and scandalous illegal acts by Khodorkovsky et al., Yukos and HVY without well-founded reasons, and (ii) made contradictory decisions in many instances by ignoring these illegal acts. After all, HVY can neither be seen as "separate" from Khodorkovsky et al. nor are they "controlled" by the trustees in Guernsey and Jersey, as wrongly held by the Tribunal. According to the Russian Federation, the Tribunal's decision to the

effect that the actions of the Russian Federation were directed "against Mr Khodorkovsky and Yukos", or that the objective was "to remove Mr Khodorkovsky from the political arena" is inconsistent with the decision that HVY and Khodorkovsky et al. are independent entities. These conflicting findings were the result of improper, incomplete and superficial assessment by the Tribunal of the evidence in the case file, according to the Russian Federation.

9.8.7 These assertions fail. The Court of Appeal refers firstly to its findings above (para. 5.1.11.7-5.1.11.9) with respect to the accusation of unclean hands. In addition, it finds the following. The Tribunal did not ignore the alleged illegal acts or fail to recognise them. The Tribunal found that, even if the alleged illegalities took place, which the Tribunal left open, those illegalities are not relevant to the question whether HVY can invoke the protection of the ECT, on the basis of the reasoning briefly set out above in para. 9.8.5. That reasoning as such is not contested by the Russian Federation, but only its application to the present case. However, the Tribunal's decision was not contrary to public policy and the Russian Federation's accusations do not justify the conclusion that the Yukos Awards or the manner in which they came about violate public policy within the meaning of Article 1065(1)(e) DCCP, even if was to be assumed that the alleged illegalities took place and were contrary to public policy. In that case, too, it is not clear why the Tribunal's decision that these illegalities are not relevant for the award of HVY's claims in the arbitration proceedings, because (i) only an illegality in the *making* of the investment is relevant for protection under the ECT, (ii) the alleged illegalities were committed by parties other than HVY and (iii) HVY acquired the shares in Yukos lawfully, would be contrary to public policy.

9.8.8 There is no factual basis for the complaint that the Tribunal erred in deciding that HVY are to be seen as "separate" from Khodorkovsky et al. and are not "controlled" by the trustees in Guernsey and Jersey. In this respect, the Tribunal only found that a number of the alleged illegal actions took place before HVY became a shareholder and that, as a result, these were carried out by 'other parties', such as Bank Menatep or Khodorkovsky et al. Thus, the Tribunal decided nothing more than that Bank Menatep and the Khodorkovsky et al. are other (legal) entities than HVY, and that HVY cannot be held liable for actions carried out by others before HVY became a shareholder. That decision, in so far as it could be tested in the present setting-aside proceedings, was correct, and has not been challenged by the Russian Federation, or at least not with sufficient substantiation.

9.8.9 Finally, another assertion of the Russian Federation that fails is that the Tribunal's decision that the actions of the Russian Federation were directed "against Mr Khodorkovsky and Yukos", or that the objective was "to remove Mr Khodorkovsky from the political arena" is inconsistent with the decision that HVY and Khodorkovsky et al. are independent entities. At the time of the actions by the Russian Federation qualified as 'expropriation' by the Tribunal, in particular the levying of VAT on oil exported and the auction of YNG, Khodorkovsky was 'chairman' and – whether or not indirectly – shareholder of Yukos, and the Tribunal ruled that, by expropriating Yukos *de facto*, the Russian Federation also intended to affect Khodorkovsky. That decision is not in itself inconsistent with the decision that HVY and Khodorkovsky are different legal entities. It has not become evident, in this respect or in other respects, that there was an improper, incomplete and superficial assessment by the Tribunal of the evidence in the case file.

9.8.10 In Chapter III.B of the Defence on Appeal, to which the Russian Federation also refers in this context, the Russian Federation also argued that the clandestine complex of transactions used by Khodorkovsky et al. to transfer their shares to Cyprus is contrary to Law No 948-I on competition and Law No 208-FZ on public limited companies (Defence on Appeal, no. 559). It is not clear whether, and if so on what grounds, the Russian Federation bases its argument that the Yukos Awards should be set aside for violation of public policy on the alleged violation of said laws. In any event, the aforementioned assertion does not give rise to the finding that the Yukos Awards or the manner in which they were made are contrary to public policy. In addition, HVY argued that on 17 December 1998 the Anti-Monopoly Commission of the Russian Federation had authorised HEL to acquire 100% of all voting shares in Yukos (deed of 26 February 2019 No 1217).
The Russian Federation has not refuted the latter and that this assertion is correct is also evident from the exhibits to which HVY refer in this context.[202]

### 9.9 Conclusion in respect of the violation of public policy (Article 1065(1)(e) DCCP)

9.9.1 It must be concluded that the Russian Federation's arguments do not constitute grounds for setting aside the Yukos Awards for violation of public policy or good morals under Article 1065(1)(e) DCCP.

## 10. Conclusion

10.1 The above leads to the following conclusion. HVY's grounds of appeal succeed at least in part: the Tribunal had jurisdiction over HVY's claims and was competent to decide thereon. The other grounds for setting-aside put forward by the Russian Federation cannot lead to the setting aside of the Yukos Awards.

10.2 To the extent that the parties have offered to provide evidence for their assertions, the Court of Appeal will disregard these offers. The parties have not offered to proof any (sufficiently specified) facts as evidence that could be relevant for the Court of Appeal's decision.

10.3 The judgment of the District Court cannot be maintained and will be quashed. Adjudicating the matter anew, the Court of Appeal will reject the Russian Federation's claims.

10.4 As the party that has lost the current annulment proceedings, the Russian Federation will be ordered to pay the costs of the proceedings in both instances. The parties will be ordered to each pay their own costs of the ancillary proceedings during this appeal, which led to the interim judgment of 25 September 2018 and in which the Court of Appeal agreed partially with both parties.

## 11. Decision:

The Court of Appeal:

- quashes the judgment of the District Court of 20 April 2016, and adjudicating the matter anew:

- rejects the Russian Federation's claims;

- orders the Russian Federation to pay the costs of the proceedings in both instances, estimated *at first instance* at € 11,592 for disbursements and € 38,532 in attorney's fees, and *on appeal* at € 795.75 for disbursements and € 44,008 for attorney's fees, as well as € 157 for subsequent attorney's fees, to be increased by € 82 if this judgment has not been complied with amicably within fourteen days after a written notice and subsequent service of this judgment has occurred, and stipulates that these amounts must be paid within fourteen days after the day of this judgment or, with regard to the amount of € 82, after the date of service, failing which these amounts will be increased by the statutory interest as referred to in Article 6:119 of the Dutch Civil Code as from the end of the aforementioned period of fourteen days;

- declares this judgment to be immediately enforceable.

1 Supreme Court 26 September 2014, ECLI:NL:HR:2014:2837; *NJ* 2015, 318 (*Ecuador/Chevron*), para. 4.2.

2 Supreme Court 28 January 2005, ECLI:NL:HR:2005:AR3645; *NJ* 2006, 469 (*IMS/DIO*).

3 Cf. Oliver Dörr and Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties. A Commentary, Berlin: Springer 2018, p. 560-588.

4 ICJ *Territorial Dispute (Libya v Chad)* judgment of 3 February 1994, para. 41; ICJ *Legality of the use of force (Serbia and Montenegro v Belgium)* (Preliminary Objections) judgment of 15 December 2004, para. 100.

5 Cf. Oliver Dörr and Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties. A Commentary, Berlin: Springer 2018, p. 595-603.

6 Oliver Dörr and Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties. A Commentary, Berlin: Springer 2018, p. 604-608.

7 Cf. Oliver Dörr and Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties. A Commentary, Berlin: Springer 2018, p. 617-622.

8 Annex C-1021 on the part of HVY in the arbitration.

9 Cf. Oliver Dörr and Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties. A Commentary, Berlin: Springer 2018, p. 442.

10 Cf. Oliver Dörr and Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties. A Commentary, Berlin: Springer 2018, p. 453-454.

11 In a similar vein: Advocate General Wesseling-Van Gent in no. 2.36 of her opinion to Supreme Court 27 March 2009, *NJ* 2010, 169 (*Breeders/Burshan*); ECLI:NL:HR:2009:BG4003.

12 Cf. for that rationale: Supreme Court 27 March 2009, ECLI:NL:HR:2009:BG6443; *NJ* 2010, 170 (*Smit/Ruwa*), para. 3.4.1.

13 Russian Federation Deed of 25 June 2019 no. 97 footnote 245.

14 ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, Reports 2011 p. 70, para. 133*, with reference to additional case law.

15 Exhibit HVY-D1 under 19; HVY-D8 under 10.

16 Exhibit HVY-D9 at 9.

17 Exhibit RF-D3 under 8.

18 Expert Report of Prof. Schrijver, Exhibit HVY-D1 at 62.

19 Exhibit RF-31.

20 Exhibit RF-D01.

21 Exhibit RF-234.

22 Exhibit C-924, p. 4.

23 Exhibit RF-113.

24 Exhibit RF-235.

25 Exhibit RF-236.

26 Exhibit C-924, p. 11-12.

27 Exhibit HVY-D1 nos. 177-178.

28 Exhibit HVY-D1 nos. 64-69 and HVY-D2 nos. 76-82.

29 Exhibit HVY-144 nos. 211, 231, 243.

30 See Oliver Dörr and Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties. A Commentary, Berlin: Springer 2018, p. 545.

31 Exhibit HVY-144 no. 243.

32 Exhibits M-69 and M-72 to Expert Report of Mishina Exhibit HVY-D4.

33 Exhibit M-73 to Expert Report of Mishina Exhibit HVY-D4.

34 Summons no. 198.

35 www.treaties.un.org.

36 See second opinion of Prof. Schrijver no. 28 (Exhibit HVY-D8), with reference to an opinion of Prof. Pellet included as appendix 1.

37 See the further statements by James A. Baker III on behalf of the United States and E. Chevardnadze on behalf of the USSR added to the text of the treaty.

38 Exhibits S-36 and S-37 to Expert Report of Stephan (Exhibit HVY-D3).

39 Exhibit S-20 to Expert Report of Stephan (Exhibit HVY-D3).

40 Exhibits M-69 and M-72 to Expert Report of Mishina (Exhibit HVY-D4).

41 Exhibit M-73 p. 7 to Expert Report of Mishina (Exhibit HVY-D4).

42 Exhibit S-33 to Expert Report of Stephan (Exhibit HVY-D3).

43 Exhibit S-50 to Expert Report of Stephan (Exhibit HVY-D3).

44 Exhibit S-34 to Expert Report of Stephan (Exhibit HVY-D3).

45 Exhibit M-80 to Expert Report of Mishina (Exhibit HVY-D4).

46 Exhibit M-78 to Expert Report of Mishina (Exhibit HVY-D4).

47 Exhibit M-85 to Expert Report of Mishina (Exhibit HVY-D4).

48 Exhibit HVY-D3 Nos. 112-116.

49 Exhibit HVY-D10 nos. 63-64.

50 Exhibit RF-125 p. 4.

51 Cassation Ruling No. 59-O09-35 of the Supreme Court of 29 December 2009 (Exhibit RF-125).

52 Exhibit RF-122 and 123.

53 Exhibit RF-124.

54 Exhibit S-33 pp. 76-77 to Expert Report of Stephan (Exhibit HVY-D3).

55 Exhibit C-1020.

56 S.I. Krupko, Investment Disputes between a state and a foreign investor p.16, Exhibit S-84 to Expert Report Stephan (Exhibit HVY-D3)

57 G.M. Veliaminov, International Economic Law and Procedure nos. 800-801, Exhibit S-82 to Expert Report Stephan (Exhibit HVY-D3); L.I. Volova, The Mechanism of Settlement of International Investment Disputes, 1(8) Econ. Journal Rostov State Univ. 80 (2010) p.81, Exhibit S-83 to Expert Report of Stephan (Exhibit HVY-D3).

58 See, for example, the BITs of the Russian Federation with Japan (C-82), Macedonia (C-85), Argentina (C-814), Egypt (C-824), South Africa (C-842), Syria (C-845) and Yemen (C-852) submitted in the arbitration.

59 Exhibit AVA53 to Expert Report of Asoskov no. 87 (Exhibit RF-D05) and Exhibit C-146 in the arbitration.

60 Exhibit C-143.

61 Exhibit RF-66.

62 Exhibit S-87 to Expert Report of Stephan (Exhibit HVY-D3).

63 Exhibit S-89 to Expert Report of Stephan (Exhibit HVY-D3).

64 Exhibit S-85 to Expert Report of Stephan (Exhibit HVY-D3).

65 Exhibit S-90 to Expert Report of Stephan (Exhibit HVY-D3).

66 Expert Report of Asoskov, p. 7 (Exhibit RF-50).

67 Exhibit S-76 to Expert Report of Stephan (Exhibit HVY-D3).

68 Exhibit RF-135.

69 Expert Report of Stephan nos. 227-229 (Exhibit HVY-D10).

70 Exhibit AVA53 to Expert Report of Asoskov no. 87 (Exhibit RF-D05).

71 Expert Report of Asoskov no. 96 et seq. (Exhibit RF-D05).

72 Expert Report of Asoskov no. 76 footnote 54 (Exhibit RF-50).

73 Expert Report of Asoskov no. 88 (Exhibit RF-D05).

74 Exhibit AVA53 to Expert Report of Asoskov no. 87 (Exhibit RF-D05).

75 Expert Report of Asoskov no. 87 footnote 77 (Exhibit RF-D05).

76 Exhibit R-902.

77 Exhibit RF-D05 nos. 129 et seq.

78 Exhibit RF-D05 no. 131.

79 Interim Award no. 372

80 Final Award no. 1580.

81 Supreme Court 28 January 2005, ECLI:NL:HR:2005:AR3645; *NJ* 2006, 469 (*IMS/DIO*).

82 Interim Award nos. 407 and 411-416.

83 Interim Award nos. 429-434.

84 Interim Award no. 435.

85 Final Award nos. 1349, 1352 and 1353.

86 Final Award nos. 1354-1356.

87 Final Award nos. 1357-1363.

88 Final Award nos. 1281-1310.

89 Final Award nos. 1364-1366.

90 Final Award nos. 1367-1372.

91 Final Award no. 1373.

92 See, inter alia, Defence on Appeal nos. 661, 670, 672 and 674.

93 Exhibit RF-D16.

94 Defence on Appeal no. 671.

95 Defence on Appeal nos. 676-677.

96 Defence on Appeal no. 678.

97 Defence on Appeal no. 679.

98 See in this respect Rachel Thorn & Jennifer Doucleff, 'Part I Chapter 1: Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of "Investor"', in: Michael Waibel, Asha Kausal, et al. (eds.), The Backlash against Investment Arbitration, Kluwer Law International 2010, pp. 3-28 (Exhibit RF-335).

99 SCC *Cem Cengiz Uzan v. Republic of Turkey* (*Preliminary Objection) Arbitration V2104/023*, award of 20 April 2016 (Exhibit RF-339).

100 Defence on Appeal nos. 683-684.

101 Yutaro Kawabata & Kojiro Fujii, Covered Investors, in: The Investment Treaty Arbitration Review, Second Edition, Barton Legum (ed.), London: Law Business Research 2017, p. 18 (Exhibit RF-369).

102 Defence on Appeal nos. 681 and 682.

103 Defence on Appeal no. 686.

104 ICSID *Phoenix Action, Ltd v. The Czech Republic, ICSID Case No. ARB/06/5*, award of 15 April 2009 (Exhibit RME-1078); UNCITRAL PCA *ST-AD GmbH v. The Republic of Bulgaria (Award on*

*Jurisdiction), PCA Caso No. 2011-06*, award of 18 July 2013 (Exhibit RF-72); ICSID *The Loewen Group Inc. v. United States of America, ICSID Case No. ARB(AF)/98/3*, award of 26 June 2003, (R-217); ICSID *Lemire v. Ukraine*, *ICSID Case No*. *ARB/06/18*, award of 28 March 2011 (Exhibit RF 340).

105 ICSID *Occidental Petroleum Corporation v. The Republic of Ecuador (Decision on Annulment), ICSID Case No. ARB/06/11*, award of 2 November 2015 (Exhibit RF-219).

106 SCC *Charanne B.V. v. The Kingdom of Spain (Final Award)*, *SCC Arbitration No. 062/2012*, award of 21 January 2016 (Exhibit HVY-183).

107 ICSID *Alapli Elektric B.V. v. Republic of Turkey*, *ICSID Case No. ARB/08/13*, award of 16 July 2012 (Exhibit RF-139).

108 ICSID *TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5*, award of 19 December 2008 (Exhibit RF-74). Cf. also ICSID *National Gas S.A.E. v. Arab Republic of Egypt, ICSID Case No. ARB/11/7*, award of 3 April 2014, para 136 (Exhibit RF-73).

109 UNCITRAL PCA *Saluka Investment BV (The Netherlands) v. The Czech Republic* (*Partial Award)*, award of 17 March 2006, para 229 (Exhibit C-253).

110 ICSID *Plama Consortium Limited v. Republic of Bulgaria (Decision on Jurisdiction) ICSID Case No*. ARB/03/24, decision of 8 February 2005, para 128 (Exhibit C-248).

111 SCC *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain, Arbitration Case No. V2013/153*, award of 12 July 2016 (Exhibit HVY-233).

112 Defence on Appeal nos. 696-697.

113 In that respect, see Oliver Dörr and Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties. A Commentary, Berlin: Springer 2018, p. 598, margin number 81.

114 Defence on Appeal nos. 701-702.

115 ICSID *Salini Construttori S.P.A. v. Kingdom of Morocco (Decision on Jurisdiction), ICSID Case No. ARB/00/4*, award of 23 July 2001 (Exhibit RF-344).

116 See, for example: ICSID *Joy Mining Machinery Limited v. The Arab Republic of Egypt (Award on Jurisdiction), ICSID Case No*. *ARB/03/11,* award of 6 August 2004, para 53 (Exhibit RF-345); ICSID *Patrick Mitchell v. The Democratic Republic of Congo (Decision on the Application for Annulment of the Award)*, *ICSID Case No. ARB/99/7*, decision of 1 November 2006 para 27 (Exhibit RF-346); ICSID *Capital Financial Holdings Luxembourg SA v. Republic of Cameroon, ICSID Case No. ARB/15/18*, award of 22 June 2017 para 423 (Exhibit RF-351).

117 ICSID *Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20,* award of 14 July 2010 (Exhibit RF-347). See also: ICSID *KT Asia Investment Group B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8,* award of 17 October 2013, para 170/171 (Exhibit RF-348); ICSID *MNSS B.V. v. Montenegro, ICSID Case No. ARB(AF)12/8*, award of 4 May 2016, para 189 (Exhibit RF-349).

118 See, for example: ICSID *Capital Financial Holdings Luxembourg SA v. Republic of Cameroon, ICSID Case No. ARB/15/18*, award of 22 June 2017 para 423 (Exhibit RF-351).

119 Defence on Appeal no. 703.

120 Defence on Appeal nos. 710 and 711. ICJ *Case concerning The Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports 1970, p. 3, judgment of 5 February 1970 (Exhibit CME-930).

121 Defence on Appeal no. 712. ICSID *Cementownia "Nowa Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)06/2,* award of 17 September 2009 (Exhibit RME-1084).

122 Defence on Appeal no. 713.

123 Defence on Appeal nos. 715-718.

124 Defence on Appeal no. 720.

125 Defence on Appeal no. 719.

126 ICSID *Phoenix Action, Ltd v. The Czech Republic, ICSID Case No. ARB/06/5*, award of 15 April 2009 (Exhibit RME-1078); in a similar vein *SAUR International S.A. v. Argentine Republic (Decision on Jurisdiction and Liability), ICSID Case No*. *ARB/04/4*, decision of 6 June 2012, para 308 (Exhibit RME-4186).

127 ICSID *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/11/12*, award of 10 December 2014 (Exhibit RF-147).

128 UNICTRAL PCA *Oxus Gold v. Republic of Uzbekistan (Final Award)*, award of 17 December 2015, para 707 (Exhibit RF-364).

129 ICSID *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, *ICSID Case No. ARB/07/24,* award of 18 June 2010, para 127 (Exhibit RF-368).

130In that sense, for example: ICSID *Metal-Tech Ltd. v. The Republic of Uzbekistan, ICSID Case No. ARB/10/3*, award of 4 October 2013, para 373 (Exhibit RF-361); ICSID *Alasdair Ross Anderson v. Republic of Costa Rica, ICSID Case No. ARB(AF)07/2,* award of 19 May 2010, para 52, 55 and 59 (Exhibit RME-4204).

131 Cf. also ICSID *David Minnotte and Robert Lewis v. Republic of Poland, ICSID Case No. ARB(AF)10/1*, award of 16 May 2014, para 131-134 (Exhibit RF-363).

132 ICSID *Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24,* award of 27 August 2008, see also para. 325 ('dispositive') (Exhibit CME-994**).**

133 ICSID *Blusun S.A. v. Italian Republic, ICSID Case No. ARB/14/3*, award of 27 December 2016 (Exhibit RF 371).

134 ICSID *Ampal-American Israel Corporation v. Arab Republic of Egypt (Decision on Jurisdiction), ICSID case no. ARB/12/11,* decision of 1 February 2016 (Exhibit RF-362).

135 Nos. 726-729 Defence on Appeal.

136 See no. 30 of the 2015 report (Exhibit RF-202).

137 Conclusion of the report, no. 45, last sentence (Exhibit RF-202).

138 Defence on Appeal nos. 530 et seq.

139 Defence on Appeal nos. 733-741.

140 See the representation of the positions in nos. 1375 et seq. Final Award.

141 Final Award no. 1406.

142 Final Award no. 1888.

143 Final Award nos. 1406, 1409, 1430 and 1446.

144 UNCITRAL *EnCana Corporation v. Republic of Ecuador*, UNCITRAL award of 3 February 2006 (Exhibit R-328).

145 ICSID *Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24,* award of 27 August 2008, para. 266 and 306 (Exhibit CME-994).

146 SCC *Novenergia II – Energy & Environment v. The Kingdom of Spain*, SCC Arbitration 2015/063, award of 15 February 2018 (Exhibit HVY-237), para 521; UNCITRAL PCA *Antaris GMBH and M. Göde v. The Czech Republic*, PCA Case No. 2014-01, award of 2 May 2018, para. 248 (Exhibit HVY-238); ICSID *Antin Infrastructure Services Luxembourg S.a.r.l. and Antin Energia Thermosolar B.V. v. The Kingdom of Spain*, ICSID Case No. ARB 13/31, award of 15 June 2018, para. 314 (Exhibit HVY-239).

147 Final Award no. 1404.

148 Final Award no. 756.

149 Final Award no. 757.

150 Supreme Court 29 January 2010, ECLI:NL:HR:2010:BK2007, *NJ* 2011/270 (*Van Wassenaer Van Catwijk/Knowsley*), para. 3.6.2.

151 Supreme Court 17 January 2003, ECLI:NL:HR:2003:AE9395; *NJ* 2004, 384 (*IMS/Modsaf*), para. 3.3.

152 Supreme Court 22 December 1978, ECLI:NL:HR:1978:AC6449; *NJ* 1979, 521 (*Zaunbrecher/Muyzert*), Supreme Court 23 December 1943, ECLI:NL:HR:1943:201; *NJ* 1944, 164 (*Drost/Schippers*).

153 Supreme Court 30 December 1977, ECLI:NL:HR:1977:AC6162; *NJ* 1978, 449 (*De Ploeg/Kruse*).

154 Supreme Court 9 January 2004, ECLI:NL:HR:2004:AK8380; *NJ* 2005, 190 (*Nannini/SFT*), para. 3.5.2.

155 H.J. Snijders, *Nederlands Arbitragerecht*, Deventer: Wolters Kluwer 2018, p.566.

156 Summons no. 577.

157 For example, Final Award nos. 610 and 618.

158 Final Award no. 625 and Summons no. 381.

159 Final Award no. 679 et seq.

160 Court of Appeal of The Hague, 14 October 2004, ECLI:NL:GHSGR:2004:AS6294; Prg. 2005, 14.

161 PCIJ *Case concerning the Factory at Chorzow*, 13 September 1928, Series A No. 17.

162 PCIJ *Case concerning the Factory at Chorzow*, 13 September 1928, Series A No. 17, p. 56.

163 Exhibit RF-85.

164 Hearings (merits) in the arbitration of 2012-10-10, pp. 47-48.

165 Defence on Appeal no. 921.

166 Defence on Appeal nos. 926-928.

167 Cf. no. 8 of Advocate General Huydecoper's opinion for Supreme Court 9 January 2004, ECLI:NL:HR:2004:AK8380; *NJ* 2005, 190 (*Nannini/SFT*).

168 Written arguments of *mr.* Meijer no. 59.

169 Defence on Appeal no. 991.

170 Written arguments of *mr.* Meijer no. 13.

171 Written arguments of *mr.* Meijer no. 35.

172 Written arguments of *mr.* Meijer no. 18.

173 Written arguments of *mr.* Meijer no. 17.

174 Defence on Appeal no. 976.

175 Written arguments of *mr.* Meijer no. 17.

176 Defence on Appeal no. 998.

177 Defence on Appeal no. 994.

178 G.B. Born, International Commercial Arbitration, Volume II: international arbitral procedures, Second Edition, Alphen aan den Rijn: Kluwer Law International 2014, pp. 1999 and 2000.

179 Supreme Court 22 December 2006, ECLI:NL:HR:2006:AZ1593; *NJ* 2008, 4 (*Kers/Rijpma*), para. 3.3.

180 P. 573 of the Defence on Appeal.

181 Final Award, nos. 272-283 and 327-328.

182 Final Award nos. 77, 283, 327 and 340-371.

183 Final Award nos. 109(1)-(14) and 109(18)-(19).

184 Final Award nos. 495-500.

185 Final Award no. 614.

186 Defence on Appeal nos. 1120-1123.

187 Defence on Appeal nos. 1124-1132, in particular no. 1131.

188 Defence on Appeal nos. 1133-1135.

189 Final Award nos. 992-1003.

190 Nos. 1782 et seq. of the Final Award.

191 No. 1815 of the Final Award.

192 Cf. nos. 1021-1023 of the Final Award.

193 Supreme Court 12 April 2019, ECLI:NL:HR:2019:565, para. 4.3.2; Supreme Court 21 March 1997, ECLI:NL:HR:1997:AA4945; *NJ* 1998, 207 (*Eco Swiss/Benneton*), para. 4.2.

194 Supreme Court 12 April 2019, ECLI:NL:HR:2019:565, para. 4.3.2, Supreme Court 24 April 2009, ECLI:NL:HR:2009:BH3137; *NJ* 2010, 171 (*IMS/Modsaf*), para. 4.3.1, Supreme Court 25 May 2007, ECLI:NL:HR:2007:BA2495; *NJ* 2007, 294 (*Spaanderman/Anova*), para. 3.5, Supreme Court 17 January 2003, ECLI:NL:HR:2003:AE9395; *NJ* 2004, 384 (*IMS/Modsaf*), para. 3.3.

195 Supreme Court 24 April 2009, ECI:NL:HR:2009:BH3137; *NJ* 2010/171 (*IMS/Modsaf*), para. 4.3.1, Supreme Court 25 May 2007, ECLI:NL:HR:2007:BA2495; *NJ* 2007, 294 (*Spaanderman/Anova*), para. 3.5.

196 Cf. Supreme Court 18 June, ECLI:NL:HR:1993:ZC1003; *NJ* 1994, 449 (*Van der Lely/VDH*), para. 3.3.

197 Cf. Supreme Court 24 April 2009, ECLI:NL:HR:2009:BH3137; *NJ* 2010, 171 (*IMS/Modsaf*), para. 4.3.3.

198 The Hague Court of Appeal 22 August 2011, ECLI:NL:GHSGR:2011:4513, paras. 32-33.

199 Supreme Court 18 February 1994, ECLI:NL:HR:1994:ZC1266; *NJ* 1994, 765 (*Nordström/Van Nievelt Goudriaan & Co*), para. 3.8.

200 Defence on Appeal nos. 1190-1191.

201 Defence on Appeal nos. 1195-1200.

202 Exhibit DG-100 to Exhibit RF-G2, Gololobov's witness statement; in which the Court of Appeal reads "Hulley" for "Halley".