PCA (PERMANENT COURT OF ARBITRATION)

PCA Case No. 2005-03/AA226

HULLEY ENTERPRISES LTD. V. RUSSIAN FEDERATION

CONCLUSION OF THE ATTORNEY-GENERAL AT THE SUPREME COURT OF THE NETHERLANDS

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23 April 2021

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Conclusion of the Attorney-General at the Supreme Court of the Netherlands

1. Introduction

1.1. In arbitral proceedings, the Russian Federation was ordered to pay damages to HVY for breach of its obligations under the Energy Charter Treaty (hereinafter: ECT).[2] The Russian Federation brought a claim for setting aside the relevant arbitral awards (hereinafter also the 'Yukos Awards') before the Dutch court. The District Court awarded the claim on the grounds of the absence of a valid arbitration agreement. On appeal, the Court of Appeal annulled the District Court's judgment and as yet rejected the Russian Federation's claims. The Russian Federation has lodged an appeal in cassation against the judgment of the Court of Appeal.

1.2. This case is still governed by the old arbitration law, i.e. by the Fourth Book ("Arbitration") of the Dutch Code of Civil Procedure, as in force until the implementation of the Arbitration Law Modernisation Act on 1 January 2015.[3] The references in this opinion are always to the old law, unless stated otherwise. For an introduction to the setting aside proceedings of Article 1064 et seq. DCCP, I refer to my opinion on the application for suspension of the enforcement that was filed by the Russian Federation.[4] The Supreme Court denied this request in its decision of 4 December 2020.[5]

1.3. In large part the complaints relate to the interpretation of ECT provisions. The Russian Federation argues in cassation that the Court of Appeal based its conclusion, that the dispute between HVY and the Russian Federation is covered by the ECT, on an incorrect interpretation of the relevant treaty provisions, so that its finding that there is a valid basis for arbitration is incorrect. This concerns in particular the interpretation of the terms 'investor' and 'investment' of the ECT, and the scope of Article 45(1) ECT, which provides for the provisional application of the ECT by a state that has signed the ECT, but for which this treaty has not yet entered into force. In this introduction, I will briefly discuss the purpose and the genesis of the ECT and the possibilities that the ECT offers for the settlement of investment disputes. The interpretation of specific provisions of the ECT will subsequently be discussed in more detail when examining the various parts of the principal appeal in cassation.

1.4. The ECT was concluded in Lisbon on 17 December 1994 with the aim of achieving cooperation in the energy sector, in particular between the Member States of the then European Economic Community (EEC, now the European Union) and states in Central and Eastern Europe, including the current Russian Federation.[6] This political wish had already previously been expressed in the non-

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[2] Energy Charter Treaty, with Annexes, Treaty Series 1995, 108 (English and French texts, with corrections in Treaty Series 1995, 250), and Treaty Series 1995, 250 (Dutch translation).

[3] Act of 2 June 2014, Bulletin of Acts and Decrees 2014, 200, entered into force on 1 January 2015 (Bulletin of Acts and Decrees 2014, 254). Transitional law is provided for in Article IV (4) in conjunction with Article IV (2) of that Act.

[4] Case no. 20/01892, ECLI:NL:PHR:2020:1082, nos. 3.10-3.18.

[5] ECLI NL:HR:2020:1952, *RvdW* 2021/2, *JOR* 2021/79, annotated by M.A. Broeders.

binding European Energy Charter of 1991. In the ECT, the agreements in the Energy Charter are laid down in a binding instrument. The ECT entered into force on 16 April 1998 after it was ratified by thirty states, including the Netherlands (see Article 44(1) ECT). The ECT has now been ratified by 51 states as well as by the European Union.[7] The Russian Federation signed the ECT on 17 December 1994, but did not ratify it.[8] On 20 August 2009, the Russian Federation informed the depositary of the ECT (Portugal) that it no longer intended to ratify the ECT. Since then, the Russian Federation has no longer been required to provisionally apply the ECT, with the exception of the provisions relating to investment protection and dispute resolution, in so far as it concerns investments already made (Article 45(3)(a) and (b) ECT).

1.5. Substantively, the provisions of Part III of the ECT, which pertain to "Promotion, Protection and Treatment of Investments", are the most relevant in this case. These provisions offer protection to investors who have made an investment in the energy sector in one of the contracting parties. They include the right to fair treatment and non-discrimination (Article 10 ECT) as well as protection against expropriation (Article 13 ECT).[9]

1.6. The ECT also provides for a mechanism allowing investors to enforce compliance with these rights.[10] Article 26 ECT provides that investors may submit a dispute about an alleged breach of one of the provisions of Part III of the ECT by a contracting party to (inter alia) an arbitral tribunal. Article 26(4) ECT mentions three possibilities for dispute resolution:

a) arbitration at the International Centre for Settlement of Investment Disputes (ICSID) in Washington, on the basis of the ICSID Convention[11], provided that both ECT states concerned are parties to the ICSID Convention (or, if one of the states concerned is party to the ICSID Convention, on the basis of the Additional Facility Rules to that Convention);

b) arbitration by a single arbitrator or an ad hoc tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), as has been done in the present case;

c) arbitration at the arbitration institute of the Stockholm Chamber of Commerce (SCC).

1.7. Disputes on rights under the ECT can therefore be brought before various arbitration tribunals. This

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[6] In this respect, see Thomas W. Wälde, International Investment under the 1994 Energy Charter Treaty. Legal, Negotiating and Policy Implications for International Investors with Western and Commonwealth of Independent States/Eastern European Countries, in: Thomas W. Wälde (ed), The Energy Charter Treaty. An East-West Gateway for Investment and Trade, The Hague: Kluwer International 1996, p. 251 et seq.; Thomas Roe & Matthew Happold, Settlement of Investment Disputes under the Energy Charter Treaty, Cambridge: Cambridge University Press 2011, p. 7-13 (these authors erroneously state that the ECT was opened for signature on 17 December 1995); Crina Baltag, The Energy Charter Treaty. The notion of investor, Alphen aan den Rijn: Kluwer Law International 2012, pp. 6-13; Kaj Hobér, The Energy Charter Treaty. A Commentary, Oxford: OUP 2020, pp. 13-24.

[7] See overheid.nl/verdragenbank, as well as the website of the Secretariat of the ECT (https://www.energycharter.org/who-we-are/members-observers).

[8] The Russian Federation signed the ECT without making the declaration of Article 45(2) ECT. Other states (Australia, Norway and Iceland) did declare at the time of signing that they would not apply the ECT provisionally.

[9] In this respect, see Hobér, op. cit., p. 6; Roe & Happold, op. cit., pp. 13-18; Wälde, op cit., p. 286 et seq.

[10] See Laurent Gouiffés, The Dispute Settlement Mechanisms of the Energy Charter Treaty, in: Clarisse Ribeiro (ed.), Investment Arbitration and the Energy Charter Treaty, New York: JurisNet 2006, pp. 22-29.

[11] Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington, 18 March 1965, Treaty Series 1981, 191.

opinion discusses various decisions by these tribunals. The question arises as to what significance should be attached to those decisions, regarding which I note the following in this introduction.

1.8. According to the Vienna Convention on the Law of Treaties (hereinafter referred to as "VCLT"),[12] arbitral case law is not a source of interpretation in respect of treaties. However, this case law can provide insight into the manner in which a treaty is applied in practice.[13] Arbitral case law can be used to demonstrate the existence of a principle of customary international law, which must be taken into account in the interpretation of a treaty pursuant to Article 31(3) VCLT. Of course, there must be a general state practice which is extensive and virtually uniform, and there must be a legal conviction that this practice is required by international law.[14]

1.9. Arbitration tribunals are not bound by each other's rulings because the principle of binding precedents *(stare decisis)* is lacking.[15] Decisions may therefore differ from one another (which, of course, can also be explained by the facts and the manner in which the proceedings were conducted). One must be wary of drawing conclusions on the basis of only one decision or a few decisions. Furthermore, unanimous decisions are given more weight than decisions in which dissenting opinions were written.[16]

1.10. The ICSID Convention provides for a procedural framework for the resolution of international investment disputes between states and investors[17] and does not relate to disputes between states and their own nationals.[18] The ICSID Convention does not determine when there is an international investment, but leaves this to the ICSID arbitral tribunals, which will also base their decision on this on the investment treaty (often a bilateral investment treaty (BIT)) underlying the dispute. The approach of an arbitration tribunal in a case under the ICSID Convention is therefore dependent on the underlying investment treaty. ICSID tribunals will only assume jurisdiction if the investment also falls within the scope of protection of the ICSID Convention.[19] In practice, ICSID tribunals therefore sometimes impose stricter requirements than the underlying investment treaties themselves, in particular with regard to the concept of 'investment'.[20] These requirements can also be stricter than those of other (commercial) arbitral tribunals, which do not base their jurisdiction on the ICSID Convention.[21]

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[12] Convention of 23 May 1969, Treaty Series 1985, 79.

[13] Inter alia Baltag, op. cit., p. 24.

[14] André Nollkaemper, Kern van het internationaal publiekrecht, The Hague: Bju 2019, pp. 127-134.

[15] Hobér, op. cit., p. 39 et seq.; Baltag, op. cit., p. 24 et seq.

[16] Hobér, op. cit., p. 40.

[17] See Roe & Happold, op. cit., p. 4; Anna Turinov, "Investment" and "Investor" in Energy Charter Treaty Arbitration: Uncertain Jurisdiction, Journal of International Arbitration 2009, p. 4.

[18] See, inter alia, Article 25 (1) ICSID Convention: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (...) and a national of *another* Contracting State" (my italics, Advocate General).

[19] See, for example, *ST-AD GmbH v. The Republic of Bulgaria* (Award on Jurisdiction), UNCITRAL, PCA Case No. 2011-06, 18 July 2013, para. 408: "It is settled jurisprudence that a national investment cannot give rise to an *ICSID arbitration,* which is reserved to international investments" (my italics, Advocate General). See also Stephen Jagusch & Anthony Sinclair, The Limits of Protection for Investments under the Energy Charter Treaty, in: Clarisse Ribeiro (ed.), Investment Arbitration and the Energy Charter Treaty, New York: Jurisnet, 2006, pp. 75-77; Turinov, op. cit., p. 6; Roe & Happold, op. cit., p. 49; Baltag, op. cit., pp. 106-107.

[20] This approach was worded as follows in *Phoenix Action, Ltd v. The Czech Republic,* ICSID Case No. ARB/06/5, 15 April 2009, para. 96: "At the outset, it should be noted that BITs, which are bilateral arrangements between two States parties, cannot contradict the definition of the ICSID Convention. In other words, they can confirm the ICSID notion or restrict it, but they cannot expand it in order to have access to ICSID. A definition included in a BIT being based on a test agreed between two States cannot set aside the definition of the ICSID Convention, which is a multilateral agreement. As long as it fits within the ICSID notion, the BIT definition is acceptable, it is not if it falls outside of such definition. (...)".

1.11. The foregoing is relevant because the ground for cassation refers to ICSID judgments in a number of places to substantiate the statement that it presents a generally accepted principle of international investment law (see ground 3 of the principal ground for cassation). When assessing this statement, it must be taken into account that the ICSID Convention sets its own requirements in some respects, which may be stricter than the requirements imposed in investment treaties. It is also the case with all arbitral case law that it will always have to be considered whether the approach taken therein is of general validity or is based on the specific wording of the underlying investment treaty.

1.12. After this introduction, I will proceed to present the facts and the course of the proceedings and the discussion of the principal ground for cassation.

2. The facts and the course of the proceedings

2.1. Briefly summarised, the issue in the present matter is the following.[22] 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 struck off the Russian Commercial Register on 21 November 2007.

2.2. HVY initiated arbitration proceedings against the Russian Federation under Article 26 ECT in 2004. They stated 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 be ordered to pay damages. The place of arbitration was The Hague.

2.3. 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 (hereinafter: the Interim Awards) 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 on 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.

2.4. In three separate Final Awards of 18 July 2014,[23] 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), respectively, plus interest and costs. The Tribunal ruled, briefly stated, that the Russian Federation, by taking a number of tax and recovery measures against Yukos, had aimed at the bankruptcy of Yukos, with no other purpose than to eliminate Mr Mikhail

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[21] Turinov, op. cit., p. 6.

[22] The presentation of the facts is derived from paras. 2.2-2.6 of the final judgment of the Court of Appeal of The Hague of 18 February 2020, ECLI:NL:GHDHA:2020:234, as challenged in cassation. Also see my opinion (ECLI:NL:PHR:2020:1082) at paras. 2.1-2.31 prior to the Supreme Court's decision of 4 December 2020, ECLI:NL:HR:2020:1952, *RvdW* 2021/2.

[23] *Hulley Enterprises Limited (Cyprus)/The Russian Federation,* UNCITRAL, PCA Case No. AA 226, Final Award; *Veteran Petroleum Limited (Cyprus)/The Russian Federation,* UNCITRAL, PCA Case No. 2005-05/AA228, Final Award; *Yukos Universal Limited (Isle of Man)/The Russian Federation,* UNCITRAL, PCA Case No. 2005-04/AA227, Final Award.

Khodorkovsky, the chairman of Yukos and one of its shareholders (hereinafter: Khodorkovsky), as a potential political opponent of President Putin and to acquire Yukos' assets.

2.5. By separate summons 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 consolidated by the District Court at the request of the Russian Federation.

2.6. On 20 April 2016, in one judgment rendered in the three consolidated cases, the District Court set aside the Interim Awards and the Final Awards because of the absence of a valid arbitration agreement.[24] HVY filed an appeal against this judgment with the Court of Appeal of The Hague.

2.7. In an interim judgment of 11 October 2016, the Court of Appeal ordered an appearance of the parties, which took place on 16 January 2017.

2.8. In its interim judgment of 25 September 2018, the Court of Appeal assessed a number of HVY's preliminary objections to the discussion of certain of the Russian Federation's statements.[25] These included (in so far as relevant here) the Russian Federation's statement that HVY had committed fraud in the arbitration proceedings by filing false statements and withholding documents (paras. 5.1-5.2). HVY objected to this, *inter alia* on the grounds that fraud should have been addressed in separate revocation proceedings based on Article 1068 DCCP (para. 5.3 (b)).

2.9. The Court of Appeal allowed HVY's objection. To that end. the Court of Appeal held, briefly stated, that the alleged fraud could only be addressed in revocation proceedings based on Article 1068 DCCP, and not (at a later stage) in setting-aside proceedings based on Article 1065 DCCP. Although both proceedings can indeed result in the setting aside of the arbitral award, they are subject to different time limits and they belong to the jurisdiction of different courts. Revocation proceedings can be initiated within three months of discovery of the fraud, even if more than three months have passed since the arbitral award attained binding force. In addition, there is only a single fact-finding instance in revocation proceedings (the Court of Appeal). Both the applicable time limits and the Court of Appeal's exclusive jurisdiction would be side-stepped if it were possible to put forward an allegation of fraud (by means of an increase of claim) at a later stage in setting-aside proceedings. Such an outcome is not acceptable (para. 5.7).

2.10. In its interim judgment of 18 December 2018, the Court of Appeal took several decisions on the further course of the proceedings.[26]

2.11. The Court of Appeal dealt with the merits of the case in the final judgment of 18 February 2020.[27]

2.12. HVY, among other things, submitted grounds of appeal against the District Court's decision that the Tribunal lacked jurisdiction because Article 26 ECT - which makes arbitration possible - is inconsistent with Russian law. The Court of Appeal assessed these grounds of appeal in paras. 4.4 et

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[24] ECLI:NL:RBDHA:2016:4229.

[25] ECLI:NL:GHDHA:2018:2476, *JBPr* 2019/9, annotated by C.L. Schleijpen.

[26] ECLI:NL:GHDHA:2018:3437.

[27] ECLI:NL:GHDHA:2020:234. The judgment was also published in *NJ* 2020/360 with Supreme Court 25 September 2020, ECLI:NL:HR:2020:1511 and in TvA 2020/31, *JOR* 2020/164, annotated by N. Peters.

seq.

Interpretation of the Limitation Clause

2.13. The Court of Appeal assessed whether the parties had concluded a valid arbitration agreement (Article 1065(1)(a) DCCP) and held that this depends on the interpretation of Articles 26 and 45 ECT in light of the law of the Russian Federation (para. 3.1.2). The Russian Federation's position, briefly stated, is that although it did sign the ECT, it 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" (hereinafter: the Limitation Clause). According to the Russian Federation, the arbitration provision of Article 26 ECT is inconsistent with the Russian Constitution and several statutory provisions which entail that disputes of a public law nature are not arbitrable.

2.14. Principally, HVY have adopted the position that the matter at issue in the interpretation of Article 26 ECT is whether the *principle* of provisional treaty application is inconsistent with Russian law. On appeal, HVY argued in the alternative that the issue is whether the *provisional application* of one or more ECT provisions is incompatible with the law of a contracting state, and thus not whether a specific ECT provision is inconsistent with that law (paras. 3.3.2 and 4.2.2).

2.15. The Court of Appeal held in paras. 4.4.3-4.4.7 that it could base its decision on HVY's alternative position on the interpretation of Article 26 ECT, despite the fact that this argument was not advanced in the arbitration proceedings and the Tribunal had therefore not based its jurisdiction on it. Any other interpretation would result in an arbitral award having to be set aside because the Tribunal assumed jurisdiction on incorrect grounds, even though the state court found that the Tribunal did have jurisdiction on other grounds. This is inconsistent with the principle that the state court has the final say on this issue.

2.16. The Court of Appeal subsequently assessed HVY's alternative position (paras. 4.5.8-4.5.48). In para. 4.5.48, the Court of Appeal 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 ECT 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 the provisional application of a treaty for certain treaty provisions or types or categories of such provisions. According to the Court of Appeal, it was not shown that provisional application of Article 26 ECT is inconsistent with Russian law (para. 4.6.1). Superfluously, the Court of Appeal examined whether, based on the Russian Federation's interpretation of the Limitation Clause, Article 26 ECT was inconsistent with any provisions of Russian law (paras. 4.6.2-4.7.65). The Court of Appeal answered that question in the negative.

2.17. According to the Court of Appeal, HVY's grounds of appeal were therefore well-founded, in part, and the District Court's reasoning could not justify its decision that no valid arbitration agreement had been concluded (para. 4.9.1). Given the devolutive effect of appeal, the Court of Appeal assessed whether the Russian Federation's other statements in support of its claim that the Tribunal had no jurisdiction are well-founded, i.e. the statements pertaining to (i) the interpretation of Article 1(6)

and (7) ECT[28] (the terms "investment" and "investor"), (ii) the interpretation of Article 1(6) and (7) ECT (the legality of the investments), (iii) the taxation measures imposed by the Russian Federation, which are a legitimate exercise of the authority of the Russian Federation falling within the scope of Article 21(1) ECT.

(i) Interpretation of Article 1(6) and (7) ECT (investment and investor)

2.18. The Russian Federation has argued that the requirement set by Article 26 ECT, i.e. that there be 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, given that they are merely sham companies beneficially owned and controlled by Russian citizens. No foreign capital was invested - only Russian (paras. 3.3.2 and 5.1.3).

2.19. The Court of Appeal decided in para. 5.1.7.3 that if a legal entity incorporated under the law of one contracting state makes an investment in another contracting state, this qualifies as an investment within the meaning of Article 26 ECT. The ECT opts for "the law of the country under the laws of which the investor is organised" in order to determine the nationality of an investor. The drafters of the ECT did not wish to impose any further requirements on the international nature of the investments. The ECT does not, therefore, require the investor to have a genuine link with the country under the laws of which it is organised (para. 5.7.1.2). Furthermore, it does not follow from Article 17 ECT that investments such as those made by HVY fall outside the protection of the ECT because they are so-called "U-turn investments" (para. 5.1.8.1 et seq.).

(ii) Interpretation of Article 1(6) and (7) ECT (legality of the investments)

2.20. The Court of Appeal assessed the Russian Federation's position that the ECT does not protect investments made in breach of the law of the host state (paras. 3.2.3 and 5.1.11.1). According to the Court of Appeal, Article 1(6) ECT does not contain an explicit requirement of legality. It does not explicitly 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 (para. 5.1.11.5). The Court of Appeal held that the Russian Federation's reliance on Article 1(6) and (7) ECT failed.

(iii) Taxation measures (Article 21 ECT)

2.21. The Court of Appeal held that Article 21 ECT does not contain any reference to the jurisdiction of arbitrators, but merely states that the ECT does not create any rights or impose any obligations in

[28] Strictly speaking, Article 1 does not have paragraphs, but elements ("points"). In this statement, however, I follow the terminology ("paragraphs" ["*leden*"]) used by the Court of Appeal and the initiating document.

relation to taxation measures. The Tribunal's jurisdiction is determined solely by Article 26 ECT. According to the Court of Appeal, the conditions of Article 26 ECT have been fulfilled, which means that the provision of Article 21(1) ECT cannot lead to the conclusion that the Tribunal would lack jurisdiction if a situation covered by Article 21(1) ECT arises (para. 5.2.5). The Court of Appeal also held that Article 21(1) ECT only concerns *bona fide* taxation measures. The Tribunal concluded that there had been no *bona fide* taxation, given 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 (paras. 5.2.15 and 5.2.16).

2.22. The Court of Appeal concluded that none of the grounds argued by the Russian Federation for the absence of a valid arbitration agreement support such a conclusion, so that there is no reason to set aside the Yukos Awards pursuant to Article 1065(1)(a) DCCP (para. 5.3.1).

2.23. The Court of Appeal then addressed, in para. 6.1 et seq., the Russian Federation's statements in connection with the setting-aside ground of violation of the mandate (Article 1065(1)(c) DCCP): (a) noncompliance with Article 21(5) ECT, (b) determination of the damages by the Tribunal, (c) the Tribunal engaged in decision by guesswork and went beyond the ambit of the legal dispute, (d) the role of the assistant to the Tribunal, and (e) the lack of reasoning.

(a) Violation of the mandate (Article 1065(1)(c) DCCP) by noncompliance with Article 21(5) ECT (para. 6.3).

2.24. In paras. 6.1 et seq., the Court of Appeal addressed the statement that the Tribunal had failed to refer the dispute to the relevant competent tax authorities, in violation of Article 21(5) ECT. According to the Court of Appeal, this failure was not sufficiently serious to justify setting aside the arbitral award, given that it had not become plausible that the Russian Federation had suffered any disadvantage as a result (para. 6.3.2). According to the Court of Appeal, it must be assumed that during the extensive 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. It is difficult to see what additional information the Tribunal could have obtained from the Russian tax authorities that would have led to a different decision on the "allocation of the income of the shell trading companies (...) to Yukos" (para. 6.3.3).

2.25. The Russian Federation also argued that the dispute ought to have been referred to the tax authorities of Cyprus and the United Kingdom. This statement does not hold, according to the Court of Appeal, as Article 21(5) 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 taxation measures taken by Cyprus or the United Kingdom constitute an expropriation (para. 6.3.4). Furthermore, the Court of Appeal held that the Tribunal's conduct was not contrary to the so-called prognosis prohibition, as argued by the Russian Federation (para. 6.3.4).

(b) Determination of the damages

2.26. In paras. 6.4.1-6.4.27, the Court of Appeal paid extensive attention to the Russian Federation's statement that the Tribunal had 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 had not been heard, thus leading to a surprise decision. The Court of Appeal concluded that there had been no surprise decision (para. 6.4.23) and that the manner in which the Tribunal had determined the amount of damages does not constitute a violation of the Tribunal's mandate.

(c) Decision by guesswork, going beyond the ambit of the legal dispute

2.27. In paras. 6.5.1-6.5.15, the Court of Appeal assessed the Russian Federation's argument that the Tribunal had 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 Court of Appeal concluded that the Russian Federation's arguments failed and that the Tribunal had not violated its mandate in this respect, nor had it failed to provide sound reasoning for its decision. It had not violated public policy either (para. 6.5.15).

(d) The role of the assistant to the Tribunal

2.28. In paras. 6.6.1-6.6.15, the Court of Appeal addressed the Russian Federation's argument that the Yukos Awards should be set aside due to the disproportionate involvement of Martin Valasek, the assistant to the Tribunal, in their drafting (para. 6.6.1). According to the Russian Federation, this involvement violated the principle that arbitrators must personally perform the task assigned to them, meaning that the Tribunal had failed to comply with its mandate (Article 1065(1)(c) DCCP). In addition, Valasek's involvement is said to mean that there effectively had been a "fourth arbitrator", meaning that the Tribunal's composition was inconsistent with the applicable rules (Article 1065(1)(d) DCCP).

2.29. The Court of Appeal rejected this argument. Although the Court of Appeal presumed that Valasek had made significant contributions to the drafting of parts of the text (para. 6.6.5), this did not mean that he had independently taken decisions which are part of the essential task of the arbitrators (para. 6.6.10). The fact that the Final Awards were signed by the three arbitrators implies, that it was they who rendered them, which means there was not an even number of arbitrators (para. 6.6.13). If the Russian Federation's statement that Valasek was only introduced as an assistant and contact person is assumed, by way of presumption, to be correct, 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 (para. 6.6.14.2).

(e) The lack of reasoning

2.30. In paras. 8.4.1-8.4.17, the Court of Appeal addressed the Russian Federation's argument that the arbitral awards lack sound reasoning (Article 1065(1)(d) DCCP) where they address the Russian Federation's statement that Yukos' Mordovian companies were sham companies. The Tribunal concluded that no proof could be found for this in "the massive record", referring to the record that was the subject of the tax proceedings that Yukos had conducted in Russia. According to the Court of Appeal, this was about the lack of evidence in that record and that the Russian Federation's numerous references to evidence submitted by it in the arbitration proceedings were therefore irrelevant (para. 8.4.13). The Court of Appeal concluded that the complaint about the reasoning of the decision that no evidence had been provided to show that the Mordovian companies are sham companies, failed (para. 8.4.17).

2.31. The Court of Appeal concluded that HVY's grounds of appeal succeeded at least in part and that the Tribunal had jurisdiction to hear and decide on HVY's claims. The other grounds for setting aside put forward by the Russian Federation cannot lead to the setting aside of the Yukos Awards (para. 10.1). The Court of Appeal annulled the judgment of the District Court and, adjudicating the matter anew, rejected the Russian Federation's claims (para. 10.3 and operative part).

2.32. The Russian Federation lodged an appeal in cassation (within the time limit) against the interim judgment of 25 September 2018 and the final judgment of 18 February 2020, hereinafter referred to as the interim judgment and the final judgment, respectively. HVY conducted a defence and lodged a conditional cross-appeal in cassation. The parties submitted written pleadings and orally argued their positions on 5 February 2021, followed by written reply and rejoinder.

2.33. The Russian Federation filed an application in the context of its appeal in cassation for *(inter alia)* the suspension of enforcement of the Yukos Awards and for HVY to be ordered to provide security. By decision of 25 September 2020, the Supreme Court decided that it has jurisdiction to hear this application.[29] By decision of 4 December 2020, the Supreme Court rejected the Russian Federation's application.[30]

3. Discussion of the principal appeal for cassation

3.1. The principal appeal for cassation consists of eight grounds, which are divided into various sub-grounds.

Ground 1: Violation of procedural public policy/exclusivity of Article 1068 DCCP

3.2. Ground 1 is directed against the Court of Appeal's decision in paras. 5.6-5.8 of the interim judgment and paras. 9.7 of the final judgment. There, the Court of Appeal held, briefly put, that the Russian Federation's objections regarding HVY's alleged fraud in the arbitration can only be raised by means of a claim for revocation on the basis of Article 1068 DCCP. The complaints argue that the Court of

[29] ECLI:NL:HR:2020:1511, *NJ* 2020/360.

[30] ECLI:NL:HR:2020:1952, *RvdW* 2021/2; *JOR* 2021/79, annotated by M.A. Breeders.

Appeal therewith failed to recognise that such fraud should also be able to lead to the setting aside of the arbitral award on the basis of Article 1065(1)(e) DCCP (violation of public policy).

3.3. In the discussion of this ground, I put the following first and foremost. There is no doubt that if an arbitral award came into being as a result of fraud or deceit by one of the parties to the proceedings, this manner of formation is contrary to public policy. After all, in such event there has been no fair trial.[31] Sanders therefore rightly writes that the grounds for revocation of Article 1068(1) DCCP lead to "an equal number of instances of violation of public policy."[32]

3.4. Though the legislature has provided for separate revocation proceedings in which fraud can be raised, this does not mean that these proceedings should be followed exclusively. It does not in any way follow from the legislative history that the legislature wanted to limit the possibilities of raising fraud by instituting these separate proceedings. After all, the claim for revocation ensues from general law of civil procedure,[33] and it may also overlap with the ordinary legal remedies, such as appeal. Revocation of a court decision (Article 382 DCCP) is an extraordinary legal remedy, which enables imputable conduct by the other party, such as fraud, to be addressed.[34] If an ordinary legal remedy is still available in such case, the ordinary legal remedy takes precedent. This is because the revocation claim can only be lodged if the relevant judgment has become final and conclusive, specifically within three months after the fraud has been discovered (Article 383(1) DCCP).[35] Consequently, in respect of ordinary civil proceedings, fraud need not exclusively be addressed by means of a revocation claim. The added value of revocation proceedings is that the adversely affected party has the option to still submit the fraud to the court after the end of the ordinary time limit for legal remedies. Revocation thus complements the existing ordinary remedies.

3.5. There are no indications that the legislature wanted to see revocation proceedings in arbitration law (Article 1068 DCCP) as the exclusive remedy for fraud in the proceedings.[36] This cannot be inferred from the fact that the legislature set up separate proceedings for that purpose, because in ordinary civil procedural law, too, the revocation claim exists alongside other legal remedies. The fact that the revocation procedure has only one instance, also does not indicate that those proceedings should be followed exclusively. The legislative history does not provide any pointers for this. It can rightly be argued that the party that chooses to submit the fraud to the court in the

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[31] H. Kronke et al (ed.), Recognition and Enforcement of Foreign Arbitral Awards. A Global Commentary on the New York Convention, Alphen aan den Rijn: Kluwer Law International 2010, p. 374. In the context of the recognition and enforcement of civil judgments, inter alia, Monique Hazelhorst. Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial, The Hague: TMC Asser Press 2017, pp. 299-300.

[32] P. Sanders, Het Nederlandse arbitragerecht, Deventer: Kluwer 2001, p. 199.

[33] See A.J. van den Berg et al., Nederlands Arbitragerecht, Zwolle: W.E.J. Tjeenk Willink 1992, pp. 136-138; Sanders, op. cit., pp. 203-210; *Parliamentary Documents* /11983-84, 18 464, no. 3 (Explanatory Memorandum), p. 31.

[34] G. Snijders, Groene Serie Burgerlijke Rechtsvordering, Article 382 DCCP, note 3 (P.J.M. von Schmidt auf Altenstadt).

[35] See Groene Serie Burgerlijke Rechtsvordering, Article 382 DCCP, note 7 (P.J.M. von Schmidt auf Altenstadt); Th. B. ten Kate & E.M. Wesseling-van Gent, Herroeping, verbetering en aanvulling van burgerrechtelijke uitspraken, Deventer: Kluwer 2013, no. 1.1.4. It follows from this requirement that a claim for revocation only comes into play if the fraud was not discovered until after the judgment and could not reasonably have been discovered earlier (Supreme Court 18 May 2018, ECLI:NL:HR:2018:727, *NJ* 2018/250, para. 3.5). In the exceptional case that the fraud is discovered after the judgment but during the current legal remedy time limit, the aggrieved party has the free choice (Groene Serie Burgerlijke Rechtsvordering, Article 382 DCCP, note 8.2 (P.J.M. von Schmidt auf Altenstadt)).

[36] Regarding the reasons for the introduction of revocation proceedings in the Arbitration Act. the legislative history *(Parliamentary Documents II* 1983-84, 18 464, no. 3 (Explanatory Memorandum), p. 31) merely notes: "The last article of the fifth section on the setting aside of the arbitral award introduces the civil law request on the somewhat modified grounds referred to in Article 382 (1)°, 7° and 8C. In arbitration law as it currently stands, these grounds, likewise amended, can be found in Article 649 nos. 8-10. Although used infrequently, and mostly on the ground set out at (a) of this Article, this final possibility to challenge an arbitral award is indispensable."

setting aside proceedings, thereby 'acquires an additional instance.[37] On the other hand, this party must immediately put forward the fraud as a ground in the setting aside writ of summons (Article 1064(5) DCCP), within the applicable period of three months after the arbitral award is deposited at the court registry (Article 1064(3) DCCP). This party will therefore not be able to benefit from the "additional" time limit of three months after discovery of the fraud as provided in Article 1068(2) DCCP.[38] This means that the risk identified by the Court of Appeal, that fraud is as yet submitted in the setting aside proceedings more than three months after it has been discovered, is not realistic. After all, the rule of Article 1064 (5) DCCP opposes this.[39]

3.6. I will now proceed to discuss the complaints. According to the ground, the Court of Appeal wrongly decided, or at least without adequate substantiation, that factual assertions that could have justified reliance on revocation within the meaning of Article 1068 DCCP cannot justify the assertion that an arbitral award obtained by means of a fraudulent statement, bribed witnesses and the withholding of essential documents, must be set aside due to violation of public policy (Article 1065 (1)(e) DCCP). The Court of Appeal wrongly deprived the Russian Federation of its possibility to freely choose between a claim pursuant to Article 1065 (1)(e) DCCP and a claim based on Article 1068 DCCP, so argues the ground.

3.7. In para. 5.7, the Court of Appeal held that fraud can only be raised in the revocation proceedings of Article 1068 DCCP, because otherwise, among other things, it might be possible to circumvent the time limit it prescribes. It follows from the foregoing that this point of departure is in general incorrect. However, this does not entail that the Court of Appeal's ultimate decision is also incorrect. According to the Russian Federation, the alleged fraud was discovered after the District Court's judgment (of 20 April 2016).[40] It is established that this was first invoked in the Defence on Appeal.[41] The rule of Article 1064(5) DCCP that all grounds for setting aside must be presented in the writ summons on pain of forfeiture of the right to do so entails that the alleged fraud could no longer be submitted in the setting aside proceedings that were already pending. After all, this should have been done in the originating summons on pain of forfeiture of the right to do so. For that reason, as the Court of Appeal held, the fraud asserted here could indeed only be raised in revocation proceedings, and could not be submitted in the defence on appeal in the setting aside proceedings.

3.8. The foregoing means that ground 1 fails.

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[37] Or at least under the old law applicable here, because the setting aside proceedings are now limited to a single fact-finding instance (Article 1064a (new) DCCP).

[38] This also means that fraud can only be brought up in setting aside proceedings in exceptional cases, namely if it is discovered after the judgment but within the current period for a setting aside claim. If fraud was discovered during the proceedings or could reasonably have been discovered by investigation on the part of the defrauded party, this must be submitted to the arbitral tribunal during the arbitration proceedings (cf. regarding a claim for revocation Supreme Court 20 June 2003, ECLI:NL:HR:2003:AF6207, *NJ* 2004/569, annotated by H.J. Snijders).

[39] Sanders has argued that this requirement should not be set where a setting-aside claim is based on a violation of public policy (op. cit., pp. 189-190). However, also according to Sanders himself, this is contrary to the system of the law. See also the objection by H.J. Snijders (Groene Serie Burgerlijke Rechtsvordering, Article 1064 DCCP, note 2): "More in general. (...) an arbitral award that is contrary to public policy - e.g. where the principle of the right to be heard has been violated -must still be challenged within a certain time limit, in this case the statutory time limit for setting aside: legal certainty is a great good and 'lites finiri oportet.'"

[40] Initiating document, no. 2.

[41] See para. 5.1 of the interim judgment, not challenged in cassation.

Ground 2: interpretation of Article 45(1) ECT

3.9. Ground 2 is directed against the Court of Appeal's interpretation of Article 45(1) ECT. This interpretation is contained in paras. 4.5.1 through 4.5.48 of the final judgment. The ground is divided into eight sub-grounds.

3.10. Ground 2 in essence argues that there is no valid arbitration agreement in this case, as required by Article 1065(1)(a) DCCP. According to the ground, though Article 26 ECT provides that disputes on rights ensuing from the ECT may be submitted to arbitration, the Russian Federation is not bound by this provision. The Russian Federation did sign the ECT, but never ratified it. Article 45(1) ECT provides for provisional application of the ECT by states that have signed the treaty, but only to the extent that such provisional application is not inconsistent with their internal legal order. According to the Russian Federation, the Court of Appeal applied an incorrect standard on this issue by deciding that it is not about whether Article 26 ECT as such is inconsistent with Russian law, but whether the provisional application of Article 26 ECT is inconsistent with it.

Introductory remarks

3.11. Before discussing the complaints of ground 2, I will make some comments about the provisional application of treaties in general and about the provisional application of the ECT in particular. Provisional application of a treaty entails the application of the treaty before it enters into force by ratification. Article 25(1) VLCT allows a treaty to be applied provisionally if the treaty so provides, or if the states that have participated in the negotiations have in some other manner so agreed. According to Article 25(2) VLCT, unless the treaty otherwise provides or the states that have participated in the negotiations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a state shall be terminated if that state notifies the other states between which the treaty is being applied provisionally of its intention not to become a party to the treaty. Provisional application can achieve the desired effects of the treaty taking effect without first having passed through the (often lengthy) national ratification procedures.[42] Provisional application is also subject to criticism, because it can conflict with national ratification procedures and thus with the separation of powers.[43]

3.12. As stated, Article 45 ECT provides for the provisional application of the ECT.[44] This provision reads as follows in the authentic English text (Treaty Series 1995, 108) and in the Dutch translation (Treaty Series 1995, 250):

Article 45 Provisional application

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[42] See Heike Krieger, in: Oliver Dörr, Kirsten Schmalenbach, Vienna Convention on the Law of Treaties. A Commentary, Berlin/Heidelberg: Springer 2018, pp. 441-446: Denise Mathy, in: Olivier Corten, Pierre Klein (eds.). The Vienna Convention on the Law of Treaties, A Commentary, Volume I, Oxford: OUP 2011, pp. 640-654.

[43] In this respect, see Krieger, op. cit., p. 445.

[44] In this respect, see Baltag, op. cit., pp. 31-55; Roe & Happold, op. cit., pp. 67-77; Hobér, op. cit., pp. 513-530; Antonio Morelli, in: Rafael Leal-Arcas (ed.), Commentary on the Energy Charter Treaty, Cheltenham: Edward Elgar 2018, pp. 477-481; W. Michael Reisman, The provisional application of the Energy Charter Treaty, in: Graham Coop & Clarisse Ribeiro (eds.), Investment Protection and the Energy Charter Treaty, New York: JurisNet 2008, pp. 47-61.

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 under 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. Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph 5 not later than 180 days after the opening date for signature of the Treaty as specified in Article 38.

5. The functions of the Secretariat shall be carried out on an interim basis by a provisional Secretariat until the entry into force of this Treaty pursuant to Article 44 and the establishment of a Secretariat.

6. The signatories shall, in accordance with and subject to the provisions of paragraph 1 or subparagraph 2c as appropriate, contribute to the costs of the provisional Secretariat as if the signatories were Contracting Parties under Article 37(3). Any modifications made to Annex B by the signatories shall terminate upon the entry into force of this Treaty.

7. A state or Regional Economic Integration Organization which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article.

Artikel 45 Voorlopige toepassing

1. Elke Ondertekenende Partij stemt ermee in dit Verdrag voorlopig toe te passen in afwachting van de inwerkingtreding voor deze Ondertekenende Partij krachtens artikel 44, voor zover deze voorlopige toepassing niet strijdig is met haar constitutie, wetten of voorschriften.

2. a. Ongeacht het eerste lid kan een Ondertekenende Partij op het tijdstip van ondertekening bij de Depositaris een verklaring indienen dat zij niet kan instemmen met voorlopige toepassing. De in het eerste lid vermelde verplichting geldt niet voor een Ondertekenende Partij die een dergelijke verklaring aflegt. Die Ondertekenende Partij kan te allen tijde haar verklaring intrekken door middel van een schriftelijke kennisgeving aan de Depositaris.

b. Een Ondertekenende Partij die een verklaring aflegt als bedoeld in het tweede lid, letter a, en investeerders van die Ondertekenende Partij kunnen geen aanspraak maken op de voordelen van voorlopige toepassing krachtens het eerste lid.

c. Ongeacht het tweede lid, letter a, moet een Ondertekenende Partij die een verklaring aflegt als bedoeld in het tweede lid, letter a, Deel Vil voorlopig toepassen in afwachting van de inwerkingtreding van het Verdrag voor de Ondertekenende Partij overeenkomstig artikel 44, voor zover die voorlopige toepassing niet strijdig is met haar wetten of voorschriften.

3. a. Een Ondertekenende Partij kan de voorlopige toepassing van dit Verdrag beëindigen door middel van een schriftelijke kennisgeving aan de Depositaris van haar voornemen geen partij bij het Verdrag te worden. De beëindiging van de voorlopige toepassing wordt voor een Ondertekenende Partij van kracht na het verstrijken van zestig dagen na de datum waarop de schriftelijke kennisgeving van die Ondertekenende Partij door de Depositaris is ontvangen.

b. Ingeval een Ondertekenende Partij de voorlopige toepassing van dit Verdrag beëindigt overeenkomstig het derde lid, letter a, blijft de krachtens het eerste lid op die Ondertekenende Partij rustende verplichting om Deel lil en Deel V toe te passen ten aanzien van investeringen die tijdens die voorlopige toepassing op haar grondgebied zijn gedaan door investeerders van andere Ondertekenende Partijen, evenwel van toepassing voor die investeringen gedurende twintig jaar na de datum van beëindiging, tenzij anders bepaald in het derde lid, letter c.

c. Het bepaalde in het derde lid, letter b, geldt niet voor de in bijlage PA vermelde Ondertekenende Partijen. Een Ondertekenende Partij wordt van de lijst in bijlage PA geschrapt zodra zij bij de Depositaris een verzoek daartoe indient.

4. In afwachting van de inwerkingtreding van dit Verdrag komen de Ondertekenende Partijen op geregelde tijdstippen bijeen in het kader van de voorlopige Conferentie van het Handvest, waarvan de eerste vergadering uiterlijk 180 dagen na de in artikel 38 vermelde datum van openstelling voor ondertekening van dit Verdrag door het in het vijfde lid bedoelde voorlopige Secretariaat wordt bijeengeroepen.

5. Tot de inwerkingtreding van dit Verdrag overeenkomstig artikel 44 en de oprichting van een Secretariaat worden de taken van het Secretariaat op tijdelijke basis verricht door een voorlopig Secretariaat.

6. In overeenstemming met dan wel onder voorbehoud van de bepalingen van het eerste lid of het tweede lid, letter c, al naar gelang het geval, dragen de Ondertekenende Partijen bij in de kosten van het voorlopige Secretariaat alsof zij Verdragsluitende Partijen in de zin van artikel 37, derde lid,

waren. Eventuele door de Ondertekenende Partijen in bijlage B aangebrachte wijzigingen vervallen bij de inwerkingtreding van dit Verdrag.

7. Een Staat of regionale organisatie voor economische integratie die, vóór de inwerkingtreding van dit Verdrag, overeenkomstig artikel 41 tot het Verdrag toetreedt, heeft in afwachting van de inwerkingtreding van het Verdrag de rechten en verplichtingen van een Ondertekenende Partij krachtens dit artikel.

3.13. The objective pursued by provisional application does not follow from the ECT. It is mentioned in the literature that provisional application is provided for so as to be able to already set up the ECT's institutional framework and create momentum for the energy cooperation for which the ECT is intended. [45]

3.14. In the case at issue in cassation, the question arises as to how the phrase "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations" of Article 45(1) ECT should be interpreted. Three different interpretations of Article 45(1) ECT were considered in these proceedings. [46]

3.15. The *first* view is basically that Article 45(1) ECT means that there is no room for provisional application of the ECT if *the principle of provisional application of a treaty* as such is inconsistent with the laws of the signatory (in this case Russian law). This view was primarily defended by HVY in the first instance (see para. 4.5.4 of the final judgment). This interpretation is referred to, also by the Court of Appeal, as the "all or nothing" approach (para. 4.5.10 of the final judgment). This view is primarily based on the use of the word "such", which refers back to the first half of the sentence: "Each signatory agrees to apply this Treaty provisionally". [47] In addition, Article 45(1) ECT mentions provisional application of "this Treaty" and not just a part of it. [48] This view was followed by the Tribunal. [49]

3.16. In the *second* view, which is defended by the Russian Federation, Article 45(1) ECT is interpreted in such a way that the issue is whether a *specific provision* of the ECT is contrary to the laws of the signatory. In this view, Article 26 ECT is contrary to Russian law (para. 4.5.3 of the final judgment). An argument particularly in favour of the second view is that in the "all or nothing" interpretation, the words "to the extent" in Article 45(1) ECT are effectively rendered meaningless. [50] Those words indicate that variation is possible in the extent to which states provisionally apply the ECT. [51] On the other hand, the second view implies that it must always be examined whether any provision of the

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[45] Hobér, op. cit., p. 515: Baltag, op. cit., p. 35.

[46] With regard to the various views, see also: Hobér, op. cit., p. 520 et seq.; Baltag, op. cit., p. 39 et seq.; Reisman, op. cit., p. 56, argues that "the inability in Article 45(2)(a) refers to an inability arising from an inconsistency between the provisional application regime and 'its constitution, laws or regulations'." It is not clear whether this author believes that this must concern inconsistency between the principle of provisional application and the internal legal order, or inconsistency between the provisions to be applied provisionally and the internal legal order.

[47] Also see the Interim Awards, para. 304, Baltag. op. cit., p. 41.

[48] Also see the decision in ICSID arbitration: *Ioannis Kardassopoulos v. The Republic of Georgia,* ICSID Case No. ARB/05/18, Decision on Jurisdiction, para. 210; Interim Awards, para. 307 et seq.

[49] Also see the Interim Awards, para. 311 et seq.

[50] See, for example, the Russian Federation's position as presented in para. 294 of the Interim Awards.

[51] Roe & Happold, pp. 72-76; *alternatively:* Baltag, pp. 46-48.

law of a signatory is contrary to the ECT,[52] while there are no indications that the treaty authors intended this.[53] In part on the basis of this argument, the Tribunal concurred with the first view in the Interim Awards. In addition, the Tribunal pointed to the principle of international law (laid down in Article 27 VCLT) that states may not invoke their national law to justify their failure to perform a treaty.[54] The District Court followed this second view in the setting-aside proceedings (see para. 5.23 of the judgment of 20 April 2016).

3.17. The *third* view entails that Article 45(1) ECT must be interpreted in such a way that the ECT must be provisionally applied by the signatory, unless provisional application of one or more ECT provisions is inconsistent with national law.[55] This view therefore does not concern the question as to whether an ECT provision is contrary to national law, but rather the question of whether the provisional application of a specific provision is inconsistent with the national law of the signatory. HVY took this position (as an alternative) in the appeal of the setting aside proceedings (para. 4.5.4 of the final judgment). The Court of Appeal concurred with this view (paras. 4.5.14, 4.5.33 and 4.5.48 of the final judgment). According to the Court of Appeal, this interpretation does justice both to the words "to the extent" and "such provisional application", and thus to the objections raised against the other two interpretations.

3.18. After this exposition, I return to the various complaints in the ground.

3.19. Ground 2.1 only contains an introduction and no complaint.

Ground 2.2: Article 26 ECT

3.20. Ground 2.2 is directed against para. 4.3 (in particular para. 4.3.4) of the final judgment. In that judgment, the Court of Appeal ruled that the Russian Federation unambiguously agreed to arbitration. The ground complains that this decision is incorrect. Article 26 ECT provides that "each Contracting Party", i.e. every contracting state, unambiguously agrees to arbitration. However, the Russian Federation never became a contracting party because it only signed the ECT and did not ratify it. As it is unclear whether Article 26 ECT also pertains to states that have only signed the treaty ("signatories"), there can be no clear and unambiguous consent, according to the ground.

3.21. Contrary to what the ground argues, the Court of Appeal did not fail to recognise that an arbitration clause must be agreed unambiguously. After all, in para. 4.3.4 the Court of Appeal clearly tested against that standard. Furthermore, contrary to what the ground argues, the Court of Appeal did not fail to recognise that Article 26 ECT only creates obligations for contracting parties and not for signatories as well. Nor did the Court of Appeal confuse these terms, as the Court of Appeal inferred from Article 45(1) ECT, which provides that signatories are required to provisionally apply the ECT provisions, that Article 26 ECT also creates obligations for signatories. Whether that interpretation

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[52] This was also identified by Hobér, op. cit., p. 520.

[53] Baltag, op. cit., pp. 41-42.

[54] Interim Awards, paras. 312-315.

[55] Thomas Wälde, 'Investment Arbitration Under the Energy Charter Treaty - From Dispute Settlement to Treaty Implementation', Arbitration International 1996, p. 462 et seq., is of the view that the purpose of the Limitation Clause is to prevent states from being bound by provisions by the mere signing that may conflict with their national law and which require legislative amendments in order to enter into force.

of Article 45(1) ECT is correct is addressed in more detail by grounds 2.4 et seq. The Court of Appeal's finding 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", should not be interpreted in such a way that it is therefore unclear to what extent a signatory is bound by Article 26 ECT. After all, on the basis of an analysis of Article 45(1) ECT, the Court of Appeal finds that signatories are required to provisionally apply Article 26 ECT (para. 4.5.48).

3.22. It follows from the above that ground 2.2 has been proposed in vain.

Ground 2.3: jurisdiction of the Tribunal

3.23. Ground 2.3 is directed against paras. 4.4.3-4.4.6 of the final judgment. The essence of those findings is that there is no reason to set aside an arbitral award if, although the arbitral tribunal declared itself to have jurisdiction on incorrect grounds, the state court decides on different grounds that the decision on jurisdiction was correct. According to the Court of Appeal, it is unacceptable that the state court would nevertheless have to decide on the parties' dispute, while a valid arbitration agreement exists, for the sole reason that the arbitral tribunal, which in this regard precisely does not have the final say, used incorrect reasoning in its decision on jurisdiction (para. 4.4.3, last sentences). The ground complains that the statutory system of setting aside proceedings does not allow this. HVY were not free to present new grounds for jurisdiction in the setting aside proceedings, at least not only on appeal, so argues the ground.

3.24. The point of departure is that the state court should not exercise restraint in respect of the arbitral tribunal's jurisdiction,[56] unlike with other setting aside grounds of Article 1065(1) DCCP. The reason for this is that by agreeing to arbitration, the parties waive the fundamental right of access to the state court (Article 6 ECHR).[57] That is why the state court is ultimately charged with answering the question as to whether a valid arbitration agreement was concluded. Not the arbitral tribunal, but the state court has the final say in this respect.[58] After all, the question is *whether* the arbitral tribunal has jurisdiction and not on which grounds the arbitral tribunal based its jurisdiction.[59]

3.25. So it is ultimately the state court that gives the final decision on whether or not the arbitral tribunal had jurisdiction.[60] The state court may conclude that the arbitral tribunal did have jurisdiction, but on grounds other than those on which the arbitral tribunal based its decision on jurisdiction itself. The ground effectively defends the view that the court should only be allowed to assess whether the arbitral tribunal assumed jurisdiction on the correct grounds and should set aside the arbitral award if that is not the case,[61] while it is clear that the arbitral tribunal had jurisdiction on other

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[56] Supreme Court 9 January 2004, ECLI:NL:HR:2004:AK8380, *NJ* 2005/190, annotated by H.J. Snijders, para. 3.5.2, with reference to Supreme Court 17 January 2003, ECLI:NL:HR:2003:AE9395, *NJ* 2004/384, annotated by H.J. Snijders. See Sanders, op. cit., pp. 186-188; H.J. Snijders, Arbitragerecht, Deventer: Wolters Kluwer 2018, no. 9.3.1.2 (= Groene Serie Burgerlijke Rechtsvordering, art. 1065 DCCP, note 1.2); Van den Berg et al., op. cit., p. 132.

[57] Snijders, op. cit., 2018, no. 1.1.3.

[58] Supreme Court 26 September 2014, ECLI:NL:HR:2014:2837, *NJ* 2015/318 annotated by H.J Snijders, para. 4.2.

[59] See at para. 2.36 of the opinion of Advocate General Wesseling-van Gent (ECLI:NL:PHR:2009:BG4003) prior to Supreme Court 27 March 2009, ECLI:NL:HR:2009:BG4003, *NJ* 2010/169, annotated by H.J. Snijders in *NJ* 2010/170.

[60] Supreme Court 9 January 1981, ECLI:NL:HR:1981:AG4130, *NJ* 1981/203, annotated by W H. Heemskerk. See Sanders, op. cit., pp. 23 and 33; Snijders, op. cit., 2018, no. 6.4.1; G.J. Meijer, Overeenkomst tot arbitrage - bezien in het licht van het bewijsvoorschrift van artikel 1021 Rv, Deventer: Kluwer 2011, p. 860; N. Peters, IPR, Proces & Arbitrage. Over grondslagen en rechtspraktijk, Apeldoorn: Maklu 2015, p. 274.

grounds. That interpretation of the law is incorrect and contrary to the right of access to the court guaranteed by Article 6 ECHR, from which it follows that the state court may examine the arbitral tribunal's jurisdiction. This also does justice to the parties' intention to submit their dispute to arbitration and prevents the parties from having to litigate before the state court nevertheless, while they did not wish to do so.[62]

3.26. The court may therefore supplement the grounds for the arbitral tribunal's jurisdiction,[63] but must of course do so while respecting the rules on the supplementation of legal grounds. In that respect, the Russian Federation argued that the Court of Appeal should not have taken into account the basis for jurisdiction of the Tribunal proposed by HVY, because HVY put forward this ground for the first time on appeal.[64] In so doing, the Russian Federation fails to recognise that the Court of Appeal was required, within the limits of the scope supplied by the grounds of appeal, to supplement the legal grounds of its own initiative if necessary (Article 25 DCCP).[65] It is not disputed that HVY's grounds of appeal are directed at the manner in which the District Court interpreted Article 45(1) ECT. The Court of Appeal was therefore free to investigate how this provision should be interpreted and to take new legal arguments into account in doing so.[66] I point out that the Court of Appeal qualified the interpretation put forward by HVY in para. 4.4.6 of the final judgment as a purely legal argument.[67] That qualification has not been challenged in cassation. Contrary to what the ground argues, the Court of Appeal was therefore allowed to take account of this legal ground that HVY for the first time put forward on appeal.

3.27. Furthermore, it cannot be said that paragraphs 4 and 5 of Article 1052 DCCP preclude this supplementing of grounds for jurisdiction.[68] Article 1052(4) DCCP provides that the arbitral tribunal's decision on jurisdiction can only be challenged using the legal remedies of Article 1064(1) DCCP if this is done together with a challenge of the subsequent full or partial final award. Article 1052(5) DCCP pertains to the case in which the arbitral tribunal has declined jurisdiction, after which the ordinary court has jurisdiction to hear the case. It follows from Article 1052(5) DCCP that the arbitral tribunal's decision that it has no jurisdiction is a final decision that cannot be challenged before the state court.[69] The Supreme Court held that the combination of Articles 1052 and 1065 DCCP serves

"to ensure that, if a party wishes to contest the jurisdiction of the arbitral tribunal because of the absence of a valid arbitration agreement, the arbitral tribunal can make a decision on the matter at

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[61] The ground refers to an opinion by Prof. H.J. Snijders (Exhibit RF-D9), submitted on appeal, which argues that the supplementation of grounds for jurisdiction by the state court is contrary to the finality and effectiveness of the arbitration proceedings. Snijders also mentions the objection that no debate can have taken place at the arbitral tribunal in respect of the ground for jurisdiction applied by the state court.

[62] See also para. 4.4.4 of the Court of Appeal's final judgment in this case.

[63] In the same sense, Peters, op. cit., p. 274 and at para. 7 of his annotation in *JOR* 2020/164 to the Court of Appeal's final judgment.

[64] Initiating document, no. 27(c).

[65] Asser Procesrecht/Bakels, Hammerstein & Wesseling-Van Gent 4 2018/171.

[66] Cf. Supreme Court 27 March 2009, ECLI:NL:HR:2009:BG4003, *NJ* 2010/169, annotated by H.J. Snijders, in which it was held that the party invoking setting aside may also provide further factual or legal substantiation of the grounds put forward on appeal, provided that the purport of Article 1064(5) DCCP is respected. See also no. 2.16 of the opinion of Advocate General Wesseling-van Gent prior to this judgment (ECLI:NL:PHR:2009:BG4003).

[67] See Peters' assent at para. 8 of his annotation in *JOR* 2020/164.

[68] Initiating document, no. 27(a).

[69] See *Parliamentary Documents II* 1983-84, 18 464, no. 3 (Explanatory Memorandum), p. 22; Meijer, op. cit., 2011, p. 860; Van den Berg et al., op. cit., p. 99.

an early stage of the proceedings, thus avoiding as far as possible unnecessary procedural steps if a reliance made later (in the arbitral proceedings or before the ordinary courts) on the absence of a valid arbitration agreement would nevertheless lead to the decision that the arbitral tribunal has no jurisdiction." [70]

Whether new factual or legal statements may be put forward in the setting-aside proceedings will have to be assessed in each specific case, also in view of the requirements of due process. [71]

3.28. I would like to note as an aside that the explanatory notes to Article 1065a (new) DCCP, in so far as relevant, do not state that the court cannot correct an incorrect decision on jurisdiction (in the sense that it can refer the case back to the arbitral tribunal on that ground). The point is that the court will not refer the case back (remission) if it decides that there is no valid arbitration agreement. [72] as referring the case back would serve no purpose in that case.

3.29. The ground (no. 28) also argues that the Court of Appeal's decision in para. 4.4.6 of the final judgment, that HVY should have put forward its new position during the arbitration proceedings, or at least at first instance, is incomprehensible. It follows from the foregoing that this complaint fails.

3.30. The conclusion is that ground 2.3 fails in its entirety.

Ground 2.4: Limitation Clause

3.31. Ground 2.4 complains that the Court of Appeal's interpretation of the Limitation Clause of Article 45(1) ECT is legally incorrect. The ground (at 2.4.1) summarises this interpretation applied by the Court of Appeal and formulates a number of complaints (at 2.4.2).

3.32. In para. 4.2.1 et seq. of the final judgment, the Court of Appeal set out its preliminary assumption -which has not been challenged in cassation - regarding the manner in which treaties are interpreted. This may be briefly summarised as follows. Articles 31 and 32 VCLT provide guidelines for the interpretation of treaty provisions. Interpretation of a treaty is always aimed at discerning the contracting parties' intention. The text of the relevant treaty provision is guiding in that process (para. 4.2.2). [73] The text must be understood in its context as well as in light of the treaty's object and purpose. Pursuant to Article 31(1) VCLT, this interpretation must be performed in good faith (para. 4.2.3). According to Article 31(3)(b) VCLT, together with the context, any subsequent practice in the application of the treaty which establishes agreement on the interpretation of the treaty must be taken into account (para. 4.2.4). Finally, according to Article 32 VCLT, the treaty's preparatory works (*"travaux préparatoires"*) can be considered. However, these are supplementary means, which can only be used to confirm the interpretation arrived at through the application of Article 31 VCLT or

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[70] See Supreme Court 27 March 2009, ECLI:NL:HR:2009:BG6443, *NJ* 2010/170, annotated by H.J. Snijders, para. 3.4.1.

[71] See para. 3.4.2 of the Supreme Court judgment cited in the previous note.

[72] G.J. Meijer et al., Parliamentary History of the Arbitration Act 2015/1.77.3.

[73] See ICJ *Territorial Dispute (Libya v. Chad),* 3 February 1994, para. 41, where the International Court of Justice notes: "Interpretation must be based above all upon the text of the treaty"; see Oliver Dörr, in: Oliver Dörr, Kirsten Schmalenbach, Vienna Convention on the Law of Treaties. A Commentary, Berlin/Heidelberg: Springer 2018, p. 580.

can be used if the interpretation leads to a result that is ambiguous or unreasonable (para. 4.2.5).

3.33. The ground (no. 34) complains that the Court of Appeal's interpretation is not in line with the ordinary meaning of the wording of Article 45(1) ECT. According to the Court of Appeal, assessment is required of whether the law of a signatory precludes provisional application of certain treaty provisions or categories of such provisions. According to the complaint, there is nothing in the wording of Article 45(1) ECT that suggests this.

3.34. It is evident from para. 4.5.10 that the Court of Appeal based this interpretation on the ordinary meaning of the words "to the extent" in the text of Article 45(1) ECT. As the Court of Appeal held, in first instance HVY defended the position that, pursuant to Article 45(1) ECT, it must be assessed whether the principle of provisional application of a treaty as such is inconsistent with the law of the signatory. In para. 4.5.10 et seq., the Court of Appeal held that this interpretation does not do justice to the ordinary meaning of the words "to the extent" from that provision. That is because, according to the Court of Appeal, those words indicate that there are gradations possible to the extent that the ECT is not provisionally applicable on grounds of inconsistency with national law. Contrary to the argument put forward in the complaint, the ordinary meaning of the wording of Article 45(1) ECT supports the Court of Appeal's interpretation. Since the complaint does not clarify why the ordinary meaning of this wording as established by the Court of Appeal would be incorrect, the complaint fails.

3.35. The ground also complains (no. 35) that the interpretation is inconsistent with the context in which the wording "to the extent" is used. The ground points out that Article 45(2)(c) ECT uses identical wording, which however pertains in that respect to specific parts of the ECT, as the Court of Appeal allegedly endorses in para. 4.5.19. Consequently, the interpretation of Article 45(1) ECT would not be consistent, according to the complaint.

3.36. Contrary to the argument put forward in the complaint, there is no inconsistency. In para. 4.5.19, the Court of Appeal endorsed the District Court's decision that the wording "to the extent" of Article 45(1) and Article 45(2)(c) ECT argue against the "all or nothing" approach primarily defended by HVY. The Court of Appeal thus consistently interpreted the two provisions. In so far as the intention behind the complaint is to argue that the words "to the extent" in Article 45(2)(c) ECT should be interpreted such that they pertain to specific parts of the ECT, and that the Court of Appeal endorsed this, the complaint is based on an incorrect reading of the challenged decision.

3.37. The ground also complains (nos. 36-37) that the Court of Appeal failed to recognise the rationale for limiting the scope of provisional application. According to the ground, the rationale of the provisional application is to "provide a solution for government officials who wish to commence international cooperation and simultaneously wish to respect internal ratification procedures". Hence, Article 45 ECT aligns with the ECT's purpose to shape and expand international cooperation based on the ECT as swiftly as possible and, on the other hand, to establish (in due time) a secure and binding international legal basis for such a cooperation, in which respect the ground refers to a passage from the Preamble to the ECT.

3.38. This complaint pertains to the manner in which the Court of Appeal interpreted Article 45(1) ECT in light of the ECT's object and purpose. In para. 4.5.22 et seq., the Court of Appeal held as follows in this respect. The ECT has the objective of attracting investment through a stable and secure

investment environment and by promoting transparency, legal certainty and investment protection. The purpose of the provisional application of the ECT is to ensure that the obligation to create the desired investment conditions would arise immediately upon signature (para. 4.5.26). According to the Court of Appeal, the interpretation defended by the Russian Federation is less compatible with this objective, because an investor would always have to take into account that the provisions of the ECT are impaired by national laws and regulations (para. 4.5.26). HVY's primary and alternative positions on the interpretation of Article 45(1) ECT are not disadvantaged by such unclarity and unpredictability, according to the Court of Appeal (para. 4.5.27).

3.39. The complaint does not in itself challenge this description of the ECT's object and purpose, but in fact argues that the purpose of provisional application of the ECT should also have been taken into account, namely to enable government officials to sign the ECT and also to respect the national ratification procedures. The passage from the ECT's Preamble (4th paragraph) cited by the complaint reads as follows:
"Recalling that all signatories to the Concluding Document of the Hague Conference undertook to pursue the objectives and principles of the European Energy Charter and implement and broaden their cooperation as soon as possible by negotiating in good faith an Energy Charter Treaty and Protocols, and desiring to place the commitments contained in that Charter on a secure and binding international legal basis".

3.40. In itself, it is correct that the Preamble to a treaty is relevant for determining the object and purpose of that treaty.[74] In order to determine what purpose is expressed in the Preamble, the Preamble must be interpreted in accordance with the rules of Article 31 et seq. VCLT. The complaint apparently assumes that the cited passage from the Preamble expresses the notion that one of the ECT's objectives would be to allow governments the time to create a binding legal basis in their own legal system (by ratification). This view cannot be accepted. The final sentence of the fourth paragraph of the Preamble relates to the desire to place the commitments contained in the ECT "on a secure and binding *international* legal basis" (my italics, Advocate General). Those words refer to the ECT itself and not to its ratification by the signatories. This is confirmed by the context in which these words are used, as the ECT constitutes the binding legal basis for obligations already included in the non-binding European Energy Charter.[75] Neither the Preamble nor the provisions of the ECT show that an aspect of the ECT's object and purpose would be the desire to allow government officials the time to create a binding internal legal basis. Even if the Preamble did have to be interpreted in the manner defended by the complaint, the Court of Appeal took this possibility into account in para. 4.5.34 et seq, since, in those paragraphs, the Court of Appeal superfluously held, on the basis of the *travaux préparatoires,* that Article 45(1) ECT aims to prevent signatories from being bound, through provisional application, by obligations for which ratification is required under their national law. On that basis, the Court of Appeal decided that Article 45(1) ECT only precludes provisional application if that application is incompatible with national law for certain ECT provisions or categories of such provisions. Thus, the Court of Appeal took account of the objective of the ECT, or at least of Article 45(1), to give signatories scope to apply the ECT provisionally, with the exception of those provisions that, according to signatories' national law, can only bind them after ratification. The complaint fails due to the above.

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[74] Dörr, op.cit., p. 585.

[75] See Rafael Leal-Arcas, Introduction, in: Rafael Leal-Arcas (ed.), Commentary on the Energy Charter Treaty, Cheltenham: Edward Elgar 2018, pp. 1 and 9.

3.41. The ground (no. 37) complains that the Court of Appeal wrongly mentioned "transparency" as one of the purposes of the ECT. According to the complaint, Article 45(1) ECT says nothing about transparency and HVY's statements to that effect have already been rejected.[76]

3.42. The complaint fails to recognise that paras. 4.5.22-4.5.27 do not relate to the purpose of Article 45(1) ECT, but to the purpose of the ECT as a whole. In para. 4.5.23, the Court of Appeal substantiated with references to the treaty text that transparency of the ECT is one of the purposes. As Article 45(1) ECT must be interpreted in light of the ECT's purpose,[77] it cannot be said that it would be incorrect for the Court of Appeal to have included the purpose of transparency in the interpretation of that provision.

3.43. The ground (nos. 38-42) complains about the Court of Appeal's decision that there was insufficient evidence of (established) state practice from which an interpretation other than its own allegedly follows (paras. 4.5.28-4.5.33). The complaint refers to various statements, which the Court of Appeal failed to recognise, from which such state practice allegedly follows.

3.44. 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" must be taken into account. This requires all contracting parties to have accepted that practice, either explicitly or implicitly, in the application of the relevant treaty.[78] Further, state practice is important if it developed after the conclusion of the treaty ('subsequent practice').

3.45. The complaint refers to various statements which allegedly imply a state practice that is incompatible with the interpretation of Article 45(1) ECT advocated by the Court of Appeal. For example, reference is made to a declaration by the European Council, the European Commission and the then Member States from 1994 (the "1994 EU Joint Statement"), which states that Article 45 ECT "(...) does not create any commitment beyond what is compatible with the existing order of the Signatories". The Court of Appeal discussed this declaration in para. 4.5.29 and held that it is not incompatible with HVY's alternative interpretation. The ground complains that this interpretation of the Court of Appeal is incorrect and that Article 45(1) ECT must be interpreted in such a way that the Russian Federation's interpretation is the right one.

3.46. Contrary to what the Russian Federation argues, the Joint Statement can be read to mean that Article 45(1) ECT does not create any commitment that is incompatible with the internal legal order of signatories, in the sense that there can be no provisional application of ECT provisions if this is incompatible with that internal legal order. Even if the Joint Statement should in fact be interpreted as advocated by the Russian Federation, the fact remains that this is merely a statement by the then EC Member States. It does not show that all (former, let alone current) ECT contracting parties endorse this interpretation. I would also point out that, strictly speaking, the Joint Statement was made *before* the date of the ECT's conclusion, for which reason alone it cannot be considered "subsequent practice". The complaint therefore fails.

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[76] Incidentally, the District Court's decision in para. 5.28 of its judgment, to which the complaint refers in no. 37, is rendered in a different setting. There, the District Court rejected HVY's position that Article 45(1) ECT requires transparency in the sense that it would require signatories to clarify by means of a prior declaration or notification which treaty provisions cannot be provisionally applied under their national law.

[77] According to Article 31(1) and (2) VCLT, and the (rightly unchallenged) representation and discussion thereof by the Court of Appeal in para. 4.2.1 et seq.

[78] Nollkaemper, op. cit., no. 243; Dörr, op. cit., pp. 598-599.

3.47. The sub-ground complains (no. 41) that, in paras. 4.5.31 and 4.5.32, the Court of Appeal wrongly and/or incomprehensibly found that - briefly stated - the interpretation of Article 45 ECT applied by the Court of Appeal was compatible with declarations of Dutch officials, of the Finnish Government, and of the Minister for Foreign Affairs of the United Kingdom.

3.48. This complaint does not hold either. The Court of Appeal's finding on the declaration by the Finnish Government is correct in light of the aforementioned rule that state practice is only relevant if it is endorsed by all contracting parties. The same goes for the Court of Appeal's findings regarding comments by Dutch officials. Contrary to what the complaint argues,[79] the Court of Appeal did not decide that these statements are compatible with the interpretation of Article 45(1) ECT endorsed by the Russian Federation, but (rightly) decided that they do not refer to state practice as referred to in Article 31(3)(b) VCLT. The Court of Appeal rightly held that these statements (including those of the Minister of Foreign Affairs of the United Kingdom) do not fall under state practice, but under the *travaux préparatoires,* which was taken into account in that context.

3.49. The ground (no. 42) also argues that the interpretation accepted by the Court of Appeal essentially means that some EC Member States must provisionally apply the ECT in its entirety. According to that interpretation, argues the ground, representatives of those states therefore exceeded their internal powers.

3.50. The ground effectively argues that, for certain contracting parties, the interpretation of Article 45(1) ECT accepted by the Court of Appeal would have consequences that are incompatible with the internal law of those states. This argument cannot be accepted. In paras. 4.5.9-4.5.33, the Court of Appeal interpreted Article 45(1) ECT on the basis of the standard of Article 31 VCLT. Starting from the ordinary meaning of the text, the Court of Appeal considered that provision in its context and in the light of the object and purpose of the ECT. The question of whether the interpretation achieved through application of Article 31 VCLT is incompatible with the internal legal order of contracting parties is not part of the rule of interpretation of Article 31 VCLT. However. Article 32(b) VCLT does contain the possibility to interpret a treaty provision on the basis of the *travaux préparatoires* in the event that the application of Article 31 VCLT leads to a manifestly absurd or unreasonable result. In so far as the ground should be taken to mean that the Court of Appeal's interpretation is absurd or unreasonable, the Court of Appeal substantiated its interpretation in para. 4.5.34 et seq. with references to the *travaux préparatoires.*

3.51. The ground (nos. 43-49) complains about paras. 4.5.34-4.5.40, in which the Court of Appeal discussed the *travaux préparatoires* to the ECT.

3.52. In para. 4.5.35, the Court of Appeal superfluously decided that the *travaux préparatoires* confirm its decision regarding the interpretation of Article 45(1) ECT. According to Article 32 VCLT, the *travaux préparatoires* do not come into play unless the interpretation reached on the basis of Article 31 VCLT is manifestly absurd or unreasonable. That is not the case, according to the Court of Appeal. As the complaints about the application of Article 31 VCLT fail, the Court of Appeal did not need to examine the *travaux préparatoires,* which means that the decision in that respect in para. 4.5.35 was rendered superfluously. Consequently, the complaints directed against this lack interest.

3.53. The conclusion is that all the complaints in ground 2.4 fail.

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[79] See no. 41 of the initiating document, footnote 92.

Ground 2.5: "not inconsistent" in Article 45(1) ECT

3.54. Ground 2.5 pertains to the interpretation of the words "not inconsistent" in Article 45(1) ECT. The ground argues that, in addition to its own treaty interpretation, the Court of Appeal developed an alternative interpretation in paras. 4.5.41-4.5.47 and 4.7 of the final judgment. According to the ground, that alternative interpretation entails that (contrary to what the Court of Appeal found in paras. 4.5.1-4.5.40) within the context of Article 45(1) ECT, an assessment should be made of whether ECT provisions are inconsistent with the internal legal order of the signatory, in which respect the ECT must already be considered part of that legal order. According to the ground, that interpretation is incorrect, because the Court of Appeal wrongly assumed that Article 26 ECT is applicable in the Russian legal order. By way of example, reference is made to para. 4.7.49, in which the Court of Appeal held that the question as to the Tribunal's jurisdiction should be assessed on the basis of Article 26 ECT, rather than based on Russian law. In so holding, the Court of Appeal allegedly assumed that arbitration can be based on Article 26 ECT and that this provision is therefore applicable in the Russian legal order, which, however, still has to be proven.

3.55. The Court of Appeal held as follows in para. 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."

3.56. In para. 4.5.42 et seq., the Court of Appeal superfluously discussed the debate conducted by the parties on the question of how to interpret "(not) inconsistent", based on the Russian Federation's interpretation of Article 45(1) ECT, which requires an assessment of whether an ECT provision is inconsistent with the law of a signatory. In para. 4.5.48, the Court of Appeal concluded that Article 45(1) ECT 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 ECT 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 a treaty for certain treaty provisions or types or categories of such provisions. Based on this interpretation, the Court of Appeal decided that the provisional application of Article 26 ECT is not inconsistent with the "constitution, laws or regulations" of the Russian Federation (para. 4.6.1). Para. 4.6.2 shows that the Court of Appeal examined, superfluously, in para. 4.7 whether Article 26 ECT is inconsistent with the law of the Russian Federation, on the basis of the interpretation given by the Russian Federation to the Limitation Clause of Article 45(1) ECT.

3.57. The Court of Appeal rendered paras. 4.5.42-4.5.47 superfluously, given that these paragraphs were only included for the purpose of para. 4.7. et seq. - also superfluously included. As a result, the complaints in ground 2.5 fail for lack of interest.

Ground 2.6: Article 26 ECT inconsistent with Russian law?

3.58. Ground 2.6 is directed against para. 4.7, in which the Court of Appeal discussed the question of whether Article 26 ECT is inconsistent with the law of the Russian Federation.

3.59. In the discussion of ground 2.5, I already noted that para. 4.7 was included superfluously, as evident from para. 4.6.2. The complaints in the ground therefore lack interest and need not be discussed. Also, the complaints in part relate to the interpretation and application of Russian law and are barred by the provisions of Article 79(1) opening words and (b) of the Judiciary (Organisation) Act, as well as the complaints in respect of reasoning that cannot be assessed without also taking into account the correctness of the Court of Appeal's decision on the substance and interpretation of Russian law. [80]

Ground 2.7: referral to the ECJ for a preliminary ruling?

3.60. Ground 2.7 does not contain an independent complaint, but argues that the Supreme Court should refer questions to the ECJ for a preliminary ruling on the interpretation of Article 45(1) ECT and Article 26 ECT. According to the ground, the Court of Appeal should have concluded that the Russian Federation's clear and unambiguous consent to arbitration is lacking, for which reference is made to grounds 2.2, 2.4, 2.5 and 2.6. The ground also considers it contrary to EU law for a judicial body of a Member State to accept an interpretation of a mixed agreement (such as the ECT) that is inconsistent with the joint interpretation of the Commission, the Council and the Member States. As different interpretations of Article 45(1) ECT are possible, there is no *'"acte clair"* or *"acte éclairé",* according to the ground.

3.61. A mixed agreement is a treaty concluded by both the EU and the Member States on the basis of shared competence (see Article 4 TFEU). Both the EU and the individual EU Member States are parties to the ECT, as some of the topics regulated in the ECT are subject to the competence of the Member States. [81] It is established case law that an international agreement concluded by the EU constitutes an act of one of the institutions of the EU within the meaning of Article 267, first paragraph, at b, TFEU, which means that the ECJ has jurisdiction to give a ruling on the interpretation of such an agreement. The provisions of such an agreement form an integral part of the Union's legal order. [82]

3.62. The question arises whether the ECJ has jurisdiction to interpret a mixed agreement in its entirety or that jurisdiction is limited to certain subjects of that agreement, and if so, what the delineation criterion is. It can be derived from ECJ case law that a question referred about a mixed agreement must relate to a subject regarding which the EU has exercised its internal powers to a sufficient degree. I will explain this in more detail below.

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[80] Cf. Supreme Court 4 December 2020. ECLI:NL:HR:2020:1952, *RvdW* 2021/2, para. 3.7.2.

[81] See also 'Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty', *OJ* L 69/115.

[82] See ECJ 30 April 1974, Case C-181/73, ECLI:EU:C:1974:41, *Jur.* 1974, p. 00449 (*Haegemari*), points 3-6; ECJ 11 September 2007, Case C-431/05, ECLI:EU:C:2007:496, *Jur.* 2007, p. 1-07001 (*Merck Genéricos*), point 31; ECJ 8 March 2011, Case C-240/09, ECLI:EU:C:2011:125, *Jur.* 2011, p. 1-01255 *(Lesoochranarske VLK),* point 30; ECJ 16 May 2017, Opinion 2/15, ECLI:EU:C:2017:376 *(EU-Singapore Free Trade Agreement),* point 29; ECJ 7 June 2018, Case C-83/17, ECLI:EU:C:2018:408 *(KP),* point 24. See also K. Lenaerts, P. van Nuffel, Europees Recht, Antwerpen: Intersentia 2017, p. 492, G. de Baere and J. Meeusen, Grondbeginselen van het recht van de Europese Unie, Antwerpen: Intersentia 2020, p. 345 et seq.

3.63. The ECJ has deemed itself competent to interpret mixed agreements in various judgments. However, it was not always clear in which cases the Court of Justice's involvement was necessary. The Court of Justice clarified this in *Merck Genéricos* by finding that the Court of Justice's preliminary jurisdiction with regard to mixed agreements only concerns those areas in which the EU has exercised its internal powers to a sufficient degree.[83]

3.64. The ECJ built on this case law in its judgment in *Lesoochranarske VLK.*[84] This case concerned the question of whether a provision of the Aarhus Convention[85] had direct effect, which raised the question of whether the Court of Justice had jurisdiction to render a preliminary ruling on the relevant provision. The Court of Justice held as follows:

"30. The Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union (see, by analogy, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 36, and Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraph 82). Within the framework of that legal order the Court therefore has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement (see, inter alia, Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 4 to 6, and Case 12/86 *Demirel* (1987] ECR 3719, paragraph 7).

31. Since the Aarhus Convention was concluded by the Community and all the Member States on the basis of joint competence, it follows that where a case is brought before the Court in accordance with the provisions of the EC Treaty, in particular Article 234 EC thereof, *the Court has jurisdiction to define the obligations which the Community has assumed and those which remain the sole responsibility of the Member States in order to interpret the Aarhus Convention* (see, by analogy, Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 33, and Case C-431/05 *Merck Genéricos -Produtos Farmacêuticos* [2007] ECR I-7001, paragraph 33).

32. *Next, it must be determined whether, in the field covered by Article 9(3) of the Aarhus Convention, the European Union has exercised its powers and adopted provisions to implement the obligations which derive from it. If that were not the case, the obligations deriving from Article 9(3) of the Aarhus Convention would continue to be covered by the national law of the Member States.* In those circumstances, it would be for the courts of those Member States to determine, on the basis of national law, whether individuals could rely directly on the rules of that international agreement relevant to that field or whether the courts must apply those rules of their own motion. In that case, EU law does not require or forbid the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the Aarhus Convention or to oblige the courts to apply that rule of their own motion (see, by analogy, *Dior and Others,* paragraph 48 and *MerckGenéricos - Produtos Farmacêuticos,* paragraph 34).

33. However, if it were to be held that the European Union has exercised its powers and adopted

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[83] ECJ 11 September 2007, Case C-431/05, ECLI:EU:C:2007:496, *Jur.* 2007, p. 1-07001 *(Merck Genéricos),* point 46. This judgment builds on the previous judgments ECJ 16 June 1998. Case C-53/96, ECLI:EU:C: 1998:292, *Jur.* 1998, p. I-03603 *(Hermes);* ECJ 14 December 2000, joined Cases C-300/98 and C-392/98, ECLI:EU:C:2000:688, *Jur.* 2000, p. 1-11307 *(Dior and Assco).*

[84] ECJ 8 March 2011, Case C-240/09, ECLI:EU:C:2011:125, *Jur.* 2011, p. I-01255 *(Lesoochranarske VLK).* See in this regard, inter alia. De Baere and Meeusen, op. cit., p. 347.

[85] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, concluded in Aarhus on 25 June 1998.

provisions in the field covered by Article 9(3) of the Aarhus Convention, EU law would apply and it would be for the Court of Justice to determine whether the provision of the international agreement in question has direct effect.

34. *Therefore, it is appropriate to examine whether, in the particular field into which Article 9(3) of the Aarhus Convention falls, the European Union has exercised its powers and adopted provisions to implement obligations deriving from it* (see, by analogy, *MerckGenéhcos - Produtos Farmacéuticos.* paragraph 39).

35. In that connection, it must be observed first of all, that, in the field of environmental protection, the European Union has explicit external competence pursuant to Article 175 EC, read in conjunction with Article 174(2) EC (see, *Commission v Ireland,* paragraphs 94 and 95).

36. Furthermore, the Court has held that a *specific issue which has not yet been the subject of EU legislation is part of EU law. where that issue is regulated in agreements concluded by the European Union and the Member State and it concerns a field in large measure covered by it (see,* by analogy, Case C-239/03 *Commission v France* [2004] ECR I-9325, paragraphs 29 to 31)."

(my italics, Advocate General)

3.65. It follows from this case law that if the EU has adopted provisions to implement a mixed agreement, the ECJ has jurisdiction to interpret the agreement.[86] In such a case, there apparently is a need for uniform interpretation of the relevant EU law and for clarity about the division of powers between the EU and the Member States. It is beyond dispute that the ECJ has jurisdiction to comment on its own jurisdiction.

3.66. For the case at issue in cassation, it is important to what extent EU legislation exists that implements the ECT or its specific provisions. Although there is extensive EU legislation in the field of energy that mainly provides for the organisation of the internal market for gas and electricity, networks and other infrastructure, energy efficiency and renewable energy, there is no EU legislation that intends to provide investment protection to companies in the energy sector, including oil companies.[87] As far as I know, only one instrument was adopted in response to the ECT, namely the now lapsed Council Regulation (EC) No 701/97 of 14 April 1997 amending a programme to promote international cooperation in the energy sector ('Synergy programme').[88] The purpose of this Regulation was to streamline the international cooperation of the EC with third countries in the field of energy. The Regulation did not contain any indications that this would implement substantive provisions from the ECT for (what is now) the EU.

3.67. In its judgment of 6 March 2018 *(Slovakia/Achmea),* the ECJ decided that Article 8 (the arbitration provision) of the bilateral investment treaty between the Netherlands and Slovakia is inconsistent with Articles 267 and 344 TFEU.[89] To that end, the Court of Justice held that arbitration proceedings

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[86] See also the opinion by Advocate General Tanchev of 2 July 2020, ECLI:EU:C:2020:512, points 130 et seq., before ECJ 8 September 2020, Case C-265/19, ECLI:EU:C:2020:677 *(Recorded Artists Actors Performers).*

[87] See Leigh Hancher, European Energy Law - From Market to Union?, in: Pieter Jan Kuijper et al. (eds)., *The Law of the European Union,* Alphen aan den Rijn: Wolters Kluwer 2018, p. 1097 et seq.

[88] See OJ 1997, no. L 104/1.

[89] ECJ 6 March 2018, case C-284/16, ECLI:EU:C:2018:158 *(Slovakia/Achmea), NJ* 2019/353, annotated by H.J. Snijders; AA 2018, p. 527,

on the basis of the BIT can also involve questions of interpretation or application of EU law. As EU law is part of the law applicable in the Member States, an arbitral tribunal established pursuant to Article 8 BIT will have to apply EU law. According to the Court of Justice, there is inconsistency with Articles 267 and 344 TFEU if such arbitral tribunals could not refer questions to the Court of Justice for a preliminary ruling because they are not part of the judicial organisation of the Member States. The *Slovak/Achmea* judgment only relates to investment arbitrations in which a Member State is a defendant. The outcome of the judgment is that Member States may no longer agree in advance to arbitration on the basis of a BIT and thus waive the jurisdiction of their own state courts. As a result of the *Slovakia/Achmea* judgment, the basis for intra-EU investment arbitration has ceased to exist. [90]

3.68. On 15 January 2019, 22 EU Member States issued a statement on the significance of the *Achmea* judgment for arbitration under the ECT. [91] In that statement, they stated, among other things, that arbitration between an EU Member State and an investor from another EU Member State is inconsistent with EU law as a result of this judgment. [92] In the context of the ongoing negotiations on the modernisation of the ECT, the European Commission made a proposal for amendment of Articles 26 and 27 ECT. In response, Belgium requested an opinion from the ECJ pursuant to Article 218(11) TFEU on whether arbitration between Member States pursuant to Article 26 ECT is compatible with Union law. [93] Both the January 2019 statement and Belgium's request for an opinion relate to the proposals for a new. modernised ECT. In the present case, the ECT as adopted in December 1994 applies, and therefore neither the January 2019 statement nor the request for an opinion of December 2020 are presently relevant.

3.69. It is further worth noting that the Paris *Cour d'appel* in 2017 intended to submit questions to the ECJ on the interpretation of *(inter alia* Article 1(6) of) the ECT in a case related to the present arbitration. [94] With regard to the jurisdiction of the ECJ, the *Cour d'appel* in its judgment limited itself by finding that mixed treaties are part of the European legal order. [95] However, these proceedings before the *Cour d'appel* were withdrawn. [96]

3.70. By order for reference of 24 September 2019, the Paris *Cour d'appel* in another case *(Republic of Moldova/Komstroy)* put questions to the ECJ about the interpretation of Article 1(6) and Article 26(1)

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annotated by P.J. Slot; AA 2018, p. 732, annotated by A S. Hartkamp.

[90] See also in this regard: B J. Drijber, Nous d'abord: Beleggingsarbitrage na 'Achmea', NJB 2019/473, pp. 588-595.

[91] Declaration of the representatives of the governments of the Member States of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union, available on https://ec.europa.eu/info/sites/info/files/business economy euro/banking and finance/documents/190117-bilateral-investment-treaties en.pdf.

[92] See the aforementioned statement, p. 2.

[93] Request for an opinion 1/20, received by the ECJ on 2 December 2020. See also the press release 'Belgium requests an opinion on the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty', 3 December 2020, https://diplomatie.belgium be/en/newsroom/news/2020/belgium requests opinion intra european application arbitration provisions : 'By submitting this question, Belgium is seeking legal clarification from the Court on the compatibility under Union law of the dispute settlement mechanism provided for in the draft modernised Energy Charter Treaty, in view of the fact that this mechanism could be interpreted as allowing its application intra- European Union, i.e. between an investor who is a national of EU Member States only and an EU Member State'.

[94] Paris *Cour d'appel* 17 June 2017, Russian Federation/Hulley Enterprises Limited, available on https://www.italaw.com/sites/default/files/case-documents/italaw9023 O.pdf.

[95] "Considérant que les accords mixtes conclus par l'Union et les Etats membres avec des tiers sont au nombre des actes pris par les institutions, organes ou organismes de l'Union (CJCE 30 sept. 1987, aff. 12/86 Demirel; CJUE 18 juil 2013, aff. C 414/11 Sanofi-Aventis Deutschland) (...)."

[96] Initiating document, no. 91.

ECT.[97] These questions had arisen in connection with the question of whether an *ad hoc* arbitral tribunal established pursuant to Art. 26(3) ECT has jurisdiction to settle a financial dispute about payment of a claim in connection with an agreement regarding the sale of electricity. Briefly put, the facts of this case are the following. In 1999, a Ukrainian electricity producer (Ukrenergo) sold electricity to the company Energoalians, a Ukrainian electricity distributor, which then resold the electricity to Derimen, a company based in the British Virgin Islands. In turn, Derimen resold the electricity to Moldtranselectro, a Moldovan state-owned company. The electricity volumes to be supplied were determined on a monthly basis between Moldtranselectro and Ukrenergo and supply took place at the Ukrainian side of the Ukrainian-Moldovan border. Energoalians had to be paid for the supplied electricity by Derimen, which itself had to receive a payment from Moldtranselectro. Moldtranselectro's debt to Derimen on 1 January 2000 amounted to more than USD 18 million. Moldtranselectro only partially satisfied its payment obligation towards Derimen, so that a debt of more than USD 16 million remained. Derimen transferred its claim against Moldtranselectro to Energoalians, which attempted to collect the claim against Moldtranselectro and initiated proceedings to that end before the Moldovan court and later before the Ukrainian court. Energoalians took the position that Moldova had violated certain obligations of the ECT and therefore initiated arbitration proceedings pursuant to Article 26(3) ECT. The company Komstroy is the legal successor of Energoalians. The *ad hoc* arbitral tribunal in Paris ruled that Moldova had failed to fulfil its obligations under the ECT and ordered it to pay a certain amount. Moldova subsequently lodged an appeal before the French court to set aside the arbitral award on account of violation of public policy, namely the jurisdiction of the *ad hoc* arbitral tribunal. Finally, the *Cour d'appel*[98] put the following questions to the ECJ:

"Must Article 1.6 of the Energy Charter Treaty be interpreted as meaning that a claim which arose from a contract for the sale of electricity and which did not involve any contribution on the part of the investor in the host State can constitute an 'investment' within the meaning of that article?

Must Article 26(1) of the Energy Charter Treaty be interpreted as meaning that the acquisition, by an investor of a Contracting Party, of a claim established by an economic operator which is not from one of the States that are Parties to that Treaty constitutes an investment?

Must Article 26(1) of the Energy Charter Treaty be interpreted as meaning that a claim held by an investor, which arose from a contract for the sale of electricity supplied at the border of the host State, can constitute an investment made in the area of another Contracting Party, in the case where the investor does not carry out any economic activity in the territory of that latter Contracting Party?"

3.71. Advocate General Szpunar delivered his opinion in this case on 3 March 2021.[99] Firstly, the Advocate General addressed the jurisdiction of the ECJ and noted that it "could be the subject of discussion, as it concerns the interpretation of an international treaty within the context of a dispute that in any event at first glance has all the characteristics of a situation that can be designated 'purely external'". Advocate General Szpunar concluded that the ECJ has jurisdiction to answer the preliminary questions, because the provisions of the ECT of which interpretation is requested may

[97] The case is registered with the ECJ under no. C-741/19.

[98] By judgment of 12 April 2016, the *Cour d'appel* set aside the arbitral award, which judgment was annulled by the *Cour de cassation* on 28 March 2018. After annulling the judgment, the *Cour de cassation* referred the case back to the *Cour d'appel,* which then by the aforementioned decision of 24 September 2019 referred the questions to the ECJ for a preliminary ruling.

[99] ECLI:EU:C:2021:164.

also apply in situations that fall within the legal order of the Union, and for that reason the Union has an interest in a uniform interpretation of the relevant provisions.[100] Incidentally, Advocate General Szpunar notes that he "must qualify this statement" (para. 46) and asks the Court of Justice to consider clarifying the consequences of the *Achmea* judgment on the applicability of Article 26 ECT (para. 48). He considers that it is not an established fact that as a result of the *Achmea* judgment Article 26 ECT can never be applied within the EU, because questions about the compatibility of ECT provisions with Union law can also arise in national court proceedings (para. 90). Regarding the jurisdiction of the Court of Justice, Advocate General Szpunar concludes that Article 26 ECT is not compatible with Union law in so far as this provision provides for resort to an arbitral tribunal, as a result of which such a system for dispute resolution cannot be applied within the legal order of the Union (para. 98). The Advocate General considers that it cannot be ruled out that the substantive provisions of the ECT, including Article 1(6) ECT (the term "investment"), and Article 26 ECT may apply within the legal order of the Union (para. 99). It is otherwise striking, that Advocate General Szpunar has not paid attention to the case law of the ECJ, in which it was decided that the Court of Justice has jurisdiction to interpret a mixed agreement if the EU has adopted provisions for implementation.

3.72. In the remainder of his opinion. Advocate General Szpunar concentrated on the question of whether a claim arising from an agreement for the supply of electricity can be considered an investment within the meaning of Article 1(6) ECT, as that provision imposes further conditions for it. The Advocate General concluded that this is not the case in *Moldova/Komstroy.*[101] An electricity supply agreement is a simple commercial transaction that does not fall under the term 'investment' within the meaning of Article 1(6) ECT and does not arise from an agreement related to an investment.[102]

3.73. Assuming that the ECJ adopts the opinion of Advocate General Szpunar and decides that it has jurisdiction to examine questions of interpretation of the ECT - and I repeat that it is up to the ECJ to decide on its own jurisdiction - what continues to apply in full is that referring questions for a preliminary ruling must also be necessary for the settlement of the complaints. For the present case, I am of the opinion that referring questions is not necessary to settle the complaints in ground 2. I will explain this as follows. Grounds 2.2 and 2.3 pertain to questions of Dutch arbitration law and civil procedural law. Grounds 2.5 and 2.6 are directed at findings by the Court of Appeal in the final judgment that were rendered superfluously, and fail for that reason alone. Ground 2.4 relates to the interpretation of Article 45(1) ECT. The ground contains complaints that, although formulated as complaints on an issue of law, are in fact complaints in respect of reasoning about the manner in which the Court of Appeal dealt with certain arguments. As I discussed in this opinion, these complaints fail because they are based on an incorrect interpretation of the challenged judgment (see the discussion of ground 2.4.2). I have also shown that the complaints in the ground relating to the failure to recognise state practice fail because no such state practice has become apparent. Complaints (see no. 42 et seq. of the initiating document) are also directed at a superfluous finding. It follows from all this that referring questions for a preliminary ruling is not necessary for the outcome of the decision on ground 2.4. I would add that in international law, a provision on provisional application of a treaty (such as Article 45 ECT) is a regularly occurring provision, on which there is generally no EU legislation. Nor does the present dispute concern the provisional

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[100] Opinion of Advocate General Szpunar, points 37-45.

[101] Opinion of Advocate General Szpunar, point 101 et seq.

[102] Opinion of Advocate General Szpunar, points 110, 118.

application of the ECT in (a Member State of) the EU, but in the Russian Federation.

3.74. The conclusion is that referring questions to the ECJ for a preliminary ruling is not necessary for the settlement of the Russian Federation's complaints in cassation.

3.75. Ground 2.8 reiterates the position that the Russian Federation's clear and unambiguous consent to arbitration is lacking. The ground does not contain a separate complaint and builds on the preceding grounds, and therefore does not need to be discussed separately.

Ground 3: interpretation of Article 1(6) and (7) ECT (investment and investor)

3.76. Ground 3 is directed against para. 5.1 of the final judgment, in which the Court of Appeal interpreted the terms 'investment' and 'investor' within the meaning of Article 1(6) and (7) ECT. According to the ground, this interpretation is incorrect. According to the Russian Federation, HVY are not genuine foreign investors and their investments do not qualify as foreign investments, but are so-called "U-turn constructions": investments made by investors who are in fact controlled by nationals of the host country, in this case the Russian Federation. The ground directs a large number of complaints against the Court of Appeal's rejection of the Russian Federation's position.

Introductory remarks

3.77. I would like to make a few introductory remarks before discussing the complaints in this ground. In so far as relevant, Article 1(6) and (7) ECT reads as follows in the authentic English text:

> Article 1 Definitions
>
> As used in this Treaty:
>
> (...)
>
> 6. "Investment" means 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.

(...)

7. "Investor" means:

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) 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;

In the Dutch translation:

Artikel 1 Definities

In dit Verdrag wordt verstaan onder:

(...)

6. "investering": elke vorm van activa die een investeerder in eigendom heeft of waarover hij direct of indirect zeggenschap heeft, met inbegrip van:

a. lichamelijke en onlichamelijke en roerende en onroerende zaken alsook andere rechten, zoals huur-, hypotheek-, retentie- en pandrechten;

b. een vennootschap of onderneming, of aandelen of andere vormen van vermogensdeelneming in, en obligaties en andere schuldbewijzen van een vennootschap of onderneming;

c. aanspraken op geld en aanspraken op prestaties volgens een contract met een economische waarde en in verband met een investering;

d. intellectuele eigendom;

e. opbrengsten;

f. een bij wet of contract of uit hoofde van overeenkomstig de wet verleende licenties en vergunningen verleend recht een economische activiteit in de energiesector te ondernemen.

(...)

7. "investeerders":

a. van een Verdragsluitende Partij,

i. natuurlijke personen die het staatsburgerschap of de nationaliteit bezitten van of permanent verblijven op het grondgebied van die Verdragsluitende Partij conform haar toepasselijke wetgeving;

ii. vennootschappen of andere organisaties opgericht conform op het grondgebied van die Verdragsluitende Partij toepasselijke wetgeving;

b. uit een derde land, natuurlijke personen, vennootschappen of andere organisaties die mutatis mutandis voldoen aan de onder a. aan Verdragsluitende Partijen gestelde voorwaarden;

3.78. Article 1(6) ECT contains, strictly speaking, no definition of the term "investment", but provides that "every kind of asset" can be considered an investment, and sets out a non-exhaustive list of assets that are to be regarded as investments in any event.[103] The definition of "investor" in Article 1(7) ECT is linked to that of "investment"[104]; an investor is a natural person or legal entity that owns or controls such an investment.[105] Where the investor is a legal entity, that entity is required to be organized in accordance with the law of a contracting state.[106] This test is referred to as the "incorporation test", and is distinguished from other aspects supporting the "nationality" of a legal entity, such as the place where the board of the legal entity is incorporated, or the nationality of the shareholders.[107] As Article 1(6) ECT qualifies shares as an investment, shareholders are also protected by the ECT, even if the company in which they invested is not itself considered an investor.[108]

3.79. Article 26 ECT builds on the concepts of investment and investor.[109] This article provides that arbitration is available in "disputes between a Contracting Party and an Investor in another Contracting Party relating to an Investment of the latter in the Area of the former (...)" ([Dutch translation:] "Geschillen tussen een Verdragsluitende Partij en een investeerder van een andere Verdragsluitende Partij over een investering van deze laatste op het grondgebied van eerstgenoemde Partij (...)"). Article 26 ECT therefore requires, *first,* that there is an investment, *second,* that it was made by an investor established in a contracting state, and *third* that said investment was made in the Area of a contracting state other than that in which the investor is established.

3.80. In essence, the question raised in ground 3 is whether the ECT contains even more requirements with regard to investments or their cross-border character than are evident from Article 1(6) and

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[103] See Dylan Geraets & Leonie Reins, in: Rafael Leal-Arcas (ed.), Commentary on the Energy Charter Treaty, 2018, pp. 25-29; Hobér, op. cit., pp. 73-78; Baltag, op. cit., pp, 167-183; Roe& Happold, op. cit., pp. 48-64; Jagusch & Sinclair, op. cit., pp. 74-87; Juliet Blanch, Andy Moody & Nicholas Lawn, 'Access to Dispute Resolution Mechanisms under Article 26 of the Energy Charter Treaty', in: Coop & Ribeiro (eds.), Investment Protection and the Energy Charter Treaty, New York: JurisNet 2008, p. 5; Emmanuel Gaillard, 'Investments and Investors Covered by the Energy Charter Treaty', in: Clarisse Ribeiro (ed.), Investment Arbitration and the Energy Charter Treaty, pp. 58-66.

[104] See Baltag, op. cit., p. 18.

[105] See Hobér, op. cit., pp. 78-84; Blanch. Moody & Lawn, op. cit., pp. 3-4.

[106] Hobér, op. cit., pp. 116-119; Baltag, op. cit., pp. 103-107; Roe & Happold, op. cit., pp. 64-65; Jagusch & Sinclair, pp. 89-93; Blanch, Moody & Lawn, loc cit.; Gaillard, op. cit., pp. 67-73.

[107] Inter alios Hobér, loc cit. See also Asser/Kramer & Verhagen 10-111 2015/1, as well as P. Vlas, *Rechtspersonen,* Praktijkreeks IPR, part 9, Maklu: Apeldoorn-Antwerpen, 2017, no. 126, with an overview of investment treaties and the description included therein for legal entities that fall under the protection of the relevant investment treaty.

[108] Hobér, op.cit., pp. 129-132.

[109] See Hobér, op. cit., pp. 78-84, 417-420; Roe & Happold, pp. 45-67.

(7) and Article 26 ECT. For example, the ground (at 3.2.3) argues, inter alia, that the ECT only protects international investments and therefore does not protect "U-turn constructions" or investments made by investors with no substantial link with the state in which they have their place of incorporation ("letterbox companies"). Furthermore, not only should the investor's place of incorporation be assessed, but the party controlling the investor should also be identified (' *piercing the corporate veil'* ground 3.4). According to ground 3.3, one can only speak of an investment if the investor made an actual economic contribution to the host state.

3.81. The Court of Appeal's approach can be summarised as follows. According to the Court of Appeal, it is not in dispute that HVY are companies that are "organized in accordance with the law applicable in that Contracting Party". Thus, from a textual point of view, the requirements set out in Article 1(7) ECT for an investor within the meaning of the ECT have been met (para. 5.1 6). The shares in Yukos, which are owned by HVY, qualify as an 'investment' within the meaning of the ECT, as 'investment' is understood to mean "every kind of asset, owned or controlled directly or indirectly by an Investor", while shares are included in the non-exhaustive list of assets in Article 1(6) ECT. Finally, the Court of Appeal held that the requirement set out in Article 26 ECT that there be 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 (para. 5.1.6). According to the Court of Appeal, there is no reason to interpret these provisions as imposing further requirements on the international character of the investments. The object and purpose of the ECT do not result in a different ruling, according to the Court of Appeal (para. 5.1.7.3).

3.82. Following these introductory remarks, I will now resume discussion of the ground and the complaints included therein.

3.83. Ground 3.1 is an introduction and contains no complaints.

Ground 3.2: "U-turn construction"

3.84. Ground 3.2 is directed against the Court of Appeal's decision in paras. 5.1.5-5.1.8 and argues that the ECT does not protect domestic investments, even if the investments in question were made by sham companies (via a "U-turn construction"). This ground is divided into four sub-grounds (3.2.1-3.2.4).

3.85. Ground 3.2.1 is a summary of the Court of Appeal's assessment and does not contain a complaint.

3.86. Ground 3.2.2 complains that the Court of Appeal wrongly interpreted the terms 'investment' and 'investor' based on a purely grammatical interpretation of only a part of the relevant text of the ECT, namely only on the definitions of Article 1(6) and (7) ECT. According to the ground, such an interpretation is in violation of Article 31(1) VCLT.

3.87. This complaint has no factual basis. The Court of Appeal did not interpret the terms 'investor' and 'investment' based on a purely grammatical interpretation of Article 1(6) and (7) ECT. In para. 5.1.6, the Court of Appeal held that the text of these provisions, with the ordinary meaning that accrues to the wording, serves as the point of departure for the interpretation. In so doing, the Court of Appeal

applied the correct standard in accordance with Article 31(1) VCLT. In paras. 5.1.7.1-5.1.7.4, the Court of Appeal then discussed the Russian Federation's arguments on the context in which Article 1(6) and (7) ECT should be considered, and on the object and purpose of the ECT. In so doing, the Court of Appeal likewise applied the correct standard in accordance with Article 31 VCLT. The fact that the Court of Appeal applied the elements of context, object and purpose of the ECT on the basis of the arguments put forward by the Russian Federation is logical and does not indicate that the Court of Appeal did not regard these elements as equivalent to the textual interpretation.

3.88. The ground also complains that, in para. 5.1.8.11, the Court of Appeal attributed little weight to subsequent state practice, to wit the fact that a large number of ECT contracting parties have in subsequent investment treaties excluded investments via the U-turn construction from the scope of application.

3.89. The Court of Appeal's decision is correct because (as the Court of Appeal also held) the circumstances do not relate to the implementation or interpretation of the ECT, but to choices made by states in concluding new treaties. Article 31 VCLT does not pertain to such choices.[110] Consequently, this complaint also fails.

3.90. Ground 3.2.3 directs a number of complaints against the Court of Appeal's interpretation of the terms 'investment' and 'investor'.

3.91. The ground (at nos. 111-112) argues that, by assigning significance to the definition of the term 'investment' in Article 1(6) ECT, the Court of Appeal failed to recognise the ordinary meaning of that term (and thus of the term 'investor'). According to that ordinary meaning, an investment only exists if a party makes an economic contribution (in the host country, in this case the Russian Federation) and runs a certain risk during a certain time period. That was not the case here, according to the ground. The Court of Appeal rejected this position in paras. 5.1.9.1-5.1.9.5. Ground 3.3 is also directed against this rejection (see below).

3.92. The complaint fails to recognise that, according to Article 31(4) VCLT, special meaning accrues to the definition of a term in a treaty for the purpose of interpreting that term. Article 31(4) VCLT provides: A special meaning shall be given to a term if it is established that the parties so intended.

A term from a treaty can therefore be understood as bearing a special (as opposed to an ordinary) meaning if it has been established that the contracting parties intended to give that term a special meaning. The most obvious evidence of such an intention is the inclusion of a definition.[111] It is therefore possible for a treaty to give a certain term a definition that differs from the term's

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[110] The reason being that the practice in question must occur in the context of the relevant treaty. Oliver Dörr, Vienna Convention on the Law of Treaties, op. cit., writes as follows on p. 598: "Practice of the parties is only relevant under lit b if it occurs **"in the application"** of the treaty, which plainly indicates that, just as for the development of international customary law, a subjective link is required under lit b: the parties whose practice is under consideration must regard their conduct to fall within the scope of application of the treaty concerned and in principle to be required under that treaty. They must act the way they do for the purpose of fulfilling their treaty obligations, *i.e.* their subsequent conduct must be motivated by the treaty obligation.' The sources mentioned in footnote 255 of the initiating document do not show that the choices made by contracting parties regarding other, subsequent treaties, are to be taken into account in the interpretation of an earlier treaty. These sources, too, always pertain to state practice in the implementation of the relevant treaty. See, for example, the cited decision in *Mobil Investments Canada Inc. v. Canada,* ICSID Case No. ARB/15/6, Decision on Jurisdiction, para. 158: "such an approach has clearly been rejected by all three NAFTA Parties in their practice subsequent to the adoption of NAFTA".

[111] Dörr, op. cit., p. 614; Richard K. Gardiner, Treaty Interpretation, Oxford: OUP 2008, p. 164.

ordinary meaning. In that case, interpretation must be based on that definition and not on the ordinary meaning, as evidenced by Article 31(4) VCLT. The Court of Appeal was therefore right in this case to use the definition of the term 'investment' in Article 1(6) ECT as a basis. The case law referred to in the ground is not relevant, as it does not relate to the ECT but to other investment treaties and to the ICSID Treaty.[112] In so far as it would even be possible to derive any ordinary meaning of the term 'investment' from the case law in question, that meaning would not apply to the ECT, as that treaty has its own definition of the term 'investment'. The complaints fail for this reason.

3.93. The ground (at nos. 113-115) also complains that the Court of Appeal failed to recognise the object and purpose of the ECT when interpreting the terms 'investment' and 'investor'. The ground notes that the object and purpose of the ECT was to promote international investments. The Court of Appeal decided in para. 5.1.7.3, allegedly wrongly, that it cannot be inferred from this that the ECT imposes further requirements as to the foreign character of an investment.

3.94. In para. 5.1.7.3, the Court of Appeal held that the ECT's purpose does indeed (also) include the promotion of international cooperation in the field of energy and the protection of international investments. However, according to the Court of Appeal, this does not mean that further requirements must be imposed on the foreign nature of an investment, which requirements do not follow from the wording of Article 26 ECT and Article 1(6) and (7) ECT. According to the Court of Appeal, the wording of those provisions is sufficiently clear in itself: that wording implies that an investment falls within the scope of Article 26 ECT if the legal person making the investment is incorporated under the law of one contracting state[113] and the investment referred to in Article 1(6) ECT takes place in another contracting state. The decision of the Court of Appeal does not demonstrate an incorrect interpretation of the law, since the requirement to interpret a treaty provision taking into account the treaty's object and purpose does not mean that the object and purpose can serve as the basis for an interpretation that is not supported by the wording of the treaty provision. While the object and purpose serve as a means to determine the meaning of the wording of a provision (which wording is paramount), the object and purpose are not more important than that wording: they cannot negate it.[114] Consequently, the Court of Appeal could decide that, although the ECT's purpose is partly to protect international investments, the wording of the relevant provisions does not support the view that additional requirements are therefore imposed on the international character of the investments or the nationality of an investor. This complaint of the ground fails for that reason.

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[112] *Saba Fakes v. Republic of Turkey,* ICSID Case No. ARB/07/20, para. 107 et seq. (Netherlands-Turkey BIT); *KT Asia Investment Group B.V. v. Republic of Kazakhstan,* ICSID Case No. ARB/09/8, para. 161 et seq. (Netherlands- Kazakhstan BIT); *MNSS B. V. and Recupero Credito Acciaio N. V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, para. 189* (Montenegro-Netherlands BIT); *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius,* PCA Case No. 2018-37, Award on Jurisdiction, para. 111 et seq. (France-Mauritius BIT); *Romak S.A. (Switzerland) v. The Republic of Uzbekistan.* UNCITRAL, PCA Case No. AA280, Award, para. 173 et seq. (Switzerland-Uzbekistan BIT); *GEA Group Aktiengesellschaft v. Ukraine.* ICSID Case No. ARB/08/16, para. 137 et seq. (Germany-Ukraine BIT).

[113] The literature frequently endorses the position that, pursuant to Article 1(7) ECT, determination of the nationality of a legal entity, and thus determination of whether this entity can be considered an investor, is based exclusively on this formalistic test. See Blanch, Moody & Lawn, op. cit., p. 4 ("In including within the definition of an Investor "companies or other organizations organized in accordance with applicable law", it would appear to be clear that the "nationality" test for companies Is a purely formalistic one that looks to the company or other organisation's place of incorporation"); Baltag, op. cit., pp. 16-17, 106; Roe & Happold, op. cit., pp. 64-65; Hobér, op. cit., p. 116; Geraets & Reins, 'Definitions', in: Leal-Arcas (ed.), op. cit., p. 39; Jagusch & Sinclair, op. cit., p. 89 et seq.

[114] Gardiner, op. cit., p. 190; Dörr, op. cit., pp. 586-587.

3.95. The ground (no. 114) complains that the Court of Appeal failed to take the context of Article 1(6) and (7) ECT into account correctly. According to the ground, Articles 10, 13, 17 and 26 ECT and the Understanding with respect to Article 1(6) ECT show that letterbox companies without substantial activities (in the state in which they have their place of incorporation) are not entitled to protection under the ECT in the event that these letterbox companies are controlled by foreign investors from a third state. According to the complaint, a fortiori, investments made by a host country's own nationals must also fall outside the scope of the ECT.

3.96. The complaint refers to Article 10(3) ECT in support of the argument. In Article 10(3) ECT, a clear distinction is made between the foreign investors and a contracting party's 'own investors', according to the ground. I quote Article 10(3) ECT and, for a proper understanding thereof, paragraph 2 of that article as well, in the authentic English text and in the Dutch translation:

Article 10 Promotion, protection and treatment of investments

2. Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph 3.

3. For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.

Artikel 10 Bevordering, bescherming en behandeling van investeringen

2. Elke Verdragsluitende Partij streeft ernaar investeerders van andere Verdragsluitende Partijen wat betreft het doen van investeringen op haar grondgebied de in het derde lid omschreven behandeling toe te kennen.

3. In dit artikel wordt onder "behandeling" verstaan een behandeling toegekend door een Verdragsluitende Partij die niet minder gunstig is dan die welke zij toekent aan haar eigen investeerders of aan de investeerders van een andere Verdragsluitende Partij of een derde staat, al naar gelang welke behandeling het gunstigst is.

As argued in the ground, this Article does indeed distinguish between a Contracting Party's own investors and investors of any other Contracting Party or any third country. In that sense, this provision only protects cross-border investments. However, it is not evident from the provision that different requirements should therefore be imposed on the international character of an investment or the nationality of an investor than the requirements ensuing from Article 1(6) and (7) ECT. The ground does not explain this in greater detail either.

3.97. The complaint also refers to Article 13 ECT in support of the statement that only cross-border investments are protected by the ECT. Article 13 ECT protects investments against expropriation, except in specific cases where expropriation is justified. Like Article 10 ECT, Article 13(1) ECT provides that this protection applies to "Investments of Investors of a Contracting Party in the Area of any other Contracting Party". While it is thus clear from the provision that the purpose is to protect cross-border investments, it does not contain any indications to the effect that additional requirements should therefore be imposed on the international character of an investment or an investor.

3.98. The complaint also refers to the Understanding with respect to Article 1(6) ECT.[115] This reads as follows:

"For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's

(a) financial interest, including equity interest, in the Investment;

(b) ability to exercise substantial influence over the management and operation of the Investment; and

(c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.

Where there is doubt as to whether an Investor Controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists".

This Understanding builds on Article 1(6) ECT, which defines an investment as "every kind of asset, owned or controlled directly or indirectly by an Investor". The Understanding therefore offers the party applying the ECT further guidelines to determine who controls a certain investment. The Understanding plays no role when it Is clear that an asset is owned by an investor. As the Court of Appeal held in para. 5.1.7.4, it is established in this case that the Yukos shares are owned by HVY. There was therefore no reason to further investigate, on the basis of the Understanding, who controls the shares.

3.99. Article 17 ECT, to which the complaint also refers, is what is known as the 'denial of benefits clause'. The clause provides for the non-application of Part III of the ECT (regarding the promotion of protection and the treatment of investments) under certain circumstances. In so far as relevant, Article 17 reads as follows in the authentic English text:

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;

(...).

In the Dutch translation:

Elke Verdragsluitende Partij behoudt zich het recht voor de voordelen van dit Deel te ontzeggen aan:

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[115] See https://www.energychartertreaty.org/provisions/part-i-definitions-and-purpose/article-1-defmitions/. These "Understandings" are texts drawn up during the ECT negotiations on which the negotiators had reached agreement, but they do not form part of the text of the ECT. They can therefore be used to interpret the treaty text, according to the ECT Secretariat (Energy Charter Secretariat, The Energy Charter Treaty - A Reader's Guide, 2002, pp. 61-62). See, in a similar vein, Roe & Happold, op. cit., p. 20. According to Geraets & Reins, op. cit., p. 17, the Understandings cannot expand or change the text of the ECT, as they do not form part of the treaty text.

1. een rechtspersoon, indien staatsburgers of onderdanen van een derde staat eigenaar zijn van of zeggenschap hebben over een dergelijke rechtspersoon en indien die rechtspersoon geen wezenlijke zakelijke activiteiten heeft op het grondgebied van de Verdragsluitende Partij waar hij is opgericht, (...).

As the Court of Appeal held in para. 5.1.8.4, Article 17 ECT gives contracting states the right to deny the protection of a large part of the treaty to a precisely 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.[116] Contrary to the argument put forward in the complaint, Article 17 ECT does not provide that the protection of the ECT *must* be denied to such investors, but rather entails that, in principle, those investors are protected by the ECT *unless* a contracting state decides otherwise.[117] Thus, Article 17 ECT does not contain a rule entailing that investments that are not genuinely international, but only international in formal terms, are not entitled to ECT protection.

3.100. The ground also complains (at nos. 115-117) that the Court of Appeal wrongly decided that the state practice the Russian Federation had invoked carried "little weight", because that state practice does not concern the interpretation and application of the ECT, but the choices made afterwards, when concluding new treaties. The complaint argues that this decision is incorrect for various reasons: (i) the Court of Appeal's decision was based on an incorrect, merely grammatical interpretation of the ECT, (ii) meaning can indeed be attributed to the conclusion of treaties concluded after the ECT was signed, and (iii) the Court of Appeal ignored the desire of the contracting states to clarify the ECT.

3.101. The Court of Appeal rejected the Russian Federation's reliance on state practice, because the meaning of Article 1(6) and (7) ECT is already clear and does not exclude U-turn investments. This decision can independently support the Court of Appeal's conclusion. According to the VCLT's standard for interpretation, state practice is only at issue in the event that the treaty text and the context lead to an unclear outcome. As that was not the case here, the Court of Appeal did not need to address state practice. I note that the sources mentioned in the ground (at no. 116) to substantiate state practice are not examples thereof, since they concern arbitral case law, an investigation report and a motion by the Dutch House of Representatives to exclude letterbox companies from trade agreements.[118] These documents do not show that the contracting states structurally interpret the ECT in such a way that U-turn constructions are denied protection. In all other respects the complaint builds on earlier complaints, and fails for that reason.

3.102. The ground (at nos. 117-120) also invokes recent proposals by the ECT Secretariat and by the European Commission to clarify Article 1(6) and (7) ECT. According to the ground, these proposals are relevant for the interpretation of those provisions, because they concern clarifying those provisions rather than changing them. The ground reiterates that letterbox companies without substantive activities in their country of origin do not fall within the definition of 'investment'.

3.103. As already noted, a state practice can only be taken into account in the interpretation of a treaty if

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[116] Regarding this definition, see: Hobér, op. cit., pp. 325-345; Jagusch & Sinclair, op. cit., pp. 17-20; Baltag, op. cit., pp. 147-149; Apurva Mudliar, in: Leal-Arcas, op. cit., p. 249 et seq.

[117] Baltag, op. cit., p. 153 et seq.

[118] See footnotes 270, 271 and 272 of the initiating document (pp. 63-64).

the practice in question developed in the context of the relevant treaty.[119] The proposals invoked by the ground pertain to a possible new treaty, and are therefore, in principle, irrelevant.[120] Furthermore, Article 31 VCLT requires, in any event, a state practice to have been implicitly accepted by all contracting states. That is not the case here either, as the relevant proposals were made by the European Commission and the European Council, which do not represent all of the parties to the ECT. Against that backdrop, the observations in the documents referred to in the ground cannot be considered an indication that the terms 'investment' and 'investor' are already interpreted in said (proposed) manner at this time such that the documents would merely amount to a codification of that interpretation.[121] The documents more readily show that the European Commission and the European Council are of the opinion that the current ECT no longer suffices, and warrants modernisation to bring it into line with changed principles of investment protection. For example, the European Commission states in its Recommendation:

"Since the 1990s (most of) the ECT provisions have not been revised. This became particularly problematic in the context of the ECT provisions on the protection of investment, which do not correspond to modern standards as reflected in the EU's reformed approach on investment protection. Those outdated provisions are no longer sustainable or adequate for the current challenges; yet it is today the most litigated investment agreement in the world."[122]

In the European Council's negotiating directives the following can be read:

"The negotiations should bring the ECT provisions on investment protection in line with the modern standards of recently concluded agreements by the EU and its Member States and adjust the ECT to new political and economic global changes (including in the energy sector).

The Investment Protection standards under the Modernised ECT should continue to aim at a high level of investment protection, with provisions affording legal certainty for investors and investments of Parties in each other's market.

The modernised ECT should provide clear definitions of covered investments and investors. The definition of investor should explicitly exclude investors and businesses that are lacking substantive business activities in their country of origin, in order to clarify that mailbox companies cannot bring disputes under the ECT."[123]

A Working Document dated 20 April 2020 includes the following proposal to amend Article 1(7) ECT:

(7) "Investor" means:

(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 [Footnote 1] ;

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[119] Dörr, op. cit., p. 598.

[120] Dörr, op. cit., pp. 598-599.

[121] The comment at the end of the passage from the European Council's negotiating directives cited below is particularly relevant.

[122] Recommendation for a Council Decision authorising the entering into negotiations on the modernisation of the Energy Charter Treaty, COM(2019) 231 final, available at http://trade ec.europa eu/doclib/docs/2019/mav/tradoc 157884 pdf.

[123] Negotiating Directives for the Modernisation of the Energy Charter Treaty, doc. 10745/19, p. 3, see https://data.consilium.europa.eu/doc/document/ST-10745-2019-ADD-1/en/pdf.

(ii) a company or other organisation organised in accordance with the law applicable in that Contracting Party and engaged in substantive business activities [Footnote 2] in the territory of that Contracting Party;

[Footnote 1: (...)]

[Footnote 2: In line with its notification of the Treaty establishing the European Community to the WTO (WT/REG39/1), the European Union understands that the concept of "effective and continuous link" with the economy of a Member State of the European Union enshrined in Article 54 of the TFEU is equivalent to the concept of "substantive business activities"]'. [124]

3.104. These documents do not indicate an established state practice entailing that additional requirements are imposed on 'investors' and 'investments' within the meaning of the ECT. They rather point in the direction that such requirements currently do not yet apply, but according to the EU Member States should be imposed in the future.

3.105. The ground (no. 121) complains that the Court of Appeal failed to appreciate clear rules and fundamental principles of international law. According to the ground, this concerns a principle of investment law entailing that international investment treaties are intended to (i) protect international investments and (ii) offer protection to actual investors and not to those who are only investors "on paper". This is the case if the actual economic investor is a national of a host state, so that it is essentially a domestic investment. The Russian Federation has substantiated the existence of this principle with references to arbitral case law. In paras. 5.1.8.6-5.1.8.10, the Court of Appeal discussed the arbitral awards invoked by the Russian Federation and decided that no principle of investment law can be derived from them, as defended by ground (no. 122).

3.106. It is correct that, pursuant to Article 31(3)(c) VCLT, principles of international law can play a role in treaty interpretation. The purpose of this provision is to be able to interpret the treaty against the backdrop of the system of international law of which it forms part. [125] This may involve rules from other treaties or customary international law. [126] Of course, the rule must be relevant to the interpretation of the relevant treaty. This may be the case, for example, if the rule to be considered originates from a treaty to which all states that are parties to the treaty to be interpreted are also parties or if that rule can be considered customary international law. [127] General principles of law ("general principles of law recognized by civilized nations") as referred to in Article 38(1)(c) of the Statute of the International Court of Justice may also be relevant. An example in this respect is the principle of good faith. [128] The wording used may have a meaning that has been accepted in

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[124] Working Document of the European Council entitled "ECT Modernisation: Revised Draft EU proposal" (WK 3937/2020 UNIT), see https://www.euractiv.com/wp-content/uploads/sites/2/2020/04/EU-Proposal-for-ECT- Modernisation-V2.pdf.

[125] Dörr, op. cit., pp. 603-604.

[126] Dörr, op. cit., pp. 605-609; Gardiner, op. cit., pp. 266-267.

[127] See International Law Commission (ILC), Yearbook of the International Law Commission, Vol. II: Report of the Commission to the General Assembly on the work of its fifty-eighth session (Document A/61/10), 2006, p. 180 (at no. 21): "Article 31, paragraph (3)(c) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term".

[128] Dörr, op. cit., p. 609.

customary international law or according to general principles of law.[129]

3.107. The Russian Federation substantiated the position that the Court of Appeal failed to appreciate international law by invoking a principle of international investment law, the existence of which was allegedly evident from the aforementioned arbitral case law. This principle allegedly entails that only truly international investments deserve protection, and that it is therefore insufficient that the investor is formally established in a state other than the state where the investment was made (the host state), and it must be determined instead whether the "actual, economic investor" is a national of that host state (in which case there is a U-turn investment). It follows from this that this principle (to the extent it exists) can only be relevant if a principle of customary international law is involved, or a rule of treaty law that is relevant to the interpretation of the ECT. In my opinion, neither is the case. I will elaborate this below.

3.108. As the Court of Appeal held, part of the arbitral case law was rendered on the basis of the ICSID Convention. As I wrote in my introduction (no. 1.10), the ICSID Convention has its own scope of application. The ICSID Convention explicitly pertains to international investments, leaving it to the ICSID tribunals to flesh out this term in more detail. In practice, ICSID tribunals sometimes impose stricter requirements than the underlying investment treaties themselves, in particular with regard to the term 'investment' (see the discussion of ground 3.3).[130] These requirements may also be stricter than those of other (commercial) arbitral tribunals, which do not base their jurisdiction on the ICSID Convention.[131] All this means that to the extent that in certain cases ICSID tribunals have imposed stricter requirements on the international nature of an investment than the ECT, this does not mean that the ECT should therefore also be interpreted more strictly. After all, those stricter requirements ensue from the ICSID Convention and/or from the underlying bilateral investment treaty. It also follows from the fact that all these treaties impose different requirements on the international nature of an investment[132] that it is not possible to speak of a rule of customary international law.[133] Nor is it clear therefore that the ECT should be interpreted in accordance with the rules from the ICSID Convention or from other investment treaties. On the contrary, the various treaties have their own definitions, which in practice may also give rise to different outcomes. Incidentally, in the award in *Plama/Bulgaria* rendered on the basis of the ECT, the ICSID tribunal decided in line with Article 1(7) ECT (see no. 3.110 below).

3.109. In so far as stricter requirements with regard to the international nature of an investment can be derived from the various arbitral awards (the Court of Appeal consistently rejected that argument), those requirements are not relevant to the ECT because the relevant case law pertains to other treaties. That is the case with most of the awards referred to in the ground. For example, the *Loewen/United States of America* judgment pertains to the NAFTA treaty[134], and *Phoenix/Czech*

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[129] ILC, op. cit., pr. 180 (at no. 20): "Customary international law and general principles of law are of particular relevance to the interpretation of a treaty under article 31, paragraph 3(c), especially where (...) the terms used in the treaty have a recognized meaning under customary international law or under general principles of law (...)".

[130] This approach was worded as follows in *Phoenix Action, Ltd v. The Czech Republic,* ICSID Case No. ARB/06/5, 15 April 2009, para. 96: "At the outset, it should be noted that BITs, which are bilateral arrangements between two States parties, cannot contradict the definition of the ICSID Convention. In other words, they can confirm the ICSID notion or restrict it, but they cannot expand it in order to have access to ICSID. A definition included in a BIT being based on a test agreed between two States cannot set aside the definition of the ICSID Convention, which is a multilateral agreement. As long as it fits within the ICSID notion, the BIT definition is acceptable, it is not if it falls outside of such definition. (...)".

[131] Turinov, op. cit., p. 6.

[132] For an overview of the requirements, see Turinov, op. cit., pp. 12-13; Jagusch & Sinclair, op. cit., 2006, pp. 90-93.

[133] See Nollkaemper, op. cit., pp. 127-134.

Republic[135], *Occidental/Ecuador*[136], *TSA Spectrum de Argentina S.A./Argentina*[137] *and ST-AD GmbH/ Bulgaria*[138] on the ICSID Treaty and various bilateral investment treaties. *Lemire/Ukraine* relates to the BIT between the United States and Ukraine.[139] These arbitral awards are not relevant to the interpretation of the ECT.

3.110. Incidentally, in para. 5.1.8.10 the Court of Appeal took into account arbitration case law (put forward by HVY) that has in fact been rendered pursuant to the ECT. In *Plama/Bulgaria,* the ICSID tribunal decided that, in accordance with the definition of Article 1(7) ECT, it is irrelevant who is the owner of the investing company and/or by whom it is controlled. According to the tribunal, it was only relevant that the investing company (Plama Consortium) was incorporated under the laws of Cyprus.[140] According to the Court of Appeal, the arbitral awards in *Charanne/Spain*[141] *and Isolux/ Spain*[142] are in line with that (see paras. 5.1.8.8 and 5.1.8.10). Although according to the Court of Appeal the award in *Alapli/Turkey* indicates that U-turn constructions do not deserve protection, given the dissent between the arbitrators on this point it does not evidence a generally accepted principle to that effect.[143] This interpretation of the various arbitral awards is not challenged by the ground for cassation.

3.111. It follows from the foregoing that the complaint that the Court of Appeal failed to appreciate international law fails. I note, superfluously, that the literature on the ECT I consulted also does not support the Russian Federation's view that additional requirements should be set for the international nature of the investments.[144] The ICSID tribunal also decided in the *Plama/Bulgaria* award referred to above that no such further requirements are imposed. It was pointed out in the literature that although the consequence of that judgment is that letterbox companies can claim protection under the ECT, contracting states can on the other hand limit that protection on the basis of Article 17 ECT (the 'denial of benefits' clause,) to investors that have a substantial connection with the country where they are established, and can thus exclude letterbox companies from that protection.[145] As long as contracting states have not made use of this possibility, letterbox companies

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[134] *The Loewen Group Inc. v. United States of America,* ICSID Case No. ARB(AF)/98/3, 26 June 2003, para. 223 et seq.

[135] *Phoenix Action, Ltd v. The Czech Republic,* cited above, in particular para. 135 et seq.

[136] *Occidental Petroleum Corporation v. The Republic of Ecuador* (Decision on Annulment), ICSID Case No. ARB/06/11, 2 November 2015, para. 259 et seq.

[137] *TSA Spectrum de Argentina S.A. v. Argentine Republic,* ICSID Case No. ARB/05/5, 19 December 2008; ICSID *National Gas S.A.E. v. Arab Republic of Egypt,* ICSID Case No. ARB/11/7, 3 April 2014, para 136. See also para. 5.1.8.9 of the Final Judgment, unchallenged in cassation.

[138] *ST-AD GmbH v. The Republic of Bulgaria* (Award on Jurisdiction), UNCITRAL, PCA Case No. 2011-06, 18 July 2013, para. 408 et seq.

[139] *Lemire v. Ukraine,* ICSID Case No. ARB/06/18, 28 March 2011, para. 55 et seq.

[140] *Plama Consortium Limited v. Republic of Bulgaria* (Decision on Jurisdiction), ICSID Case No. ARB/03/24, 8 February 2005, para. 128, in which the tribunal held: "it remains the case that the Claimant (Plama Consortium, Advocate General] was an "Investor" under Article 1 (7) ECT: it is here irrelevant who owns or controls the Claimant at any material time. The definition of "Investment" under Article 1 (6) refers to the Investor's investment, in other words it is again here irrelevant who owns or controls the Claimant at any material time; (...)". See also Turinov, op. cit., p. 16.

[141] *Charanne B.V. v. The Kingdom of Spain (Final Award), Stockholm Chamber of Commerce (SCC) Arbitration No. 062/2012, 21 January 2016.*

[142] *SCC Isolux Infrastructure Netherlands. B.V. v. Kingdom of Spain, Arbitration Case No. V2013/153, 12 July 2016.*

[143] *Alapli Elektrik B.V. v. Republic of Turkey.* ICSID Case No. ARB/08/13, 16 July 2012.

[144] In addition to the contributions mentioned in the following footnotes, the following sources have been consulted: Turinov, op. cit., pp. 12-13; Hobér, op. cit., p. 116; Baltag. op. cit., pp. 141-146; Roe & Happold, op. cit., pp. 64-65; Jagusch & Sinclair, op. cit., p. 93; Blanch, Moody & Lawn, op. cit., pp. 3-4; Engela C. Schlemmer, 'Investment, Investor, Nationality, and Shareholders', in: Peter T. Muchlinski et al. (eds.), The Oxford Handbook of International Investment Law, Oxford: OUP 2015, pp. 77-78.

[145] See Wälde, op. cit., p. 274, who states that 'incorporating just for the sake of Treaty protection' is not sufficient, referring to Article 17 ECT.

also fall within the scope of the ECT.[146]

3.112. Ground 3.2.4 complains about para. 5.1.8.8, in which the Court of Appeal held that it has been insufficiently explained why Khodorkovsky et al. should be deemed 'beneficial owners' of the Yukos shares and why HVY only hold the shares on behalf of Khodorkovsky et al. The ground argues that, in light of Articles 149 and 154 DCCP, this decision is erroneous, or at least incomprehensible, because the parties allegedly agree on this.

3.113. The complaint fails for a lack of interest. This is because the challenged legal finding does not exclusively pertain to the question of whether Khodorkovsky et al. are the 'beneficial owners' of the Yukos shares and of HVY, but primarily relates to the question of whether this is relevant for the application of the ECT. In this finding, the Court of Appeal rejected the Russian Federation's statement that the ECT makes a distinction between the formal and material owner, in the sense that only the latter has legal standing (see para. 5.1.8.7). The Court of Appeal concluded that such a rule does not exist, and substantiated that conclusion by referring to *Charanne/Spain.* Incidentally, the ground does not challenge that conclusion.

3.114. I conclude that all complaints in ground 3.2 fail.

Ground 3.3: actual economic contribution to economy of host country

3.115. Ground 3.3 is directed against paras. 5.1.9.1-5.1.9.5 and complains that the Court of Appeal wrongly rejected the Russian Federation's position that HVY's shares in Yukos cannot be considered an 'investment' under the ECT because HVY did not make an actual economic contribution to the Russian Federation. The ground complains that the Court of Appeal wrongly ruled that the Russian Federation failed to demonstrate the existence of such an internationally recognised principle of investment law (no. 126) and that the Court of Appeal wrongly based its ruling on a merely grammatical interpretation of the terms 'investment' and 'investor' from the ECT (no. 127). According to the ground, the Court of Appeal wrongly ruled that the requirement of the economic contribution only applies to an investment within the meaning of the ICSID Convention and not to the ECT (no. 129).

3.116. In so far as the complaints build on earlier grounds, they share the same fate. As regards the complaint in no. 129, I repeat that the ICSID Convention has its own scope of application, which led to the ICSID tribunal formulating criteria in the *Salini Costruttori SpA/Morocco*[147] award for determining whether an investment is involved. These Salini criteria are stricter than those of the

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[146] Anthony C. Sinclair, 'The substance of nationality requirements in investment treaty arbitration', ICSID Review - Foreign Investment Law Journal 2005, p. 378 et seq. (in a similar sense the same author in 'Investment Protection for "Mailbox Companies" under the 1994 Energy Charter Treaty', Transnational Dispute Management 2005). In *Plama/Bulgaria* (cited above, para. 147 et seq.), the ICSID tribunal decided that contracting states will have to inform investors in advance of a decision pursuant to Article 17 ECT, and that states may not resort to this as late as in arbitration proceedings in order to achieve inadmissibility of the investor's claim. See also Sinclair, op. cit., ICSID Review 2005, p. 387: "The decision in *Plama* on the right-to-deny-benefits provision has practical consequences. It follows that ECT Article 17 can offer a good defence for host States to claims brought by 'mailbox' companies, but a State must exercise its right prior to the time the investment is made."

[147] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (Decision on Jurisdiction), ICSID Case No. ARB/00/4, 23 July 2001, International Legal Materials 2003, pp. 609-624.*

ECT.[148] One of those criteria is that the investment makes a contribution to the economic development of the host state (see para. 5.1.9.2 et seq. of the Final Judgment). Given the existence of the differences between the *Salini* criteria and the ECT criteria, investors who believe that their rights under the ECT have been violated should carefully consider whether they wish to submit their claim to the ICSID, because there is a risk that the ICSID will decline jurisdiction.[149] It is therefore clear and accepted in practice that the ICSID Convention is interpreted differently to the ECT. There are also no indications in the text of the ECT that the definition of 'investor' (or other terms) of the ECT should be interpreted in conformity with that of the ICSID Treaty.

3.117. As I have already noted, the ECT does not offer a real definition of the term, 'investment', but instead offers a non-exhaustive list of assets designated as such. This raises the question of how to assess whether assets that are not included in the list of Article 1(6) ECT should be considered an investment. In this respect, it has been noted in the literature that interpretations of the term 'investment' that developed outside the ECT, as in the context of the ICSID Treaty, could be of use.[150] There are also a number of decisions in ECT cases in which the definition of 'investor' was had been aligned with the *Salini* case law under the ICSID Treaty.[151] For example, the majority of the arbitrators in *Alapli/Turkey* decided that the ECT requires "a meaningful contribution" by the investor in the host state. This was not the case in their opinion, because the claimant had not invested its own money, but had only acted as a "conduit".[152] One of the other arbitrators challenged this view in a dissenting opinion on the ground that no such a criterion can be found in the ECT.[153] In other case law, it was explicitly decided that the *Salini* criteria cannot play a role in the context of the ECT. In *Anatolie Stati and Others/Kazakhstan,* the tribunal held that the ECT has an "extremely broad definition" of the term 'investment' and that if an asset is covered by Article 1(6) ECT, criteria developed in the context of another treaty no longer have any significance:

"806. (...) Guidelines and tests of criteria developed in this jurisprudence on the ICSID Convention and similar treaties, therefore, cannot be used as long as any right or activity is clearly covered by the wording of the above definition in ECT cases. Therefore, the so-called *Salini* test, controversial and much discussed both by the Parties in this case and otherwise in ICSID and similar arbitrations, even if applied as a flexible guideline rather than as a strict jurisdictional requirement, cannot be used for the definition of investment under the ECT or, likewise, in the present case. The Tribunal, thus, sees no need to examine the various criteria discussed for the *Salini* test."[154]

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[148] See in this regard Baltag, op. cit., pp. 211-219; Jagusch & Sinclair, op. cit., p. 75 et seq.; Turinov, op. cit., p.5 et seq.; Roe & Happold, op. cit., pp. 57-63; Hobér, op. cit., pp. 69-73.

[149] Baltag, op. cit., p. 219: "A diligent Investor will have to take into consideration all relevant criteria, including the chances for an ECT dispute to be dismissed by an ICSID tribunal because of failure to fulfil the investment requirement under Article 25(1) of the ICSID Convention"; Jagusch & Sinclair, op. cit., p. 87; Turinov, op. cit., pp. 19-22; Roe & Happold, op. cit., p. 49. The latter point out that it is generally accepted that the Salini criteria 'are not jurisdictional hurdles which must each be surmounted but, rather, typical characteristics of investments' (p. 57).

[150] Roe & Happold, op. cit., p. 57 et seq.

[151] See the aforementioned judgments *Alapli/Turkey* and *Isolux/Spain;* Hobér, pp. 73-78 (in particular p. 75).

[152] *Alapli/Turkey,* cited above, paras. 337-350. See Geraets & Reins, op. cit., pp. 35-36.

[153] *Alapli/Turkey, Dissenting Opinion* of Marc Lalonde, para. 9.

[154] *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan,* SCC (Stockholm Chamber of Commerce) Case No. V 116/2010, 19 December 2013, para. 806. In a similar sense, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain,* ICSID Case No. ARB/13/30, Decision on Jurisdiction, para. 157: "The definition of investment must be interpreted according to article 31 of the Vienna Convention on the Law of Treaties and not in accordance with tests, criteria or guidelines beyond the terms, the context or the object and purpose of the ECT. There is no test, set of criteria or guidelines that can or should be relied upon in international law to restrict or replace the definition that exists in the ECT".

3.118. The conclusion is that ICSID case law, in particular regarding *Salini,* does not indicate the existence of a principle of international investment law that should also be taken into account when interpreting the ECT. Arbitration case law is too divergent for that. Moreover, this position was taken only in a few decisions (one of which is non-unanimous), and therefore no decisive significance can be assigned to it. I also refer to what I noted at 1.8 of this opinion regarding the significance of arbitral case law in the context of the interpretation of treaties.

3.119. I conclude that the complaints in ground 3.3 fail.

Ground 3.4: piercing the corporate veil

3.120. Ground 3.4 is directed against paras. 5.1.8-5.1.11 and complains that the Court of Appeal and the Tribunal should have looked "past the mere formal corporate structure" of HVY, because these companies were only incorporated for the purpose of committing and concealing illegal acts, including tax evasion. It is a principle of international law that if companies have been abused in such a way, it is necessary to look past their corporate structure *(piercing/lifting the corporate veil).* According to the ground, the consequence in this case is that HVY cannot be considered an investor within the meaning of the ECT because they cannot be considered to have been incorporated under the laws of Cyprus and the Isle of Man, respectively, as is required by Article 1(7) ECT.

3.121. The Court of Appeal rejected this argument by the Russian Federation on three grounds. First, according to the Court of Appeal, there is no evidence of such a principle (paras. 5.1.10.1-5.1.10.2). Second, there are no indications that Article 1(7) ECT provides a basis for applying this doctrine in the sense advocated by the Russian Federation. Third, the doctrine of piercing the corporate veil pertains to the determination of liability and cannot be used to challenge the jurisdiction of the Tribunal (para. 5.1.10.4).

3.122. The complaints take as a factual starting point that HVY were established solely to conceal illegal activities. This has not been established.[155] Therefore, as a hypothetical factual basis, the starting point in cassation will be that HVY were indeed incorporated to conceal said illegal activities.

3.123. The complaints of the ground are based on the doctrine of *piercing/lifting the corporate veil.* As the Court of Appeal considered, this term is indeed primarily significant in the context of liability of legal entities. Piercing the corporate veil means that it is necessary to 'pierce through' the legal entity so that the shareholders can be held liable instead of only the legal entity itself.[156] The term sometimes acquires a broader meaning and is used to denote other situations in which the legal entity is disregarded and those who control it are considered instead.[157] For example, the ECT includes the principle of piercing the corporate veil in this broad sense: Article 26(7) ECT allows the legal protection of Article 26 ECT to be extended to investors established in the country where the

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[155] In para. 5.1.11.6, on the basis of the Tribunal's award, the Court of Appeal rejected the statement that there was illegal conduct at the time of the making of the investment by HVY (in other words, HVY's acquisition of shares in Yukos). Ground 3.4 pertains to other alleged illegal activities, which took place later, including the evasion of dividend tax, the payment of bribes, money laundering and the diversion of Yukos' assets from Russia (no. 131).

[156] See, for example, Karen Vandekerckhove, Piercing the corporate veil, Alphen aan den Rijn: Kluwer Law International 2007, pp. 1 and 11; Asser/Maeijer/Van Solinge & Nieuwe Weme 2-II* 2009, no. 834 et seq,. with further references.

[157] Baltag, op. cit., p. 115. See also regarding the various forms: R.C. van Dongen, Identificatie in het rechtspersonenrecht. Uitgaven vanwege het Instituut voor Ondernemingsrecht, no. 22, Deventer: Kluwer, 1995.

investment was made, provided that they are controlled by investors from another contracting state. In that case, therefore, the decisive factor is not who the investor is and where it is established, but under whose control the investor actually is.[158] In this manner we look past the investor/company, but this time - unlike in the view just described - in favour of those who control it.

3.124. The ground relies on an interpretation of the term *piercing the corporate veil* in international law allegedly entailing that courts and arbitral tribunals must look past corporate entities that have been abused for illegal conduct. Those entities should allegedly be denied protection under investment treaties for that reason. Strictly speaking, there is no piercing the corporate veil in that case, because according to that view, we are not looking past the company at the shareholders; rather, the company is deemed not to exist at all, without it being further relevant who controls it. However, the part invokes a principle of international law to that effect.

3.125. In support of the existence of such a principle, the ground refers to the judgment of the International Court of Justice (ICJ) in *Barcelona Traction.*[159] At issue in that case was whether Belgium could institute proceedings at the ICJ against Spain for the benefit of Belgian shareholders of Barcelona Traction, a Canadian company. The ICJ therefore had to assess, *inter alia,* whether the shareholders of a company could engage in litigation on the basis of alleged unlawful acts against the company. The ICJ took the company's independence vis-à-vis its shareholders as a starting point, but also held that exceptions could be made to this under certain circumstances, in particular in the event that the company has proved unable to defend the interests of those who have entrusted their financial resources to it.[160] In such situations, according to the ICJ, an exception is made to the principle of independence of the company:

"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 an 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."

The ICJ held that such an exception could also play a role under international law. The ICJ did however emphasise the exceptional nature of the process involved in *lifting the veil.*

"58. In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders."

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[158] Baltag. loc. cit.

[159] *ICJ, Case concerning the Barcelona Traction, Light and Power Company, Limited (new application: 1962) (Belgium v. Spain), 5 February 1970.*

[160] ICJ *Barcelona Traction,* paras. 37 et seq.

3.126. The ICJ has acknowledged the existence under international law of the possibility of piercing the corporate veil, among other reasons "to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance", but also held that there is room for this only in exceptional circumstances. The ICJ did not therefore go as far as the ground (no. 132) argues, given that the decision does not state that courts and arbitral tribunals are "obligated" to lift the corporate veil of companies that have been misused for purposes of "fraud or malfeasance". Moreover, the decision does not indicate that a company could also be disregarded in its entirety, as the ground argues.

3.127. From the ICSID arbitral awards to which the ground (and the Court of Appeal) refer (in the cases *Cementownia v. Turkey*[161]*, Phoenix v. Czech Republic* and *Alapli v. Turkey),* no rule emerges either by which arbitral tribunals are obligated to lift the corporate veil of companies in the event that they have been misused for illegal activities. Those decisions have more limited implications. They imply that, under certain circumstances, the protections offered by the ECT can be denied to claimants who have acquired shares in companies for the sole purpose of gaining access to the arbitration procedure. In that case, the claimant company is not "disregarded" because it was allegedly not incorporated under the laws of a contracting state, but there is no investment within the meaning of Article 1(6) ECT. [162]

In addition, although the ICSID tribunal held in these cases that acquiring shares in a foreign company in order to gain access to investment arbitration can be unacceptable, it also held that a distinction should be made between *bona fide* transactions, and that this is highly dependent on the circumstances of the case. [163] This ICSID case law therefore acknowledges, to a certain extent, the doctrine of *piercing the corporate veil,* although it has only applied it to date in a specific situation that does not appear in the case at issue in cassation. [164]

3.128. As the Court of Appeal rightly held, Article 1(7) ECT provides no basis to "lift the corporate veil" in the manner that the ground contends. I reiterate that Article 1(7) ECT merely imposes the formal requirement that a company must be incorporated under the laws of a contracting state. This wording provides no basis to "disregard" a company incorporated under the laws of a contracting state by not qualifying it as an investor (because it was incorporated for illegal purposes or for any other reason). [165] The ground (no. 137) goes on to argue that Article 1(7) ECT provides an explicit basis for the application of the doctrine of piercing the corporate veil that exists under the law of Cyprus and the Isle of Man (where HVY have their registered office), but does not argue that this doctrine is, under the law of those States, fleshed out in the manner that the ground contends. In so far as the ground intends to complain that the Court of Appeal applied foreign law incorrectly on

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[161] *Cementownia "Nowa Huta" S.A. v. Republic of Turkey,* ICSID Case No. ARB(AF)06/2, 17 September 2009.

[162] See *Phoenix v. Czech Republic,* para. 143: "Although, at first sight, the operation by Phoenix looks like an investment, numerous factors converge to demonstrate that the apparent investment is not a protected investment. (...). It is the conclusion of the Tribunal that the whole "investment" was an artificial transaction to gain access to ICSID", and *Alapli v. Turkey,* para. 404: "All the elements of the file and the particular circumstances of the case prove the investment was manipulated to appear as a foreign investment".

[163] *Alapli v. Turkey,* paras. 401 et seq.; *Phoenix v. Czech Republic,* paras. 142-143; *Cementownia v. Turkey,* paras. 154-156, with reference to *Tokios Tokeles v. Ukraine,* ICSID Case No. ARB/02/18 (Decision on Jurisdiction), paras. 53-56.

[164] This also applies to the other judgments cited on appeal (see Defence on Appeal, no. 712). These decisions acknowledge the existence of the doctrine of *piercing the corporate veil,* but place it in the context of liability. They give no indication that the doctrine should be applied in the way that the ground contends. See *ADC Affiliate Ltd v. Hungary,* ICSID Case No. ARB/03/16, 6 October 2006, para. 358; *Rumeli Telekom AS et al. v. Kazakhstan,* ICSID Case No. ARB/05/1, 29 July 2008, para. 328; *Saluka Investments v. Czech Republic,* Partial Award, UNCITRAL, 17 March 2006, para. 230.

[165] See, specifically, Baltag, op. cit., pp. 141-146.

this point, the complaint fails based on the provisions of Article 79(1)(b) of the Judiciary (Organisation) Act or due to a lack of factual basis, given that this matter was apparently not brought up at the fact-finding instances (the ground does not refer to sources in the procedural documents where positions were allegedly taken in that respect).

3.129. The conclusion is that the complaints in ground 3.4 fail.

Ground 3.5: referral of questions about Article 1(6) and (7) and Article 26 ECT for a preliminary ruling?

3.130. Ground 3.5 argues that the Court of Appeal's interpretation is incompatible with EU law. According to the ground, the Court of Appeal should have submitted questions to the ECJ for a preliminary ruling on the interpretation of Article 1(6) and (7) and Article 26 ECT, addressing, in this respect, all the issues that have been raised in this case.

3.131. I refer to what I noted in the discussion of ground 2.7. There is no reason to submit questions for a preliminary ruling if the answer to those questions is not necessary to the assessment of the dispute. This is also the case with ground 3. The various complaints contained in this ground fail for a variety of reasons: partly due to the lack of a factual basis, partly because they rely on sources that, according to the VCLT's rules of interpretation, are not relevant to the interpretation of the ECT, and partly because the complaints are complaints in respect of reasoning, for which reason they fail.

Ground 4: interpretation of Article 1(6) and (7) ECT (the legality of the investments)

3.132. Ground 4 also refers to the interpretation of the terms 'investment' and 'investor' in Article 1(6) and (7) ECT, arguing that they do not cover illegal investments, and that the Tribunal therefore lacked jurisdiction to take cognisance of HVY's claims. In addition, the ground argues that the Tribunal's decision is contrary to public policy, as it ensures that HVY will be able to benefit from illegal conduct. The ground is divided into four sub-grounds.

3.133. Ground 4.1 contains no complaints, but gives an overview of the illegal acts allegedly committed by HVY. The Russian Federation has stated the following in that regard:

1) HVY acquired the shares in Yukos illegally, namely by manipulating auctions and paying bribes (ground 4.1.2);

2) Hulley and VPL were incorporated for the evasion of dividend tax, in which YUL also participated (ground 4.1.3);

3) Yukos evaded tax in the Russian Federation by using sham companies in free tax regions (ground 4.1.4);

4) HVY impeded the course of justice in response to this illegal conduct by destroying evidence and channelling funds abroad (ground 4.1.5).

3.134. The Russian Federation has argued that the Tribunal should have declined jurisdiction because of the illegality of HVY's investments. In investment arbitration, according to the Russian Federation, 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 EOT. [166]

3.135. The Court of Appeal held, in summary, that there is indeed a principle of international investment law which entails that international investments made in breach of the law of the host state do not deserve protection. This applies, however, only to cases in which illegal acts were committed when initiating the investment, not afterwards (para. 5.1.11.2). Where this can be established, according to the Court of Appeal a distinction should be made between the consequences of (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 first category of treaties, illegal investment falls entirely outside the scope of the treaty: in that case, there is no investment. The ECT contains no such explicit legality requirement. For such treaties, there is no generally accepted principle of law which implies that an arbitral tribunal should decline jurisdiction in the case of an illegal investment (paras. 5.1.11.4-5.1.11.5). According to the Court of Appeal, the wording of Article 1(6) and Article 26 ECT is decisive. Given that no explicit legality requirement is to be found there, it cannot be decided that if an investment turns out to be illegal, the arbitral tribunal lacks jurisdiction. It could be decided that the investment cannot be allowed to benefit from the material protection of the ECT, but that is a separate matter. The Court of Appeal referred superfluously to the Tribunal's decision entailing that the unlawful conduct in the privatisation of Yukos is too far removed from the acquisition of the shares in Yukos by HVY. Therefore, according to the Court of Appeal, it cannot be established that there was an illegal investment.

Ground 4.2: existence of legality requirement

3.136. Ground 4.2 complains that the Court of Appeal failed to recognise that (the definition of investment in) the ECT contains an implied legality requirement given that the ECT does not protect investments that are illegally obtained and held. The ground relies on the ordinary meaning of the term 'investment' as well as on the context, object and purpose of the ECT and arbitral case law

3.137. The Court of Appeal held in para. 5.1.11.5 that the ECT does not include an explicit legality requirement, such as a phrase to the effect that the investment must have been made "in accordance with the law" or words of a similar nature. The ground does not argue that such words are to be found in the ECT, [167] but defends the position that they are implied there, referring (in no. 154) to, *inter alia,* an introduction to the ECT by the ECT Secretariat. [168] In para. 5.1.11.2, the Court of

[166] This characterisation of the Russian Federation's position is derived from para. 5 1.11.1 of the final judgment.

[167] See e.g. Hobér, op. cit., p. 99: "(...) the ECT does not have any provision requiring that an investment be in conformity with a particular law, neither municipal law nor international law."

Appeal held that there is a principle of international investment law which entails that illegal investments made in violation of the laws of the host country do not deserve protection. In para. 5.1.11.3 (read in conjunction with para. 5.1.11.5), the Court of Appeal decided that the definition of 'investment' in the ECT does not include a phrase to the effect that the investment must have been made "in accordance with the law". According to the Court of Appeal, this is of no consequence to the Tribunal's jurisdiction to hear claims based on the ECT due to the distinction made earlier between treaties that do and treaties that do not contain an explicit legality requirement. The ground does not dispute that such a distinction must be made, and the ground therefore fails to that extent.

3.138. Nor does arbitration case law give any indication that the Court of Appeal's decision is incorrect. It can be inferred from arbitral case law that the ECT contains an implicit legality requirement, but not that this should lead to a lack of jurisdiction on the part of the arbitral tribunal.[169] Relevant in this context are, *inter alia,* the decisions of the ICSID tribunal in the aforementioned case *Plama v. Bulgaria,* which the Court of Appeal discussed in para. 5.1.11.4. In those proceedings, Bulgaria argued that there was no investment within the meaning of the ECT because the investor had concealed who was controlling it. The tribunal rejected this argument in the context of the assessment of its jurisdiction, and decided that the definition in Article 1(6) ECT has been met if there is *a* right of ownership or a contractual claim, even if this right or entitlement is "defeasible".[170] The tribunal then went on to address this argument anyway in the assessment of the claim on the merits. There, the tribunal held, *inter alia,* that the ECT does not protect investments made in breach of the law. The claim was thereupon denied.[171] This approach was also taken in the decision of the arbitral tribunal in the case *Blusun v. Italy,* which also involved the ECT (see para. 5.1.11.4), as well as in the decision of the arbitral tribunal in the case *Anatolie Stati and others v. Kazakhstan.*[172]

3.139. There are also arbitral decisions in which a different approach was taken, but those cases do not pertain to the ECT. Moreover, some of those decisions pertain to treaties that contain an explicit legality requirement.[173] Therefore, no general rule can be inferred from this case law entailing that an arbitral tribunal should always decline jurisdiction in the event of an illegal investment, even if the treaty in question does not contain an explicit legality requirement. It is true that some arbitral decisions have held without further ado that illegality implies a lack of jurisdiction on the part of the arbitral tribunal[174], but it is required in that case that illegal acts must have been committed in

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[168] Baltag, op. cit., pp. 197-198, writes that this introduction cannot play any role in interpreting the ECT, *inter alia,* because it does not fall under the sources that are deemed relevant under Articles 31 and 32 VCLT.

[169] Regarding this case law, see also Hobér, op. cit., pp. 99-105.

[170] *Plama v. Bulgaria* (Jurisdiction), para. 128: "The definition of "Investment" under Article 1 (6) refers to the Investor's investment, in other words it is again here irrelevant who owns or controls the Claimant at any material time; and as already noted above, the definition is broad, extending to "any right conferred by law or contract". That definition would be satisfied by a contractual or property right even if it were defeasible." See also *Plama v. Bulgaria* (Award), 27 August 2008, para. 112.

[171] *Plama v. Bulgaria* (Award), para. 139.

[172] *Anatolie Stati v. Kazakhstan, cited above, para. 812.*

[173] See the following cases: *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines,* ICSID Case No. ARB/11/12, 10 December 2014, paras. 322 et seq. (BIT Germany-Philippines); *Inceysa Vallisoletana, S.L. v. Republic of El Salvador,* ICSID Case No. ARB/03/26, 2 August 2006, paras. 195 et seq. (BIT El Salvador-Spain); *Gustav F W Harvester GmbH & Co KG v. Republic of Ghana,* ICSID Case No. ARB/07/24, 18 June 2010, para. 126 (BIT Germany-Ghana); *Phoenix v. Czech Republic,* cited above, paras. 56 and 101 (BIT Czech Republic-Israel).

[174] *Ampal-American Israel Corporation and others v. Arab Republic of Egypt,* ICSID Case No. ARB/12/11, 1 February 2016 (Decision on Jurisdiction), paras. 301 et seq. See also *Alasdair Ross Anderson v. Republic of Costa Rica,* ICSID Case No. ARB(AF)/07/3, 19 May 2010, paras.

the making of the investment, for example because of fraud when submitting a tender.[175] According to the arbitral tribunal in *Phoenix v. Czech Republic,* however, only evident illegality results in a lack of jurisdiction.[176] In *Mamidoil Jetoil v. Albania,* the arbitral tribunal held that, in principle, states do not have to accept the jurisdiction of an arbitral tribunal in the case of illegal investments, but that this is otherwise if the state in question has expressed its willingness to legalise the investments.[177] It was also held in *SAUR International v. Argentina* that illegal investments are not protected, but that the consequences thereof are not a lack of jurisdiction.[178]

3.140. It follows from the above that there are conflicting answers to the question of whether the illegality of an investment should lead to the arbitral tribunal's lack of jurisdiction (in cases in which there is no legality requirement in the relevant treaty). Some arbitral tribunals answer this question in the affirmative, while others take a more nuanced approach. However, it is decisive that there are no decisions where the ECT was interpreted in such a way that the illegality of an investment led to a lack of jurisdiction. It has also been emphasised in the literature that the ECT does not have a legality requirement with potential consequences for the jurisdiction of an arbitral tribunal to assess claims based on the ECT.[179] Therefore, in my opinion, there is no generally accepted principle of law which implies that an arbitral tribunal should decline jurisdiction in the case of an illegal investment. In the context of the ECT, it has been consistently held that the illegality of an investment can, at best, play a role in the assessment of the case on the merits.

3.141. It follows from the above that ground 4.2 fails.

Ground 4.3: illegal conduct

3.142. Ground 4.3 is divided into two grounds, and it contends that illegal conduct has to be taken into account.

3.143. Ground 4,3.1 is directed against paras. 5.1.11.7-5.1.11.9 and paras. 9.8.5-9.8.10, in which the Court of Appeal rendered decisions on fraud and corruption in the acquisition of a majority interest in Yukos. Briefly stated, the ground complains that the Court of Appeal proceeded on the basis of an incorrect interpretation of the law or rendered an incomprehensible decision, having considered only the transactions by which HVY acquired the shares in Yukos. According to the ground, when answering the question of whether an investment had been obtained legally, the Court of Appeal should not have limited itself to an assessment of the last transaction in a chain of transactions, but should have also considered the events that preceded HVY's acquisition of the shares. According to

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55 et seq., UNCITRAL, *Oxus Gold pic v. The Republic of Uzbekistan,* 17 December 2015 (Award), paras. 706 et seq.

[175] As in, for example, the case *Inceysa Vallisoletana. S.L. v. Republic of El Salvador,* cited above, paras. 235-237, in particular.

[176] *Phoenix v. Czech Republic,* paras. 102-104. Similarly: *David Minnotte and Robert Lewis v. Republic of Poland,* ICSID Case No. ARB(AF)/10/1, 16 May 2014, paras. 131-132.

[177] *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania,* ICSID Case No. ARB/11/24, 30 March 2015, paras. 492-495.

[178] *SAUR International S.A. v. Argentine Republic,* ICSID Case No. ARB/04/4, 6 June 2012, para. 308.

[179] Baltag, op. cit., pp. 196-199; Roe & Happold, pp. 87-88; Gaillard, in: Ribeiro (ed.), Investment Arbitration and the Energy Charter Treaty, op. cit., p. 62, which in fact points out the following: "In line with the existing case law and the clear language of the ECT, it is fair to assume that (...) there would be no jurisdictional restriction with respect to a contract or license terminated on the basis of an alleged non-compliance: the termination of a contract or a license, the validity of which is challenged by the host State and thus constitutes precisely the issue to be decided on the merits by the arbitral tribunal, cannot provide sufficient ground for a host State to deny the benefit of access to dispute resolution to an otherwise covered investment"; Blanch, Moody & Lawn, op. cit., p, 5.

the ground, it is of importance, amongst other things, that bribes were paid to Yukos' directors before it was privatised (the so-called *Red Directors),* and that the illegally acquired Yukos shares were transferred from one (sham) company to the other in order to conceal their illegal acquisition.

3.144. The ground lacks interest, given that it follows from para. 5.1.11.6 that paras. 5.1.11.7-5.1.11.9 were rendered superfluously. The complaint also fails in all other respects, given that the circumstance that an investment was made in breach of the law of the host country is only relevant if that breach pertains to the making of the investment.[180] The Court of Appeal therefore rightly adopted this as a starting point in para. 5.1.11.2. The Court of Appeal was therefore right to assess whether there was evidence of illegal conduct by HVY at the time they made their investment (para. 5.1.11.8) and not, in addition, the actions of others in acquiring the shares in Yukos in 1995/1996. The Court of Appeal's decision is, moreover, not incomprehensible. For the record, I would note that the Court of Appeal did assess the statement that YUL had been involved in the payment of bribes to the Red Directors, rejecting it as irrelevant. The Court of Appeal's decision that only the acquisition of the shares in Yukos by HVY, and not any earlier transactions, need be considered, implies a rejection of the statement that HVY helped conceal the earlier illegal acquisition of those shares. The ground thus fails.

3.145. Ground 4.3.2 is directed against the Court of Appeal's decision that illegal conduct by HVY after having made the investment is not relevant to the Tribunal's jurisdiction.

3.146. This ground, too, fails, given that the Court of Appeal's starting point, i.e. that only illegal conduct at the time the investment was made can lead to a lack of jurisdiction on the part of the Tribunal, is correct. The arbitral decision in the case *Hesham Talaat M. Al-Warraq v. Indonesia* to which the ground refers (no. 164 and footnote 341) does not lead to another conclusion. That judgment concerns an investment treaty that, unlike most investment treaties, contains an explicit provision that requires investors to respect the laws of the host country.[181] Consequently, no general rule can be inferred from this to imply that illegal conduct after the investment is made can also lead to a lack of jurisdiction on the part of an arbitral tribunal.

Ground 4.4: violation of public policy

3.147. Ground 4.4 is directed against paras. 9.8.5-9.8.10, in which the Court of Appeal rejected the Russian Federation's argument that the Final Awards were contrary to public policy because in consequence thereof, the aforementioned illegal acts are protected. After an introduction (in 4.4.1), the ground complains (in 4.4.2) that the Court of Appeal failed to recognise that it is contrary to national and international public policy to offer protection to treaty claims which concern investments that have been illegally acquired or exploited, or that the Court of Appeal's decision is at any rate insufficiently substantiated.

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[180] See, inter alia, *Oxus Gold plc v. Uzbekistan,* cited above, para. 707 (with references to *Gustav F W Harvester v. Ghana* and *Inceysa Vallisoletana v. El Salvador,* cited above). The judgment of the ECJ, 14 March 2019, case C-724/17, ECLI:EU:C:2019:204 (*Vantaan kaupunki v Skanska Industrial Solutions Oy and others*), para. 46, that the ground cites (no. 159, footnote 337), is irrelevant in this respect because the judgment pertains to the specific context of corporate liability for violations of EU competition rules.

[181] *Hesham Talaat M. Al-Warraq v. Republic of Indonesia,* UNCITRAL, 15 December 2014 (Final Award), paras. 631 et seq. The ground mistakenly refers to the award on jurisdiction of 21 June 2012 in that case, sub-chapters 634-637, although that award does not have sub-chapters 634-637, which means that the probable intention was to refer to the Final Award of 15 December 2014.

3.148. According to established case law, it is only possible to set aside an arbitral award on the basis of Article 1065(1)(e) DCCP if the content or execution of the award would be contrary to mandatory law of such a fundamental nature that compliance with it may not be obstructed by limitations of a procedural nature.[182] In essence, the ground argues that the Final Award violated a fundamental rule of mandatory law which entails that no protection is due to goods or rights obtained as a result of illegal acts. The Russian Federation put forward this argument in the arbitral proceedings under the heading of "unclean hands". In support of this, the ground refers to (arbitral) case law, including the ruling by the Paris *Cour d'appel* in the case *Kyrgyzstan v. Belokon,* in which enforcement of an arbitral award was refused because the alleged investor was guilty of money laundering.[183] The ground also refers to various anti-corruption and money laundering treaties and to literature in which it is argued that corruption is contrary to international public policy.[184]

3.149. The ground disregards the essence of the Court of Appeal's decision in para. 9.8.5 et seq. and likewise the essence of the Tribunal's decision as summarised by the Court of Appeal.[185] The Court of Appeal did not fail to recognise that the protection of goods or rights obtained as a result of illegal conduct (such as corruption) can constitute a violation of international public policy. The essence of the Court of Appeal's decision is that, in so far as such illegal acts took place, they cannot be attributed to HVY, or they are not at any rate related to their investments. The illegal acts had, after all, taken place in part after HVY made the investment, and were committed in part by others before HVY became a Yukos shareholder. In addition, there is no evidence whatsoever of a connection between HVY's illegal conduct and HVY's investment, according to the Tribunal and the Court of Appeal. According to this decision, therefore, there was no illegal conduct, such as corruption or money laundering, on the part of HVY itself when the investment was made. It cannot be inferred from the sources to which the ground refers that illegal conduct is relevant even if the investor was not involved or it was not committed at the time of the making of the investment. For example, the judgment in the case *World Duty Free v. Kenya* to which the ground refers (no. 166) involved the bribery of the Kenyan president by the investor's chief executive officer[186], and the decision in *Kyrgyzstan v. Acquisition* involving alleged money laundering on the part of the investor. The ground's complaints fail on the basis of the foregoing.

3.150. Ground 4.4.3 is directed against para. 9.8.8, in which the Court of Appeal discussed sub-chapter 1370 Final Awards. The Court of Appeal held that the Tribunal had decided that a number of the alleged illegal actions took place before HVY became a shareholder and that, as a result, they had been carried out by other parties, such as Bank Menatep and Khodorkovsky et al. According to the Court of Appeal, the Tribunal had thus decided nothing more than that Bank Menatep and Khodorkovsky et al. were other legal entities or persons than HVY, and that HVY could not be held liable for actions carried out by others before HVY became a shareholder. According to the Court of Appeal, this decision is correct and it has not been challenged by the Russian Federation, or at least not with sufficient substantiation. The ground complains that this decision is incomprehensible because the Russian Federation did indeed dispute the Tribunal's decision with substantiation. The ground argues, furthermore, that the Court of Appeal should have investigated this issue *ex officio* because it concerns a possible violation of international public policy.

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[182] Supreme Court 21 March 1997, ECLI:NL:HR:1997:AA4945, *NJ* 1998/207, annotated by H.J. Snijders, para. 4.2.

[183] Cour d'appel de Paris, *République du Kirghizistan c. M. Valeriy Belokon,* 21 February 2017.

[184] Emmanuel Gaillard, The emergence of transnational responses to corruption in international arbitration, Arbitration International 2019/35, pp. 1-19.

[185] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation, Final Award,* para. 1370 (identical to the other Final Awards).

[186] *World Duty Free Company v Republic of Kenya,* ICSID Case No. ARB/00/7, 4 October 2006.

3.151. In discussing this complaint, I note that the Court of Appeal did not render its own decision in para. 9.8.8, but established what the Tribunal had held. The Court of Appeal was thus responding to a complaint by the Russian Federation about the Tribunal's decision. According to the Court of Appeal, that complaint lacks a factual basis because the Tribunal's decision needs to be interpreted differently. The Court of Appeal's finding that the Tribunal's decision is correct and has not been challenged was therefore rendered superfluously, which is what the Court of Appeal also held ("in so far as it could even be tested in the present setting-aside proceedings"). The ground already fails entirely for this reason. I note that the substance of the complaints also fails in all other respects. The Tribunal's decision, with which the Court of Appeal concurs (in the uncontested view of the Court of Appeal), merely implies that a number of the alleged illegal actions took place before HVY became a shareholder and that, as a result, these actions had been carried out by other parties, such as Bank Menatep and Khodorkovsky et al. The statements that the ground enumerates basically imply that HVY were controlled by Khodorkovsky et al. These statements do not themselves do anything to detract from the Tribunal's factual determination. The Court of Appeal was therefore able to decide that the Russian Federation had not challenged the decision, or at least not with sufficient substantiation. The ground (nos. 177 and 178) also points out certain alleged inconsistencies in the Final Awards. The Tribunal had allegedly taken into consideration at various places that Khodorkovsky et al. owned the shares in Yukos indirectly. In para. 9.8.9, the Court of Appeal has given an explanation for this, which entails that this was not incompatible with the determination that HVY and Khodorkovsky et al. are separate legal entities. That decision is not incomprehensible because the Court of Appeal was thus expressing that HVY need to be distinguished, as companies, from those who control them.

Ground 4.5: referral of questions about Article 1(6) and Article 26 ECT for a preliminary ruling?

3.152. Ground 4.5 argues that the Court of Appeal's interpretation of Articles 1(6) and 26 ECT is contrary to EU law, and that the Supreme Court should refer questions to the ECJ for a preliminary ruling on the issues raised in grounds 4.2, 4.3, and 4.4.

3.153. Referring to what I noted with regard to ground 2.7, I believe, also with regard to ground 4, that referring questions for a preliminary ruling is not essential to the outcome of the cassation proceedings. Ground 4.2 fails, after all, because it essentially fails to challenge the Court of Appeal's decision and because it relies on a generally accepted legal principle, the existence of which has not been demonstrated. Ground 4.3 merely comprises complaints in respect of reasoning. Ground 4.4 pertains to Dutch arbitration law, i.e. Article 1065(1)(e) DCCP, and it is based, moreover, on an incorrect reading of the Court of Appeal's decision.

3.154. The conclusion is that ground 4 fails entirely.

Ground 5: Article 21(5) ECT

3.155. Ground 5 is divided into four sub-grounds and complains about para. 6.3 of the final judgment, in

which the Court of Appeal held that it does not attach any consequences to the fact that the Tribunal did not consult the relevant (Russian) tax authorities. According to the ground, the Tribunal was required to do so under Article 21(5) ECT. By not consulting the tax authorities, the Tribunal violated its mandate and the arbitral awards must therefore be set aside on the basis of Article 1065(1)(c) DCCP. This too causes the arbitral awards to be contrary to public policy (Article 1065(1)(e) DCCP), according to the ground.

3.156. The Tribunal held that referral of the case to the Russian tax authorities would be "an exercise in futility" because the parties had already been given a very extensive opportunity to submit their views, on whether the taxation measures entailed an expropriation, to the Tribunal.[187] In para. 6.3, the Court of Appeal held that, in principle. Article 21(5) ECT mandatorily prescribes that the tax authorities must be consulted, but that the Tribunal's failure was insufficiently grievous to warrant setting aside the Final Awards because the Russian Federation did not suffer any disadvantage, given that it was able to present, at length, all relevant information.

Introductory remarks

3.157. HVY have argued in their written pleadings that the complaints in ground 5 lack interest. They have pointed out that the Court of Appeal decided in paras. 5.2.11 et seq., without challenge, that Article 21 ECT does not at all apply the measures raised by HVY in the arbitration proceedings. According to the Court of Appeal in paras. 5.2.16 et seq., the taxation measures cannot be considered *bona fide,* whereas Article 21(1) ECT pertains only to *bona fide* measures. Given that the rule of Article 21(1) (the "carve-out" for taxation measures) does not apply, the exception thereto in Article 21(5) ECT (the "claw-back") is also irrelevant, according to HVY.[188] Although HVY rightly point to the Court of Appeal's decision on Article 21(1) ECT, it cannot be said that the complaints about the interpretation of Article 21(5) ECT lack interest. This is because the findings on the applicability of Article 21(1) ECT do not form the basis of the decision as to whether the Tribunal violated its mandate by failing to comply with the obligation arising from Article 21(5) ECT. The findings on Article 21(1) ECT are situated in a different context, namely the question of whether Article 21(1) ECT has consequences for the jurisdiction of the Tribunal (which the Court of Appeal answered in the negative in paras. 5.2.4 et seq.). For this reason, the complaints in ground 5 will be discussed.

3.158. On the basis of Article 1065(1)(c) DCCP, there can be a violation of the mandate, *inter alia,* if the Tribunal has acted in violation of the agreed procedural rules or statutory arbitration rules.[189] The violation of mandate must be serious enough to justify setting aside, as is implied by the general requirement of reticence.[190] The decisive question is whether the decision would have turned out otherwise if the arbitrators had complied with their mandate.[191] The court enjoys discretion when assessing whether the violation of mandate is serious enough to justify the setting aside of the

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[187] *Final Awards,* paras. 1421-1422.

[188] Written pleadings HVY, nos. 690 et seq.

[189] Snijders, op. cit., 2018, nos. 9.3.4.2.4 and 9.3.4.2.7 (= Groene Serie Burgerlijke Rechtsvordering, Article 1065 DCCP, notes 4 2.4 and 4.2.7). See also Supreme Court 17 January 2003, ECLI:NL:HR:2003:AE9395, *NJ* 2004/384, annotated by H.J. Snijders.

[190] This is currently laid down in Article 1065(4) DCCP (see Parliamentary History of the Arbitration Act 2015/1.76.3) but already applied to old law: see Van den Berg et al., op. cit., p. 134 and Snijders, op. cit., no. 9.3 4.3 (= Groene Serie Burgerlijke Rechtsvordering, Article 1065 DCCP, note 4.3).

[191] *T&C Burgerlijke Rechtsvordering,* Article 1065 DCCP, note 4 (G.J Meijer); Snijders, *op. cit.,* no. 9.3.1.2 (= Groene Serie Burgerlijke Rechtsvordering, Article 1065 DCCP, note 1.2).

arbitral award.

3.159. With regard to the setting-aside ground of Article 1065(1)(e) DCCP (violation of public policy), the following applies.[192] Public policy has a substantive and a procedural side. A violation of substantive public policy occurs where the content of the arbitral award violates rules of mandatory law of such a fundamental nature that compliance with such rules may not be obstructed by restrictions of a procedural nature.[193] This standard already shows that this ground for setting aside must be applied with reticence. A violation of procedural public policy occurs where the manner in which the award has come into being is contrary to fundamental principles of procedural law, for example in the event that the principle of the right to be heard has been violated[194], or if it turns out that (one of) the arbitrators has/have not been impartial or independent.[195] On this point as well, the court, of necessity, has discretion.

3.160. Grounds 5.1. and 5.1.1 contain an introduction and no complaint.

Ground 5.2: mandatory nature of Article 21(5) ECT

3.161. Ground 5.2 raises various complaints against para. 6.3 and is broken down into six grounds (grounds 5.2.1-5.2.6)

3.162. Ground 5.2.1 complains that in para. 6.3, the Court of Appeal wrongly disregarded the mandatory nature of the referral obligation in Article 21 (5)(b) ECT or failed to recognise that no "futility exception" applies to it. The Court of Appeal thus failed, *inter alia,* to properly apply the rules of interpretation of Articles 31 and 32 VCLT.

3.163. Regarding this ground, I note the following. Article 21 ECT pertains to taxation measures.[196] Article 21 ECT reads as follows in the authentic English text and the Dutch translation:

> **Article 21 Taxation**
>
> 1. 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.
>
> 2. Article 7(3) shall apply to Taxation Measures other than those on income or on capital, except that such provision shall not apply to:
>
> a) an advantage accorded by a Contracting Party pursuant to the tax provisions of any convention,

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[192] See also no. 3.18 of my opinion prior to Supreme Court 4 December 2020, ECLI:NL:HR:2020:1952, *RvdW* 2021/2.

[193] Supreme Court 21 March 1997, ECLI:NL:HR:1997:AA4945, *NJ* 1998/207, annotated by H.J. Snijders, para. 4.2.

[194] For example Supreme Court 18 June 1993, ECLI:NL:HR:1993:ZC1003, *NJ* 1994/449, annotated by H.J. Snijders, para. 3.3.

[195] Inter alia Supreme Court 18 February 1994, ECLI:NL:HR:1994ZC1266, *NJ* 1994/765, annotated by H.J Snijders, para. 3.8.

[196] Regarding this provision, see Hobér, op. cit., p. 354 et seq.; Gloria Alvarez, Article 21. Taxation, in Leal-Arcas (ed.), op. cit., pp. 288-298; William W. Park, Tax arbitration and investor protection, in Coop & Ribeiro (eds.), Investment Protection and the Energy Charter Treaty, op. cit., p. 115-145.

agreement or arrangement described in subparagraph (7)(a)(ii); or

b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure of a Contracting Party arbitrarily discriminates against Energy Materials and Products originating in, or destined for the Area of another Contracting Party or arbitrarily restricts benefits accorded under Article 7(3).

3. Article 10(2) and (7) shall apply to Taxation Measures of the Contracting Parties other than those on income or on capital, except that such provisions shall not apply to:

a) impose most favoured nation obligations with respect to advantages accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii) or resulting from membership of any Regional Economic Integration Organization; or

b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure arbitrarily discriminates against an Investor of another Contracting Party or arbitrarily restricts benefits accorded under the Investment provisions of this Treaty.

4. Article 29(2) to (6) shall apply to Taxation Measures other than those on income or on capital.

5. 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) or 27(2) shall make a referral to the relevant Competent Tax Authorities;

(ii) The Competent Tax Authorities shall, within a period of six months of such referral, strive to resolve the issues so referred. Where non-discrimination issues are concerned, the Competent Tax Authorities shall apply the non-discrimination provisions of the relevant tax convention or, if there is no non-discrimination provision in the relevant tax convention applicable to the tax or no such tax convention is in force between the Contracting Parties concerned, they shall apply the non-discrimination principles under the Model Tax Convention on Income and Capital of the Organisation for Economic Cooperation and Development;

(iii) Bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) may take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the tax is an expropriation. Such bodies shall take into account any conclusions arrived at within the six-month period prescribed in subparagraph (b)(ii) by the Competent Tax Authorities regarding whether the tax is discriminatory. Such bodies may also take into account any conclusions arrived at by the Competent Tax Authorities after the expiry of the six-month period;

(iv) Under no circumstances shall involvement of the Competent Tax Authorities, beyond the end of the six-month period referred to in subparagraph (b)(ii), lead to a delay of proceedings under

Articles 26 and 27.

6. For the avoidance of doubt, Article 14 shall not limit the right of a Contracting Party to impose or collect a tax by withholding or other means.

7. For the purposes of this Article:

a) The term "Taxation Measure" includes:

(i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and

(ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound.

b) There shall be regarded as taxes on income or on capital all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

c) A "Competent Tax Authority" means the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when no such agreement is in force, the minister or ministry responsible for taxes or their authorized representatives.

d) For the avoidance of doubt, the terms "tax provisions" and "taxes" do not include customs duties.

In the Dutch translation:

Artikel 21 Belastingen

1. Behalve als bepaald in dit artikel worden door geen enkele bepaling van dit Verdrag rechten verleend of verplichtingen opgelegd met betrekking tot belastingmaatregelen van de Verdragsluitende Partijen. In geval van onverenigbaarheid van dit artikel met andere bepalingen van dit Verdrag heeft dit artikel, wat de onverenigbaarheid betreft, de voorrang.

2. Artikel 7, derde lid, is van toepassing op andere belastingmaatregelen dan belastingen op inkomen of kapitaal, met dien verstande dat de bepalingen van die artikelen niet van toepassing zijn op:

a. een voordeel dat een Verdragsluitende Partij heeft toegekend overeenkomstig de belastingbepalingen van een verdrag, overeenkomst of regeling als bedoeld in het zesde lid, letter a), onder ii), van dit artikel; of

b. een belastingmaatregel die ten doel heeft de doeltreffende inning van belastingen te waarborgen, behalve indien die maatregel van een Verdragsluitende Partij een willekeurige discriminatie tussen energiegrondstoffen en energieprodukten van een andere Verdragsluitende Partij of een willekeurige beperking van de krachtens de betreffende bepalingen van artikel 7, derde lid, toegekende voordelen inhoudt.

3. Artikel 10, tweede en zevende lid, zijn van toepassing op andere belastingmaatregelen van de Verdragsluitende Partijen dan belastingen op inkomen of kapitaal, met dien verstande dat geen van

deze bepalingen:

a. ertoe strekt dat verplichtingen tot toepassing van het meestbegunstigingsbeginsel worden opgelegd met betrekking tot voordelen die een Verdragsluitende Partij heeft toegekend overeenkomstig de belastingbepalingen van een verdrag, overeenkomst of regeling als bedoeld in het zevende lid, letter a), onder ii), van dit artikel of als uitvloeisel van het lidmaatschap van een regionale organisatie voor economische integratie; of

b. van toepassing is op een belastingmaatregel die ten doel heeft de doeltreffende inning van belastingen te waarborgen, behalve indien de maatregel een willekeurige discriminatie tussen investeerders van de Verdragsluitende Partijen of een willekeurige beperking van de krachtens de investeringsbepalingen van dit Verdrag toegekende voordelen inhoudt.

4. Artikel 29, tweede tot en met zesde lid, is van toepassing op andere belastingmaatregelen dan belastingen op inkomen of kapitaal.

5. a. Artikel 13 is van toepassing op belastingen.

b. Wanneer in het kader van artikel 13 een geschil rijst, voor zover het betrekking heeft op de vraag of een belasting een onteigening vormt, dan wel of een belasting waarvan wordt beweerd dat deze een onteigening vormt, discriminerend is, geldt het volgende:

i. De investeerder of de Verdragsluitende Partij die aanvoert dat er sprake is van onteigening legt het geschil over de vraag of de maatregel een onteigening dan wel discriminerend is, voor aan de bevoegde belastingautoriteiten. Laat de investeerder of de Verdragsluitende Partij dit na, dan leggen de instanties die worden verzocht geschillen te beslechten overeenkomstig artikel 26, tweede lid, letter c), of artikel 27, tweede lid, het geschil voor aan de bevoegde belastingautoriteiten.

ii. De bevoegde belastingautoriteiten streven ernaar om het aldus voorgelegde geschil binnen een periode van zes maanden te regelen. Indien het gaat om een geschil inzake non-discriminatie, passen de bevoegde belastingautoriteiten de bepalingen inzake non- discriminatie van het relevante belastingverdrag toe, of passen zij, indien er geen non- discriminatiebepaling voorkomt in het op de belasting van toepassing zijnde relevante belastingverdrag of indien er geen belastingverdrag tussen de betrokken Verdragsluitende Partijen van kracht is, de non-discriminatiebeginselen overeenkomstig het modelverdrag van de OESO betreffende belastingen op inkomen en kapitaal toe.

iii. De instanties die worden verzocht geschillen te regelen overeenkomstig artikel 26, tweede lid, letter c), of artikel 27, tweede lid, kunnen rekening houden met eventuele conclusies van de bevoegde belastingautoriteiten over de vraag of de belasting een onteigening is. Die instanties houden rekening met eventuele binnen de bij letter b), onder ii), voorgeschreven termijn van zes maanden door de bevoegde belastingautoriteiten getrokken conclusies over de vraag of de belasting discriminerend is. Deze instanties kunnen ook rekening houden met eventuele na het verstrijken van de voorgeschreven periode van zes maanden door de bevoegde belastingautoriteiten getrokken conclusies.

iv. In geen geval mag de betrokkenheid van de bevoegde belastingautoriteiten na het einde van de bij letter b), onder ii), bedoelde periode van zes maanden leiden tot een vertraging van de procedures ingevolge de artikelen 26 en 27.

6. Voor alle duidelijkheid wordt bepaald dat artikel 14 het recht van een Verdragsluitende Partij om een belasting op te leggen of te innen via bronheffing of andere middelen niet beperkt.

7. Voor de toepassing van dit artikel:

a. omvat de term "belastingmaatregel":

i. de bepalingen betreffende belastingen van de interne wetgeving van de Verdragsluitende Partij of van een staatsrechtelijke onderverdeling of een plaatselijke autoriteit ervan; en

ii. de bepalingen betreffende belastingen van verdragen ter voorkoming van dubbele belasting en van internationale overeenkomsten of regelingen waaraan de Verdragsluitende Partij gebonden is.

b. worden als belastingen op het inkomen en het vermogen beschouwd alle belastingen die worden geheven op het gehele inkomen, op het gehele vermogen of op bestanddelen van het inkomen of vermogen, met inbegrip van belastingen op winsten uit de vervreemding van eigendom, onroerend-zaakbelasting, successierechten, belastingen op schenkingen of in wezen soortgelijke belastingen, belastingen op het totaalbedrag van de door ondernemingen betaalde lonen of salarissen, alsmede belastingen op de waardevermeerdering van vermogen.

c. wordt onder "bevoegde belastingautoriteit" verstaan de bevoegde autoriteit overeenkomstig een overeenkomst inzake dubbele belasting tussen de Verdragsluitende Partijen, of, bij ontstentenis van een van kracht zijnde overeenkomst de/het voor belastingen bevoegde minister of ministerie of hun gemachtigde vertegenwoordigers.

d. voor alle duidelijkheid wordt bepaald dat de termen "belastingbepalingen" en "belastingen" geen betrekking hebben op douanerechten.

3.164. Article 21(1) ECT provides that the ECT does not affect the powers of the contracting states to impose taxation measures. Therefore, such measures fall, in principle, outside the substantive scope of the ECT (which is why it is also referred to as a "carve-out"). However, there are exceptions to this rule (so-called "clawbacks"). One of them, which is set out in Article 21(5) ECT, entails that taxation measures may not constitute an expropriation that is contrary to the conditions of Article 13 ECT. In that case, a taxation measure can indeed constitute a violation of the ECT.[197] Article 13 ECT pertains to expropriations and reads as follows in the authentic English text and in the Dutch translation:

Article 13 Expropriation

1. Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:

a) for a purpose which is in the public interest;

[197] With regard to the foregoing, see Hobér, op. cit., p. 357.

b) not discriminatory;

c) carried out under due process of law; and

d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

2. The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).

3. For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.

In the Dutch translation:

Artikel 13 Onteigening

1. Investeringen van investeerders van een Verdragsluitende Partij op het grondgebied van een andere Verdragsluitende Partij mogen niet worden genationaliseerd, onteigend of onderworpen aan maatregelen met een soortgelijk effect als nationalisatie of onteigening (hierna te noemen "onteigening"), behalve wanneer de onteigening:

a. geschiedt in het algemeen belang;

b. niet discriminerend is;

c. geschiedt met inachtneming van een behoorlijke rechtsgang; en

d. gepaard gaat met de betaling van prompte, adequate en doeltreffende compensatie.

Die compensatie is gelijk aan de billijke marktwaarde van de onteigende investering op het tijdstip vlak voordat de onteigening of op handen zijnde onteigening zodanig bekend werd dat de investeringswaarde werd beïnvloed (hierna te noemen: de "datum van de waardebepaling").

Deze billijke marktwaarde wordt op verzoek van de investeerder berekend in een vrij inwisselbare valuta volgens de voor die valuta op de datum van de waardebepaling geldende marktwisselkoers. De compensatie omvat tevens rente over de periode tussen de onteigenings- en de betalingsdatum, welke berekend wordt tegen een commercieel, op marktbasis vastgesteld tarief.

2. De betrokken investeerder heeft recht op onverwijlde toetsing, krachtens het recht van de

Verdragsluitende Partij die de onteigening verricht, van zijn zaak, de waardebepaling van zijn investeringen en de betaling van compensatie overeenkomstig de beginselen neergelegd in het eerste lid, door een gerechtelijke of andere onafhankelijke bevoegde instantie van die Partij.

3. Voor alle duidelijkheid wordt bepaald dat onteigening ook de gevallen omvat waarin een Verdragsluitende Partij de activa onteigent van een vennootschap of onderneming op haar grondgebied waarin een investeerder van een andere Verdragsluitende Partij een investering, ook indien via aandelenbezit, heeft.

3.165. Article 21(5)(b)(i) ECT assigns a role to the tax authorities of the contracting state concerned ("the relevant Competent Tax Authority") in assessing whether the taxation measures taken constitute a prohibited expropriation within the meaning of Article 13 ECT. The investor or contracting state concerned shall refer the issue to the relevant tax authorities. If they fail to do so, the body called upon to settle the dispute (as, in this case, the Tribunal) must refer the question of whether there is a prohibited expropriation within the meaning of Article 13 ECT to the relevant tax authorities. The text of Article 21(5)(b)(i) ECT refers to "shall make a referral", which indicates an obligation on the part the body called upon.[198] This wording does not show that the body has freedom of choice in this respect.[199] However, Article 21(5) ECT does not attach any consequences to a refusal to consult the tax authorities.[200]

3.166. However, Article 25(1) ECT clearly provides that the body that settles the dispute is not bound by the conclusions of the tax authorities. According to Article 25(1)(b)(iii), the authority *"may* take into account" the tax authorities' conclusions regarding the issue whether the tax is an expropriation. As regards the issue whether the tax is discriminatory, the body *"shall* take into account" the conclusions of the tax authorities when forming its opinion, but it does not require these conclusions to be adopted. The final assessment of whether the taxation measure is an expropriation or is discriminatory, is for the body called upon to settle the dispute.[201] Article 21(5)(b)(iv) ECT also provides that the opinion of the tax authorities need not be awaited if it has not yet been received after six months. A referral to the tax authorities may under no circumstances lead to a delay in the dispute resolution, according to this provision. It has been pointed out in the literature that all this indicates is that the role of the tax authorities lies in facilitating the decision-making of the body called upon and that the words "shall make a referral" of Article 21(5)(b)(i) ECT are intended to give the relevant tax authorities the opportunity to give their views, but not to raise additional jurisdiction or admissibility thresholds.[202] Failure to make a referral to the tax authorities cannot lead to the termination or interruption of the dispute resolution.[203]

3.167. It is clear that in this case, even if it had made a referral to the relevant tax authorities, the Tribunal would not have been bound by the findings of those authorities. It follows from the text of Article 21(5)(b)(iii) and (iv) ECT that an arbitral tribunal does not need to await the opinion of the tax

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[198] Cf. the (also authentic) French text of Article 21(5)(b)(i): '(...) les organes appelés à trancher le différend (...) renvoient l'affaire aux autorités fiscales compétentes'.

[199] See Hobér, op. cit., p. 371.

[200] See Hobér, op. cit., p. 373.

[201] See Roe & Happold, op. cit., p. 193.

[202] Decisions in arbitration case law are inconsistent in this respect, see Hobér, op. cit., p. 369 et seq.

[203] Hobér, op. cit., p. 373.

authorities if this leads to a delay in the proceedings. It is therefore unlikely that a referral to the tax authorities would have led to a different decision of the Tribunal. Invoking setting aside on account of a violation of the mandate therefore cannot succeed. The obligation to make a referral to the tax authorities is not so serious or mandatory that arbitrators seriously violate their mandate if they do not comply with said obligation when (as in this case) they consider themselves sufficiently informed. The issue whether Article 21(5) ECT includes a "futility exception"[204] therefore does not need to be discussed separately.

3.168. Ground 5.2.1 completely fails based on the above.

3.169. Ground 5.2.2 is directed against para. 6.3.2 of the final judgment, where the Court of Appeal finds that the Russian Federation did not suffer any disadvantage from the Tribunal's refusal to refer the case to the tax authorities. The ground complains that this reasoning is speculative and incorrect.

3.170. The Court of Appeal held in para. 6.3.2 that the Russian Federation, in itself, rightly pointed out that the referral obligation of Article 21(5) ECT is mandatory for the Tribunal. As follows from the discussion of ground 5.2.1, that obligation is not so compelling that a refusal to comply with that obligation automatically constitutes a serious violation of the mandate. The issue of whether the Russian Federation suffered a disadvantage from the Tribunal's refusal to submit the matter to the Russian tax authorities therefore need not be discussed. Moreover, the complaints put forward in this respect are based on the assumption that a referral to the tax authorities could or should have led to a different decision by the Tribunal. However, as I noted above, the Tribunal would not have been bound by the findings of the tax authorities and would not be obliged to take the conclusions on whether there is an expropriation into account. Therefore, ground 5.2.2 fails.

3.171. Ground 5.2.3 is directed against para. 6.3.3, in which the Court of Appeal held, inter alia, that the information that the Tribunal could have obtained by a referral to the Russian tax authorities would probably not have led to a different decision. According to the ground, this decision is impermissibly speculative, also in light of the Russian Federation's position that the tax authorities would have supported its view.

3.172. As I have already explained, the complaint fails to recognise that Article 21(5) ECT does not require an arbitral tribunal to follow the findings obtained from the tax authorities. Moreover, the Court of Appeal cannot rightly be accused of having rendered a "speculative" decision. As part of the assessment of Article 1065(1)(c) DCCP, the Court of Appeal had to assess whether the Tribunal would have arrived at a different decision. That decision can only come about by speculating on what the Tribunal would have decided if it had had more or different information. For that reason as well, the ground fails.

3.173. Ground 5.2.4 complains about para. 6.3.4, in which the Court of Appeal decided that there was no reason to also refer the dispute to the tax authorities in Cyprus and the UK (where HVY have its registered office). According to the Court of Appeal, it has not been argued that taxation measures taken by Cyprus or the UK constitute an expropriation, while Article 21(5) ECT prescribes that the tax authorities concerned must be consulted in those cases only. With this decision, the Court of Appeal went beyond the ambit of the legal dispute and furthermore decided contrary to Article 21

[204] The ground refers to the Tribunal's finding in para. 1421 of the Final Awards stating that consulting the tax authorities would be 'an exercise in futility'.

ECT, according to the ground.

3.174. It does not follow from Article 21 ECT that referrals must be made to the tax authorities of all the countries involved. After all, Article 21(5)(b)(i) ECT provides that a referral shall be made to the "relevant Competent Tax Authority" or "relevant Competent Tax Authorities". Which authorities are "relevant" is not further defined. In view of the context in which the term is used, it is obvious, as the Court of Appeal held in para. 6.4.3, to interpret "relevant" as "the ability to provide information about the issue as to whether there is a (discriminatory) expropriation". Moreover, it is obvious that it is up to an arbitral tribunal to assess in a specific case which tax authorities are relevant. The background of the referral to "Competent Tax Authorities" (plural) in Article 21 (5)(b)(ii) and (iv) is that the definition of "Competent Tax Authority" in Article 21(7) ECT refers to "a double taxation agreement", i.e. treaties to prevent double taxation. In such cases, it is obvious that both the authorities from the investor's country of establishment and those of the host country are consulted (in order to solve the tax problems between these authorities). It therefore does not follow from Article 21(5) ECT that the tax authorities of all the States concerned should always be consulted, even if they are not considered "relevant" in a specific case. By interpreting and applying Article 21(5) ECT ex officio, the Court of Appeal did not go beyond the ambit of the legal dispute. For the rest, the ground builds on earlier complaints and shares the fate of those complaints. Therefore, ground 5.2.4 fails.

3.175. Ground 5.2.5 complains that the Court of Appeal rejected the Russian Federation's reliance on (an analogy with) the prognosis prohibition originating from Dutch civil procedural law. According to the ground, the Tribunal violated this prognosis prohibition by deciding in advance that consulting the Russian tax authorities would be futile.

3.176. It has not been established that the Tribunal was bound by such a prognosis prohibition. With regard to being bound by the prognosis prohibition, the ground provides no substantiation other than a reference to the obligation of Article 21(5) ECT, but it cannot be inferred from that provision that it contains a prognosis prohibition. Nor does the ground explain this in greater detail. The complaint of the ground fails for that reason.

3.177. Ground 5.2.6 argues that the Supreme Court should refer a question to the ECJ for a preliminary ruling on the correct interpretation of Article 21(5)(b)(i) ECT.

3.178. With reference to what I noted with regard to ground 2.7, I do not consider referring a question to the ECJ for a preliminary ruling on the interpretation of Article 21 ECT necessary for the outcome of the proceedings in cassation with regard to ground 5 either. After all, in the challenged judgment, the Court of Appeal decided in line with the Russian Federation's argument that the Tribunal acted contrary to Article 21(5) ECT. However, the Court of Appeal did not find this violation of the mandate sufficiently serious that the *Yukos Awards* should be set aside. Whether or not the complaints in cassation regarding that decision are successful is not therefore dependent on the interpretation of Article 21(5) ECT but on the question of whether the Court of Appeal's findings in the context of Article 1065(1)(c) DCCP are comprehensible. There is therefore no need to refer questions for a preliminary ruling.

3.179. The conclusion is that ground 5 fails.

Ground 6: the role of the secretary of the Tribunal

3.180. Ground 6 is broken down into two sub-grounds, and pertains, briefly put, to the involvement of the assistant (secretary) to the Tribunal, Valasek, in drafting the arbitral awards. According to the Russian Federation, this involvement violates the principle that arbitrators must personally perform the task assigned to them, as a consequence of which the Tribunal has failed to comply with its mandate (Article 1065(1)(c) DCCP). In addition, Valasek's involvement is said to mean that there effectively was a "fourth arbitrator", as a consequence of which the Tribunal's composition was in violation of the applicable rules (Article 1065(1)(d) DCCP). The Court of Appeal rejected these arguments in paras. 6.6.1-6.6.15.

3.181. Ground 6.1 does not contain any complaints but sketches the background of the complaints and summarises the challenged decision of the Court of Appeal.

Ground 6.2: delegation to Secretary of the Tribunal

3.182. Ground 6.2 comprises three complaints: (i) a complaint (at 6.2.1) about the Court's rejection of the Russian Federation's offer of witness evidence in respect of Valasek's contributions to the decision-making process, (ii) a complaint (at 6.2.2) that the Court of Appeal's decision is contrary to Article 1065(1)(b) DCCP in conjunction with Article 1026(1) DCCP, which provide that an arbitral award may not be rendered by an even number of arbitrators, and (iii) a complaint (at 6.2.3) that the Court of Appeal failed to recognise various (unwritten) procedural rules in its decision.

Introductory remarks

3.183. The ground raises the question of the extent to which the arbitrators are able to delegate (parts of) their work to a secretary or assistant without, in the process, neglecting the basic principle that they are required to perform their duties personally [205], and without the secretary serving, in fact, as a "fourth arbitrator". In concrete terms, the question arises as to the extent to which a secretary is allowed to draft the decisive or supporting parts of the judgment.

3.184. There are different views on this issue. [206] Some authors have pointed out that there is a risk that the secretary can end up being involved in the arbitral tribunal's decision-making in an impermissible manner if this is not carefully monitored. [207] Nevertheless. Born concludes:

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[205] See Snijders, Nederlands arbitragerecht, 2018, no. 4.14.2; Gary B. Born, International Commercial Arbitration. Vol. II: International Arbitral Procedures, Alphen aan den Rijn: Kluwer Law International 2014, p. 1999; M.P.J. Smakman, De rol van de secretaris van het scheidsgerecht belicht, TvA 2007/2, at 4: Constantine Partasides, The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration, Arbitration International 2002, pp. 147-163.

[206] In addition to the literature referred to below, the initiating document (no. 212, p. 109) refers to the contribution of F.J.M. de Ly, Kroniek internationale arbitrage, TvA 2012/84. As opposed to the ground, I do not read there that De Ly is of the opinion that secretaries are not allowed to draft judgments. Although De Ly writes that "Decisions and other essential duties may still not be delegated to a secretary and memoranda written by secretaries may not lead to arbitrators not personally considering the case and not writing awards", this describes the practice followed under the (new) ICC memorandum of 1 August 2012 for the appointment, duties and remuneration of administrative secretaries in the context of ICC arbitration.

[207] Born, op. cit., p. 2000; Partasides, op. cit., p. 148 et seq.

"the better view is that there is no per se prohibition on secretaries or junior lawyers performing such tasks, provided that the members of the tribunal carefully review and make appropriate use of any preparatory work." [208]

Peters concurs with this, and is of the opinion that it is not a problem if secretaries write (parts of) an arbitral award, provided this is done in accordance with the instructions of and under the responsibility of the arbitral tribunal, and that the latter does not adopt the texts indiscriminately. [209] Smakman took a similar position. [210] Sanders is of the opinion that "the reasoning of the award or parts thereof (...) is solely the task of the arbitral tribunal, and it does so in its own words." [211] Von Hombracht-Brinkman distinguishes between cases in which the arbitral tribunal consists (partly) of lawyers and cases in which that is not the case, and considers the drafting of an award by a secretary to be acceptable only in the latter case. [212] Partasides thinks it undesirable (but not unacceptable, per se) that the draft decision be left to a secretary, but also writes that this is strongly dependent on the circumstances. Moreover, decisions in this regard are up to the arbitrator. [213] Polkinghorne and Rosenberg are outspoken: in their opinion, it is impermissible for the secretary to write substantive sections of the judgment. [214]

3.185. There is no generally accepted rule or practice to imply that it is unacceptable in all cases for the drafting of substantive portions of an arbitral award to be assigned to a secretary. [215] For that, it also has to be established in this respect that lines have been crossed ensuing from the principle of the proper performance of the duties of arbitrators. That could be the case, for example, if it turns out that the arbitral tribunal has adopted texts written by the secretary without further ado, or if the secretary was improperly involved in the decision-making. The burden of proof for such facts lies with the party that invokes the alleged violation of mandate on the part of the arbitrators, as is the case when relying on any of the grounds for setting aside in Article 1065 DCCP. [216] It will not be easy to prove such facts, although this is justified by the fact that the arbitrators are facing serious accusations (neglecting their individual duties), and by the restraint that must generally be observed when relying on Article 1065(1)(c) DCCP.

3.186. The lack of a generally accepted rule on this matter explains why some arbitration regulations have specific rules in this regard. The Court of Appeal held - unchallenged in cassation - that the applicable UNCITRAL Rules in this case do not contain any provisions on this point (para. 6.6.14.1),

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[208] Born, op. cit., p. 2000. In a similar sense, Peters, op. cit., at 13.

[209] See Peters' annotation to the Court of Appeal's final judgment, *JOR* 2020/16, at point 13.

[210] Smakman, op. cit., at 4.

[211] P. Sanders, De secretaris van het scheidsgerecht, TvA 2007/29, at 2.

[212] F.D. von Hombracht-Brinkman, Er zijn secretarissen en secretarissen! Response to *prof. mr.* P. Sanders' article, 'De secretaris van het scheidsgerecht', TvA 2008/17.

[213] Partasides, op. cit., p. 158.

[214] Michael Polkinghorne & Charles B. Rosenberg, The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard, Dispute Resolution International. Vol. 8, 2014, pp. 107-128. In their contribution, these authors call attention to the role of the secretary in various arbitration regulations, and make a number of recommendations ('standards'). One of those standards entails that the secretary may not prepare "substantive portions of awards" and may not be assigned any "decision-making functions" (p. 127).

[215] The initiating document also refers to a number of articles that have been submitted as exhibits, from which, in my opinion, no generally accepted interpretation can be inferred. Some contributions (exhibits RF-396 and RF-405) discuss specific arbitration regulations, whereas the authors of other contributions defend their own views while acknowledging that differing views do exist (Exhibits RF-400, RF-403, RF-404).

[216] Supreme Court 23 April 2010, ECLI:NL:HR:2010:BK8097, *NJ* 2011/475, annotated by H.J. Snijders, para. 3.5.3.

and that the extent to which the arbitrators delegate certain duties to their secretary is therefore left to their discretion, while respecting the personal fulfilment of their tasks as a basic principle. According to the Court of Appeal, it has not been demonstrated that the arbitrators violated this basic principle, and that even if Valasek did provide drafts of the supporting parts of the award, this does not necessarily imply that he himself took decisions as well (para. 6.6.14.1, last sentences). According to the Court of Appeal, it has not been demonstrated that the taking of substantive decisions relevant to the arbitral awards was delegated to Valasek, or that Valasek had ultimate responsibility for (certain parts of) the awards. Therefore, according to the Court of Appeal, there is no question of a violation of mandate within the meaning of Article 1065(1)(c) DCCP.

3.187. After this explanation, I will discuss the three complaints in the ground.

Ground 6.2.1: rejection of Russian Federation's tender of evidence

3.188. Ground 6.2.1 complains about para. 6.6.5, in which the Court of Appeal disregarded the Russian Federation's tender of evidence. The Russian Federation offered to have Valasek testify about "the hours he claimed and his contributions to the Tribunal's decision-making process' and furthermore to have two witness experts testify. [217]

3.189. The Court of Appeal rejected this tender of evidence because it assumed for the sake of argument that Valasek "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". Therefore, the tender of evidence was no longer at stake. The complaint apparently intends to argue that the Court of Appeal should nonetheless have allowed the tender of evidence because of the possibility that Valasek had also influenced the ultimate decisions of the Tribunal by providing said texts. The ground in fact complains that the Court of Appeal interpreted the Russian Federation's tender of evidence too narrowly. Such a complaint must fail, however, as interpreting the procedural documents is a matter reserved for the Court of Appeal. [218]

Ground 6.2.2: even number of arbitrators?

3.190. Ground 6.2.2 complains that in para. 6.6.13, the Court of Appeal rejected the reliance on Article 1065(1)(b) DCCP in conjunction with Article 1026(1) DCCP. That reliance entails that, as a result of Valasek's involvement, the Yukos Awards were, in fact, rendered not by three but by four arbitrators, which is a violation of the aforementioned provisions. The Court of Appeal held that the Yukos Awards were signed by the three appointed arbitrators, thus fulfilling the requirements under those provisions. The Court of Appeal therefore interpreted those provisions too narrowly, given that they are also meant to prevent a fourth person from, in fact, serving as arbitrator, according to the ground.

3.191. Article 1026(1) DCCP provides that the arbitral tribunal must consist of an odd number of

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[217] Defence on Appeal no. 991.

[218] Asser Procesrecht/Korthals Altes & Groen 7 2015/157; A.E.H. van der Voort Maarschalk, De toetsing in cassatie, in B.T.M. van der Wiel (ed.), Cassatie, Deventer: Kluwer 2019, no. 68.

arbitrators. Article 1065(1)(b) DCCP then provides that an arbitral award can be set aside if the arbitral tribunal is not validly composed. The ground argues that Article 1026(1) DCCP not only sets the formal requirement that the arbitral tribunal must consist of an odd number of arbitrators, but also aims to prevent a fourth person from being involved in the decision-making. There are no indications in the literature and legislative history that this provision should indeed be understood this way.[219] In principle, it can be assumed that it can be deduced from the signing of an arbitral award which arbitrators rendered the award, as is also evident from the signing of a court decision in government case law which judges rendered that decision.[220] If the signing shows that the award was rendered by an odd number of arbitrators, the requirement of Article 1026(1) DCCP has thus been satisfied. All this obviously does not set aside that it is undesirable for a fourth person to act as a *de facto* arbitrator by exerting influence on the decision in the arbitration proceedings. The Court of Appeal did not fail to recognise this, but evidently investigated in para. 6.6.14 et seq. whether the arbitrators delegated part of their personal mandate to Valasek. The complaint fails due to the above.

Ground 6.2.3: role of the secretary

3.192. Ground 6.2.3 raises five complaints (referred to by the letters a through e). I will briefly discuss these complaints.

3.193. The first complaint (at a) is directed against the rejection by the Court of Appeal of the Russian Federation's argument that there is a (unwritten) rule entailing that a secretary is not allowed to write substantive parts of an arbitral award. According to the complaint, the Court of Appeal failed to recognise that such substantive tasks may only be delegated to a secretary after the parties' express consent. The second complaint (at b) is directed against the Court of Appeal's decision in para. 6.6.14.2 that by not "fully" informing the parties of Valasek's drafting task, the Tribunal did not seriously violate its mandate.

3.194. The two complaints can be discussed jointly. As I have already mentioned, there is no unwritten rule. In so far as both complaints argue that the Court of Appeal failed to recognise the importance of transparency by the Tribunal in delegating substantive tasks, the Court of Appeal acknowledged in para. 6.6.14.2 that the Tribunal should have fully informed the parties on this point, but decided that this violation of the mandate was not serious enough to justify setting aside the arbitral awards. The two complaints fail for this reason. For the rest, the Court of Appeal's decision is not incomprehensible.

3.195. The third complaint (at c) argues that the Court of Appeal wrongly decided in para. 6.6.14.1 that only a specific provision in the applicable arbitration rules can preclude arbitrators from delegating substantive tasks to an assistant.

3.196. This complaint is based on an incorrect interpretation of para. 6.6.14.1, as the Court of Appeal did not find that the authority of arbitrators to delegate tasks is limited solely by the arbitration rules. According to the Court of Appeal, in the absence of any concrete party agreements and as long as

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[219] See Sanders, *Het Nederlandse arbitragerecht.* op. cit., p. 60; Van den Berg et al., *Arbitragerecht,* op. cit., p. 46; Snijders, *Nederlands arbitragerecht,* op. cit., nos. 4.4.1 and 9.3.3; G.J. Meijer et al., Parliamentary History of the Arbitration Act 2015/III.8 3.

[220] Cf., for example. Supreme Court 18 November 2016, *NJ* 2017/202, annotated by H.B. Krans and P. van Schilfgaarde *(Meavita),* para. 3.2.5.

the substantive decisions are taken by the arbitrators themselves, it is left to the Tribunal's discretion to what extent an assistant or secretary is used for the drafting of the arbitral award. The arbitrators must therefore always respect the principle of personal performance of one's duties. The Court of Appeal evidently investigated whether the actions taken conflict with this principle, and answered that question in the negative. The complaint fails for that reason.

3.197. The fourth complaint (at d) is directed against para. 6.6.14.1 and complains about the decision that there can only be a (sufficiently serious) violation of the mandate if the arbitrators entirely left the taking of substantive decisions or the ultimate responsibility for the award to their assistant.

3.198. In light of the positions in the literature described above, the Court of Appeal's decision is neither incorrect nor incomprehensible, so that the complaint fails.

3.199. The fifth complaint (at e) entails that the principle of personal performance of one's duties would be reduced to nil if arbitrators were able to fully delegate the writing of their awards to a secretary, with the proof that they themselves performed their duties consisting only of the fact that they signed the award.

3.200. The complaint builds on the previous complaints. The fact that the arbitrators signed the award can serve as proof that the arbitral tribunal was properly composed, but it does not automatically prove that the principle of personal performance of one's duties was respected. That principle continues to apply in full, on the understanding that it must be established that it has not been complied with in a specific case. As follows from my discussion of this ground, there is no violation of the principle of personal performance of one's duties merely because a secretary wrote substantive parts of the arbitral award. All complaints in ground 6.2.3 fail for that reason.

3.201. The conclusion is that ground 6 fails.

Ground 7: lack of reasoning?

3.202. Ground 7 is divided into two sub-grounds and is directed against paras. 8.4.13 and 8.4.16 of the final judgment. These paragraphs pertain to the argument that the arbitral awards lack sound reasoning where they address the Russian Federation's statement that Yukos' Mordovian companies were shams. The Tribunal concluded that there was no evidence for this in 'the massive record'. According to the Court of Appeal, with this the Tribunal referred to the record that was the subject of the tax proceedings conducted by Yukos in Russia (para. 8.4.13). According to the ground, this 'attempt at reparation' is contrary to Articles 19 and 24 DCCP, and moreover incomprehensible.

Introductory remarks

3.203. Before I discuss the complaints, I note the following (also see the Court of Appeal's unchallenged assumption in para. 8.1.2). The Russian Federation invoked the setting-aside ground that is included in Article 1065(1)(d) DCCP. Setting aside on this ground is only possible in the absence of reasoning, and is thus not possible in cases of inadequate reasoning, according to the Supreme Court.[221] After

all, examining the adequacy of the reasoning of the arbitral award can boil down to a substantive reassessment of that award, for which the court does not have jurisdiction. There may, however, be cases in which, while reasons have been stated, no well-founded explanation for the relevant decision can be identified.[222] Setting aside on the basis of Article 1065(1)(d) DCCP is then justified, even if the court must exercise this power with reticence, in the sense that it should only intervene in arbitral decisions in clear-cut cases.[223] Setting aside on the basis of Article 1065(1)(d) DCCP is therefore subject to a high threshold.

3.204. Briefly put, the context of the complaints in ground 7 is as follows (for a more detailed representation, see para. 8.4.2 et seq. of the final judgment). In the arbitration proceedings, HVY argued that the additional tax assessment imposed on Yukos had been fabricated and was basically an expropriation. The Russian Federation argued that HVY could have known that the way Yukos used tax exemption in low-tax regions (including Mordovia) was inconsistent with the applicable bad faith taxpayer doctrine. The Tribunal assessed whether evidence had been provided that there was bad faith. The Tribunal subsequently decided that "the massive record" contains no evidence of the statement that Yukos' Mordovian companies were shams (sub-chapter 639 *Final Awards).* In the setting-aside proceedings, the Russian Federation argued that this decision was insufficiently substantiated because such evidence had actually been submitted in the arbitration proceedings. The Court of Appeal rejected this argument because, according to the Court of Appeal, it is clear that with "the massive record", the Tribunal referred to the record at issue in the tax proceedings conducted by Yukos in Russia (para. 8.4.13). The Court of Appeal further substantiated this in paras. 8.4.1.4-8.4.16 by pointing out that the Tribunal's decision focusses on the question of whether there was due process in the Russian tax proceedings.

3.205. Ground 7.1 contains an introduction and no complaints. Ground 7.2 is divided into four sub-grounds with complaints.

Ground 7.2.1: incompatibility with Articles 19 and 24 DCCP?

3.206. According to ground 7.2.1, the Court of Appeal's decision is incompatible with Articles 24 and 19 DCCP, because the Court of Appeal's interpretation that "the massive record" refers to the tax record and not to the arbitration file was not defended by either party.

3.207. This complaint fails. After all, the Court of Appeal had to address the question of how the relevant decision of the Tribunal should be understood. That is why the Court of Appeal was also free to interpret this decision differently to how it was defended by the parties. As such, that defended interpretation is not a fact, but is precisely the issue on which a judgment is requested from the Court of Appeal. Consequently, there is no prohibited supplement to the factual basis (Article 24 DCCP) or a violation of the principle of the right to be heard (Article 19 DCCP).

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[221] Supreme Court 25 February 2000, ECLI:NL:HR:2000:AA4947, *NJ* 2000/508, annotated by H.J. Snijders, para. 3.3.

[222] Supreme Court 9 January 2004, ECLI:NL:HR:AK8380, *NJ* 2005/190, annotated by H.J. Snijders, para. 3.5.2. See also Advocate General Bakels' opinion prior to the judgment of the Supreme Court of 25 February 2000 referred to in the previous footnote, in which he argues that a lack of reasoning should also be understood to Include 'reasoning that is so flawed that it can be equated with a complete absence of reasoning in terms of information and power of persuasion'.

[223] Supreme Court 22 December 2006, ECLI:NL:2006:AZ1593, *NJ* 2008/4, annotated by H.J. Snijders, para. 3.3.

Ground 7.2.2: evidence in tax proceedings

3.208. Ground 7.2.2 complains about the Court of Appeal's finding at the end of para. 8.4.13 that the Russian Federation did not argue that the evidence it submitted in the arbitration proceedings had already been submitted in the tax proceedings. According to the ground, there was no reason for the Russian Federation to argue this, because it is an "obvious fact". Furthermore, according to the ground, it was clear that various supporting documents submitted in the arbitration proceedings originated from the tax proceedings.

3.209. The findings challenged by the ground build on the rejection by the Court of Appeal of the Russian Federation's argument that evidence of bad faith on the part of Yukos/HVY had been provided in the arbitration proceedings. In line with this, the Court of Appeal decided that said supporting documents were irrelevant, as the issue was whether they had been submitted in the tax proceedings, which the Russian Federation did not assert. Without the Russian Federation's statements in this respect, the Court of Appeal was not required to independently investigate whether certain supporting documents had also been submitted in the tax proceedings. If the Court of Appeal had done so, the Court of Appeal would have gone beyond the ambit of the legal dispute and, moreover, supplemented the factual basis by establishing facts itself and taking them into account. The complaint fails for this reason.

Ground 7.2.3: significance of tax record

3.210. Ground 7.2.3 argues that on points other than the Mordovian sham companies (namely, the use of sham companies in Lesnoy and Trekghomy), the Tribunal concurred with the audit reports and decisions of the Russian tax authorities and did not attach any significance to the tax record, as such. According to the ground, the Tribunal also did not have the Russian tax records. Moreover, there are several tax records, so that there is no single 'massive record' (singular). That is why the Court of Appeal's interpretation of this decision is incomprehensible, according to the complaint.

3.211. Even after repeated reading of the ground it is still unclear to me what the ground wants to argue. In so far as the ground intends to argue that the Court of Appeal failed to recognise that the Tribunal's decision is incomprehensible and therefore does not meet the requirements of Article 1065(1)(d) DCCP, the complaint fails because this argument was not raised at the fact-finding instances (after all, it was argued at the time that the lack of reasoning was that evidence had actually been provided in the arbitration proceedings). In so far as the ground intends to argue that the Court of Appeal's interpretation in para. 8.4.13 is illogical, because with 'the massive record' Tribunal could not refer to the tax record, this complaint also fails because these reasons were not put forward at the fact-finding instances (after all, a different argument was put forward at the time). Furthermore, the Court of Appeal extensively substantiated its interpretation in paras. 8.4.14-8.4.16 with arguments. These findings are unchallenged.

3.212. Lastly, ground 7.2.4 is directed against para. 8.4.16. This ground assumes that in that finding, the Court of Appeal gave an alternative reasoning for its rejection of the reliance on Article 1065(1)(e) DCCP, 'brushing aside' its earlier rejection (para. 8.4.13 et seq.) in the process.

3.213. The ground fails to recognise that the Court of Appeal does not provide "alternative" reasoning in the challenged finding, but superfluously finds that even if the Russian Federation's interpretation of sub-chapter 639 of the *Final Awards* is correct, this does not affect the Tribunal's ultimate conclusion. That this is a superfluous finding is shown by the fact that in para. 8.4.13, the Court of Appeal explicitly based itself on a different interpretation of the Tribunal's decision. The complaints fail for this reason.

3.214. It follows from the above that the complaints in ground 7 were presented in vain.

Ground 8: catch-all ground for cassation

3.215. Ground 8 of the grounds for cassation contains a catch-all ground that builds on grounds 1 through 7. The ground argues that if one or more of grounds 1 through 7 succeed, the damages awarded by the Tribunal to HVY and upheld by the Court of Appeal cannot be upheld.

3.216. As grounds 1 through 7 fail, this catch-all ground does not need to be discussed.

Conclusion regarding the principal appeal

3.217. The conclusion is that the principal appeal must be rejected.

4. Discussion of the conditional cross-appeal in cassation

4.1. HVY lodged a conditional cross-appeal in cassation against both the interim judgment and the final judgment. The cross-appeal in cassation contains three grounds, all of which were raised on condition that one or several of the Russian Federation's complaints in principal appeal were successful. As the principal appeal in cassation fails, the conditional cross-appeal in cassation does not need to be discussed.

5. Conclusion

The opinion is that the principal appeal in cassation must be rejected.