**UNITED STATES DISTRICT COURT**
**DISTRICT OF COLUMBIA**

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| HULLEY ENTERPRISES LTD., YUKOS UNIVERSAL LTD., AND VETERAN PETROLEUM LTD.,<br><br>*Petitioners*,<br><br>v.<br><br>THE RUSSIAN FEDERATION,<br><br>*Respondent*. | Case No. 1:14-cv-01996-BAH |

**SECOND DECLARATION OF SIR NICHOLAS FORWOOD QC**

I, SIR NICHOLAS FORWOOD QC, hereby declare as follows:

1. At the request of the Russian Federation's U.S. counsel, I respectfully submit this Second Declaration regarding matters of EU law and the practice of the EU Court of Justice.[1]

2. This Second Declaration addresses certain mischaracterisations in the Opposition (ECF No. 181) submitted by Hulley Enterprises Limited, Veteran Petroleum Limited, and Yukos Universal Limited (together, "HVY") and the Witness Statement (ECF No. 181-43) submitted in support by Mr. Tobias Cohen Jehoram. I also elaborate further on several issues raised by HVY concerning the potential referral to the EU Court of Justice in the present case. In particular, I address the following topics:

(i) **Duration of the Proceedings:** The likely duration of the proceedings in this matter is necessarily dependent upon whether referral is made to the EU Court of Justice. In this regard, the doctrines of *acte clair* and *acte éclairé* provide a screening

[1] My relevant qualifications are set forth in my First Declaration and in Annex A thereto. First Declaration of Sir Nicholas Forwood QC [hereinafter Forwood Decl.] ¶¶ 2-4 (ECF No. 180-9), Annex A (ECF No. 180-10).

mechanism by which frivolous or particularly meritless arguments are removed from consideration before a referral to the EU Court of Justice is made or accepted under Article 267 of the Treaty on the Functioning of the European Union ("TFEU"). Once referred, if the EU Court of Justice considers the answer to those questions to be obvious, it may apply an abridged procedure to provide its answers, which serves as a further screening mechanism against frivolous arguments.

(ii) ***Moldova v. Komstroy*:** The proceedings in *Moldova v. Komstroy* (EU Court of Justice, Case No. C-741/19), which I referenced briefly in my First Declaration,[2] remain ongoing, as the Paris Court of Appeal has referred questions concerning the interpretation of Article 1(6) of the Energy Charter Treaty ("ECT") to the EU Court of Justice. A hearing has been set for the morning of September 15, 2020, before the Grand Chamber of the EU Court of Justice.

(iii) **The EU's Interest in the Interpretation of the ECT:** The EU Institutions (*e.g.*, the EU Council, EU Parliament, and EU Commission) and EU Member States recently have demonstrated an increased level of interest in how foreign courts (including the courts of the United States) interpret the ECT, particularly since 2017. Indeed, the EU has submitted a substantial number of amicus briefs to U.S. courts in cases involving the interpretation of the ECT since 2019, and has been significantly involved in the on-going ECT modernisation process.

(iv) **Questions of EU Law on Corruption and Money Laundering:** EU law requires the annulment of arbitral awards issued in violation of rules of EU public policy. This category includes *inter alia* the prohibitions of "particularly serious crime with a cross-border dimension" such as corruption and money laundering, as enumerated in Article 83(1) TFEU. Moreover, the concepts of "remoteness" and "separateness" in the context of corruption and money laundering constitute legal questions capable of interpretation by the EU Court of Justice.

## I. THE DOCTRINES OF *ACTE CLAIR* AND *ACTE ÉCLAIRÉ* AND OTHER PROTECTIONS WITH RESPECT TO REFERRALS TO THE EU COURT OF JUSTICE

3. HVY assert that a referral by the Dutch Supreme Court to the EU Court of Justice under Article 267 TFEU may extend Case No. 20/01595 by up to five years based upon what HVY have attempted to characterise as allegedly frivolous challenges raised by the Russian Federation.[3] The scenario described by HVY, however, is legally impossible due to protections in place both at the national court level and at the level of the EU Court of Justice. These

[2] Forwood Decl. ¶ 18 n. 27 (ECF No. 180-9).

[3] Pet'rs' Opp. at 1, 11 (ECF No. 181).

protections include the legal doctrines of *acte clair* and *acte éclairé*, as explained below.

4. The doctrines of *acte clair* and *acte éclairé* act as screening mechanisms by the national courts to prevent the EU Court of Justice from hearing any referral on questions that would be genuinely frivolous as a matter of EU law. These doctrines thus serve to prevent any potentially time-consuming referral process where none is warranted. Within the EU legal system, the doctrines of *acte clair* and *acte éclairé* may be applied by the courts of the EU Member States to refuse to make any referral to the EU Court of Justice.

5. Specifically, the doctrine of *acte clair* provides a judicial exception to the explicit requirement in Article 267(3) TFEU that all final courts must refer to the EU Court of Justice any question of EU law that is necessary for the determination of the case.[4] In effect, a question is only to be regarded as *acte clair* if the correct interpretation of the rule of law in question "admits of no reasonable doubt."[5] The doctrine of *acte éclairé* similarly provides that a final court need not refer a question of EU law to the EU Court of Justice under Article 267 TFEU if there already exists well-established case law of the EU Court of Justice on the issue that clearly indicates the correct answer to the question.[6] The decision by a national court make a referral

[4] *See, e.g.*, Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, ECLI:EU:C:1982:335 ¶ 16 ("[T]he correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved."); *see also* Court of Justice of the European Union, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 2019 O.J. (C 380) 1 [hereinafter EU Ct. of Just. Recommendations] ¶ 6 (stating that Member State Courts under a mandatory referral obligation are obligated to seek a preliminary ruling under Article 267 TFEU "unless the correct interpretation of the rule of law in question admits of no reasonable doubt.").

[5] EU Ct. of Just. Recommendations ¶ 6.

[6] *See, e.g.*, Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, ECLI:EU:C:1982:335 ¶¶ 13-14; *see also* EU Ct. of Just. Recommendations ¶ 6 (stating that Member State Courts under a mandatory referral obligation are obligated to seek a preliminary ruling under Article 267 TFEU "unless there is already well-established case-law on the point . . .").

under Article 267 TFEU —such as the 2017 order[7] by the Paris Court of Appeal proposing to make a referral in the parallel French litigation, exhibited hereto as Annex C—thus can be said to reflect the national court's assessment that the litigants' arguments (at a minimum) do have objective merit and are not frivolous as a matter of EU law.

6. In their declarations, Mr. Rob Meijer and Mr. Cohen Jehoram state that the Dutch Supreme Court will decide whether to make the referral under Article 267 TFEU by rendering an interim judgment in approximately September 2021.[8] Accordingly, if the Dutch Supreme Court did consider the issues of EU Law raised by the Russian Federation to be frivolous as a matter of law under the doctrines of *acte clair* and *acte éclairé* (which I consider to be highly unlikely in the present case),[9] the Dutch Supreme Court would make this assessment in less than 14 months' time.

7. The EU Court of Justice maintains an additional screening mechanism at its disposal. If the Dutch Supreme Court, or any other court of an EU Member State, makes a referral to the EU Court of Justice, and the EU Court of Justice considers that the answer to the questions posed are obvious, it may – and regularly does – use an abridged procedure to answer the questions, without even hearing the parties on those questions. As the EU Court of Justice has explained:

> In some cases, however, the Court may find it necessary to rule on those questions without an oral part of the procedure, or even without seeking the written observations of the interested persons referred to in Article 23 of the Statute. That is the case, in particular, when the question referred for a preliminary ruling is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case-law or admits of no

[7] *See Russian Fed. v. Veteran Petrol. Ltd., Hulley Enter. Ltd., and Yukos Universal Ltd.*, Court of Appeal of Paris, Case Nos. 15/11664, 15/11666, and 15/11668, Judgment (June 27, 2017), Annex C.

[8] Jehoram Witness Statement Ex. F (ECF No. 181-49); Declaration of Rob S. Meijer ¶ 25 (ECF No. 180-6).

[9] Forwood Decl. Annex B (ECF No. 180-11) (listing proposed questions for referral to the EU Court of Justice).

> reasonable doubt. In such cases, the Court will, on the basis of Article 99 of its Rules of Procedure, rule expeditiously on the question put, by a reasoned order which has the same scope and the same binding force as a judgment.[10]

8. By approximately the end of 2021, therefore, the Dutch Supreme Court and the EU Court of Justice both will have been presented with opportunities to reject any frivolous arguments under the doctrines of *acte clair* or *acte éclairé*, or through the use of the abridged procedure. Accordingly, if HVY in fact were correct that the challenges raised by the Russian Federation to the Dutch Supreme Court are frivolous, then the proceedings would last only a little over one year (and not five years). On the other hand, if the alternative scenario raised by HVY is correct, such that the proceedings before the EU Court of Justice last an additional 16 to 24 months,[11] then this timing consequence necessarily means that the challenges raised by the Russian Federation to the Dutch Supreme Court necessarily are not frivolous.

9. In Annex B to my First Declaration, I included a proposed list of questions for referral by the Dutch Supreme Court to the EU Court of Justice in this case.[12] Each question presents a substantial question on the interpretation of (1) the ECT, which, as I previously have explained,[13] is a mixed agreement to which the EU and most EU Member States are parties; or (2) the interpretation of EU public policy. None of these questions would be subject to rejection under the doctrines of *acte clair* or *acte éclairé*.

## II. THE ON-GOING PROCEEDINGS IN *MOLDOVA V. KOMSTROY*

10. In this section, I provide an update regarding the on-going proceedings in *Republic of Moldova v. Komstroy* before the EU Court of Justice (Case No. C-741/19), which I

[10] EU Ct. of Just. Recommendations ¶ 31.

[11] *See* Jehoram Witness Statement ¶ 92 (ECF No. 181-43); Pet'rs' Opp. at 11 (ECF No. 181).

[12] Forwood Decl. Annex B (ECF No. 180-11).

[13] Forwood Decl. ¶¶ 13-14 (ECF No. 180-9).

briefly mentioned in my First Declaration.[14]

11. On 23 October 2013, an arbitral tribunal seated in Paris rendered an arbitral award in the *Komstroy* case against Moldova under the ECT.[15] Moldova subsequently challenged the award in annulment proceedings before the French courts. Although the award was set aside by the Paris Court of Appeal in 2016,[16] that decision then was reversed in 2018 by the French Court of Cassation, which remanded the case to the Paris Court of Appeal for additional proceedings.[17] In September 2019, following the remand from the French Court of Cassation, the Paris Court of Appeal referred certain questions arising out of the *Komstroy* case to the EU Court of Justice under Article 267 TFEU.[18]

12. At present, the *Komstroy* case is pending before the EU Court of Justice. In Annex D hereto, I attach the list of questions referred by the Paris Court of Appeal to the EU Court of Justice for a preliminary ruling under Article 267 TFEU.[19] As set forth in this record, the EU Court of Justice will be faced with deciding, among other issues, whether a claimant may proceed to arbitration under the ECT where the claimant's purported investment "did not involve any contribution on the part of the investor in the host State."[20]

13. I further attach as Annex E hereto an extract of the EU Court of Justice register (*i.e.*, equivalent to its "docket"), which shows submissions made to the Court in the *Komstroy*

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[14] *Id.* ¶ 18 n.27.

[15] *Energoalians TOB v. Republic of Moldova*, UNCITRAL, Arbitral Award (Oct. 23, 2013).

[16] *Republic of Moldova v. Komstroy*, Court of Appeal of Paris, Case No. 13/22531, Judgment (Apr. 12, 2016).

[17] *Republic of Moldova v. Komstroy*, French Court of Cassation, Case No. 16-16568, ECLI:FR:CCASS:2018:C100352, Judgment (Mar. 28, 2018).

[18] *Republic of Moldova v. Komstroy*, Court of Appeal of Paris, Case No. 18/14721, Judgment (Sep. 24, 2019).

[19] Case C-741/19, *Republic of Moldova v. Komstroy*, Request For a Preliminary Ruling From the Cour d'Appel de Paris (France) lodged on 8 Oct. 2019, 2019 O.J. (C 413) 34, Annex D.

[20] *Id.*

case.[21] Although the written pleadings submitted to the EU Court of Justice are not publicly available, the registry shows that the EU Commission and three EU Member States all have made written submissions to the Court.

14. In addition, I recently have been informed by the Registry of the EU Court of Justice that an oral hearing in the *Komstroy* case now has been scheduled for 15 September 2020. The hearing will take place before the Grand Chamber of the Court, which comprises fifteen of the twenty-seven Judges who sit on the EU Court of Justice (rather than the usual five- or three-judge panel). Hearings before the Grand Chamber are held only when an EU Member State or an EU Institution so requests, or in particularly difficult or important cases.[22]

15. Because the ruling of the EU Court of Justice will be binding on the French courts (and all courts of EU Member States), a ruling in favour of Moldova may ultimately lead to the successful annulment of the *Komstroy* award in the French litigation.

## III. THE EU INSTITUTIONS' INCREASED LEVEL OF INTEREST IN THE INTERPRETATION OF THE ECT SINCE 2017

16. HVY assert that the principle of international comity is not relevant with respect to the Motion to Stay submitted by the Russian Federation in the U.S. litigation.[23] In this section, I explain that the EU Institutions have taken the opposite view, including in numerous amicus briefs submitted to U.S. courts with respect to the interpretation of the ECT. Indeed, since 2017, the EU Institutions have shown that the interpretation of the ECT is a matter of significant interest and institutional priority for the EU, including as regards non-EU courts'

[21] Registry, Case C-741/19, European Court of Justice, Annex E.

[22] *See* TFEU, Protocol No. 3 on the Statute of the Court of Justice of the European Union, 2012 O.J. (C 326) 210 arts. 16, 50; Rules of Procedure of the Court of Justice, 2012 O.J. (L 265) 1, as most recently amended by 2019 O.J. (L 316) 103 art. 60.1.

[23] Pet'rs' Opp. at 34-37 (ECF No. 181).

interpretation of the ECT's provisions on investor-State dispute settlement (ISDS).

17. Starting around 2012, several EU Member States became the subjects of a surge of ISDS claims under the ECT. Spain and Italy, for example, had never previously been subject to any publicly known ECT claims since the ECT first entered into force in the 1990s. In the short period from 2012 to 2019, however, Spain was named as a respondent in 47 ISDS claims under the ECT, and from 2014 to 2016 Italy was named as a respondent in 11 ISDS claims under the ECT.[24] Altogether, this total of 58 claims constitutes nearly half of all ISDS claims brought under the ECT in its 26-year history.[25] In response to this surge in ISDS claims, Italy became the first EU Member State to withdraw from the ECT, effective 1 January 2016.[26]

18. These events brought about a sea change in the relationship between the EU and the ECT. The EU Institutions have become increasingly vocal with respect to how the ECT should be interpreted. At the end of 2017, for example, the Energy Charter Conference convened in Brussels to initiate a new phase of "modernisation" focused on reforming the substantive and procedural aspects of the ECT, including especially the ISDS provisions.[27] As the Conference expressed at the Brussels meeting in 2017, the intended reforms included both retroactive "clarification" of the existing 1994 ECT text through the issuance of an interpretive declaration, as well as the prospective "amendment" of the ECT through a potential supplemental treaty.[28] As is reflected in the policy documents published by the EU Institutions,

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[24] *See* List of Cases, Energy Charter Conference, https://www.energychartertreaty.org/cases/list-of-cases/ (last visited Aug. 4, 2020).

[25] *See Id.* (stating that the Energy Charter Secretariat is aware of 131 cases initiated under the ECT to date).

[26] *See* Italy, Energy Charter Conference, https://www.energycharter.org/who-we-are/members-observers/countries/italy/ (last visited Aug. 4, 2020) (indicating Italy's 31 December 2014 withdrawal took effect on 1 January 2016).

[27] Decision of the Energy Charter Conference CCDEC 2017 (23 STR) (Nov. 28, 2017), Annex F.

[28] *Id.* at 1-2.

the EU consistently has been one of the most active participants in the modernisation process.[29]

19. During the same period, the EU Commission also began a practice of routinely submitting amicus briefs to U.S. courts with respect to how the ECT should be interpreted and applied in proceedings to enforce or annul arbitral awards. I am aware of six such amicus briefs to date.[30] The first was submitted in March 2019,[31] and the most recent in January 2020.[32]

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[29] *See, e.g.*, Communication on the first negotiating round to modernise the Energy Charter Treaty, European Commission (July 10, 2020), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2167&utm_source=dlvr.it&utm_medium=facebook (indicating the EU's participation in the first round of modernisation negotiations in July 2020); EU text proposal for the modernisation of the Energy Charter Treaty (ECT) COM (2020) (May 27, 2020), Annex G (EU's draft proposed text of the modernised ECT); ECT Modernisation: Revised Draft EU proposal, COM WK 3937/2020 INIT (Apr. 20, 2020) (earlier EU draft proposed text); Energy Charter Treaty Modernisation: Draft EU proposal, COM WK 2430/2020 INIT (Mar. 2, 2020) (earlier EU draft proposed text); Council of the EU: Council adopts negotiation directives for modernisation of Energy Charter Treaty, European Council (July 15, 2019), https://www.consilium.europa.eu/en/press/press-releases/2019/07/15/council-adopts-negotiation-directives-for-modernisation-of-energy-charter-treaty (explaining that the European Council promulgated final negotiating directives for the EU's engagement in the modernisation negotiations); Negotiating Directives for the Modernisation of the Energy Charter Treaty – Adoption, COM (2019) 10745/19 ADD 1 (July 2, 2019) (the final negotiating directives adopted by the European Council); Recommendation for a Council Decision authorising the entering into negotiations on the modernisation of the Energy Charter Treaty, COM (2019) 231 final (May 14, 2019) (explaining the legal and policy rationales for the EU's involvement in the modernisation process); Annex to the Recommendation for a Council Decision authorising the entering into negotiations on the modernisation of the Energy Charter Treaty, COM (2019) 231 final ANNEX (May 14, 2019) (proposing negotiating directives for the EU's engagement in the modernisation negotiations).

[30] *See CEF Energia, B.V. v. Italian Republic and Greentech Energy Systems A/S et al. v. Italian Republic*, Nos. 1:19-cv-03443 and 1:19-cv-03444 (D.D.C.), Br. of the Eur. Comm'n on Behalf of the Eur. Union as *Amicus Curiae* in Support of the Italian Republic (Jan. 22, 2020), ECF No. 34; *Novenergia II – Energy & Env't (SCA) v. The Kingdom of Spain*, No. 1:18-cv-01148 (D.D.C.), Proposed Br. of the Eur. Comm'n on Behalf of the Eur. Union as *Amicus Curiae* in Support of the Kingdom of Spain (Sept. 23, 2019), ECF No. 38; *Masdar Solar & Wind Cooperatief U.A. v. The Kingdom of Spain*, No. 1:18-cv-2254 (D.D.C.), Proposed Br. of the Eur. Comm'n on Behalf of the Eur. Union as *Amicus Curiae* in Support of the Kingdom of Spain (May 13, 2019), ECF No. 20; *Foresight Luxembourg Solar I S.A.R.L., et al. v. The Kingdom of Spain*, No. 19-cv-03171 (S.D.N.Y.), Br. of the Eur. Comm'n on Behalf of the Eur. Union as *Amicus Curiae* in Support of the Kingdom of Spain (May 3, 2019), ECF No. 27; *Infrastructure Services Luxembourg S.A.R.L. and Energia Termosolar B.V. v. The Kingdom of Spain*, No. 1:18-cv-1753 (D.D.C.), Proposed Br. of the Eur. Comm'n on Behalf of the Eur. Union as *Amicus Curiae* in Support of the Kingdom of Spain (Mar. 22, 2019), ECF No. 31-1; *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.A.R.L. v. The Kingdom of Spain*, No. 1:18-cv-01686 (D.D.C.), Proposed Br. of the Eur. Comm'n on Behalf of the Eur. Union as *Amicus Curiae* in Support of the Kingdom of Spain (Mar. 18, 2019), ECF No. 33.

[31] *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.A.R.L. v. The Kingdom of Spain*, No. 1:18-cv-01686 (D.D.C.), Proposed Br. of the Eur. Comm'n on Behalf of the Eur. Union as *Amicus Curiae* in Support of the Kingdom of Spain (Mar. 18, 2019), ECF No. 33.

[32] *CEF Energia, B.V. v. Italian Republic and Greentech Energy Systems A/S et al. v. Italian Republic*, Nos. 1:19-cv-03443 and 1:19-cv-03444 (D.D.C.), Br. of the Eur. Comm'n on Behalf of the Eur. Union as *Amicus Curiae* in Support of the Italian Republic (Jan. 22, 2020).

20. All of these amicus briefs have expressed the EU's position that the ECT should be understood and interpreted in accordance with EU law principles and the jurisprudence of the EU Court of Justice – including because of the EU's key role in developing and creating the ECT legal regime. ("[T]he ECT was essentially the brainchild of the EU.")[33] The amicus briefs submitted by the EU Commission also requested, at minimum, that the U.S. courts should stay the litigation pending before them until after the courts of primary jurisdictions and/or the EU Court of Justice could first address the interpretative questions.[34]

21. As noted in the Russian Federation's Cassation Petition (ECF No. 176-2), the EU Institutions' statements regarding the interpretation of the ECT routinely have coincided with the positions of the Russian Federation, and contradicted the positions of HVY.[35] For example, in December 1994, at the time the European Communities adopted the decision to provisionally apply the ECT, the European Council, the European Commission, and the European Communities' Member States adopted a joint declaration stating that "Article 45(1) . . . does not

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[33] Forwood Decl. ¶¶ 10-12 (ECF No. 180-9) (quoting *Novenergia II – Energy & Env't (SCA) v. The Kingdom of Spain*, No. 1:18-cv-1148 (D.D.C.), Proposed Br. of the Eur. Comm'n on Behalf of the Eur. Union as Amicus Curiae in Support of the Kingdom of Spain (Feb. 28, 2019), ECF No. 30-1 at 6-7).

[34] *See, e.g.*, *Novenergia II – Energy & Env't (SCA) v. The Kingdom of Spain*, No. 1:18-cv-01148 (D.D.C.), Proposed Br. of the Eur. Comm'n on Behalf of the Eur. Union as *Amicus Curiae* in Support of the Kingdom of Spain (Sep. 23, 2019), ECF No. 38 at 2-3 (explaining the inapplicability of Article 26 ECT's dispute settlement regime under the EU legal order), 21-22 (explaining that international comity favors a stay or dismissal of the enforcement petition in favor of the EU courts: "Resolving that controversy touches on matters of vital importance to the EU, including the role and jurisdiction of EU courts, the interpretation and application of EU law by non-EU adjudicatory bodies, and the future of investor-State arbitration within the EU. These questions are best decided by EU courts, within the EU judicial system. Proper respect for foreign sovereigns counsels strongly in favor of permitting the enforceability of the Award to be debated and decided by the courts of the EU Member States and ultimately the Court of Justice of the EU. . . . Neither party to the underlying dispute between Novenergia and Spain is a U.S. citizen, no U.S. property is at issue, and none of the underlying events took place on U.S. territory. U.S. law is only implicated to the extent that Novenergia has asserted jurisdiction under the Foreign Sovereign Immunities Act and seeks to enforce the award pursuant to the New York Convention—which Convention is also equally binding on all 28 Member States of the EU. *Rather than embroil itself in the internal affairs of the EU, this Court should deny recognition and enforcement of the Award—or, at a minimum, stay enforcement proceedings pending the resolution of the proceedings before the Swedish courts—so that the questions implicated by this dispute may be decided by the courts of the Member States and the EU Court of Justice, all of which have an infinitely greater stake in these issues than U.S. courts.*") (emphasis added).

[35] *Procesenleiding* ¶¶ 38-40, 118-120 (ECF No. 176-2).

create any commitment beyond what is compatible with the existing internal legal order of the Signatories . . . ."[36]

22. More recently, the EU Institutions have made a number of additional statements in the context of the ECT modernisation process. As described above, the terms of the ECT modernisation process expressly contemplate the possibility of retroactive "clarification" of the ECT provisions by means of an interpretive declaration.[37] These statements include the following:

(i) In May 2019, the European Commission stated in its list of proposed negotiating directives for the ECT's modernisation that "[t]he Investment Protection standards under the Modernised ECT . . . should seek to include appropriate mechanisms to exclude businesses that do not have a sufficient connection to their country of origin."[38]

(ii) In July 2019, the European Council adopted its final negotiating directives for the ECT's modernisation, stating that "[t]he 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."[39]

(iii) In October 2019, the EU suggested that, with respect to the modernised ECT, "[t]he

[36] "A" Item Note from the Permanent Representatives Committee to the Council of the European Union, Doc. 12165/94, Annex I (Dec. 14, 1994) (R-352).

[37] Decision of the Energy Charter Conference CCDEC 2017 (23 STR) at 1-2 (Nov. 28, 2017).

[38] Annex to the Recommendation for a Council Decision authorising the entering into negotiations on the modernisation of the Energy Charter Treaty COM (2019) 231 final ANNEX at 1 (May 14, 2019).

[39] Negotiating Directives for the Modernisation of the Energy Charter Treaty – Adoption, COM (2019) 10745/19 ADD 1 at 4 (July 2, 2019).

definition of investment should . . . ensure that investments must have been made in accordance with the law of the host State; that the investment should fulfil certain characteristics such as the commitment of capital, [and] the expectation of profit and the assumption of risk . . ."[40]

(iv) Also in October 2019, the EU stated with respect to the modernised ECT that "[t]he definition of investor should include an appropriate mechanism to exclude investors and businesses that are lacking substantive business activities in their country of origin in order to prevent the mailbox companies bringing disputes under the ECT."[41]

(v) In May 2020, the EU included the following clarified text for Article 1(6) ECT in its revised draft proposed text of the modernised ECT: "'Investment'" means every kind of asset <u>that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk</u>."[42] The EU's clarified definition also provided that "'Investment' includes all investments <u>made in accordance with the applicable law and the domestic law of the host Contracting Party</u>, whether existing at or made after the later of the date of entry into force of this Treaty" for the investor's home State and the investment's host State.[43]

(vi) In May 2020, the EU included the following clarified text for Article 1(7) ECT in its revised draft proposed text of the modernised ECT: "'Investor' means . . . a company

[40] Decision of the Energy Charter Conference CCDEC 2019 08 STR at 11 (Oct. 6, 2019).

[41] *Id*. at 13.

[42] EU text proposal for the modernisation of the Energy Charter Treaty (ECT), COM (2020) at 2 (May 27, 2020), Annex G (emphasis in original).

[43] *Id.* (emphasis in original).

> or other organisation organised in accordance with the law applicable in that Contracting Party and engaged in substantive business activities . . . in the territory of that Contracting Party.'"[44]

23. These interpretive statements confirm the significance of the ECT for the EU Institutions and the EU Member States, and further demonstrate the EU's increased level of interest in the interpretation of the ECT, especially during the past two years.

## IV. THE EU PUBLIC POLICY AGAINST BRIBERY AND MONEY LAUNDERING

24. Mr. Cohen Jehoram makes a number of statements regarding the public policy arguments raised by the Russian Federation in connection with the EU public policy against bribery and money laundering. I address two of Mr. Cohen Jehoram's statements below.

25. First, Mr. Cohen Jehoram contends that only mandatory rules of fundamental importance can provide the basis for annulment on the basis of public policy.[45] Whether or not this limitation is correct, the EU's public policies against bribery and money laundering clearly fall within this category because Article 83(1) TFEU expressly classifies these offenses as instances of "particularly serious crime with a cross-border dimension."[46] The significance of these public policy rules further are emphasised in other multilateral instruments cited in my first Declaration, including, for example, in the UN Convention Against Corruption and the UN

[44] *Id.* at 3 (emphasis in original).

[45] *See* Jehoram Witness Statement ¶ 26(c) (ECF No. 181-43); Pet'rs' Opp. at 20 (ECF No. 181).

[46] TFEU art. 83(1) ("The European Parliament and the Council may . . . establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: . . . money laundering [and] corruption . . . .").

Convention Against Transnational Organized Crime,[47] as well as the money-laundering directive promulgated by the EU Institutions in 1991, and regularly updated since then.[48] In this regard, I further note that the national courts of at least two EU Member States – France and the Netherlands (specifically, the Hague Court of Appeal) – have recently declined to enforce arbitral awards based upon transnational public policy against bribery and money laundering.[49] Such decisions further confirm that bribery and money-laundering do indeed fall within the category of EU public policy capable of supporting annulment of arbitral awards based upon the decisions of the EU Court of Justice in the *Eco Swiss* and *Mostazo Clara* cases.[50]

26. Second, Mr. Cohen Jehoram suggests that any question regarding the public policy against illegal corruption and money-laundering in the present litigation is not amenable to a referral to the EU Court of Justice. In the view of Mr. Cohen Jehoram, this aspect of the judgment is allegedly supported (independently) by the Dutch Court of Appeal's purported factual finding that the bribery and money laundering were "remote" from HVY's acquisition of the YUKOS shares and were conducted by individuals who are "separate" from HVY.[51] According to Mr. Cohen Jehoram's reasoning, the EU Court of Justice thus cannot address this

[47] Forwood Decl. ¶ 21(ii) (ECF No. 180-9); *see also* United Nations Convention against Corruption, *adopted* Oct. 31, 2003 (entered into force Dec. 14, 2005); Convention against Transnational Organized Crime and the Protocols Thereto, *adopted* Nov. 15, 2000 (entered into force Sept. 29, 2003).

[48] Directive 91/308/EEC, of the European Council of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, 1991 O.J. (L 166) 77-83; Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, 2018 O.J. (L 156) 43-74.

[49] *See Bariven S.A. v. Wells Ultimate Serv. LLC*, Hague Court of Appeal, Case 200.244.714/01, ECLI:NL:GHDHA:2019:2677 (Oct. 22, 2019) (set aside on the basis that the underlying contract was procured through corruption); *Republic of Kyrgyzstan v. Valeriy Belokon*, Court of Appeal of Paris, Case No. 15/01650, Judgment (Feb. 21, 2017) (annulled on the basis that the investor's banking business was involved in money laundering).

[50] Case C-126/97, *Eco Swiss China Time Ltd v Benetton Int'l NV*, ECLI:EU:C:1999:269 ¶¶ 31, 36-37; Case C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, ECLI:EU:C:2006:675 ¶ 36.

[51] *See* Jehoram Witness Statement ¶¶ 118-121 (ECF No. 181-43).

aspect of the case for the reason that the neither the EU Court of Justice nor the Dutch Supreme Court can decide factual questions, thus rendering the legal question irrelevant to the outcome of the dispute.[52]

27. The concepts of "remoteness" and "separateness" applied by the Dutch Court of Appeal, however, are not factual issues. Rather, they are legal ones – *i.e.*, questions regarding the legal methodology that the national courts of EU Member States should apply when evaluating questions of public policy concerning illegal corruption and money laundering.

28. With respect to "remoteness," the question is whether determinations of illegality must be performed based upon only transactions proximate to the final acquisition of the investment (*i.e.*, the interpretation apparently taken by the Hague Court of Appeal in the HVY case) or must be performed based upon the entire chain of transactions (*i.e.*, the interpretation taken by the arbitral Tribunal in the HVY case). To illustrate, the Tribunal confirmed that "an examination of the legality of an investment should not be limited to verifying whether the last in a series of transactions leading up to the investment was in conformity with the law. The making of the investment will often consist of several consecutive acts and all of these must be legal and *bona fide*."[53]

29. By contrast, the Hague Court of Appeal overlooked the conduct of HVY's principals prior to the "last in [the] series of transactions",[54] concluding simply that any potential illegality "does not mean that HVY themselves were acting illegally at the time of their

[52] *See* Jehoram Witness Statement ¶¶ 118, 122 (ECF No. 181-43); Pet'rs' Opp. at 20 (ECF No. 181).

[53] *Hulley Enter. Ltd. (Cyprus) v. Russian Fed'n*, PCA Case No. AA 226, Final Award ¶ 1369 (July 18, 2014) (ECF No. 2-1) (emphasis added).

[54] *Id.*

investment."[55] Significantly, the applicable EU directives confirm that a money-laundering transaction is defined as such because of the illegal "origin" of the laundered property.[56] The legality of the individual final transaction *per se*, therefore, is not dispositive of identifying a money-laundering transaction when the property originated with an illegal act. Addressing this methodological issue is necessarily a key legal question with respect to this fundamental rule of EU public policy.

30. Similarly, with respect to "separateness," the question is whether the relevant adjudicator may take account of the illegal actions committed by the natural persons who ultimately own and control the purported "investor" entity. Significantly, the EU Institutions have repeatedly emphasised their concern that transnational bribery[57] and money laundering[58]

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[55] *Yukos Universal Ltd. v. Russian Fed'n*, Case No. 200.197.079/01, Judgement of the Hague Court of Appeal ¶ 5.1.11.8 (Feb. 18, 2020) (ECF No. 176-1) (emphasis in original).

[56] *See, e.g.,* Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, 2015 O.J. (L 141) 73 (explaining that money laundering involves "the efforts of criminals and their associates to disguise the origin of criminal proceeds . . ."), 83 (defining money laundering in part as "the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property"); Directive 91/308/EEC, of the European Council of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, 1991 O.J. (L 166) 79 (same).

[57] *See, e.g.*, Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, 2017 O.J. (L 198) 30 ("Corruption constitutes a *particularly serious threat to the Union's financial interests*, which can in many cases also be linked to fraudulent conduct. Since all public officials have a duty to exercise judgment or discretion impartially, the giving of bribes in order to influence a public official's judgment or discretion and the taking of such bribes should be included in the definition of corruption, irrespective of the law or regulations applicable in the particular official's country or to the international organisation concerned.") (emphasis added). Article 4.4(a) of the Directive defines a "public official" as "a Union official or a national official, including any national official of another Member State and any national official of a third country. . . ."

[58] *See, e.g.*, Report from the Commission to the European Parliament and the Council on the assessment of the risk of money laundering and terrorist financing affecting the internal market and relating to cross-border activities, COM (2019) 370 final, at 6 (July 24, 2019) ("A common technique for criminals is to create shell companies, trusts or complex corporate structures to hide their identities."); Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and the Council on the assessment of the risk of money laundering and terrorist financing affecting the internal market and relating to cross-border activities, COM SWD (2019) 650 final at 129, 131 (July 24, 2019) ("Perpetrators create complex structures involving many jurisdictions, in particular offshore jurisdictions with secretive chains of ownership, normally through shell companies . . . By involving offshore companies, the perpetrators can stay anonymous, [and] return the funds derived from criminal activity into the legal economy . . . The assessment of the money laundering threat related to

both routinely involve the use of shell companies and other intermediaries to disguise illegal transactions as lawful transactions. The methodological issue of "separateness" in the adjudication of questions involving these EU public policies thus is another key question of law, rather than a purely factual question.

31. Based on the 2020 judgment of the Dutch Court of Appeal, none of the relevant facts pertaining to the "remoteness" and "separateness" questions—*e.g.*, whether the original transactions were illegal and whether those illegal acts are traceable to the investors and transactions at issue in this case—were decided by the Dutch Court of Appeal.[59] To the contrary, the Dutch Court of Appeal merely concluded, as a legal matter, that such matters are not relevant. The questions proposed for referral with respect to "remoteness" and "separateness" are therefore legal questions regarding the methodology and framework to be applied to effectuate the EU public policy. These issues therefore are capable of referral to the EU Court of Justice.[60]

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the creation of legal entities and legal arrangements shows that this tool is almost exclusively used to hide and obscure the beneficial ownership. . . . Complex chains of ownership throughout different countries increase the opacity of the money laundering scheme. However, on the creation of the structure itself, as long as the use of intermediaries is sufficient to hide the beneficial ownership, it is an attractive and fairly secure method to launder the proceeds of crime."); Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, 2018 O.J. (L 156) 49, 52-53 (highlighting that "[c]riminals move illicit proceeds through numerous financial intermediaries to avoid detection" and, on that basis requiring Member States to establish publicly accessible registers of beneficial ownership of corporate entities, trusts, and other legal entities by early 2020, or otherwise face legal proceedings for breaching EU law); European Parliament resolution 2017/2028(INI) of 13 Sept. 2017 on corruption and human rights in third countries, 2018 O.J. (C 337) 96 ¶ 84 (noting that the European Parliament "[u]rges the implementation of zero-tolerance policies towards tax havens and money laundering, raising international standards of transparency, and encourages deeper international cooperation to determine the ownership of secretive shell companies and trusts used as conduits for evading tax, fraud, illicit trade, capital flows, money laundering and to benefit from corruption.").

[59] *See* Jehoram Witness Statement ¶¶ 118, 122 (ECF No. 181-43); Pet'rs' Opp. at 20 (ECF No. 181).

[60] *See* Forwood Decl. Annex B (ECF No. 180-11).

The foregoing is a true and correct reflection of my professional opinion. I declare under penalty of perjury under the laws of the United States pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on __5th___ August 2020 in Junglinster, Luxembourg.

Sir Nicholas Forwood QC
White & Case LLP
Wetstraat 62 rue de la Loi
1040 Brussels
Phone: +32 2 2392 605
nicholas.forwood@whitecase.com