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Procedural law. Arbitration. Public international law. Claim for annulment of arbitral award (Yukos Awards) based on Article 1065 (old) Civil Procedure Code; fraud as an annulment ground only in revocation procedure under Article 1068 (old) Civil Procedure Code? position of the secretary of the arbitral tribunal; breach of mandate (Article 1065(1)(c) (old) Civil Procedure Code); the reasoning of arbitral decisions (Article 1065(1)(d) (old) Civil Procedure Code). Energy Charter Treaty (ECT); provisional application of ECT (Article 45 ECT); interpretations under Article 31-33 Vienna Convention; state practice; concepts of 'investment' and 'investor' within the meaning of Article 1(6)-(7) ECT; requirement of legality of investments?; mandatory obligation to consult tax authorities within the meaning of Article 21 ECT?; complaints of deficient reasoning.

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Opinion

ATTORNEY GENERAL

AT THE

SUPREME COURT OF THE NETHERLANDS

Number 20/01595
Session 23 April 2021

OPINION

P. Vlas

In the matter of

The Russian Federation, domiciled in Moscow, Russian Federation,

against

1. Hulley Enterprises Limited, having its registered office in Nicosia, Cyprus (hereinafter: Hulley),

2. Veteran Petroleum Limited, having its registered office in Nicosia, Cyprus (hereinafter: VPL),

3. Yukos Universal Limited, having its registered office in Douglas, Isle of Man (hereinafter: YUL)
(hereinafter collectively: HVY)

Contents[1]

1 Introduction

1.1 The Russian Federation was ordered in arbitral proceedings to pay damages to HVY for breaching its obligations under the Energy Charter Treaty (Energy Charter Treaty, hereinafter referred to as the ECT).[2] The Russian Federation has brought an action before Dutch courts for the annulment of the relevant arbitral awards (hereinafter also referred to as the 'Yukos Awards'). The District Court granted the claim based on the absence of a valid arbitration agreement. On appeal, the Court of Appeal overturned the District Court's judgment and dismissed the Russian Federation's claims. The Russian Federation filed a cassation appeal against the Court of Appeal judgment.

1.2 This case is still governed by the old arbitration law, *i.e.*, by the Book Four ('Arbitration') of the Civil Procedure Code as it applied before the introduction of the Law to Modernise Arbitration Law on 1 January 2015.[3] Unless otherwise stated, this opinion always refers to the old law. For an introduction to the annulment procedure under Article 1064 *et seq* of the Civil Procedure Code, I refer to my opinion regarding the request for stay of enforcement submitted by the Russian Federation.[4] That application was rejected by the Supreme Court in its decision of 4 December 2020.[5]

1.3 The complaints largely relate to the interpretation of ECT provisions. The Russian Federation argues in cassation that the court based its conclusion that the dispute between HVY and the Russian Federation was covered by the ECT on a misinterpretation of the relevant treaty provisions, such that its finding that there is a valid basis for arbitration is incorrect. The dispute concerns, in particular, the interpretation of the notions of 'investor' and 'investment' under the ECT, and the scope of Article 45(1) ECT, which provides for the provisional application of the ECT by a State which has signed the ECT but for which the treaty has not yet entered into force. In this introduction I will briefly discuss the purpose and the creation of the ECT, as well as the possibilities that the ECT offers for the settlement of investment disputes. The discussion of the various parts of the principal cassation appeal will be followed by a more detailed discussion of the specific ECT provisions.

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 the states of Central and Eastern Europe, including the present-day Russian Federation.[6] The political desire to that effect had previously been expressed in the non-binding European Energy Charter of 1991. The ECT laid down the Energy Charter arrangement in a binding instrument. The ECT entered into force on 16 April 1998 after being ratified by 30 States, including the Netherlands (see Article 44(1) of the ECT). At present, the ECT has been ratified by 51 States and 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 notified the depositary of the ECT (Portugal) that it no longer intended to ratify the ECT. From that point on, the Russian Federation was no longer bound to provisionally apply the ECT, with the exception of the provisions relating to investment protection and dispute resolution in relation to already existing investments (Article 45(3)(a) and (b) ECT).

1.5 The ECT provisions that are the most relevant in this case are those of Part III of the ECT, which relate to 'Promotion, protection and treatment of investments'. These provisions offer protection for investors who have made an investment in the energy

sector in one of the Contracting Parties. They encompass 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 by which investors can enforce compliance with those rights.[10] Article 26 ECT provides that investors may refer a dispute concerning an alleged breach of one of the provisions of Part III of the ECT by a Contracting Party (inter alia) to an arbitration tribunal. Article 26(4) of the ECT mentions three options for dispute resolution:

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

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

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

1.7 Disputes over rights under the ECT can therefore be brought before various arbitration tribunals. This opinion addresses several decisions by such tribunals. The question arises as to the significance that should be attached to such statements, on which I would note in this introduction as follows.

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

1.9 Arbitration tribunals are not bound by each other's rulings, because the principle of binding precedent (*stare decisis*) does not apply.[15] Decisions may therefore differ from each other (which can, of course, also be explained by the facts and the manner in which the proceedings were pursued). Care should be taken when drawing conclusions based on just one or a few decisions. Furthermore, unanimous decisions carry more weight than those including dissenting opinions.[16]

1.10 The ICSID Convention provides a procedural framework for settling international investment disputes between States and investors[17] and does not concern disputes between States and their own nationals.[18] The ICSID Convention does not specify when an international investment exists, but leaves this question to the ICSID arbitration tribunals, which usually resolve it based 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 therefore depends 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, therefore, ICSID tribunals sometimes impose stricter requirements than the underlying investment treaties

themselves, in particular as regards the notion of 'investment'.[20] Such requirements may also be stricter than those of other (commercial) arbitration tribunals, whose jurisdiction is not based on the ICSID Convention.[21]

1.11 The foregoing is important because, in a number of places, the appeal refers to ICSID decisions in support of the assertion that they reflect a generally accepted principle of international investment law (see part 3 of the main plea). In considering this assertion, it should be borne in mind that, in certain respects, the ICSID Convention imposes its own requirements, which may be stricter than those laid down in investment treaties. It is also the case for all arbitral decision that one must always consider whether the approach adopted therein has general application or is based on the particular investment treaty on which the decision is based.

1.12 Having made this introduction, I shall now proceed to present the factual background, the procedural history and the discussion of the principal cassation appeal.

2 Factual background and procedural history

2.1 In summary, this case is about the following.[22] HVY are, or, at least, were, shareholders in Yukos Oil Company (hereinafter: Yukos), an oil company established in the Russian Federation, which was declared bankrupt on 1 August 2006 and removed from the Russian Trade Register on 21 November 2007.

2.2 In 2004, HVY initiated arbitration proceedings against the Russian Federation on the basis of Article 26 ECT. They claimed that the Russian Federation had expropriated their investments in Yukos and failed to protect those investments, contrary to the ECT. HVY requested that the Russian Federation be ordered to pay damages. The place of the arbitration was The Hague.

2.3 The arbitral tribunal appointed pursuant to the UNCITRAL Arbitration Rules ('the Arbitral Tribunal') ruled in three separate 'Interim Awards on Jurisdiction and Admissibility' of 30 November 2009 (the 'Interim Awards') on a number of preliminary objections raised by the Russian Federation, including with regard to the Arbitral Tribunal's jurisdiction. In the Interim Awards, the Tribunal rejected certain jurisdictional and admissibility objections, and reserved other preliminary objections to the merits phase of the proceedings.

2.4 In three separate Final Awards of 18 July 2014,[23] the Arbitral Tribunal rejected the remaining jurisdictional and/or admissibility objections of the Russian Federation, found that the Russian Federation had breached its obligations under Article 13(1) ECT, and ordered the Russian Federation to pay HVY damages of, respectively, USD 8,203,032,751 (to VPL), USD 1,846,000,687 (to YUL) and USD 39,971,834,360 (to Hulley), plus interest and costs. In short, the Arbitral Tribunal ruled that by taking a number of tax and recovery measures against Yukos, the Russian Federation led Yukos into bankruptcy for no other purpose than the elimination of Mr Mikhail Khodorkovsky, the chairman of Yukos and one of its shareholders, as a potential political opponent of President Putin, and the acquisition of Yukos' assets.

2.5 In a separate summons dated 10 November 2014, the Russian Federation brought an action against Hulley, VPL and YUL before the Hague District Court and requested that

the court annul the Interim Awards and the Final Awards issued by the Arbitral Tribunal in each of the cases. At the Russian Federation's request, the Court joined the three cases.

2.6 On 20 April 2016, by a single judgment in the three joined cases, the court annulled the Interim Awards and the Final Awards for lack of a valid arbitration agreement.[24] HVY appealed that judgment to the Hague Court of Appeal.

2.7 By interim judgment of 11 October 2016, the Court of Appeal ordered an interlocutory hearing that took place on 16 January 2017.

2.8 By interim judgment of 25 September 2018, the Court decided a number of HVY's preliminary objections to the examination of certain statements by the Russian Federation.[25] These include (to the extent still relevant) the Russian Federation's contention that HVY committed fraud in the arbitration proceedings by submitting false statements and withholding documents (paras 5.1-5.2). HVY objected to this, including on the ground that fraud should have been raised in separate revocation proceedings under Article 1068 of the Civil Procedure Code (para 5.3 (b)).

2.9 The court upheld HVY's objection, finding, in summary, that the alleged fraud can only be raised in revocation proceedings under Article 1068 of the Civil Procedure Code and can no (longer) be raised in set-aside proceedings under Article 1065 of the Civil Procedure Code. Although both proceedings result in the annulment of the arbitral award, they are subject to different time limits and the jurisdictions of different courts. A revocation procedure may be initiated within three months of discovery of the fraud, even if more than three months have already elapsed after the arbitral award obtained the authority of *res judicata*. Furthermore, a revocation procedure has only one court of fact (the Court of Appeal). If the alleged fraud could also be raised in annulment proceedings, both the applicable time limits and this exclusive jurisdiction of the Court of Appeal would be circumvented. That is would be unacceptable (para 5.7).

2.10 By interim judgment of 18 December 2018, the Court of Appeal made a number of decisions concerning the further conduct of the proceedings.[26]

2.11 By final judgment of 18 February 2020, the Court resolved the dispute on the merits.[27]

2.12 Among other things, HVY complained against the court's finding that the Arbitral Tribunal lacked jurisdiction, because Article 26 ECT – which allows arbitration – was contrary to Russian law. The Court of Appeal addressed those complaints in paras 4.4 *et seq*.

Interpretation of the Limitation Clause

2.13 The Court of Appeal considered whether a valid arbitration agreement was concluded between the parties (Article 1065(1)(a) of the Civil Procedure Code) and held that this depended on the interpretation of Article 26 and 45 ECT in light of the law of the Russian Federation (para 3.1.2). In short, the Position of the Russian Federation is that it signed the ECT but never ratified it. It is true that Article 45(1) ECT allows each party that signed the ECT to apply it 'provisionally', but 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 contrary to the Russian Constitution and several legal provisions which provide that disputes of a public-law nature are not arbitrable.

2.14 Primarily, HVY took the view that, in interpreting Article 26 ECT, the relevant question is whether the *principle* of provisional treaty application is contrary to Russian law. On appeal, HVY argued, in the alternative, that it is a question of whether provisional application of *one*

or more provisions of the ECT is incompatible with the law of a Contracting Party, and not whether a specific provision of the ECT is contrary to that law (para 3.3.2 and 4.2.2).

2.15 In paras 4.4.3-4.4.7, the Court of Appeal considered that it may base its judgment on HVY's subsidiary argument on the interpretation of Article 26 ECT, despite the fact that this was not raised in the arbitration proceedings and the Arbitral Tribunal therefore did not base its jurisdiction on it. A different view would require the annulment of an arbitral award because the Arbitral Tribunal assumed jurisdiction on incorrect grounds, even though the State court considers that the Arbitral Tribunal had jurisdiction on other grounds. This is contrary to the principle that the State court has the final say on this point.

2.16 The Court then considered HVY's subsidiary argument (paras 4.5.8-4.5.48). In para 4.5.48, the Court concluded that the Limitation Clause must be interpreted as meaning that a signatory State that has not made the declaration referred to in Article 45(2)(a) must apply the ECT provisionally, except to the extent that provisional application of one or more ECT provisions is contrary to national law, in the sense that the laws or regulations of that State exclude the provisional application of a treaty for certain (types or categories of) Treaty provisions. According to the Court of Appeal, it has not been established that provisional application of Article 26 ECT was contrary to Russian law (para 4.6.1). For the sake of completeness, the Court of Appeal examined whether, based on the Russian Federation's interpretation of the Limitation Clause Article 26 ECT conflicted with provisions of Russian law (Articles 4.6.2-4.7.65). The Court of Appeal answered that question in the negative.

2.17 The Court of Appeal thus found that HVY's appeal was partially well-founded and the reasoning provided by the District Court did not sufficiently support its judgment that no valid arbitration agreement was concluded (para 4.9.1). Given the devolutionary effect of the appeal, the Court further considered whether the other claims put forward by the Russian Federation supported the argument that the Arbitral Tribunal lacked jurisdiction. Those were claims relating to (i) the interpretation of Article 1(6) and (7) ECT[28] (the definitions of 'investment' and 'investor'), (ii) the interpretation of Article 1(6) and (7) ECT (legality of investments), and (iii) the taxation measures taken by the Russian Federation which constitute a legitimate exercise of the Russian Federation's powers and fall 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 argued that the requirement of Article 26 ECT that there must be an 'investment' within the meaning of Article 6(1) ECT was not met, and that HVY are not investors within the meaning of Article 1(7) ECT because they are merely sham companies that are beneficially owned and controlled by Russian citizens. Furthermore, the capital invested was Russian rather than foreign (para 3.3.2 and 5.1.3).

2.19 In para 5.1.7.3, the Court of Appeal concluded that an 'investment' within the meaning of Article 26 ECT exists where a juridical person established under the law of one Contracting Party makes an investment in another Contracting Party. In order to determine the nationality of an investor, the ECT opted for 'the law of the country under whose legislation the investor is organised'. The drafters of the ECT did not wish to subject the international character of investments to any other requirements. Thus, the ECT does not require the investor to have an actual relationship with the country under the laws of which it is organised (para 5.7.1.2). Further, 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 constitute

so-called 'roundtrip investments' (para 5.1.8.1 *et seq*).

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

2.20 The Court of Appeal considered the Russian Federation's position that the ECT does not protect investments made contrary to the law of the host country (para 3.2.3 and 5.1.11.1). According to the Court, Article 1(6) ECT does not contain an explicit legality requirement. It is not expressly required that an investment must have been made in compliance with the host State's law. Nor does the ECT contain any restrictions in this respect with regard to access to arbitration for the purposes of Article 26 ECT (para 5.1.11.5). The Court rejected the Russian Federation's reliance on Article 1(6) and (7) ECT.

(iii) Taxation measures (Article 21 ECT)

2.21 The Court of Appeal considered that Article 21 ECT contains no references to the jurisdiction of arbitrators, but merely provides that the ECT does not grant rights or impose obligations with regard to taxation measures. The Arbitral Tribunal's jurisdiction is determined exclusively by Article 26 ECT. According to the Court of Appeal, the conditions laid down in Article 26 of the Treaty have been met, such that the provisions of Article 21(1) ECT cannot lead to the conclusion that the Arbitral Tribunal would lack jurisdiction in the event of a situation covered by Article 21(1) ECT (para 5.2.5). The Court of Appeal further considered that Article 21(1) ECT was only applicable to *bona fide* taxation measures. The Arbitral Tribunal concluded that there was no *bona fide* taxation because the measures taken by the Russian Federation were not intended solely to collect tax, but rather to provoke the bankruptcy of Yukos and to 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 put forward by the Russian Federation to argue that a valid arbitration agreement was lacking was sufficient to support that conclusion, such that there was no ground to annul the Yukos Awards under Article 1065(1)(a) Civil Procedure Code (para 5.3.1).

2.23 In para 6.1 *et seq*, the Court of Appeal then discussed the Russian Federation's arguments raised under the rubric of the annulment ground of breach of mandate (Article 1065(1)(c) Civil Procedure Code): (a) non-compliance with Article 21(5) ECT, (b) the Arbitral Tribunal's assessment of damages, (c) the Arbitral Tribunal has decided by guesswork and by venturing outside the limits of the dispute, (d) the role of the Arbitral Tribunal's assistant, and(e) the absence of reasoning.

(a) Breach of mandate (Article 1065(1)(c) Civil Procedure Code) due to non-compliance with Article 21(5) ECT (para 6.3).

2.24 In para 6.1 *et seq*, the Court of Appeal discussed the assertion that the Arbitral Tribunal had failed to submit the dispute to the relevant competent tax authorities contrary to Article 21(5) ECT. The Court of Appeal found that this omission was not sufficiently serious to justify the set-aside of the arbitral award because it has not been demonstrated that the Russian Federation suffered any prejudice as a result (para 6.3.2). According to the Court of Appeal, it must be assumed that during the detailed examination of the dispute by the Arbitral Tribunal, the Russian Federation has either put forward, or had the ability to put forward, all such relevant information as the Arbitral Tribunal could have obtained by seeking advice from the Russian tax authorities. It is not clear what additional information the Arbitral Tribunal could have obtained from the Russian tax authorities that could have led to a different assessment of the "allocation of income from shell trading companies (...)

to Yukos" (para 6.3.3).

2.25 The Russian Federation further argued that the dispute should also have been referred to the tax authorities of Cyprus and the United Kingdom. According to the Court of Appeal, this view is unavailing because Article 21(5) ECT only requires that advice be sought from the 'relevant competent tax authority' with regard to the question 'whether a tax constitutes an expropriation'. However, HVY did not argue that taxation measures taken by Cyprus or the United Kingdom were an expropriation (para 6.3.4). Furthermore, the Court of Appeal considered that the Arbitral Tribunal's conduct did not conflict with the prohibition of prejudgment, as argued by the Russian Federation (para 6.3.5).

(b) Determination of damages

2.26 In para 6.4.1-6.4.27, the Court of Appeal paid close attention to the Russian Federation's contention that the Arbitral Tribunal violated its mandate by awarding damages on the basis of its own new and highly flawed calculation method which deviated from the parties' dispute and on which the parties have not been heard, such that there was a surprise decision. The Court concluded that there had been no surprise decision (para 6.4.23) and that the manner in which the Arbitral Tribunal had determined damages did not constitute a breach of the Arbitral Tribunal's mandate.

(c) Deciding by guesswork and by venturing outside the limits of the dispute

2.27 In paras 6.5.1-6.5.15, the Court of Appeal considered the Russian Federation's assertion that the Arbitral Tribunal had based its decision on its own speculations about the Russian Federation's hypothetical actions in a counterfactual scenario instead of its actual actions. The Court concluded that the Russian Federation's arguments were beside the point and that the Arbitral Tribunal had not breached its mandate or failed to provide valid reasoning for its decision in this respect. Nor had there been a violation of public policy (para 6.5.15).

(d) The role of the Arbitral Tribunal's assistant

2.28 In paras 6.6.1-6.6.15, the Court of Appeal discussed the Russian Federation's argument that the Yukos Awards should be annulled because of the disproportionate involvement of the Arbitral Tribunal's assistant Martin Valasek in drafting them (para 6.6.1). According to the Russian Federation, such involvement was contrary to the principle that the arbitrators must perform the task assigned to them personally, such that the Arbitral Tribunal had failed to comply with its mandate (Article 1065(1)(c) Civil Procedure Code). Furthermore, Valasek's involvement would in fact be tantamount to having a 'fourth arbitrator', meaning that the Arbitral Tribunal was composed contrary to the applicable rules (Article 1065(1)(d) Civil Procedure Code).

2.29 The Court of Appeal rejected this argument, holding that, even assuming that Valasek had greatly contributed to drafting parts of the text (para 6.6.5), this did not mean that he had made decisions himself (para 6.6.10). The fact that the Final Awards were signed by three arbitrators demonstrates that they were the persons who made it, such that there had not been an even number of arbitrators (para 6.6.13). If one assumes that the Russian Federation's assertion that Valasek was only introduced as an assistant and contact person is correct, then one can acknowledge that the Arbitral Tribunal had failed to fully inform the parties of the nature of Valasek's work in this respect. However, in the circumstances, this does not constitute so serious a breach of mandate that it must lead to the annulment 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 considered the Russian Federation's arguments that the arbitral awards were based on insufficient reasoning (Article 1065(1)(d) Civil Procedure Code) with respect to the Russian Federation's contention that Yukos' Mordovian companies were sham companies. The Arbitral Tribunal concluded that there was no evidence for this anywhere in 'the massive record' (referring to the record of the tax proceedings conducted by Yukos in Russia). According to the Court of Appeal, the issues concerned the lack of evidence in that record, and the Russian Federation's numerous references to the evidence that it had submitted in the arbitration proceedings are therefore irrelevant (para 8.4.13). The Court of Appeal thus rejected the complaint as to the reasoning of the finding that no evidence was provided that the Mordovian companies were sham companies (para 8.4.17).

2.31 The Court of Appeal concluded that HVY's complaints were at least partially successful and that the Arbitral Tribunal had jurisdiction to hear and decide on HVY's claims. The other annulment grounds raised by the Russian Federation could not lead to the annulment of the Yukos Awards (para 10.1). The Court of Appeal overturned the District Court's judgment and, deciding de novo, dismissed the Russian Federation's claims (para 10.3 and dictum).

2.32 The Russian Federation filed a (timely) cassation appeal against the interim judgment of 25 September 2018 and the final judgment of 18 February 2020, hereinafter referred to respectively as the interim judgment and the final judgment. HVY filed a defence and lodged a conditional cross-appeal. The parties submitted written comments and made oral submissions on 5 February 2021, which were followed by a written reply and rejoinder.

2.33 As part of its appeal in cassation, the Russian Federation (among other things) requested a stay of enforcement of the Yukos Awards and an order for HVY to provide security. By order of 25 September 2020, the Supreme Court ruled that it had jurisdiction to hear this request.[29] By order of 4 December 2020, the Supreme Court rejected the Russian Federation's request.[30]

3 Discussion of the main plea in cassation

3.1 The main cassation plea consists of eight parts, which break down into various sub-parts.

Part 1: breach of procedural public policy / exclusivity of Article 1068 Civil Procedure Code

3.2 Part 1 targets the Court of Appeal's ruling in para 5.6-5.8 of the interim judgment and para

9.7 of the final judgment, wherein, the Court considered, in short, that the Russian Federation's objections concerning the alleged fraud committed by HVY in the arbitration proceedings could only be raised by way of a revocation claim under Article 1068 Civil Procedure Code. According to the complaints, this finding of the Court of Appeal overlooks that such fraud should also lead to the annulment of the arbitral award based on Article 1065(1)(e) Civil Procedure Code (conflict with public policy).

3.3 My discussion of this part will start with the following observation. There is no doubt that

when an arbitral award was arrived at as a result of fraud or deception by one of the parties to the proceedings, the manner in which the award was created is contrary to public policy. After all, such a case is not one of fair trial.[31] As Sanders correctly points out, the revocation grounds under Article 1068(1) Civil Procedure Code give rise "to as many cases of conflict with public policy".[32]

3.4 Although the legislator has provided for a separate revocation procedure in which fraud can be raised, this does not mean that such procedure is the only one to be followed. It is by no means apparent from the legislative history that, by setting up that separate procedure, the legislator sought to limit the possibilities of raising fraud in any way. The claim for revocation stems from general civil procedural law,[33] and may also overlap with ordinary remedies such as appeals. Revocation of a court ruling (Article 382 Civil Procedure Code) is an extraordinary remedy permitting a party to raise the culpable conduct, such as fraud, on the part of the other party.[34] If an ordinary remedy is still available, then such ordinary remedy must take precedence. After all, the remedy of revocation is only available once the relevant judgment has become final, and then only within three months after the fraud was discovered (Article 383(1) Civil Procedure Code).[35] Thus, in ordinary civil proceedings, the possibility of raising fraud is not limited to a revocation claim. The added value of the withdrawal procedure is that it allows the injured party to submit the fraud to the court after the expiry of the ordinary appeal period. In this way, revocation supplements the existing ordinary remedies.

3.5 There is no indication that the legislator had wanted to see the revocation procedure (Article 1068 Civil Procedure Code) as the exclusive procedural remedy for fraud in arbitration law.[36] This cannot be inferred from the fact that the legislator has set up a separate procedure for this purpose, since, in ordinary civil procedure law, the remedy of revocation exists side by side with other remedies. Nor does the exclusivity of the revocation procedure follow from the fact that it is only open in a single instance. No support for this can be found in the legislative history. It can rightly be argued that the party who chooses to submit the fraud to the court in the annulment proceedings thereby 'gains' an additional instance.[37] At the same time, however, such party must immediately raise the fraud as a ground in its annulment summons (Article 1064(5) Civil Procedure Code) within the applicable period of three months after the deposit of the arbitral award at the registry (Article 1064(3) Civil Procedure Code). That party will therefore not be able to benefit from the 'extra' period of three months after the discovery of the fraud, as provided in Article 1068(2) Civil Procedure Code.[38] This means that the risk identified by the court that fraud may still be raised in the annulment procedure more than three months after it had been discovered is not a real one. That would be precluded by the rule in Article 1064(5) Civil Procedure Code.[39]

3.6 This brings me to the discussion of the complaints. According to the part, the Court of Appeal committed an error of law or was insufficient in its reasoning when deciding that factual statements capable of supporting a request for revocation within the meaning of Article 1068 Civil Procedure Code were not capable of supporting the argument that an arbitral award obtained by means of a fraudulent misstatement, witness bribery and withholding of essential evidence must be annulled for breach of public policy (Article 1065(1)(e) Civil Procedure Code). The Court of Appeal wrongly deprived the Russian Federation of its freedom to choose between a claim under Article 1065(1)(e) Civil Procedure Code and a claim under Article 1068 Civil Procedure Code, so the part argues.

3.7 In para 5.7, the Court of Appeal considered that fraud could only be raised in a revocation procedure under Article 1068 Civil Procedure Code because the converse would mean circumventing the deadline provided therein. It follows from the foregoing that this assumption is generally incorrect. However, this does not mean that the final decision arrived at by the Court of Appeal is also incorrect. According to the Russian Federation, the alleged fraud was discovered after the judgment of the District Court (of 20 April 2016).[40] It is common ground that this was first invoked in the answer to the appeal.[41] The rule of Article 1064(5) Civil Procedure Code that all annulment grounds will be waived unless raised in the summons means that the alleged fraud can no longer be raised in the course of already pending annulment proceedings. That should have been done, on pain of forfeiture, in the initiating summons. For that reason, in line with the Court of Appeal's conclusion, the alleged fraud indeed could be raised only in revocation proceedings, and not in the answer in the annulment proceedings.

3.8 Part 1 must therefore fail.

Part 2: interpretation of Article 45(1) ECT

3.9 Part 2 attacks the Court of Appeal's interpretation of Article 45(1) of the ECT contained in paras 4.5.1 through 4.5.48 of the final judgment. The part is divided into eight subparts.

3.10 In essence, part 2 argues that there is no valid arbitration agreement as required by Article 1065(1)(a) Civil Procedure Code in this case. According to the part, even though Article 26 ECT does provide that disputes concerning the rights arising from the ECT may be subject to arbitration, the Russian Federation is not bound by that provision because the Russian Federation only signed, but never ratified the ECT. Article 45(1) ECT provides for provisional application of the ECT by States that signed the treaty, but only to the extent that such provisional application is not inconsistent with their domestic legal order. According to the Russian Federation, the Court of Appeal applied the wrong standard in this respect by ruling that the question was not whether Article 26 ECT itself was contrary to Russian law, but whether the provisional application of Article 26 ECT was at odds with it.

Introductory remarks

3.11 Before discussing the complaints in part 2, I would like to make several comments on the provisional application of treaties in general and on the provisional application of the ECT in particular. Provisional application of a treaty means that the treaty is applied before it enters into force through ratification. Article 25(1) VCLT allows a treaty to be applied provisionally, if the treaty so provides, or if the negotiating States have in some other manner so agreed. According to Article 25(2) VCLT, unless the treaty otherwise provides or the negotiating States 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 permits the desired effects of the treaty to enter into force without the need to go through (often lengthy) national ratification procedures.[42] Provisional application is also criticised for conflicting with national ratification procedures and thus with the separation of powers.[43]

3.12 As mentioned, Article 45 ECT provides for the provisional application of the ECT.[44] In its

authentic English text (Trb. 1995, 108) and in Dutch translation (Trb. 1995, 250), the provision reads as follows:

Article 45 Provisional application

1. Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.
2. a) Notwithstanding paragraph 1 any signatory may, when signing, deliver to the Depositary 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 Depositary.

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 Depositary 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.

[Dutch translation]

3.13 The objective pursued by the provisional application does not follow from the ECT's text. According to commentators, provisional application was provided in order to be able to set up the institutional framework laid down in the ECT, and to create momentum for the ECT's objective of energy cooperation.[45]

3.14 The cassation case concerns the question of interpretation of the phrase 'to the extent that such provisional application is not inconsistent with its constitution, laws or regulations' in Article 45(1) ECT. Three different interpretations of Article 45(1) ECT have been considered in these proceedings.[46]

3.15 The *first* view is that Article 45(1) ECT means that there is no place for the provisional application of the ECT if *the principle of provisional application of treaties* is, as such, contrary to the law of the Signatory State (in this case, Russian law). This is primarily the view HVY advanced at first instance (see para 4.5.4 of the final Court of Appeal judgment). The Court of Appeal described this interpretation as the 'all-or-nothing' approach) (see para 4.5.10 of the final Court of Appeal judgment). This view is mainly 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 refers to the provisional application of 'this Treaty' and not only a part thereof.[48] This was the view adopted by the Arbitral Tribunal.[49]

3.16 According to the *second* interpretation, advanced by the Russian Federation, the proper interpretation of Article 45(1) ECT is that the question is whether an *individual provision* of the ECT is contrary to the law of the Signatory Party. According to this view, Article 26 ECT is contrary to Russian law (para 4.5.3 of the final Court of Appeal judgment). The main argument for the second view is that the 'all-or-nothing' approach would render meaningless the words 'to the extent' in Article 45(1)ECT.[50] Those words indicate that there may be variation in the extent to which states provisionally apply the ECT.[51] On the other hand, the second view implies that it must be checked every time whether any provision in the law of the Signatory Party is contrary to the ECT,[52] while there are no indications that the treaty's drafters intended this.[53] It was partly based on this argument that the Arbitral Tribunal supported the first view in the Interim Awards. In addition, the Arbitral Tribunal pointed to the principle of international law (laid down in Article 27 VCLT) according to which States may not invoke their national law in order to justify their failure to perform a treaty.[54] In the annulment proceedings, the District Court followed the second view (see para 5.23 of the judgment of 20 April 2016).

3.17 The *third* view is that Article 45(1) ECT must be interpreted as meaning that the ECT must be applied provisionally by the Signatory, unless the provisional application of one or more provisions of the ECT is incompatible with domestic law.[55] In this approach, the

question is not whether a particular provision of the ECT is contrary to domestic law, but whether the provisional application of a specific provision is contrary to the domestic law of the Signatory Party. HVY took that view (in the alternative) in the annulment appeal proceedings (para 4.5.4 of the final Court of Appeal judgment). The Court of Appeal agreed with that view (paras 4.5.14, 4.5.33 and 4.5.48 of the final Court of Appeal judgment). According to the Court of Appeal, that interpretation does justice both to the phrase 'to the extent' and 'such provisional application', and thus addresses the objections that have been raised against the two other interpretations.

3.18 Having set out the above, I now return to the various complaints of the part.

3.19 Part 2.1 contains only an introduction and no complaints.

Part 2.2: Article 26 ECT

3.20 Part 2.2 targets para 4.3 (specifically, sub-para 4.3.4) of the final Court of Appeal judgment, where the Court of Appeal ruled that the Russian Federation unequivocally consented to arbitration. The part complains that this ruling is incorrect. Article 26 ECT provides that 'each Contracting Party', *i.e.* contracting State, unconditionally consents to arbitration. However, the Russian Federation never became a Contracting Party because it had only signed, and never ratified, the ECT. Given that it is not clear whether Article 26 ECT also applies to states that have merely signed the treaty ("Signatories"), there can be no clear and unambiguous consent, so the part argues.

3.21 Contrary to the arguments raised in the part, the Court of Appeal has not disregarded the need for unambiguous consent to an arbitration clause. Indeed, in paras 4.4.3-4.4.7, the Court of Appeal expressly applied that requirement. Furthermore, contrary to what the part argues, the Court has not ignored that Article 26 ECT only creates obligations for Contracting Parties and not also for Signatories. Nor has the court confused the two notions. Indeed, the Court of Appeal derives its finding that Article 26 ECT also creates obligations for Signatories from Article 45(1) ECT, which provides that Signatories shall apply the provisions of the ECT provisionally. Whether that interpretation of Article 45(1) ECT is correct is addressed in greater detail in parts 2.4 *et seq*. The Court of Appeal's finding that 'there may be differences of views about the scope of the Limitation Clause and its application in the light of the law of the Russian Federation' should not be understood as meaning that, according to the Court of Appeal, it is unclear to what extent a Signatory is bound by Article 26 ECT. After all, the Court of Appeal does, based on an analysis of Article 45(1) ECT, arrive at the conclusion that Signatories are bound to apply Article 26 ECT provisionally (para 4.5.48).

3.22 It follows from the above that part 2.2 fails.

Part 2.3: jurisdiction of the Arbitral Tribunal

3.23 Part 2.3 targets paras 4.4.3-4.4.6 of the final Court of Appeal judgment. The core of the findings there is that there is no reason to annul an arbitral award in circumstances where, even though the arbitral tribunal accepted jurisdiction on incorrect grounds, the state court considers that the decision on jurisdiction was correct on other grounds. The Court of Appeal found it unacceptable for the dispute to revert to the state court even though there is still a valid arbitration agreement for the sole reason that the arbitral tribunal, which has no final say on the matter, had applied incorrect reasoning in support of its jurisdictional

decision (para 4.4.3, conclusion). The part complains that this is contrary to the statutory system of the annulment proceedings. According to the part, it was not open to HVY to raise new grounds of jurisdiction in the annulment proceedings, in any event not as late as the appeal.

3.24 The starting point is that, unlike with other grounds for annulment under Article 1065(1) Civil Procedure Code,[56] the state court must not exercise restraint on the point of the arbitral tribunal's jurisdiction. The reason for this is that, by agreeing to arbitration, the parties waive their fundamental right of access to the state court (Article 6 ECHR).[57] The answer to the question whether a valid arbitration agreement has been concluded is therefore ultimately entrusted to the state court. Not the arbitral tribunal, but the judge has the final say in this regard.[58] It is a question of whether the arbitral tribunal has jurisdiction and not of the foundation on which the arbitral tribunal based its jurisdiction.[59]

3.25 It is therefore ultimately up to the state court to make a final decision on whether or not the arbitral tribunal had jurisdiction.[60] The state court may find that the arbitral tribunal did have jurisdiction, but on different grounds than those on which the arbitral tribunal itself based its jurisdictional decision. The part essentially defends the view that the court should only be permitted to test whether the arbitral tribunal assumed jurisdiction on the correct grounds and annul the arbitral award if that is not the case,[61] even though it is clear that the arbitral tribunal had jurisdiction on other grounds. That legal position is incorrect and contrary to the right of access to justice secured by Article 6 ECHR, based on which the state court may examine the jurisdiction of the arbitral tribunal. This also does justice to the intention of the parties to submit their dispute to arbitration and prevents the parties from having to litigate in the public court contrary to their own wishes.[62]

3.26 The court may therefore supplement the grounds for the arbitral tribunal's jurisdiction,[63] but, in doing so, must, of course, comply with the rules on adding legal bases. In that regard, the Russian Federation argued that the Court of Appeal should disregard the basis for the Arbitral Tribunal's jurisdiction proposed by HVY because HVY only raised that ground for the first time in its appeal.[64] In doing so, the Russian Federation overlooks that the Court of Appeal had the duty, within the scope of the dispute created by the complaints, to supplement the legal bases, if necessary of its own motion (Article 25 Civil Procedure Code).[65] It is not disputed that HVY's complaints are directed against the way in which the District Court interpreted Article 45(1) ECT. The Court of Appeal was therefore free to examine how this provision should be interpreted, taking into account new legal arguments.[66] I would point out that in para 4.4.6 of the final judgment, the Court of Appeal qualified the interpretation put forward by HVY as a purely legal argument.[67] That qualification was not disputed in cassation. Contrary to what the part claims, the Court of Appeal was thus entitled to take into account this legal ground, which HVY raised, for the first time, in the appeal.

3.27 Moreover, it is not apparent that Article 1052(4) and (5) stands in the way of such addition of jurisdictional grounds.[68] Article 1052(4) Civil Procedure Code provides that arbitral decision on jurisdiction can only be challenged on the grounds under Article 1064(1) together with the subsequent full or partial final award. Article 1052(5) Civil Procedure Code concerns the situation where the arbitral tribunal has declined jurisdiction, thus reviving the jurisdiction of the ordinary court to hear the case. It follows from Article 1052(5) Civil Procedure Code that the arbitral tribunal's finding that it lacks jurisdiction is final and cannot be challenged before the public court.[69] The Supreme Court

considered that the combination of Article 1052 and 1065 Civil Procedure Code is intended

"to ensure that, if a party wishes to challenge the arbitral tribunal's jurisdiction based on the lack of a valid arbitration agreement, a decision can be taken by the arbitral tribunal at an early stage of the proceedings, thereby avoiding, as far as possible, unnecessary procedural acts if the absence of a valid arbitration agreement is invoked subsequently (whether in the arbitration or before the ordinary court) and may still lead to the conclusion that the arbitral tribunal lacks jurisdiction'.[70]

Whether new factual or legal claims may be put forward in the annulment procedure will have to be assessed in each specific case while taking into account the requirements of due process.[71]

3.28 As an aside, I would point out that the explanatory memorandum to Article 1065a (new) Civil Procedure Code, insofar as relevant, cannot be read as precluding the court from correcting an incorrect decision on jurisdiction (given that it can remit the case back to the arbitral tribunal on that ground). The point is that the court may not remit the case if it finds that there is no valid arbitration agreement,[72] given that, in such a case, a remission would be pointless.

3.29 The part (para 28) further argues that the Court of Appeal's finding in para 4.4.6. of the final judgment that HVY should have raised its new position in the arbitration or, at the latest, at first instance, is not understandable. That complaint fails for the reasons already set out above.

3.30 The conclusion is that part 2.3 must fail as a whole.

Part 2.4: Limitation Clause

3.31 Part 2.4 complains that the Court of Appeal's interpretation of the Limitation Clause in Article 45(1) ECT is legally incorrect. The part summarises this interpretation adopted by the court (in para 2.4.1) and formulates a number of complaints (in para 2.4.2).

3.32 In para 4.2.1 *et seq* of the final judgment, the Court of Appeal has stated the basis for the method treaty interpretation. This was not contested in cassation and I shall briefly summarise it. Articles 31 and 32 VCLT provide guidance on the interpretation of treaty provisions. The interpretation of a treaty is always aimed at finding out the intention of the treaty parties. In this regard, the text of the relevant treaty provision plays the leading role (para 4.2.2).[73] The text must be considered in its context, as well as in the light of the object and purpose of the treaty. Pursuant to Article 31(1) VCLT, such interpretation must take place in good faith (para 4.2.3). According to Article 31(3)(b) VCLT, in addition to the context, there must be taken into account any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (paras 4.2.4). Finally, according to Article 32 VCLT, recourse may be had to the preparatory work of the treaty (*travaux préparatoires*). However, this is a supplementary means which is reached for only in order to confirm the interpretation under Article 31 VCLT or if the interpretation leads to an ambiguous or unreasonable outcome (paras 4.2.5).

3.33 The part (para 34) complains that the court's interpretation is contrary to the ordinary meaning of the wording of Article 45(1) ECT. According to the Court of Appeal, it must be considered whether the law of a Signatory excludes the provisional application of (a particular category of) certain provisions of the Treaty. According to the complaint, nothing

in the wording of Article 45(1) ECT indicates this.

3.34 Based on para 4.5.10, it appears 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 reasoned, HVY argued at first instance that the test under Article 45(1) ECT was whether the principle of provisional application of a treaty as such is contrary to the law of the Signatory Party. In para 4.5.10 *et seq*, the Court of Appeal held that such an interpretation did not do justice to the ordinary meaning of the words 'to the extent' contained in that provision, given that, in the Court of Appeal's view, those words indicate the possibility of gradations in the extent to which the provisional application of the ECT must be excluded because of incompatibility with domestic law. Contrary to the complaint's arguments, the ordinary meaning of the wording of Article 45(1) ECT does support the Court of Appeal's interpretation. The complaint does not clarify why the ordinary meaning of those terms established by the Court of Appeal is incorrect and thus fails.

3.35 The part (para 35) also complains that the interpretation is contrary to the context in which the words 'to the extent' are used. According to the part, Article 45(2)(c) ECT uses the same terms, in that context, however, referring to specific parts of the ECT, which is said to be supported by the Court of Appeal in para 4.5.19. According to the complaint, the interpretation of Article 45(1) ECT is therefore not consistent.

3.36 However, contrary to the complaint's assertions, there is no such inconsistency. In paras 4.5.19, the Court of Appeal subscribed to the District Court's judgment that the words 'to the extent that' in Article 45(1) and Article 45(2)(c) ECT militated against the 'all-or-nothing" approach primarily pursued by HVY. The Court of Appeal therefore interpreted the two provisions consistently. Insofar as the complaint means to argue that the words 'to the extent that' in Article 45(2)(c) ECT must be interpreted as referring to specific parts of the ECT, and that the Court of Appeal allegedly endorsed that view, it is based on a misreading of the disputed finding.

3.37 The part further argues (paras 36-37) that the Court of Appeal misunderstood the rationale for limiting the scope of provisional application. According to the part, the rationale for provisional application is to provide 'a tool for government officials who want to implement international cooperation while respecting domestic ratification procedures'. This fits Article 45 ECT within the ECT's objective of implementing international cooperation under the ECT as soon as possible while, on the other hand, establishing (in due course) a secure and binding international legal framework for that cooperation (whereby the part refers to a passage from the ECT's Preamble).

3.38 This complaint relates to the way in which the Court of Appeal has interpreted Article 45(1) ECT in the light of the ECT's object and purpose. In para 4.5.22 *et seq*, the Court considered the following. The ECT's objective is to attract investment through a stable and safe investment environment and by promoting transparency, legal certainty and investment protection. The provisional application of the ECT is intended to ensure that the obligation to create the desired investment conditions would arise immediately after signature (paras 4.5.26). According to the Court of Appeal, the interpretation supported by the Russian Federation is less compatible with this objective, because an investor would always have to keep in mind that the provisions of the ECT may be prejudiced by national laws and regulations (para 4.5.26). HVY's primary and subsidiary interpretation

of Article 45(1) ECT do not have that disadvantage of ambiguity and unpredictability, according to the Court of Appeal (para 4.5.27).

3.39 The complaint does not in itself dispute this description of the ECT's object and purpose, instead essentially arguing that the objective of the ECT's provisional application - namely to enable government officials to sign the ECT while also respecting national ratification procedures - should also have been taken into account. The passage from the Preamble (4th paragraph) of the ECT 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 true that the Preamble to a Treaty is relevant for the determination of that treaty's object and purpose.[74] In order to determine the purpose expressed in the Preamble, the Preamble must be interpreted in accordance with the rules laid down in Article 31 *et seq* VCLT. It appears that the complaint assumes that the cited passage of the Preamble states that the ECT's purpose is to provide governments with the time to create a binding legal basis for applying the treaty within their own legal order (through ratification). This view cannot be accepted. The final sentence of the fourth paragraph of the Preamble concerns the desire to establish the commitments contained in the ECT 'on a sound and binding *international* legal basis' (emphasis added, A-G). These words refer to the ECT itself and not to its ratification by the signatory States. This is confirmed by the context in which these words are used: the ECT is the binding legal basis for the commitments already included in the non-binding European Energy Charter.[75] It does not follow either from the preamble or from the provisions of the ECT that it is part of the ECT's object and purpose to give government officials the time to create a binding domestic legal basis. Even if the Preamble is to be interpreted in the manner advocated by the complaint, the Court of Appeal has still taken it into account in para 4.5.34 *et seq*. In those paragraphs of its judgment, the Court *ex abudanti cautela* considered based on the *travaux préparatoires* that the purpose of Article 45(1) of the ECT is to prevent signatory States from being bound, by provisional application, to obligations which are subject to ratification under their national law. On that basis, the Court concluded that Article 45(1) ECT only excluded provisional application if such application was incompatible with national law for certain (categories of) of ECT provisions. The Court of Appeal has therefore taken into account that the ECT, and, in any event, Article 45(1) thereof, has the purpose of allowing the Contracting Parties to apply the ECT provisionally, with the exception of those provisions to which, under their domestic law, the Contracting Parties may only bind themselves after ratification. For these reasons, the complaint fails.

3.41 In para 37, the part complains that the Court of Appeal was wrong to name 'transparency' among the ECT's objectives. According to the complaint, Article 45(1) ECT says nothing about transparency and HVY's arguments to that effect have already been rejected.[76]

3.42 However, the complaint overlooks that paras 4.5.22-4.5.27 do not concern the objective of Article 45(1) ECT, but, rather, the objective of the ECT as a whole. In para 4.5.23 the Court of Appeal set out, with references to the treaty text, that transparency was one of the ECT's

objectives. Given that Article 45(1) ECT must be interpreted in the light of the ECT's object and purpose,[77] it is not clear why it would be incorrect for the Court of Appeal to have involved the purpose of transparency in the interpretation of that provision.

3.43 The part (paras 38-42) complains about the Court of Appeal's finding that no sufficient showing was made of the existence of (established) state practice that would entail a different interpretation than the court's (paras 4.5.28- 4.5.33). The complaint points to several statements that allegedly demonstrate such practice and were disregarded by the Court of Appeal.

3.44 Article 31(3)(b) VCLT provides that, together with the context, there shall also be taken into account 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. This requires all Contracting Parties to have accepted that practice in the application of the relevant treaty, either expressly or implicitly.[78] Furthermore, state practice is relevant if it has developed after the conclusion of the treaty ('subsequent practice').

3.45 The complaint points to several statements allegedly demonstrating state practice that is incompatible with the Court of Appeal's proposed interpretation of Article 45(1) ECT. For instance, it refers to a declaration by the European Council, the European Commission and the then Member States from 1994 (the '1994 EU Joint Statement'), which stated 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 statement in para 4.5.29 and considered that it was not incompatible with HVY's alternative interpretation. The part complains that the Court of Appeal's interpretation is inaccurate and that Article 45(1) ECT must be interpreted in line with the Russian Federation's interpretation.

3.46 Contrary to the Russian Federation's arguments, the Joint Statement can be read to mean that Article 45(1) ECT does not create any obligation that is incompatible with the internal legal order of Signatory Parties in the sense that it excludes the provisional application of ECT provisions that are incompatible with the domestic legal order. Even if the Joint Statement were to be interpreted as advocated by the Russian Federation, it is only a statement by the then EC Member States. This does not show that all the then ECT contracting States (l*et al*one all the current contracting States) subscribe to this interpretation. I also wish to point out that, strictly speaking, the Joint Statement was issued before the date the ECT was concluded and, for that reason alone, therefore cannot qualify as 'subsequent practice'. The complaint thus fails.

3.47 Para 41 of the part further complains that in paras 4.5.31 and 4.5.32 of its judgment, the Court of Appeal wrongly or without sufficient reasoning found (in summary) that statements by Dutch officials, the Finnish government and the UK Foreign Secretary were allegedly compatible with the Court of Appeal's interpretation of Article 45 ECT.

3.48 This complaint too is untenable. The Court's findings regarding the Finnish Government's declaration were made precisely in the light of the already mentioned rule that state practice is only relevant if it is endorsed by all contracting States. The same applies to what the Court found in respect of the comments made by Dutch officials. Contrary to the complaint,[79] the Court did not consider that those declarations were compatible with the interpretation of Article 45(1) ECT endorsed by the Russian Federation, but (rightly) held that they did not indicate state practice as referred to in Article 31(3)(b) VCLT. The Court rightly considered that those statements (including those of the UK Foreign Secretary) did not amount to state practice, but, rather, formed part of the travaux préparatoires,

and have been taken into account in that context.

3.49 The part further argues in para 42 that the interpretation adopted by the Court means that some EC Member States have to apply the ECT provisionally in its entirety. According to that interpretation, so the part argues, representatives of those states must have exceeded their internal powers.

3.50 Indeed, the part argues that the interpretation of Article 45(1) ECT adopted by the Court of Appeal would have consequences in certain contracting States that are incompatible with the domestic law of those States. That argument cannot be accepted. In paras 4.5.9-4.5.33, the Court of Appeal has interpreted Article 45(1) ECT based on the standard of Article 31 VCLT, considering that provision based on the ordinary meaning of its wording in its context and in the light of the ECT's object and purpose. The question whether the interpretation arrived at pursuant to Article 31 VCLT is incompatible with the domestic legal order of the contracting States is not part of the interpretation rule under Article 31 VCLT. However, based on Article 32(b) VCLT it is possible to interpret a treaty provision on the basis of the *travaux préparatoires* if the application of Article 31 VCLT leads to a manifestly absurd or unreasonable result. To the extent that the part should be read in the sense that the Court of Appeal's interpretation is absurd or unreasonable, it is recalled that the Court of Appeal supported its interpretation with references to the travaux préparatoires (paras 4.5.34 *et seq*).

3.51 The part (paras 43-49) complains about paras 4.5.34-4.5.40 of the judgment, wherein the Court of Appeal addressed the ECT's *travaux préparatoires*.

3.52 In paras 4.5.35, the Court of Appeal, for the sake of completeness, considered that the *travaux préparatoires* confirmed its judgment on the interpretation of Article 45(1) ECT. According to Article 32 VCLT, the *travaux préparatoires* only come into play when the interpretation reached on the basis of Article 31 VCLT is manifestly absurd or unreasonable. According to the court, this is not the case. Given that the complaints about the application of Article 31 VCLT fail, the Court of Appeal was not required to investigate the *travaux préparatoires*, such that the opinion concerning the *travaux* in para 4.5.35 was given merely for the sake of completeness. The consequence thereof is that the complaints targeting that opinion are beside the point.

3.53 The conclusion is that all complaints in part 2.4 fail.

Part 2.5: the phrase 'not inconsistent' in Article 45(1) ECT

3.54 Part 2.5 concerns the interpretation of the words 'not inconsistent' in Article 45(1) ECT. This part asserts that, in addition to its own treaty interpretation, the Court of Appeal allegedly developed an alternative interpretation in paras 4.5.41-4.5.47 and 4.7 of the final judgment. According to the part, that alternative interpretation (contrary to what the Court of Appeal has considered in paras 4.5.1-4.5.40) is that the test in the context of Article 45(1) ECT should be whether ECT provisions are contrary to the domestic legal order of the Signatory, whereby the ECT must itself be regarded as forming part of that legal order. The part argues that such interpretation is incorrect because the Court of Appeal has wrongly assumed that Article 26 ECT was applicable in the Russian legal order. By way of example, the part refers to para 4.7.49, in which the court considered that the question of the Arbitral Tribunal's jurisdiction must be determined based on Article 26 ECT and not under Russian law. In doing so, the Court of Appeal is said to have assumed that arbitration can be founded on Article 26 ECT and that, therefore, that

provision is applicable in the Russian legal order; however, that still remains to be proved.

3.55 In paras 4.5.41, the Court of Appeal held as follows:

'The meaning of the words "not inconsistent" follows from the Court of Appeal's interpretation of the Limitation Clause. That interpretation is concerned with whether there are domestic laws or regulations that exclude the provisional application for certain (types or categories of) treaty provisions. If that is the case, then the provisional application of those (types or categories of) treaty provisions will be 'inconsistent' with domestic law.'

3.56 In paras 4.5.42 *et seq*, the Court of Appeal, for the sake of completeness, addressed the parties' debate on the question of how to interpret '(not) inconsistently', based on the Russian Federation's interpretation of Article 45(1) ECT, which requires an examination of whether an ECT provision is contrary to the law of a signatory State. In para 4.5.48, the Court of Appeal came to the conclusion that Article 45(1) ECT must be interpreted as meaning that a signatory State that has not made the declaration referred to in Article 45(2) ECT is bound to apply the Treaty provisionally, except to the extent the provisional application of one or more provisions of the ECT is contrary to domestic law, in the sense that the laws or regulations of that State exclude the provisional application of a treaty for certain (types or categories of) treaty provisions. Based on this interpretation, the Court of Appeal ruled that the provisional application of Article 26 ECT was not contrary to the 'constitution, laws or regulations' of the Russian Federation (para 4.6.1). Para 4.6.2 shows that the Court of Appeal has, for the sake of completeness, investigated, in para 4.7, whether Article 26 ECT would be contrary to the law of the Russian Federation if one adopted the Russian Federation's interpretation of the Limitation Clause in Article 45(1) ECT.

3.57 The Court of Appeal's considerations in paras 4.5.42-4.5.47 were given for the sake of completeness only, given that they have been made for the purposes of paras 4.7 *et seq*, which were themselves only for the sake of completeness. As a result, the complaints of part 2.5 fail due to lack of interest.

Part 2.6: is Article 26 ECT contrary to Russian law?

3.58 Part 2.6 targets para 4.7, in which the Court of Appeal addresses the question whether Article 26 ECT 26 ECT is contrary to the Russian Federation's law.

3.59 As already pointed out when discussing part 2.5, para 4.7 contains reasoning adopted obiter, which is clear from para 4.6.2. The complaints of the part therefore lack interest and require no discussion. In addition, the complaints in part relate to the interpretation and application of Russian law and run up against the provisions of Article 79(1), introductory part and (b), of the Judicial Organisation Act, as do the complaints of insufficient reasoning that cannot be decided without assessing whether the Court of Appeal correctly ruled on the content and interpretation of Russian law.[80]

Part 2.7: referral for a preliminary ruling to the CJEU?

3.60 Part 2.7 contains no independent complaints, but argues that the Supreme Court must refer preliminary questions to the CJEU about the interpretation of Articles 45(1) ECT and 26 ECT. According to the part, the court should have concluded that there was no clear

and unambiguous consent of the Russian Federation to arbitration, for which reference is made to parts 2.2, 2.4, 2.5 and 2.6. The part also argues that it would be contrary to EU law for a Member State court to adopt an interpretation of a mixed agreement such as the ECT that is not in line with the common interpretation of the Commission, the Council and the Member States. Given that different interpretations of Article 45(1) ECT are possible, there is no case of 'acte clair' or an 'acte éclairé', so the part argues.

3.61 A mixed agreement is a treaty concluded by both the EU and the Member States by virtue of shared competence (see Article 4 TFEU). Both the EU and the individual EU Member States are parties to the ECT, because the subjects covered by the ECT partly fall within the competence of the Member States.[81] It is settled case law that an international agreement concluded by the EU constitutes an act of one of the EU institutions within the meaning of Article 267, first paragraph (b) TFEU, such that the CJEU has jurisdiction to rule on the interpretation of such an agreement. The provisions of such an agreement form an integral part of the EU legal order.[82]

3.62 The question arises whether the CJEU is competent to interpret a mixed agreement in its entirety or whether its jurisdiction is limited to certain subject-matter of that agreement, and, if so, what is the delimitation criterion. It can be inferred from CJEU case law that a question referred for a preliminary ruling with respect to a mixed agreement must relate to a subject-matter on which the EU has sufficiently exercised its competences internally. I expand on this further below.

3.63 In several judgments, the CJEU accepted jurisdiction to interpret mixed agreements. However, it was not always clear in which cases it was necessary to involve the Court. The Court clarified the position in *Merck Genéricos* case, where it found that the preliminary jurisdiction of the Court with regard to mixed agreements only concerns those areas in which the EU has sufficiently exercised its internal competences.[83]

3.64 The CJEU expanded on this it the *Lesoochranárske VLK* case.[84] That case concerned the question whether a provision of the Aarhus Convention[85] had direct effect, which raised the question whether the Court had jurisdiction to give a preliminary ruling concerning the relevant provision. The Court 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, i.a. the judgments of 10 January 2006 in *IATA and ELFAA*, C-344/04, Jurispr. p I-403, paragraph 36, and 30 May 2006, *Commission v Ireland*, C-459/03, Jurispr. p 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, judgments of 30 April 1974, *Haegeman*, 181/73, Jurispr. p 449, paragraphs 4-6, and of 30 September 1987, *Demirel*, 12/86, Jurispr. p 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, judgments of 14 December 2000, *Dior and Others*, Joined Cases C-300/98 and C-392/98 Jurispr. p I-11307, paragraph 33, and

of 11 September 2007, *Merck Genéricos – Produtos Farmacêuticos* Case C-431/05 Jurispr. p 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 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, *MerckGenéricos – Produtos Farmacêutico*s, 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, judgment of 7 October 2004, *Commission v France*, Case C-239/03 Jurispr. p I-9325, paragraphs 29-31).' (emphasis added, A-G)

3.65 This jurisprudence shows that, if the EU has adopted provisions to implement a mixed agreement, the CJEU has jurisdiction to interpret that agreement,[86] given that, in such a case, there is a need for a uniform interpretation of the relevant EU law, and for clarity about the division of competences between the EU and the Member States. There is no doubt that the CJEU has the power to decide on its own competence.

3.66 For the case at issue in cassation, it matters to what extent there is EU legislation implementing the ECT or its specific provisions. While there is extensive EU legislation in the energy field that provides in particular 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 aims to provide investment protection to energy companies, including oil companies.[87] To my knowledge, the ECT gave rise to the adoption of only one instrument, namely Council Regulation (EC) No 701/97 of 14 April 1997 establishing a programme to promote international cooperation in the energy sector (the 'Synergy programme'), which has meanwhile expired.[88] The aim of that Regulation was to

streamline the EC's international cooperation with third countries in the field of energy. The Regulation did not contain any indication that it implemented the substantive provisions of the ECT for (what is now) the EU.

3.67 In its judgment of 6 March 2018 (*Slovakia v* Achmea), the CJEU ruled that Article 8 (the arbitration provision) of the bilateral investment treaty between the Netherlands and Slovakia was contrary to Articles 267 and 344 TFEU.[89] The Court based this finding on the consideration that BIT proceedings could also implicate questions of interpretation and application of EU law. Since EU law is part of the law in force in the Member States, a tribunal established on the basis of Article 8 of the BIT would have to apply EU law. According to the Court, there is conflict with Articles 267 and 344 TFEU if such arbitral tribunals cannot refer questions for preliminary ruling to the Court because they are not part of the judicial system of the Member States. The *Slovakia v Achmea* judgment only relates to investment arbitrations in which a Member State is a respondent. The judgment's implications are that Member States may no longer provide advance consent to arbitration on the basis of a BIT and thus waive the jurisdiction of their own state courts. *Slovakia v Achmea* judgment has removed the basis for intra-EU investment arbitration.[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] wherein they opined, inter alia, that, as a result of this judgment, arbitration between an EU Member State and an investor from another EU Member State was contrary to EU law.[92] In the context of the ongoing negotiations on the modernisation of the ECT, the European Commission has made a proposal to amend Articles 26 and 27 ECT. As a result, Belgium requested from the CJEU an opinion under Article 218(11) TFEU on the question whether arbitration between Member States on the basis of Article 26 ECT was compatible with EU law.[93] Both the January 2019 declaration and Belgium's request for an Opinion relate to the proposals for a new, modernised ECT. The present case is governed by the ECT as adopted in December 1994, such that neither the January 2019 declaration nor the December 2020 request for an Opinion are relevant here.

3.69 It is also worth noting that, in 2017, the Paris Court of Appeal intended to submit questions to the CJEU on the interpretation of the ECT (including Article 1(6)) in a case related to the present arbitration.[94] As regards the jurisdiction of the CJEU, the Paris Court of Appeal merely considered in its judgment that mixed agreements form part of the European legal order.[95] However, those proceedings before the Paris Court of Appeal were withdrawn.[96]

3.70 By order for reference of 24 September 2019, the Paris Court of Appeal referred questions to the CJEU in another case (Republic of *Moldova v Komstroy*) concerning the interpretation of Articles1(6) and 26(1) ECT.[97] Those questions were raised in the context of the question whether an *ad hoc* arbitral tribunal established under Article 26(3) ECT had jurisdiction to settle a financial dispute concerning the payment of a claim relating to an agreement on the sale of electricity. In short, the facts of that case were the following. In 1999, a Ukrainian electricity producer (Ukrenergo) sold electricity to Energoalians, a Ukrainian electricity distributor, which then resold the electricity to Derimen, a company based in the British Virgin Islands. Derimen in turn resold the electricity to Moldtranselectro, a Moldovan public company. The volumes of electricity to be supplied were determined monthly between Moldtranselectro and Ukrenergo and

deliveries were made to the Ukrainian side of the Ukrainian-Moldovan border. Energoalians was to be paid for the delivered electricity by Derimen, which was itself meant to receive payment from Moldtranselectro. On 1 January 2000, Moldtranselectro's debt to Derimen amounted to more than USD 18 million. Moldtranselectro only met its payment obligation towards Derimen in part, leaving a debt exceeding USD 16 million. Derimen transferred its claim against Moldtranselectro to Energoalians, which sought to recover the claim from Moldtranselectro and brought proceedings to that end before the Moldovan courts and later before the Ukrainian courts. Energoalians took the view that Moldova breached certain ECT obligations and, consequently, initiated arbitration proceedings on under Article 26(3) ECT. Komstroy was the legal successor of Energoalians. The *ad hoc* arbitral tribunal in Paris ruled that Moldova had failed to meet its obligations under the ECT and ordered it to pay a certain amount. Moldova then brought an action before the French courts for the annulment of the arbitral award on the grounds of breach of public policy, namely the jurisdiction of the *ad hoc* arbitral tribunal. Ultimately, the Paris Court of Appeal[98] posed the following questions to the CJEU:

'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 On 3 March 2021, A-G Szpunar delivered his Opinion in this case.[99] The A-G first addressed the CJEU's jurisdiction, and observed that it 'could be the subject of debate, since this case is concerned with the interpretation of an international convention, in a dispute which, at least at first sight, appears to be what might be called a "purely external" situation.' A-G Szpunar concluded that the CJEU has jurisdiction to answer the questions referred for a preliminary ruling, since the provisions of the ECT whose interpretation is sought may also apply in situations falling within the EU legal order and, for that reason, the European Union has an interest in a uniform interpretation of the provisions in question.[100] At the same time, A-G Szpunar stated that he 'must, however, qualify that statement' (paragraph 46) and suggested that the Court should clarify the implications of the *Achmea* judgment on the applicability of Article 26 ECT (paragraph 48). In his view, it was not a foregone conclusion that Article 26 ECT could never apply within the EU, because questions concerning the compatibility of ECT provisions with EU law could also be raised in domestic court proceedings (paragraph 90). A-G Szpunar concluded with regard to the Court's jurisdiction that Article 26 ECT was not compatible with EU law in that it provides for recourse to an arbitral tribunal, with the result that such a dispute settlement mechanism cannot apply within the EU legal order (paragraph 98). At the same time, the A-G considered that it could not be excluded that the substantive provisions of the ECT,

including Article 1(6) ECT (the definition of 'investment'), and Article 26 ECT could be applicable in the EU legal order (paragraph 99). It is also notable that A-G Szpunar has not addressed the CJEU case law holding that the Court has jurisdiction to interpret a mixed agreement if the EU has adopted implementing provisions.

3.72 In the remainder of his Opinion, A-G Szpunar focussed on the question whether a claim under a contract for the supply of electricity could be regarded as an investment within the meaning of Article 1(6) ECT, in so far as that provision imposes further conditions in that respect. The A-G concluded that this was not the case in *Moldova v Komstroy*.[101] An agreement to supply electricity was a simple commercial transaction which did not fall under the definition of 'investment' within the meaning of Article 1(6) ECT and does not arise from an agreement relating to an investment.[102]

3.73 Assuming that the CJEU follows A-G Szpunar's opinion and finds itself competent to take cognisance of questions of interpretation from the ECT – and I would reiterate that it is up to the CJEU to decide on its own jurisdiction – it would still be true that a referral of questions for a preliminary ruling would still require that this is necessary for the resolution of the complaints. For the present case, I am of the opinion that it is not necessary to refer questions for a preliminary ruling in order to deal with the complaints in part 2. My explanation is the following. Parts 2.2 and 2.3 relate to questions of Dutch arbitration and civil procedure law. Parts 2.5 and 2.6 are directed against the court's findings in the final judgment that were only obiter and fail for that reason alone. Part 2.4 relates to the interpretation of Article 45(1) ECT. The part contains complaints that, although formulated as complaints as to law, actually are complaints as to reasoning, concerning the manner in which the Court of Appeal dealt with certain arguments. As already discussed above, such complaints fail because they are premised on an incorrect interpretation of the disputed judgment (see the discussion of part 2.4.2). As also demonstrated, the complaints of the part relating to the alleged disregard of state practice fail because no such state practice has been shown to exist. Complaints (see para 42 et seq of the Initiating Submission) also target obiter findings. It follows from the above that no referral of questions for a preliminary ruling is required to reach a decision with respect to part 2.4. I would add that, in international law, a provision on the provisional application of a treaty (such as Article 45 ECT) is a common provision on which there is generally no EU legislation. The present dispute also does not concern the provisional application of the ECT in (a member state of) the EU, but, rather, in the Russian Federation.

3.74 The conclusion is that the submission of questions to the CJEU for a preliminary ruling is not necessary in order to decide on the Russian Federation's cassation complaints.

3.75 Part 2.8 reiterates the view that there is no clear and unambiguous consent of the Russian Federation to arbitration. The part contains no separate complaint and elaborates on the preceding parts, such that a separate discussion can be omitted.

Part 3: Interpretation of Article 1(6) and (7) ECT (investment and investor)

3.76 Part 3 targets para 5.1 of the final judgment, in which the Court of Appeal interpreted the terms 'investment' and 'investor' for the purposes of Articles 1(6) and (7) ECT. According to the part, that interpretation is incorrect. According to the Russian Federation, HVY are not true foreign investors and their investments do not qualify as foreign investments, but, rather, as so-called 'round-trip investments', *i.e.*, investments made by investors who are in

fact controlled by nationals of the host country (in this case the Russian Federation). The part raises a large number of complaints against the Court of Appeal's rejection of the Russian Federation's position.

Introductory remarks

3.77 Before discussing the complaints of this part, I wish to make some preliminary remarks. To the extent relevant, the authentic English version of Article 1(6) and (7) ECT reads as follows:

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 Dutch translation, they read:

[Dutch translation]

3.78 Strictly speaking, Article 1(6) ECT contains no definition of the notion of 'investment',

but provides that 'every kind of asset' can qualify as an investment and contains a non-exhaustive list of assets that in any case qualify as investments.[103] The definition of 'investor' in Article 1(7) ECT is linked to that of 'investment':[104] an investor is an individual or entity who owns or controls such an investment.[105] Where the investor is a legal entity, the requirement is for that entity to be incorporated under the law of a contracting State.[106] This test is sometimes referred to as 'the incorporation test', and is distinguished from other connecting factors for the 'nationality' of a legal entity, such as the place where the management of the legal entity is located, or the nationality of its shareholders.[107] Article 1(6) ECT classifies shares as an investment, such that shareholders are protected by the ECT even if the company in which they have invested does not itself qualify as an investor.[108]

3.79 Article 26 ECT further develops the notions of investment and investor.[109] In 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 (...)'. Article 26 ECT thus requires, first, that there be an investment, second, that the investment be made by an investor that is established in a contracting State, and, *third*, that such investment be made in the territory of a contracting State other than that in which the investor is established.

3.80 The central question raised by part 3 is whether the ECT contains further requirements with regard to investments or their cross-border nature than appears from Articles 1(6) and (7) and 26 ECT. So, the part argues, inter alia (para 3.2.3), that the ECT only protects international investments and therefore does not protect 'round-trip investments', or investments made by investors who have no substantial connection with the State in which they are established ('letterbox companies'). Furthermore, the criterion should be not only the investor's place of establishment, but also who controls the investor *('piercing the corporate veil'*, part 3.4). An investment is alleged to exist only if the investor has made a real contribution to the economy of the host State (part 3.3).

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 'organised in accordance with the law applicable in that Contracting Party'. From a textual point of view, this means that the requirements of Article 1(7) ECT for an entity to qualify as an 'investor' for the purposes of the ECT are met (paras 5.1.6). The Yukos shares in HVY ownership qualify as 'investment' within the meaning of the ECT, since '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. The Court of Appeal further considered that, from a textual point of view, the requirement of Article 26 ECT of a dispute between a 'Contracting Party' (the Russian Federation) and investors from 'another Contracting Party' (HVY, companies under the law of Cyprus and the Isle of Man) 'relating to an Investment of the latter in the Area of the Former' is also met (paras 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. Nor does the object and purpose of the ECT lead to a different conclusion, according to the Court of Appeal (paras 5.1.7.3).

3.82 After these introductory remarks, I return to the discussion of the part and the complaints that it contains.

3.83 Part 3.1 is limited to an introduction and contains no complaints.

Part 3.2: 'Round-trip Structure'

3.84 Part 3.2 targets the Court of Appeal's ruling in para 5.1.5-5.1.8 and argues that the ECT does not protect domestic investments, even if these investments were made by sham companies via a 'Round-trip Structure'. This part splits into four subparts (3.2.1-3.2.4).

3.85 Part 3.2.1 is a summary of the court's assessment and does not contain any complaints.

3.86 Part 3.2.2 complains that the Court of Appeal wrongly based its interpretation of the notions of 'investment' and 'investor' on a purely literal interpretation of only a part of the relevant ECT text, namely the definitions contained in Article 1(6) and (7) ECT. According to the part, such an interpretation conflicts with Article 31(1) VCLT.

3.87 This complaint lacks factual basis. The Court of Appeal did not base its interpretation of the terms 'investor' and 'investment' on a purely literal interpretation of Article 1(6) and (7) ECT. In paras 5.1.6, the Court of Appeal held that the starting point for the interpretation was the ordinary meaning of the text of the relevant provisions. In doing so, 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 addressed Russian Federation's arguments regarding the context in which Article 1(6) and (7) ECT should be read, and the ECT's object and purpose. Here, too, the Court of Appeal applied the correct standard in accordance with Article 31 VCLT. The fact that the Court of Appeal applied the elements of context and ECT object and purpose on the basis of the arguments put forward by the Russian Federation is logical, and does not indicate that the Court of Appeal failed to treat those elements as having equal weight as the textual interpretation.

3.88 The part also complains that, in para 5.1.8.11, the Court of Appeal gave too little weight to subsequent state practice of a large number of ECT parties which had excluded round-trip investments from the scope of their later investment treaties.

3.89 The Court of Appeal's judgment is correct because, as the court itself held, this is not state practice regarding the application or interpretation of the ECT, but, rather, regarding the choices that states have made when concluding new treaties. This falls outside the scope of Article 31 VCLT[110] Accordingly, this complaint, too, must fail.

3.90 Part 3.2.3 raises a number of complaints targeted at the Court of Appeal's interpretation of the notions of 'investment' and 'investor'.

3.91 The part (paras 111-112) alleges that in determining the meaning of the definition of 'investment' in Article 1(6) ECT, the Court of Appeal disregarded the ordinary meaning of that notion (and, with that, of the notion of 'investor'). In accordance with that ordinary meaning, an investment exists only if a party, during a certain period, makes an economic contribution to the host country (in this case, the Russian Federation) and runs a certain risk. According to the part, this has not occurred in this case. The Court of Appeal rejected this position in paras 5.1.9.1-5.1.9.5, which are also the target of part 3.3 (see below).

3.92 The part disregards that, in accordance with Article 31(4) VCLT, a definition of a term in a treaty assigns a special meaning to that term. That paragraph provides:

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

A treaty term can thus be given a special meaning (*i.e.*, a meaning other than the ordinary meaning) if it is established that the parties intended to give that term such

special meaning. The inclusion of a definition is the most evident proof of such clear intent.[111] Treaties will therefore sometimes contain definitions of particular terms that depart from their ordinary meaning. As apparent from Article 31(4) VCLT, in such a case, one must proceed based on the definition and not the ordinary meaning. In this case, the Court of Appeal thus correctly proceeded based on the definition of the term 'investment' in Article 1(6) ECT. The case law referred to by the part is not relevant because it relates to other investment treaties and the ICSID Convention, not the ECT.[112] Even assuming that the ordinary meaning of the term 'investment' could be inferred from that case law in the first place, such meaning does not apply to the ECT, given that the ECT contains its own definition of the term 'investment'. That is fatal to the complaints.

3.93 The part (paras 113-115) further complains that the Court of Appeal disregarded the object and purpose of the ECT in interpreting the terms 'investment' and 'investor'. The part points out that the object and purpose of the ECT lies in stimulating international investment, and argues that the Court of Appeal wrongly found in para 5.1.7.3 that this does not lead to the conclusion that the ECT poses further requirements as to the foreign nature of an investment.

3.94 In paras 5.1.7.3, the Court of Appeal held that the ECT's object did, among other things, indeed encompass the promotion of international cooperation in the field of energy and the protection of international investments. However, the Court of Appeal did not consider this to mean that the foreign character of an investment had to be subject to further requirements other than the requirements derived from the wording of Articles 26 ECT and 1(6) and (7) ECT. According to the Court, the wording of those provisions is sufficiently clear: according to their terms, an investment falls within the scope of Article 26 ECT if the legal entity making the investment is established under the law of one contracting State[113] and the investment within the meaning of Article 1(6) ECT occurs in another contracting State. This conclusion shows no error of law on the part of the Court of Appeal. While the treaty's object and purpose must be taken into account when interpreting it, that does not mean that such object and purpose can lead to an interpretation that is not supported by the wording of the treaty provision. Object and purpose serve as a means of determining the meaning of the wording of a provision (which are primary), but do not carry more weight than the wording; they cannot undo the wording.[114] Accordingly, the Court of Appeal was entitled to rule that, although the ECT's object includes the protection of international investments, the wording of the relevant provisions does not support the view that this entails additional requirements for the international character of the investments or the nationality of the investor. Accordingly, this part of the complaint fails.

3.95 The part (para 114) complains that the Court of Appeal disregarded the context of Article 1(6) and (7) ECT. According to this part, Articles 10, 13, 17 and 26 ECT as well as the 'Understanding' to Article 1(6) ECT mean that letterbox companies without substantive activities in the State in which they are established do not enjoy protection under the ECT if such letterbox companies are controlled by foreign investors from a third State. The complaint argues that investments made by the nationals of the host state itself must, *a fortiori*, fall outside the scope of the ECT.

3.96 In support of this argument, the complaint points to Article 10(3) ECT, which it says makes a clear distinction between the foreign investors and the 'own investors' of a Contracting Party. I shall quote Article 10(3) ECT, and, for the proper understanding thereof, also paragraph 2 of the same Article, 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.

[Dutch translation]

As the part argues, this Article does indeed distinguish between a contracting Party's own investors and investors of other contracting States and of other countries. In that sense, the provision protects only cross-border investments. However, it is not apparent from that provision that it is therefore necessary to set different requirements for the international nature of an investment or the investor's nationality than those arising from Article 1(6) and (7) ECT. Nor does the part provide any detail in this respect.

3.97 In support of its argument that the ECT only protects cross-border investments, the part also refers to Article 13 ECT. Article 13 ECT protects investments from expropriation, except in specific cases where expropriation is justified. Like Article 10, 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'. The provision thus makes clear that the objective is to protect cross-border investments, but also contains no indication that additional requirements should therefore be imposed on the international character of an investor's investment.

3.98 The complaint also refers to the 'Understanding' to Article 1(6) ECT,[115] which 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 in influence over the management and operation of the Investment; and

(c) ability to exercise substantial in 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 applier of the ECT additional tools to verify who has 'control' over a particular investment. The 'Understanding' plays no part when it is clear that an asset is 'owned by' an investor. As the Court of Appeal held in paras 5.1.7.4, it is established in this case that the Yukos shares were 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, also referred to in the complaint, is the so-called 'denial of benefits clause'. The provision provides that, in certain circumstances, Part III of the ECT (on investment promotion, protection and treatment) shall not apply. The relevant part of the authentic English text of Article 17 reads as follows:

Each Contracting Party reserves the right to deny the advantages of this Part to:

1. a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized;

(…).

In Dutch translation, this reads:

[Dutch translation]

As the Court of Appeal held in paras 5.1.8.4, Article 17 ECT gives the contracting States the right to deny the protection of a large part of the ECT to a precisely defined category of investors, namely such investors as are formally established in a contracting State, but are, in substance, predominantly linked to a non-contracting State.[116] Contrary to the complaint' s submissions, Article 17 ECT does not provide that ECT protection must be denied to such investors, but, rather, provides that such investors are, in principle, protected by the ECT, *unless* a contracting State decides otherwise.[117] Article 17 ECT does not therefore contain any rule under which investments which are only formally, but not actually, international do not enjoy protection under the ECT.

3.100 The part (paras 115-117) also complains that the Court of Appeal wrongly held that the state practice relied on by the Russian Federation carries 'little weight', because such state practice did not concern the interpretation and application of the ECT, but, rather, the choices that were subsequently made at the conclusion of new treaties. The complaint argues that this ruling is incorrect for several reasons: (i) the Court of Appeal proceeded on an incorrect, merely literal interpretation of the ECT, (ii) the conclusion of treaties after the signing of the ECT does carry weight, and (iii) the Court of Appeal ignored the intent of the contracting States to clarify the ECT.

3.101 The Court of Appeal rejected the Russian Federation's state practice argument because the meaning of Article 1(6) and (7) ECT was already clear and did not exclude roundtrip investments. That holding is capable of independently supporting the Court of Appeal's conclusion. According to the interpretation rule of the VCLT, state practice only comes up for consideration if the text of the treaty and the context lead to an ambiguous result. Since this is not the present case, the Court of Appeal was not required to address

state practice. I note that the sources mentioned in the part (para 116) in support of state practice do not constitute examples thereof because they are arbitral decisions, a research paper and a motion of the Lower House of Parliament to exclude letterbox companies from trade agreements.[118] These documents do not demonstrate that the Contracting States structurally interpret the ECT as not protecting roundtrip structures. For the rest, the complaint builds on previous complaints. The complaint therefore fails.

3.102 The part (paras 117-120) also relies on the recent proposals of the ECT Secretariat and the European Commission to clarify Article 1(6) and (7) ECT and argues that such proposals are relevant for the interpretation of those provisions because they concern a clarification rather than an amendment. The part reiterates that letterbox companies without substantial activities in the country where they are established do not fall under the definition of 'investment'.

3.103 As already noted, state practice can only be taken into account when interpreting a treaty if the practice in question is one developed within the relevant treaty's framework.[119] The proposals invoked by the part relate to a potential new treaty and are therefore, in principle, irrelevant.[120] In addition, Article 31 VCLT requires that the state practice to be implicitly accepted by all the parties to the treaty. That too is not the case here, given that the proposals in question came from the European Commission and the European Council, which only represent some of the parties to the ECT. Against that background, the observations in the documents referred to in the part cannot be regarded as an indication that the notions of 'investment' and 'investor' are already being interpreted in the proposed manner and the documents merely refer to a codification of such interpretation.[121] Rather, the documents show that the European Commission and the European Council are of the opinion that the current ECT is no longer adequate and requires modernisation to be brought in line with the changed principles of investment protection. For example, in its Recommendation, the European Commission states:

'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]

The European Council's negotiating directives, among other things, include the following:

'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 of 20 April 2020 includes the following proposal for the adaptation of 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];

(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 any established state practice that involves additional requirements being imposed on 'investors' and 'investments' within the meaning of the ECT. Rather, they indicate that such requirements at present do not yet apply, but should, according to the EU Member States, be imposed in the future.

3.105 The part (para 121) complains that the Court of Appeal disregarded clear rules and fundamental principles of international law. According to the part, this concerns a principle of investment law under which international investment treaties are meant to (i) protect international investments and (ii) protect effective investors and not those who are only investors 'on paper'. That would be the case if the real economic investor is a national of the host country, such that, in essence, the investment is a domestic once. The Russian Federation substantiates the existence of that principle by references to arbitral case law. In paras 5.1.8.6-5.1.8.10, the Court of Appeal discussed the arbitral awards relied on by the Russian Federation and held that no principle of investment law as advocated by the part (part 122) could be inferred from them.

3.106 It is correct that, in accordance with Article 31(3) VCLT, principles of international law may play a role in treaty interpretation. The purpose of that provision is to be able to interpret the treaty against the background of the system of international law of which it forms part.[125] This may include norms derived from other treaties or from customary international law.[126] Of course, the norm must be relevant to the interpretation of the treaty in question. This may, for instance, be the case if the norm to be taken into account is from a treaty to which all the States parties to the treaty being interpreted are also parties, or the norm qualifies as international customary law.[127] The '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, for instance, the principle of good faith.[128] The terms used may have the meaning which has been accepted in customary international law or in accordance with the general principles of law.[129]

3.107 In support of its position that the court disregarded international law, the Russian Federation has invoked a principle of international investment law, the existence of which is allegedly evidenced by the aforementioned arbitral case law. The content of the principle is alleged to be that only genuinely international investments deserve protection, such that it is not sufficient for the investor to be formally established in a country other than the country

where the investment was made (the host country); it is also necessary to establish whether the 'real economic investor' is a national of that host country (a case of 'round-trip' investment). It follows that the principle (in so far as it exists) can be relevant only if it represents a principle of customary international law or a rule of treaty law relevant to the interpretation of the ECT. In my opinion, neither is the case. I expand on this below.

3.108 As the Court of Appeal has held, part of the arbitral case law was delivered under the ICSID Convention. As stated my introduction (para 1.10), the ICSID Convention has its own scope of application. The ICSID Convention expressly concerns international investment, while leaving it to ICSID tribunals to flesh out that notion. In practice, therefore, ICSID tribunals sometimes impose stricter requirements than do the underlying investment treaties themselves; this concerns, in particular, the notion of 'investment' (see discussion of part 3.3).[130] Such requirements may also be stricter than those of other (commercial) arbitration tribunals, which do not base their jurisdiction on the ICSID Convention.[131] All this means that to the extent that ICSID tribunals have, in certain cases, imposed stricter requirements on the international character of investments than apply under the ECT, it does not follow that the ECT also ought to be interpreted more strictly: such stricter requirements emanate from the ICSID Convention and/or the underlying bilateral investment treaty. The fact that all such treaties set different requirements for the international character of an investment[132] also means that one cannot speak of a rule of international customary law.[133] It is therefore not at all clear why the ECT would have to be interpreted in accordance with the rules of the ICSID Convention or other investment treaties. On the contrary, the various treaties have their own definitions, which in practice can also give rise to different outcomes. Furthermore, in the *Plama v Bulgaria* award delivered on the basis of the ECT, the ICSID Tribunal ruled in line with Article 1(7) ECT (see para 3.110 below).

3.109 Accordingly, in so far as the various arbitral decisions do imply stricter requirements regarding the international nature of an investment (an argument which the Court of Appeal consistently rejected), such requirements are not relevant to the ECT, because the case law at issue relates to other treaties. This is the case for most of the decisions cited by the part. Thus, the decision in *Loewen v United States of America* related to NAFTA,[134] whereas *Phoenix v Czech Republic*,[135]*Occidental v Ecuador*,[136] *Spectrum de Argentina S.A. v Argentina*,[137] and *ST-AD GmbH v Bulgaria*[138] all relate to the ICSID Convention and various bilateral investment treaties. The *Lemire v Ukraine* case concerns the BIT between the United States and Ukraine.[139] These arbitral decisions are not relevant to the interpretation of the ECT.

3.110 Incidentally, in paras 5.1.8.10, the Court of Appeal considered the arbitral case law (submitted by HVY) that was, in fact, made based on the ECT. In *Plama v* Bulgaria, the ICSID Tribunal held that, in accordance with the definition in Article 1(7) of the ECT, it is irrelevant who owns and/or controls the investing company. According to the tribunal, the only relevant fact was that the investing company (Plama Consortium) was established in accordance with the law of Cyprus.[140] According to the Court of Appeal, the arbitral awards in *Charanne v Spain*[141] and *Isolux v Spain*[142] are therefore consistent with this (see paras 5.1.8.8 and 5.1.8.10). With regard to the *Alapli v Turkey* award, the Court of Appeal considers that it does indicate that round-trip structures do not deserve protection; however, in view of the division between the arbitrators on this point, the award does not demonstrate a generally accepted principle to that effect.[143] That reading of the various arbitral awards is not disputed by the plea.

3.111 It follows from the foregoing that the complaint that the Court of Appeal has erred with respect to international law must fail. I would also add for the sake of completeness that

the commentary on the ECT that I reviewed likewise does not support the Russian Federation's view that the international character of the investments is subject to greater demands.[144] The imposition of such greater demands was also denied by the ICSID Tribunal in the *Plama v Bulgaria* award cited above. As pointed out in commentary, the effect of this ruling is that letterbox companies do have the ability to claim protection under the ECT, but, at the same time, based on Article 17 ECT, the contracting States may limit such protection to investors that have a substantive link with the country in which they are established (the 'denial of benefits clause'), and thus exclude letterbox companies.[145] As long as the contracting States have not made use of this possibility, letterbox companies remain included within the ECT's scope.[146]

3.112 Part 3.2.4 complains about para 5.1.8.8, in which the Court of Appeal held that it was not sufficiently explained why Khodorkovsky *et al* can be regarded as 'beneficial owners' of the Yukos shares and why HVY only held such shares for the benefit of Khodorkovsky *et al*. The part argues that, in view of Articles 149 and 154 Civil Procedure Code, this position is either incorrect or incomprehensible, because this point is not in dispute between the parties.

3.113 The complaint fails due to lack of interest; the disputed legal reasoning does not relate solely to the question whether Khodorkovsky *et al* were the beneficial owners of Yukos shares and HVY, but primarily to the question whether this is relevant for the application of the ECT. In this paragraph of the judgment, the Court of Appeal rejected the Russian Federation's assertion that the ECT distinguished between the formal and the actual owner, in the sense that only the latter had *locus standi* (see paras 5.1.8.7). The Court of Appeal concluded that there was no such rule, and supported that conclusion by a reference to *Charanne v Spain.* The part does not dispute that opinion.

3.114 I conclude that all the complaints in part 3.2 fail.

Part 3.3: actual economic contribution to the host country's economy

3.115 Part 3.3 targets 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 could not be considered an 'investment' under the ECT because HVY did not make an actual economic contribution to the Russian Federation. The part complains that the Court of Appeal wrongly found that the Russian Federation had not demonstrated the existence of such an internationally recognised legal principle of investment law (No. 126) and that the Court of Appeal wrongly adopted a purely literal interpretation of the ECT's notions of 'investment' and 'investor' (para 127). According to the part, the Court of Appeal wrongly considered that the requirement of economic contribution only applied to 'investment' as referred to in the ICSID Convention, and not to the ECT (para 129).

3.116 To the extent that the complaints build on the previous parts, they fall together. With regard to the complaint in para 129, I reiterate that the ICSID Convention has its own scope of application, which led the ICSID tribunal in the *Salini Costruttori SpA v Morocco* award[147] to set out the criteria to determine whether there is an 'investment'. These *Salini* criteria are stricter than those under the ECT.[148] One such criterion is that the investment must contribute to the economic development of the host country (see para 5.1.9.2 of the final Court of Appeal 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 breached should carefully consider whether to submit their claim at ICSID, given the risk that ICSID might decline jurisdiction.[149] It

is therefore clear and accepted in practice that the ICSID Convention is interpreted differently from the ECT. There is also no indication in the ECT's text that the definition of 'investor' (or other terms) in the ECT should be interpreted in accordance with that of the ICSID Convention.

3.117 As already noted above, the ECT does not provide a real definition of the notion of 'investment', instead providing a non-exhaustive list of assets identified as such. This raises the question of how to determine whether assets that are not on listed in Article 1(6) ECT must be treated as 'investments'. In this context, commentators note that interpretations of the notion of 'investment' as developed outside the ECT, *e.g.*, under the ICSID Convention, may be useful.[150] There are also some ECT cases in which the definition of 'investor' was based on the *Salini* case law under the ICSID Treaty.[151] Thus, the majority of the arbitrators in *Alapli v Turkey* ruled that the ECT required 'a meaningful contribution' by the investor in the host state. According to them, this was not the case, because the claimant had not invested its own money, but had acted as a mere 'conduit'.[152] This view was disputed in a dissenting opinion by another arbitrator on the ground that the ECT did not contain such a requirement.[153] In other cases, it was expressly held that *the Salini* criteria could not play a role in ECT context. In *Anatolie Stati and Others v Kazakhstan*, the Tribunal considered that the ECT contained an 'extremely broad definition' of the notion of 'investment', and if an asset was covered by Article 1(6) ECT, the criteria developed in the context of another treaty were no longer relevant:

'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]

3.118 The conclusion is that ICSID case law, and, in particular the *Salini* case, does not indicate the existence of a principle of international investment law that should also be taken into account when interpreting the ECT. Arbitral case law is too divergent for that to be the case. Moreover, there are only a few awards (of which one is not unanimous) in which this position was taken, such that no decisive significance can be attributed thereto. I also refer to my observations in para 1.8 of this Opinion regarding the significance of arbitral case law in the context of treaty interpretation.

3.119 I conclude that all the complaints in part 3.3 fail.

Part 3.4: 'piercing the corporate veil'

3.120 Part 3.4 targets paras 5.1.8-5.1.11 and complains that the Court of Appeal and the Tribunal should have looked 'beyond the purely formal corporate structure' of HVY because these companies were only set up to commit and conceal illegal acts, including tax evasion. It is a principle of international law that where companies have been abused in such a way, the corporate structure must be disregarded *(piercing/lifting the corporate veil).* In this case, so the part argues, this has the consequence that HVY cannot be treated as an 'investor' within the meaning of the ECT, because they cannot be considered to have been incorporated, respectively, in accordance with the law of Cyprus or the Isle of Man as required by Article 1(7)

ECT.

3.121 The Court of Appeal rejected this argument of the Russian Federation on three grounds. First, according to the Court of Appeal, no such principle has been demonstrated (paras 5.1.10.1-5.1.10.2). Second, there are no indications that Article 1(7) ECT provided any basis for the application of this doctrine in the sense advocated by the Russian Federation. Third, the doctrine of 'piercing the corporate veil' relates to the determination of liability and cannot be used to challenge a tribunal's jurisdiction (para 5.1.10.4).

3.122 The factual premise of the complaints is that HVY were allegedly only established in order to conceal illegal activities. This has not been established.[155] Accordingly, in cassation, a hypothetical factual assumption must be made that HVY were indeed established in order to conceal the specified illegal activities.

3.123 The complaints of the part are based on the doctrine of 'piercing/lifting the corporate veil'. As the Court of Appeal correctly held, this term's primary significance is in the context of liability of legal entities. 'Piercing the corporate veil' means that one must look beyond legal personality so that the shareholders may be held liable instead of only the legal entity itself.[156] The term sometimes takes on a broader meaning and is used to denote other situations in which the legal personality of an entity is discarded and one instead looks at who controls it.[157] The ECT recognises the principle of 'piercing the corporate veil' in this broad sense, for instance, in Article 26(7), which makes it possible to extend the legal protection of Article 26 ECT to investors established in the country where the investment was made, provided that they are controlled by investors from another contracting state. In such a case, the decisive questions is thus not who the investor is and where it is established, but, rather, by whom it is controlled.[158] This is a way of looking beyond the investor/company, but – contrary to the view set out above – this is done for the benefit of the person controlling the investor.

3.124 The part relies on an interpretation of the notion of 'piercing the corporate veil' in international law according to which judges and arbitral tribunals must allegedly look beyond corporate entities that are abused in order to commit illegal acts. Such entities must therefore be denied protection under (investment) treaties. Strictly speaking, this is not a case of 'piercing the corporate veil' because that view does not involve looking through the company at its shareholders; instead, the company is deemed entirely non-existent regardless of 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 part refers to the International Court of Justice (ICJ) *Barcelona Traction* judgment.[159] The question in that case was whether Belgium could bring proceedings before the ICJ against Spain, on behalf of the Belgian shareholders of Barcelona Traction, a Canadian company. The ICJ therefore had to assess, among other things, whether company shareholders could sue based on allegedly unlawful acts vis-a-vis the company. The ICJ proceeded on the premise that the company was independent with regard to its shareholders, but also considered that this was possibly subject to exceptions in certain circumstances, in particular where the company has been unable to protect the rights of those who entrusted their financial resources to it.[160] According to the ICJ, such cases constitute and exception to the principle of corporate autonomy:

'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 found that such an exception can also play a role in international law. However, the ICJ also emphasised the exceptional nature of the process of '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.'

3.126 The ICJ acknowledged the existence of the possibility of 'piercing the corporate veil' in international law, including 'to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance', but, at the same time, found that there was room for this only in exceptional circumstances. The ICJ did not therefore go as far as the part alleges (para 132), since nothing in the judgment states that courts and arbitral tribunals are 'required' to look beyond the corporate entities that have been abused for 'fraud or malfeasance'. Nor does it follow from the judgment that the corporate entity can also be disregarded in its entirety, as the part argues.

3.127 Nor is it the case that the ICSID arbitral awards cited by the part (and the Court of Appeal) (*Cementownia v Turkey*,[161] *Phoenix v Czech Republic and Alapli v Turkey)* confirm the existence of any rule that arbitral tribunals are required to look beyond corporate entities if they were misused for illegal activities. The scope of these decisions is more limited, *viz* that, in certain circumstances, ECT protection may be denied to claimants who have acquired shares in companies for the sole purpose of gaining access to the arbitration procedure. These are not cases in which the claimant entity is 'disregarded' because it was not established in accordance with the law of a contracting state, but, rather cases where there is no investment for the purposes of Article 1(6) ECT.[162] Furthermore, while the ICSID tribunal in these cases did hold that acquiring shares in a foreign company in order to gain access to investment arbitration can be unacceptable, it also held that it was necessary to distinguish this from *bona fide* transactions, which greatly depends on the circumstances of the case.[163] Thus, while ICSID jurisprudence does, to a certain extent, recognise the doctrine of piercing the corporate veil, it has, to date, only applied this doctrine in a specific situation that is not at issue in the matter now in cassation.[164]

3.128 As correctly held by the Court of Appeal, Article 1(7) ECT provides no basis to 'disregard' corporate entities in a manner advocated by the part. I would reiterate that Article 1(7) ECT merely imposes the formal requirement that a company be incorporated in accordance with the law of a contracting state. Such language provides no basis to 'disregard' a corporate entity set up under the law of a contracting state by not treating it as an investor, be it because it was established for unlawful purposes or otherwise.[165] The part (para 137) further argues that Article 1(7) ECT provides an express basis for the application of the doctrine of 'piercing the corporate veil', which exists in the law of Cyprus and Isle of Man (where HVY are established); it does not, however, allege that, under those states' laws, this

doctrine is applied in the manner advocated by the part. To the extent that the part intends to argue that the Court of Appeal misapplied foreign law on this point, such a complaint would fail either based on Article 79(1)(b) of the Judicial Organisation Law of for lack of factual basis, since this question was not discussed before the courts of fact (the part fails to cite the location in the procedural documents stating the parties' positions on these points).

3.129 My conclusion is that the complaints of part 3.4 must thus fail.

Part 3.5: referral for a preliminary ruling on Article 1(6) and (7) and Article 26 ECT?

3.130 Part 3.5 argues that the court's interpretation is incompatible with EU law. According to the part, the Court of Appeal should have referred questions about Article 1(6) and (7) and Article 26 ECT to the ECJ, and, in the context thereof, includeв all the issues in dispute in this case.

3.131 I refer to my discussion of part 2.7. There is no need to refer questions for a preliminary ruling if the answer to those questions is not necessary for the resolution of the dispute. This is also the case with regard to part 3. The various complaints in this part fail for a variety of reasons: partly for lack of factual basis, partly because they rely on sources that are not relevant for the interpretation of the ECT under the interpretation rules of the VCLT, and partly because the complaints in question are unsuccessful complaints as to reasoning.

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

3.132 Part 4 likewise refers to the interpretation of the notions of 'investment' and 'investor' in Article 1(6) and (7) ECT; it argues that illegal investments do not qualify thereunder, such that the Arbitral Tribunal was not competent to hear HVY's claims. In addition, the part argues that the Arbitral Tribunal's award is contrary to public policy because it permits HVY to benefit from unlawful acts. The part is divided into four subparts (3.2.1-3.2.4).

3.133 Section 4.1 contains no complaints, but provides an overview of the illegal acts allegedly committed by HVY. In this regard, the Russian Federation makes the following allegations:

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

2) Hulley and VPL were set up to evade dividend withholding tax, in which YUL participated as well (part 4.1.3);

3) Yukos evaded taxes in the Russian Federation through the use of sham companies in free tax regions (part 4.1.4);

4) HVY have obstructed the course of justice concerning this illegal activity by destroying evidence and siphoning funds abroad (part 4.1.5).

3.134 The Russian Federation argued that the Arbitral Tribunal should have declined jurisdiction because of the illegality of HVY's investments. According to the Russian Federation, investment arbitrations generally accept that treaty protection does not extend to investments made in breach of the host State law even if the relevant treaty does not contain a provision expressly excluding such investments from the scope of the ECT.[166]

3.135 In summary, the Court of Appeal considered that there is indeed a principle of international investment law under which investments made contrary to the host country's

law are not protected. However, this concerns cases of illegality at the time of making the investment, not thereafter (paras 5.1.11.2). In the event that this is established, the Court of Appeal held that, in determining the consequences, a distinction must be made between (a) investment treaties in which the definition of the term 'investment' includes the phrase 'in accordance with the law' or wording to similar effect; and (b) investment treaties in which this is not the case. With respect to the first category of treaties, an illegal investment falls entirely outside the scope of the treaty: it simply does not qualify as an 'investment'. The ECT does not contain such an express legality requirement. For treaties of this kind, there is no generally accepted legal principle under which an arbitral tribunal would have to decline jurisdiction in the event of an illegal investment (paras 5.1.11.4-5.1.11.5). According to the Court of Appeal, the wording of Articles 1(6) and 26 of the ECT are determinative. Given that such wording lacks an express legality requirement, it cannot be held that a finding of illegality of an investment would entail a lack of jurisdiction of the arbitral tribunal. While it can be held that the investment cannot benefit from the ECT's substantive protections, that is a different matter. For the sake of completeness, the Court of Appeal referred to the Arbitral Tribunal's ruling according to which the illegal activities in the course of Yukos privatisation and HVY's acquisition of Yukos shares were not sufficiently connected. The Court of Appeal thus found that the existence of an illegal investment was not established.

Part 4.2: the existence of a legality requirement

3.136 Part 4.2 complains that the Court of Appeal failed to recognise that (the definition of investment in) the ECT implies a legality requirement because the ECT does not protect investments that have been illegally acquired and retained. The part relies on the ordinary meaning of the term 'investment', as well and the context and object and purpose of the ECT, as well as arbitral jurisprudence.

3.137 In paras 5.1.11.5 *et seq*, the Court of Appeal, found that the ECT contained no express legality requirement, such as a phrase to the effect that the investment must be made 'in accordance with the law' or similar. The part does not argue that the ECT actually contains such wording,[167] but rather puts forward that it is implicit in the ECT, and refers (in para 154), in particular, to the introduction to the ECT by the ECT Secretariat.[168] In para 5.1.11.2, the Court of Appeal held that there was a principle of international investment law under which investments made contrary to the law of the host country are not protected. In paras 5.1.11.3 (in conjunction with para 5.1.11.5), the Court of Appeal held that the ECT's definition of 'investment' did not include the phrase that the investment must have been made 'in accordance with the law'. According to the Court of Appeal, this has no consequences for the Arbitral Tribunal's jurisdiction to take cognizance of the claims based on the ECT due to the distinction the Court had made earlier between treaties that do and do not contain an express legality requirement. The part does not dispute the need for such a distinction, such that, to that extent, the part must fail.

3.138 Arbitral case law likewise does not show the Court of Appeal's decision to be incorrect. While it can indeed be inferred from such case law that the ECT does contain an implicit legality requirement, that does not have the consequence of depriving the arbitral tribunal of jurisdiction.[169] Among the relevant cases in this regard is the decision of the ICSID tribunal in the case of *Plama v Bulgaria* mentioned above, that was also discussed by the Court of Appeal in para 5.1.11.4. In that case, Bulgaria claimed that there was no investment for the purposes of the ECT because the investor concealed the persons controlling it. The tribunal rejected this

argument in the context of the assessment of its jurisdiction and held that the definition of Article 1(6) ECT is satisfied where there is a property right or a contract claim, even if such right or claim is 'defeasible'.[170] Subsequently, the tribunal considered this argument again in its assessment of the claim on the merits. In that context, the tribunal found, among other things, that the ECT did not protect investments that were made contrary to the law. Consequently, the claim was dismissed.[171] This approach was also followed in the decision of the arbitral tribunal in *Blusun v Italy*, also concerning the ECT (see para 5.1.11.4), as well as in the decision of the arbitral tribunal in *Anatolie Stati and Others v Kazakhstan*.[172]

3.139 There are also arbitral decisions that took a different approach, but those cases did not concern the ECT. In addition, some of those decisions relate to treaties that contain an express legality requirement.[173] The case law according to which an arbitral tribunal should always decline jurisdiction in the event of an illegal investment even if the relevant treaty does not contain an express legality requirement therefore cannot serve as the basis for any general rule. It is true that certain arbitral awards have found that the illegality of investments, without more, deprives the arbitral tribunal of jurisdiction,[174] but, in such cases, the requirement is that illegal conduct must have taken place at the time of making the investment, *e.g.* because fraud was committed in the course of registration for a tender.[175] However, according to the arbitral tribunal in *Phoenix v Czech Republic*, only manifest illegality would lead to a lack of jurisdiction.[176] In *Mamidoil Jetoil v Albania*, the arbitral tribunal considered that, in principle, States do not have to accept arbitral jurisdiction when it comes to illegal investments, but that this is different when that State has shown willingness to legalise such investments.[177] In *Saur International v Argentina*, the tribunal likewise held that while illegal investments were not protected, that this did not entail a lack of jurisdiction.[178]

3.140 It follows from the foregoing that arbitral case law provides different answers to the question whether the illegality of an investment deprives the arbitral tribunal of jurisdiction (in cases where no legality requirement is contained in the relevant treaty). Some arbitral tribunals answer this question in the affirmative, while others take a more nuanced approach. The decisive factor, however, is that there are no decisions that would interpret the ECT in such a way that the illegality of an investment entails a lack of jurisdiction. Commentary likewise emphasises that the ECT does not contain a legality requirement that would have consequences for an arbitral tribunal's jurisdiction to decide claims based on the ECT.[179] I therefore consider that one cannot speak of a generally accepted legal principle according to which an arbitral tribunal must decline jurisdiction in the event of an illegal investment. In ECT context, it has always been held that the illegality of an investment, at most, plays a role in deciding the merits of the case.

3.141 For these reasons, part 4.2 fails.

Part 4.3: illegal acts

3.142 Part 4.3 is comprised of two parts and argues that illegal acts must be taken into account.

3.143 Part 4.3.1 targets paras 5.1.11.7-5.1.11.9 and paras 9.8.5-9.8.10, in which the Court of Appeal ruled on fraud and corruption in the acquisition of a majority stake in Yukos. In summary, the part complains that the Court of Appeal proceeded based on an error of law, or, alternatively, issued an incomprehensible judgment, in that it only looked at the transactions through which HVY acquired Yukos shares. According to the part, in answering the question whether an investment was legally acquired, the Court of Appeal should not have limited itself

to an assessment of the last transaction in a chain of transactions, but should also have taken into account what preceded HVY's acquisition of the shares. Among other things, the part argues that it is relevant that bribes were paid to Yukos directors (the so-called 'Red Directors') before it was privatised, and that the illegally acquired Yukos shares were moved from one (sham) company to another in order to conceal their illegal acquisition.

3.144 The part lacks interest because, as it appears from para 5.1.11.6, paras 5.1.11.7-5.1.11.9 are *obiter dictum*. In addition, the complaint fails because the circumstance that an investment was made contrary to the law of the host State is only relevant if the conflict is linked to the making of the investment.[180] The Court of Appeal has therefore correctly proceeded from that premise in para 5.1.11.2. The Court of Appeal was thus right to have considered whether there has been illegal conduct on the part of HVY at the time of their investment (para 5.1.11.8) and not also the acts at the time of the acquisition of the Yukos shares by third parties in 1995/1996. Nor is the Court of Appeal's judgment incomprehensible. For good order, I also note that the Court of Appeal has reviewed the claim that YUL was involved in paying bribes to the 'Red Directors' and dismissed it as irrelevant. The Court of Appeal's ruling that only the acquisition of Yukos shares by HVY, and not previous transactions, ought to be taken into account, implies a rejection of the proposition that HVY helped to conceal the earlier illegal acquisition of those shares. The part therefore fails.

3.145 Part 4.3.2 targets the Court of Appeal's finding that HVY illegal acts after the investment was made are irrelevant for the Arbitral tribunal's jurisdiction.

3.146 This part too must fail because the Court of Appeal's premise is precisely that only illegal conduct at the time of the making of the investment can deprive the Arbitral Tribunal of jurisdiction. The arbitral award in *Hesham Talaat M. Al-Warraq v Indonesia* to which the part refers (para 164 and footnote[341]) does not lead to a different conclusion. This is because the award relates to an investment treaty that, unlike most investment treaties, contained an express provision requiring investors to respect the host State's laws.[181] It cannot therefore serve as the basis for any general rule that illegal conduct entails a lack of arbitral jurisdiction even if it takes place after the investment was made.

Part 4.4: conflict with public policy

3.147 Part 4.4 targets paras 9.8.5-9.8.10 in which the Court of Appeal rejected the Russian Federation's argument that the Final Awards are contrary to public policy because they involve protecting the results of the aforementioned illegal conduct. Following an introduction (in para 4.4.1), the part (para 4.4.2) complains that the Court of Appeal has failed to recognise that it was contrary to national and international public policy for treaty-based claims in respect of an illegally acquired or illegally exploited investment to qualify for protection, or, alternatively, the Court of Appeal's judgment was not sufficiently reasoned.

3.148 According to settled case law, annulment of an arbitral award based on Article 1065(1)(e) of the Civil Procedure Code is only possible if the content or execution of the award is contrary to mandatory law of so fundamental that compliance therewith may not be precluded by restrictions of a procedural nature.[182] The part argues in essence that the Final Award violates a fundamental rule of mandatory law according to which goods or rights obtained through illegal conduct must not be protected. This argument was presented by the Russian Federation in the arbitration proceedings under the 'unclean hands' rubric. In support, the part refers to arbitral case law including the Paris Court of Appeal judgment in the matter of *Kyrgyzstan v Belokon*, where the enforcement of an arbitral award was refused

because the alleged investor was guilty of money laundering.[183] The part also refers to various treaties against corruption and money laundering as well as commentary arguing that corruption is contrary to international public policy.[184]

3.149 The part ignores the core of the Court of Appeal's judgment in para 9.8.5 *et seq*, as well as the core of the Arbitral Tribunal's decision as summarised by the Court of Appeal.[185] The Court of Appeal has not ignored the fact that the protection of goods or rights acquired through illegal acts (such as corruption) may constitute a breach of international public policy. The essence of the Court of Appeal's opinion is that, insofar as such illegal acts have taken place, they cannot be blamed on HVY, or at least are not related to their investments. After all, the illegal acts have in part been committed after HVY made their investment, and in part by others before HVY became Yukos shareholders. Nor was there, according to the Arbitral Tribunal and the Court of Appeal, any evidence of a link between the illegal conduct and HVY's investment. In their judgment, there is therefore no question of illegal conduct such as corruption or money laundering committed by HVY itself in the course of making the investment. Nor do the sources mentioned by the part imply that illegal conduct is also relevant if it did not involve the investor or was not committed when making the investment. For example, the award in *World Duty Free v Kenya* referred to in the part (para 166) relates to bribery of the Kenyan president by the investor's chief executive officer,[186] and the judgment in *Kyrgyzstan v Belokon* – to alleged money laundering by the investor. The part's complaints cannot overcome the above.

3.150 Part 4.4.3 targets para 9.8.8, in which the Court of Appeal discussed para of the 1370 Final Awards. The Court of Appeal held that the Arbitral Tribunal found that a number of the alleged illegal actions had occurred before HVY became a shareholder and that they were consequently carried out by others, such as Bank Menatep and Khodorkovsky *et al*. According to the Court of Appeal, the Arbitral Tribunal therefore found nothing other than that Bank Menatep and Khodorkovsky *et al* were different (juridical) persons in relation to HVY, and that HVY could not be held liable for acts committed by others before HVY became shareholders. According to the Court of Appeal, this finding is correct and has not been contested by the Russian Federation with sufficient reasons. The part complains that this decision is incomprehensible because the Russian Federation did contest the finding of the Arbitral Tribunal with reasons. The part further argues that the Court of Appeal should have examined this issue *ex officio* because it concerns a possible violation of international public policy.

3.151 In discussing this complaint, I note that, in para 9.8.8, the Court of Appeal did not make any findings of its own, but merely acknowledged the findings of the Arbitral Tribunal. The Court of Appeal has thus responded to the Russian Federation's complaint about the Arbitral Tribunal's finding. According to the Court of Appeal, such complaint lacked factual basis because the judgment of the Arbitral Tribunal must be interpreted differently. The Court of Appeal's statement that the Arbitral Tribunal's decision was correct and has not been contested was therefore made *obiter dicta*, as the Court of Appeal itself stated ('in so far as this issue could even arise in this annulment dispute'). This alone is sufficient to defeat the part. For the rest, I note that the complaints also fail on the merits. The ruling of the Arbitral Tribunal accepted by the Court of Appeal merely provides (in the undisputed account given by the Court of Appeal) that a number of the alleged illegal acts had taken place before HVY became shareholders and that such acts were therefore committed by others, such as Bank Menatep and Khodorkovsky *et al*. The allegations contained in the part essentially suggest that HVY were controlled by Khodorkovsky *et al*. Such allegations do not, without more, affect

the Arbitral Tribunal's factual findings. The Court of Appeal was therefore justified in ruling that the Russian Federation has failed to contest the finding with sufficient reasons. The part (paras 177-178) further points to certain alleged inconsistencies in the Final Awards. Thus, the Arbitral Tribunal is alleged in several places to have taken into account that Khodorkovsky *et al* indirectly owned shares in Yukos. In para 9.8.9, the Court of Appeal explained this in the sense that this was not incompatible with the finding that HVY and Khodorkovsky *et al* were legally separate entities. That judgment is not incomprehensible because the Court of Appeal has thereby expressed the fact that HVY as companies must be distinguished from their controlling persons.

Part 4.5: referral for a preliminary ruling on Article 1(6) and Article 26 ECT?

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

3.153 With reference to what I have said with regard to part 2.7, with regard to part 4, I am likewise of the opinion that a reference for a preliminary ruling is not necessary for the outcome of the appeal in cassation. Section 4.2 fails because it does not substantively challenge the judgment of the Court of Appeal and because it invokes a generally accepted legal principle the existence of which has not been established. Section 4.3 only contains complaints as to reasoning. Section 4.4 relates to Dutch arbitration law, namely Article 1065(1)(e) of the Civil Procedure Code, and, moreover, proceeds from an incorrect reading of the Court of Appeal judgment.

3.154 The conclusion is that part 4 must fail as a whole.

Part 5: Article 21(5) ECT

3.155 Part 5 breaks down into four sub-parts and complains about para 6.3 of the final judgment, in which the Court of Appeal considered that it would not attach any consequence to the fact that the Tribunal failed to consult the relevant (Russian) tax authorities. According to the part, the Arbitral Tribunal was obliged to do so based on Article 21(5) ECT. By failing to consult the tax authorities, the Tribunal is alleged to have breached its mandate, such that the arbitral awards must be set aside based on Article 1065(1) Civil Procedure Code. Accordingly, the part argues, the award is contrary to public policy (Article 1065(1)(e) Civil Procedure Code).

3.156 The Tribunal considered 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 tax measures constituted expropriation to the Arbitral Tribunal.[187] In para 6.3, the Court of Appeal considered that Article 21(5) ECT does, in principle, require the tax authorities to be consulted, but that the Tribunal's failure to do so is not sufficiently serious to set aside the Final Awards because the Russian Federation has not suffered any prejudice as a result given that it has had the opportunity to put forward all the relevant information in detail.

Introductory remarks

3.157 In their written comments, HVY argue that the complaints in part 5 lack interest. They point out that, in paras 5.2.11 *et seq*, the Court of Appeal held that Article 21 ECT as a whole is not applicable to the measures that HVY had challenged in the arbitration proceedings.

According to the Court of Appeal (paras 5.2.16 *et seq*), the taxation measures cannot be recognised as *bona fide*, whereas Article 21(1) ECT is only meant to apply to *bona fide* measures. HVY argue that, since the rule in Article 21(1) ECT (the 'carve-out' for taxation measures) does not apply, it follows that the exception to that rule in Article 21(5) ECT (the 'claw-back') is likewise irrelevant.[188] Although HVY correctly point to the Court of Appeal's judgment on Article 21(1) ECT, it cannot be said that the complaints about the interpretation of Article 21(5) ECT lack interest because the findings concerning the applicability of Article 21(5) ECT do not form the basis for the decision on whether or not the Arbitral Tribunal breached its mandate by failing to comply with the obligation under Article 21(5) ECT. The considerations about Article 21(1) ECT appear in a different context, and, in particular, that of the question whether Article 21(1) ECT is relevant for the Tribunal's jurisdiction (which the Court of Appeal answered in the negative – paras 5.2.4 *et seq*). For this reason, the complaints in part 5 shall be addressed.

3.158 According to Article 1065(1)(c) Civil Procedure Code, there could be a breach of mandate, *i.a.*, if the Arbitral Tribunal acted contrary to the agreed rules of procedure or the legislative arbitration rules.[189] The general restraint to be observed dictates that, in order justify set-aside, the breach of mandate must be sufficiently serious.[190] The decisive factor is whether the decision would have been different if the arbitrators had complied with their mandate.[191] The court enjoys discretion in determining whether the breach of mandate is sufficiently serious to justify the annulment of the arbitral award.

3.159 With regard to the ground for set-aside under Article 1065(1)(e) Civil Procedure Code, the following applies.[192] Public policy has a substantive and a procedural aspect. A breach of substantive public policy exists if the content of the arbitral award is contrary to mandatory law of such a fundamental nature that compliance therewith cannot be precluded by limitations of a procedural nature.[193] As this standard clearly shows, the court must exercise restraint when applying this annulment ground. A breach of procedural public policy exists if the manner in which the award was made is contrary to fundamental principles of due process, for instance, in the event of a breach of the adversarial principle,[194] or if it appears that (one of) the arbitrators was not impartial or independent.[195] Here too, the court necessarily has discretion.

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

Part 5.2: mandatory character of Article 21(5) ECT

3.161 Part 5.2 makes various complaints against para 6.3 and breaks down into six sub-parts (parts 5.2.1-5.2.6).

3.162 Part 5.2.1 complains that, in para 6.3, the Court of Appeal wrongly disregarded the binding nature of the duty to refer in Article 21(5)(b)(i) ECT or, alternatively, failed to recognise that such duty was not subject to any 'futility exception'. In doing so, the Court of Appeal has, *inter alia*, failed to properly apply the treaty interpretation rules under Articles 31 and 32 VCLT.

3.163 My comments on this part are as follows. Article 21 ECT relates to taxation measures.[196] The authentic English text and Dutch translation of Article 21 ECT read as follows:

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 73 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, agreement or arrangement described in subparagraph 7a)(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 73.

3. Article 102 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 7a)(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 292 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.

Dutch translation:

[Dutch translation]

3.164 Article 21(1) ECT provides that the ECT does not affect the Contracting States' power to take taxation measures. In principle, such measures thus fall outside the material scope of the ECT (which is why this is also referred to as a 'carve-out'). However, there are exceptions to this rule (the so-called 'claw-backs'). One of them, laid down in Article 21(5) ECT, provides that taxation measures may not constitute expropriation that is contrary to Article 13 ECT. In that case, a taxation measure can constitute a breach of the ECT.[197] Article 13 ECT relates to expropriations and, in the authentic English version and Dutch

translation, reads as follows:

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;

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.

Dutch translation:

[Dutch translation]

3.165 Article 21(5)(b)(i) ECT confers on the tax authorities of the relevant Contracting Party ('the relevant Competent Tax Authority') a role in assessing whether the taxation measures taken constitute a prohibited expropriation within the meaning of Article 13 ECT. The investor concerned or the contracting state must consult the relevant tax authorities. If they fail to do so, the body called upon to settle the dispute (such as, in this case, the Arbitral Tribunal) must refer the question of whether there is prohibited expropriation within the meaning of Article 13 ECT to the relevant tax authorities. The wording of Article 21(5)(b)(i) ECT is 'shall

make a referral'; this indicates an obligation on the part of the body seised.[198] Such wording does not indicate any discretion on the part of the body in this regard.[199] However, Article 21(5) ECT does not attach any consequences to the failure to consult the tax authorities.[200]

3.166 At the same time, Article 25(1) ECT does provide that the body resolving the dispute is not bound by the tax authorities' conclusions. According to Article 25(1)(b)(iii), the body 'may take into account' the conclusions of the tax authority on the question whether the measures represent an expropriation. With regard to whether the measures are discriminatory, the body must ('shall') 'take into account' the tax authorities' conclusions when forming its judgment, but there is no requirement to adopt such conclusions. The final assessment of whether the taxation measure constitutes expropriation or is discriminatory is a matter for the body called upon to settle the dispute.[201] Article 21(5)(b)(iv) ECT further provides that the tax authorities' conclusions need not be awaited if it was not received after six months. According to that provision, the involvement of the tax authorities shall under no circumstances lead to a delay in the settlement of the dispute. Commentary points out that all of this indicates that the tax authorities' role is to facilitate the decision-making by the body called upon to settle the dispute, and that the words 'shall make a referral' in Article 21(5)(b)(i) ECT are intended to enable the tax authorities concerned to express their views, but not to create additional hurdles to jurisdiction or admissibility.[202] Failure to consult the tax authorities cannot lead to a termination or interruption of the dispute resolution proceedings.[203]

3.167 It is clear that even if the Arbitral Tribunal in this case had consulted the relevant tax authorities, it would not have been bound such authorities' conclusions. According to the text of Article 21(5)(b)(iii) and (iv) ECT, an arbitral tribunal need not await the opinion of the tax authorities if this leads to a delay in the proceedings. It is therefore unlikely that consulting the tax authorities would have led to the Arbitral Tribunal to reach a different view. The argument based on a breach of mandate therefore cannot succeed. The obligation to consult the tax authorities lacks both the weight and the binding force for the arbitrators to be guilty of a serious breach of their mandate for failure to comply with it where (as in this case) they already consider themselves sufficiently informed. The question of whether Article 21(5) ECT implies a 'futility exception'[204] therefore requires no separate discussion.

3.168 The above defeats part 5.2.1 in its entirety.

3.169 Part 5.2.2 targets para 6.3.2 of the final Court of Appeal judgment, in which the Court of Appeal considered that the Russian Federation has not suffered any prejudice from the Arbitral Tribunal's refusal to refer the case to the tax authorities. The part complains that this reasoning is speculative and incorrect.

3.170 In para 6.3.2, the Court of Appeal held that the Russian Federation was, per se, correct to point out that the obligation to refer under Article 21(5) ECT was binding on the Arbitral Tribunal. As demonstrated by the discussion of part 5.2.1, that obligation is not so binding that a refusal to comply with it would, without more, entail a serious breach of mandate. The question of whether the Russian Federation has been adversely affected by the Arbitral Tribunal's refusal to refer the matter to the Russian tax authorities therefore requires no discussion. The complaints raised in this regard are also based on the assumption that consultation of the tax authorities could or should have led to a different decision by the Arbitral Tribunal. However, as I have noted above, the Arbitral Tribunal would not have been bound by any of the tax authorities' conclusions and would not have been obliged to take into account the conclusions as to whether there has been an expropriation. Part 5.2.2 therefore fails.

3.171 Part 5.2.3 targets para 6.3.3, in which the Court of Appeal, *inter alia*, held that the

information that the Arbitral Tribunal could have obtained by means of a reference to the Russian tax authorities is unlikely to have led to a different outcome. The part argues that this view is unacceptably speculative, including in the light of the Russian Federation's position that the tax authorities would have supported its view.

3.172 The complaint ignores the fact that, as I have already explained, Article 21(5) ECT does not require an arbitral tribunal to follow the conclusions obtained from the tax authorities. Moreover, the Court of Appeal cannot fairly be accused of making a 'speculative' judgment. This is because Article 1065(1)(c) Civil Procedure Code, after all, required the Court of Appeal to consider whether the Arbitral Tribunal would have reached a different decision. Any judgment on the issues can necessarily only be formed by way of speculation as to the question what the Arbitral Tribunal would have decided if it had more or different information. This is another reason why the part must fail.

3.173 Part 5.2.4 complains about para 6.3.4, in which the Court ruled that there was no basis for also referring the dispute to the tax authorities in Cyprus and the United Kingdom (where HVY are located). According to the Court of Appeal, it has not been argued that any taxation measures taken by Cyprus or the United Kingdom constituted expropriation, whereas Article 21(5) ECT only requires the relevant tax authorities to be consulted in cases of that kind. The part argues that this ruling of the Court of Appeal was both *ultra petita* and in conflict with Article 21 ECT.

3.174 Article 21 ECT does not provide that the tax authorities of all the countries concerned must always be approached. Rather, Article 21(5)(b)(i) ECT requires only the 'relevant Competent Tax Authority' or 'relevant Competent Tax Authorities' to be consulted. It does not further define what authorities are 'relevant'. As the Court of Appeal held in para 6.4.3, given the context in which the term 'relevant' appears, it makes sense to interpret it is as meaning 'capable of providing information with respect to the question whether there has been a (discriminatory) expropriation'. Furthermore, it is clear that it is up to the arbitral tribunal to determine, in a specific case, what tax authorities are 'relevant'. The background of the reference to 'Competent Tax Authorities' in 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'. In such cases, it makes sense to consult both the authorities of the investor's country of residence and those of the host member state (with the aim of finding a solution to the tax issues between those authorities). It thus 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 particular case. The Court of Appeal has not gone *ultra petita* by interpreting and applying Article 21(5) ECT *ex officio*. The remainder of the part builds on previous complaints and must share their fate. Part 5.2.4 thus fails.

3.175 Part 5.2.5 complains that the Court of Appeal rejected the Russian Federation's appeal by analogy with the prohibition of prejudgment originating from Dutch civil procedure law. The part argues that the Arbitral Tribunal breached that prohibition of prejudgment by deciding in advance that consulting the Russian tax authorities would be futile.

3.176 It has not been established that the Arbitral Tribunal was bound by such a prohibition on prejudgment. The only basis the part invokes for a binding application of the prohibition on prejudgment is a reference to the obligation contained in Article 21(5) ECT; however, it cannot be inferred from that provision that it implies a prohibition on prejudgment. The part provides no further explanation. Accordingly, this part of the

complaint fails.

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

3.178 With reference to my comments with regard to part 2.7, with regard to part 5, I likewise believe that no preliminary reference to the CJEU on the interpretation of Article 21 ECT is necessary for the outcome of the cassation appeal. After all, in the disputed judgment, the Court of Appeal ruled in line with the Russian Federation's arguments that the Arbitral Tribunal had acted contrary to Article 21(5) ECT. However, the Court of Appeal did not consider this violation of the mandate to be sufficiently serious to justify setting aside the Yukos Awards. The success or failure of the cassation complaints about that judgment therefore turns not on the interpretation of Article 21(5) ECT, but, rather, on the question whether the Court of Appeal's rulings are comprehensible within the framework of Article 1065(1)(c) Civil Procedure Code. There is therefore no need for a preliminary reference.

3.179 The conclusion is that part 5 must fail.

Part 6: the role of the Arbitral Tribunal's secretary

3.180 Part 6 is divided into two sub-parts and, in summary, targets the involvement of the Arbitral Tribunal's assistant (secretary), Valasek, in drafting the arbitral awards. According to the Russian Federation, such involvement was contrary to the principle that the arbitrators must perform the mandate they were charged with personally, such that the Arbitral Tribunal has failed to comply with its mandate (Article 1065(1)(c) Civil Procedure Code). Furthermore, Valasek's involvement is allegedly tantamount to having a 'fourth arbitrator', such that the Arbitral Tribunal was also composed contrary to the applicable rules (Article 1065(1)(d) Civil Procedure Code). The Court of Appeal rejected this argument in paras 6.6.1-6.6.15.

3.181 Part 6.1 does not contain any complaints, but describes the background to the complaints and summarises the contested ruling of the Court of Appeal.

Part 6.2: delegation to the Arbitral Tribunal's secretary

3.182 Part 6.2 contains three complaints: (i) a complaint about the Court of Appeal's rejection of the Russian Federation's offer to prove Valasek's contribution to the decision-making process by witness examination (para 6.2.1); (ii) a complaint that the Court of Appeal's ruling is contrary to Articles 1065(1)(b) and 1026(1) Civil Procedure Code which provide that an arbitral award may not be made by an even number of arbitrators (para 6.2.2); and
(iii) a complaint that the Court of Appeal's ruling has disregarded various (unwritten) procedural rules (para 6.2.3).

Introductory remarks

3.183 The part raises the question of the extent to which arbitrators can delegate (parts of) their work to a secretary or assistant without breaching the principle that they must perform their duties personally,[205] and without the secretary acting as a de facto 'fourth arbitrator'. Specifically, the question arises to what extent a secretary may draft the decisive of carrying portions of the award.

3.184 Different views exist on this issue.[206] Some authors have pointed out that there is a risk of unacceptable involvement of the secretary in the arbitral tribunal's decision-making unless there is careful supervision.[207] Nevertheless, Born concludes:

'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 agrees and sees no problem in secretaries drafting (parts of) an arbitral award, provided that this is done in accordance with the instructions and under the responsibility of the arbitral tribunal and the latter does not blindly adopt the texts.[209] Smakman adheres to a similar position.[210] Sanders considers that 'providing the reasoning of the award or parts thereof ... is solely the task of the arbitral tribunal, which must do so in its own words'.[211] Von Hombracht-Brinkman distinguishes between situations in which the arbitral tribunal is (partly) comprised of lawyers, and situations where this is not the case, and considers the drafting of an award by a secretary to be acceptable only in the latter situations.[212] Partasides considers it unwelcome (but not necessarily unacceptable) for the preparation of a draft decision to be delegated to the secretary, but also notes that this depends on the circumstances. Furthermore, this is a matter for the arbitrator to decide on.[213] Polkinghorne and Rosenberg take a very clear view that the secretary should not be permitted to draft the substantive parts of the award.[214]

3.185 There is no generally accepted rule or practice according to which it is always unacceptable for the drafting of substantive parts of an arbitral award to be entrusted to a secretary.[215] For that to be the case, it must also be established that this breaches the boundaries flowing from the principle of proper performance of arbitrators' duties. This can be, for instance, if it appears that the arbitral tribunal has blindly adopted the text drafted by the secretary, or that the secretary was involved in the decision-making in an unacceptable manner. As applies to any appeal on one of the annulment grounds under Article 1065 Civil Procedure Code, the burden of proof with regard to such facts lies with the person who invokes the alleged breach of mandate by the arbitrators.[216] Proving such facts is never easy, but this is justified by the very serious nature of the allegation against the arbitrators (neglecting their personal duty), as well as the restraint generally to be observed when applying Article 1065(1)(c) Civil Procedure Code.

3.186 The absence of a generally accepted rule on this issue explains why some arbitration rules regulate it specifically. The Court of Appeal's ruling (para 6.6.14.1) – undisputed in cassation – was that the UNCITRAL regulations applicable in this case contain no rules on this point, such that it remains the arbitrators' discretion to what extent they delegate certain tasks to their secretary, provided they respect the principle of personal performance of their mandate. According to the Court of Appeal, it has not been established that the arbitrators have violated this principle, and, even if Valasek had provided the draft texts for the carrying portions of the award, this does not *per se* mean that he was also the person who made the decisions in question (para 6.6.14.1, final sentence). According to the Court of Appeal, it has not been established that the taking of substantive decisions relevant to the arbitral awards was delegated to Valasek, or that Valasek had the final responsibility for (certain parts of) the awards. The Court of Appeal thus found no breach of mandate for the purposes of Article 1065(1)(c) Civil Procedure Code.

3.187 Having set out the above, I shall now discuss the part's complaints.

Parts 6.2.1: Rejection of the Russian Federation's offer of proof

3.188 Part 6.2.1 complains about para 6.6.5, in which the Court of Appeal rejected the Russian Federation's offer of proof. The Russian Federation proposed to examine Valasek regarding 'the hours he declared and his contributions to the Arbitral Tribunal's decision-making process', and, further, to examine two expert witnesses.[217]

3.189 The Court of Appeal rejected this offer of evidence, because it accepted the assumption that Valasek had 'made major contributions to the drafting of Chapters IX, X and XII of the Final Award, by providing (draft) texts that arbitrators then incorporated in whole or in part in the arbitral awards'. Accordingly, the offer of proof was no longer relevant. The complaint purports to argue that the Court of Appeal should nevertheless have allowed the production of evidence because of the apparent possibility that, by submitting the text in question, Valasek also influenced the final decision-making of the Arbitral Tribunal. Essentially, the part argues that the Court of Appeal understood the Russian Federation's offer of proof too narrowly. However, such a complaint must fail given that it is in the Court of Appeal's discretion to interpret the documents on the record.[218]

Part 6.2.2: an even number of arbitrators?

3.190 Part 6.2.2 also complains that, in para 6.6.13, the Court of Appeal rejected the argument under Articles 1065(1)(b) and 1026(1) Civil Procedure Code. The argument is that, due to Valasek's involvement, the Yukos Awards were *de facto* issued by four instead of three arbitrators, which amounts to a breach of the above provisions. The Court of Appeal has ruled that the Yukos Awards were signed by the three appointed arbitrators, such that the requirements of those provisions were met. It is alleged that, in doing so, the Court of Appeal interpreted those provisions too narrowly, because they are aimed, *inter alia*, at preventing a fourth person acting as a *de facto* arbitrator.

3.191 Article 1026(1) Civil Procedure Code provides that the arbitral tribunal must consist of an odd number of arbitrators. Article 1065(1)(b) Civil Procedure Code further provides that an arbitral award may be set aside if the arbitral tribunal was not validly constituted. The part argues that Article 1026(1) Civil Procedure Code not only imposes the formal requirement that the arbitral tribunal must have an odd number of arbitrators, but is also intended to prevent the involvement in the decision-making of a fourth person. Neither the commentary, nor legislative history gives any indications that the provision must be understood in this manner.[219] In principle, it can be assumed that the signature of an arbitral award enables one to deduce which arbitrators made the award, just as, in the case of state courts, the signature under a judicial decision demonstrates which judges have rendered that decision.[220] If the signature shows that the award was made by an odd number of arbitrators, the requirement of Article 1026(1) Civil Procedure Code is met. Of course, all this does not alter the fact that it is undesirable for a fourth person to actually act as an arbitrator by influencing the decision in the arbitration proceedings. This was not lost on the Court of Appeal which, in para 6.6.14 *et seq* clearly investigated whether the arbitrators had delegated a part of their personal mandate to Valasek. For these reasons, the complaint fails.

Section 6.2.3: the secretary's role

3.192 Part 6.2.3 cites five complaints (indicated by letters a to e). I shall now briefly discuss these complaints.

3.193 The first complaint (under a) targets the court's rejection of the Russian Federation's argument that there is an (unwritten) rule that a secretary may not draft substantive parts of

an arbitral award. According to the complaint, the Court of Appeal failed to recognise that such a delegation of substantive tasks to a secretary may only take place with the express consent of the parties. The second complaint (under b) targets the Court of Appeal's decision in para 6.6.14.2 that the Arbitral Tribunal has not seriously violated its mandate by not 'fully' informing the parties about Valasek's drafting tasks.

3.194 The two complaints can be discussed together. As I already mentioned, there is no unwritten. In so far as the two complaints argue that the Court of Appeal has disregarded the importance of transparency on the part of the Arbitral Tribunal when delegating substantive tasks, in para 6.6.14.2, the Court of Appeal acknowledged that the Arbitral Tribunal should have fully informed the parties on this point, but considered that this breach of mandate was not sufficiently serious to justify the annulment of the arbitral awards. This is fatal for both complaints. Furthermore, the court's judgment is not incomprehensible.

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

3.196 This complaint is based on an incorrect reading of para 6.6.14.1. It is not correct that the Court of Appeal found that the arbitrators' power to delegate tasks were limited exclusively by the arbitration rules. According to the Court of Appeal, in the absence of specific party agreements, and as long as the substantive decisions are taken by the arbitrators themselves, it remains in the Arbitral Tribunal's discretion to what extent an assistant or secretary is used in the drafting of the arbitral award. The arbitrators must therefore always respect the principle of personal performance of their mandate. The Court of Appeal has clearly investigated whether the course of events was in conflict with this principle, and answered that question in the negative. The complaint therefore fails.

3.197 The fourth complaint (point (d)) targets para 6.6.14.1 and complains about the holding that a (sufficiently serious) violation of the mandate can only exist if the arbitrators have left the taking of substantive decisions or the final responsibility for the award entirely to their assistant.

3.198 In the light of the positions in the commentary set out above, the Court of Appeal's opinion is neither incorrect nor incomprehensible, such that the complaint fails.

3.199 The fifth complaint (e) argues that the principle of personal performance of the mandate would be entirely hollowed out if arbitrators could delegate the drafting of the entirety of their awards to a secretary, with the only proof that they performed their mandate personally being comprised in the fact that they signed the award.

3.200 The complaint builds on the previous complaints. The fact that the arbitrators have signed the award can provide evidence that the arbitral tribunal was correctly composed, but do not, without more, prove that the principle of personal performance of the mandate has been respected. That principle remains in full force, on the understanding that it must be established that it has not been complied with in a specific case. As is clear from my discussion of this part, the mere fact that a secretary had drafted substantive parts of the award is not sufficient to conclude that the principle of personal performance of the mandate has been breached. The complaints in part 6.2.3 cannot overcome this.

3.201 The conclusion is that part 6 must fail.

Part 7: lack of reasoning?

3.202 Part 7 is divided into two parts and targets paras 8.4.13 through 8.4.16 of the final judgment. Those holdings relate to the argument that the arbitral awards were not properly reasoned as to the Russian Federation's assertion that Yukos's Mordovan companies were 'shams'. The Arbitral Tribunal concluded that 'the extensive record' contained no evidence of this. According to the Court of Appeal, the Arbitral Tribunal was referring to the record of the tax proceedings that Yukos had conducted in Russia (para 8.4.13). According to the part, this 'attempted remedial action' is contrary to Articles 19 and 24 of the Civil Procedure Code and, moreover, incomprehensible.

Introductory remarks

3.203 Before proceeding to address the complaints, I note the following (see also the Court of Appeal's undisputed assumption in para 8.1.2). The Russian Federation has invoked the annulment ground under Article 1065(1)(d) Civil Procedure Code. As the Supreme Court held, annulment on this ground is only possible in the absence of reasoning, and thus not in cases of defective reasoning.[221] Reviewing the propriety of the reasoning of the arbitral award is, after all, tantamount to a substantive reconsideration of that award, which the courts lack the jurisdiction to do. However, there may be cases where a statement of reasons may be provided, but does not contain any plausible explanation for the decision in question.[222] In such cases, annulment based on Article 1065(1)(d) Civil Procedure Code will be justified, although the court must exercise this power with restraint, in the sense that it must intervene in arbitral decisions only in egregious cases.[223] There is thus a high threshold for annulment under Article 1065(1)(d) Civil Procedure Code.

3.204 In summary, the context of the complaints of part 7 is the following (for a more detailed account, see paras 8.4.2 *et seq* of the final Court of Appeal judgment). In the arbitration proceedings, HVY argued that the additional imposition of taxes on Yukos was fabricated and amounted to an expropriation. The Russian Federation argued that HVY should have been aware that Yukos' use of the tax exemption in low-tax regions (including Mordovia) was contrary to the prevailing 'bad faith taxpayer doctrine'. The Arbitral Tribunal considered the issue whether there had been bad faith. The Tribunal then ruled that 'the massive record' contained no evidence of this assertion that Yukos' Mordovan companies were 'shams' (Final Awards, paragraph 639*).* In the annulment proceedings, the Russian Federation argued that this finding was insufficiently reasoned, because such evidence had, in fact, been submitted in the arbitration proceedings. The Court of Appeal rejected this argument on the basis that, according to the Court of Appeal, it was clear that, by 'the massive record', the Arbitral Tribunal was referring to the record available in the tax proceedings that Yukos had conducted 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 Arbitral Tribunal's finding was made under the rubric of the issue whether the Russian tax proceedings complied with 'due process'.

3.205 Part 7.1 contains only an introduction and no complaints. Part 7.2 is divided into four sub-sections with complaints.

Part 7.2.1: incompatibility with Articles 19 and 24 Civil Procedure Code?

3.206 According to part 7.2.1, the judgment of the Court of Appeal is incompatible with Articles 24 and 19 Civil Procedure Code because the Court of Appeal's interpretation that 'the massive record' referred to the tax record and not the arbitration record was not argued by either party.

3.207 This complaint fails. The Court of Appeal was faced with the question how the relevant finding of the Arbitral Tribunal was to be interpreted. The Court of Appeal thus had the discretion to interpret that finding otherwise than argued by the parties. The interpretation advocated is not, as such, a fact; rather, it constitutes the precise issue on which the Court of Appeal was asked to rule. Accordingly, this is not a case of prohibited addition to the factual basis (Article 24 Civil Procedure Code) or a breach of the adversarial principle (Article 19 Civil Procedure Code).

Part 7.2.2: evidentiary materials in the tax proceedings

3.208 Part 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 that it presented in the arbitration proceedings had also been presented in the tax proceedings. According to the part, there was no reason for the Russian Federation to argue so because it was an 'obvious fact'. Furthermore, according to the part, it was clear that various pieces of evidence submitted in the arbitration proceedings came from the tax proceedings.

3.209 The holdings contested by the part build on the Court of Appeal's rejection of the Russian Federation's argument that it had provided evidence of bad faith on the part of Yukos/HVY in the arbitration proceedings. In line with this, the Court of Appeal ruled that such evidence was irrelevant, since the question was whether or not that evidence was submitted in the tax proceedings, which the Russian Federation never alleged. Absent the Russian Federation's specific allegations in this respect, the Court of Appeal was not required to conduct its own investigation into whether particular pieces of evidence had also been submitted in the tax proceedings. If the Court of Appeal were to do so, it would have ventured *ultra petita* and, moreover, added to the factual basis by itself putting forward certain facts and then taking them into account. The complaint fails at this juncture.

Part 7.2.3: meaning of "tax record"

3.210 Part 7.2.3 argues that, on points other than the Mordovan sham companies (namely the use of sham companies in Lesnoy and Trekhgorny), the Arbitral Tribunal has not attached any significance to the tax record as such and instead adhered to the 'Audit Reports' and 'Decisions' of the Russian tax authorities. According to the part, the Russian tax record was not even available to the Arbitral Tribunal. Furthermore, there are also several tax files, such that one cannot speak of a 'massive record' in the singular. The complaint argues that this makes the corresponding finding of the Court of Appeal incomprehensible.

3.211 Even on several readings of this part, I was unable to understand what it is that the part actually purports to argue. Insofar as the part purports to argue that the Court of Appeal has failed to recognise that the Arbitral Tribunal's award was incomprehensible and therefore contrary to Article 1065(1)(d) Civil Procedure Code, the complaint fails because that argument was not put to the courts of fact (where it was, in fact, argued that the reasoning defect was comprised in the fact that the evidence had actually been provided). Insofar as the part purports to argue that the Court of Appeal's reading in para 8.4.13 is illogical because the Arbitral Tribunal could have meant the words 'the massive record' as referring to the tax record, that complaint likewise fails because those arguments have not been put to the courts of fact (where the arguments put were different). Furthermore, the Court of Appeal supported its reading with detailed arguments in paras 8.4.14-8.4.16. Those considerations are not disputed.

3.212 Finally, part 7.2.4 targets para 8.4.16. This part assumes that, in this holding, the Court of Appeal provided 'secondary' reasoning for its rejection of the arguments under Article 1065(1)(e) Civil Procedure Code, whereby the Court of Appeal allegedly "cast aside" its earlier rejection (para 8.4.13).

3.213 The part overlooks that the disputed Court of Appeal ruling does not provide 'secondary' reasoning, but, rather, holds, *obiter*, that even if the Russian Federation's proposed reading of paragraph 639 of the Final Awards were correct, that would not affect the ultimate conclusion of the Arbitral Tribunal. The obiter nature of this holding is apparent from the fact that, in para 8.4.13, the Court of Appeal expressly adopts a different reading of the Arbitral Tribunal's decision. The complaints fail against this.

3.214 As demonstrated above, the complaints in part 7 are unavailing.

Part 8: Residual complaint

3.215 Part 8 of the plea contains a residual complaint that builds on parts 1 to 7. The part argues that if one or more of parts 1 to 7 were to succeed, the damages awarded by the HVY by the Arbitral Tribunal and reinstated by the Court of Appeal could not be maintained.

3.216 Given that parts 1 to 7 have failed, this residual complaint requires no discussion.

Conclusion on principal cassation appeal

3.217 The conclusion is that the principal cassation appeal must be dismissed.

4 Discussion of the conditional cross-appeal plea.

4.1 HVY lodged a conditional cross-appeal in cassation against both the interim judgment and the final judgment of the Court of Appeal. The cross-appeal plea in cassation contains three parts, all of which are filed on the condition that one or more of the complaints of the principal cassation appeal of the Russian Federation would succeed. Given that the main cassation appeal fails, the conditional cross-appeal in cassation requires no discussion.

5 Opinion

I opine for the rejection of the principal cassation appeal.

Attorney General at
the Supreme Court of
the Netherlands

A-G

[1] The reference is to the paragraph numbers of this Opinion.

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

[3] Law of 2 June 2014, Stb. 2014, 200), entered into force on 1 January 2015 (Stb. 2014, 254). The transitional provisions are contained in Article IV(4) in connection with Article IV(2) of that law.

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

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

[6] 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 commentators mistakenly mention 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, p 6-13; Kaj Hobér, The Energy Charter Treaty. A Commentary, Oxford: OUP 2020, p 13-24.

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

[8] The Russian Federation signed the ECT without making the declaration under Article 45(2) ECT. Other states (Australia, Norway and Iceland) declared at the time of their signature that they will not provisionally apply the ECT.

[9] See Hobér, *op cit*, p 6; Roe & Happold, *op cit*, p 13-18; Wälde, *op cit*, p 286 *et seq*.

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

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

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

[13] *See inter alia* Baltag, *op cit*, p 24.

[14] André Nollkaemper, Kern van het internationaal publiekrecht [Core of public international law], The Hague: Bju 2019, p 127-134.

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

[16] Hobér, *op cit*, p 40.

[17] 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, *i.a.*, Article 25(1) of the 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' (emphasis added, A-G).

[19] See, *e.g.*, *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' (emphasis added, A-G). 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, p 75-77; Turinov, *op cit*, p 6; Roe & Happold, *op cit*, p 49; Baltag, *op cit*, p 106-107.

[20] That approach is expressed 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. (…)'.

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

[22] The presentation of the facts is derived from para 2.2-2.6 of the final Hague Court of Appeal judgment dated 18 February 2020 challenged in cassation, ECLI:NL:GHDHA:2020:234. See also my opinion (ECLI:NL:PHR:2020:1082) under 2.1-2.31 before the order of the Supreme Court of 4 December 2020, ECLI:NL:HR:2020:1952, RvdW 2021/2.

[23] *Hulley Enterprises Limited (Cyprus) v 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.

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

[25] ECLI:NL:GHDHA:2018:2476, JBPr 2019/9, with note 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 HR 25 September 2020, ECLI:NL:HR:2020:1511, and in TvA 2020/31, JOR 2020/164, with note by N. Peters.

[28] Strictly speaking, Article 1 does not have paragraphs, but sub-sections ('points'). In this Opinion, however, I use the same terminology ('paragraphs') as that used by the Court of Appeal and in the initiating documents.

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

[30] ECLI:NL:HR:2020:1952, RvdW 2021/2; JOR 2021/79, with note by M.A. Broeders.

[31] For the arbitration context, see *e.g.* Dirk Otto & Omaia Elwan, in: Herbert Kronke *et al*, 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, see *i.a.* Monique Hazelhorst, Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial, The Hague: TMC Asser Press 2017, p 299-300.

[32] P. Sanders, Het Nederlandse arbitragerecht - nationaal en internationaal [Dutch arbitration law - national and international], Deventer: Kluwer 2001, p 199.

[33] See A.J. van den Berg *et al*, Nederlands Arbitragerecht [Dutch Arbitration Law], Zwolle: W.E.J. Tjeenk Willink 1992, p 136-138; Sanders, *op cit*, p 203-210; *Kamerstukken* II 1983-84,

18 464, No 3 (Explanatory Memorandum), p 31.

[34] Groene Serie Burgerlijke Rechtsvordering [Civil Procedure - Green Series], Article 382 Civil Procedure Code, note 3 (P.J.M. von Schmidt auf Altenstadt).

[35] See Groene Serie Burgerlijke Rechtsvordering [Civil Procedure - Green Series], Article 382 Civil Procedure Code, note 7 (P.J.M. von Schmidt auf Altenstadt); Th. B. ten Kate and E.M Wesseling-van Gent, Herroeping, verbetering en aanvulling van burgerrechterlijke uitspraken [Revocation, rectification and supplementation of civil judgments], Deventer: Kluwer 2013, para I.1.4. It follows from this requirement that a revocation request only becomes relevant if the fraud was discovered after the judgment and could not reasonably have been discovered earlier (HR 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 before the expiry of the appeal deadline, the injured party is free to choose (Groene Serie Burgerlijke Rechtsvordering [Civil Procedure - Green Series], Article 382 Civil Procedure Code, note 8.2 (P.J.M. von Schmidt auf Altenstadt).

[36] For the rationale behind introducing the revocation procedure into the Arbitration Act the legislative history (Parliamentary *Kamerstukken II* 1983-84, 18 464, para 3 (Explanatory Memorandum), p 31) only notes as follows: 'The last article of the fifth part on the annulment of the arbitral award introduces the civil application on the slightly modified grounds mentioned in article 382(1), (7) and (8C). In the current arbitration law, these grounds (likewise modified) can be found in Article 649, paras 8-10. Though not commonly used, and, if so, mostly on the ground referred to in paragraph (a) of this Article, this last piece in the arsenal of challenges of an arbitral award cannot be missed'.

[37] At least under the old law applicable here, since the annulment proceedings are now limited to a single factual instance (Article 1064a (new) Civil Procedure Code).

[38] That also means that fraud can be raised in annulment proceedings only in exceptional cases, namely if it was discovered after the award, but within the pending annulment action deadline. If fraud was discovered during the proceedings or could reasonably have been detected by an investigation that could reasonably be have been expected of the victim, this must be submitted to the arbitral tribunal in the course of the arbitration proceedings (cf. on a claim for revocation HR 20 June 2003, ECLI:NL:HR:2003:AF6207, NJ 2004/569, with note by H.J. Snijders).

[39] Sanders argued that this requirement should not be imposed where an annulment action is based on a breach of public policy (*op cit*, p. 189-190). However, even according to Sanders himself, this would conflict with the legislative system. See also the objection of H.J. Snijders (Groene Serie Burgerlijke Rechtsvordering [Civil Procedure - Green Series], Article 1064 Civil Procedure Code, note 2): 'More generally, (...) an arbitral award that is contrary to public policy – thinking, for example, of cases of violation of the adversarial principle – will nevertheless have to be challenged within a certain period of time, in this case the legal deadline for annulment: legal certainty is a major value and *lites finiri oportet*.

[40] Initiating Submission, para 2.

[41] See para 5.1 of the interim judgment, uncontested in cassation.

[42] See Heike Krieger, in: Oliver Dörr, Kirsten Schmalenbach, Vienna Convention on the Law of Treaties. A Commentary, Berlin/Heidelberg: Springer 2018, p 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, p 640-654.

[43] See Krieger, *op cit*, p 445.

[44] See Baltag, *op cit*, p 31-55; Roe & Happold, *op cit*, p 67-77 Hobér, *op cit*, p 513-530; Antonio Morelli, in: Rafael Leal-Arcas (ed.), Commentary on the Energy Charter Treaty, Cheltenham: Edward Elgar 2018, p 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, p 47-61.

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

[46] For the different 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 that author considers that there must be inconsistency with the domestic legal order of the principle of provisional application, or whether there must be inconsistency with the domestic legal order of the provisions to be applied provisionally.

[47] See also the Interim Awards, para 304; Baltag, *op cit*, p 41.

[48] See also ICSID decision: *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] See also Interim Awards, para 311 *et seq*.

[50] See, for example, the position of the Russian Federation as set out in para 294 of the Interim Awards.

[51] Roe & Happold, p 72-76; otherwise: Baltag, p 46-48.

[52] This has also been noted by Hobér, *op cit*, p 520.

[53] Baltag, *op cit*, p 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*, considers that the purpose of the Limitation Clause is to prevent States from being bound, by mere signature, to provisions which may conflict with their domestic law and which require legislative amendments in order to enter into force.

[56] HR 9 January 2004, ECLI:NL:HR:2004:AK8380, NJ 2005/190, with note by H.J. Snijders, para 3.5.2, with reference to HR 17 January 2003, ECLI:NL:HR:2003:AE9395, NJ 2004/384, with note by H.J. Snijders, 136-138; Sanders, *op cit*, p 186-188; H.J. Snijders, Arbitragerecht [Arbitration Law], Deventer: Wolters Kluwer 2018, para 9.3.1.2 (= Groene Serie Burgerlijke Rechtsvordering [Civil Procedure - Green Series]), Article 1065 Civil Procedure Code, note 1.2); Van den Berg *et al*, *op cit*, p 132.

[57] Snijders, *op cit*, 2018, para 1.1.3.

[58] HR 26 September 2014, ECLI:NL:HR:2014:2837, NJ 2015/318, with note by H.J. Snijders, para 4.2.

[59] See para 2.36 of the Opinion of A-G Wesseling-van Gent (ECLI:NL:PHR:2009:BG4003) for HR 27 March 2009, ECLI:NL:HR:2009:BG4003, NJ 2010/169, with note by H.J. Snijders in NJ 2010/170.

[60] HR 9 January 1981, ECLI:NL:HR:1981:AG4130, NJ 1981/203, with note by W.H. Heemskerk. See Sanders, *op cit*, p 23 and 33; Snijders, *op cit*, 2018, para 6.4.1; G.J. Meijer,

Overeenkomst tot arbitrage - bezien in het licht van het bewijsvoorschrift van artikel 1021 Rv [Agreement to Arbitrate - viewed in the light of the evidentiary requirement of Article 1021 Civil Procedure Code], Deventer: Kluwer 2011, p 860; N. Peters, IPR, Proces & Arbitrage. Over grondslagen en rechtspraktijk [Procedure and Arbitration. Foundations and Legal Practice], Apeldoorn: Maklu 2015, p 274.

[61] The part refers to an opinion of Professor H.J. Snijders submitted in the appeal (exhibit RF-D9), which defends the view that supplementation of jurisdictional grounds by the state court conflicts with the finality and effectiveness of the arbitration proceedings. Another objection raised by Snijders is that the jurisdictional ground applied by the state court could not have been debated before the arbitral tribunal.

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

[63] See, in the same vein, Peters, *op cit*, p 274 and para 7 of his note in JOR 2020/164 to the final Court of Appeal judgment.

[64] Initiating Submission, para 27(c).

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

[66] Cf HR 27 March 2009, ECLI:NL:HR:2009:BG4003, NJ 2010/169, with note by H.J. Snijders, stating the view that, if the object of Article 1064(5) Civil Procedure Code is to be respected, the party requesting annulment must also be permitted to support the grounds invoked in support with further legal and factual argumentation. See also para 2.16 of the Opinion of A-G Wesseling-van Gent for this judgment (ECLI:NL:PHR:2009:BG4003).

[67] See Peters in para 8 of his aforementioned note in JOR 2020/164, agreeing.

[68] See Initiating Submission, para 27(a).

[69] *Kamerstukken* 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.

[70] See HR 27 March 2009, ECLI:NL:HR:2009:BG6443, NJ 2010/170, with note 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*, Legislative History of the Arbitration Act, 2015/I.77.3.

[73] See ICJ *Territorial Dispute (Libya v Chad)*, 3 February 1994, para 41, where the International Court of Justice observes: 'Interpretation must be based above all upon the text a 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.

[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, p 1 and 9.

[76] I note that the District Court's ruling in para 5.28 of its judgment to which the complaint refers in para 37 concerns a different aspect. In that paragraph, the District Court rejected HVY's position that Article 45(1) ECT requires transparency in the sense that the Contracting Parties must make it clear which treaty provisions cannot be provisionally applied in accordance with their domestic law by way of a prior declaration or notice.

[77] In accordance with Article 31(1) and (2) VCLT and the (rightly undisputed) discussion thereof by the Court of Appeal in paras 4.2.1 *et seq*.

[78] Nollkaemper, *op cit*, para 243; Dörr, *op cit*, p 598-599.

[79] See Initiating Submission, para 41, footnote 92.

[80] Cf HR 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', PbEG L 69/115.

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

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

[84] CJEU 8 March 2011, Case C-240/09, ECLI:EU:C:2011:125, Jur. 2011, p I-01255 (*Lesoochranárske VLK*). See, among others, 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 at Aarhus on 25 June 1998.

[86] See also the Opinion of A-G Tanchev of 2 July 2020, ECLI:EU:C:2020:512, paras 130 *et seq* for CJEU 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 L 104/1.

[89] CJEU 6 March 2018, case C-284/16, ECLI:EU:C:2018:158 (*Slovakia v Achmea*), NJ 2019/353, with note by H.J. Snijders; AA 2018, p 527, with note by P.J. Slot; AA 2018, p 732, with note by A.S. Hartkamp.

[90] See further: B.J. Drijber, Nous d'abord: investeringsarbitrage na 'Achmea' [Nous d'abord: investment arbitration after 'Achmea'], NJB 2019/473, p 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 at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190_bilateral-investment-treaties_en.pdf.

[92] See the above declaration, p 2.

[93] Opinion 1/20, received by the CJEU on 2 December 2020. See also 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_ap '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] Cour d'appel Paris 17 June 2017, *Russian Federation v Hulley Enterprises Limited*, available at https://www.italaw.com/sites/default/files/case-documents/italaw9023_0.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 (CJEC 30 Sept. 1987, case 12/86 *Demirel*; CJEU 18 July 2013, case C 414/11 *Sanofi-Aventis Deutschland*) (…).'

[96] Initiating Submission, para 91.

[97] The case was registered with the CJEU under No C-741/19.

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

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

[100] Opinion of A-G Szpunar, paras 37-45.

[101] Opinion of A-G Szpunar, paras 101 *et seq*.

[102] Opinion of A-G Szpunar, paras 110, 118.

[103] See Dylan Geraets & Leonie Reins, in: Rafael Leal-Arcas (ed.), Commentary on the Energy Charter Treaty, 2018, p 25-29; Hobér, *op cit*, p 73-78; Baltag, *op cit*, p 167-183; Roe & Happold, *op cit*, p 48-64; Jagusch & Sinclair, *op cit*, p 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, p 58-66.

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

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

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

[107] Among others Hobér, *id*. See also Asser/Kramer & Verhagen 10-III 2015/1, as well as P. Vlas, Legal Entities, Praktijkreeks IPR [PrIL Practice Series], part 9, Maklu: Apeldoorn-Antwerp, 2017, para 126, containing an overview of investment treaties and the description contained therein for legal entities that fall under the protection of the relevant investment treaty.

[108] Hobér, *op cit*, p 129-132.

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

[110] For it to apply, there must be practice in the context of the treaty in question. Oliver Dörr, Vienna Convention on the Law of Treaties, *op cit*, p 598, states: '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 cited in footnote 255 of the Initiating Submission likewise do not show that the choices made by the contracting parties in other subsequent treaties play a role in the interpretation of an earlier treaty. Those sources, too, always relate to state practice in the implementation of the treaty in question. See, for example, the quoted ruling 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.

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 Commentators have repeatedly supported the view that, in accordance with Article 7(1) ECT, this formal test is the only test to be applied to determine the nationality of a legal entity (and therefore the question whether it qualifies as an investor). 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*, p 16-17, 106; Roe & Happold, *op cit*, p 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*, p 586-587.

115 See https://www.energychartertreaty.org/provisions/part-i-definitions-and-purpose/article-1- definitions/. These 'Understandings' are texts drawn up during the negotiations on the ECT and agreed by the negotiators, but are not part of the ECT's text. Therefore, according to the ECT Secretariat, they can be used to interpret the treaty text (Energy Charter Secretariat, The Energy Charter Treaty - A Reader's Guide, 2002, p 61-62). In the same vein, see Roe & Happold, *op cit*, p 20. The Understandings cannot extend or change the text of the ECT because they are not part of the treaty text, according to Geraets & Reins, *op cit*, p 17.

116 On that definition, see: Hobér, *op cit*, p 325-345; Jagusch & Sinclair, *op cit*, p 17-20; Baltag, *op cit*, p 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 Submission (p 63-64).

119 Dörr, *op cit*, p 598.

120 Dörr, *op cit*, p 598-599.

[121] This refers, in particular, to the observation made at the end of the part of the European Council's negotiating directives cited below.

[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/may/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.

[124] Working Document of the European Council re: '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*, p 603-604.

[126] Dörr, *op cit*, p 605-609; Gardiner, *op cit*, p 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 (para 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.

[129] ILC, *op cit*, p 180 (para 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] That approach is expressed 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*, p 12-13; Jagusch & Sinclair, *op cit*, 2006, p 90-93.

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

[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*, *op cit*, especially paras 135 *et seq*.

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

[137] *TSA Spectrum de Argentina S.A. v Argentine Republic*, ICSID Case No ARB/05/5, 19 December 2008; *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, undisputed in cassation.

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

[139] *Lemire v Ukraine*, ICSID Case No ARB/06/18, 28 March 2011, paras 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, where the tribunal held: '(...) it remains the case that the Claimant [Plama Consortium, A-G] 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 V20I3/153, 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, I reviewed the following commentary: Turinov, *op cit*, p 12-13; Hobér, *op cit*, p 116; Baltag, *op cit*, p 141-146; Roe & Happold, *op cit*, p 64-65; Jagusch & Sinclair, *op cit*, p 93; Blanch, Moody & Lawn, *op cit*, p 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, p 77-78.

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

[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 the same vein, see the same author in 'Investment Protection for "Mailbox Companies" under the 1994 Energy Charter Treaty', Transnational Dispute Management 2005). In *Plama v Bulgaria* (*op cit*, paras 147 *et seq*) the ICSID tribunal ruled that the Contracting States would have to inform investors in advance of a decision under Article 17 ECT, and that States cannot rely on it only during arbitral proceedings in order to procure the 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, p 609-624.

[148] See Baltag, *op cit*, p 211-219; Jagusch & Sinclair, *op cit*, p 75 *et seq*; Turinov, *op cit*, p 5 *et seq*.; Roe & Happold, *op cit*, p 57-63; Hobér, *op cit*, p 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*, p 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 judgments in *Alapli v Turkey* and *Isolux v Spain* cited above; Hobér, p 73-78 (in particular, p 75).

[152] *Alapli v Turkey*, *op cit*, paras 337-350. See Geraets & Reins, *op cit*, p 35-36.

[153] *Alapli v 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. See, in the same vein, *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'.

[155] Based on the Arbitral Tribunal's ruling, the Court of Appeal, in para 5.1.11.6, rejected the proposition that HVY had acted illegally at the time of making the investment (*i.e.* HVY's acquisition of Yukos shares). Part 3.4 covers other alleged illegal activities that took place later, including dividend tax evasion, bribery, money laundering and siphoning off of Yukos' assets from Russia (para 131).

[156] See, *e.g.*, Karen Vandekerckhove, Piercing the Corporate Veil, Alphen aan den Rijn: Kluwer Law International 2007, p 1 and 11; Asser/Maeijer/Van Solinge & Nieuwe Weme 2-II* 2009, paras 834 *et seq*, with further references.

[157] Baltag, *op cit*, p 115. On the various manifestations, see: R.C. van Dongen, Identificatie in het rechtspersonenrecht [Identification in the law of legal entities], published by the Institute for Corporate Law, No 22, Deventer: Kluwer, 1995.

[158] Baltag, *id*.

[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*.

[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 Tokelés v Ukraine*, ICSID Case No ARB/02/18,

Decision on Jurisdiction, paras 53-56.

[164] The same applies to the other awards referred to in the appeal (see response memorial, para 712). These statements acknowledge the existence of the doctrine of piercing the corporate veil but place it in the context of liability. They offer no indication that the doctrine should be applied in the way advocated by the part. 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, expressly, Baltag, *op cit*, p. 141-146.

[166] That description of the position of the Russian Federation is taken from para 5.1.11.1 of the final Court of Appeal judgment,

[167] See i.a. 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'.

[168] Baltag, *op cit*, p 197-198, observes that this introduction cannot play a role in the interpretation of the ECT, partly because it does not fall under the sources that are relevant in accordance with Articles 31 and 32 VCLT.

[169] On that case law, see also Hobér, *op cit*, p 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, op cit*, 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, para 322 *et seq* (Germany-Philippines BIT); *Inceysa Vallisoletana, S.L. v Republic of El Salvador*, ICSID Case No ARB/03/26, 2 August 2006, para 195 *et seq*. (El Salvador-Spain BIT); *Gustav FW Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, 18 June 2010, para 126 (Germany-Ghana BIT); *Phoenix v Czech*, Republic, *op cit*, paras 56 and 101 (Czech Republic-Israel BIT).

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

[175] As, for example, in *Inceysa Vallisoletana, S.L. v Republic of*, El Salvador, *op cit*, especially paras 235-237.

[176] *Phoenix v Czech Republic*, paras 102-104. In the same vein: *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 Societe 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*, p 196-199; Roe & Happold, p 87-88; Gaillard, in: Ribeiro (ed.), Investment Arbitration and the Energy Charter Treaty, *op cit*, p 62, which also points out that: '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.

[180] See, inter alia, *Oxus Gold plc v Uzbekistan*, *op cit*, para 707 (with references to *Gustav FW Hamester v Ghana* and *Inceysa Vallisoletana v El Salvador*, cited above). The CJEU judgment of 14 March 2019, case C-724/17, ECLI:EU:C:2019:204 (*Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*) referred to in the part (para 159, footnote 337), paragraph 46, is not relevant in this regard because it stands in the specific context of liability of undertakings for breaching the European competition rules.

[181] *Hesham Talaat M. Al-Warraq v Republic of Indonesia*, UNCITRAL, 15 December 2014 (Final Award), paras 631 *et seq*. The part inadvertently refers to the award on jurisdiction of 21 June 2012, paragraphs 634-637, in the same case, but that award does not contain paragraphs 634-637, such that the intention must presumably have been to refer to the Final Award of 15 December 2014.

[182] HR 21 March 1997, ECLI:NL:HR:1997:AA4945, NJ 1998/207, with note 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, p 1-19.

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

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

[187] Final Awards, paras 1421-1422.

[188] HVY's written submission, paras 690 *et seq*.

[189] Snijders, *op cit*, 2018, paras 9.3.4.2.4 and 9.3.4.2.7 (= Groene Serie Burgerlijke Rechtsvordering [Civil Procedure - Green Series], Article 1065 Civil Procedure Code, notes 4.2.4 and 4.2.7). See also HR 17 January 2003, ECLI:NL:HR:2003:AE9395, NJ 2004/384, with note by H.J. Snijders.

[190] This is now laid down in Article 1065(4) Civil Procedure Code (see Leg. Hist. Arbitration Act 2015/I.76.3) but was already applicable to the old law: see Van den Berg *et al*, *op cit*, p 143 and Snijders, *op cit*, para 9.3.4.3 (= Groene Serie Burgerlijke Rechtsvordering [Civil Procedure - Green Series], Article 1065 Civil Procedure Code, note 4.3).

[191] T&C Burgerlijke Rechtsvordering [Text and Commentary on Civil Procedure], Article 1065 Civil Procedure Code, note 4 (G.J. Meijer); Snijders, *op cit*, para 9.3.1.2 (= Groene Serie Burgerlijke Rechtsvordering [Civil Procedure - Green Series], Article 1065 Civil Procedure Code, note 1.2).

[192] See also para 3.18 of my Opinion for HR 4 December 2020, ECLI:NL:HR:2020:1952, RvdW 2021/2.

[193] HR 21 March 1997, ECLI:NL:HR:1997:AA4945, NJ 1998/207, with note by H.J. Snijders, para 4.2.

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

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

[196] On that provision, see Hobér, *op cit*, p 354 *et seq*.; Gloria Alvarez, Article 21. Taxation, in Leal-Arcas (ed), *op cit*, p 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.

[197] On the preceding, see Hobér, *op cit*, p 357.

[198] *Cf* the likewise 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] Roe & Happold, *op cit*, p 193.

[202] The case law diverges on this point, see Hobér, *op cit*, p 369 *et seq*.

[203] Hobér, *op cit*, p 373.

[204] The part refers to the Arbitral Tribunal's ruling in para 1421 of the Final Awards that consulting the tax authorities would have been 'an exercise in futility'.

[205] See Snijders, Nederlands arbitragerecht [Dutch Arbitration Law], 2018, para 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 [The Role of the Secretary of the Arbitral Tribunal Highlighted], TvA 2007/2, para 4; Constantine Partasides, The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration, Arbitration International 2002, p 147-163.

[206] In addition to the commentary mentioned below, the initiating submission (para 212, p 109) refers to the contribution of F.J.M. de Ly, Kroniek internationale arbitrage [Chronicle of International Arbitration], TvA 2012/84. Unlike the part, I don't read therein that De Ly is of the opinion that secretaries may not draft awards. Admittedly, De Ly does state: 'Still, decisions or other essential duties of arbitrators may not be delegated to a secretary and secretaries' notes may not have the effect that arbitrators do not review the matter in person and do not draft awards'. However, this is a description of the practice under the (new) ICC note of 1 August 2012 that is followed with regard to the appointment, the 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*.

[208] Born, *op cit*, p 2000. See, in the same vein, Peters, *op cit*, para 13.

[209] See Peters' note to the final Court of Appeal judgment, JOR 2020/16, under point 13.

[210] Smakman, *op cit*, para 4.

[211] P. Sanders, De secretaris van het scheidsgerecht [The Secretary of the Arbitral Tribunal], TvA

2007/29, para 2.

212 F.D. von Hombracht-Brinkman, Er zijn secretarissen en secretarissen! Reactie op het artikel van prof. mr. P. Sanders, 'De secretaris van het scheidsgerecht' [There are Secretaries and Secretaries! Reaction to the Article by Prof. P. Sanders entitled 'The Secretary of the Arbitral Tribunal'], 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, p 107-128. In their contribution, these authors address the role of the secretary under various arbitration rules and make a number of recommendations ('standards'). One of such 'standards' is that the secretary may not prepare 'substantive portions of awards' and may not have 'decision-making functions' (p 127).

215 The initiating submission also refers to a number of articles submitted as exhibits, which, in my view, likewise do not support the existence of a generally accepted view. Some contributions (exhibits RF-396 and RF-405) discuss specific arbitration rules; in the other contributions, while the authors defend their own view, they also show that different views exist (exhibits RF-400, RF-403, RF-404).

216 HR 23 April 2010, ECLI:NL:HR:2010:BK8097, NJ 2011/475, with note by H.J. Snijders, para 3.5.3.

217 Defence, para 991.

218 Asser Procesrecht/Korthals Altes & Groen 7 2015/157; A.E.H. van der Voort Maarschalk, De toetsing in cassatie [The Review Standard in Cassation], in B.T.M. van der Wiel (ed), Cassatie [Cassation], Deventer: Kluwer 2019, para 68.

219 See Sanders, Het Nederlandse arbitragerecht [Dutch Arbitration Law], *op cit*, p 60; Van den Berg *et al*, Arbitragerecht [Arbitration Law], *op cit*, p 46; Snijders, Nederlands arbitragerecht [Dutch Arbitration Law], 4.4.1, para 9.3.3; G.J. Meijer *et al*, Leg. Hist. of the Arbitration Law 2015/III.8.3.

220 *Cf e.g.* HR 18 November 2016, NJ 2017/202, with note by H.B. Krans en P. van Schilfgaarde (*Meavita*), para 3.2.5.

221 HR 25 February 2000, ECLI:NL:HR:2000:AA4947, NJ 2000/508, with note by H.J. Snijders, para 3.3.

222 HR 9 January 2004, ECLI:NL:HR:2005/190:AK8380, NJ 2005/190, with note by H.J. Snijders, para 3.5.2. See also the opinion of A-G Bakels before the Supreme Court judgment of 25 February 2000 referred to in the previous footnote, in which he argues that the lack of a statement of reasons should also include 'a statement of reasons that is so defective that, in terms of informative content and persuasiveness, it can be equated with a complete lack of reasoning'.

223 HR 22 December 2006, ECLI:NL:2006:AZ1593, NJ 2008/4, with note by H.J. Snijders, para 3.3.