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SUPREME COURT OF THE

NETHERLANDS

CIVIL LAW DIVISION

Number 20/01595
Date 5 November 2021

JUDGMENT

In the case of

THE RUSSIAN FEDERATION,
with its seat of power in Moscow, Russian Federation,
APPELLANT in cassation, respondent in the conditional cross-appeal in cassation, hereinafter: the Russian Federation,
attorneys: R.S. Meijer, R.R. Verkerk and A.E.H. van der Voort Maarschalk

v.

1. VETERAN PETROLEUM LIMITED, having its registered office in Nicosia, Cyprus, hereinafter: VPL,

2. YUKOS UNIVERSAL LIMITED, having its registered office in Douglas, Isle of Man, hereinafter: YUL,

3. HULLEY ENTERPRISES LIMITED, having its registered office in Nicosia, Cyprus, hereinafter: Hulley,

RESPONDENTS in cassation, claimants in the conditional cross-appeal in cassation, hereinafter jointly: HVY,

attorneys: T. Cohen Jehoram, J. de Bie Leuveling Tjeenk and B.M.H. Fleuren.

1. Course of the proceedings

For the course of the proceedings at the fact-finding instances, the Supreme Court refers to:

a. the judgments in cases C/09/477160 / HA ZA 15-1, C/09/477162 / HA ZA 15-2 and C/09/481619 / HA ZA 15-112 of the District Court of The Hague of 11 March 2015, 8 July 2015 and 20 April 2016;

b. the judgments in case 200.197.079/01 of the Court of Appeal of The Hague of 11 October 2016, 25 September 2018, 18 December 2018 and 18 February 2020.

The Russian Federation lodged an appeal in cassation against the judgments of the Court of Appeal of 25 September 2018 and 18 February 2020.

HVY lodged a conditional cross-appeal in cassation.

The parties have each lodged a statement of defence moving for the rejection of the appeal in cassation. The parties submitted written pleadings and argued their positions orally.

The opinion of Advocate General P. Vlas recommends that the principal appeal in cassation be denied.

The parties' attorneys responded to that opinion in writing.

2. Introduction and manner of handling

(a) Introduction

2.1 In arbitration proceedings, the Russian Federation was ordered to pay damages to three (former) Yukos Oil Company shareholders for breach of its obligations under the Energy Charter Treaty (hereinafter: ECT)[1]. This case is about the question of whether the awards rendered in those proceedings should be set aside.

(b) Manner of handling

2.2 The Supreme Court will first establish (at 3) several points of departure for the assessment of the case. These are (a) the facts, (b) the applicable law and (c) the Russian Federation's claim and the decisions of the District Court and the Court of Appeal in that regard. The decisions of the Court of Appeal most relevant to the assessment in cassation will also be cited in broad terms at (d).

2.3 A summary will then be given (at 4) of the Russian Federation's and HVY's complaints in cassation.

2.4 The Supreme Court will address (at 5) the Russian Federation's principal appeal, ground by ground.
In each case, the Court of Appeal's findings will be cited first, in so far as relevant to the assessment of the ground. The relevant statutory and treaty provisions will be cited in the subsequent discussion of grounds 1, 2, 3 and 5, with the treaty provisions in the authentic English version. The complaints of the ground will then be discussed. For grounds 6, 7 and

[1] Energy Charter Treaty, Lisbon, 17 December 1994, Treaty Series 1995, 108.

8, the Court of Appeal's findings against which the complaints are directed will not be cited given that grounds 6 and 7 will be fully dealt with using an abridged reasoning pursuant to Article 81(1) of the Judiciary Organisation Act (*Wet op de rechterlijke organisatie*) and ground 8 does not require separate discussion.

2.5 The Supreme Court will then assess (at 6) whether the conditions under which HVY lodged the cross-appeal have been met.

2.6 The Supreme Court will formulate the conclusion (at 7).

2.7 Lastly, the decision (at 8).

3. Points of departure and facts

(a) The facts

3.1 In cassation, the following facts can be assumed.

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

(ii) In 2004, HVY initiated arbitration proceedings against the Russian Federation under Article 26 of the Energy Charter Treaty (hereinafter: the arbitration proceedings). In the arbitration proceedings, HVY sought an order requiring the Russian Federation to pay them damages. They based this on the Russian Federation having expropriated their investments in Yukos in violation of the ECT and having failed to protect those investments. The place of arbitration was The Hague.

(iii) The arbitral tribunal appointed pursuant to the UNCITRAL Arbitration Rules (hereinafter: the arbitral tribunal) decided in three separate interim awards [2] (hereinafter: the interim awards) on a number of preliminary defences raised by the Russian Federation, including in relation to the arbitral tribunal's jurisdiction. In the interim awards, the arbitral tribunal rejected certain defences of jurisdiction and admissibility and decided with respect to other preliminary defences that the decision thereon would be stayed until the merits phase of the proceedings.

(iv) In three separate final awards[3] (hereinafter: the final awards), the arbitral tribunal rejected the Russian Federation's remaining defences of jurisdiction and admissibility, decided that the Russian Federation had breached its obligations under Article 13(1) ECT and ordered the Russian Federation to pay HVY damages

[2] Hulley Enterprises *v.* The Russian Federation, PCA Case No. 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009; Yukos Universal *v.* The Russian Federation, PCA Case No. 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009; Veteran Petroleum *v.* The Russian Federation, PCA Case No. 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009.

[3] Hulley Enterprises *v.* The Russian Federation, PCA Case No. 226, Final Award, 18 July 2014; Yukos Universal *v.* The Russian Federation, PCA Case No. 227, Final Award, 18 July 2014; Veteran Petroleum *v.* The Russian Federation, PCA Case No. 228, Final Award, 18 July 2014.

in the amount of USD 8,203,032,751 (to VPL), USD 1,846,000,687 (to YUL) and USD 39,971,834,360 (to Hulley). Briefly put, the arbitral tribunal decided that the Russian Federation, by taking a number of tax and recovery measures against Yukos, had aimed for the bankruptcy of Yukos for no other purpose than to eliminate M. Khodorkovsky (the chairman of Yukos and one of its shareholders) as a potential political opponent of President Putin and to acquire Yukos' assets.

(v) The Russian Federation signed the ECT but never ratified it.

(b) Applicable law

3.2 These proceedings for the setting-aside of arbitral awards are subject to the Fourth Book ('Arbitration') of the Dutch Code of Civil Procedure as it was applicable until 1 January 2015.[4] This is consistently indicated below as '(old) DCCP', even when referring to provisions that are identical to identically numbered provisions in the current text of the Fourth Book of the Dutch Code of Civil Procedure.

(c) Claim of the Russian Federation and the decisions of the District Court and the Court of Appeal

3.3.1 In these proceedings, the Russian Federation sought the setting aside of the interim awards and final awards rendered by the arbitral tribunal (see above at 3.1(iii) and (iv), hereinafter also jointly referred to as the arbitral awards).
To that end, the Russian Federation invoked the following setting-aside grounds (as set out in Article 1065(1) (old) DCCP):

(a) the absence of a valid arbitration agreement, in connection with which the arbitral tribunal lacked jurisdiction to examine and decide on HVY's claims;
(b) the arbitral tribunal was irregularly composed, specifically because the arbitral tribunal's assistant had apparently played a significant, substantive role in the assessment of the evidence, the deliberations of the arbitral tribunal, and in the preparation of the final awards;
(c) the arbitral tribunal has not complied with its mandate;
(d) the arbitral awards do not provide reasoning in respect of various crucial aspects;
(e) the arbitral awards violate Dutch public policy and good morals.

3.3.2 The District Court[5] awarded the Russian Federation's claim due to the lack of a valid arbitration agreement.
HVY appealed the District Court's judgment.

3.3.3 In the appeal proceedings, HVY objected to certain amendments of claim allegedly included in the Russian Federation's Defence on Appeal. In an interim judgment[6] (hereinafter: the interim judgment), the Court of Appeal decided that this objection was well-founded in so far

[4] Article IV(4) in conjunction with Article IV(2) of the Act of 2 June 2014 amending Book 3, Book 6 and Book 10 of the Dutch Civil Code and the Fourth Book of the Dutch Code of Civil Procedure in connection with the modernisation of Arbitration Law (Bulletin of Acts and Decrees 2014, 200), which entered into force on 1 January 2015 (Bulletin of Acts and Decrees 2014, 254).
[5] District Court of The Hague 20 April 2016, ECLI:NL:RBDHA:2016:4229.
[6] Court of Appeal of The Hague, 25 September 2018, ECLI:NL:GHDHA:2018:2476.

as it pertained to the Russian Federation's statements regarding fraud allegedly committed by HVY in the arbitration proceedings.

3.3.4 The Court of Appeal annulled the judgment of the District Court by final judgment[7] (hereinafter: the final judgment) and dismissed the Russian Federation's claim.

(d) A summary of the Court of Appeal's decisions

3.4 In broad terms, and in so far as relevant in cassation, the Court of Appeal's decisions boil down to the following.

in the interim judgment

(i) In the Defence on Appeal, the Russian Federation made statements entailing, briefly put, that in the arbitration proceedings, HVY had fraudulently concealed who actually owned and had control over HVY. These statements, if correct, could constitute grounds to seek the revocation of the arbitral awards pursuant to Article 1068(1) (old) DCCP. Therefore, these accusations cannot be raised in setting-aside proceedings such as those at hand (paras. 5.1-5.7).

in the final judgment

Jurisdiction; interpretation of the limitation clause in Article 45(1) ECT

(ii) Article 45(1) ECT provides that each signatory shall provisionally apply the Treaty, but this applies only "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations" (hereinafter also: the limitation clause). HVY are entitled to argue an alternative interpretation of the limitation clause in the setting-aside proceedings – and for the first time on appeal – that they did not already argue in the arbitration proceedings (paras. 4.4-4.5).

(iii) The limitation clause should be understood to mean that a signatory that has not made the declaration referred to in Article 45(2)(a) ECT is bound to apply the ECT provisionally, except to the extent that provisional application of one or more provisions of the ECT is contrary to national law in the sense that the laws or regulations of that state preclude provisional application of the ECT for certain (types or categories of) treaty provisions. Accordingly, the limitation clause cannot be invoked if a provision of the ECT is in itself inconsistent with any rule of national law (para. 4.5).

(iv) Based on this interpretation of the limitation clause, the provisional application of Article 26 ECT (which enables disputes between a contracting state and an investor of another contracting state to be settled by means of arbitration) is not inconsistent with the Russian Federation's "constitution, laws or regulations". It has not been stated or shown that Russian law contains a rule that precludes the provisional application of Article 26 ECT. This means that the Russian Federation was obliged to apply Article 26 of the ECT provisionally and that the District Court

[7] Court of Appeal of The Hague, 18 February 2020, ECLI:NL:GHDHA:2020:234.

wrongly decided otherwise (para. 4.6).

(v) Based on the Russian Federation's interpretation of the limitation clause, the question is whether any provision of the ECT is in itself inconsistent with national law. Even based on that interpretation, Article 26 ECT is not inconsistent with Russian law within the meaning of Article 45(1) ECT (para. 4.7).

Jurisdiction; interpretation of 'Investment' and 'Investor' in Article 1(6) and (7) ECT

(vi) It follows from the wording of the ECT that an investment dispute falls within the scope of Article 26 ECT if the legal person making the investment is incorporated under the law of one (contracting) state and the investment referred to in Article 1(6) ECT takes place in another (contracting) state. It follows neither from the context of Articles 1 and 26 ECT nor from the purpose of the Treaty that the drafters of the treaty intended to impose further requirements as to the foreign character of the investment or investor, or the international character of the dispute. (para. 5.1.7)

(vii) It does not follow from the text of Article 17 ECT (denial of benefits-clause) that investments via the U-turn construct (which, according to the Russian Federation, includes the investments of HVY) fall outside the scope of ECT protection. Nor is there any rule of customary international law or general legal principle on the basis of which, in a case like this, there is no entitlement to protection (para. 5.1.8).

(viii) The Russian Federation has not demonstrated that there is a principle of investment law by which investment treaties only provide protection to investments that make an economic contribution to the host state, regardless of whether the treaty contains a definition of the term investment. (para. 5.1.9).

(ix) The Russian Federation has argued in vain for piercing the corporate veil, as Russian businessmen who were involved in the privatisation of Yukos (hereinafter: Khodorkovsky et al.) should not be allowed to hide behind the corporate structure of HVY which they themselves have abused to commit fraud, bribery, and other crimes. Article 1(7) ECT offers no basis for the application of rules of national law on piercing the corporate veil (para. 5.1.10).

(x) The ECT does not require that an investment is made in accordance with the law of the host state. Nor does the text of the ECT contain any restrictions on access to arbitration as referred to in Article 26 ECT. As a result, the arbitral tribunal does not lack jurisdiction even if it is proven that there was illegal conduct at the time of, or in making, the investment (para. 5.1.11).

(xi) In conclusion, the grounds argued by the Russian Federation for the absence of a valid arbitration agreement do not support such a conclusion (para. 5.3).

Violation of mandate and composition of arbitral tribunal

(xii) The arbitral tribunal was in principle obliged to submit the dispute regarding the taxation measures imposed in Russia to the Russian tax authorities in any event. However, the failure to do so was not sufficiently serious to justify setting aside the arbitral award, given that it has not become plausible that the Russian Federation has suffered any disadvantage as a result of this failure (para. 6.3).

(xiii) Even if it is assumed that the arbitral tribunal's assistant has written parts of the Arbitral Awards, this cannot lead to the conclusion that the arbitral tribunal was composed in violation of statutory rules or rules agreed between the parties. That the assistant performed substantive work does not constitute such a serious violation of the arbitrators' mandate that it should lead to the setting aside of the arbitral awards (para. 6.6).

Reasoning

(xiv) The complaint that, in respect of the statement that Yukos made use of sham companies in low-tax regions, the arbitral tribunal rendered an incomprehensible and ill-founded decision that can be equated with a decision for which no grounds have been provided at all is based on an incorrect reading of the final awards (para. 8.4).

Public policy

(xv) The fraudulent, corrupt and illegal activities of Khodorkovsky et al. alleged by the Russian Federation do not lead to the conclusion that the arbitral awards or the manner in which they came about violate public policy within the meaning of Article 1065(1)(e) (old) DCCP (para. 9.8).

4. The Russian Federation's and HVY's complaints in cassation

Russian Federation's principal appeal in cassation

4.1.1 The grounds for cassation in the Russian Federation's principal appeal in cassation comprise eight grounds, with grounds 1 through 7 each containing an introduction and various complaints. The grounds, in summary, address the following.

4.1.2 Ground 1 is directed against the Court of Appeal's decision (see 3.4 at (i) above) that the Russian Federation's statements put forward on appeal that HVY had acted fraudulently in the arbitration proceedings cannot be brought up in these setting-aside proceedings.

4.1.3 Ground 2 argues that the Russian Federation was not bound by the arbitration clause in Article 26 ECT because the Russian Federation had merely signed the ECT but never ratified it. The Russian Federation does not agree with the Court of Appeal's interpretation of the limitation clause or the Court of Appeal's decision based on it that the Russian Federation was held to provisionally apply Article 26 ECT (see 3.4 at (ii)-(v) above).

4.1.4 Grounds 3 and 4 are directed against the Court of Appeal's decision (see 3.4 at (vi)-(x) above) that HVY can invoke the provisions of the ECT. According to the Russian Federation, HVY cannot be deemed foreign investors and their investments do not qualify as foreign investments within the meaning of the ECT. Moreover, the Russian Federation also argues that there are illegal investments on HVY's part and that the arbitral tribunal did not therefore have jurisdiction to examine HVY's claims. The Russian Federation furthermore argues that the arbitral tribunal's decision violates public policy (see 3.4 at (xv) above).

4.1.5 According to ground 5, the Court of Appeal wrongly did not decide (see 3.4 at (xii) above) that the arbitral tribunal had violated its mandate by not requesting advice from the tax authorities, as prescribed by Article 21(5) ECT.

4.1.6 Ground 6 objects to the Court of Appeal's decision (see 3.4 at (xiii) above) regarding the role played by the arbitral tribunal's assistant in the creation of the arbitral awards. According to the Russian Federation, the assistant also performed substantive work and the arbitral tribunal was not transparent in that regard. Therefore, the Court of Appeal should have decided that the arbitral tribunal had violated its mandate and was irregularly composed, according to the Russian Federation.

4.1.7 Ground 7 is directed against the rejection by the Court of Appeal (see 3.4 at (xiv) above) of the setting-aside ground raised by the Russian Federation that the arbitral tribunal had failed to provide sound reasoning for the decision that it had found no evidence whatsoever that Yukos' trading companies in the low-tax region Mordovia were sham companies.

4.1.8 Ground 8 follows on from grounds 1 through 7.

HVY's conditional cross-appeal

4.2.1 HVY's cross-appeal comprises three grounds. Ground 1 is directed against the Court of Appeal's rejection of HVY's primary position on the interpretation of the limitation clause. Ground 2 complains about the Court of Appeal's decision that the arbitral tribunal was, in principle, obliged to refer the dispute to the Russian tax authorities. Ground 3 complains that the Court of Appeal failed to recognise that the Russian Federation could challenge the arbitral tribunal's decision to reject the allegations based on the unclean hands argument with a setting-aside ground in the writ of summons at the latest.

4.2.2 All the grounds have been conditionally submitted. Ground 1 was submitted on the condition that one or more complaints in ground 2 of the grounds for cassation in the principal appeal succeed, ground 2 on the condition that one or more complaints in ground 5 of the grounds for cassation in the principal appeal succeed, and ground 3 on the condition that one or more complaints in grounds 3 or 4 of the grounds for cassation in the principal appeal succeed.

5. Assessment of the grounds for cassation in the principal appeal

Ground 1

Can fraud in the arbitration proceedings be raised only in revocation proceedings?

(a) Overview of the Court of Appeal's findings

5.1.1 In so far as relevant to the assessment of the ground, the Court of Appeal considers as follows.

(i) HVY object to, among other things, the Russian Federation's statements that the arbitral awards violate public policy on account of fraud committed by HVY during the arbitration consisting of the making of false statements and the withholding of documents, and that HVY had failed to submit various documents and correspondence in the arbitration (paras. 5.1 at (i) and (iii) of the interim judgment)

(ii) HVY's objection to these statements by the Russian Federation is that the Russian Federation should have initiated revocation proceedings under Article 1068 (old) DCCP or at least submitted its change of claim within three months of the time it became aware or should have been aware of the facts upon which it bases its allegation that fraud was committed or documents were withheld. According to HVY, the change of claim is also contrary to the requirements of due process (Article 130 DCCP). (para. 5.3 at (b) and (c) of the interim judgment).

(iii) In the Defence on Appeal, the Russian Federation did not argue any new cases of fraud, but merely referred to "new documents" it believes should have been submitted by HVY in the arbitration. At issue, therefore, are the statements about fraud and the withholding of documents in the arbitration (para. 5.5 of the interim judgment).

(iv) These statements, if correct, could constitute grounds to seek the revocation of an arbitral award pursuant to Article 1068(1) (old) DCCP. The accusation that HVY failed to submit certain documents relevant to the arbitral tribunal's decision falls under the revocation ground of Article 1068(1)(c) (old) DCCP. The accusations that HVY made (intentionally) false and/or incorrect statements, concealed the true state of affairs or influenced a witness in an improper manner fall under the revocation ground of Article 1068(1)(a) (old) DCCP (para. 5.6 of the interim judgment).

(v) HVY rightly argue that these accusations can only be raised in revocation proceedings on the basis of Article 1068 (old) DCCP and not in setting-aside proceedings like this. The legal consequences of setting aside by reason of one of the grounds in Article 1065(1)(old) DCCP and by reason of revocation are identical: the ordinary court regains its jurisdiction unless the parties have agreed otherwise (cf. Article 1068(3) (old) DCCP). There are however differences as to the time limits within which these remedies are to be lodged and as to the competent court. If more than three months have passed since the arbitral award acquired binding force, revocation may nonetheless be claimed within three months of the fraud or forgery of documents becoming known or of the new documents being obtained by a party. No such additional period is given for setting-aside proceedings. Moreover, the claim for revocation must be brought before the Court of Appeal that would have jurisdiction to decide on the setting-aside claim on appeal referred to in Article 1064 (old) DCCP, whereas the setting-aside proceedings (which are governed by the old law in this case) must be brought before the District Court. The revocation proceedings therefore have only one fact-finding instance. Were it possible to seek the setting aside of the arbitral award by reason of one or more of the grounds for setting aside in Article 1065(1) (old) DCCP based on the statement that the other party had committed fraud or withheld documents during the arbitration, it would be possible to achieve the same result as a claim for revocation, but it would be possible to circumvent both

the aforementioned three-month period and the exclusive jurisdiction of the Court of Appeal as the only trier of fact, for example by invoking by means of a change of claim, more than three months after the discovery of the fraud, fraud as a new argument for a reliance on Article 1065(1)(e) (old) DCCP already made in the writ of summons in setting-aside proceedings pending before the District Court. That would be unacceptable (para. 5.7 of the interim judgment).

(vi) HVY's objection that the Russian Federation cannot, in these setting-aside proceedings, argue its statements about fraud committed by HVY in the arbitrations is therefore well-founded. HVY's objection that the amendment of claim is contrary to the requirements of due process will not be addressed, (para. 5.8 of the interim judgment).

(vii) In view of paras. 5.1-5.8 of the interim judgment, there is no need to rule on the Russian Federation's arguments that HVY committed fraud in the arbitrations (paras. 9.7.1-9.7.2 of the final judgment).

(b) Relevant statutory provisions

5.1.2 Article 1064 (old) DCCP reads as follows:

1. Only the legal remedies of setting aside and revocation pursuant to this section are available against a full or partial final award that is not subject to arbitral appeal or that has been made on arbitral appeal.
2. A claim for setting aside will be presented to the District Court at whose registry the original of the award must be filed in accordance with Article 1058(1).
3. A party may present a claim for setting aside as soon as the award has acquired *res judicata* effect. The right to do so lapses three months after the day the award was filed at the registry of the District Court. If, however, the award with leave for enforcement is served on the other party, then that party may, notwithstanding the expiry of the time-limit of three months mentioned in the previous sentence, still present a claim for setting aside within three months after such service.
4. (...)
5. All setting-aside grounds must be submitted in the writ of summons on pain of forfeiture of the right to do so.

Article 1065(1) (old) DCCP reads as follows:

1. Setting aside of the award can take place only on one or more of the following grounds:
   a. absence of a valid arbitration agreement;
   b. the arbitral tribunal was composed in violation of the applicable rules;
   c. the arbitral tribunal has not complied with its mandate;
   d. the award is not signed in accordance with the provisions of Article 1057 or does not provide reasoning;
   e. the award, or the manner in which it was made, violates public policy or good morals.

Article 1067 (old) DCCP reads as follows:

As soon as the judgment setting aside the award has become irrevocable, the jurisdiction of the ordinary court revives, unless otherwise agreed by the parties.

Article 1068 (old) DCCP reads as follows:

1. Revocation can only take place on one or more of the following grounds:

a. the award is wholly or partially based on fraud discovered after the award was made and committed during the arbitral proceedings by or with the knowledge of the other party;
b. the award is wholly or partially based on documents which, after the award was made, are discovered to have been forged;
c. after the award was made, a party obtains documents which would have had an influence on the decision of the arbitral tribunal and which were withheld as a result of the acts of the other party.

2. A claim for revocation will be brought before the Court of Appeal that would have jurisdiction to decide on the setting-aside claim on appeal, referred to in Article 1064, with analogous application of Article 1064(3) or, if the resulting date is later, within three months of the fraud or forgery of documents becoming known or of the new documents being obtained by a party. (...)
3. If the court finds the ground or grounds for revocation presented to have merit, it will set aside the award in whole or in part. Article 1067 applies *mutatis mutandis*.

(c) Assessment of the complaints

5.1.3 Ground 1.2 argues, *inter alia*, that the Court of Appeal wrongly decided that factual assertions that could have justified reliance on revocation within the meaning of Article 1068 (old) DCCP cannot result in setting aside pursuant to Article 1065(1), opening words, and at (e) (old) DCCP due to violation of public policy. The Court of Appeal wrongly withheld from the Russian Federation a free choice between the legal remedies of setting aside and revocation, according to the ground.

5.1.4 In its originating writ of summons, the Russian Federation put forward as a ground for setting aside the arbitral awards, *inter alia*, that the arbitral awards were made in violation of public policy. On appeal, it stated in its Defence on Appeal that the arbitral awards violate public policy because HVY had acted fraudulently in the arbitration proceedings, *inter alia*, by submitting false statements, by withholding documents relevant for crucial issues in debate in the arbitration and by making secret payments to one of HVY's main witnesses.

5.1.5 Only the legal remedies of setting aside (hereinafter: the setting-aside proceedings) and revocation (hereinafter: the revocation proceedings) are available against a final award that is not subject to arbitral appeal (Article 1064 (old) DCCP).

5.1.6 Setting aside of the award can take place only on the grounds referred to in Article 1065(1)(a) through (e) (old) DCCP. One of those grounds is that the award, or the manner in which it was made, violates public policy.
A party may present a claim for setting aside as soon as the award has acquired *res judicata* effect. The right to do so lapses three months after the day the award was filed at the registry of the District Court. If the award with leave for enforcement is served on the other party, then that party may still present a claim for setting aside within three months after such service (Article 1064(3) (old) DCCP).

5.1.7 Pursuant to Article 1068(1) (old) DCCP, revocation can only take place on the grounds (a) that the award is wholly or partially based on fraud discovered after the award was made and committed by or with the knowledge of the opposite party in the arbitration proceedings, (b) that the award is wholly or partially based on documents which, after the award was rendered, are discovered to have been forged, or (c) that after the award was made, a party obtains

documents which would have had an influence on the decision of the arbitral tribunal and which were withheld as a result of the acts of the other party. These grounds are hereinafter collectively referred to as: fraud.
A revocation claim will be brought within the time limit of Article 1064(3) (old) DCCP or, if the resulting date is later, within three months after the fraud became known (Article 1068(2), first sentence, (old) DCCP).

5.1.8 If an arbitral award was made under the influence of fraud, this may constitute a ground for the decision that the award, or the manner in which the award was made, violates public policy as referred to in Article 1065(1)(e) (old) DCCP. Based on this ground, a party may therefore seek the setting aside of an arbitral award in setting-aside proceedings.

5.1.9 The findings above in 5.1.8 are not affected by the fact that fraud by one of the parties to the proceedings may also constitute a ground for revocation on the basis of Article 1068(1) (old) DCCP. Neither from the legislative text nor the legislative history does it follow that it was the legislature's intention to provide that, if the statements put forward constitute both a setting-aside ground within the meaning of Article 1065(1)(old) DCCP and a revocation ground within the meaning of Article 1068(1) (old) DCCP, a party is exclusively allowed to base its claim on these statements in revocation proceedings. Nor do the manner in which both sets of proceedings were designed by the legislature and the differences between the two sets of proceedings give cause to interpret the statutory regulation of Articles 1064 through 1068 (old) DCCP in that way. The Supreme Court considers as follows in that regard.

5.1.10 Like setting-aside proceedings, revocation proceedings result in the setting aside of the arbitral award in the event the claim is awarded (Article 1068(3) (old) DCCP). There is therefore no difference in legal effect that would justify the notion that revocation proceedings, to the exclusion of setting-aside proceedings, are the only course of proceedings in which it can be argued that an arbitral award was made under the influence of fraud.
As a result of the regulation provided for in Article 1068(2), first sentence, (old) DCCP, a revocation claim may still be brought if the time limit for presenting a setting-aside claim has already expired or the setting-aside proceedings have been completed without the award having been set aside. The purport of the provisions of Article 1068(2) (old) DCCP is to broaden the possibility of challenging an arbitral award by giving the party wishing to rely on fraud an additional period of time to bring the revocation claim. It would be inconsistent with that purport if the statement that the arbitral award was rendered under the influence of fraud could exclusively constitute the basis for a revocation claim but not a setting-aside claim, which is lodged timely.
Nor does it follow from the statutory regulation regarding the revocation of court decisions (Article 382 et seq. DCCP) that grounds that may result in revocation can exclusively be raised in revocation proceedings. In fact, the setting aside of court decisions must be achieved as much as possible by using ordinary legal remedies.[8] The extraordinary remedy of revocation is only available if the ordinary legal remedies to challenge a court decision have been exhausted or the time limits for doing so have expired without having been used (Article

[8] Cf. Parliamentary Documents II 1999/2000, 26855, no. 3, p. 170.

383(1) DCCP).

5.1.11 Pursuant to Article 1064(2) (old) DCCP, the setting-aside claim must be presented to the District Court, with the possibility of appeal,[9] while pursuant to Article 1068(2) (old) DCCP, the revocation claim, by way of prorogation,[10] must be brought before the Court of Appeal that would have jurisdiction to decide on the setting-aside claim on appeal. The reason for this difference has not been explained in the legislative history. The difference carries – also in light of the fact that it no longer exists under current law (see Article 1064a(1) DCCP) – insufficient weight to assume that revocation proceedings were intended as an exclusive course of proceedings for fraud, and therefore does not preclude the statement that the arbitral award was made under the influence of fraud from possibly constituting the base for a setting-aside claim which was lodged timely.

5.1.12 The Court of Appeal's decision that the Russian Federation could only raise the statements mentioned in para. 5.5 of the interim judgment in revocation proceedings and could not base the setting-aside claim at issue in these proceedings on those statements is therefore incorrect. The complaint directed against this succeeds. The other complaints in ground 1 need not be discussed.

5.1.13 The following should be noted.

5.1.14 Pursuant to Article 1064(5) (old) DCCP, the grounds on which the claimant wishes to base the setting-aside claim must be included in the originating writ of summons, on pain of forfeiture of the right to do so. In the judgment in *Breeders/Burshan,*[11] the Supreme Court decided that Article 1064(5) (old) DCCP does not in itself preclude that, in response to the defence conducted in the further course of the proceedings, or in response to the decision of the first court, a more detailed elaboration of the grounds put forward in the originating writ of summons is provided on appeal, and, if necessary, an omission is remedied. However, on appeal, the possibility of elaborating the grounds already put forward in the writ of summons in more detail or of advancing new factual statements is not unlimited. This possibility is limited, *inter alia*, by the ordinary rules applicable to appeal proceedings, such as Article 130 DCCP. In addition, this possibility is limited by specific provisions prescribing when a particular setting-aside ground must be invoked (for the first time), subject to forfeiture of the right to invoke it at any later juncture. If such a provision is at issue, it will always have to be determined in a specific case whether a new factual or legal statement put forward in the course of the setting-aside proceedings is contrary to the purport of such a provision, also in view of the requirements of due process.[12]

5.1.15 It follows from the findings above in 5.1.7-5.1.10 that the revocation proceedings give the party that is of the opinion that the arbitral award is based on fraud an additional possibility to challenge the award at law on that ground, which is particularly relevant if the other legal

[9] Parliamentary documents II 1985/86, 18464, no. 6, p. 37.
[10] Parliamentary documents II 1983/84, 18464, no. 3, p. 31.
[11] Supreme Court 27 March 2009, ECLI:NL:HR:2009:BG4003.
[12] Cf. Supreme Court 27 March 2009, ECLI:NL:HR:2009:BG4003, paras. 4.3.3-4.3.4.

remedies, such as the setting-aside claim, have already been exhausted or the time limits for presenting it have expired without having been used when the fraud is discovered.
The purport of the fact that this possibility is limited in time by the time limit of three months after the fraud has become known (Article 1068(2), first sentence, (old) DCCP) is that, after that time limit has expired without having been used, the other party may assume that the arbitral award is no longer liable to setting aside as a result of revocation. This time limit therefore serves legal certainty. If, however, setting-aside proceedings are already pending in which it was argued in the writ of summons that the award, or the manner in which it was made, violates public policy, the other party is able to take into account the possibility that the arbitral award will not be upheld on that ground, and the interest of legal certainty will not be harmed if the reliance on public policy is elaborated in more detail in the course of the setting-aside proceedings by invoking fraud.
The purport of Article 1068(2), first sentence, (old) DCCP therefore does not entail that in setting-aside proceedings, too, fraud must be invoked within the time limit mentioned in that provision, on pain of forfeiture of the right to still do so later. Whether fraud can still be invoked in setting-aside proceedings at a later stage must otherwise be assessed on the basis of the rules set out above in 5.1.14.

5.1.16 With regard to the application of Article 130(1) DCCP, it will always have to be determined in a specific case whether advancing a new factual statement to substantiate a setting-aside ground already put forward in the writ of summons is contrary to the requirements of due process. Among other things, the reason for not putting forward the new statement at an earlier stage may be relevant in this respect.
Contrariety to the requirements of due process as referred to in Article 130(1) DCCP may exist, *inter alia*, if, in a case such as the present one, in which it is stated that the arbitral award was made under the influence of fraud, the aforementioned detailed elaboration is provided later than in the next statement or deed after the fraud becoming known.

5.1.17 The above findings regarding the relationship between revocation proceedings and setting-aside proceedings also apply under current law.

5.1.18 In this case, the Russian Federation has stated that it discovered fraud on the part of HVY after the date of the District Court's judgment, and invoked it in its first statement in the appeal proceedings (the Defence on Appeal). The Court of Appeal did not discuss the question of whether this more detailed elaboration, provided by the Russian Federation in the Defence on Appeal, of the setting-aside ground already invoked in the originating writ of summons is contrary to the requirements of due process as referred to in Article 130(1) DCCP.

(d) Conclusion

5.1.19 The conclusion is that ground 1 succeeds.

Ground 2

Is the Russian Federation bound to provisionally apply Article 26 ECT pursuant to Article 45 ECT?

(a) Overview of the Court of Appeal's findings

5.2.1 In so far as relevant to the assessment of the ground, the Court of Appeal considered as follows in the final judgment.

New grounds for jurisdiction and jurisdictional arguments in the setting-aside proceedings

(i) The arbitral tribunal identified two possible interpretations of the limitation clause: the issue is whether the *principle* of provisional application is inconsistent with Russian law (HVY's position) or whether a *separate provision* of the ECT (in this case Article 26) is inconsistent with Russian law (the Russian Federation's position). The arbitral tribunal accepted HVY's position as the correct one. (para. 4.4.1)

(ii) In these setting-aside proceedings – and for the first time on appeal – HVY defended as an alternative argument that the limitation clause concerns the question whether the provisional application of one or more provisions of the ECT is irreconcilable with the law of a contracting party, in the sense that the law of that state allows the provisional application of a treaty in principle, but excludes certain (categories or types of) provisions of the treaty from provisional application (para. 4.4.2).

(iii) It would not be compatible with the legal system if the setting-aside court were only allowed to review whether the arbitral tribunal had assumed jurisdiction on proper grounds but not to uphold that jurisdiction on grounds that the arbitral tribunal, for whatever reason, (in the court's view, wrongly) did not discuss. It would frustrate the effective administration of justice in arbitration if an arbitral award had to be set aside because the arbitral tribunal relied upon an incorrect basis for assuming jurisdiction, even when in fact jurisdiction did exist. (paras. 4.4.3-4.4.4)

(iv) This also means that, in principle, there is no objection if the defendant in setting-aside proceedings advances new arguments in support of the arbitral tribunal's decision that it has jurisdiction. The conclusion is that the Court of Appeal will take into account HVY's alternative position with regard to the interpretation of the limitation clause in its decision as to whether a valid arbitration agreement is lacking within the meaning of Article 1065(1)(a) (old) DCCP. (paras. 4.4.5-4.4.7)

The interpretation of Article 45(1) ECT, in particular of the limitation clause, and the interpretation of Article 45(2)(a) ECT

(v) The alternative interpretation of HVY is most consistent with the ordinary meaning of the wording of the limitation clause, as well as the context and the object and purpose of the ECT. An established state practice within the meaning of Article 31(3) of the Vienna Convention on the Law of Treaties (hereinafter: VCLT)[13] has been insufficiently demonstrated, but even if that were the case, it would not oppose the alternative position of HVY. This means that the limitation clause

[13] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Treaty Series 1972, 51 and 1985, 79.

should be understood to mean that a signatory which has not made the declaration referred to in Article 45(2)(a) ECT is bound to apply the ECT provisionally, except to the extent that provisional application of one or more provisions of the ECT is inconsistent with national law in the sense that the laws or regulations of that state preclude provisional application of the ECT for certain treaty provisions (or types or categories of provisions). Accordingly, the limitation clause cannot be invoked if a provision of the ECT is in itself inconsistent with any rule of national law. (paras. 4.5.9-4.5.33)

(vi) This interpretation does not leave the meaning of Article 45(1) ECT or the limitation clause ambiguous or obscure, and this interpretation does not lead to a result that is manifestly absurd or unreasonable. There is therefore no reason to apply the supplementary rules of interpretation in Article 32 VCLT. Superfluously, it is noted that the *travaux préparatoires* confirm this interpretation of Article 45(1) ECT. (paras. 4.5.34-4.5.40)

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

(viii) The text and context of Article 26 ECT do not provide any basis for an interpretation by which the provisional application of Article 26 ECT (dispute resolution by means of arbitration) is 'inconsistent' with Russian law if such a manner of dispute resolution has no legal basis in Russian law or that law does not provide for that possibility itself. The District Court's decision to the contrary is to the effect that the ECT provisions can only be provisionally applied if there is already a legal basis for this in national law. This would deprive the provisional application of Article 45(1) ECT of much of its practical use and would not be consistent with the desire expressed in that provision by the contracting parties to provisionally apply the ECT to the furthest extent possible. (para. 4.5.47)

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

Application of the limitation clause in this case (assuming the Court of Appeal's interpretation

of that provision)

(x) The provisional application of Article 26 of the ECT is not inconsistent with the 'constitution, laws or regulations' of the Russian Federation. It has not been stated or shown that Russian law contains a rule that precludes the provisional application of Article 26 ECT. This means that the Russian Federation was obliged to apply Article 26 of the ECT provisionally and that the District Court wrongly decided otherwise. (para. 4.6.1)

Application of the limitation clause in this case (assuming the Russian Federation's interpretation of that provision)

(xi) Nevertheless, the Court of Appeal will examine, superfluously, whether Article 26 of the ECT is inconsistent with any provision of the law of the Russian Federation, on the basis of the interpretation given by the Russian Federation and the District Court to the limitation clause. (para. 4.6.2)

(xii) The Russian Federation put forward three independent grounds which, in its view, lead to the conclusion that arbitration about HVY's claims is inconsistent with Russian law: (a) it is inconsistent with the principle of the separation of powers enshrined in Russia's (constitutional) law; (b) under Russian law, disputes concerning powers under public law, such as tax and expropriation disputes, cannot be submitted to arbitration; (c) under Russian law, shareholders are not entitled to bring an action in consequence of a reduction in the value of their shares on account of damages caused to the company. (para. 4.7.1)

(a) The separation of powers

(xiii) The Russian Laws on Foreign Investment of 1991 and 1999 (hereinafter: LFI 1991 and LFI 1999) enable international arbitration on investment disputes in so many words. (para. 4.7.5)

(xiv) There is no rule in Russian law that provisional application cannot relate to treaties that are subject to ratification because they contain provisions that derogate from or supplement federal legislation. Article 23(2) of the Federal Law on International Treaties (hereinafter: FLIT) allows treaty provisions that derogate from or supplement federal legislation to be applied provisionally. Now that under Russian law, the provisional application continues until the moment the Russian Federation has let the other signatories know that it does not intend to become a party to the treaty in question, which was done in this case in August 2009, it cannot reasonably mean anything else than that the provisional application of the ECT prior to that moment is not 'inconsistent' with Russian law within the meaning of Article 45(1) ECT. (paras. 4.7.9-4.7.21 and 4.7.30)

(xv) The Constitutional Court of the Russian Federation considers it admissible that the government obliges the Russian Federation to provisionally apply treaty provisions pending ratification, even if those treaty provisions derogate from federal legislation. (para. 4.7.29).

(xvi) Although the ECT was not submitted to the State Duma within the six-month term referred to in Article 23(2) FLIT, this has no consequences for the provisional application of the ECT. This means that the provisional application of the ECT is not limited by the effect of the limitation clause of Article 45(1) ECT in combination with Article 23(2) FLIT. The Russian Federation's reliance on the separation of powers cannot hold. (paras. 4.7.30-4.7.32)

(b) Are disputes about public law powers arbitrable?

(xvii) A dispute between a foreign investor and the host country is not of a public law nature. However, even to the extent that it is assumed that, under Russian law, only civil law disputes are open to arbitration, and that the current dispute is not a civil law dispute, international arbitration under Article 26 ECT is not 'inconsistent' with Russian law. An arbitral tribunal appointed pursuant to Article 26 ECT should decide a dispute put before it "in accordance with this Treaty and applicable rules and principles of international law". It cannot be seen why such a form of international arbitration cannot exist alongside the legal provisions referred to by the Russian Federation. The fact that Russian law, in purely domestic situations, only provides for the option of arbitration in civil law disputes is not inconsistent with the circumstance that the ECT, in cases regulated by the ECT, does provide for international arbitration in addition to the options offered under Russian national law. The Russian Federation's approach to treaties also shows no hesitation in respect of the international arbitration of disputes about investment treaties. (paras. 4.7.35-4.7.37)

(xviii) Nor does the Explanatory Note sent by the government to the State Duma on 26 August 1996 to clarify the ECT ratification bill, which pursuant to Article 16(4) FLIT had to include "a report on its conformity with the legislation of the Russian Federation", suggest that there were any problems with the arbitration clause of Article 26 ECT or with provisional application thereof. (para. 4.7.38)

(xix) Even based solely on the above, it cannot be maintained that Article 26 ECT is inconsistent with Russian law in the meaning of the limitation clause, even if the Russian Federation's interpretation thereof is taken as the point of departure. (para. 4.7.39)

(xx) Articles 25 and Article 27 of the Russian Code of Civil Procedure also allow no other conclusion than that treaties sometimes contain rules as a consequence of which disputes other than civil law disputes may be subjected to arbitration. This also applies to Article 1(5) of the Act on International Commercial Arbitration and Articles 21 and 23 of the Code of Civil Procedure in Commercial Matters (paras. 4.7.40-4.7.42).

(xxi) Both the LFI 1991 and the LFI 1999 explicitly allow the option of resolving a dispute between a foreign investor and the Russian Federation other than by a Russian court. Article 9 LFI 1991 refers to the option of "international means for settling disputes" and Article 10 LFI 1999 to "international arbitration (arbitration tribunal)". Arbitration pursuant to Article 26 ECT falls under both descriptions. Articles 9 LFI 1991 and 10 LFI 1999 start out from a broad interpretation of what may be considered an investment dispute under those laws and do not limit that option to private law disputes. (paras. 4.7.47-5.7.52)

(xxii) Also the Fundamental Principles Act provides that an international treaty may prescribe that investment disputes between an investor and the former USSR can be resolved by means other than by a Russian court. No limitation to private law disputes can be read therein. (para. 4.7.54)

(xxiii) Even if the LFI 1991 and the LFI 1999 offer no grounds to subject a dispute such as the one between HVY and the Russian Federation to international investment arbitration in a treaty, in any case it cannot be deduced from those laws that such a form of arbitration is 'inconsistent' with Russian law. This also does not follow from other sources of Russian law. Nor is there any evidence of a legal conviction, generally held in the Russian Federation, that international arbitration of international investment disputes is not permitted. (para. 4.7.57)

(xxiv) The conclusion is that Article 26 ECT is not inconsistent with Russian law in the meaning of the limitation clause. (para. 4.7.58)

(c) Are shareholders entitled to file a claim regarding the depreciation of their shares under Russian law?

(xxv) The statement that HVY as (former) shareholders of Yukos cannot file a claim under Russian law for damage inflicted upon the company has nothing to do with the question whether, pursuant to Article 26 ECT, the arbitral tribunal had jurisdiction to hear the dispute between the parties. (para. 4.7.62)

(xxvi) The arbitral tribunal has understood HVY's claim thus, that they argue that the Russian Federation has expropriated (not explicitly but indeed, *de facto*) their shares. The arbitral tribunal awarded HVY's claims on this ground. The Court of Appeal endorses this interpretation of HVY's statements. On that basis, the arbitral tribunal has rightly decided that HVY have not filed a legal claim for damage inflicted upon the company (Yukos). (para. 4.7.63)

(xxvii) To the extent that it should be decided that the ECT makes it possible for shareholders to file claims that they are otherwise prevented from filing under Russian law, it nonetheless does not follow that the ECT is inconsistent (in the meaning of the limitation clause) with Russian law in this respect. (para. 4.7.64)

(b) Relevant treaty provisions

5.2.2 Art. 26 ECT ("Settlement of Disputes between an Investor and a Contracting Party") reads, in so far as relevant, as follows:

> 1. Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
> 2. If such disputes can not be settled according to the provisions of paragraph 1 within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
> a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
> b) in accordance with any applicable, previously agreed dispute settlement procedure; or
> c) in accordance with the following paragraphs of this Article.

3. a) Subject only to subparagraphs b) and c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
   b) (...)
   c) (...)
4. In the event that an Investor chooses to submit the dispute for resolution under subparagraph 2 c), the Investor shall further provide its consent in writing for the dispute to be submitted to:
   a) (...)
   b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or
   c) (...)
5. (...)
6. A tribunal established under paragraph 4 shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.
7. (...)
8. (...).

Paragraphs 1 and 2 of Article 45 ECT ("Provisional application") read as follows:

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.

(c) Assessment of the complaints

Did the Russian Federation unambiguously and voluntarily agree to arbitration?

5.2.3 Grounds 2.2 and 2.8 argue that it is not enough that Article 26 ECT contains an arbitration clause for the arbitral tribunal to have jurisdiction. The arbitral tribunal could only have jurisdiction if the Russian Federation had given clear, unambiguous and voluntary consent to arbitration. The grounds complain that this requirement has not been met in the present case.

5.2.4 These complaints cannot lead to cassation. The Supreme Court need not provide reasons for how it reached this decision, because assessing these complaints does not require answering questions that are in the interests of the uniform application or the development of the law (see Article 81(1) of the Judiciary Organisation Act).

Was the Court of Appeal allowed to consider new jurisdictional arguments?

5.2.5 Ground 2.3 directs various complaints against the Court of Appeal's decision (see above at 5.2.1(i)-(iv)) that based on arguments put forward by HVY for the first time in the setting-aside proceedings, it could decide that the arbitral tribunal had jurisdiction to hear HVY's claims even though the arbitral tribunal itself did not base its jurisdiction thereon.

5.2.6 These complaints cannot lead to cassation already on account of lack of interest, since the Court of Appeal's decision on the jurisdiction of the arbitral tribunal is based not only on the jurisdictional argument put forward by HVY for the first time in the setting-aside proceedings and the corresponding interpretation of the limitation clause (paras. 4.5.8-4.6.2 of the final judgment), but also – superfluously – on the Russian Federation's position regarding the interpretation of the limitation clause (paras. 4.7.1-4.7.58 of the final judgment). It will become clear below in 5.2.11-5.2.20 that the complaints against that superfluously rendered decision cannot succeed.

5.2.7 Nor do the complaints succeed on their merits. The following is considered in this regard.
Pursuant to Article 1052(1) (old) DCCP, the arbitral tribunal itself can decide on its jurisdiction. However, if the arbitral tribunal decides that it has jurisdiction, such decision is not final. The final word on the jurisdiction of the arbitrators accrues to the court.[14] That is related to the fundamental nature of the right of access to the courts.[15]
If it is claimed, on the basis of Article 1065(1), opening words and (a) (old) DCCP, that the arbitral award must be set aside because there is no valid arbitration agreement, the court must assess whether there is a valid arbitration agreement. That assessment must be without reticence,[16] and it is not limited to the question of whether the arbitrators accepted their jurisdiction on the proper grounds. The general interest in an effectively functioning arbitral administration of justice entails that the court must not set aside the arbitral decision solely on the ground that the arbitral tribunal provided incorrect reasoning for the decision that it has jurisdiction to hear the dispute. The court is therefore free to decide, on grounds other than the grounds used by the arbitral tribunal, that the latter rightly considered itself to have jurisdiction to hear the dispute, as any other interpretation would result in the court that decides that the grounds used by the arbitral tribunal were insufficient for the arbitral tribunal to assume jurisdiction while noting that the arbitral tribunal does have jurisdiction on other grounds nevertheless having to set the arbitral award aside. The consequence of this would be that, although there is a valid arbitration agreement, the dispute would have to be decided by the ordinary court, unless the parties agree otherwise (Article 1067 (old) DCCP). This does not match with the parties' apparent intent to submit their dispute to arbitration rather than to the government judicial system.

Interpretation of the limitation clause

5.2.8 Ground 2.4 is directed against the Court of Appeal's interpretation of the limitation clause (paras. 4.5.8-4.6.1 of the final judgment, summarised above in 5.2.1 at (v)-(x)). Grounds 2.5

[14] Parliamentary documents II 1983/84, 18464, no. 3, p. 21. Cf. Supreme Court 27 March 2009, ECLI:NL:HR:2009:BG6443, para. 3.4.1.
[15] Cf. Supreme Court 26 September 2014, ECLI:NL:HR:2014:2837, para. 4.2.
[16] Supreme Court 26 September 2014, ECLI:NL:HR:2014:2837, para. 4.2.

and 2.6 are directed against the Court of Appeal's superfluous decisions on the basis of the interpretation of the limitation clause argued by the Russian Federation and endorsed by the District Court (paras. 4.7.1-4.7.58 of the final judgment, summarised above in 5.2.1 at (xii)-(xxiv)).

According to grounds 2.4 and 2.5, the limitation clause is about whether the provisional application of individual treaty provisions in a specific case is inconsistent with national laws and regulations. The grounds are consistent with the District Court's interpretation of the limitation clause, which entails (see para. 5.33 of the District Court's judgment) that the provisional application of the possibility of arbitration as regulated in Article 26 ECT is not only incompatible with Russian law if the purport of that provision is prohibited in national law, but also if arbitration in a dispute such as the present one has no legal basis or does not fit into the legal system, or is incompatible with the principles laid down in or knowable from legislation. According to the grounds, the District Court rightly considered that there even may be an inconsistency with Russian law if that law does not itself provide for the possibility of arbitration as provided for in Article 26 ECT. According to the grounds, the Court of Appeal should therefore not have assessed whether Article 26 ECT and Russian law could simultaneously apply in this case, but should have assessed – as the District Court has done – whether this dispute could be settled by arbitration on the basis of Russian law.

5.2.9 The provisions of the ECT must be interpreted on the basis of the standards of Articles 31-33 VCLT. Based on Article 31(1) VCLT, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. It follows from Article 31(3), opening words and at (b) VCLT, that together with the context, account must be taken of any subsequent practice in the application of the treaty which establishes the agreement of the parties to the treaty regarding its interpretation, which means that the prevailing opinion in the case law and literature of the contracting states also constitutes a primary means of interpretation when interpreting the treaty (hereinafter: state practice).[17] Resource may be had to supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31 VCLT or to determine the meaning when the interpretation according to Article 31 VCLT leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable (Article 32 VCLT). With due observance of the provisions of Article 32 VCLT, recourse may be had to the preparatory work (*travaux préparatoires*) of the treaty for the interpretation of that treaty.[18]

5.2.10 The Supreme Court considers the Court of Appeal's interpretation of the limitation clause *prima facie* to be correct (para. 4.5.48, first sentence, of the final judgment, see above in 5.2.1 at (ix)), based on the relevant arguments used by the Court of Appeal in paras. 4.5.9-4.5.47 (see above in 5.2.1 at (v)-(viii)). However, also in view of the varying interpretations given to the limitation clause by the arbitral tribunal, the District Court and the Court of Appeal in this case, it cannot be assumed that this interpretation is an *acte clair* in all respects. The Supreme

[17] Cf. Supreme Court 29 June 1990, ECLI:NL:HR:1990:AD1191, para. 3.7; Supreme Court 29 May 2020, ECLI:NL:HR:2020:956, para. 3.1.3.
[18] Supreme Court 29 May 2020, ECLI:NL:HR:2020:956, para. 3.1.3.

Court would have to refer the question of how the limitation clause should be interpreted to the Court of Justice of the European Union, if this were necessary. Contrary to what ground 2.7 argues, however, there is no need to do so in this case, because the answer to the question of whether the interpretation accepted by the Court of Appeal is correct is not decisive for the decision in cassation. This is because the complaints cannot lead to cassation on other grounds. To that end, the Supreme Court considers as follows.

5.2.11 In paras. 4.7.5-4.7.32 of the final judgment (see above in 5.2.1 at (xiii)-(xvi)), the Court of Appeal considered that Russian constitutional law and federal law do not oppose the provisional application of treaties. In paras. 4.7.5 and 4.7.47-4.7.52 of the final judgment (see above at 5.2.1 at (xiii) and (xxi)), the Court of Appeal considered that Russian law in Articles 9 LFI 1991 and Article 10 LFI 1999 allows international arbitration on investment disputes in so many words and that both laws confirm that a dispute such as the present can be subjected to arbitration. The Court of Appeal thus assessed not only – in accordance with its interpretation of the limitation clause – whether the provisional application of Article 26 ECT is inconsistent with Russian law and whether Article 26 ECT and Russian law can simultaneously apply, but also – superfluously, according to the interpretation of the limitation clause advocated by the Russian Federation – whether Russian law itself provides a basis for a form of dispute resolution as provided for in Article 26 ECT and as is at issue here.

5.2.12 Ground 2.5 complains, among other things, that the Court of Appeal "used a legally incorrect *petitio principii*" because it based its decision that Russian law provides for the possibility of international arbitration in a dispute such as the one at issue here, via Article 9 LFI 1991 and Article 10 of the LFI 1999, on Article 26 ECT itself, while the issue is whether the existing internal legal order – as the Supreme Court understands this: leaving aside the ECT – provides for such arbitration. This complaint fails because it is based on an interpretation of the limitation clause that in any event cannot be correct to that extent. The reasons for this are the following.

5.2.13 The interpretation of the words "not inconsistent with its constitution, laws or regulations" in the limitation clause presented above in 5.2.12, as advocated by the Russian Federation, is not in accordance with its wording. The text of the limitation clause does not provide any support for the interpretation that there is no room for the provisional application of Article 26 ECT if Russian law itself does not provide for the possibility of arbitration as regulated in Article 26 ECT. The wording "not inconsistent with" used indicates that there may be no inconsistency between the relevant ECT provision and national law, not that the ECT provision must be in accordance with a similar provision in national law.

5.2.14 The interpretation advocated by the Russian Federation does not ensue from the context of the limitation clause either, nor is it in line with the object and purpose of the ECT.
The preamble to the ECT includes the following:

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

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

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

The European Energy Charter 1991, to which the preamble and Article 2 ECT refer, provides at 4. ("Promotion and protection of investments"):

> "In order to promote the international flow of investments, the signatories will at national level provide for a stable, transparant legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade.
> They affirm that it is important for the signatory States to negotiate and ratify legally binding agreements on promotion and protection of investments which ensure a high level of legal security and enable the use of investment risk guarantee schemes. "

Article 10(1) ECT reads as follows:

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

The ECT, in particular Part III of the ECT ("Investment Promotion and Protection"), also contains various provisions aimed at stimulating foreign investments and protecting investors and their investments. All this shows that an important objective of the ECT is to promote investments in the energy sector, including by encouraging and creating stable, equitable, favourable and transparent investment conditions for investors of other contracting states. Article 26 ECT, which provides for a mechanism by which investors can enforce the rights ensuing from the ECT, must also be considered in that light.
The purport of the provisional application of the ECT is to allow these favourable investment conditions to take effect as much as possible from the signing of the ECT. This cannot be reconciled with an interpretation of the limitation clause on the basis of which an investor could not invoke the protection provided for in the ECT if the law of the signatory itself does not provide for this. After all, this would deprive the provisional application of ECT provisions provided for in Article 45(1) ECT of any practical significance.

5.2.15 The interpretation of the limitation clause advocated by the Russian Federation presented above in 5.2.12 is not supported by state practice either. In order to be able to determine that there is subsequent practice in the application of the treaty, establishing agreement between the contracting parties on this interpretation, it is necessary that all contracting states have accepted that interpretation in the application of the relevant treaty, expressly or otherwise.
The Russian Federation invoked statements by parties to or signatories of the ECT. It invoked, *inter alia*, the 1994 EU Joint Statement[19] and a declaration by the European Commission of 21 September 1994[20] (see para. 4.5.29 of the final judgment). There has been no evidence

[19] Council of the European Union, 'Statement by the Council, the Commission, and the Member States on Article 45 of the European Energy Charter Treaty', 'A' Item Note, Brussels, 14 December 1994, Document 12165/94, Annex I.

[20] Annex ("Summary of the content of the "European Energy Charter Treaty") to the Communication from the Commission to the Council and the European Parliament on the signing and provisional application by the European Communities of the European Energy Charter Treaty, 21 September 1994, COM(94) 405 final, 94/0214 (CNS).

that the other contracting states support the interpretation of the limitation clause that, according to the Russian Federation, appears from the 1994 EU Joint Statement. Moreover, this Joint Statement and the aforementioned declaration by the European Commission were made prior to the creation of the ECT, so that no subsequent practice can be derived from it. Nor does the declaration by the European Council of 13 July 1998[21] cited by the Russian Federation, howsoever it must be understood, show that all contracting states support that declaration.
Nor can the statements regarding the preparation and approval of the authentic Russian text of the ECT be considered subsequent practice within the meaning of Article 31(3)(b) VCLT. The same applies to the comments made during or after the negotiation process by (officers of) a number of other countries, such as the Netherlands, Finland and the United Kingdom.
Nor has there otherwise been any evidence of any subsequent practice in the application of the ECT establishing agreement between the contracting parties regarding the interpretation defended by the Russian Federation.

5.2.16 The conclusion is that the Russian Federation's interpretation of the limitation clause, in so far as that interpretation entails that the national law of a signatory itself must provide for the treaty rule the provisional application of which is at issue, is not in accordance with its wording, does not ensue from the context, is inconsistent with the object and purpose of the ECT, and finds no support in state practice. That, in any event, the limitation clause cannot be interpreted to that extent as advocated by the Russian Federation is not ambiguous or obscure and does not lead to a result that is manifestly absurd or unreasonable. There is therefore no reason to apply the supplementary rules of interpretation in Article 32 VCLT, including consultation of the *travaux préparatoires*.
In view of the findings above, there can be no reasonable doubt as to the decision that the interpretation of the limitation clause advocated by the Russian Federation is incorrect, in any event to that extent. There is therefore no reason to refer questions for a preliminary ruling on the basis of Article 267(3) TFEU, as argued in ground 2.7.

5.2.17 The Court of Appeal's decision that Russian law explicitly allows arbitration in a dispute such as the present is otherwise based on its interpretation of Russian law. Pursuant to the provisions of Article 79(1), opening words and (b) of the Judiciary Organisation Act, the correctness of this decision cannot be the subject of a complaint in cassation.

5.2.18 In so far as ground 2.6 opposes the Court of Appeal's findings with complaints in respect of reasoning regarding the question of whether Russian law offers a basis for a form of dispute settlement as provided for in Article 26 ECT, these complaints cannot be assessed without also including the correctness of the Court of Appeal's decision on the content and interpretation of that law. This entails that these complaints in respect of reasoning also fail on the basis of Article 79(1), opening words and (b) of the Judiciary Organisation Act.

[21] Council Decision of 13 July 1998 approving the text of the amendment to the trade-related provisions of the Energy Charter Treaty and its provisional application agreed by the Energy Charter Conference and the International Conference of the Signatories of the Energy Charter Treaty, 98/537/EC, L 252/21.

5.2.19 The complaint in ground 2.6.5 that the Court of Appeal should not have taken into account HVY's defences concerning the scope of the LFI 1991 and the LFI 1999 that were not put forward until after the exchange of statements on appeal, fails as the Court of Appeal must apply foreign law *ex officio*, and in its decision in that respect was not bound by what the parties argued in that respect. Moreover, HVY were free to elaborate on and specify their earlier position regarding the applicability and interpretation of these laws in a deed.

5.2.20 Since the complaints in grounds 2.5 and 2.6 against the Court of Appeal's superfluous decisions cannot lead to cassation based on the interpretation of the limitation clause advocated by the Russian Federation, there is no interest in ground 2.4, as these decisions can independently support the Court of Appeal's decision that the Russian Federation is bound by the arbitration clause contained in Article 26 ECT.
This means that ground 2.4 cannot lead to cassation either.

(d) Conclusion

5.2.21 The conclusion is that the complaints in ground 2 cannot lead to cassation.

Ground 3

Did HVY make an Investment and are they an Investor within the meaning of Articles 1 and 26 ECT?

(a) *Overview of the Court of Appeal's findings*

5.3.1 Briefly put, in so far as relevant to the assessment of the ground, the Court of Appeal considered as follows in the final judgment.

The standards to be observed when interpreting the ECT

(i) The provisions of the ECT must be interpreted on the basis of the standards set out in Articles 31 and 32 VCLT. (paras. 4.2.1-4.2.5)

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

(a) *Introduction*

(ii) Article 1(6) and (7) ECT defines the terms 'Investment' (hereinafter also: Investment) and 'Investor' (hereinafter also: Investor). According to the Russian Federation, the arbitral tribunal misinterpreted these terms, with the result that it wrongly accepted jurisdiction to hear HVY's claim. (para. 5.1.1)

(b) (...)

(c) *The Russian Federation's position and the Court of Appeal's premises*

(iii) The position of the Russian Federation in these setting-aside proceedings is that the arbitral tribunal had no jurisdiction because HVY and their shares in Yukos do not fall under the protection of the ECT, so that the arbitral awards should be set aside pursuant to Article 1065(1)(a) (old) DCCP. HVY are, according to the Russian Federation, fake foreign investors with a fake foreign investment. (para. 5.1.3)

(iv) The point of departure for the interpretation of Article 1(6) and (7) ECT is the text of these provisions and the ordinary meaning that accrues to the wording. It is not in dispute that HVY are companies that are "organized in accordance with the law applicable in that Contracting Party". Thus – from a textual point of view – the requirements set out in Article 1(7) ECT for an Investor have been met. The definition of Investment as referred to in Article 1(6) ECT is – from a textual point of view – also fulfilled. The paragraph gives a non-exhaustive list of 'assets', which includes shares (Article 1(6)(b) ECT). The Yukos shares, held by HVY, can therefore be regarded as an Investment within the meaning of the ECT. Finally, the requirement set out in Article 26 ECT that there is a dispute between a Contracting Party (the Russian Federation) and investors from another Contracting Party (HVY, companies incorporated under the laws of Cyprus and the Isle of Man) "relating to an Investment of the latter in the Area of the Former" has – from a textual point of view – been satisfied. (para. 5.1.6)

(d) Foreign investment, foreign investor

(v) The ECT opted for "organised in accordance with the law applicable in that Contracting Party" in order to determine the nationality of an Investor. The drafters of the ECT could have chosen to include additional conditions in Article 1(7) ECT (as has been done in other investment treaties) which would have made it possible to determine whether HVY have a genuine link with Cyprus or Isle of Man, respectively. They did not do so. (para. 5.1.7.2)

(vi) The ECT determines exactly when there is an Investor and an Investment and when an investment dispute has an international character that falls within the scope of Article 26 ECT. It follows neither from the context of Articles 1 and 26 ECT nor from the object of the ECT that the drafters of the treaty intended to impose further requirements as to the foreign character of the Investment or Investor, or the international character of the dispute. (para. 5.1.7.3)

(vii) Article 1(6) ECT provides that Investment means every kind of asset that is owned or controlled by an Investor. It is certain that the Yukos shares are held by HVY. There is therefore no need to establish who controls the shares. The Understanding to Article 1(6) ECT which specifies how to determine whether an Investment in one contracting party is directly or indirectly controlled by an Investor from another contracting party is therefore not relevant here. (para. 5.1.7.4)

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

(viii) It does not follow from the text of Article 17 ECT (denial of benefits-clause) that investments via the U-turn structure (as, according to the Russian Federation, the investments of HVY should be qualified) fall outside the protection of the ECT. Article 17 ECT gives contracting parties the right to deny the protection of part of

the treaty to a well-defined category of investors, i.e. investors who are established in a contracting party only on formal grounds, but are to a large extent materially linked to a non-contracting state. This circumstance does not mean that Article 1 ECT is to be understood as meaning that it is to be read as an exception for another category of investors, namely sham companies and/or investors controlled by nationals of the contracting party in which they make investments. (para. 5.1.8.4)

(ix) The arbitral awards that confirm (to a certain extent) that U-turn structures do not deserve protection offer insufficient clues to assume that there is an international principle of law whereby investment treaties do not (or should not) protect U-turn structures. (para. 5.1.8.9)

(x) It can be inferred from the arbitral awards cited by HVY that there is no generally accepted principle of law according to which investment treaties do not provide protection to companies wholly controlled by nationals of the host state. (para. 5.1.8.10)

(xi) Little weight should be given to the state practice referred to by the Russian Federation, since the correct interpretation of the ECT does not exclude U-turn investments. What is more, the circumstances to which the Russian Federation refers do not comply with the provisions of Article 31(3)(b) VCLT because they do not pertain to state practice in the application of the ECT, but to choices made by states in concluding new treaties. (para. 5.1.8.11)

(f) Economic contribution to host state

(xii) There may be a rule of unwritten law that an investment within the meaning of the ICSID Convention[22] can only exist if the investor makes an economic contribution to the host state. This does not imply the existence of an internationally recognised principle of investment law according to which any investment treaty provides protection only to investments making an economic contribution to the host state, regardless of whether the treaty contains a definition of the term investment. Although the Russian Federation has referred to a single arbitral award in which the existence of such a principle of law has been assumed, that is not sufficient to establish the existence of a principle of law as advocated by the Russian Federation. The Russian Federation further argues that arbitral awards and recent treaties exist, which establish the existence of an international investment on the basis of objective criteria. However, the Russian Federation has not demonstrated that such criteria also apply to an Investment within the meaning of Article 1(6) ECT. (para. 5.1.9.4)

(xiii) The drafters of the treaty could have defined the term 'Investment' in Article 1(6) ECT more narrowly than they did. It is clear from the wording of the ECT, however, that only on the basis of an 'asset-based' definition, i.e. on the basis of a non-exhaustive list of assets, will it be determined whether an Investment within the meaning of the ECT exists. Against this backdrop, the fact that Article 1(6) ECT refers to an Investor "making" an Investment and (in the Understanding) to an

[22] Convention on the settlement of investment disputes between States and nationals of other States, Washington, 18 March 1965, Treaty Series 1981, 191.

Investment "being made" does not provide sufficient guidance to read in this paragraph the requirement that the foreign investor must make an economic contribution to the host state. (para. 5.1.9.5)

(b) Relevant treaty provisions

5.3.2 Article 1(6) and (7) ECT reads as follows:

> 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.
> A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.
> "Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.
>
> 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) fora Contracting Party.

(c) Assessment of the complaints

Should there be further requirements for being an Investment and Investor within the meaning of the ECT?

5.3.3 According to ground 3.2.2, the interpretation given to the terms 'Investment' and 'Investor' by the Court of Appeal in paras. 5.1.5-5.1.8 of the final judgment is contrary to Article 31(1) VCLT. The Court of Appeal allegedly wrongly based its interpretation on a purely grammatical interpretation of only part of the text of the ECT, namely the definitions of Article 1(6) and (7) ECT, and assigned little weight to any subsequent state practice to be taken into account on the basis of Article 31(3)(b) VCLT. The Court of Appeal therefore erroneously failed to apply

the four interpretation criteria mentioned in Article 31(1) VCLT equally and in conjunction with each other, according to the ground.

In essence, ground 3.2.3 argues that in the interpretation of the terms 'Investment' and 'Investor', the Court of Appeal failed to recognise that for the assessment of whether a company is protected as an Investor under the ECT, it is not sufficient that it was incorporated under the law of a contracting party other than the host state and that it is the formal owner of shares in a company in that host state. If in reality the ownership and control (Article 1(6) ECT refers to "owned or controlled") lies with nationals of the host country, that company is not a foreign investor and therefore does not fall under the protection of the ECT, according to the ground. According to the ground, the Court of Appeal failed to recognise the ordinary meaning of the terms in the ECT. That ordinary meaning, according to the ground, is that a party makes an economic contribution and runs a certain risk for a certain period of time.

Ground 3.2.3 goes on to say that the Court of Appeal wrongly attributed no or insufficient meaning to the object and purpose of the ECT, namely the promotion and protection of foreign investments.

Moreover, according to the ground, the Court of Appeal failed to recognise the context of Article 1(6) and 1(7) ECT. According to the complaint, the connection of these provisions with the Understanding to Article 1(6) ECT and Articles 10(1) and (3), 13, 17 and 26 ECT makes it clear that the ECT only applies if an investor of a contracting party invests in the territory of another contracting party.

The ground also complains that the Court of Appeal wrongly, or at least without adequate reasoning, considered that little weight should be given to the state practice invoked by the Russian Federation. The Court of Appeal's decision that the state practice does not pertain to the (interpretation and) application of the ECT is also incorrect, because it pertains to choices made afterwards, when concluding new treaties.

Lastly, the ground complains that the Court of Appeal failed to recognise clear rules and fundamental principles of international law and thus acted contrary to Article 31(3)(c) VCLT. In this respect, the ground refers to the principles that international investment treaties only protect international investments and thus not domestic ones and protect actual investors, and therefore not to those who are merely investors 'on paper'.

Ground 3.3, which is directed against paras. 5.1.9.1-5.1.9.5 of the final judgment, complains that the Court of Appeal wrongly rejected the Russian Federation's position that HVY's shares in Yukos cannot be considered an Investment within the meaning of Article 1(6) ECT because HVY did not make an actual economic contribution to the Russian Federation. The complaint is that the Court of Appeal wrongly based its ruling on a purely grammatical interpretation and that the Court of Appeal wrongly considered that the Russian Federation failed to demonstrate the existence of such an internationally recognised principle of investment law, because the Court of Appeal must establish the existence of a legal principle in the context of its obligation to interpret a treaty (if necessary *ex officio*). According to the ground, the Court of Appeal wrongly considered that the requirement of the economic contribution only applies to an investment within the meaning of the ICSID Convention. In that respect, the ground refers, *inter alia*, to the requirements set in *Salini Costruttori SpA/Morocco*[23] (hereinafter: *Salini*).

[23] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, 23 July 2001.

5.3.4 The grounds, which can be discussed jointly, raise a question of interpretation of ECT provisions. That question must be answered on the basis of the standards of Articles 31-33 VCLT, as set out above in 5.2.9. In addition, under Article 31(4) VCLT, a term in the ECT must be assigned a special meaning if it is established that the parties so intended.[24]

5.3.5 Article 1 ECT is entitled 'Definitions' and in paragraphs 6 and 7 contains definitions of the terms 'Investment' and 'Investor'. It follows from the text of Article 1(6) and (7) ECT that the parties to the ECT have assigned a special meaning to these terms. Article 1(7) ECT defines an Investor as a company or other organisation organized in accordance with the law applicable in that contracting party ("organized in accordance with the law applicable in that Contracting Party").[25] HVY are companies under the law of the contracting parties Cyprus and the Isle of Man.
Article 1(6), first paragraph, ECT provides that an Investment means every kind of asset, owned or controlled directly or indirectly by an Investor, followed by a list of kinds of assets at (a) through (f). In order to qualify as an Investment within the meaning of this provision, two cumulative conditions must be met: (i) there must be a kind of asset owned or directly or indirectly controlled by an Investor, and (ii) those assets must comprise at least one of the elements referred to at (a) through (f) of that provision.[26] HVY hold, or at least held, shares in Yukos, an oil company based in the Russian Federation. Shares in a company or business enterprise are included in Article 1(6) first paragraph, (b) ECT.

5.3.6 It follows from the findings above at 5.3.5 that HVY meet the definition of Investor laid down in Article 1(7) ECT, and that the shares held by them meet the definition of Investment laid down in the first paragraph of Article 1(6)(b) ECT.
Not all investments that meet the definition given in the first paragraph of Article 1(6) ECT fall within the scope of the ECT. To do so, the Investment must be associated with an economic activity in the energy sector within the meaning of the third paragraph of Article 1(6) ECT.[27] The shares held by HVY in the oil company Yukos are associated with an economic activity in the energy sector. This is not in dispute between the parties. That is why the condition laid down in the third paragraph of Article 1(6) ECT has also been met.

5.3.7 The wording of Articles 1(6) (b) and (7) ECT indicates that for the assessment of whether a company is protected as an Investor under the ECT, it is sufficient that it is organised in accordance with the law of a contracting state other than the host state and that it is the formal owner of shares in a company in that host state. In Articles 1(6) and 1(7) ECT, the contracting parties assigned a special meaning to the terms 'Investment' and 'Investor' by the descriptions of these terms contained therein. Therefore, in this case, when interpreting the term 'Investment' in Article 1(6)(b) ECT no significance is attached to the requirements formulated in *Salini* to determine whether there is an investment within the meaning of the ICSID

[24] Supreme Court 26 September 2014, ECLI:NL:HR:2014:2837, para. 5.2.
[25] Cf. also ECJ 2 September 2021, case C-741/19, ECLI:EU:C:2021:655 (*Republic of Moldova/Komstroy*), point 70.
[26] ECJ 2 September 2021, case C-741/19, ECLI:EU:C:2021:655 (*Republic of Moldova/Komstroy*), point 69.
[27] ECJ 2 September 2021, case C-741/19, ECLI:EU:C:2021:655 (*Republic of Moldova/Komstroy*), points 67-68.

Convention that, unlike the ECT, itself does not determine when there is an international investment.

5.3.8 The interpretation referred to above at 5.3.5-5.3.7 in accordance with the wording of Article 1(6) and (7) ECT is in line with the context of these provisions and the object and purpose of the ECT. In respect of context, the following is relevant.
Ground 3.2.3 invokes the Understanding with respect to Article 1(6) ECT as included in the Final Act of the Conference on the European Energy Charter[28]. This Understanding relates to the criterion of 'controlled'. HVY are the party entitled to the Yukos shares ('owned'), so that this Understanding plays no role in the interpretation of Article 1(6)(b) ECT.
Although Article 10(3) and Article 13 ECT distinguish between a contracting party's own Investors and Investors of other contracting parties or third states, they do not contain any indications that additional requirements must be imposed on the international character of an Investment or Investor.
Article 17 ECT (denial of benefits clause) gives contracting states the right to deny the protection of Part III of the ECT to investors who are established in a contracting party on formal grounds, but are to a large extent materially linked to a non-contracting state. This provision allows the contracting states to limit the scope of application of the ECT and thus confirms the broad scope of application of the ECT if (as is the case with the Russian Federation) Article 17 ECT has not been applied.
Not only the context, but also the purpose of the ECT – which (also) encompasses the promotion of international cooperation in the field of energy and the promotion and protection of international investments (see also above in 5.2.14) – indicates that no requirements must be imposed on the foreign character of an Investment other than the requirements ensuing from the wording of Article 1(6) and 1(7) ECT. This purpose is indeed served by broad, easily applicable and predictable definitions of the terms 'Investment' and 'Investor'.

5.3.9 Account must further be taken of any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Article 31(3)(b) VCLT).The fact that a number of contracting parties to the ECT have in subsequent investment treaties excluded investments via a U-turn structure from the scope of application does not concern the application of the ECT. Consequently, this cannot be taken into account on the basis of Article 31(3)(b) VCLT. The same applies to the proposals for the modernisation of the ECT, as these proposals do not pertain to the application of the current ECT but to a possible new, amended treaty. Nor has there otherwise been any evidence of any subsequent practice in the application of the ECT which establishes the agreement of the contracting parties regarding an interpretation that differs from what follows from the text, context, object and purpose of the ECT.

5.3.10 Account must further be taken of any relevant rules of international law applicable in the relations between the parties (Article 31(3)(c) VCLT). General principles of law as referred to in Article 38(1)(c) of the Statute of the International Court of Justice may also be relevant.
No rule of international law applicable in the relations between the parties can be derived from arbitral case law with regard to treaties other than the ECT. Moreover, this case law is not

[28] Treaty Series 1995, 108, p. 209 et seq.

uniform. For that reason alone, the Russian Federation's statements regarding internationally recognised principles of investment law that it believes can be derived from that case law need not be taken into account. There is no evidence of other sources showing that there are internationally recognised principles of international investment law entailing that every investment treaty – thus including the ECT – provides protection only to investments making an economic contribution to the host state, regardless of whether the treaty contains a definition of the term 'investment', or entailing that investment treaties provide no protection to companies wholly controlled by nationals of the host state.

5.3.11 In light of the foregoing, the Court of Appeal's interpretation of Article 1(6)(b) and 1(7) ECT is correct. This means that the requirement set out in Article 26 ECT that there is a dispute between a 'Contracting Party' (the Russian Federation) and an Investor from another 'Contracting Party' (HVY) "relating to an Investment of the latter in the Area of the Former" has also been satisfied.

5.3.12 For the sake of completeness, it is taken into account that the *travaux préparatoires* of Article 1(6) and 1(7) ECT confirm this interpretation. It is evident from this history of development that the parties to the ECT deliberately opted for a broad meaning of the terms 'Investor' and 'Investment' and, despite proposals to the contrary, decided not to include additional criteria.

5.3.13 The complaints in grounds 3.2.2, 3.2.3 and 3.3 fail on the basis of the foregoing.

Is there an 'acte clair'?

5.3.14 In view of the findings above, there is no reasonable doubt about the interpretation of the ECT in so far as relevant to the decisions presented above. Therefore, the Supreme Court, contrary to what is argued in ground 3.5, sees no need to refer questions for a preliminary ruling within the meaning of Article 267(3) TFEU.

Other complaints

5.3.15 The other complaints in ground 3 cannot lead to cassation either. The Supreme Court need not provide reasons for how it reached this decision, because assessing these complaints does not require answering questions that are in the interests of the uniform application or the development of the law (see Article 81(1) of the Judiciary Organisation Act).

(d) Conclusion

5.3.16 The conclusion is that the complaints in ground 3 cannot lead to cassation.

Ground 4

Do the alleged illegal acts of HVY and Khodorkovsky et al. affect the eligibility of the arbitral awards for setting aside?

(a) Overview of the Court of Appeal's findings

5.4.1 In so far as relevant to the assessment of the ground, the Court of Appeal considered as follows in the final judgment.

(i) There is a principle of international law which entails that international investments made in breach of the law of the host state do not deserve protection. This also applies even if the relevant investment treaty does not expressly provide for it. However, in order to lose the protection of an investment treaty, it must concern cases where "the illegality affects the "making", i.e. arises when initiating the investment itself and not just when implementing and/or operating it." A distinction must be made between "(1) legality as at the initiation of the investment ("made") and (2) legality during the performance of the investment". Therefore, illegal conduct by HVY in the period after HVY made their investment in Yukos cannot lead to a lack of jurisdiction of the arbitral tribunal. (para. 5.1.11.2)

(ii) The ECT does not fall into the category of investment treaties in which the definition of the term 'investment' includes a phrase to the effect that the investment must have been made "in accordance with the law", or words of a similar nature. With regard to a treaty that does not contain a legality requirement, arbitration case law is divided on what consequence should be attached when an investor acts 'illegally' in making the investment. (paras. 5.1.11.3-5.1.11.4)

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

(iv) Even if it should be assumed that unlawful conduct at the time of making the investment under the ECT does lead to a lack of jurisdiction on the part of the arbitral tribunal, this is of no avail to the Russian Federation. In no. 1283 of the Final Awards the arbitral tribunal correctly considered that the conduct by Khodorkovsky et al. complained of is too far removed from the transactions by which HVY acquired their shares in Yukos. Therefore, the Russian Federation's statement that HVY's direct involvement in the illegal acquisition of the Yukos shares in 1995/1996 precludes the jurisdiction of the arbitral tribunal does not hold. (paras. 5.1.11.6-5.1.11.7)

(v) Even if the shares acquired by HVY in 1999-2001 were acquired by other persons/companies in 1995/1996 through illegal conduct, this does not mean that HVY themselves were acting illegally at the time of their investment. There is an insufficient connection between the (alleged) illegalities in 1995/1996 and the making of the investment by HVY. This does not change if the – possible – involvement of HVY in the payment of bribes is taken into account. The Russian Federation's statements directed against this do not show a sufficient link between

the investment of HVY (more specifically of YUL) and the alleged bribery. In any event, the illegality is not so evident that it should lead to a lack of jurisdiction on the part of the arbitral tribunal. (para. 5.1.11.8).

(vi) Possible illegal conduct by Khodorkovsky et al. at the time of the privatisation of Yukos is too far removed from the investment by HVY. (para. 5.1.11.9)

(vii) Under the heading 'unclean hands', the Russian Federation argues that the enforcement of the arbitral awards will lead to a violation of public policy regarding fraud, corruption, and other serious illegalities. (para. 9.8.1)

(viii) The findings of the arbitral tribunal in this respect, as well as the allegations directed against those findings by the Russian Federation, have been either discussed or rejected in paras. 5.1.11.1- 5.1.11.9. (para. 9.8.5)

(ix) In addition, the following is considered. The arbitral tribunal decided that the alleged illegalities were not relevant for the award of HVY's claims in the arbitration proceedings because (i) only an illegality in the making of the investment is relevant for protection under the ECT, (ii) the alleged illegalities were committed by parties other than HVY and (iii) HVY acquired the shares in Yukos lawfully. Even if it should be assumed that the alleged illegalities took place and touch upon public policy, it cannot be seen why this decision of the arbitral tribunal would be contrary to public policy. (para. 9.8.7)

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

(xi) At the time of the actions by the Russian Federation qualified as expropriation by the arbitral tribunal, Khodorkovsky was 'chairman' and – whether or not indirectly – shareholder of Yukos, and the arbitral tribunal decided that, by *de facto* expropriating Yukos, the Russian Federation also intended to affect Khodorkovsky. That decision is irreconcilable with the decision that HVY and Khodorkovsky are different legal entities. It has therefore not become evident that there was an improper, incomplete and superficial assessment by the arbitral tribunal of the evidence in the case file. (para. 9.8.9)

(b) Assessment of the complaints

Is there sufficient connection between the alleged illegal conduct and the investment of HVY?

5.4.2 Ground 4.3.1 complains that when considering the question of whether the shares were obtained legally, the Court of Appeal should not have limited itself to an analysis of the

transactions by which HVY acquired the shares in Yukos, but should also have included in its analysis Khodorkovsky et al.'s involvement in the acquisition of the shares in 1995/1996. The Court of Appeal's decision is based on an erroneous legal finding on the scope of the ECT and had, in any event, been provided with insufficient reasons, according to the ground.

5.4.3 The complaint on an issue of law in ground 4.3.1 is based on an incorrect interpretation of the Court of Appeal's decision and can therefore not lead to cassation for lack of factual basis alone, as the Court of Appeal (in paras. 5.1.11.7-5.1.11.9 of the Final Judgment) included the transactions in 1995/1996 that preceded HVY's acquisition of the shares in 1999-2001 in its analysis. In that respect it assumed that the shares were acquired by other persons or companies through illegal conduct in 1995/1996. The Court of Appeal thus did not limit itself to an analysis of the transactions by which HVY acquired the shares in Yukos.

5.4.4 The Court of Appeal concluded that there is an insufficient connection between the alleged illegalities in 1995/1996 and the making of the investment by HVY. This decision is based on a weighing and valuation of the facts put forward by the Russian Federation in this respect and assumed to be correct by the Court of Appeal. That weighing and valuation is the prerogative of the Court of Appeal as the court ruling on the facts. The decision is not incomprehensible and is sufficiently reasoned. The complaint in respect of reasoning fails on that basis.

5.4.5 Ground 4.3.2 complains that the Court of Appeal's decision (in para. 5.1.11.2 of the final judgment) that HVY's illegal conduct in the period after HVY made their investment in Yukos cannot lead to a lack of jurisdiction of the arbitral tribunal is incorrect or at least insufficiently reasoned.

5.4.6 This ground, too, cannot lead to cassation for lack of factual basis.
At the fact-finding instances (Defence on Appeal, paragraph 723), the Russian Federation took the position that the argument that the protection of the ECT can only be withheld for investments, the making as opposed to the later performance of which is unlawful, is uncontroversial. It did not argue that the arbitral tribunal should have declined jurisdiction due to illegal conduct by HVY in the period after HVY made their investment in Yukos. This argument, which, among other things, requires an assessment of the facts, cannot be put forward for the first time in cassation.

5.4.7 The Court of Appeal's decision, challenged in vain by grounds 4.3.1 and 4.3.2, that the alleged illegal conduct is insufficiently connected to HVY's acquisition of the shares, can independently support the Court of Appeal's decision that the alleged illegal conduct does not preclude the arbitral tribunal from having jurisdiction. This means that there is no interest in addressing ground 4.2, which complains about the Court of Appeal's decision (in paras. 5.1.11.3-5.1.11.5) that, as the ECT does not contain an explicit legality requirement, illegal conduct at the time of HVY's investments does not preclude the arbitral tribunal from having jurisdiction. For that reason, that ground cannot lead to cassation either.

Is there a ground for the decision that the arbitral awards, or the manner in which they were made, violate public policy?

5.4.8 Ground 4.4 directs various complaints against the Court of Appeal's decision (in para. 9.8 of the final judgment) that there is no ground for the decision that the arbitral awards, or the manner in which they were made, violate public policy.
Ground 4.4.2 complains that this decision is not in conformity with the international standard that no protection accrues to goods or rights acquired though illegal conduct or exploited for illegal purposes, and that, moreover, the Court of Appeal failed to recognise that it is contrary to national and international public policy that claims based on a treaty and in respect of an illegally acquired or illegally exploited investment could be eligible for protection.
Ground 4.4.3 complains that it is incomprehensible that the Court of Appeal decided (in para. 9.8.8 of the final judgment) that the arbitral tribunal's decision that HVY cannot be held liable for the conduct of Khodorkovsky et al. was correct, and has not been challenged by the Russian Federation, or at least not with sufficient grounds.

These grounds can be discussed jointly.

5.4.9 Under Article 1065(1)(e) (old) DCCP, an arbitral award may be set aside on the ground that the award, or the manner in which it was made, violates public policy. According to established case law, it is only possible to set aside an arbitral award on this ground if the content or execution of the award would be contrary to mandatory law of such a fundamental nature that compliance with such rules must never be allowed to be hindered by limitations of a procedural nature.[29]
In the assessment of the setting-aside claim, the court must apply reticence; except in so far as this claim is based on the absence of a valid arbitration agreement or that the right to be heard has been violated. Setting-aside proceedings may not be used as a covert appeal, since the general interest in effective administration of justice in arbitration entails that the civil court should only intervene in arbitral decisions in clear-cut cases.[30] The grounds – rightly – do not complain that the Court of Appeal failed to recognise the standard presented above.

5.4.10 In para. 9.8.7 of the final judgment, the Court of Appeal referred to its findings in paras. 5.1.11.7- 5.1.11.9 of the final judgment. In the assessment of the alleged violation of public policy, it assumed that the illegal acts of Khodorkovsky et al. alleged by the Russian Federation took place and assumed that these were contrary to public policy. Para. 9.8.8 of the final judgment went on to present the arbitral tribunal's decision that, to the extent relevant here, in essence says that Bank Menatep and Khodorkovsky et al. were other legal entities or persons than HVY, and that HVY could not be held liable for actions carried out by others before HVY became a shareholder.
The Court of Appeal's decision that this decision of the arbitral tribunal was correct and had not been challenged by the Russian Federation, or at least not with sufficient grounds, must be understood to mean that the Russian Federation had not challenged, or at least not with sufficient grounds, that the alleged illegal conduct was performed by other legal entities or persons than HVY and that they took place before HVY became a shareholder. The decision must, in addition, be viewed in conjunction with the Court of Appeal's decision challenged in vain as evident from the finding above in 5.4.4 – that even if the Russian Federation's factual

[29] Supreme Court 21 March 1997, ECLI:NL:HR:1997:AA4945, para. 4.2.
[30] Supreme Court 4 December 2020, ECLI:NL:HR:2020:1952, para. 3.3.1.

statements were assumed to be correct, there is insufficient connection between the alleged illegal conduct of Khodorkovsky et al. and the making of the investment by HVY that is at issue in this case.

5.4.11 The Court of Appeal's decision that the arbitral awards, or the manner in which they were made, do not violate public policy is based on the findings stated above in 5.4.10 and, in light of the standard presented above in 5.4.9, does not demonstrate an incorrect interpretation of the law. It is based on weighing and valuation which is the prerogative of the Court of Appeal as the court ruling on the facts. Consequently, the correctness of that decision cannot be further examined in cassation. The challenged decision is sufficiently reasoned and not incomprehensible in light of the procedural documents.

The complaints presented in 5.4.8 above fail in view of this.

Other complaints

5.4.12 The other complaints in ground 4 cannot lead to cassation either. The Supreme Court need not provide reasons for how it reached this decision, because assessing these complaints does not require answering questions that are in the interests of the uniform application or the development of the law (see Article 81(1) of the Judiciary Organisation Act).

(c) Conclusion

5.4.13 The conclusion is that the complaints in ground 4 cannot lead to cassation.

Ground 5

Did the arbitral tribunal violate its mandate by not seeking advice from the relevant tax authorities (Article 21(5) ECT)?

(a) Overview of the Court of Appeal's findings

5.5.1 In so far as relevant to the assessment of the ground, the Court of Appeal considered as follows in the final judgment.

(i) Article 21(5) ECT contains the obligation for the arbitral tribunal, whenever an issue arises as to whether a taxation measure is an expropriation, to refer this issue to the relevant tax authorities. The arbitral tribunal was therefore, in principle, obliged to submit the dispute regarding the taxation measures imposed in Russia to the Russian tax authorities in any event. However, the failure to do so was not sufficiently serious to justify setting aside the arbitral awards, given that it had not become plausible that the Russian Federation had suffered any disadvantage as a result of this failure (para. 6.3.2).

(ii) It cannot be seen what additional information the arbitral tribunal could have obtained from the Russian tax authorities that would have led to a different

decision. Therefore, it cannot be concluded that the Russian Federation suffered any substantive disadvantage due to the fact that the arbitral tribunal did not refer, to the Russian tax authorities, the question whether the taxation measures taken in Russia constituted an expropriation (para. 6.3.3).

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

(iv) The prognosis prohibition, invoked by the Russian Federation, is a Dutch procedural concept which means that the judge may not anticipate the outcome of a possible witness hearing. Even if it must be assumed that arbitrators in an international arbitration are bound by this prohibition, the conclusion is that there was no prognosis of witness testimony. Article 21(5)(b)(iii) has a completely different nature than the obligation not to refrain from hearing witnesses on the basis of a prognosis. The right to be heard, also invoked by the Russian Federation, is a fundamental principle of procedural law which cannot be reconciled with the arbitral tribunal's obligation to refer the dispute to the competent tax authorities and the (discretionary) power to take account of the conclusions reached by the tax authorities. There is therefore no breach of mandate justifying the setting aside of the arbitral award. (para. 6.3.5)

(b) Relevant treaty provisions

5.5.2 Article 21 ("Taxation") (1) and (5) ECT reads as follows:

> 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.
>
> 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.

(c) Assessment of the complaints

Should the failure to refer a question to the tax authorities lead to the setting aside of the arbitral awards?

5.5.3 Ground 5.2.1 complains that the Court of Appeal, by not attaching any consequences to the fact that the arbitral tribunal refused to refer the dispute regarding the taxation measures imposed in Russia to the tax authorities, made serious errors. In so doing, the Court of Appeal denied the mandatory nature of the referral obligation prescribed by Article 21(5)(b)(i) ECT or applied a non-existent futility exception. The arbitral tribunal's refusal to refer is a serious violation of its mandate and of (the procedural aspect of) public policy, justifying the setting aside of the arbitral awards, according to the ground.

5.5.4 Pursuant to Article 1065(1), opening words and (c) (old) DCCP, an arbitral award may be set aside if the arbitral tribunal has not complied with its mandate. In assessing whether the arbitral tribunal has exceeded the limits of its mandate, it should also be considered whether the dispute has been resolved in accordance with the procedural rules that are applicable in the given case. In its investigation of whether the arbitral tribunal complied with the rules of procedure, the court must apply reticence. This is in part related to the fact that proceedings pursuant to Article 1065 (old) DCCP may not be used as a covert appeal, and that the general interest in the effective administration of arbitral justice entails that the civil court may only intervene in arbitral decisions in clear-cut cases. If there is a violation of the principles of due process in such a case, then the arbitral award will be eligible for setting aside pursuant to Article 1065(1), opening words and (e) (old) DCCP (violation of public policy). By its very nature, that provision, too, must be applied with reticence.[31] It follows from this, *inter alia*, that if the violation of the mandate is not serious, this does not lead to the setting aside of the arbitral award. The court enjoys discretion when assessing whether the violation of mandate is serious enough to justify the setting aside of the arbitral award.

5.5.5 Pursuant to Article 21(1) ECT, the ECT does not, in principle, preclude the power of contracting states to take taxation measures. Article 21(5) ECT contains an exception to this,

[31] For all this, see Supreme Court 17 January 2003, ECLI:NL:HR:2003:AE9395, para. 3.3.

which essentially means that taxation measures may not constitute an expropriation in violation of Article 13 ECT. Pursuant to Article 21(5)(b)(i) ECT, the Investor or the contracting state claiming that a taxation measure is in fact an expropriation contrary to Article 13 ECT must refer the question of whether that is indeed the case to the competent tax authorities. If the Investor or the contracting state fails to do so, that obligation rests with the dispute-settling body, in this case the arbitral tribunal. Article 21(5)(b) ECT pertains both to a dispute about whether a tax constitutes an expropriation and a dispute about whether a tax that is alleged to constitute an expropriation is discriminatory.

5.5.6 According to the first sentence of para. 6.3.1 of the final judgment, the Court of Appeal established – unchallenged in cassation – that the Russian Federation's complaints about the arbitral tribunal not (correctly) applying Article 21(5) ECT related to the question of whether expropriation was involved. With regard to that question, Article 21(5)(b)(iii) ECT provides that the dispute-settling body may take into account ("may take into account") any conclusion arrived at by the competent tax authorities. To that extent, the obligation of the dispute-settling body deviates from a case in which it is at issue whether a tax claimed to constitute an expropriation is discriminatory. In the latter case, Article 21(5)(b)(iii) ECT prescribes that the dispute-settling body shall take into account ("shall take into account") any conclusions provided – timely – by the competent tax authorities.

5.5.7 In light of the arbitral tribunal's power to, if the tax authorities are asked whether a taxation measure constitutes an expropriation, take into account or not take into account in its assessment the conclusions provided by those authorities ("may take into account"), and taking into consideration the explicit reference to that power in the final awards (no. 1427) by the arbitral tribunal, the Court of Appeal's decision that it cannot be seen why the arbitral tribunal would have reached a different judgment if that question had been referred to the tax authorities is not incomprehensible. The decision based thereupon that the failure – assumed by the Court of Appeal – to refer the dispute to the tax authorities is not sufficiently serious to justify the setting-aside of the final awards, also in view of the reticence to be applied by the court (as described above in 5.5.4), does not demonstrate an incorrect interpretation of the law and is not incomprehensible or insufficiently reasoned.
The complaints in ground 5.2.1 fail for that reason.

Other complaints

5.5.8 The other complaints in ground 5 cannot lead to cassation either. The Supreme Court need not provide reasons for how it reached this decision, because assessing these complaints does not require answering questions that are in the interests of the uniform application or the development of the law (see Article 81(1) of the Judiciary Organisation Act).

(d) Conclusion

5.5.9 The conclusion is that the complaints in ground 5 cannot lead to cassation.

Ground 6

Is the manner in which the arbitral tribunal's assistant was involved in the creation of the arbitral awards, a ground for setting aside the arbitral awards?

5.6.1 Ground 6 is directed against para. 6.6 of the final judgment. In that paragraph, the Court of Appeal rejected the Russian Federation's objections to the manner in which the arbitral tribunal's assistant was allegedly involved in the creation of the arbitral awards.

5.6.2 The complaints in the ground cannot lead to cassation. The Supreme Court need not provide reasons for how it reached this decision, because assessing these complaints does not require answering questions that are in the interests of the uniform application or the development of the law (see Article 81(1) of the Judiciary Organisation Act).

Ground 7

Do the arbitral tribunal's decisions regarding Yukos' alleged abuse of sham companies lack sound reasoning?

5.7.1 Ground 7 is directed against paras. 8.4.13 and 8.4.16 of the final judgment. In those paragraphs, the Court of Appeal rejected the Russian Federation's objections to the arbitral tribunal's decision in no. 639 of the final awards, which entails, *inter alia*, that "[t]he Tribunal has not found any evidence in the massive record that would support Respondent's submission that there was a basis for the Russian authorities to conclude that the entities in Mordovia, for example, were 'shams'" and to the conclusions drawn by the arbitral tribunal in no. 648 of the final awards, which entail, *inter alia*, that the Tax Ministry had presented too little proof to justify the conclusion that all Yukos subsidiaries based in the Republic of Mordovia were abusing the low-tax regime.

5.7.2 The complaints in the ground cannot lead to cassation. The Supreme Court need not provide reasons for how it reached this decision, because assessing these complaints does not require answering questions that are in the interests of the uniform application or the development of the law (see Article 81(1) of the Judiciary Organisation Act).

Ground 8

5.8 Ground 8 relies upon grounds 1 through 7 and needs not be discussed separately.

6. Assessment of the grounds for cassation in the conditional cross-appeal

The cross-appeal was lodged conditionally (see above at 4.2.2).
It follows from the assessment of the principal appeal that the conditions have not been met, so that the conditional cross-appeal needs not be discussed.

7. Conclusion

7.1 The conclusion is that grounds 2 through 7 of the grounds for cassation in the principal appeal cannot lead to cassation and that ground 8 needs not be discussed separately. Ground 1 is

successful. The challenged judgments of the Court of Appeal will therefore be annulled. The conditional cross-appeal need not be discussed.

7.2 The case will be referred to another Court of Appeal for further examination and decision.

8. Decision

The Supreme Court:
in the principal appeal:

- annuls the judgments of the Court of Appeal of The Hague of 25 September 2018 and 18 February 2020;
- refers the case to the Amsterdam Court of Appeal for further examination and decision;
- orders HVY to pay the costs of the proceedings in cassation, estimated up to this judgment on the part of the Russian Federation at € 7,082.07 in disbursements and € 2,600 in attorney's fees, plus statutory interest on these costs if HVY does not pay these costs within fourteen days after today.

This judgment was rendered by Vice President C.A. Streefkerk as presiding justice and justices T.H. Tanja-van den Broek, M.J. Kroeze, C.H. Sieburgh and F.J.P. Lock, and read out in open court by justice H.M. Wattendorff on 5 November 2021.

SWORN TRANSLATION
The English text is a sworn translation of the Dutch original. In case of any discrepancies, the Dutch original shall prevail.

20/01595

Signature page of Judgment

ECLI:NL:HR:2021:1645

Signatures

Versteeg, E.E.J.

[signature]

Wattendorff, *mr.* H.M.

[signature]

CERTIFICATION

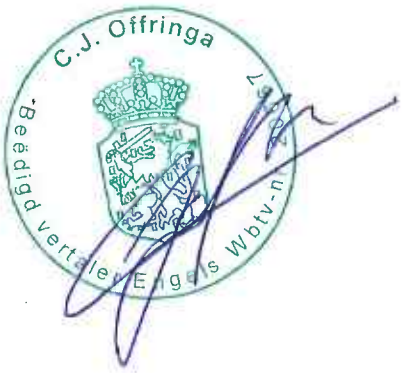
I, Cornelis Jacob Offringa, translator for the English language sworn in before the District Court of Noord-Holland, the Netherlands, and registered in the public register pursuant to the Dutch Act on Sworn Interpreters and Translators Wbtv (*Wet beëdigde tolken en vertalers "Wbtv")* under number 20667, do hereby certify, to the best of my knowledge and belief, that the attached English translation is a true, complete, and accurate translation of the Dutch source document listed below:

- Judgment of the Supreme Court of the Netherlands, dated 5 November 2021, Case Number 20/01595, in the case of *Veteran Petroleum Limited, Yukos Universal Limited, and Hulley Enterprises Limited v. The Russian Federation*

I have prepared this document, at the request of Bart Fleuren of De Brauw Blackstone Westbroek N.V., for submission to this Court and other legal proceedings in English. I affirm that I am competent to translate documents from Dutch to English and review such translations. I am not a relation to any of the parties in the source document.

C.J. Offringa, Sworn Translator

Dated: December 3, 2021



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APOSTILLE

(Convention de La Haye du 5 octobre 1961)

1. Country: THE NETHERLANDS
   This public document
2. has been signed by **C.J. Offringa**
3. acting in the capacity of sworn translator
4. bears the seal/stamp of aforesaid translator

Certified

5. in Amsterdam 6. on 03-12-2021
7. by the registrar of the district court of Amsterdam
8. no. F 6684

9. Seal/stamp: 10. Signature:

C.M. Demmers