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Zaaknummer	C/09/477160 / HA ZA 15-1 (english translation)
Rechtsgebieden	Civiel recht
Bijzondere kenmerken	Eerste aanleg - meervoudig
Inhoudsindicatie	Arbitration awards on multi-billion claims against Russia quashed

The Hague District Court has quashed six arbitration awards (three interim awards and three final awards) of the Permanent Court of Arbitration in The Hague. In the final awards, the Russian Federation was ordered to pay damages amounting to 50 billion US dollars to Yukos Universal Limited, Hulley Enterprises Limited and Veteran Petroleum Limited. The three parties had been shareholders of the bankrupted Russian oil company Yukos. With the arbitration awards quashed, the Russian Federation is no longer liable for paying compensation to these parties.

The cases concerned international investment arbitration proceedings brought before the Permanent Court of Arbitration under the Energy Charter Treaty (ECT). Since the arbitrations were conducted in The Hague, the District Court of The Hague is competent to rule on the requested reversal of the arbitration awards.

Explanation of ruling: Permanent Court of Arbitration not competent

The Hague District Court has reversed the awards of the international arbitrators on the grounds that they lacked jurisdiction to arbitrate the cases concerning international investment arbitrations based on the ECT. The Hague District Court included in its assessment the fact that the Russian Federation had signed the ECT, but never ratified it.

The Russian parliament had rejected the legislative proposal for the ratification of the ECT. Against this backdrop, four provisions of the ECT play an important role.

- Article 26 covers the settlement of disputes between a foreign investor and a contracting party to the ECT.
- Article 39 stipulates that the treaty must be ratified by the signatories.

- Article 44 specifies that the treaty's entry into force is conditional on the ratification by a certain number of states.
- Article 45 (in the Dutch translation) determines that each signatory agrees to the provisional application pending its entry into force for said signatory, "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations".

The court finds that the wording of Article 45 necessitates an examination whether or not the provision in each separate article of the ECT is contrary to the constitution or other legislation of the state involved. This interpretation of Article 45 is different from the reading of the arbitrators.

Arbitration option contrary to Russian law

The court concluded that the option of arbitration under Article 26 ECT for disputes such as the ones in these proceedings are contrary to written Russian law. In the arbitral proceedings, the investors mainly opposed the consequences of the tax measures the Russian state had imposed on Yukos. They believed that these measures essentially resulted in an expropriation of their shares without compensation.

The court finds that this dispute warrants a judicial assessment of public-law actions. The court's examination of Russian legislation resulted in the finding that a legal provision is required for subjecting the Russian state to arbitration in such disputes; one which requires the approval (ratification) of the Russian parliament. Such provision does not exist, neither in a general sense nor in a specific sense for this case, as the Russian legislature has not ratified the ECT.

This means that the arbitral clause of Article 26 ECT does not apply through the provisional application of the treaty. The court finds that the arbitrators did not have jurisdiction to take cognizance of this case and were therefore wrong to declare themselves competent.

Vindplaatsen

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judgment

THE HAGUE DISTRICT COURT

Chamber for Commercial Affairs

case number / cause list number

Judgment of 20 April 2016

in the following joined cases

**I. the case with case number / cause list number: C/09/477160 / HA ZA 15-1
(hereinafter: case I) of**

THE RUSSIAN FEDERATION,

seated in Moscow, the Russian Federation,

claimant,

lawyer mr. L.Ph.J. Baron van Utenhove of The Hague,

versus

the company incorporated under and subject to Cypriot law

VETERAN PETROLEUM LIMITED,

with its registered office in Nicosia, Cyprus,

defendant,

lawyer mr. M.A. Leijten of Amsterdam;

**II. the case with case number / cause list number: C/09/477162 / HA ZA 15-2
(hereinafter: case II) of**

THE RUSSIAN FEDERATION,

seated in Moscow, the Russian Federation,

claimant,

lawyer mr. L.Ph.J. Baron van Utenhove of The Hague,

versus

the company incorporated under and subject to Cypriot law

YUKOS UNIVERSAL LIMITED,

with its registered office in Douglas, Isle of Man,

defendant,

lawyer mr. M.A. Leijten of Amsterdam;

**III. the case with case number / cause list number: C/09/481619 / HA ZA 15-112
(hereinafter: case III) of**

THE RUSSIAN FEDERATION,

seated in Moscow, the Russian Federation,

claimant,

lawyer mr. L.Ph.J. Baron van Utenhove of The Hague,

versus

the company incorporated under and subject to Cypriot law

HULLEY ENTERPRISES LIMITED,

with its registered office in Nicosia, Cyprus,

defendant,

lawyer mr. M.A. Leijten of Amsterdam.

Parties are hereinafter referred to as the Russian Federation, VPL, YUL and Hulley, respectively. The court also jointly refers to the three defendants as "defendants".

(Translation) Only the Dutch text of the ruling is authoratative.

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1 The proceedings

1.1. The course of the proceedings is evidenced by:

in case I

- the summons of 10 November 2014 served on VPL, with Exhibits RF-1 up to and including RF-95;
- the court documents in the interim proceedings for the consolidation of the proceedings, initiated by the Russian Federation, resulting in the decision on the procedural issue of 11 March 2015, in which the court joined this case with the cases II and III;

in case II

- the summons of 10 November 2014 served on YUL, with Exhibits RF-1 up to and including RF-95;
- the court documents in the interim proceedings for the consolidation of the proceedings, initiated by the Russian Federation, resulting in the decision on the procedural issue of 11 March 2015, in which the court joined this case with the cases I and III;

in case III

- the summons of 10 November 2014 served on Hulley, with Exhibits RF-1 up to and including RF-95;
- the court documents in the interim proceedings for the consolidation of the proceedings, initiated by the Russian Federation, resulting in the decision on the procedural issue of 11 March 2015, in which the court joined this case with the cases I and II;

in all cases

- the defendants' joint statement of defence of 20 May 2015, with Annexes numbered 1-7, of which Annex 1 comprises Exhibits HVY-1 up to and including HVY-107;
- the court's letter to the parties of 22 June 2015 containing the correspondence of the parties sent to the court (the letters of 18 and 25 May 2015 and 2 June 2015 from the Russian Federation and the letters of 21 May 2015 and 3 June 2015 from the defendants) concerning the subsequent course of the proceedings;
- the letter of 2 July 2015 from the Russian Federation, stating the dates on which the party is unable to appear as well as the terms for the reply and rejoinder;
- the interim judgment of 8 July 2015, in which the court referred the case to the 9 February 2016 hearing of a three-judge panel for the closing arguments;
- the e-mail message of 8 July 2015 from the registrar of the court to the lawyers, with the dates for presenting the replies and rejoinders;
- the joint reply of 16 September 2015 of the Russian Federation, with Exhibits RF-96 up to and including RF-198;
- the letter of 16 November 2015 from the Russian Federation, concerning some of the facilities available in the court room;
- the letter of 30 November 2015 from the Russian Federation, with Exhibit RF-199;
- the letter of 10 December 2015 from the registrar of the court to the parties, with a response to the letter of 16 November 2015;
- the letter of 15 December 2015 from the Russian Federation, with Annex 1, a translation into the Dutch language of the Interim Awards and the Final Awards, Annex 2, an overview of the folder structure on the USB flash drive submitted alongside the letter, and Annex 3, a USB flash drive containing all court documents and all documents previously submitted by the parties;
- the joint rejoinder of the defendants dated 15 December 2015, with Exhibits HVY-108 up to and including HVY-126;
- the letter of 11 January 2016 from the Russian Federation, regarding the course of action during the hearing (speaking time and audio recording);
- the letter of 13 January 2016 from the defendants, with a response to the letter of 11 January 2016;
- the letter of 19 January 2016 from the registrar of the court to the parties' lawyers, with the court's decisions on the procedural questions in the letters of 11 and 13 January 2016;
- the letter from the Russian Federation of 22 January 2016 with the document containing Exhibits RF-200 up to and including RF-222 of the same date;
- the letter from the Russian Federation of 25 January 2016 with the additional document containing Exhibits RF-223 up to and including RF-225, dated 25 January 2016;
- the letter of 26 January 2016 from the lawyer of the Russian Federation, listing the persons who would attend the hearing on the part of the Russian Federation;
- the letter of 26 January 2016 from the lawyer of the defendants, listing the persons who would attend the hearing on the part of the defendants;

- the letter of 27 January 2016 from the lawyer of the Russian Federation, with the additional document containing Exhibit RF-226 as well as a USB flash drive with Annexes to the previously submitted Exhibits RF-200 up to and including RF-202 and, again, Exhibit RF-225, dated 27 January 2016;
 - the letter of 27 January 2016 from the Russian Federation, with Exhibit R-282 in hard copy (previously submitted on a USB flash drive);
 - the letter of 28 January 2016 from the lawyer of the defendants, with an objection to the additional Exhibits of the Russian Federation;
 - the official report of the hearing of 9 February 2016, for the closing arguments in this case, as well as the statements of case and other documents of the lawyer of the Russian Federation handling the case, Prof. mr. A.J. van den Berg, and of the defendants' lawyer and his colleague mr. M. Ynzonides;
 - the dispatch on 16 February 2016 of this official report to the lawyers, with the notification that any remarks about the official report can be communicated to the court within two weeks of receipt;
 - the letter of 22 February 2016 from the lawyer of the Russian Federation handling the case, with a response to the official report;
 - the letter of 26 February 2016 from the lawyer of the defendants with a response to the official report and to the letter of 22 February 2016 from the lawyer of the Russian Federation;
 - the letter of 1 March 2016 from the registrar of the court to the lawyers, containing the confirmation of receipt of the above-mentioned letters of 22 and 26 February 2016.
- 1.2. At the end of the hearing of 9 February 2016, the court informed the parties that it would deliver its judgment on this day, 20 April 2016.
- 1.3. In its judgment, the court has taken into account, in so far as possible, the remarks of the parties about the text of the official report of the hearing of 9 February 2016. For the rest, these remarks should be viewed as parties' positions.

2 the facts established between the parties

in all cases

- 2.1. The Energy Charter Treaty was opened for signature in Portugal in December 1994. From Article 50 of said Treaty it follows that the English and French texts of the Treaty and associated Protocol, among other languages, are equally authentic. These equally authentic have been published in the Dutch Treaty Series (*Tractatenblad - Trb.* 1995, 108). The English-language version of the Treaty serves as the basis for this judgment and is designated as "the ECT" or "the Treaty". The provisions of the ECT relevant to this case are stated in the English-language version below, in 3.2. The ECT entered into force on 16 April 1998.
- 2.2. Among the parties that signed the ECT is the Russian Federation, claimant in these proceedings. Mr O.D. Davydov, then Vice Prime Minister of the Russian Federation, signed the ECT on behalf of that state on 17 December 1994, thereby making the Russian Federation Signatory in the sense of Article 45 paragraph 1 ECT ("*Ondertekenende Partij*" in the Dutch version, as published in *Trb.* 1995, 250). The Russian Federation did not make use of the possibility provided under Article 45 paragraph 2 under a ECT for a Signatory to submit a declaration that it is not able to accept provisional application of the ECT.
- 2.3.

On 26 August 1996, the government of the Russian Federation presented a legislative proposal to the Duma, as part of the Parliament of the Russian Federation, for ratification of the ECT. This legislative proposal contains the passages, among other things, cited under 5.9.

- 2.4. The Parliament never ratified the ECT. On 20 August 2009, the Russian Federation notified the Portuguese Republic (the Depository under Article 49 ECT) of its intention not to become signatory to the ECT.
- 2.5. The Russian company Yukos Oil Company (hereinafter: Yukos) was a major oil producer, through its subsidiaries and otherwise, at the start of the previous decade. Its CEO was Mr Mikhail Khodorkovsky. Each of the defendants was shareholder of Yukos – through other entities.
- 2.6. In and after 2003, the Russian tax authorities took the position that Yukos had been involved in the systemic and large-scale evasion of regular taxation in the Russian Federation. This resulted in substantial tax assessments (including additional tax assessments and fines) and subsequently – among other things – in the seizure of Yukos assets. The execution of claims asserted by the tax authorities resulted in the execution sale of Yukos assets and in its bankruptcy (in August 2006).
- 2.7. The Yukos shareholders have taken the position that by doing so the Russian Federation unlawfully expropriated most of Yukos' assets. Based on the argument that this constituted an unlawful expropriation of their investments, each of the defendants requested arbitration under Article 26 paragraph 4 sub b ECT and the Arbitration Rules of the United Nations Commission on International Trade Law.
- 2.8. After each of the parties had appointed an arbitrator, the Secretary-General of the Permanent Court of Arbitration in The Hague appointed a third arbitrator on 21 July 2005, who was also Chairman of the arbitral tribunal (hereinafter: the Tribunal), Mr L.Yves Fortier. Following the replacement in 2007 of one of the arbitrators appointed in 2005, the Tribunal consisted of the aforementioned Mr Fortier (Chairman), Charles Poncet and Stephen M. Schwebel. The Tribunal was assisted by a secretary and (later also) by an official – described as "assistant" – a Mr Martin Valasek (hereinafter: Valasek).
- 2.9. These arbitrations (hereinafter jointly referred to as "the Arbitration", singular) commenced on 31 October 2005. The place of arbitration was The Hague. In the Arbitration, the defendants in these proceedings – in brief – argued as respective claimants that the Russian Federation had unlawfully expropriated their investments in Yukos and had wrongfully failed to protect them from it, resulting in substantial losses. The defendants claimed compensation for these damages.
- 2.10. After several hearings and so-called procedural orders, the Tribunal gave an interim award in each of the three parallel cases (hereinafter: Interim Award) on 30 November 2009. In these Interim Awards, the Tribunal answered several questions regarding its jurisdiction. In so far as currently relevant, the Interim Awards pertain to the following. The articles cited by the Tribunal are provisions of the ECT – unless the following indicates otherwise. Footnotes have been omitted from this representation. The quotations are derived from the Interim Award in the case of defendant VPL and are virtually identical to the considerations in the Interim Awards of the other defendants. Defendant VPL is indicated with "Claimant" while the Russian Federation is indicated with "Respondent".

b) Tribunal's Decision

(...)

264. *In sum, the ordinary meaning to be given to the terms of Articles 45(1) and 45(2), when read together, demonstrates to the satisfaction of the Tribunal that the declaration which is referred to in Article 45(2) is a declaration which is not necessarily linked to the Limitation Clause of Article 45(1).*

(...)

284. *The Tribunal therefore concludes, based on the ordinary meaning of Article 45(1) in its context, and subject to considerations of estoppel (addressed below), that the Russian Federation may, even after years of stalwart and unqualified support for provisional application and, until this arbitration, without ever invoking the Limitation Clause, claim an inconsistency between the provisional application of the ECT and its internal laws in order to seek to avoid the application of Part V of the ECT.*

(...)

4. What Effect Should Be Given to the Limitation Clause in Article 45(1)?

a) All-or-Nothing vs. "Piecemeal" Approach

290. *The Tribunal has concluded that Respondent may rely on the Limitation Clause of Article 45 (1) even though it has neither made a declaration under Article 45(2) nor served any prior notice under Article 45(1). Thus, the Tribunal must determine what effect should be given to the Limitation Clause itself and it now turns its attention to that issue.*

(...)

292. (...) *According to Respondent, the clause requires a "piecemeal" approach which calls for the analysis of the consistency of each provision of the ECT with the Constitution, laws and regulations of the Russian Federation. According to Claimant, the inquiry is an "all-or-nothing" exercise which requires an analysis and determination of whether the principle of provisional application per se is inconsistent with the Constitution, laws or regulations of the Russian Federation.*

(ii) Tribunal's Decision

(...)

303. *The Tribunal finds that neither party has properly parsed the Limitation Clause of Article 45 (1). While each party has provided a starting point for the analysis, neither has carried it through to its conclusion:*

considering Respondent's argument first, the Tribunal agrees that the phrase "to the extent that" is often the language used when drafters of a clause in a treaty or a statute wish to make clear that a provision is to be applied only insofar as what then follows is the case. Far from being determinative of the meaning of the Limitation Clause, however, the use of the introductory words "to the extent that" requires the Tribunal to examine carefully the words that follow, namely "that such provisional application is not inconsistent with [each signatory's] constitution, laws or regulations."

Turning to Claimant's argument about the meaning of these words, the Tribunal finds that Claimant does not provide sufficient support for its interpretation of the phrase "such provisional application" as necessarily referring to the principle of provisional application. Article 45(1) does not refer anywhere to the principle of provisional application, but rather to "[e]ach signatory agree[ing] to apply this Treaty provisionally . . ."

304. *For the Tribunal, the key to the interpretation of the Limitation Clause rests in the use of the adjective "such" in the phrase "such provisional application" "Such," according to Black's Law Dictionary (Seventh Edition), means "that or those; having just been mentioned." The Merriam-Webster Collegiate Dictionary (Tenth Edition) defines "such" as "of the character, quality, or extent previously indicated or implied." The phrase "such provisional application," as*

used in Article 45(1), therefore refers to the provisional application previously mentioned in that Article, namely the provisional application of "this Treaty."

305. The Tribunal concludes, therefore, that the meaning of the phrase "such provisional application" is context-specific, in that its meaning is derived from the particular use of provisional application to which it refers. In Article 45(1), the particular use of provisional application to which it refers is provisional application of "this Treaty." Accordingly, Article 45(1) can therefore be 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 the provisional application of this Treaty is not inconsistent with its constitution, laws or regulations.

[emphasis added]

306. By contrast, the Tribunal refers to the Limitation Clause in Article 45(2)(c), which reads:

(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.

[emphasis added]

In this context, the phrase "such provisional application" necessarily has a different meaning, referring to the provisional application of only Part VII of the Treaty.

(...)

308. There are two possible interpretations of the phrase "the provisional application of this Treaty": it can mean either "the provisional application of the entire Treaty" or "the provisional application of some parts of the Treaty." The Tribunal finds that, in context, the former interpretation accords better with the ordinary meaning that should be given to the terms, as required by Article 31(1) of the VCLT. Indeed, without any further qualification, it is to be presumed that a reference to "this Treaty" is meant to refer to the Treaty as a whole, and not only part of the Treaty.

309. The Tribunal notes that its finding on the scope of provisional application in Article 45(1) is entirely consistent with the decision on jurisdiction rendered in the Kardassopoulos case. (...)

311. In the Tribunal's opinion, there is no basis to conclude that the signatories would have assumed an obligation to apply only part of the Treaty provisionally, without making such partial provisional application explicit. The Tribunal therefore concludes that the Limitation Clause in Article 45(1) contains an "all-or-nothing" proposition: either the entire Treaty is applied provisionally, or it is not applied provisionally at all.

312. Furthermore, the Tribunal concludes that the determination of this "all-or-nothing" question depends on the consistency of the principle of provisional application with a signatory's domestic law. The alternative—that the question hinges on whether, in fact, each and every provision of the Treaty is consistent with a signatory's domestic legal regime—would run squarely against the object and purpose of the Treaty, and indeed against the grain of international law.

313. Under the *pacta sunt servanda* rule and Article 27 of the VCLT, a State is prohibited from invoking its internal legislation as a justification for failure to perform a treaty. In the Tribunal's opinion, this cardinal principle of international law strongly militates against an interpretation of Article 45(1) that would open the door to a signatory, whose domestic regime

recognizes the concept of provisional application, to avoid the provisional application of a treaty (to which it has agreed) on the basis that one or more provisions of the treaty is contrary to its internal law. Such an interpretation would undermine the fundamental reason why States agree to apply a treaty provisionally. They do so in order to assume obligations immediately pending the completion of various internal procedures necessary to have the treaty enter into force.

314. Allowing a State to modulate (or, as the case may be, eliminate) the obligation of provisional application, depending on the content of its internal law in relation to the specific provisions found in the Treaty, would undermine the principle that provisional application of a treaty creates binding obligations.

315. Provisional application as a treaty mechanism is a question of public international law. International law and domestic law should not be allowed to combine, through the deployment of an "inconsistency" or "limitation" clause, to form a hybrid in which the content of domestic law directly controls the content of an international legal obligation. This would create unacceptable uncertainty in international affairs. Specifically, it would allow a State to make fluctuating, uncertain and un-notified assertions about the content of its domestic law, after a dispute has already arisen. Such a State, as Claimant argues, "would be bound by nothing but its own whims and would make a mockery of the international legal agreement to which it chose to subject itself." A treaty should not be interpreted so as to allow such a situation unless the language of the treaty is clear and admits no other interpretation. That is not the case with Article 45(1) of the ECT.

320. The Tribunal reiterates that its interpretation of the Limitation Clause of Article 45(1) is based on its specific language in its context. The Tribunal recognizes, as do Claimant's experts, Professors Crawford and Reisman, that parties negotiating a treaty enjoy drafting freedom and could (using clear and unambiguous language) overcome the "strong presumption of the separation of international from national law." Indeed, parties to a treaty are free to agree to any particular regime. This would include a regime where each signatory could modulate (or eliminate) its obligation of provisional application based on consistency of each provision of the treaty in question with its domestic law. For the reasons set out above, however, agreement to such a regime would need to be clearly and unambiguously expressed, a standard which Article 45(1) does not meet.

321. The Tribunal's interpretation of Article 45(1) is also supported by State practice. As already noted in an earlier section, six States (Austria, Luxembourg, Italy, Romania, Portugal and Turkey) relied expressly on the Limitation Clause in Article 45(1). An analysis of the statements or declarations made by these States confirms that each one of them relied on Article 45(1)—sometimes alone and sometimes in conjunction with Article 45(2)—for the non-application of the entire Treaty under the provisional application regime. Respondent itself has described these six signatories as States who "consider themselves unable to apply and have not applied any provision of the Treaty on a provisional basis." Not one of these six States, in other words, relied on the Limitation Clause in Article 45(1) for the interpretation now posited by Respondent, namely the selective or partial provisional application of the ECT based on the non-application of only those individual provisions that are claimed to be inconsistent with a signatory's domestic law.

322. Similarly, in the lists it maintained to keep track of the intentions of the signatories, the ECT Secretariat identified the States that intended to rely on Article 45(1) as intending to do so in order to avoid provisional application of the Treaty altogether. Thus, the preliminary list of signatories prepared by the ECT Secretariat, dated 19 December 1994, described signatories intending to rely on Article 45(1) as States "which will not apply the Treaty provisionally in accordance with Article 45(1)"[emphasis added]. This preliminary list identified Austria, Italy,

Portugal, Romania and Turkey. The updated list prepared by the ECT Secretariat, dated 1 March 1995, described the same category of signatories in exactly the same way, as States "which will not apply the Treaty provisionally in accordance with Article 45(1)" [emphasis added]. In addition to the countries already identified on the list dated 19 December 1994, this list included Hungary⁶¹ and Luxembourg.

329. The Tribunal therefore concludes that Article 45(1) requires an analysis and determination of whether the principle of provisional application per se is inconsistent with the Constitution, laws or regulations of the Russian Federation. If it is not inconsistent, then this Tribunal has jurisdiction to hear Claimant's claims under Article 26 of the Treaty, which would apply provisionally in the Russian Federation in accordance with Article 45(1). It is to that issue that the Tribunal now turns.

b) Is the Principle of Provisional Application Inconsistent with Russian Law?

330. There is no significant debate between the Parties on the issue of whether the principle of provisional application per se is inconsistent with the Constitution, law or regulations of the Russian Federation. Claimant asserts that the principle is not inconsistent with Russian law, citing ample legislative and doctrinal authorities in support of its submission, and concludes on that basis that the Limitation Clause in Article 45(1) is unavailable to the Russian Federation. Respondent does not seriously challenge the authorities cited by Claimant on this point. Respondent's principal argument against provisional application of the ECT, as seen earlier, is based on the interpretation of Article 45(1), not on the assertion that provisional application per se is unknown or unrecognized by Russian law.

(...)

338. The Tribunal therefore has no difficulty in concluding that the principle of provisional application is perfectly consistent with the Constitution, laws and regulations of the Russian Federation. Accordingly, the Tribunal finds that the whole of the ECT applied provisionally in the Russian Federation until such provisional application was terminated, in accordance with the notification that the Russian Federation made on 20 August 2009, pursuant to Article 45(3)(a) of the Treaty, of its intention not to become a Contracting Party to the Treaty.(...)

343. The Tribunal is of the view that the determination as to whether or not the principle of provisional application is consistent with the constitution, the laws or the regulations of the host State in which the Investment is made must be made in the light of the constitution, laws and regulations at the time of signature of the ECT. (...)

c) Are the Provisions of the ECT Relating to Dispute Resolution Inconsistent with Russian Law?

346. In view of the Tribunal's conclusion with respect to the interpretation of Article 45(1), there is no need, in principle, to address Respondent's submission that the provisions of the ECT relating to dispute resolution are themselves inconsistent with Russian law.

347. However, since both sides made extensive submissions to the Tribunal with respect to the so-called "piecemeal" approach and because, as will be seen, the Tribunal's analysis and findings with respect to the consistency with Russian laws and Constitution of these provisions of the ECT relating to dispute resolution lead the Tribunal to the same conclusion, the Tribunal has nevertheless decided to set out its analysis under this alternative approach.

(...)

(ii) Tribunal's Decision

370. After having considered the totality of the Parties' submissions and having deliberated, the Tribunal concludes that Article 26 of the ECT is not inconsistent with the Constitution, laws or regulations of the Russian Federation. The terms of the Russian Federation's Law on Foreign Investment (both the 1991 and 1999 versions) are crystal clear. Investor-State disputes such as the present one are arbitrable under Russian law. The Tribunal recalls the key provisions of the law which inform its conclusion. (...)

371. Furthermore, the definitions of "foreign investor" and "foreign investment" in both the 1991 and 1999 versions of the Law on Foreign Investment are consistent with the definitions of "Investor" and "Investment" in Article 1 of the ECT. (...)

372. On the issue of standing, the Tribunal concludes that Claimant is claiming for violation of its own rights under the ECT, not the rights of Yukos. The Tribunal agrees with Claimant's characterization of its claim, which is not a derivative action, but an action for the direct loss by Claimant of its shares and their value.

374. The Tribunal's conclusions are confirmed by the representations of the Government of the Russian Federation in the Explanatory Note which it submitted to the State Duma of the Federal Assembly of the Russian Federation when the ECT was submitted for ratification. The following extracts from the Note are particularly relevant:

Prior to the entry into force of the ECT, the majority of the Contracting Parties agreed to apply the treaty on a provisional basis. In this respect, it was decided that such provisional application of the ECT would be implemented to the extent that it would not be inconsistent with the constitution, laws and regulations of the country in question. At the time for the signing of the ECT, its provisions on provisional application were in conformity with the Russian legal acts. For that reason, the Russian side did not make declarations as to its inability to accept provisional application (such declarations were made by 12 of the 49 ECT signatories).

[. . .]

The provisions of the ECT are consistent with Russian legislation.

[. . .]

The legal regime of foreign investments envisaged under the ECT is consistent with the provisions of the existing Law of the RSFSR on Foreign Investments in the RSFSR, as well as with the amended version of the Law currently being discussed in the State Duma, and does not require the acknowledgement of any concessions or the adoption of any amendments to the abovementioned Law. The ECT is also consistent with the provisions of Russian bilateral international treaties on the promotion and protection of investment.

[emphasis added]

375. During his cross-examination, Professor Avakiyan, one of Respondent's expert witnesses, confirmed that he agreed with the contents of the Explanatory Note cited in the previous paragraph. The Tribunal's conclusion on the consistency of Article 26 of the ECT with Russian law is also supported by the writings of Professor Yershov, who was a member of the Russian delegation to the ECT negotiations. During parliamentary hearings concerning the ECT, Professor Yershov submitted a paper in which he noted the following:

From the standpoint of Russian interests, the compromise achieved in developing the ECT language guarantees Russia a solution to a critical foreign trade problem: receipt and codification of a liberal nondiscriminatory trade policy regime for an EMP exporter otherwise unattainable in such a short time. In exchange for this, under the ECT, Russia grants foreign

investors an energy investment regime acceptable to them that does not require any concessions on Russia's part beyond the framework of current law.

[emphasis added]

376. As to the BIT practice of the Russian Federation, in the Tribunal's opinion, it is of little assistance to either Party. On the one hand, Claimant refers to the many BITs entered into by the Russian Federation that provide for investor-State arbitration, inviting the conclusion that investor-State arbitration is not inconsistent with Russian law. As Respondent has pointed out, however, the BITs in force in the Russian Federation have all been ratified, thus eliminating any concern with provisions in the BITs that might be different from the underlying Russian legislation. The ratified BITs therefore do little to advance Claimant's position.

377. On the other hand, Respondent seeks support for its position by pointing out that some of the explanatory notes submitted to the Duma in connection with the ratification of BITs have made it explicit that the BIT in question is subject to ratification because it contains a provision for the settlement of investor-State disputes through international arbitration. As Claimant points out, however, none of the BITs in question contains a provisional application regime such as that found in Article 45(1) of the ECT. Ratification by the State Duma is thus required in order for the Russian Federation to express its consent to arbitration.

378. At this point, the Tribunal recalls again its fundamental finding on the meaning and interpretation of Article 45(1): irrespective of any inconsistencies that might exist between Article 26 of the ECT and Russian law, Article 26 of the ECT, as well as other provisions of the Treaty, apply provisionally and the Russian Federation has therefore consented to international arbitration.

379. Pursuing nevertheless its detailed analysis of Article 26, in particular, through the prism of the FLIT, the Tribunal will now seek to answer the question whether the signature of a treaty which contains a provisional application clause is sufficient to establish the consent of the Russian Federation to international arbitration of disputes arising under the Treaty.

382. These provisions [this refers to Articles 2 and 6, added by the court] of the FLIT are very clear. There is no room for ambiguity. The Tribunal therefore concludes that the Russian Federation has consented to be bound — albeit provisionally — by Article 26 of the ECT by its signature of the ECT. Article 45(1) of the ECT establishes beyond the shadow of a doubt, and notwithstanding Article 39 of the ECT, that the Russian Federation and other signatories agreed that their signature of the Treaty would have the effect of expressing the consent of the Russian Federation (and each other signatory) to be provisionally bound by its terms.

383. The Tribunal notes that Article 11 of the FLIT provides that the decision to sign a treaty is a decision which rests with the Executive: (...)

Moreover, as we saw earlier, Article 23(1) of the FLIT makes it clear that provisional application is permissible under the legislation of the Russian Federation. Therefore, the obligation assumed by the Russian Federation to be bound, prior to ratification, by the dispute settlement provisions (including international arbitration) of a provisionally applied treaty such as the ECT, and the consent expressed therein, are not inconsistent with the Constitution, laws or regulations of the Russian Federation, and the Tribunal so finds.

384. Respondent argues that a treaty must be ratified by the Russian Federation, and therefore be in force, in order to establish the consent of the Russian Federation to an arbitration provision of the treaty. As shown above, however, under the FLIT, ratification is not the only means by which the Russian Federation can express its consent to the terms of a treaty:

signature can express consent where the treaty, such as the ECT, so provides, as it does by specifying in Article 45 the obligations not of a party to the treaty but of a "signatory."

385. That there is a distinction between consenting to be bound provisionally by the treaty and, on the other hand, the treaty being "in force" for a State is also clear from the definition of "Contracting Party" in Article 1(2) of the ECT. As used in the ECT, "Contracting Party" means "a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force." [emphasis added] The use of the conjunction "and" between the clauses "which has consented to be bound by this Treaty" and "for which the Treaty is in force" means that there must be circumstances, in the eyes of the parties to the ECT, including the Russian Federation, where a State for which the ECT is not "in force," has nevertheless consented to be bound by its terms.

386. There is one last argument of Respondent which the Tribunal finds important to address. Article 23(2) of the FLIT requires that a treaty subject to provisional application must be submitted to and ratified by the State Duma within six months from its signature and the start of its provisional application. It is common ground between the Parties that the ECT which was signed on 17 December 1994 has never been ratified by the State Duma. Respondent submits that since the six-month period had long expired, any continued provisional application of the ECT would have been inconsistent with Russian law.

387. In the view of the Tribunal, the six-month limit is merely an internal requirement; failure to respect that procedure does not in and of itself automatically terminate provisional application. (...)

392. The Tribunal's analysis leads it to conclude that Article 26 of the ECT is not inconsistent with the Constitution, laws or regulations of the Russian Federation. Although, as noted at the outset of this section, this analysis was not essential in view of the Tribunal's dispositive interpretation of Article 45(1), it does sustain the Tribunal's decision.

5 Conclusion

(...)

394. In this chapter, the Tribunal has found that:

d) The regimes of provisional application in Article 45(1) and 45(2) are separate, and the Russian Federation can benefit from the Limitation Clause in Article 45(1) even though it made no declaration under Article 45(2);

e) The Russian Federation can invoke the Limitation Clause in Article 45(1) even though it made no prior declaration nor gave any prior notice to other signatories that it intended to rely on Article 45 (1) to exclude provisional application;

f) The Limitation Clause of Article 45(1) negates provisional application of the Treaty only where the principle of provisional application is itself inconsistent with the constitution, laws or regulations of the signatory State; and

g) In the Russian Federation, there is no inconsistency between the provisional application of treaties and its Constitution, laws or regulations.

395. Accordingly, the Tribunal has concluded that the ECT in its entirety applied provisionally in the Russian Federation until 19 October 2009, and that Parts III and V of the Treaty (including Article

26 thereof) remain in force until 19 October 2029 for any investments made prior to 19 October 2009. Respondent is thus bound by the investor-State arbitration provision invoked by Claimant.

396. The Tribunal is comforted in its decision by its further finding that, had it been an essential consideration under the Limitation Clause of Article 45(1)—which it is not— Article 26 of the ECT itself, as well as Articles 1(6) and 1(7), are consistent with Respondent's Constitution, laws and regulations.

(...)

2.11. The operative part of the Interim Awards of 30 November 2009 is as follows:

IX. DECISION

612. For the reasons set forth above, the Tribunal:

(a) *DISMISSES* the objections to jurisdiction and/or admissibility based on Article 1(6) and 1(7), Article 17, Article 26(3)(b)(i) and Article 45 of the ECT (...).

2.12. Arbitration was continued after this. On 18 July 2014, the Tribunal delivered a Final Award in each of the three cases brought before it.

2.13. In the arbitral proceedings instituted by VPL, the Russian Federation was ordered to pay compensation in the amount of \$ 8.203.032.751. In the arbitral proceedings initiated by YUL and Hulley, these defendants were awarded \$ 1.846.000.687 and \$ 39.971.834.360 respectively in damages.

3 Relevant legislation

The Energy Charter Treaty ("ECT")

3.1. Articles 1, 2, 10, 13, 26, 39, 44 and 45 ECT read as follows:

Article 1. Definitions

As used in this Treaty:

1. "Charter" means the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991; signature of the Concluding Document is considered to be signature of the Charter.

2. "Contracting Party" means a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force.

6. "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor (...)

7. "Investor" means:

a) with respect to a Contracting Party:

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

(ii) company or other organization organized in accordance with the law applicable in that Contracting Party;

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

Article 2. Purpose of the Treaty

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

Article 10. Promotion, protection and treatment of investments

1. *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. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party*

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

7. *Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most*

12. *Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.*

Article 13. Expropriation

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

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

b) *not discriminatory;*

c) *carried out under due process of law; and*

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

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

(...)

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

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

Article 21. Taxation

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

(...)

5. a) Article 13 shall apply to taxes.

Article 26. Settlement of disputes between an Investor and a Contracting Party

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 cannot 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)

(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph 2a) or b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

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)

(i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

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) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

5.

a) The consent given in paragraph 3 together with the written consent of the Investor given pursuant to paragraph 4 shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and

(iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.

b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

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. An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph 4 and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".

8. The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

Article 39. Ratification, acceptance or approval

This Treaty shall be subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Depositary.

Article 44. Entry into force

1. This Treaty shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance or approval thereof, or of accession thereto, by a state or Regional Economic Integration Organization which is a signatory to the Charter as of 16 June 1995.

2. For each state or Regional Economic Integration Organization which ratifies, accepts or approves this Treaty or accedes thereto after the deposit of the thirtieth instrument of ratification, acceptance or approval, it shall enter into force on the ninetieth day after the date of deposit by such state or Regional Economic Integration Organization of its instrument of ratification, acceptance, approval or accession.

3. For the purposes of paragraph 1, any instrument deposited by a Regional Economic Integration Organization shall not be counted as additional to those deposited by member states of such Organization.

Article 45. Provisional application

1. Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

2.

a) Notwithstanding paragraph 1 any signatory may, when signing, deliver to the Depositary a declaration that it is not able to accept provisional application. The obligation contained in paragraph 1 shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depositary.

b) Neither a signatory which makes a declaration in accordance with subparagraph a nor Investors of that signatory may claim the benefits of provisional application under paragraph 1.

c) Notwithstanding subparagraph a), any signatory making a declaration referred to in subparagraph a shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.

3.

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

b) In the event that a signatory terminates provisional application under subparagraph a, the obligation of the signatory under paragraph 1 to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph c).

c) *Subparagraph b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depositary of its request therefor.*

The Vienna Convention on the Law of Treaties ("VCLT")

3.2. Articles 11, 12, 14, 25, 27, 31 and 32 VCLT in the official English version are as follows.

Article 11. Means of expressing consent to be bound by a treaty

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 12. Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

- (a) the treaty provides that signature shall have that effect;*
- (b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or*
- (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.*

2. For the purposes of paragraph 1:

- (a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;*
- (b) the signature ad referendum of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.*

Article 14. Consent to be bound by a treaty expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

- (a) the treaty provides for such consent to be expressed by means of ratification;*
- (b) it is otherwise established that the negotiating States were agreed that ratification should be required;*
- (c) the representative of the State has signed the treaty subject to ratification; or*
- (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.*

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 25. Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or*
- (b) the negotiating States have in some other manner so agreed.*

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Article 27. Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

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

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

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

Article 32. Supplementary means of interpretation

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

(a) leaves the meaning ambiguous or obscure; or

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

The Russian Constitution

3.3. Articles 10, 15, 86, 94, 105 and 106 of the Russian Constitution, according to the unofficial English translation submitted by the Russian Federation, read as follows:

Article 10

State power in the Russian Federation shall be exercised on the basis of its division into legislative, executive and judicial. The legislative, executive and judicial authorities shall be independent.

Article 15

1. The Constitution of the Russian Federation shall have the supreme juridical force, direct application and shall be used on the whole territory of the Russian Federation. Laws and other legal acts adopted in the Russian Federation shall not contradict the Constitution of the Russian Federation.

2. The bodies of state authority, bodies of local self-government, officials, private citizens and their associations shall be obliged to observe the Constitution of the Russian Federation and laws.

3. Laws shall be officially published. Unpublished laws shall not be used. Normative legal acts concerning human rights, freedoms and duties of man and citizen may not be used, if they are not officially published for general knowledge.

4. The universally-recognised norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation establishes other rules than those envisaged by law, the rules of the international agreement shall be applied.

Article 86

The President of the Russian Federation shall

- a) Govern the foreign policy of the Russian Federation,*
- b) Hold negotiations and sign international treaties and agreements of the Russian Federation,*
- c) Sign ratification instruments (...)*

Article 94

The Federal Assembly – the parliament of the Russian Federation – shall be the representative and legislative body of the Russian Federation.

Article 95

1. The Federal Assembly consists of two chambers – the Council of the Federation and the State Duma (...)

Article 105

1. Federal laws shall be adopted by the State Duma. (...)

Article 106

Federal laws adopted by the State Duma on the following issues shall be the liable to obligatory consideration by the Council of the Federation

- a) federal budget;*
- b) federal taxes and dues;*
- c) financial, currency, credit, customs regulation, and money issue;*
- d) ratification and denunciation of international treaties and agreements of the Russian Federation;*
- e) the status and protection of the state border of the Russian Federation;*
- f) peace and war.*

The Russian Federal Law on International Treaties ("FLIT")

- 3.4. Articles 2, 6, 11, 14, 15 and 23 of the Russian Federal Law on International Treaties, also designated as RFW International Treaties by the Russian Federation, hereinafter: FLIT, are as follows, according to the unofficial English translation submitted by the Russian Federation:

Article 2 Use of terms

For the purposes of this Federal Law:

[. . .]

- b) "ratification," "approval," "acceptance," and "accession" mean in each case a form whereby the Russian Federation expresses its consent to be bound by an international treaty;*
- c) "signature" means either a stage in the conclusion of a treaty, or a form of expressing consent of the Russian Federation to be bound by an international treaty, if the treaty provides that signature shall have that effect, or it is otherwise established that the Russian Federation and the other negotiating States were agreed that signature should have that effect, or the intention of the Russian Federation to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation;*
- d) "conclusion" means the expression of consent of the Russian Federation to be bound by an international treaty;*

Article 6 Expression of consent of the Russian Federation to be bound by an international treaty

- 1. Consent of the Russian Federation to be bound by an international treaty may be expressed by means of:*

signature of the treaty;

exchange of the documents constituting the treaty;

ratification of the treaty;

approval of the treaty;

acceptance of the treaty;

accession to the treaty; or

any other means of expressing consent agreed by the contracting parties.

- 2. Decisions to grant consent for the Russian Federation to be bound by international treaties shall be made by state bodies of the Russian Federation in accordance with their competence as established by the Constitution of the Russian Federation, this Federal Law and other legislative acts of the Russian Federation.*

Article 11

- 1. Decisions to negotiate and to sign international treaties of the Russian Federation shall be made:*

a) with respect to treaties to be concluded on behalf of the Russian Federation, by the President of the Russian Federation, but with respect to treaties to be concluded on behalf of the Russian Federation on matters under the jurisdiction of the Government of the Russian Federation, by the Government of the Russian Federation;

b) with respect to treaties to be concluded on behalf of the Government of the Russian Federation, by the Government of the Russian Federation.

2. Decisions to negotiate and to sign international treaties of the Russian Federation on matters under the jurisdiction of the Government of the Russian Federation shall be made by the President of the Russian Federation if circumstances so require.

Article 14 Ratification of international treaties of the Russian Federation

In accordance with the Constitution of the Russian Federation the ratification of international treaties of the Russian Federation shall be effected through the enactment of federal law.

Article 15 International treaties of the Russian Federation subject to ratification

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

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

b) international treaties whose subject is basic rights and freedoms of the person and the citizen;

c) international treaties concerning the territorial demarcation of the Russian Federation with other States, including international treaties on the State Border of the Russian Federation, as well as international treaties concerning the demarcation of the exclusive economic zone or continental shelf of the Russian Federation;

d) international treaties concerning the basis of inter-State relations, concerning issues affecting the defense capability of the Russian Federation, concerning disarmament and international arms control, and international peace and security, as well as peace treaties and collective security treaties;

e) international treaties concerning the participation of the Russian Federation in inter-State unions, international organizations, and other inter-State associations, if such treaties require the Russian Federation to transfer certain powers to them or establish that decisions of their bodies are binding upon the Russian Federation.

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

Article 23 Provisional application of international treaties by the Russian Federation

1. An international treaty or a part of a treaty may, prior to its entry into force, be applied by the Russian Federation provisionally if the treaty itself so provides or if an agreement to that effect has been reached with the parties that have signed the treaty.

2. Decisions on the provisional application of a treaty or a part thereof by the Russian Federation shall be made by the body that has taken the decision to sign the international treaty according to the procedure set out in Article 11 of this Federal Law.

If an international treaty - the decision on the consent to the binding character of which for the Russian Federation is, under this Federal Law, to be taken in the form of a Federal Law - provides for the provisional application of the treaty or a part thereof, or if an agreement to that effect was reached among the parties in some other manner, then this treaty shall be submitted to the State Duma within six months from the start of its provisional application. The term of provisional application may be prolonged by way of a decision taken in the form of a federal law according to the procedure set out in Article 17 of this Federal Law for the ratification of international treaties.

3. Unless the international treaty provides otherwise, or the respective States otherwise agree, the provisional application by the Russian Federation of a treaty or a part thereof shall be

terminated upon notification to the other States that apply the treaty provisionally of the intention of the Russian Federation not to become a party to the treaty.

The Russian Fundamentals of Legislation

- 3.5. Articles 1 and 43 of the Fundamentals of Legislation on Foreign Investments in the USSR 1991 (hereinafter: the Fundamentals of Legislation) read as follows, according to the unofficial English translation submitted by the Russian Federation:

Article 1

Legislation on Foreign Investments of the USSR and republics Relations in connection with foreign investments in the territory of the USSR shall be regulated by the legislation of the USSR and republics, except where these Fundamentals and other legislation of the USSR and the republics on foreign investments provide otherwise. The laws of the republics shall regulate in accordance with these Fundamentals the relations arising in connection with foreign investments in the republics' territories, subject to specific features of their economic operations and investment policy, except to the extent that regulation of the relations is referred to the jurisdiction of the Union, and the relations that must be regulated by the Union pursuant to the USSR international treaties.

Article 43

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

Disputes of foreign investors and enterprises with foreign investments with Soviet State bodies acting as a party to relationships regulated by civil legislation, enterprises, social organizations and other Soviet legal entities, disputes between participants of the enterprise with foreign investments and the enterprise itself are subject to consideration in the USSR in courts or, upon agreement of the parties, in arbitration proceedings, inter alia, abroad, and in cases provided by legislative acts of the Union of SSR and the republics - in arbitrazh courts, economic courts and others.

The Law on Foreign Investments

- 3.6. Articles 2, 7, and 9 of the Law on Foreign Investments 1991, also designated as RFW Foreign Investments 1991 (hereinafter: the Law of Foreign Investments 1991) by the Russian Federation, are as follows, according to the unofficial English translation submitted by the Russian Federation or derived from the export report of A. Asoskov (Expert Report Annex 30) mentioned below:

Article 2. Foreign investments

Foreign investments are all types of material assets and intellectual property injected by foreign investors into objects of entrepreneurial and other types of activity with the aim of obtaining profit (income).

Article 7. Guarantees Against Expropriation and Unlawful Actions of State Bodies and Their Officials

Foreign investments in the RSFSR may not be subject to nationalization, requisition or confiscation, except in cases provided by legislative acts, when such measures are taken in public interest. In cases of nationalization or requisition prompt, adequate and effective compensation is paid to the foreign investor.

Decisions on nationalization are made by the Supreme Council of the RSFSR.

Decisions on requisition and confiscation are made under the procedure prescribed by the legislation in effect in the territory of the RSFSR.

Decisions of governmental bodies on expropriation of foreign investments may be contested in the RSFSR courts.

Foreign investors are entitled to compensation of damages, including lost profit, incurred as a result of compliance with the instructions of State bodies of the RSFSR and their officials that are inconsistent with the legislation in effect in the territory of the RSFSR, and as a result of improper discharge by such bodies and their officials of statutory obligations owed to the foreign investor or an enterprise with foreign investments.

Article 9. Dispute Resolution

Investment disputes, including disputes over the amount, conditions and procedure of the payment of compensation, shall be resolved by the Supreme Court of the RSFSR or the Supreme Arbitrazh Court of the RSFSR, unless another procedure is established by an international treaty in force in the territory of the RSFSR.

Disputes of foreign investors and enterprises with foreign investments against RSFSR State bodies, disputes between investors and enterprises with foreign investments involving matters relating to their operations, as well as disputes between participants of an enterprise with foreign investments and the enterprise itself shall be resolved by the RSFSR courts, or, upon agreement of the parties, by an arbitral tribunal, or, in cases specified by the laws, by authorities authorized to consider economic disputes.

International treaties in force in the territory of the RSFSR may provide for recourse to international means of resolution of disputes arising in connection with foreign investments in the territory of the RSFSR.

- 3.7. Articles 2 and 10 of the Law on Foreign Investments 1999, also designated as RFW Foreign Investments 1999 (hereinafter: the Law on Foreign Investments 1999) by the Russian Federation, are as follows, according to the unofficial English translation submitted by the Russian Federation or derived from the export report of A. Asoskov (Expert Report Annex 31):

Article 2. The Basic Terms Used in the Present Federal Law

The following basic terms are used for the purposes of the present Federal Law:

(...)

foreign investment - *the injection of foreign capital in objects of entrepreneurial activity in the territory of the Russian Federation in the form of objects of civil law rights belonging to a foreign investor, unless such objects are excluded from the realm of civil law relations or are restricted in the Russian Federation pursuant to federal laws, including money, securities (denominated in a foreign currency and the currency of the Russian Federation), other property, property rights which can be evaluated in a monetary form, exclusive rights to the results of intellectual activities (intellectual property), as well as services and information.*

Article 10. Guarantees of Due Resolution of Disputes Arising in Connection with Investments and Business of a Foreign Investor in the Territory of the Russian Federation

A dispute of a foreign investor arising in connection with its investments and business activity conducted in the territory of the Russian Federation shall be resolved in accordance with international treaties of the Russian Federation and federal laws in courts, arbitrazh courts or through international arbitration (arbitral tribunal).

4 The dispute between the parties

in all cases

- 4.1. The Russian Federation requires, in brief, that the court quash the Interim Awards of 30 November 2009 and the Final Awards of 18 July 2014 (hereinafter jointly referred to as: the Yukos Awards) issued in the cases between the Russian Federation as Respondent in the Arbitration and the defendants as the respective Claimants in the Arbitration in a provisionally enforceable judgment, in so far as is possible, and that the court order the defendants to pay the costs of these proceedings, plus interest at the statutory rate from the fourteenth day following the date of this judgment.
- 4.2. In brief, the Russian Federation bases these identical claims on the following. There are six grounds in Section 1065 subsection 1 of the Dutch Code of Civil Procedure (Rv), which is relevant to this case, that each lead to the legal effect of reversal of the Yukos Awards. The six grounds are stated in Section 1065 subsection 1 under the following letters:
- (1) *a* (absence of valid arbitration agreement), in connection with which the Tribunal was not competent to take cognizance of and given an award on the defendant's claims;
 - (2) *c* (the Tribunal overstepped its remit);
 - (3) *b* (there were irregularities in the Tribunal's composition), particularly because assistant Valasek evidently played a significant substantive role in assessing the evidence, in the deliberations of the Tribunal and in preparing the Final Awards;
 - (4) *d* (the Yukos Awards lack substantiation in several critical aspects);
 - (5) *e* (the Yukos Awards are contrary to Dutch to public policy and public morality, including in this case the fundamental right of the Russian Federation to a fair trial), since the Awards show the Tribunal's partiality and biases.
- 4.3. The defendants have disputed all of the aspects of the Russian Federation's claim supported by reasons.
- 4.4. The parties' arguments and other assertions are discussed in more detail below, in so far as relevant.

5 The assessment of the disputes

in all cases

INTRODUCTION

Authentic texts or translation?

- 5.1. The relevant passages from the Yukos Awards in the authentic, English version are cited in 2.10-12. The quotations below from the Awards are shown in Dutch in the Dutch-language judgment. For this, the court has used the Dutch translation produced by the Russian Federation. It should be noted that the defendants have not argued that this translation is inadequate.
- 5.2. Citations of the ECT are hereinafter in the previously used English-language version, in principle. Whenever the court uses the Dutch translation, it makes use of the Dutch text as published in the Treaty Series (*Tractatenblad*).

The competence of the court in these proceedings

- 5.3. Since The Hague was the place of Arbitration, this court is competent to take cognizance of the claim described in 4.1. This follows from Section 1073 subsection 1 Rv, in conjunction with Section 1064 subsection 2 Rv, as it applied up until 1 January 2015. Section 1074 Rv *old* applies in this case based on Section IV of the Act of 2 June 2014 (*Stb.* 200) which stipulates that this Act, containing new arbitration regulations, applies to arbitrations pending on or after the date of the entry into force of the Act. At the time, on 1 January 2015, the Arbitration was no longer pending.

THE COMPETENCE OF THE TRIBUNAL

Introduction

- 5.4. In view of the first ground put forward by the Russian Federation to support its request for reversal of the Yukos Awards, the court will first assess whether the Tribunal was competent to take cognizance of the claims of the Claimants in the Arbitration. First and foremost, the court would like to state the following regarding the assessment framework. Although under Section 1052 subsection 1 Rv the appointed Tribunal in the Arbitration was qualified to assess its jurisdiction, the fundamental character of the right to access to the courts entails that ultimately an ordinary court is entrusted with answering the question whether or not a valid arbitration agreement in the sense of Section 1065 subsection 1 under *a* Rv was lacking. This fundamental character also entails that, in deviation from a principally restrictive assessment in reversal proceedings, the court does not restrictively assess a request for reversal of an arbitral award on the ground of a lacking valid agreement (cf. recent Supreme Court ruling of 26 September 2014, ECLI:NL:HR:2014:2837). Furthermore, in assessing such a request, the court takes as a starting point that the onus is on the defendants to prove that the Tribunal is competent. After all, the burden of proof was also on them (as Claimants) in the Arbitration, while in the current proceedings the same jurisdiction issue is to be dealt with.
- 5.5. The Tribunal based its jurisdiction assessment on two independent grounds. These grounds, which are discussed below, are linked to (1) the meaning of Article 45 ECT and (2) the question whether the arbitration provision of Article 26 ECT is “not inconsistent” with the Russian Constitution, laws or other regulations.

Article 45 ECT

General

- 5.6.

Before discussing the meaning of Article 45 ECT, the court would like to remind the parties that the Russian Federation did not ratify the ECT. Article 39 ECT mainly pertains to ratification, as does Article 44, which relates to the entry into force of the Treaty. However, by way of exception, the Treaty also provides for a "provisional application", laid down in Article 45.

Article 45 paragraph 1

5.7. The first ground for reversal is linked to the meaning of Article 45 paragraph 1 ECT, which forms the basis for the provisional application of the Treaty referred to in this section. According to that provision, each Signatory consents to the provisional application of the ECT "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations". The court designates this restriction hereinafter as the "Limitation Clause", in accordance with the terminology used in the Interim Awards. The Tribunal decided that by signing the ECT the Russian Federation consented to the provisional application of the entire Treaty pending its entry into force, unless the principle of provisional application itself were contrary to the Russian Constitution, laws or other regulations. According to the Tribunal, the Limitation Clause contained in Article 45 paragraph 1 entailed an "all or nothing" approach. This opinion, extensively covered in 2.10, can be summarised as follows, only taking into account the considerations relevant to this judgment. The numbers in parentheses refer to the corresponding grounds for the decision of the Tribunal.

- The phrase "to the extent" is often used as a formulation when drafters of a provision in a treaty or act want to express that a particular provision should only be applied to the extent to which the subsequent words are complied with. (303)

- However, the key to the interpretation of the Limitation Clause in this case is to be found in the word "such". The phrase "such provisional application" refers to the provisional application stated earlier in the paragraph, namely the provisional application of "this Treaty". The meaning of the phrase "such provisional application" is therefore context-specific: the meaning is derived from the specific use of the provisional application referred to in this phrase. (304 and 305)

- In the context of Article 45 paragraph 2 under c ECT, the phrase "such provisional application" necessarily has another meaning. It refers to the provisional application of only Part VII of the Treaty. (306)

- There are two possible interpretations of the phrase concerning the provisional application of this treaty. The passage could provide for the provisional application of the entire treaty or several parts of the treaty. Considering the context, the first interpretation corresponds better with the ordinary meaning that must be ascribed to the terms. (308)

- This conclusion fully agrees with the decision the tribunal took regarding its jurisdiction in the Kardassopoulos case. (309)

- The alternative to the Tribunal's "all or nothing" approach is that the provisional application depends on the answer to the question whether one specific provision of the Treaty can be reconciled with the national legislation regime of a Signatory. This would be diametrically opposed to the object and purpose of the Treaty, and even to the nature of international law. And it would also be incompatible with the *pacta sunt servanda* principle and Article 27 of the Vienna Convention on the Law of Treaties (VCLT). (312-319)

- The chosen interpretation of Article 45 paragraph 1 ECT is also supported by state practice. Six states expressly invoked the Limitation Clause of Article 45 paragraph 1. Similarly, in the lists the Secretariat of the ECT kept of signatories' intentions, it designated the states that planned to invoke Article 45 paragraph 1 as intending to completely avoid provisional application of the Treaty. (321 and 322)

- In view of the conclusion of the Tribunal on the interpretation of Article 45 paragraph 1, it is unnecessary to take the *travaux préparatoires* into account. (329)

- The provisional application principle is not contrary to Russian laws. (330 et seq.)

- 5.8. The Russian Federation contested the Tribunal's interpretation of Article 45 paragraph 1, stating reasons. In the opinion of the Russian Federation, the scope of the provisional application depends on the agreement of each individual treaty provision with the Constitution, laws or regulations. By relying on the same arguments as are stated in the Interim Awards, the defendants have supported the Tribunal's opinion. This means that it essentially concerns the question whether or not the Limitation Clause should be interpreted in such a way that this clause relates to the provisional application principle – in which case the possibility of applying the ECT (as a whole) provisionally depends on the answer to the question whether national law provides for this principle – or that the provisional application of the ECT is limited to the treaty provisions that are not contrary to national law.
- 5.9. The interpretation of the Limitation Clause must take place according to the regulations laid down in Articles 31 and 32 (VCLT), that is in accordance with the meaning assigned to the phrases in common parlance, with due observance of their context and in light of the object of the ECT (Article 31 paragraph 1 VCLT). The context of a treaty in any case comprises the text, including preamble and annexes (Article 31 paragraph 2 VCLT). Article 31 paragraph 3 VCLT states that an interpretation should include, among other things, all later use in the application of the treaty resulting in agreement among the parties about the interpretation of the treaty. Pursuant to Article 32 paragraph 2 VCLT, significance can also be attached to supplemental means of interpretation, and in particular preparatory work (*travaux préparatoires*) and the circumstances in which the treaty was concluded. These interpretation means can be used to confirm the meaning ensuing from the application of Article 31, or to determine the meaning if the interpretation, also by applying Article 31, leaves the meaning (a) ambiguous or obscure, or (b) leads to a manifestly absurd or unreasonable result.
- 5.10. In interpreting Article 45 paragraph 1 ECT, the ordinary meaning of phrases is paramount. This particularly concerns the word "extent", which the *Oxford Thesaurus of English* defines as "degree, scale, level, magnitude, scope, extensiveness, amount, size; coverage, breadth, width, reach and range." This dovetails with the Russian Federation's stated description of the words "to the extent" and which it derived from the *Oxford English dictionary* (second edition, 1989) and *Webster's Third International Dictionary of the English Language* (1961): "to the extent": "space or degree to which anything is extended", "width of application, operation, etc. scope", "range (as of inclusiveness or application) over which something extends" and "the limit to which something extends".
- 5.11. The term "to the extent" in common parlance signifies a degree of application, scope or – formulated slightly differently – a differentiation. This meaning is also expressed in several other language versions of the treaty. For instance, in the German-language version, the term is translated as "in dem Maße", in the French-language version as "dans la mesure où" and in the Dutch-language version as "voor zover".
- 5.12. Separate from their context, the ordinary meaning of these words is more indicative of the accuracy of the explanation put forward by the Russian Federation. After all, in the interpretation of the Tribunal – in which the word "if" would be more fitting – the Limitation Clause is limited to one form of irreconcilability with national law, namely a ban on provisional application itself. The Tribunal has specifically acknowledged that the drafters of a treaty or legislative provision often use the term "to the extent" to indicate that a provision can only be applied to the extent to which the subsequent words are complied with. However, considering the context in which this term should be placed, the Tribunal attached decisive importance to the adjective "such". According to the Tribunal, the words "such provisional application" only refer to the term "this Treaty" mentioned earlier in Article 45 paragraph 1, and it concerns whether or not "such provisional application of this Treaty" is not contrary to national law. The court holds that this notional addition does not provide clarity. This reference to the treaty,

which is evident – another interpretation is after all inconceivable – does not provide clarity on the question whether the provisional application can only relate to the Treaty as a whole, and therefore to the provisional application principle, or only parts of the treaty, meaning particular treaty provisions. Special significance can therefore not be attached to the reference to "*this Treaty*" in the interpretation of the Limitation Clause.

5.13. However, what the court does deem relevant for the context-related interpretation is first and foremost the circumstance that Article 45 paragraph 1 ECT links the provisional application to the irreconcilability with not only the "*constitution*" and "*laws*", but expressly also to "*regulations*". The Russian Federation rightly pointed out that a ban on the provisional application of treaties as such usually results from constitutional requirements and may be enshrined in a formal act. It is, however, inconceivable that a ban on the provisional application of a treaty can be laid down in delegated legislation, given the principal nature of a ban. But it is conceivable that a test of compatibility of individual treaty provisions is laid down in delegated legislation. Regarding this aspect, the defendants limited themselves to stating that the use of the word "*regulations*" only emphasises that the drafters of the ECT intended to provide a broad as possible overview to ensure that each provision of the law of a Signatory incompatible with a provisional application as such was included. This may be unusual, according to the defendants, but they do not deem it impossible that a regulation contains a provision related to the principle of provisional application. The court finds this explanation insufficient and furthermore holds that any reference to such intention on the part of the drafters of the Treaty is lacking.

Article 45 paragraph 2

5.14. Regarding the context in which the explanation of the Limitation Clause should take place, Article 45 paragraph 2 ECT is also relevant. At the time of signing, a state can submit a declaration that it is not able to accept provisional application (Article 45 paragraph 2 under a ECT). For such situations, Article 45 paragraph 2 under c provides for the Signatory to nevertheless comply with the provisional application "*to the extent that such provisional application is not inconsistent with its laws and regulations*" of Part VII of the Treaty ("*Structure and Institutions*"). In this paragraph, the same terminology is used as in the first paragraph, with the difference that Article 45 paragraph 2 under c does not contain a reference to the Constitution. The Tribunal failed to clearly address the meaning of Article 45 paragraph 2 under c and limited itself to the opinion that in the context of this provision, the phrase "*such provisional application*" necessarily has a different meaning than the same reference in Article 45 paragraph 1, and referred to the provisional application of only Part VII of the Treaty. Whether the Tribunal was referring to the principle of provisional application does not become clear from its considerations.

5.15. Since the provisional application in Article 45 paragraph 2 under c remains limited to Part VII, this alone does not make it evident that in this provision the principle of provisional application is designated as a relevant criterion. After all, such a principle can only concern a treaty as a whole; and it is not conceivable that it regards part of a treaty. This was also acknowledged in the Interim Awards under 311 in the consideration that the Limitation Clause entails an "all or nothing" approach: either the entire Treaty is applied provisionally, or not at all. If Article 45 paragraph 2 under c does cover the provisional application principle, as put forward by the defendants, it is furthermore difficult to understand why this provision lacks "*the constitution*" as assessment criterion. In light of this, it must be assumed that Article 45 paragraph 2 under c, which makes the scope of the provisional applications exclusively conditional on compatibility of Part VII with legislation, primary or delegated, also covers the specific treaty provisions from

that part. The court does not agree with the Tribunal's explanation if that explanation differs from the interpretation in this section.

5.16. In this respect, the Russian Federation rightly pointed out that in their approach the defendants have lost sight of the interaction between paragraphs 1 and 2 of Article 45 ECT. In their vision (discussed in section 5.24 and subsequent sections), a Signatory may only invoke the Limitation Clause if its national laws prohibit provisional application as such and if it has submitted a declaration in the sense of Article 45 paragraph 2. Invocation of the Limitation Clause, which relies on incompatibility of the principle of provisional application with the Constitution and other laws and regulations, appears to be difficult to reconcile with the obligation of Article 45 paragraph 2 under c to, in that case, still apply Part VII *"to the extent that such provisional application"* is not contrary to said laws and regulations.

5.17. In short, the Tribunal interpreted the Limitation Clause in a way that significantly deviates from the meaning that must be assigned to the corresponding words in Article 45 paragraph 2 under c ECT. In the opinion of the court, there is no proper ground for this deviation. A consistent explanation of both paragraphs supports the interpretation of the Limitation Clause, in the opinion of the Russian Federation.

Provisional conclusion on Article 45 paragraph 1

5.18. The above considerations lead to the conclusion that the ordinary meaning of the term *"to the extent"* in paragraph 1, partly in the context of the term, results in an interpretation of the Limitation Clause in which the option of provisional application is focused on and depends on the compatibility of separate treaty provisions with national laws.

Object and purpose of the ECT and the nature of international law

5.19. The Tribunal also held that the interpretation of the Limitation Clause it had rejected supposedly conflicted with the object and purpose of the ECT and the nature of international law. This opinion is based on the *pacta sunt servanda* principle of Article 26 VCLT and the associated principle, laid down in Article 27 VCLT, that a signatory may not invoke the provisions of its national laws to justify the non-application of a treaty. The court does not agree with this opinion of the Tribunal either. The court would like to state first and foremost that although the Tribunal made a general reference to the object of the ECT (providing a legal framework to promote long-term cooperation in the area of energy, based on mutual benefit and complementarity and in accordance with the objects and principles of the Treaty), but failed to specify to what extent a limited application of the treaty provisions – under Article 45 ECT – would be contrary to this object. Be that as it may, the principles in Articles 26 and 27 VCLT, referred to by the Tribunal, do not automatically lead to the interpretation of Article 45 as applied by the Tribunal. These principles express that signatories are bound by a treaty that has entered into effect and may not frustrate the application of the treaty by invoking national laws. And although these principles similarly extend to treaties that have entered into force based on provisional application, they are not limitless. Signatories to a treaty can explicitly limit the provisional application of treaty provisions, as becomes apparent from Article 25 VCLT which reads as follows, in so far as is relevant: *"A treaty or a part of a treaty is applied provisionally pending its entry into force if (a) the treaty itself so provides"*. As argued by the Russian Federation, with reference also to academic lawyers, a provision such as the Limitation Clause provides for the solution of conflicts between states' national laws and international obligations that ensue from the provisional application of treaties (see the summons, 148 and the literature in note 163). In this case, the Signatories to the ECT have explicitly laid down in the Limitation Clause in Article 45 paragraph 1 ECT, explained in the sense accepted by the court, that the scope of the provisional application is limited to treaty provisions that are not contrary

to national law. Even while it is possible that provisions of national law can stand in the way of the performance of one or more provisions of the ECT, the basis for doing so is encased in the ECT itself – i.e., at treaty level. In other words: a state that relies on a conflict between a treaty provision and national law, on sound grounds and referencing the Limitation Clause, does not act contrary to the *pacta sunt servanda* principle, nor to the principle of Article 27 VCLT. As was considered by the Tribunal and is relevant in this case, the fact that the invocation of a provision of national law can lead to a discussion about the meaning of the contents of said provision and thus result in uncertainty in international matters, does not affect this. After all, that is inherent in the Limitation Clause contained in the ECT.

Opinion of other tribunal

5.20. For the sake of completeness, the court also considers that for the interpretation of the Limitation Clause significance should also not be attached to the circumstance that the Tribunal's opinion is supported by the opinion of another tribunal – Chaired by the same person, incidentally – in another ECT-based arbitration, namely the Kardassopoulos case. The motivation in the Interim Awards of the award in that case does not contain substantive arguments for a different interpretation of Article 45 paragraph 1 ECT.

State practice

5.21. All parties have discussed the meaning of state practice. The court disregards this practice and the meaning of this practice in its assessment of Article 45 paragraph 1 ECT. This is furthermore also the primary standpoint of the defendants (see: statement of defence, 145 and the rejoinder, 56). Article 31 paragraph 3 preamble and under *b* VCLT links the acknowledgement of relevance of state practice to the condition that through this later use the parties agree on the interpretation of the treaty concerned. In other words: significance can only be attached to this practice if the states involved have explicitly or implicitly accepted it. None of the parties have argued that there is a (wide) application practice supported by all states involved, nor has any evidence arisen to prove this practice.

The travaux préparatoires

5.22. Another question to be answered concerning the interpretation of Article 45 paragraph 1 ECT is whether significance should be attached to the *travaux préparatoires* of the ECT, as mentioned by the Russian Federation. From Article 32 VCLT it follows that if application of the interpretation rules contained in Article 31 leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable, use may be made of supplemental means of interpretation, specifically of (data from) the preparatory work referred to here. There is no ground to apply this supplemental means of interpretation; the court holds that the explanation – in accordance with Article 31 VCLT – does not lead to an ambiguous or obscure meaning or to a result that is manifestly absurd or unreasonable. Superfluously, the court would like to point out the statement of the Russian Federation concerning the addition of the term "*regulations*" to the draft text of the Limitation Clause. Mr Bamberger, chairman of the legal advisory committee to the Conference on the ECT, answered the question of the Secretary-General of the Conference on the ECT about the addition of this term as follows:

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

Conclusion about the interpretation of Article 45

5.23. The foregoing considerations lead to the conclusion that the court accepts the Russian Federation's supported interpretation of Article 45 ECT. This means that the Russian Federation was only bound by the treaty provisions reconcilable with Russian law. Before delivering its opinion on the compatibility of Article 26 ECT with Russian law, the court will first deal with the following issue raised by the defendants.

Prior declaration required?

5.24. The defendants have taken the viewpoint – as they also did in the Arbitration – that based on Article 45 paragraph 1 ECT a prior declaration is required, which the Russian Federation failed to submit. In support of this assertion, they argued that paragraphs 1 and 2 of Article 45 are complementary in the sense that in the first paragraph the general rule of provisional application is laid down, while in the second paragraph the notification procedure is explained. This standpoint, which implies that the Russian Federation was obliged to submit a declaration that it did not consent to the provisional application of the ECT, is not only confirmed in a textual interpretation of Article 45 but is also in accordance with the object and purpose of the ECT, according to the defendants.

5.25. The court is inclined to follow the reasoning of the Russian Federation when it argues that this issue cannot be raised in the current reversal proceedings. The Tribunal did not follow the reasoning of the defendants and therefore did not base its competence on the absence of such a declaration. In accordance with the legal system of reversal proceedings, from which it follows that the grounds for reversal are stated in the summons and which has determined that a ground for reversal can only be directed against a positive arbitral decision on jurisdiction (Section 1064 subsection 5 and Section 1065 subsection preamble and under *a Rv*), there appears to be no room in these proceedings to form an opinion on the question whether or not the Tribunal could have assumed its jurisdiction based on another argument it rejected.

5.26. Nevertheless, the court will discuss this issue for the sake of completeness. The court deems the Tribunal's opinion correct based on the following grounds. In these considerations, the court once again starts from the ordinary meaning of the used words referred to in Article 31, as considered in their context.

5.27. In light of their ordinary meaning, the wording of paragraphs 1 and 2 of Article 45 ECT – read in isolation and together – do not indicate that the Limitation Clause of paragraph 1 depends on the submission of a declaration under paragraph 2. Although the first paragraph contains an arrangement for provisional application, the same holds for the second paragraph. Nothing in the texts of these paragraphs indicates that paragraph 2 is intended as a procedure rule for the specification of the arrangement in paragraph 1. Article 45 paragraph 2 describes a specific regime that enables a Signatory to completely renounce provisional application, also if under paragraph 1 there is no impediment for provisional application, and therefore there is no incompatibility with national law. Furthermore, the word “[n]otwithstanding” used in Article 45 paragraph 2, which is used at the beginning of the second paragraph and which indicates a deviation from, and not continuation of, the first paragraph, and the word “may”, which refers to a possibility and not to a prescribed mechanism in conjunction with paragraph 1, indicate that Article 45 paragraph 2 does not contain a procedural rule to specify Article 45 paragraph 1. The ordinary meaning of the components of Article 45 mentioned here therefore leads to an explanation in which the first paragraph does not require a prior declaration.

5.28. States wishing to invoke the exception of Article 45 paragraph 2 are bound by submitting an express declaration, while such a declaration cannot be deduced from Article 45 paragraph 1. Incidentally, there are insufficient grounds for the opinion that regardless of this situation, a certain form of prior declaration or notification is required to be able to invoke the Limitation

Clause of Article 45 paragraph 1. Although during the negotiations the various states stressed the importance of transparency regarding an invocation of the Limitation Clause, and the Secretariat of the ECT encouraged the Signatories to be transparent about the provisional application (see the Interim Awards under 282), these circumstances are not compelling enough to deduce an implicit obligation to submit a prior declaration. If the drafters of the Treaty had also wanted to make invocation of the Limitation Clause due to incompatibility with national law conditional on a prior declaration, they obviously would have expressly included this, like they also did in paragraph 2. They did not do this. The argument of the defendants regarding the object and purpose of the ECT can be largely reduced to the already mentioned desirability of transparency and therefore does not lead to a different opinion. The principle of reciprocity mentioned by the defendant in that respect, which they believe will be impaired if the Tribunal's explanation were to be followed, also does not succeed. In connection with this aspect, the Russian Federation has correctly remarked that Article 45 paragraph 1 ECT does not contain indications for a requirement of absolute reciprocity. The fact that Article 45 paragraph 2 under *b* contains the principle of reciprocity for the cases described in paragraph 2 under *a* does not automatically lead to the opinion that Article 45 paragraph 1 contains an obligation to submit a prior declaration.

- 5.29. The defendants can also not successfully derive an argument from the context of paragraphs 1 and 2 of Article 45 ECT. In referring to that context, they first and foremost allude to Article 45 paragraph 3 ECT, which contains an arrangement for the termination of the provisional application of the ECT, and for the provisions of Parts III and V to remain in effect with respect to any investments made in the territory of the state concerned during such provisional application for twenty years following termination of the provisional application. The defendants argue that if Article 45 paragraph 1 ECT would allow a Signatory to dodge provisional application at any given time and with immediate effect, the detailed provisions of Article 45 paragraph 3 ECT would not have any effect. The court rejects this argument. First, the defendants forget that material conditions are attached to an invocation of the Limitation Clause – unlike the termination in Article 45 paragraph 3 ECT – namely conflict between a Treaty provision and national law. Furthermore, the Russian Federation rightly argues that there is no incompatibility. With the express reference to the obligation on the Signatory under the first paragraph to apply Parts III and V, Article 45 paragraph 3 under *b* ECT limits the continued effect of the Treaty provisions in the same way as the Limitation Clause.
- 5.30. Finally, it also applies to the issue that has been discussed here that since it has neither been argued, nor has it become evident that there was agreement among the Signatories on the application practice regarding invocation of the clauses in Article 45 paragraph 1 and paragraph 2 ECT, and the defendants did not rely on a subsequent state practice, no significance can be attached to the manner in which the states involved have implemented Article 45 ECT. Superfluously, the court considers that it is not disputed between the parties that a number of states have invoked the Limitation Clause without explicitly submitting the declaration stated in Article 45 paragraph 2 ECT. The single fact that these states appear on a list compiled by the Secretariat of states supposedly not intending to provisionally apply the ECT, is irrelevant here.
- 5.31. The court arrives at the conclusion that even if this question were relevant to the decision on the claim, the Russian Federation was not obliged to submit a prior declaration in the sense of Article 45 paragraph 2 for a successful reliance on the Limitation Clause of Article 45 paragraph 1.

Article 26 ECT

- 5.32. In light of the meaning the court assigns to the Limitation Clause of Article 45 paragraph 1 ECT, the question arises – and this is also the subject of dispute between the parties – whether

the arbitral provision in Article 26 ECT, from which the Tribunal derived its competence, is in accordance with Russian law. This provision, as follows from paragraph 1 of Article 26, relates to "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". Article 26 has therefore only created the option for arbitration for an (alleged) breach of obligations as laid down in Part III of the Treaty ("*Investment Promotion and Protection*"). One of the obligations laid down can be found in Article 10 ECT. This provision obliges the contracting parties to treat the investments of foreign investors fairly and equitably and to refrain from taking discriminatory measures which hamper (the use of) these investments. Another obligation (to refrain from an action), laid down in Article 13 ECT, put briefly, determines that investors may not be nationalised, expropriated or subject to measures with a similar effect as nationalisation or expropriation. The obligations arising from Articles 10 and 13 ECT, through references in Article 21 ECT which relates to "taxes", may also pertain to taxes or tax measures of contracting parties. The defendants' claims for compensation in the Arbitration are based on the assertion that the Russian Federation has breached these obligations. The breach of the obligations of Article 10 ECT asserted by the defendants consisted of, among other things, impeding the course of justice and a fair trial, more specifically, by the numerous house searches and seizures, the failure to give due notice of administrative acts, cases not being heard by an impartial judge, the sale by auction of Yuganskneftegaz (YNG) and the initiation of bankruptcy proceedings against Yukos. The defendants have based their allegation about a breach of the obligations in Article 13 ECT on a number of circumstances, some of which also form the basis of the breach of Article 10 ECT. This includes, among other things, the seizure of the defendants' shares in Yukos, the additional tax assessments over the years 2000-2004, the sale of YNG at a sham auction and the initiation of Yukos' bankruptcy. According to the defendants, these circumstances have led to the deprivation of all of their investments. They qualified this as expropriation. In the Final Awards, the Tribunal accepted the breach of Article 13 ECT and therefore did not take a position on the alleged breach of Article 10 ECT.

5.33. Against this backdrop, the court will now assess whether the provisional application of the arbitral provision of Article 26 ECT is in accordance with the Russian Constitution, laws or other regulations. In this context, the court states the following first and foremost. In the view of the defendants, a provision of the ECT, such as Article 26, can only be incompatible with Russian law if the Treaty provision concerned is *prohibited* in national law. They believe that there cannot be incompatibility if Russian law does not expressly provide for the treaty provision concerned. The court holds that the defendants' interpretation is too limited. Leaving aside the fact that a linguistic explanation of Article 45 ECT does not yield a basis for such an interpretation, it is also not evident. Given in part the fact that the provisional application finds its legitimacy in the signing (and the sovereignty of the Signatories is at stake in a number of treaty provisions), the provisional application of the arbitral provision contained in Article 26 is also contrary to Russian law if there is no legal basis for such a method of dispute settlement, or – when viewed in a wider perspective – if it does not harmonise with the legal system or is irreconcilable with the starting points and principles that have been laid down in or can be derived from legislation. Whenever the court for the sake of brevity uses "compatibility" of the provisions of the ECT with Russian laws below, the court refers to this interpretation of the term "*not inconsistent*" in Article 45 paragraph 1 ECT.

5.34. It is, rightly, not contested between the parties that the issue of compatibility or incompatibility should be answered according to Russian law. In the Dutch legal system, foreign law is not designated as a fact, but as law. This follows from Section 25 Rv, which stipulates that the court may supplement legal bases of its own motion. It is accepted in the legal system that the law the court must apply pursuant to this section also includes foreign law (see among other cases, *HR* 22 February 2002, ECLI: NL: HR: 2002:AD8197 and more recently *HR* 17

December 2010, ECLI: NL: HR: 2010:BO1979). From this it follows that the court must determine the contents of the relevant Russian laws in these reversal proceedings. While the determination thereof does not take place based on provided evidence, as is evident from the foregoing, it can be determined in part based on the expert's reports provided by the parties. The Russian Federation has taken advantage of the opportunity to provide experts' reports regarding the relevant Russian laws. The reports chiefly concern the February 2006 expert's report of A.A. Kostin (hereinafter: Kostin), which was also submitted in the Arbitration, whose position is described as "*Senior Professor and head of the Private International and Civil Law Department of the Moscow State Institute of International Relations*", and the October 2014 expert's report with annexes of A.V. Asoskov (hereinafter: Asoskov) submitted in these reversal proceedings. The positions of this expert are designated as "*Professor of the International Private Law Department of the Russian School of Private Law and Assistant Professor of the Civil Law Department at M.V. Lomonosov Moscow State University*". In the court's establishment of the contents of Russian law, which first and foremost examines substantive legislation and regulations, these experts' reports are included.

The Law on Foreign Investments

General

5.35. The Tribunal sought the answer to the question whether (the provisional application of) the arbitral provision of Article 26 ECT is contrary to Russian law in two consecutive provisions in the Law on Foreign Investments. This concerns Article 9 paragraph 2 of this act of 1991 and Article 10 of the same act in its 1999 version. Based on these two provisions, the Tribunal arrived at the opinion that disputes between investors and a state of a nature that is relevant to these proceedings may be arbitrated under Russian law (Interim Award under 370).

5.36. In examining the meaning of these two legislative provisions, the court will first discuss the standpoint of the Russian Federation that other Russian laws have never allowed for arbitration for disputes arising from public-law legal relations. In this context, the Russian Federation pointed out provisions from various Russian laws, a number of which were in force prior to the signing of the ECT while others entered into force more recently. This concerns, among other things, Article 1 paragraph 2 of the 1993 International Arbitration Law (expert's report Asoskov, note 7). Herein it is determined that:

"The following kinds of disputes shall be submitted for international commercial arbitration by agreement between the parties: disputes arising from contractual and other civil law relationships arising from the maintenance of foreign trade and other international economic relations, if the commercial enterprise of at least one of the parties is located abroad (...)".

A quotation from the manual "*International Commercial Arbitration*" written by Prof. V.A. Musin and Prof. O.Yu. Skvortsov in 2012 (expert's report Asoskov, note 16) states the following, among other things, about this provision:

"Therefore, if relations between the parties are of a public law nature, then a dispute arising out of such relations cannot be referred to international commercial arbitration."

5.37. In addition, both Asoskov and Kostin listed legislative provisions which make arbitration conditional on the nature of the dispute. Pursuant to Article 21 of the 1992 Arbitrazh Procedure Code, arbitration based on agreement is possible in case of an "*economic dispute*" (expert's report Asoskov, note 9). Article 1 of the 1992 Provisional Regulation on Arbitral Tribunal for Resolving Economic Disputes mentions arbitration of disputes "*arising out of civil law relations*" (expert's report Asoskov, note 10). In Article 23 of the 1995 Arbitrazh Procedure Code

and in Article 4 of the same act in the 2002 version, the option of arbitration is also related to disputes *"that arises out of civil law relations"* (expert's report Asoskov, note 11 and 12). The same applies to Article 11 of the 1995 Russian Civil Code (expert's report Asoskov, note 27) and Article 3 of the 2002 Civil Procedure Code (expert's report Asoskov, note 14).

5.38. Both Asoskov (in sections 23 and 24 of his expert's report) and Kostin (on page 3 of his expert's report) have concluded that public-law disputes cannot be settled by arbitration, referencing various quotations from Russian legal literature. From the Russian literature and jurisprudence stated therein (as mentioned in the expert's report of Asoskov in sections 28-30) it transpires that disputes arising from disputes between unequal parties – also designated as *"the principle of subordination"* – are viewed as public-law disputes, while private-law disputes arise from relations between equal parties. In connection with the latter, the term *"the principle of coordination"* is used. Furthermore, disputes can have a public-law character, also when they arise from contracts, if there is a *"concentration of socially significant public elements"*. This is the case when a public interest, the involvement of public body or the use of budgetary means is concerned (expert's report Asoskov under 34 and the jurisprudence mentioned there).

5.39. Asoskov furthermore called attention to Article 16 of the Russian Civil Code, which provides for the right to damages in cases that involve actions of the state (expert's report Asoskov, note 44):

"Damages caused to an individual or a legal entity as a result of unlawful actions (or failure to act) by State bodies, bodies of local self-government, or officials of these bodies, including the adoption of an act by a State body of local self-government that is inconsistent with a law or other regulatory act, shall be compensated by the Russian Federation, the respective Russian Federation subject, or the municipal formation."

5.40. The public-law nature of unlawful acts on which, in the sense of this Article 16, claims for damages can be based, entails according to the expert's report of Asoskov and the literature contained therein (in 64-67) that such claims for compensation, even though they are governed by civil law, cannot be submitted in arbitral proceedings. After all, an assessment of such a claim inevitably entails an assessment of the underlying exercise of public-law authorities of Russian state bodies. From the referenced literature it also becomes apparent that a claim for compensation based on unlawful acts of state bodies in typical private-law relations – which do not involve the exercise of public-law authorities – can be subjected to arbitration.

5.41. The court follows the analysis in the experts' reports based on the legal provisions and the references to the Russian doctrine and jurisprudence cited in the two experts' reports. Incidentally, the defendants did not contest this interpretation of the legal provisions discussed above. In this context, they limited their defence to the argument that the legal provisions solely relate to arbitration within the Russian Federation's national legal system. Even if their defence were correct – which in any case does not hold for the 1993 International Arbitration Law van 1993, which explicitly concerns cases in which one of the parties is not established in the Russian Federation – this does not alter the fact that the Russian legislation mentioned here limits the option of arbitration to civil-law disputes. Moreover, the court does not agree with the defendants' argument that the fact that public-law disputes can only be brought before the national court is in no way contrary to the fact that the Russian Federation has committed at an international level to compensating foreign investors for damages ensuing from acts of the State that are contrary to international rules (statement of defence, under 256). In their statement, the defendants ignore that incompatibility with Russian law can also exist if that law does not provide for the option of arbitration as laid down in Article 26 ECT. The legislative provisions discussed above in any case do not provide for the option of arbitration for disputes arising from a legal relationship between the Russian Federation and (foreign) investors, in which the public-

law nature of the Russian Federation's actions in that relationship is predominant and in which an assessment of the exercise of public-law authorities by Russian Federation state bodies is concerned. In the opinion of the court, it is beyond doubt that such a dispute exists in the current cases. The conduct for which the defendants reproach the Russian Federation cannot be designated as acts carried out by the Russian Federation as an equal party or private-law party. Moreover, the Tribunal did not derive its jurisdiction from these legal provisions.

5.42. The court will examine below whether Article 9 paragraph 2 and Article 10 of the Law on Foreign Investments, in the 1991 and 1999 version, respectively, and which the Tribunal deemed decisive for determining its jurisdiction, allow a farther-reaching option for arbitration than can be derived from the Russian laws discussed above. It should be noted – by way of introduction – that Article 9 was in force at the time of the signing of the ECT, but not when the Arbitration commenced, while Article 10 entered into force after the signing of the ECT and was in force at the time the Arbitration commenced. However, the court will not take a position on whether both provisions form part of Russian law referred to in Article 26 ECT and will examine, like the Tribunal and parties also did, whether the competence of the Tribunal can be derived from one of the two provisions. Here, too, the starting point applies that the court must determine the meaning of the provisions on its own.

Article 9 The Law on Foreign Investments 1991

5.43. The following applies concerning Article 9 of the Law on Foreign Investments 1991. The Russian Federation has rightly taken the position that this article cannot be read in isolation, but must be viewed in conjunction with Article 43 of the Fundamentals of Legislation. After all, Article 1 of the Fundamentals of Legislation (*"The laws of the republics shall regulate in accordance with these Fundamentals the relations arising in connection with foreign investments in the republics' territories, subject to specific features of their economic operations and investment policy"*) expresses that the other acts which provide for legal relationships involving foreign investments must be in accordance with the fundamentals. The phrase after the last comma of this provision does not necessitate a different, narrower, interpretation, contrary to the defence of the defendants. It is also irrelevant for this assessment that, as assumed by the defendants based on the remarks of Asoskov (expert's report in note 67), the Fundamentals of Legislation were no longer in force at the time of the signing of the ECT. After all, it is not disputed whether or not the Fundamentals of Legislation were in force at the time the Law on Foreign Investments 1991 was drafted. In fact: both acts entered into force at virtually the same time. In this sense, the Fundamentals of Legislation could have served as a basis for the contents of the 1991 act.

5.44. The phrasing of Article 43 of the Fundamentals of Legislation also indicate the connection with Article 9 of the Law on Foreign Investments 1991. For clarity's sake, the two provisions are shown again below. Article 43 of the Fundamentals of Legislation reads as follows:

Paragraph 1: *"Disputes between foreign investors and the State are subject to consideration in the USSR in courts, unless otherwise provided by international treaties of the USSR."*

Paragraph 2: *"Disputes of foreign investors and enterprises with foreign investments with Soviet State bodies acting as a party to relationships regulated by civil legislation, enterprises, social organizations and other Soviet legal entities, disputes between participants of the enterprise with foreign investments and the enterprise itself are subject to consideration in the USSR in courts or, upon agreement of the parties, in arbitration proceedings, inter alia, abroad, and in cases provided by legislative acts of the Union of SSR and the republics - in arbitrazh courts, economic courts and others."*

5.45. When reading the two paragraphs, it is clear that Article 43 makes a distinction between two types of dispute. Following the words of expert Asoskov, the court holds that the first paragraph concerns investment disputes "*within the strict meaning of this term*". It furthermore concerns disputes arising from the exercise of public-law authorities, or sovereign government actions (expert's report Asoskov, under 73). This dispute type must be brought before a Russian court *unless* other proceedings are provided for in an international treaty of the Russian Federation. The second paragraph of Article 43 concerns investment disputes between various entities, including between companies and between companies and Russian state bodies, in which the latter act in the capacity of a private party ("*acting as a party to relationships regulated by civil legislation*"). This type of dispute must – in so far as is relevant – be adjudicated by a Russian court *or* by arbitration if provisions have been made for arbitration in an agreement. In short, concerning the first type of dispute, Article 43 paragraph 1 of the Fundamentals of Legislation appoints the Russian court as the competent court and stipulates that arbitration is only possible when there is a treaty. The second paragraph contains an explicit provision for arbitration besides regular proceedings if the parties have agreed to that.

5.46. Article 9 of the Law on Foreign Investments 1991 also makes a distinction between two types of dispute, to which different dispute resolution regimes apply.

Paragraph 1 stipulates: "*Investment disputes, including disputes over the amount, conditions and procedure of the payment of compensation, shall be resolved by the Supreme Court of the RSFSR or the Supreme Arbitrazh Court of the RSFSR, unless another procedure is established by an international treaty in force in the territory of the RSFSR.*"

Paragraph 2 stipulates: "*Disputes of foreign investors and enterprises with foreign investments against RSFSR State bodies, disputes between investors and enterprises with foreign investments involving matters relating to their operations, as well as disputes between participants of an enterprise with foreign investments and the enterprise itself shall be resolved by the RSFSR courts, or, upon agreement of the parties, by an arbitral tribunal, or, in cases specified by the laws, by authorities authorized to consider economic disputes.*"

5.47. Although the wording of Article 9 is not literally the same as that of Article 43 of the Fundamentals of Legislation, a comparison of both provisions appears to reveal that Article 9 is based on the same principles as Article 43. Article 9 paragraph 2 also applies to both disputes between foreign investors and state bodies and disputes between foreign investors and other companies – disputes in the latter situation being civil-law in nature by definition – while, as in Article 43 paragraph 2, arbitration is possible besides regular proceedings if the parties have agreed to that ("*or, upon agreement by the parties*"). Unlike in Article 43 paragraph 2, Article 9 paragraph 2 does not contain the explicit statement that the paragraph exclusively provides for cases in which the government acts in the capacity of a private party, but that scope of application appears to be implied, in light of the disputes and the context of the disputes described in Article 9 paragraph 1. For its part, Article 9 paragraph 1 appears to be in line with Article 43 paragraph 1 and explicitly designates the regular Russian courts as the competent authorities, with the added remark that this principle can only be deviated from by an international treaty ("*unless another procedure is established by an international treaty in force*").

5.48. The fact that Article 9 envisages a similar distinction as Article 43 Fundamentals of Legislation is supported by the expert's report of Asoskov (sections 75 et seq.) and the Russian doctrine cited by him. Article 9 paragraph 1, which according to Asoskov concerns (civil-law) disputes arising from sovereign government actions which mainly concern expropriation of foreign investments, is often viewed in conjunction with Article 7 paragraph 3 of the Law on Foreign Investments 1991, which stipulates "*Decisions of governmental bodies on expropriation of*

foreign investments may be contested in the RSFSR courts." This provision indicates that public-law disputes regarding expropriation can only be adjudicated by the Russian courts. To this extent, the court shares the view of the Russian Federation. The defendants otherwise not explained argument that the words "*may be appealed against*" could indicate an option to submit such disputes to the Russian court but that another, alternative course of justice is not excluded, is not supported by the text of Article 7 paragraph 3. According to Asoskov, a claim based on Article 7 paragraph 3 can result in proceedings in the sense of Article 9 paragraph 1, in which compensation can be claimed for damages arising from expropriation measures. Asoskov confirms that on the opposite end of the disputes described above that ensue from public-law legal relations are the investment disputes ensuing from civil-law legal relations contained in Article 9 paragraph 2.

5.49. In the quotation provided by Asoskov of B.N. Toporin in *Russian Law and Foreign Investments*, page 30 (1995), this distinction is acknowledged and described as follows (expert's report Asoskov, 78):

"[Article 9] of the Law on Foreign Investments in the RSFSR divided disputes with the participation of foreign investors into two groups. One group comprised investment disputes as such, including the disputes on the issue of the amount, terms and procedure of payment of compensation in case of nationalization or confiscation. (...) The other group comprised disputes related to economic activity of the enterprises with foreign investments."

5.50. The description of the investment disputes in Article 9 paragraph 1 is in line with the writings of R. Nagapetyanys in *Treaties for the Promotion and Reciprocal of Investments/Foreign Trade*, no. 5, page 14 (1991) on the practice of investment treaties at the time of the drafting of the law of 1991 (expert's report Asoskov, note 54):

"In treaties for the protection of investments that the USSR concludes with foreign States, the USSR gives its consent to the consideration [of investment disputes] in international arbitral tribunals. The scope of such disputes is limited to civil law issues only (primarily, determination of the amount of compensation and the procedure for its payment in the event of nationalization of investments and transfer of profits and other payments due to the investor)."

5.51. Based on the considerations stated here, the court concludes that Article 9 paragraph 1 concerns (civil-law) disputes arising from legal relations between foreign investors and the Russian Federation in which the public-law nature predominates. The scope of application of Article 9 paragraph 2, on the other hand, is limited to investment disputes of a predominantly civil-law nature. This is in line with the distinction made by Russian jurisprudence and doctrine, as described in section 5.36 et seq. in this judgment. The Tribunal did not acknowledge this distinction. Instead, it limited itself to the representation of Article 9 paragraph 2 in the Interim Awards and subsequently drew the conclusion that disputes between an investor and a state can be settled by arbitration according to Russian law. The court deems this opinion incorrect. As has been considered above, the Arbitration is connected to the previously described mode of action of the Russian Federation, which in the view of the defendants constitutes a breach of Article 13 (and Article 10) ECT. The Arbitration concerned a dispute that had arisen from a public-law legal relationship and that centred on compensation for damage caused by the actions of the government. This finding means that the option of arbitration is not determined by Article 9 paragraph 2, as was the reasoning of the Tribunal, but by the first paragraph of Article 9. In view of the fact that Article 9 paragraph 1 favours proceedings before the Russian court for civil-law disputes arising from public-law legal relationships and only provides for other modes of dispute resolution if a treaty provides for it, this provision does not offer an independent legal basis for arbitration between the defendants and the Russian Federation.

Article 10 The Law on Foreign Investments 1999

5.52. The Tribunal furthermore based its jurisdiction on Article 10 of the Law on Foreign Investments 1999. This article, which does not distinguish between various categories of disputes, reads as follows:

"A dispute of a foreign investor arising in connection with its investments and business activity conducted in the territory of the Russian Federation shall be resolved in accordance with international treaties of the Russian Federation and federal laws in courts, arbitrazh courts or through international arbitration (arbitral tribunal)."

5.53. The Tribunal did not devote a separate consideration to the meaning of Article 10. Here, too, the Tribunal limited itself to the opinion that based on Article 10 disputes between an investor and a state, such as is the case in the current proceedings, can be settled by arbitration. The court does not share this opinion either, for the following reasons.

5.54. The expert's report of Asoskov and the quotations he provided clearly show that in Russian legal literature there is a distinction between three types of legal provision. S.S. Alexeev in *General Theory of Law* (1982) gave the following description (expert's report Asoskov, 84):

"Elements of a legal provision can be set out using three techniques: direct, referential, and blanket. Depending on the above, legal provisions can be distinguished accordingly: direct, referential and blanket. In the case of a direct provision, all elements of the provision are directly set out in an article of the regulatory act. In the case of a referential provision, certain elements of the provision are not set out directly in the article; the article itself provides a reference to another provision containing the required instructions. This technique is used to establish connections between parts of a particular set of rules, and in order to avoid repetitions. In the case of a blanket provision, certain elements of the provision are not set out directly, and its missing elements are not compensated for by some clearly referenced provision, but rather by rules of a certain kind that can evolve with time. In other words, the provision contains an 'empty blank,' a reference to a certain type of rule."

5.55. A similar classification is described by N.I. Matuzov and A.V. Malko in *Theory of State and Law: Treatise* (2004). They have described the "blanket mode" as the "mode, where the article provides for a reference not to a specific article, but to a set of other regulatory acts, rules (...)." (expert's report Asoskov, 85). M.N. Marchenko has also given a similar description (expert's report Asoskov, 86).

5.56. Article 10 is characterised by a general reference to both treaties and federal laws that could create authorities for regular courts to settle disputes involving foreign investors, but also for "arbitrazh tribunals" and for international arbitration between foreign investors and the Russian state. Article 10 therefore does not create a direct legal basis for arbitration of disputes over obligations of Part III of the ECT, but rather makes the option of arbitration conditional on the existence of a provision in treaties and federal laws to that effect. The court agrees with the Russian Federation that the nature of Article 10 provides for a "blanket provision" or a mutatis mutandis clause ("schakelbepaling" in Dutch). This interpretation of Article 10 is in line with the perceptions in Russian doctrine mentioned by Asoskov. I.Z. Farkhudinov, A.A. Danelian and M.Sh. Magomedov in *National Regulation of Foreign Investments in Russia* (2013) establish that:

"However, unfortunately, many of its provisions [provisions of the 1999 law] are of a declaratory or blanket nature only and do not add anything to the regulatory treatment of foreign investments. Instead of provisions that are empty in substance, the Law should include

rules that would provide efficient protection for foreign investments” (expert’s report Asoskov, 91).

- 5.57. More specifically, these authors noted in relation to Article 10: *“In substance, it makes the investor’s right to resolution of its dispute conditional upon the existence of an international treaty or relevant provision in a federal law.”* (expert’s report Asoskov, 92). M.M. Boguslavksy describes Article 10 as being *“too generic”* (*Legal Regulation of Foreign Trade, 2001, expert’s report Asoskov, 93*), while S. Ripinsky deduces from the 1999 Law that *“[t]he Law does not provide for investor-State arbitration”* (*Commentaries on Selected Model Investment Treaties, Chapter 14: Russia, 2013, summons under 230, note 274*).
- 5.58. Based on the foregoing, the court arrives at the opinion that also Article 10 of the Law on Foreign Investments 1999 does not provide a separate legal base for the arbitration of disputes between an investor and a state in international arbitral proceedings, as provided for in Article 26 ECT. Therefore, the court does not follow the Tribunal’s opinion that such disputes, and therefore also the current dispute, can be arbitrated based on Russian law.

The Explanatory Memorandum to the ratification act

- 5.59. The court’s interpretation of Articles 9 and 10 of the Law on Foreign Investments, in the respective versions, is not altered by the remarks made by the Russian government in 1996 in the explanatory memorandum for the intended ratification of the ECT. According to the defendants, great significance should be attached to this explanatory memorandum for the explanation of these legal provisions – and in this they follow the Tribunal – and have mainly focused on the following three passages:

“The provisions of the ECT are consistent with Russian legislation.”

“The legal regime of foreign investments envisaged under the ECT is consistent with the provisions of the existing Law [...] on Foreign Investment in [Russia], as well as with the amended version of the Law currently being discussed in the State Duma”.

[The regime of the ECT for foreign investments] *“does not require the acknowledgement of any concessions or the adoption of any amendments to the abovementioned Law”.*

- 5.60. It is the court’s opinion that in assessing the meaning of the explanatory memorandum the Tribunal insufficiently recognised that this memorandum originated from the executive and was primarily aimed at prompting the Duma, as part of the legislature, to ratify the ECT. Since the ECT was never ratified, the opinion of the executive (the government) cannot be ascribed to the legislature and the government’s standpoint therefore does not have independent meaning. This observation alone necessitates an assessment of (the relevance of) the explanatory memorandum from the government with the utmost restraint. This is all the more relevant since the explanatory memorandum only discusses the compatibility of the ECT with Russian laws in general terms. For instance, the arbitral provision of Article 26 ECT is not explicitly stated in the explanatory memorandum. Furthermore, the court follows the standpoint taken by the Russian Federation on this aspect that the remark of the government that (the regime of) the ECT is in line with Russian law and *“does not require the acknowledgement of any concessions or the adoption of any amendments”* of Russian legislation, should be viewed against the backdrop of the intended ratification. Whether or not the ratification of the ECT and more specifically of Article 26 would require and adjustment of Russian legislation, is a wholly different question

than the question whether the provisional application of this provision is in accordance with Russian law. The latter question is not answered in the explanatory memorandum.

5.61. For the same reason, concerning the interpretation of Articles 9 and 10 of the Law on Foreign Investments, no significance should be attached to the remarks, mentioned by the Tribunal, of Professor Yershov who was a member of the Russian delegation during the ECT negotiations. Incidentally, like the explanatory memorandum, he also concluded in very general terms only that *"under the ECT, Russia grants foreign investors an energy investment regime acceptable to them that does not require any concessions on Russia's part beyond the framework of current law"*. In this context, significance should also not be attached to a statement by the expert of the Russian Federation, Professor Avakiyan who, according to the Tribunal had confirmed during his witness hearing to agree with the contents of the government's explanatory memorandum. Aside from the fact that in the transcript of 17 November 2008 the court was unable to find such a statement, Avakiyan stressed that the explanatory memorandum reflects the viewpoint of the Russian government and that only the Duma can decide whether Russian legislation needs to be adjusted.

5.62. The parliamentary history of a significant number of bilateral investment agreements the Russian Federation has concluded and ratified, as provided by the Russian Federation, rather supports the view that the arbitration of disputes, such as the ones in these proceedings, is not provided for in Russian law. The list concerns a total of 57 ratified investment treaties – according to the Russian Federation's undisputed assertion. Among other things, the Russian Federation pointed out (summons, 232) the parliamentary history concerning the ratification of the *"Agreement between the Government of the Russian Federation and the Government of the Republic of Argentina on Encouragement and Reciprocal of Investments"*, which states among other things:

"Considering that the Agreement contains provisions different from those provided by the Russian legislation, it is subject to ratification in accordance with clause 1a, 15 of the Federal Law (...) 'on International Treaties of the Russian Federation'."

"The key issues by virtue of which the above Agreement is subject to ratification are as follows (...)"

"the settlement in an international arbitration court of investment disputes between one Party and an investor of the Other Party, as well as disputes between the Parties concerning the interpretation and application of the Agreement (...)"

"the Federal Law No. 1545-1 of July 4, 1991 'On Foreign Investment in the RSFRS' does not provide for a mechanism of settlement of such type of dispute by international arbitration". (explanatory note of 25 October 1999)

5.63. The explanatory note of 8 April 2000 to the proposal to ratify the bilateral investment agreement between the Russian Federation and the Republic of South Africa also states that *"the Agreement contains provisions different from those set forth in the Russian legislation"* and therefore *"[is] subject to ratification"* and that the Law on Foreign Investments 1991 does not contain a *"mechanism of consideration"* for the arbitration of investment disputes between a foreign investor and the State. In the explanatory note to the ratification of the bilateral investment treaty between the Russian Federation and Japan of 29 February 2000, a similar passage can be found on the Law on Foreign Investments 1999 (summons, 234).

5.64. These explanatory notes support the opinion that the Law on Foreign Investments in the versions of 1991 and 1999 does not contain a legal provision for arbitration in cases as referred

to in Article 26 ECT, such as the current case. The court rejects the interpretation defended by the defendants which holds that from these explanatory notes it can only be deduced that the Law on Foreign Investments does not have a specific mechanism for arbitration between foreign investors and the State in the sense that the law does not include specific rules and a procedure that must be adhered to. This viewpoint proceeds from a too restrictive reading of the explanatory notes. The provided parliamentary notes can only be taken to mean that the versions of the Law on Foreign Investments of 1991 and 1999 do not contain any type of legal basis for investment arbitrations such as the ones in these proceedings. If arbitration had been permitted under this law, the arbitration provisions in the investment treaties concluded by the Russian Federation would not have been designated as "*provisions different from those provided by the Russian legislation*" and ratification would not have been deemed necessary. The fact that possibly not all explanatory notes to the ratified investment treaties discuss the differences between the arbitration clauses contained in the treaties and Russian law, as also argued by the defendants, does not alter the clear wording of the other explanatory notes.

Interim statement on Article 26 ECT

5.65. It can be concluded from the foregoing that the arbitration clause of Article 26 ECT does not have a legal basis in Russian law and is incompatible with the starting points laid down in that law.

Bound by virtue of signature or ratification?

General

5.66. The foregoing does not provide a final answer to the question whether Article 26 ECT could be applied provisionally based on its signing, or that the provisional application required the approval of the Russian legislature. The Tribunal appears to have acknowledged this issue by asking in section 379 of the Interim Awards whether signing a treaty containing a provisional application clause is sufficient to determine that the Russian Federation consented to the international arbitration of disputes arising from the ECT. The Tribunal held that it was. Essentially, the Tribunal held that Articles 2 and 6 FLIT imply that by signing the ECT the Russian Federation and the other Signatories consented to the provisional binding force of the Treaty, albeit provisionally and notwithstanding Article 39 ECT, and therefore also to international arbitration as laid down in Article 26 ECT (Interim Awards, 382). In arriving at this opinion, the Tribunal furthermore attached significance to Article 11 FLIT, from which it follows that the executive determines whether to sign a treaty. The Tribunal also referred to its prior opinion on the question whether the principle of provisional application is permitted under the legislation of the Russian Federation, and in this context referred to Article 23 paragraph 1 FLIT as the basis for that provisional application (383). The Tribunal concluded that in the opinion of the parties to the ECT, there must be circumstances based on which a state for whom the ECT "has not entered into effect" nonetheless has still consented to being bound by the ECT's conditions (385). The court will discuss this opinion below and will include the provisions of the FLIT, even though it entered into force on 21 July 1995, six months after Davydov signed the ECT – except Article 23, which entered into force retroactively by Presidential Instruction.

Articles 2, 6 and 23 FLIT

5.67. The object of the FLIT is evident from Article 1 paragraph 1 FLIT:

"The present Federal Law determines the procedure for the conclusion, fulfillment, and termination of international treaties of the Russian Federation. International treaties of the Russian Federation shall be concluded, fulfilled, and terminated in accordance with generally-

recognized principles and norms of international law, the provisions of the treaty itself, the Constitution of the Russian Federation, and the present Federal Law.”

5.68. Articles 2 and 6 FLIT, which have also been shown above, read as follows (as was provided by the Russian Federation in a Dutch translation), in so far as relevant:

Article 2 Use of terms

For the purposes of this Federal Law:

[. . .]

b) "ratification," "approval," "acceptance," and "accession" mean in each case a form whereby the Russian Federation expresses its consent to be bound by an international treaty;

c) "signature" means either a stage in the conclusion of a treaty, or a form of expressing consent of the Russian Federation to be bound by an international treaty, if the treaty provides that signature shall have that effect, or it is otherwise established that the Russian Federation and the other negotiating States were agreed that signature should have that effect, or the intention of the Russian Federation to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation;

(. . .)

Article 6 Expression of consent of the Russian Federation to be bound by an international treaty

1. Consent of the Russian Federation to be bound by an international treaty may be expressed by means of:

signature of the treaty;

exchange of the documents constituting the treaty;

ratification of the treaty;

approval of the treaty;

acceptance of the treaty;

accession to the treaty; or

any other means of expressing consent agreed by the contracting parties.

2. Decisions to grant consent for the Russian Federation to be bound by international treaties shall be made by state bodies of the Russian Federation in accordance with their competence as established by the Constitution of the Russian Federation, this Federal Law and other legislative acts of the Russian Federation.

5.69. Article 6 FLIT is based on Article 11 VCLT, which describes the various means in which a state can express consent to be bound by a treaty. Article 11 VCLT, and consequently also Article 6 FLIT, lists the means of signature, ratification, acceptance, approval and accession as well as other means. These means of expressing consent are detailed in Articles 12 and 14 VCLT. Article 12 VCLT concerns the means of signature and dictates that a state's expression of consent to be bound by a treaty is expressed by the signature of its representative, if the treaty provides that signature has that effect. Following from this, Article 2 under c FLIT expressly determines that the signing of a treaty can only be interpreted as consent by the Russian Federation to be bound by a treaty if *"the treaty provides that signature shall have that effect"*. These provisions leave it to the drafters of a treaty to establish which consequences a signature

will have. Article 14 FLIT also determines that the consent of a state to be bound by a treaty is expressed by ratification, if the treaty provides that ratification has that effect.

- 5.70. Article 23 paragraph 1 FLIT is also derived from a provision of the VCLT, namely Article 25. Under these provisions, a treaty or parts of a treaty can be provisionally applied pending its entry into force, if the treaty so provides.
- 5.71. Other than manifestly ruled by the Tribunal, neither the above provisions of the FLIT nor those of the VCLT provide an independent – meaning, separate from the text of the ECT – basis for the unlimited provisional binding force of the Treaty. Both Article 2 under c FLIT (and Article 12 VCLT) and Article 23 paragraph 1 FLIT (and Article 25 VCLT) explicitly refer to the concrete text of the treaty for the interpretation of the meaning of signing a treaty and for the possibility – and therefore also scope – of provisional application. In other words: whether or not a signatory is bound by a treaty based on provisional application is not determined by the general provisions of the FLIT and VCLT, but by the treaty itself. For the same reason, Article 11 FLIT, which exclusively concerns the body authorised to sign, does not provide an independent ground for the provisional application of a treaty provision.

Article 39 ECT

- 5.72. Article 39 ECT designates – in accordance with the terminology of Article 14 VCLT and Article 6 FLIT – ratification, acceptance or approval as the means through which the Treaty can enter into force. This means that it cannot enter into force by signature, which is not in dispute. In light of its considerations in 382 and 385 of the Interim Awards, it is clear that also for the Tribunal the starting point was that Davydov's signature could not replace the ratification required under Article 39 ECT and only related to the provisional application of the ECT. However, by attributing to the signing of the ECT the effect of unconditional consent of the Russian Federation to be provisionally bound by the Treaty and therefore also to Article 26 ECT, the Tribunal failed to realise that the scope of the signing was expressly restricted by the Limitation Clause in Article 45. As has been considered above, from Article 45 ECT it follows, in the interpretation of Article 45 ECT which the court considers correct, that the possibility of provisional application is focused on and depends on the compatibility of separate treaty provisions with the national law of a Signatory. From the treaty text it thus follows that by signing the ECT, the Russian Federation was provisionally bound by the arbitration clause of Article 26, in so far as this clause could be reconciled with Russian law. The mentioned general provisions of the FLIT therefore do not provide cause for the Tribunal's opinion. In its interpretation of these general provisions, the Tribunal essentially deprived all meaning of the Limitation Clause and the requirement of ratification laid down in Article 39 ECT. Upon closer inspection, the Tribunal's opinion implies that each treaty provision, even if the provisional application thereof is incompatible with national laws and the constitution, is assigned full force. This view can only be followed if the Limitation Clause is considered as an "all or nothing" provision, but as has been explained above, the court does not follow this interpretation.

Provisional conclusion on the binding force of signature and ratification

- 5.73. With its opinion, the Tribunal failed to answer the question formulated in 5.66 within the correct assessment framework. The question whether the arbitration clause could be applied provisionally without ratification must be primarily answered, as the Russian Federation rightly argued, based on the provisions of the 1993 Russian Constitution. In this context, the Russian Federation, in brief, argued that the principle of separation of powers enshrined therein entails that the Parliament of the Russian Federation (the Duma and the Council of the Federation jointly, hereinafter the Federal Parliament) must ratify treaties that supplement or amend Russian law by adopting a federal law. According to the Russian Federation, the ECT, and

particularly Article 26 ECT, warrants such an approach, and this provision could not be provisionally applied without ratification.

The principle of separation of powers

General

5.74. The Tribunal did not formulate a specific opinion – and neither did the defendants in these reversal proceedings – on the principle of the separation of powers and its relevance to the option of provisional application of Article 26 ECT. They only dealt with the meaning of Article 15 paragraph 4 of the Constitution, about which it should be noted that in connection with this the Tribunal only examined the question whether the principle of provisional application is compatible with Russian legislation – a question which follows on from its interpretation of Article 45 ECT. In determining the scope and relevance of the principle of the separation of powers the court – like the parties – will base its assessment on Russian legislation, as laid down in the Constitution and as it extends to other legislation. This will also involve a discussion of Article 15 paragraph 4 of the Constitution.

The Russian Constitution

5.75. The following provisions in the Constitution are relevant in this case. Article 10 of the Constitution stipulates the principle of the separation of powers, and expresses that the legislature, executive and judiciary are each independent:

"State power in the Russian Federation shall be exercised on the basis of its division into legislative, executive and judicial. The legislative, executive and judicial authorities shall be independent."

5.76. The supremacy of the Constitution over federal laws is derived from Article 15 paragraph 1 of the Constitution:

"The Constitution of the Russian Federation shall have the supreme juridical force, direct application (...). Laws and other legal acts adopted in the Russian Federation shall not contradict the Constitution of the Russian Federation."

5.77. Article 15 paragraph 4 of the Constitution contains the following rule:

"The universally-recognised norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation establishes other rules than those envisaged by law, the rules of the international agreement shall be applied."

5.78. Article 94 of the Constitution determines that the Federal Parliament is the legislative body of the Russian Federation. Pursuant to Article 106 preamble and under d of the Constitution, federal laws concerning the "*ratification and denunciation of international treaties and agreements of the Russian Federation*" must be enacted by the Federal Parliament.

5.79. The Russian Federation submitted experts' reports in the Arbitration in support of its standpoint. The defendants also submitted experts' reports in the arbitral proceedings. Like it did in setting out Russian substantive law, the court will make use of the experts' reports submitted by the parties as well as of the commentaries in legal handbooks they referred to in order to determine the contents of the Constitution and the associated legislation. The Russian Federation submitted the following experts' reports, as well as other reports:

- Dr Marat V. Baglay, designated as *Doctor of law, Professor of constitutional law and former judge at the Constitutional Court of the Russian Federation* (Expert Opinion On Provisional Application of International Treaties according to the Constitution of the Russian Federation, 26 February 2006);
- Prof. Suren A. Avakian, designated as *Doctor of Law, Head of the Department of Constitutional and Municipal Law of the Faculty of Law of the Moscow State University of M.V. Lomonosov* (Expert Opinion on the constitutional legal aspects of the conclusion and application of international treaties of the Russian Federation, 21 February 2006 and Expert Opinion of 29 June 2006);
- A. Nussberger, Professor at the University of Cologne and Director of the Institute of Eastern Law (Opinion Concerning the Provisional Application of the Energy Charter Treaty by the Russian Federation of 17 January 2007).

The defendants' main expert's report is the 29 June 2006 opinion of V. Gladyshev, lawyer in Moscow and former employee of the Russian Ministry of Foreign Affairs. Since none of the other experts' reports submitted by the defendants have specific relevance to Russian constitutional law, the court will disregard these opinions.

5.80. Various experts have opined on the principle of the separation of powers and the attendant implications. Baglay wrote on this subject:

"The Russian Parliament is the only body possessing legislative power in the Russian Federation, no other federal state body is entitled to adopt laws or other statutory acts having the force of law. Ratification of international treaties of the Russian Federation also falls within the exclusive competence of the Parliament. The Constitution does not authorize other branches of power to give consent in the name of the Russian Federation to be bound by an international treaty, if the treaty is subject to ratification." (Baglay opinion, page 3)

5.81. Avakian noted that the starting point of the separation of powers entails that each international treaty that annuls, modifies or adds any provisions to Russian legislation must be ratified before it can be applied:

"The principle of separation of powers as it applies to international treaties means the following: some bodies of state power, in accordance with the interest of the state, are vested with the authority to conduct negotiations and to sign treaties, while other bodies of state power, in accordance with the interest of the state, are vested with the authority to assess the signed treaties and to put them in effect on the basis of constitutional requirements. Any treaty that annuls, modifies or adds any provisions to the Russian legislation must, under the principle of separation of powers, undergo the process of ratification in order to become effective." (Avakian opinion, page 4)

Article 86 of the Constitution determines that the president of the Russian Federation is authorised to conduct negotiations and sign international treaties. Avakian holds that the Russian government also has this authority, under Article 114 of the Constitution, in so far as that authority is laid down in a federal law. Avakian has made the following comment about this:

"However, neither the President of the Russian Federation, nor the Government of the Russian Federation has the right to make a final determination in respect of an international treaty of a legislative nature. The process with respect to such treaties also involves the legislative power of the Russian Federation - The Federal Assembly".

He refers to the ratification procedure under Articles 105 and 106 of the Constitution (Avakian opinion, page 6).

5.82. Nussberger also mentioned the authorities of the president under Article 86 of the Constitution regarding negotiations about and signature of international treaties. However, she pointed out that

“the roles of the Duma and the Council of the Federation, however, remain essential to international treaties requiring ratification. The Duma adopts a law on the ratification of a treaty if ratification is necessary.” (Nussberger opinion, page 18)

5.83. The Russian Federation also referenced the Russian commentators who agree with the opinion that the Russian Constitution assigns exclusive authority to the Federal Parliament to approve of the binding force of treaties (statement of reply, 141 and sources in the note under 238).

5.84. The cited experts and commentators support the standpoint of the Russian Federation that the Federal Parliament plays a vital role in the constitutional system in effectuating international treaties that deviate from or supplement Russian legislation. The court follows this standpoint. The approval of the binding force of international treaties— especially if a treaty deviates from or adds new provisions to national legislation – cannot be viewed as anything other than the creation of new legislation. Following from this and based on the principle of the separation of powers, the authority to create new legislation is exclusively accorded to the legislature.

5.85. In this context, it should be noted that, in accordance with and resulting from the constitutional principle of the separation of powers, Article 15 paragraph 1 FLIT – which, as has been stated, entered into force shortly after the ECT was signed – stipulates that certain treaties, including *“international treaties whose implementation requires amendment of existing legislation or enactment of new federal laws, or that set out rules different from those provided for by law”*, are subject to ratification. Based on the second paragraph, the ratification requirement also applies *“if the parties have agreed to subsequent ratification when concluding the international treaty”*. Although the former Soviet Union had a different state system than the one that was introduced in 1993, Article 12 of the predecessor of the FLIT, the Law of the USSR of 6 July 1978 *“on the Procedure for Conclusion, Performance, and Denunciation of International Treaties of the USSR”*, contained a similar ratification requirement as Article 15 FLIT. That requirement applied, among other things, to *“treaties providing for rules different from those contained in the USSR legislative acts”* as well as to *“international treaties of the USSR (...) where the contracting parties have agreed on subsequent ratification when concluding the treaty”*.

5.86. With respect to the meaning of Article 15 paragraph 1 FLIT, the comment of D.A. Shilyantsev in *Commentary to the Federal law on international treaties of the Russian Federation* (2006) is worth noting (also contained in section 141 of the statement of reply):

“(...) the consent of the Russian Federation to be bound by an international treaty containing rules different from those provided for by law may be expressed only in the form of a federal law. This rule serves as a guarantee of the normal functioning of the separation of powers principle, because neither the President of the Russian Federation, nor the Government of the Russian Federation, much less a federal agency, is authorized to take a decision on the consent of the Russian Federation to be bound by an international treaty establishing rules different from those provided for by law, or implementation of which requires amendment to existing or adaptation of new federal laws.”

5.87. The principle of the separation of powers and the ensuing requirement of approval by the Russian Parliament of treaties is also reflected in Article 15 paragraph 4 of the Constitution. Under this provision, standards of international law and treaties form part of national law. If a treaty contains rules that deviate from national law, the treaty takes precedence. Whereas this

provision mainly comprises a conflict rule and does not primarily answer the question whether an arbitration clause, such as the one contained in Article 26 ECT, requires ratification, the experts of the Russian Federation emphasise the importance of the Federal Parliament's legislative authorities in interpreting this provision. According to Baglay and Avakiyan, for international treaties to be incorporated in the Russian legal system under Article 15 paragraph 4 of the Constitution, they first must be ratified. Baglay's opinion is as follows:

"It follows that international treaties can be an integral part of the Russian legal system and have priority over federal laws only after duly becoming effective. International treaties that are not subject to ratification shall have no priority over the federal law. Otherwise in case of a conflict an international treaty not approved by the Parliament would have had priority over federal laws." (Baglay opinion, page 2)

5.88. Avakiyan wrote the following on this subject:

"The rules referred to above are important because they contain a profound constitutional logic: if international treaties become an integral part of Russia's legal system (Article 15.4 of the Constitution), it is essential to protect the integrity of this system, and to achieve this, it is necessary to ensure that it is amended and supplemented by the joint integral will of all bodies of the state within the system of separation of powers in the Russian Federation." (Avakiyan opinion, page 7)

5.89. Gladyshev, the experts on whom the defendants rely, is the only expert with a deviating opinion on Article 15 paragraph 4 of the Constitution:

"All treaties which are internationally binding on the Russian Federation enjoy, by virtue of Article 15(4) of the Russian Constitution, absolute and unconditional precedence over domestic Russian laws." (Gladyshev opinion, page 6)

(...)

"Importantly, contemporary Russian authors clearly have taken the position that Article 15(4) of the Russian Constitution extends not only to ratified treaties, but to all other treaties applied by the Russian Federation." (Gladyshev opinion, page 17)

5.90. Nussberger refuted Gladyshev's standpoint. Although she acknowledged that *"Article 15(4) does not explicitly specify the conditions under which international treaties prevail over domestic law"* (Nussberger opinion, page 29), she also pointed out that most Russian legal experts argue that based on Article 15 paragraph 4 of the Constitution, only ratified treaties can be incorporated in the Russian legal system and take precedence over federal laws:

"The majority of Russian legal scholars argue that only international treaties ratified on the basis of a parliamentary law can take precedence over other parliamentary laws." (Nussberger opinion, page 29; underlining added by the court)

5.91. The court shares the interpretation of Article 15 paragraph 4 of the Constitution as can be read in the opinions of the experts on which the Russian Federation relies. This interpretation is also supported in the resolutions mentioned by the Russian Federation in section 135 of the statement of reply of 31 October 1995 and of 10 October 2003 of the Russian Supreme Court and of 6 November 2014 of the Constitutional Court (see: statement of reply, 135). A different interpretation of Article 15 paragraph 4 of the Constitution would allow treaties not approved by the legislature to form part of Russian law and also supersede legislation not compatible with such treaties. Such an interpretation cannot be reconciled with the principle of separation of powers.

5.92. In this context, the court discusses the defendants' invocation of jurisprudence of the Constitutional Court concerning the fact that provisionally applicable treaties also form part of the Russian legal system (statement of defence, 193). This starting point, which was touched upon briefly earlier in this judgment in 5.19, does not alter the fact that – as is also expressed in the same jurisprudence of the Constitutional Court – a treaty like the ECT can limit the scope of the provisional application to those treaty provisions that are compatible with the Russian Constitution and other laws and regulations. This jurisprudence also does not offer a basis for the unrestricted provisional application of the provisions of the ECT.

5.93. The constitutional limitations discussed above require that treaties that deviate from or supplement national Russian laws, cannot be applied based only on their signature, but require prior ratification. In accordance with this, these limitations also apply if treaties, like the ECT, are applied provisionally. As has been considered earlier in this judgment, through Article 26 ECT the Russian Federation is exposed to investment disputes in which foreign investors could accuse the Russian Federation of breach of the legal standards of Chapter III of the ECT. The court concludes that Russian law does not offer an independent legal basis for the settlement of such disputes in international arbitral proceedings. Considering existing Russian legislation, Article 26 ECT constitutes a new form of dispute resolution, namely a form which limits the sovereignty of the Russian Federation in the settlement of international public-law disputes to such an extent that an international tribunal would be competent to rule on the exercise of public-law government actions rather than a national court. The Constitution and the principle of the separation of powers enshrined therein preclude a representative of the executive from being able to bind the Russian Federation to Article 26 ECT. This means, as is also argued by the experts Avakiyan (Opinion of 21 February 2006, pages 8 and 9) and Baglay (Opinion, page 5), as well as A. Martynov in an opinion of 14 December 2006, who at the time participated in the negotiations on the ECT on behalf of the Ministry of Foreign Economic Relations of the Russian Federation, that provisional application of Article 26 ECT is contrary to the constitutional separation of the executive, legislative and judiciary powers.

Article 23 FLIT

5.94. The provisions of Article 23 paragraph 2 FLIT, which is a supplement to the general rule of Article 23 paragraph 1 FLIT, do not affect this opinion. Based on this second paragraph, a treaty that must be ratified by federal law and which provides for the provisional application must be submitted to the Federal Parliament within six months. Although it should be ruled that provisional application of the arbitration clause was incompatible with the Constitution and the ensuing principle of the separation of powers from the outset – given the assessment framework of Article 45 paragraph 1 ECT and the significance attached therein to the Constitution – it is agreed that the provisional application was no longer in accordance with the Constitution after the six-month term. The notification requirement of Article 23 paragraph 3 FLIT, which makes the termination of provisional application conditional on the notification to the other states that have applied the treaty provisionally, does not alter this opinion. In its view (in 387 et seq. in the Interim Awards) that the six-month term is merely an internal requirement, the Tribunal insufficiently recognised the meaning of the Limitation Clause in this context, too. This clause concerns incompatibility of the provisional application of the treaty provisions with Russian national law, including the Constitution. In short, in the absence of approval of the legislature, the Limitation Clause precluded a longer provisional application of Article 26 ECT than the six months. In this context, the court refers to pages 39 and following of Nussberger's extensive opinion and the Russian doctrine discussed therein, as well as to the opinion of Avakiyan of 29 June 2006. In this context, independent significance can also not be attached to Article 45 paragraph 3 ECT discussed in this judgment under 5.29. The court also does not share the opinion of the Tribunal in this area. As has been considered above, with the

explicit reference to the first paragraph, Article 45 paragraph 3 ECT restricts the continued application in the same manner as the Limitation Clause.

Final conclusion on the meaning of Article 45 ECT in connection with Article 26 ECT

5.95. The opinion delivered in this judgment leads to the final conclusion that from Article 45 paragraph 1 ECT it follows that based only on the signature of the ECT, the Russian Federation was not bound by the provisional application of the arbitration regulations of Article 26 ECT. The Russian Federation never made unconditional offer for arbitration, in the sense of Article 26 ECT. As a result, the defendants' "notice of arbitration" did not form a valid arbitration agreement.

Final conclusion on the jurisdiction of the Tribunal

5.96. From that which has been stated in 5.95, it follows that the Tribunal wrongly declared itself competent in the Arbitration to take cognizance of the claims and issue the ensuing award.

THE CONSEQUENCES OF THE RULING ON THE JURISDICTION OF THE TRIBUNAL

5.97. The incompetence of the Tribunal leads to the reversal of the Interim Awards and the Final Awards based on Section 1065 subsection 1 under *a Rv.*

5.98. This means that the other grounds for reversal in 4.2 are left undiscussed.

THE COSTS OF THE PROCEEDINGS

5.99. In view of the reversal of the Yukos Awards of the Tribunal, the defendants are to be deemed the parties against whom judgment has been given, and will be ordered to pay the costs of these proceedings on the part of the Russian Federation. The costs of the proceedings in each of the joined cases are estimated at € 3,957.80 in disbursements (€ 93.80 for the summons and € 3,864 in court fees) and at € 12,844 (four items at € 3,211, according to rate VIII) in lawyer's fees, amounting to a total of € 16,801.80.

5.100. It should be noted that during the proceedings, the court fees charged to the parties were increased. The initially applied rate in court fees, for claims of undetermined value, was changed to the rate for cases with a financial interest of the highest category at the 9 February 2016 hearing.

6 THE RULING

The court:

in case I

6.1. quashes the Interim Award of 30 November 2009 issued in the Arbitration between VPL as Claimant and the Russian Federation as Respondent as well as the Final Award of 18 July 2014;

6.2. orders VPL to pay the costs in these proceedings incurred by the Russian Federation, provisionally estimated, up to this judgment, at € 16,801.80;

6.3. declares this judgment provisionally enforceable;

in case II

6.4. quashes the Interim Award of 30 November 2009 issued in the Arbitration between YUL as Claimant and the Russian Federation as Respondent as well as the Final Award of 18 July 2014;

6.5. orders YUL to pay the costs in these proceedings incurred by the Russian Federation, provisionally estimated, up to this judgment, at € 16,801.80;

6.6. declares this judgment provisionally enforceable;

in case III

6.7. quashes the Interim Award of 30 November 2009 issued in the Arbitration between Hulley as Claimant and the Russian Federation as Respondent as well as the Final Award of 18 July 2014;

6.8. orders Hulley to pay the costs in these proceedings incurred by the Russian Federation, provisionally estimated, up to this judgment, at € 16,801.80;

6.9. declares this judgment provisionally enforceable.

This judgment was passed by mr. D. Aarts, mr. I.A.M. Kroft and mr. H.F.M. Hofhuis and pronounced in open court on 20 April 2016.¹

¹ type: 1820
