The Hague Court of Appeal
Hearing 23 September 2019
Case-list number: 200.197.079/01

ORAL ARGUMENTS RE ARTICLE 45 ECT (PART II)
PROF. *MR.* A.J. VAN DEN BERG

in the case of:

the **Russian Federation**, respondent, originally claimant in the setting aside proceedings and defendant in the arbitrations

v.

Hulley Enterprises Limited, **Veteran Petroleum Limited** and **Yukos Universal Limited**, appellants, claimants in the arbitrations (hereinafter: "**HVY**")
counsel: *mr.* M.A. Leijten and *mr.* A.W.P. Marsman

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III. INCONSISTENCY WITH RUSSIAN LAW

A. Introduction

102. In the previous section, we saw that the interpretation of the Limitation Clause in Article 45(1) ECT (*"to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*") entails that application of the ECT is dependent on whether the individual provisions of the treaty can be reconciled with the constitution, laws or regulations of the "signatory", in our case, the Russian Federation.

103. The treaty provision at issue is the arbitration clause in Article 26 ECT. The question is whether the provisional application of this provision can be reconciled with the Russian Constitution, laws or regulations.

104. In the Arbitrations and in these setting aside proceedings, the Russian Federation has put forward three independent arguments on the basis of which the provisional application of Article 26 ECT in this case cannot be reconciled with Russian law. These arguments can be briefly summarised as follows:[160]

(1) HVY's claims in the Arbitrations under Article 26 ECT were based on the assertion that the Russian tax assessments and collection measures constituted an unlawful expropriation. It is inconsistent with Russian laws to submit such non-arbitrable tax or expropriation disputes to arbitration.[161]

(2) Treaties containing arbitration provisions, like Article 26 ECT, must be ratified by the Russian parliament (Parliament). It is inconsistent with the

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[160] See Defence on Appeal, para. 153.

[161] This follows from Russian law, including the Tax Code, the Law governing Attachments and Executions, the Bankruptcy Act, the Codes of Civil Procedure and the federal Laws on Arbitral Tribunals. Summons, paras. 208-240, Reply, paras. 152-182, and Defence on Appeal, paras. 185-241.

Russian constitutional and statutory principle of separation of powers for the Russian government to agree to unconditional provisional application of Article 26 ECT without parliamentary approval.[162]

(3) HVY have instituted legal proceedings for compensation of the decrease in value of their shares as a result of damage allegedly caused to the company Yukos. It is inconsistent with Russian laws for shareholders to bring a derivative claim in connection with damage caused to the company.[163]

105. The District Court held that the Russian Federation's first and second arguments were well-founded. It did not discuss the third argument.

106. The District Court assessed the Russian Federation's two arguments in para. 5.32-5.95 of its Judgment. It did so under the following headings (with my additions in italics and between square brackets):

[Introduction]

(a) Article 26 ECT (paras. 5.32-5.34)

[First argument: tax and expropriation disputes cannot be subjected to arbitration]

(b) The Law on Foreign Investments (paras. 5.35-5.58)

(c) The Explanatory Memorandum to the Ratification Act (paras. 5.59-5.63)

(c) Preliminary conclusion regarding Article 26 ECT (para. 5.65)

[Second argument: separation of powers]

(e) Bound by signature or ratification? (paras. 5.66-5.74)

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[162] See Summons, paras. 187-204, Reply, paras. 129-149 and Defence on Appeal, paras. 155-184.

[163] Summons, paras. 241-244, and Reply, paras. 183-185 and Defence on Appeal, paras. 242-251.

(f) The principle of the separation of powers (paras. 5.75-5.95)

[Final conclusion]

(g) Final conclusion regarding the Tribunal's jurisdiction (para. 5.96).

107. Below, I will discuss these two arguments in the same sequence (see parts B and C). For the sake of completeness, I will summarize the third argument not assessed by the District Court (shareholders' derivative claim for compensation of damage) (see part D).

B. First argument: Article 26 ECT is inconsistent with Russian law (paras. 5.32-5.65)

108. This part concerns the Russian Federation's first independent argument showing that arbitration of this dispute is inconsistent with Russian law (see para. 103 at (1) above). As indicated, the District Court addressed this argument in paras. 5.35-5.65 of its Judgment (see para. 106 at (b)-(d) above).

(a) Article 26 ECT (paras. 5.32-5.34)

109. First, the District Court analysed Article 26 ECT (arbitration clause) in general.[164] It established that Article 26 ECT creates the possibility of arbitration for an alleged breach of the obligations laid down in Part III of the ECT ("Investment Promotion and Protection"[165]). This includes Article 13 ECT on expropriation. That was the basis on which the Tribunal ruled that the Russian Federation was liable. Against that backdrop, the provisional application of Article 26 ECT is in line in this case with the Russian Constitution, its laws and its regulations.

110. The District Court concluded that it had been established between the parties, without dispute, that the question of consistency must be answered according to Russian law. It also noted that Russian law is deemed not a fact, but law

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164 District Court's Judgment, paras. 5.32-5.34, see para. 106 at (a) above.

165 Dutch translation: "Bevordering bescherming en behandeling van investeringen".

(Article 25 DCCP), and that this can also be determined based on the parties' expert opinions.[166]

(b) Soviet Union, sovereign action, and distinction between disputes under public and private law

111. For a proper understanding of the consistency with Russian law of arbitration of investment disputes, it is important to understand the Russian view regarding sovereign action by the government and the distinction between disputes under public and private law.

112. In the former Soviet Union, sovereign action by the government was a delicate subject. Even if it could be put in question, the Russian court would have exclusive jurisdiction. This applied in particular to disputes regarding the legality of expropriations. Such disputes were – and still are – public law disputes under Russian law.

113. By contrast – and this is a unique feature of Russian law – disputes regarding the compensation of damages as a result of expropriation are considered civil law (or private law) disputes . According to Russian legal doctrine, the reason for this distinction is that compensation is calculated objectively, without taking the reason for the sovereign action (or omission) into account.

114. This view was also reflected in practice in respect of the Soviet Union's bilateral investment treaties (BITs). A majority of the BITs concluded by the Soviet Union with other States limited dispute resolution by means of arbitration to merely determining the amount of the damages and the method of payment in the event of expropriation and other cases that were unrelated to an assessment of sovereign action or omission.[167] These BITs are also known as First Generation BITs. [168]

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166 District Court Judgment, para. 5.34.

167 See the 1990 Agreement Between the Government of the People's Republic of China and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Article 9 (**Exhibit RF-51= iPad-2.g**); 1989 Agreement Between the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Government of the Union of

115. An example is the Yukos arbitration *Quasar de Valores v. Russian Federation* arbitration.[169] That case pertained to the Spain - USSR BIT of 1990. The arbitration clause in that BIT is a typical example of a first generation BIT:

> "Article 10—Disputes between one Party and investors of the other Party
>
> Any dispute between one Party and an investor of the other Party relating to the amount or method of payment of the compensation due under Article 6 of this Agreement [nationalization and expropriation] (…) may be referred to (…) an arbitral tribunal (…)"[170]

116. The arbitrators in the *Quasar* case were of the opinion that this clause could be broadly interpreted, in the sense that an arbitral tribunal could also determine whether expropriation had taken place. This is a telling example of arbitrators in Yukos-related cases who are overly eager to assume jurisdiction. The Swedish court rightly set aside the arbitral award on the basis that the

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Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Article 10 (**Exhibit RF-52 = iPad-2.g**); 1989 Agreement Between the Government of Finland and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Article 8 (**Exhibit RF-53 = iPad-2.g**); 1989 Agreement Between the Government of the Republic of Italy and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Article 9 (**Exhibit RF-54 = iPad-2.g**); 1990 Agreement Between the Government of the Kingdom of Spain and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Article 10 (**Exhibit RF-55 = iPad-2.g**); 1990 Agreement Between the Government of the Republic of Austria and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Article 7 (**Exhibit RF-56 = iPad-2.g**); 1989 Agreement Between the Federal Republic of Germany and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Article 10 (**Exhibit RF-57 = iPad-2.g**); 1989 Agreement Between the Kingdom of the Netherlands and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Article 9; 1990 Agreement Between the Swiss Federal Council and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Article 8 (**Exhibit RF-58 = iPad-2.g**); 1990 Agreement Between the Government of the Republic of Turkey and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Article 6 (**Exhibit RF-59 = iPad-2.g**); 1990 Agreement Between the Government of the Republic of Korea and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Article 9 (**Exhibit RF-60 = iPad-2.g**); 1989 Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Article 8(1) (**Arbitration File Exhibit C-849**).

168 See Defence on Appeal, paras. 148-150 and Defence on Appeal, paras. 444-445.

169 *Quasar de Valores SICAV S.A., et al. v. The Russian Federation*, Award on Preliminary Objections, 20 March 2009 (**Arbitration File Exhibit C-1048**).

170 1990 Agreement Between the Government of the Kingdom of Spain and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Article 10 (**Exhibit RF-55 = iPad-2.g**).

arbitration clause was limited to disputes regarding compensation after expropriation.[171]

117. Another example is the BIT between the Netherlands and the USSR of 1989. Article 9(2) of that treaty also limits jurisdiction to disputes regarding the amount or the payment of compensation:

> "Disputes concerning the amount or procedure of payment of compensation under Article 6 of this Agreement or concerning the free transfer as defined in Article 4 of this Agreement which cannot be settled amicably within a period of six months from the date either party to the dispute requested amicable settlement, may be referred by the investor to international arbitration or conciliation."[172]

118. The Dutch government's Explanatory Memorandum shows that any arbitration between the investor and the State in expropriation cases was limited to arbitration for the determination of the amount of compensation and the procedure for its payment in the event of expropriation and other issues that do not involve a review of sovereign acts or omissions.

> "Article 9.
>
> The Soviet delegation initially objected in principle to the inclusion of an arrangement as regards an international dispute resolution procedure for disputes between an investor and the host country. Ultimately, the Soviet delegation agreed to a list of disputes to which such an arrangement would apply. These concern the free transfer (Article 4) and the amount and/or the compensation procedure in the event of expropriation or nationalisation (Article 6). Not arbitrable are decisions to expropriate or nationalise, as the Soviet delegation considered this to be a violation of its national sovereignty. Disputes regarding fair and equitable treatment of investments cannot be subject to arbitration either. This is because the USSR fears that because of the scope of the fair and equitable treatment, the limiting

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171 Svea Court of Appeal, 18 January 2016 (**Exhibit RF-218 = iPad-21.b**).

172 Agreement between the Kingdom of the Netherlands and the Union of Socialist Soviet Republics regarding the reciprocal protection of investments; Moscow, 5 October 1989, with effect as from 20 July 1991. Treaty Series 1989-162. See Summons, paras. 228-229 and Defence on Appeal, para. 149.

> nature of the prescriptions in Articles 4 and 6 would be undetermined.[173] (emphasis added)

119. The same analysis is found on the Russian side. As Mr Nagapetyants, who had negotiated Russian bilateral investment treaties, explains:

> "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)." (emphasis added).[174]

120. It was not until the 1990s that BITs were concluded with a broader description of the matters that could be subjected to arbitration. If such a BIT was ratified by Russia's parliament, the Parliament, arbitrability of the public disputes described in the BIT was created.[175] Russian legislation on arbitration did not change. Public law disputes continued to be non-arbitrable under the Civil Procedure Code, the Commercial [so-called *Arbitrazh*] Procedure Code, the Law on International Commercial Arbitration, and other relevant laws that I will address below.[176] Only explicit exceptions could be made to this, for example by means of a BIT ratified by the Russian Parliament.

121. The principle of the Russian court having exclusive jurisdiction to rule on taxes and expropriation is also reflected in the legislation adopted since the 1990s. The legislation that I will be discussing below should also be viewed in that light.

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[173] Agreement with the USSR on the Promotion and Reciprocal Protection of Investments, Parliamentary Papers II, 1989/90, 21 462 (R 1383), no. 1 (Memorandum accompanying the letter from the Minister dated 7 February 1990). As cited in Summons, para. 228, for example, and Defence on Appeal, para. 149.

[174] R. Nagapetyants, Treaties for the Promotion and Reciprocal Protection of Investments, 5 Foreign Trade (1999), 14 (Prof. Asoskov's Expert Opinion of 30 October 2014 (**Exhibit RF-50, Annex AVA-32**).

[175] See para. 166-169 *infra.*

[176] See para. 125 *infra.* Prof. Asoskov's Expert Opinion dated 10 November 2017 (**Exhibit RF-D5 = iPad-66.a**), paras. 23-25; Defense on Appeal, para. 195.

122. First and foremost, it should be understood that the Russian laws I will be discussing are not in any way exceptions or deviations. In nearly all jurisdictions, sovereignty is a delicate subject. Therefore, in nearly all jurisdictions, disputes on taxes and expropriation cannot be settled through arbitration. By way of example, I would refer to a fax from Sydney Freemantle, Chair of the working group that drew up the first draft of the ECT. In his fax of 3 August 1994, he wrote: "*[M]ost national and sub-national laws provide for disputes under those laws to go to the local courts, not through international arbitration unless there is special provision (…) [P]rovisional application does not, by and large, bind the signatory to Articles [26 and 27 ECT]*."[177]

(c) Dispute pertains to Russian public law (paras. 5.35-5.42) [178]

(i) Dispute is not arbitrable

123. As indicated, HVY based their claim on the assertion that Russian tax assessments and the subsequent collection and enforcement measures with respect to Yukos Oil constituted unlawful expropriation.[179] HVY's reproaches pertain to the manner in which primarily the Russian Federation's tax authorities used their powers under public law. In its substantive assessment of the dispute, the Tribunal considered it decisive that (i) the Russian tax authorities wrongfully imposed VAT assessments and (ii) subsequently

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[177] Defence on Appeal, para. 131, 146, with reference to Fremantle's Expert Opinion (submitted in the Arbitrations as **Arbitration File Exhibit RF-03.1.C-1.3.3**) Annex A. Dutch translation: "De meeste nationale (…) wetten voorzien erin dat geschillen (…) naar de lokale rechtbanken gaan, niet naar internationale arbitrage (…). Dienovereenkomstig stel ik mij voor dat, in het algemeen, voorlopige toepassing de ondertekenaars niet bindt aan artikelen [26 en 27 ECT].

[178] Under the headings of "Law regarding Foreign Investments" and "General" above para. 5.35 on p. 44 of the District Court Judgment, first the question is reviewed of whether other Russian laws have permitted arbitration for disputes ensuing from legal relationships under public law (paras. 5.36-5.41). Starting in para. 5.42, the District Court specifically addressed the Law regarding Foreign Investments of 1991 (paras. 5.43-5.51) and of 1999 (paras. 5.52-5.58).

[179] See the Hulley Statement of Claim, 3 February 2005, paras. 59-76, 80-87 and 101-121. See Reply, para. 156, and Prof. Asoskov's 2014 Expert Opinion of 30 October 2014 (**Exhibit RF-50 = iPad-2.g**), which was not substantively disputed on this point. The unsubstantiated assertions to the contrary in the Rejoinder, paras. 107 and 115, are incorrect.

wrongfully collected taxes by selling the shares in the capital of the production company Yuganskneftegaz.[180]

124. The District Court ruled correctly that it is "*beyond doubt*" that this dispute pertains to the exercise of public-law authority by state bodies of the Russian Federation.[181] As will be explained below, HVY are in reality not disputing this.

125. The District Court also rightly ruled that disputes under public law are not arbitrable according to Russian law.[182] HVY equally do not dispute the expert opinions by Prof. Asoskov[183] and Prof. Kostin[184] entered into evidence by the Russian Federation in that regard. In their opinions, these experts refer to a large number of specific statutory provisions evidencing this.[185] These provisions either appoint the domestic court as the exclusive adjudicator,[186] or indicate the limited – i.e. only civil-law – instances in which arbitration is permitted. Examples include (emphasis added):[187]

- **Statutory provisions designating the national court as the <u>exclusive adjudicator</u>:**

  - Article 17 of the Law of 27 December 1991 on the Principles of Taxation (No. 2118-1):

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180 See Hulley Final Award (**Exhibit RF-02 = iPad-2.g**) para. 1579. The Russian Federation disputes this opinion on substantive grounds.

181 District Court Judgment, see paras. 5.41 and 5.51.

182 District Court Judgment, paras. 5.35-5.41.

183 See Prof. Asoskov's 2014 Expert Opinion of 30 October 2014 (**Exhibit RF-50 = iPad-2.g**). Prof. Asoskov drew up a new additional opinion for the appeal proceedings (**Exhibit RF-D5 = iPad-66.a**).

184 See A.A. Kostin, "Opinion on Certain Issues of Arbitrability", dated 21 February 2006, (**Arbitration File Exhibit RF-03.1.C-1.1.3**).

185 The provisions confer exclusive jurisdiction on a specific court or judge. The Russian Federation contests HVY's assertion that it was not argued that "*Russian law has a specific provision*" that impedes arbitration (Statement of Appeal, paras. 549 and 569).

186 For the sake of avoiding any misunderstandings: the Russian system of law differs from the system of law in the Netherlands to the extent that there are no specialised administrative-law forums, like the Council of State. Many disputes under administrative law are adjudicated by the regular courts.

187 Defense on Appeal, para. 195.

> "[p]rotection of the rights and interests of taxpayers and the State is exercised by judicial or other procedure provided for by the legislation of the Russian Federation."[188]

- Article 138(1) of the Tax Act (1998):

> "the acts of tax authorities, the actions or failure to act of their officials may be challenged before a higher tax authority (higher tax official) or in court."[189]

- Article 90 of the Federal Law on an Execution Proceeding (1997, No. 119-FZ):

> "A claimant or a debtor may file a complaint against court bailiff actions related to the execution of an enforcement document issued by an arbitrazh court (…) to the arbitrazh court at the court bailiff's location (…). In all other instances a complaint against enforcement actions or a refusal to perform enforcement actions by a court bailiff (…) shall be filed with a court of general jurisdiction at the court bailiff's location (...)"[190]

- Article 428 of the Code of Civil Procedure of 1964:

> "A claimant or a debtor may file a complaint, and a prosecutor may file a challenge, against court bailiff actions related to the enforcement of a decision or a refusal to perform such actions. Such a complaint or challenge shall be submitted to the court to which that court bailiff is attached or to the judge who made the decision (…)."[191]

- **Statutory provisions showing that only civil-law disputes are arbitrable:**

  - Article 27 of the Code of Civil Procedure of 1964;

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[188] Prof. Asoskov's Expert Opinion of 30 October 2014 (**Exhibit RF-50 = iPad-2.g, Annex AVA-18**) (emphasis added).

[189] Prof. Asoskov's Expert Opinion of 30 October 2014 (**Exhibit RF-50 = iPad-2.g, Annex AVA-19**) (emphasis added).

[190] English translation of the Russian original (emphasis added).

[191] English translation of the Russian original. Prof. Asoskov's Expert Opinion of 30 October 2014 (**Exhibit RF-50 = iPad-2.g, Annex AVA-21**) (emphasis added).

> "In cases provided by law or by international treaties, a dispute arising from civil law relationships, upon agreement of the parties, may be submitted for resolution by an arbitral tribunal (…)."[192]

- Article 1(2) of the International Commercial Arbitration Law of 1993;

> "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…".[193]

- Article 21 of the Code of Civil Procedure in Commercial Matters (Arbitrazh[194]) of 1992:

> "By agreement of the parties, an economic dispute that has arisen or may arise and that falls within the jurisdiction of arbitrazh courts can be submitted to arbitration before an arbitrazh court has commenced the proceedings." [195]

- Article 23 of the Code of Civil Procedure in Commercial Matters (Arbitrazh) of 1995:

> "By agreement of the parties, a dispute that has arisen or may arise and that arises out of civil law relations and falls within the jurisdiction of arbitrazh courts can be referred to arbitration before it has been resolved by an arbitrazh court." [196]

- Article 1(2) of the Law on Arbitral Tribunals:

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[192] Prof. Asoskov's Expert Opinion of 30 October 2014 (**Exhibit RF-50 = iPad-2.g, Annex AVA-21**) (emphasis added).

[193] Prof. Asoskov's Expert Opinion of 10 November 2017 (**Exhibit RF-D5 = iPad-66.a, Annex AVA-57**).

[194] It should be repeated here that Russian terminology is not always clear to outsiders. An Arbitrazh Court in the Russian Federation is similar to a District Court. An Arbitrazh Court therefore is not an arbitral tribunal.

[195] Prof. Asoskov's Expert Opinion of 30 October 2014 (**Exhibit RF-50 = iPad-2.g, Annex AVA-02**) (emphasis added).

[196] Prof. Asoskov's Expert Opinion of 30 October 2014 (**Exhibit RF-50 = iPad-2.g, Annex AVA-04**) (emphasis added).

> "By agreement of the parties to arbitration proceedings (hereinafter referred to as the parties), any dispute resulting from civil law relations may be referred to the arbitration tribunal, unless otherwise provided by the federal law." [197]

126. The principle under Russian law that public-law disputes are not arbitrable is also confirmed in Russian case law and literature.[198] The Russian Constitutional Court held expressly that "*the current legal system does not permit the arbitration of disputes arising out of administrative and other public law relations*".[199]

127. I would repeat: these provisions of law are not unique or extraordinary. It is also generally assumed under Dutch law that tax dispute, execution disputes and expropriation disputes are not arbitrable (Article 1020(3) DCCP).[200]

128. HVY did not dispute the interpretation of these Russian statutory provisions for more than 14 years, from 2005 to 2019.[201] They were in agreement that public-law tax disputes, execution disputes, bankruptcy disputes and expropriation disputes are not arbitrable.[202] They only created confusion regarding the question of whether this entails an all-encompassing prohibition against submitting public-law disputes to arbitrators.

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197 English translation of the Russian original (emphasis added).

198 See Defence on Appeal, paras. 196-197.

199 Ruling of the Constitutional Court of the Russian Federation No. 5-O of 15 January 2015 (**Exhibit RF-135 = iPad-12.a**), para. 2.2; Resolution of the Constitutional Court of the Russian Federation No. 10-P of 26 May 2011 (**Exhibit RF-D5 = iPad-66.a, Annex AVA-001**), para. 3.1 ("[T]he current regulatory framework does not allow the referral to an arbitral tribunal of disputes arising out administrative or other public law relations".)

200 See Defence on Appeal, para. 194 and the legal sources referred to there.

201 District Court Judgment, paras. 5.36-5.38 and 5.41.

202 However, in Prof. Stephan's second expert report, which HVY filed with their "Submission" of 26 February 2019, he now also disputes that public law disputes are not arbitrable under Russian law. This tardy and incorrect argument was refuted in the Submission of 25 June 2019 of the Russian Federation. This argument does not hold. In addition, Prof. Stephan contradicts himself. These tardy and incorrect assertions were refuted in the RF's Submission, paras. 48-54. This also creates a deviation from previously held views. In his first expert opinion of 8 March 2017, Prof. Stephan accepted that Resolution No. 10-P demonstrates that "[u]nder Russian law what is generally arbitrable might be determined by looking at the legal relations from which the dispute arises." (**Exhibit HVY-D3 = iPad-61.a**), footnotes 136 and 157.

(ii) Qualification according to Russian law, not according to the ECT

129. Firstly, HVY assert that the tax and collection measures taken by the Russian Federation qualify as unlawful expropriation within the meaning of Article 13 ECT. They believe that the choice for this claim basis in the Arbitrations entails that their claim cannot be regarded as a public-law claim.

130. This position taken by HVY is incorrect. Relevant is the question of whether HVY's claim concerns the exercise of powers under public law.[203]

131. What is more: HVY is perpetrating *Etikettenschwindel* here: The question of whether arbitration is permitted must be answered according to Russian law, not according to the Treaty. The *Limitation Clause* in Article 45(1) ECT expressly refers to national law,[204] and *in casu* that is Russian law.

(iii) No third category of investment disputes under Russian law (para. 5.41)

132. Secondly, HVY would have us believe that in addition to the distinction between disputes under public law and under private law, there is a third and separate category of investment disputes.[205]

133. The District Court rightly rejected this position taken by HVY. The District Court's opinion in this regard included that the aforementioned 1993 International Arbitration Law explicitly provides that only civil-law disputes may be resolved through arbitrators.[206]

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[203] Defence on Appeal, paras. 191-193; Prof. Asoskov's Expert Opinion of 10 November 2017 (**Exhibit RF-D5 = iPad-66.a**), paras. 53-76.

[204] See Defence on Appeal, paras. 177 *et seq.*.

[205] See Defence on Appeal, paras. 199-206; RF's Submission, paras. 43-47.

[206] District Court Judgment, para. 5.41.

134. Furthermore, HVY's assertion fails because it is not supported in any way by Russian legislation. There is no such third category of international investment disputes in the system of Russian law.[207]

(d) Foreign Investments Law 1991/1999 (paras. 5.43-5.58)[208]

(i) Introduction

135. HVY are asserting that the Foreign Investment Law of 1991, amended in 1999[209], expressly allows arbitration between the State and a foreign investor, and is therefore at variance with the rule of Russian law that public law disputes are not arbitrable.[210] This is a misconception, and the District Court rightly rejected this position taken by HVY, as I will explain below.

136. In short, my explanation boils down to three points:

(a) The laws confirm that public law disputes are not arbitrable.

(b) The laws offer no independent ground for arbitration.

(c) The laws confirm that treaties that ratified treaties may allow arbitration, but the ECT has not been ratified.

(ii) Fundamentals Law of 1991 (paras. 5.43-5.44)

137. Before discussing the Law on Foreign Investments of 4 July 1991 ("Law of 1991"), it is important to also mention the Fundamentals Law of 5 July 1991, which was enacted almost simultaneously.[211]

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207 See in great detail RF Submission, paras. 44-46 in which case law and literature has been cited; see also Defence on Appeal, paras. 204-206; Prof. Asoskov's Expert Opinion of 10 November 2017 (**Exhibit RF-D5 = iPad-66.a**), paras. 73-76.

208 See Defence on Appeal, for example, paras. 207-241.

209 Also referred to in the Summons and Reply as the "RF Foreign Investments Act".

210 Statement of Defence, para. II.247.

211 The Soviet Union came to an end on 8 December 1991.

138. The Fundamentals Law was intended as a guideline that was be used by the individual states of the Soviet Union in the enactment of legislation.[212] Article 1 of the Fundamentals Law: "*the laws of the republics shall regulate in accordance with these Fundamentals the relations arising in connection with foreign investments in the republics' territories*, (…)."[213]

139. The Fundamentals Law should also be viewed in light of the views on sovereign action of the government of the Soviet Union that I just discussed (see paras. 111-118 above).

140. The Fundamentals Law of 1991 makes a clear distinction between:

(1) public law disputes that must be exclusively adjudicated by the national court (Article 43(1)), and

(2) disputes ensuing from private-law legal relationships that could possibly be submitted to arbitrators (Article 43(2)):

141. The text of the Fundamentals Law provides:

> "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.
>
> 2. Disputes of foreign investors (...) with Soviet State bodies acting as a party to relationships regulated by civil legislation (...) are subject to consideration in the USSR in courts or, upon agreement of the parties, in arbitration proceedings (...)"[214]

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[212] Summons, paras. 222-223, Defence on Appeal, paras. 209-211. District Court Judgment, paras. 5.43-5.45. Para. 5.43: "After all, Article 1 of the Fundamentals of Legislation (...) expresses that the other acts which provide for legal relationships involving foreign investments must be in accordance with the fundamentals."

[213] Fundamentals of the Foreign Investment Act (1991), Article 1 (**Exhibit RF-136 = iPad-12.a**), (emphasis added). By way of resolution no. 2303-1 of 5 July 1991, the Highest Council of the People of the USSR, which issued the Fundamentals (1991), advised the Highest Councils of the Soviet Republics "[to] adopt legislation on foreign investments and bring the legislation of the republics in line with the [...] Fundamentals."

[214] Emphasis added. **Arbitration File Exhibit R-902**; Dutch translation:

"1. Geschillen tussen buitenlandse investeerders en de Staat dienen te worden beslecht in de USSR bij de Rechtbanken, als niet anders bepaald in internationale verdragen van de USSR.

142. The first paragraph of Article 43 concerns investment disputes *stricto sensu*, involving disputes ensuing from the exercise of authority under public law, also known as sovereign acts by the government.[215] Disputes of this type must be submitted to the Russian courts, unless otherwise provided in an international treaty. Those are exclusively treaties that have been ratified by the legislation (I will return to this point below).[216]

143. The second paragraph of Article 43 concerns disputes between different entities, including between enterprises and between enterprises and the bodies of the Russian state, with the latter "acting as a party to relationships regulated by civil legislation". Disputes of this type are adjudicated by the Russian courts or in arbitration if that has been agreed by means of a contract.

144. In short, as found by the District Court[217], Article 43(1) of the Fundamentals Law designates the Russian court as the competent court, and arbitration is only possible through a treaty, while the Article 43(2) does offer an explicit provision for arbitration alongside ordinary court jurisdiction if the parties involved agree to this.

145. That Fundamentals Law - issued on the level of the Soviet Union - carries weight in the interpretation of the implementation Law of 1991.

146. There is no support in the case law or literature for HVY's deviating position.[218] As Professor Asoskov - the Russian Federation expert - explains,

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2. Geschillen van buitenlandse investeerders (...) met Sovjetstaatsorganen die optreden als partij bij door burgerlijke wetgeving geregelde betrekkingen (...) dienen te worden beslecht in de USSR bij de Rechtbanken of worden, met instemming der partijen, ter arbitrage voorgelegd (…)" (emphasis added) (**Arbitration File Exhibit R-902**)

215 District Court Judgment, para. 5.45.

216 See e.g. Prof. Asoskov's Expert Opinion of 10 November 2017 (**Exhibit RF-D5 = iPad-66.a**), paras. 98-104.

217 District Court Judgment, para. 5.45.

218 Statement of Appeal, paras. 688 *et seq*.; HVY's "Submission" of 26 February 2019, para. 313. For the refutation of that position, see for example Reply, para. 169, Defence on Appeal, para. 211, footnote 297, RF's Submission, para. 87.

commentators agree that the Law of 1991 was drafted under influence of the Fundamentals Law.[219]

(iii) Law of 1991 (paras. 5.46-5.51)

147. Like Article 43 of the Fundamentals Act, the Law on Foreign Investments of 1991 distinguishes between two types of disputes. I will first quote Article 9 of the Law of 1991[220]:

> "Article 9. Dispute Resolution Procedure
>
> [1] Investment disputes, including disputes over amount, terms or procedure of paying compensation, shall be resolved by the RSFSR Supreme Court or the RSFSR High Commercial [Arbitrazh] Court, unless another procedure is envisaged by an international treaty in effect on the territory of the RSFSR.
>
> [2] Disputes between foreign investors and businesses featuring foreign investment and RSFSR government bodies, enterprises, public associations and other RSFSR legal entities, disputes between investors and businesses featuring foreign investment on matters pertaining to their business operations, as well as disputes between members of a business involving foreign investment and the said business per se shall be considered by RSFSR courts, or, upon the parties' agreement, by an arbitral tribunal, and, in situations provided for by the legislation, by bodies tasked to consider economic disputes.
>
> [3] An international treaty in effect on the territory of the RSFSR may envisage recourse to international means of settling disputes

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219 Prof. Asoskov's Expert Opinion of 10 November 2017 (**Exhibit RF-D5 = iPad-66.a**), paras. 99-101.

220 The translation of Article 9 quoted above is the sworn translation submitted alongside the expert opinion of Professor Avtonomov of 14 August 2019, Expert Opinion of Prof. Avtonomov of 14 August 2019 (**Exhibit RF-D25 = iPad 114-b, Appendix A**). In its judgment, the District Court had quoted the translation of Professor Asoskov, District Court Judgment, para. 3.6. This translation did not deviate in terms of substance from the translation used by HVY in both the Arbitration and before the District Court, Expert Opinion of Prof. Asoskov dated 30 October 2014 (**Exhibit RF-50 = iPad-2.g, Annex 30**). **Arbitration File Exhibit C-1537.** In appeal, however, HVY considered that a different translation should be used**, Exhibit HVY-128 = iPad-53.b** [*rectius*: HVY-134]. HVY creates even more confusion as their American expert Prof. Stephan uses yet another translation (**Exhibit HVY-D10 = iPad-98.a, Annex S-123**). In particular, HVY assert that the words "*in force"* in paragraphs 1 and 3 of Article 9 should be translated as "*in effect"*. HVY, however, add that "*the meaning of this provision is in any case not dependant on the exact wording of this article."* Statement of Appeal, fn. 430. The difference in translation does not matter according to HVY.

> arising in connection with the implementation of foreign investments on the territory of the RSFSR."[221]

148. **Paragraph 1 of Article 9** concerns investment disputes regarding damages for expropriation in particular. **Paragraph 2** pertains to disputes between investors and Russian entities, including state-owned enterprises, "involving matters relating to their operations".

149. Article 9(3) refers to an "*international treaty in effect on the territory of the RSFSR*". The legislator thereby has expressed that only a ratified treaty may provide for arbitration between an investor and the State.[222]

150. Article 9(1) concerns disputes ensuing from sovereign government acts that notably relates to the expropriation of foreign investments.

151. Disputes about such sovereign government acts may only be adjudicated by the Russian courts. This is provided for in so many words in Article 7(3) of the same Law of 1991:

> "Decisions of governmental bodies on expropriation of foreign investments may be contested in the RSFSR courts." (emphasis added)[223]

152. The word "may" is used repeatedly in these and other Russian laws and only makes it clear that an investor is not obliged to challenge a decision. The word "may" therefore indicates that the investor has a choice to apply to the national

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[221] For the Dutch translation see Defence on Appeal, para. 215.

[222] See generally Prof. Marochkin's Expert Opinion dated 24 October 2017 (**Exhibit RF-D6 = iPad 66.a**), see also Prof. Avtonomov's Second Expert Opinion dated 14 August 2019 (**Exhibit RF-D-25 = iPad 114.b**), paras. 47-61. Professor Stephan's most recent, revised arguments regarding Article 9(1) and (3) of the Law of 1991 were refuted in RF's Submission, para. 88.

[223] Dutch translation: "Besluiten van een overheidsorgaan inzake de onteigening van buitenlandse investeringen kunnen aangevochten worden bij de Rechtbanken of handelsrechtbanken." See Professor Asoskov's 2014 Expert Opinion (**Exhibit RF-50= iPad-2.g, Annex 30).** See for example Statement of Reply, para. 165 and Defence on Appeal, paras. 213-214.

court. If an investor wishes to do so, only the national court is competent to hear the dispute.[224]

153. It therefore follows from Article 7(3) that the Russian national court has exclusive jurisdiction to hear expropriation. All of the experts agree on this[225], except for HVY's American expert (Professor Stephan). He is not even supported by HVY's Russian experts (Dr. Mishina and Mr. Gladyshev).

154. The Tribunal ruled – without further analysis or substantiation – that the text of Article 9 of the Law of 1991 is "*crystal clear*" and supposedly shows that all investment disputes are always arbitrable.[226] A painful error made by the Tribunal is that its conclusion is based on Article 9(**2**) of the Law of 1991, which it qualifies as the "relevant part".[227] The second paragraph is not relevant, precisely because it does not refer to investment disputes, but only to civil law disputes. Obviously, the relevant part is Article 9(**1**) in conjunction with Article 7(3) of the Law of 1991, about which the Tribunal says absolutely nothing. This part specifically refers to investment disputes concerning expropriation.

155. The District Court did extensively discuss the interpretation of Articles 7 and 9 of the Law of 1991, also referring to relevant Russian literature. The District Court rightly[228] concluded that disputes regarding public-law actions of government must be submitted to Russian national courts on the basis of Article 9(1) of the Law of 1991. As noted by the District Court, Articles 7 and 9 confirm that arbitration on this dispute is contrary to Russian laws. The

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224 Prof. Asoskov's Expert Opinion of 10 November 2017 (**Exhibit RF-D5 = iPad-66.a**), paras. 82-86.

225 Professor Asoskov's 2017 Expert Opinion (**Exhibit RF-D5 = iPad-66.a**), paras. 87-89.

226 Hulley Interim Award, paragraph 370 (**Exhibit RF-01 = iPad-2.g**).

227 See Summons, paras. 224-225.

228 Also see Reply, paras. 166-170.

District Court also correctly ruled that Article 9 does not provide "an independent legal basis for arbitration".[229]

156. To be absolutely clear: Article 9(1) of the Law of 1991 confirms that treaties of the Russian Federation may contain an exception to the main rule that investment disputes are not arbitrable. However, this does require that the treaty has been ratified. The ECT was never ratified. [230]

(iv) Law of 1999 (paras. 5.52-5.58)

157. The Law of 1991 was replaced by the Law of 1999. With the introduction of the Law of 1999, the legislator did not intend to introduce substantive changes that relate to dispute resolution through arbitration. Consequently, the Acts of 1991 and 1999 largely support the same approach.[231] HVY do not dispute this.[232] As stated above, however, they are advocating a different interpretation of the Law of 1991.

158. The Law of 1999 contains merely a general reference to other federal laws and international treaties of the Russian Federation. Article 10 of the Law of 1999 provides the following:

> "A foreign investor's dispute arising due to investments or engagement in entrepreneurial activities in the territory of the Russian Federation shall be resolved in accordance with the international treaties of the Russian Federation and its federal laws in a court of law or an arbitrazh court or in international arbitration (arbitral tribunal)".[233]

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229 District Court Judgment, para. 5.51.

230 HVY's assertions in paras. 581-582 of the Statement of Appeal are incorrect. In this context, also see Professor Asoskov's 2017 Expert Opinion (**Exhibit RF-D5 = iPad-66.a**), para. 113 et seq. Second Expert Opinion of Prof. Avtonomov dated 14 August 2019 (**Exhibit RF-D25, iPad 114-b**), para. 55-61.

231 Prof. Asoskov's 2017 Expert Opinion of 10 November 2017 (**Exhibit RF-D5 = iPad-66.a**), para. 106.

232 See for example Summons, para. 230 and Statement of Appeal, paras. 584 *et seq*.

233 Expert Opinion of Prof. Avtonomov dated 14 August 2019 (**Exhibit RF-D25 = iPad 114-b, Appendix A**), Appendix A. For the Dutch translation, see Defense on Appeal, para. 219.

159. The Russian Federation's expert, Prof. Asoskov, explained that this is a blanket provision.[234] The provision itself does not determine whether a dispute with an investor may be resolved through arbitration; it indicates that the answer to that question is given by other Russian laws or treaties.

160. HVY have been unable to demonstrate which federal laws do allow investment arbitration.[235]

161. Nor have HVY been able to demonstrate that any ratified treaty that allows arbitration between HVY and the Russian Federation.

(v) Consent to arbitration and arbitrability of the dispute

162. HVY's expert Prof. Stephan rightly confirmed that the 1991 and 1999 Laws "*did not provide free-standing consent for international arbitration"*.[236] In his most recent expert opinion of 22 February 2019, however, he says that Article 9 of the Law of 1991 and Article 10 of the Law of 1999 "*establish the arbitrability of this category of disputes, but look to treaties to express the consent of the Russian Federation to arbitration of specific disputes"*.[237] The text of these statutory provisions offer no support for this interpretation. Nor

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234 Summons, para. 230. Prof. Asoskov's Expert Opinion of 30 October 2014 (**RF-50 = iPad 2.g**), paras. 81-95. The District Court ruled that Article 10 merely "contains a general reference to both treaties and federal laws" (Judgment, para. 5.56). Professor Asoskov's Expert Opinion 10 November 2017 (**Exhibit RF-D5 = iPad 66.a**), para. 105-112. Prof. Stephan is again confusing this matter with another new argument in his second expert report of 22 February 2019. He now claims that "*blanket provisions*" are *"a legitimate and enforceable exercise of legislative power*" and that therefore Articles 9 and 10 of the Laws of 1991 and 1999 imply that investment disputes between investors and the Russian State can be arbitrated. Second Expert Report of Prof. Stephan 22 February 2019 (**Exhibit HVY-D10 = iPad-98.a**) para. 194. The Russian Federation has refuted this untenable argument in its Submission of 25 June 2019, RF Submission, para. 90.

235 Defence on Appeal, paras. 228-233.

236 Prof. Stephan's First Expert Opinion of 8 March 2017 (**Exhibit HVY-D3 = iPad-61.a**), paras. 190, 207.

237 Prof. Stephan's Second Expert Opinion of 22 February 2019, (**Exhibit HVY-D10 = iPad-98.a**), paras. 154-156.

does the text of the law distinguish between consenting to arbitration and arbitrability of a dispute.

163. Prof. Stephan has failed to appreciate the interaction between consent to arbitration and the arbitrability of disputes. Consent can only be given for disputes that are arbitrable. If disputes, like public law disputes on expropriation or taxes, are not arbitrable under Russian law, no consent can be given for the arbitration of those disputes.

(vi) Laws of 1991 and 1999 also otherwise inapplicable[238]

164. Incidentally, HVY did not assert in good time with reasons that the Laws of 1991 and 1999 are applicable.[239] After all: both of these laws apply exclusively to transactions that involve an injection of foreign capital into the territory of the Russian Federation:

> "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)."[240]

> "Foreign investment means the injection of foreign capital in an object of business activity in the territory of the Russian Federation in the form of objects of civil law rights owned by a foreign investor (…)."[241] (emphasis added)

165. To qualify as a "foreign investment," a transaction must therefore inject foreign capital into "objects of entrepreneurial activity" in the territory of the Russian Federation. This means that an investment using capital that is originally foreign must result in a capital increase in the economy of the Russian

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238 Summons, paras. 219-221; Defence on Appeal, paras. 235-239; RF's Submission, paras. 80-92.

239 See Summons, para. 220 and Defence on Appeal, paras. 235-239. It was not until after the exchange of statements that HVY discussed this argument in detail in their "Submission" of 26 February 2019, paras. 320-328. Those new assertions are not only tardy, but also incorrect. See RF's Submission of 25 June 2019, paras. 91 and 92.

240 Article 2, Law regarding Foreign Investments 1991 (**Arbitration File Exhibit R-176**).

241 Article 2, Law regarding Foreign Investments 1991 (**Arbitration File Exhibit R-178**).

Federation.[242] As extensively explained in the submissions, HVY did not invest foreign capital in the territory of the Russian Federation.

(e) The BIT practice of the Russian Federation (paras. 5-62-5.64)[243]

166. The BIT practice was already briefly discussed above.[244] The District Court rightly ruled that this BIT practice confirms that under Russian law, investment disputes cannot be subjected to arbitration.[245]

167. The federal Parliament has ratified all fifty-seven bilateral investment treaties to which the Russian Federation is a party.[246] These investment treaties all needed to proceed through the national conclusion procedures before they could enter into force.[247]

168. The parliamentary history of the legislation regarding the ratification of several bilateral investment treaties clarifies why ratification by the Parliament is required: treaty provisions that provide for arbitration between an investor and the State "*set out rules different from those provided for by a law*".[248] The

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242 See the Lisitsyn-Svetlanov Opinion of 22 February 2006, pp. 2-4, as entered into evidence in the Arbitrations; see also Expert Report of Prof. Vladimir Yarkov, 27 November 2017 (**Exhibit RF-D07 = iPad-66.a**).

243 See Statement of Reply, paras. 175-182, with examples.

244 See paras. 114-120 above.

245 District Court Judgment, ground 5.64.

246 Summons, para. 203, Defence on Appeal, paras. 444-445.

247 Agreement Between the Government of the Argentine Republic and the Russian Federation for the Promotion and Reciprocal Protection of Investments, Clause 14(1) (**Arbitration File Exhibit C-814**); Agreement Between the Government of the Russian Federation and the Government of the Republic of South Africa on the Encouragement and Mutual Protection of Capital Investments, Clause 14(1) (**Arbitration File Exhibit C-842**); Agreement Between the Government of the Russian Federation and the Government of the Republic of Macedonia for the Promotion and Reciprocal Protection of Investments, Clause 12 (**Arbitration File Exhibit C-85**); Agreement Between The Government of the Russian Federation and the Government of Japan on Promotion and Protection of Investments, Clause 179(1) (**Arbitration File Exhibit C-82**); Agreement Between the Government of the Russian Federation and the Government of the Arab Republic of Egypt on the Encouragement and Mutual Protection of Capital Investments, Clause 14 lid 1 (**Arbitration File Exhibit C-824**); Agreement Between the Government of the Russian Federation and the Government of the Syrian Arab Republic for the Promotion and Mutual Protection of Investments, Clause 12 (1) (**Arbitration File Exhibit C-845**); Agreement Between the Government of the Russian Federation and the Government of the Republic of Yemen for the Promotion and Mutual Protection of Investments, Clause 12(1) (**Arbitration File Exhibit C-852**).

248 Article 15(1)(a) FLIT (1995) (**Exhibit RF-47 = iPad-2.g**).

parliamentary history therefore confirms that provisions that provide for arbitration between investors and the State are inconsistent with Russian federal laws as referred to in Article 45(1) ECT.[249]

169. The District Court therefore rightly noted: "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."[250]

(f) Article 15(4) of the Constitution and the hierarchy of legal norms

(i) Article 15(4) of the Constitution

170. HVY devote hundreds of pages to rules of conflict regarding the hierarchy of legal norms.[251] In particular, they have applied the basis of Article 15(4) of the Constitution:

> "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."[252]

171. I will explain below that this provision relates to a treaty that has been ratified by the Parliament.

172. HVY assert that Article 15(4) of the Constitution entails that Article 26 ECT prevails over federal laws. Thus they conclude that the Russian Federation

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249 Summons, paras. 232-234, Defence on Appeal, paras. 223-224, Judgment, paras. 5.62-5.64.

250 District Court Judgment, para. 5.64.

251 The term "rules of conflict" is primarily used here to refer to hierarchical conflicts between standards. The District Court, for example, has understood Article 15(4) of the Constitution to be a rule of conflict (para. 5.87).

252 Constitution of the Russian Federation, Article 15(4) (**Arbitration File Exhibit R-163**). The Dutch translation of this originally Russian text is as follows: "De universeel erkende normen en bepalingen van internationaal recht en internationale overeenkomsten van de Russische Federatie maken deel uit van haar rechtsstelsel. Indien een internationaal verdrag of internationale overeenkomst van de Russische Federatie andere regels vaststelt dan door de wet bepaald, dan zijn de regels van de internationale overeenkomst van toepassing."

consented to arbitration on the basis of Article 26 ECT. As explained extensively in the submissions, HVY's circular reasoning cannot hold.[253]

173. Prof. Avtonomov – expert of the Russian Federation – clearly presents this discussion in three graphical representations in his second expert report.[254]

(ii) In any event, Article 15(4) of the Constitution only allows ratified treaties to prevail

174. The District Court correctly held that only treaties that have been ratified by the Russian Parliament prevail over laws.[255] The ECT has not been ratified. Consequently, no provisions of the ECT can prevail over federal laws. The opinion of the District Court is in line with the established case law, the legislative history and the literature:

(a) Established case law dictates that only ratified treaties prevail over federal laws.[256] See, for instance, the so-called Chinese Border case. It concerned a conflict between an unratified treaty and a federal law. The Supreme Court confirmed that the federal law had priority:

> (….)
>
> International treaties of the Russian Federation, whereby the consent to be bound by these was given by the government of the Russian Federation, have priority over decisions and regulations of the Government and decisions and regulations of federal executive bodies.
>
> By virtue of the hierarchy of legal acts, priority over the laws of the Russian Federation is accorded to international treaties of the Russian Federation concluded on behalf of the Russian Federation (interstate treaties), consent to be bound by which was given in the form of a federal law.

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253 See for example RF's Submission paras. 55-79 and Defence on Appeal, paras. 420 *et seq*.

254 Second Expert Report of Prof. Avtonomov dated 14 August 2019 (**Exhibit RF-D25 = iPad-114.b**), para. 23.

255 District Court Judgment, paras. 5.87-5.93. See Defence on Appeal, paras. 419-434; RF's Submission, paras. 68-79.

256 See for example Reply, para. 135, Defence on Appeal, paras. 424-425; RF's Submission paras. 71 *et seq*; Expert Report of Prof. Avtonomov of 10 November 2017, (**Exhibit RF-D4 = iPad-66.a**), paras. 65-67.

> (…) Since the Government of the Russian Federation is not entitled to adopt, amend or abrogate the provisions of criminal laws or laws on criminal procedure, the provisions of the non-ratified Treaty between the Government of the Russian Federation and the Government of the Chinese People's Republic on the Russian-Chinese Border Regime dated November 9, 2006, to the extent it provides for rules different from those provided for by the Russian Criminal Code and the Russian Criminal Procedure Code, shall not apply in the Russian Federation."[257] (emphasis added)

See also Judgment No. 2531-O of the Russian Constitutional Court of 6 November 2014:

> "The Plenum of the Supreme Court of the Russian Federation has repeatedly noted the priority of an international treaty of the Russian Federation that has entered into force and consent to be bound by which was given in the form of a federal law over laws of the Russian Federation (…)"[258]

(b) The legislative history of Article 15(4) of the Constitution: the Secretary of the Constitutional Committee, explained during the oral hearing that treaties only prevail "if they have been ratified".[259]

(c) When the Federal Law on International Treaties of 1995 ("FLIT") was enacted, it was confirmed that only ratified treaties prevail. The State Secretary confirmed to the Parliament:

> "I would like to draw your attention to the fact that only those treaties that will be ratified in the parliament and, accordingly, will be approved in the form of a law, will have priority over legislation in case of conflict of laws."[260]

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[257] Cassation Ruling No. 59-O09-35 of the Supreme Court of the Russian Federation (29 december 2009) (**Exhibit RF-125 = iPad 12.a**); The English text is included in Defense on Appeal, f.n. 626. With regard to this ruling, RF Submission, paras. 71-72, 82; *see also* Second Expert Report of Prof. Avtonomov dated 14 August 2019 (**Exhibit RF-D25 = iPad-114.b**), para. 50.

[258] Ruling No. 2531-O of the Constitutional Court of the Russian Federation (6 november 2014 (**Exhbit RF-124 = iPad 12.a**).

[259] See Defence on Appeal, para. 426-427; see Prof. Avtonomov's Expert Opinion of 6 November 2017 (**Exhibit RF-D4 = iPad-66.a**), para. 59.

[260] Prof. Avtonomov's Expert Opinion of 6 November 2017 (**Exhibit RF-D4 = iPad-66.a, Annex ASA-019**), State Parliament Hearing Transcript "on Draft Federal Statute 'on International Treaties of the Russian Federation'" dated 27 May 1994.

(d) The literature: it is generally understood in the literature that only ratified treaties prevail.[261]

175. HVY are of the opinion that unratified treaties that are merely provisionally applied on the basis of consent from the government might prevail over federal laws.[262] They are ignoring the numerous sources cited above that demonstrate the opposite. Instead, they have based their opinion on an incorrect interpretation of the Constitutional Court's Judgment 8-P. They also refer to four later judgments that refer to this earlier Resolution (more on these below). Their experts have quoted from these five judgments more than one hundred and fifty times (!) in their latest opinions.[263] These five judgments have already been discussed extensively in the submissions, including most recently in Professor Avtonomov's third expert opinion.[264] None of them provide support for HVY's position.[265] **Not even one** of these five judgments related in fact to **a conflict** between a provisionally applicable treaty that had not been ratified and a law that was inconsistent with that treaty.[266] The fact that HVY's

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261 See Defence on Appeal, para. 434; see, for instance, Prof. Avtonomov's Expert Opinion of 6 November 2017 (**Exhibit RF-D4 = iPad-66.a**), paras. 68-69; Talalaev A.N., *Correlation of International and National Law and the Constitution of the Russian Federation*, in MOSCOW JOURNAL OF INTERNATIONAL LAW No. 4 (1994) (**Exhibit RF-D4 = iPad-66.a**, **Annex ASA-015**), at 13

262 See Dr Mishina's Second Expert Opinion of 19 February 2019 (**Exhibit HVY-D11 = iPad 98.a**), Part II, paras. 44-122; Prof. Stephan's Second Expert Opinion of 22 February 2019 (**Exhibit HVY-D10 = iPad 98.a**), paras. 48-80.

263 One of the five judgments often cited by HVY's experts is the Constitutional Court's Resolution No. 8-P of 27 March 2012 (the Ushakov case, also known as the Customs Case, Constitutional Court Resolution No. 8-P "on the Matter of the Constitutionality Test of Paragraph 1 of Article 23 of the Federal Statute 'on International Treaties of the Russian Federation' in Connection with a Complaint Filed by Citizen I.D. Ushakov" of 27 March 2012 (**Exhibit RF-49 = iPad-2.g**) para. 1.1; judgment of the Zabaykalsky Regional Court dated 1 September 2011 (**Exhibit RF-426 = iPad-106.a**). About this, see for example Prof. Avtonomov's First Expert Opinion (**Exhibit RF-D4 = iPad-66.a**) paras. 139-143. Also see RF's Submission paras. 77(a) and 78. Also see Prof. Avtonomov's Second Expert Opinion of 14 August 2019 (**Exhibit RF-D25 = iPad-114.b**) paras. 31-32.

264 See Prof. Avtonomov's Third Expert Opinion of 9 September 2019 (**Exhibit RF-D30, iPad 114.b)**, paras. 26-34.

265 For example, see Prof. Avtonomov's Third Expert Opinion dated 9 September 2019 (**Exhibit RF-D30, iPad 125.b)**, paras. 15-25, discussing Resolution 6-P. See also Prof. Avtonomov's Second Expert Opinion dated 14 August 2019 (**Exhibit RF-D25 = iPad 114.b**), para. 35.

266 See Defence on Appeal, paras. 437-440, RF's Submission, para. 77 and note 174.

interpretation of these judgments is only supported by their own experts speaks volumes.[267]

176. I will discuss the judgment cited most often: **Resolution 8-P**, also known as the Customs Case. HVY continually refer to sections in the judgments, the purport of which is that treaties that are provisionally applied essentially have the same consequences as treaties that have entered into force. From this, HVY have wrongly drawn the far-reaching conclusion that every non-ratified treaty that is provisionally applicable prevails over national laws and regulations. The District Court rightfully rejected this argument:[268]

- Firstly: Resolution 8-P must be read in the correct context. This case concerned the question whether non-ratified treaties that are provisionally applicable must be published.[269] HVY wrongly asserts that the procedural debate was about the hierarchy of legal norms.

- Secondly: HVY's allege that this case concerned "*a provisionally applied treaty which provided for the imposition of a higher import levy than laid down in Russian federal legislation*."[270] This is incorrect and misleading. The decision of the lower court shows that this case concerned a provisionally applied treaty, which was inconsistent with a *government resolution*.[271] Obviously, a treaty provisionally applied by the

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267 District Court Judgment, paras. 5.87-5.93, RF's Submission, paras. 75-78. Also see Reply, paras. 133 *et seq*.

268 District Court, para. 5.92.

269 Article 15(3) of the Russian Constitution provides: "Laws shall be officially published. Unpublished laws shall not be used. Any 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." First Expert Opinion of Prof. Avtonomov dated 6 November 2017 (**Exhibit RF-D4 = iPad-66.a**, **Annex ASA-014**); see Prof. Avtonomov's Expert Opinion of 6 November 2017 (**Exhibit RF-D4 = iPad-66.a**), paras. 140-143.

270 HVY's "Submission" para. 221. They refer to the opinions of their own experts, which also refer to inconsistency with "*domestic legislation*". See for example Prof. Stephan's Expert Opinion, (**Exhibit HVY-D10 = iPad-98.a**), para. 34.

271 See for example RF's Submission, para. 77. This concerns Resolution No. 718 of the Government of the Russian Federation "on Approval of the Regulation on the Application of Uniform Rates of Customs Duties and Taxes on Goods Transported Across the Customs Border of the Russian Federation by Individuals for Personal Use" dated 29 November 2003, in Second Expert Opinion of Prof. Avtonomov dated 14 August 2019 (**Exhibit RF-D25 = iPad-114.b, ASA-110**), paras. 28-34.

government prevails over a government decision, as the government may revoke or amend its own decisions. However, the government cannot set aside laws at its own discretion.

(iii) *Limitation Clause* from Article 45(1) ECT does not refer back to the ECT

177. HVY have furthermore misinterpreted Article 45(1) ECT. Article 45(1) ECT exclusively refers to the "*constitution, laws or regulations*" of the Contracting States. This text does not refer to the provisions of the treaty itself.[272] Consequently, "reference" cannot be made by applying national rules of conflict regarding a hierarchy of norms.[273] Prof. Avtonomov – the expert of the Russian Federation - clearly explained this in his expert opinion of 14 August 2019.[274]

178. This is also confirmed by the case law cited by HVY. The District Court rightly held that "the case law of the Constitutional Court reflects that a treaty like the ECT can limit the scope of the provisional application to treaty provisions that are consistent with the Russian Constitution and other law and regulations".[275]

(g) Explanatory Memorandum to legislative proposal for ratification of the ECT (paras. 5.59-5.64)

179. HVY also rely on the Explanatory Memorandum to the legislative proposal for ratification of the ECT submitted by the Russian government to the Parliament in 1996.[276] The Parliament did not accept that proposal, and therefore did not ratify the ECT. The government subsequently withdrew the legislative proposal.

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[272] See for example Defence on Appeal, paras. 420, 436.

[273] RF's Submission paras. 61-65. See also RF's Submission para. 66. A similar principle is the internationally accepted premise in rules of conflict in private international law that re-referral ("*renvoi*") must be ruled out. This premise is accepted in most, if not all, European systems of law.

[274] Prof. Avtonomov's Second Expert Opinion dated 14 August 2019 (**Exhibit RF-D-25 = iPad-114.b**), paras. 11-20.

[275] District Court Judgment, para. 5.92.

[276] The Explanatory Memorandum was entered into evidence as **Exhibit RF-66 = iPad 2.g**. See in this regard Reply, paras. 117-128 and Defence on Appeal, paras. 321 *et seq*.

180. HVY draw far-reaching conclusions form the Explanatory Memorandum. They maintain that it provides that all treaty provisions have always been consistent with Russian law.[277] The District Court rightfully rejected this position.[278]

181. Firstly, the Explanatory Memorandum expresses only the view of the executive. As noted by the District Court, this view lacks independent weight, because the ECT was never ratified.[279]

182. Secondly, Article 26 ECT is not mentioned anywhere in the Explanatory Memorandum. It does not even mention arbitration between an investor and the State in general.

183. Thirdly, the Explanatory Memorandum explains the situation *after* ratification of the ECT by the Parliament. It does not express a view on whether provisional application of any particular provision of the ECT was consistent with Russian law.[280] The explanation rather points to the contrary. It states that specific ECT provisions are "yet had to be reflected" in Russian legislation.[281]

(h) Conclusion

184. Based on the foregoing, the conclusion is that arbitration on allegedly unlawful expropriation and tax assessments is **not** consistent with Russian law.

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[277] Hulley Interim Award (**Exhibit RF-01**), paragraph 374. The Tribunal based its opinion on an incorrect translation of the Explanatory Memorandum, despite the fact that this had been expressly pointed out to the Tribunal and this had been noted (Summons, para. 237). Statement of Appeal, paras. 170-173, 704-710, Statement of Defence, paras. II.202-204 and Rejoinder paras. 83-88. For the rejection of this position, see for example Reply, paras. 117-128, Defence on Appeal, paras. 321-322; Prof. Asoskov's Expert Opinion of 10 November 2017 (**Exhibit RF-D5 = iPad-66.a**) paras. 135-140, and Prof. Nolte's Expert Opinion of 22 November 2017 (**Exhibit RF-D2 = iPad-66.a**), paras. 60-76.

[278] District Court Judgment, paras. 5.59-5.64.

[279] District Court Judgment, para. 5.60.

[280] See the certified translation entered into evidence as **Exhibit RF-66 = iPad 2.g**. At most, it shows that limited provisional application of the Treaty is consistent with Russian law: "*At the time of signing of the ECT, the provision regarding provisional application was not in contravention of the Russian legal acts."*

[281] Summons, paras. 237-238 and Reply, paras. 121 *et seq.;* Explanatory Note (**Arbitration File Exhibit C-143**), 4: ("*The ECT contains a number of legally binding provisions, based on the GATT provisions, that have yet to reflected (or fully reflected) in the Russian legislation.*"). Representatives of the Russian Federation have confirmed on numerous occasions that the ECT is in conflict with federal laws; see Defense on Appeal, paras. 318 *et seq*,

Arbitration regarding disputes of that kind is only possible if federal law or a ratified treaty unambiguously provide for arbitration. The foregoing entails that the provisional application of Article 26 ECT in the present case is inconsistent with Russian law. The District Court rightly concluded that there is no valid arbitration agreement.

C. Second argument: separation of powers in the Russian Federation (paras. 5.66-5.95)

(a) Introduction

185. This is the second independent argument showing that arbitration on HVY's alleged claim is inconsistent with Russian law (for a summary of the three arguments, see para. 103 and the structure of the District Court's Judgment, para. 106 above).

186. This second argument concerns the question of whether provisional application of the arbitration clause in a treaty signed by the executive violates the constitutional principle of the separation of powers. It is important in that regard to first examine whether the Russian Federation is bound by signature or by ratification.

(b) Bound by signature or ratification? (paras. 5.66-5.73)

187. After the Tribunal had incorrectly interpreted the Limitation Clause as an all-or-nothing provision, it assessed the question of whether the principle of provisional application of treaties in itself is inconsistent with the Russian Constitution or Russia's laws or regulations. More particularly, the question was "*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*."[282] The Tribunal

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[282] Hulley Interim Award, paragraph 379.

answered this question in the negative. It based its opinion on its analysis of the Federal Law on International Treaties of 1995 ("FLIT").

188. The District Court rightly rejected the Tribunal's analysis and conclusion. "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."[283] (emphasis added)

189. It is, in fact, the text of the treaty that is determinative of provisional application. That is also evident from the text of Articles 1(1), 2, 6 and 23 FLIT[284] and Articles 11-14 VCLT. The FLIT follows the main lines of the VCLT. All of these articles are restricted by the words "if so provided by the treaty" or words of similar purport.[285]

190. Article 23(1) FLIT ("*Provisional application of international treaties by the Russian Federation*") is particularly relevant:

> "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."

191. Article 23(1) FLIT is based on Article 25 VCLT ("Provisional application"):

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

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283 District Court Judgment, para. 5.71.

284 Article 1(1) (purport of the FLIT) is cited in the District Court's Judgment, para. 5.67. Articles 2 and 6 in the District Court's Judgment pp. 27-28 (English translation) and para. 5.68 (Dutch translation), and Article 23 in the District Court's Judgment p. 29.

285 Article 2(c) FLIT: "'signature' [means] (...) either a phase in the creation of a treaty or a manner in which the Russian Federation can make its consent to being bound by an international treaty known, if the treaty provides that signature will have that consequence (...)." Article 6 FLIT is based on Article 11 VCLT ("Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty"). Those instruments are specified in Articles 12 and 14 VCLT. Article 12 VCLT concerns expressing consent to being bound by a treaty "when the treaty provides that signature shall have that effect" (Article 12(1)(a)). Article 14 VCLT concerns expressing consent to be bound by a treaty through ratification when "the treaty provides for such consent to be expressed by means of ratification" (Article 14(1)(a)).

(a) the treaty itself so provides; (...)". (emphasis added)

192. In what can be deemed one of the key opinions in the Judgment (para. 5.72), the District Court then rightly refers to Article 39 ECT which requires "ratification" for "entry into force". Signature is nothing more or other than a phase in the conclusion of the Treaty. Here, *signature* does not express consent to be bound by the Treaty as referred to in Article 12 VCLT. This concerns signature subject to ratification within the meaning of Article 14(1)(c) VCLT.[286] Signature merely leads to the limited provisional application of the ECT. The scope of provisional application is limited by the Limitation Clause in Article 45 ECT.

193. In the words of the District Court: "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. (…)."

194. In its opinion, the District Court departs from its earlier conclusion that the Limitation Clause entails consistency of individual provisions of the treaty with national law.

195. Even if the Limitation Clause were to be interpreted as advocated by the Tribunal and HVY – "all or nothing" – however, the provisional application of Article 26 ECT is still not possible in this case. This is because pursuant to the separation of powers in the Russian Federation, exclusively the Parliament can declare **the provisions of treaties that supplement or amend Russian law** applicable by adopting a national law. Article 26 ECT is one of the ECT provisions that are inconsistent with Russian law. This leads us to the topic of separation of powers, which is the subject of the next part of these pleadings.

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[286] Also see Defence on Appeal, paras. 41-51; Expert Report of Prof. Marochkin dated 24 November 2017 (**Exhibit RF-D06 = iPad-66.a**), paras. 32-44.

(c) Separation of powers (paras. 5.74-5.95)

(i) Introduction

196. Already before the Tribunal, the Russian Federation argued (secondly[287]) that provisional application of Article 26 ECT violates the constitutional principle of separation of powers.[288] This has also been extensively explained in these setting aside proceedings.[289]

197. The District Court devoted an extensive section to the principle of separation of powers in the Russian Federation.[290] It rightly concluded that treaties that **are inconsistent with or supplement** national Russian law cannot be applied based only on their signature, but require ratification by the Parliament.[291]

(ii) Constitutional framework

198. The 1993 Constitution of the Russian Federation, which largely follows international constitutional practice, is based on the principle of separation of powers.[292] Article 10 of that Constitution provides:

> "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."[293]

199. The executive power is exercised by the Russian Federation's government.[294] The government may act exclusively on the basis of the Constitution, federal laws and regulations issued by the President.[295]

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287 For the three arguments see para. 104 above.

288 Hulley Interim Award, p. 23 at 19.

289 See for example the Summons, paras. 191-195. Reply, para. 57, District Court Judgment, paras. 5.74-5.94.

290 District Court Judgment, 5.74-5.95.

291 District Court Judgment, para. 5.93.

292 L.A. Okunkov (ed.), *Commentary to Constitution of the Russian Federation* (Art.-By-Art.) (1996) (**Exhibit RF-44 = iPad-2.g**); for separation of powers in general, see Expert Report of Prof. Avtonomov of 10 November 2017, (**Exhibit RF-D4 = iPad-66.a**), paras. 31-48; see also Constitutional Court Resolution No. 16-P "on the Inspection of the Constitutionality of paragraph 4 Article 28 of the Statute of the Komi Republic 'on State Service of the Komi Republic'" dated 29 May 1998 (**Exhibit RF-D4 = iPad-66.a, Annex ASA-038**).

293 Constitution of the Russian Federation, Article 10 (**Arbitration File Exhibit R-163**).

200. The legislative power is assigned to the Parliament.[296] As evidenced by Article 106 of the Constitution, the Parliament is charged with adopting federal laws regarding the "ratification and denunciation of international treaties and agreements of the Russian Federation".[297]

201. The supremacy of the Constitution over federal laws is laid down in Article 15(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."

202. After citing the aforementioned and other provisions from the Constitution, the District Court discussed the experts and commentary cited by the parties in detail.[298] It then endorsed the position of the Russian Federation that the Parliament plays a vital role in the system of the Constitution by effectuating international treaties that are inconsistent with or supplement Russian legislation.[299]

(iii) Article 15(4) Constitution requires ratification by the Parliament of a treaty that contains inconsistent or supplementary provisions

203. Article 15(4) of the Constitution was already cited within the context of the hierarchy of legal norms (see para. 170 above). For the sake of this Court of Appeal's convenience, I will cite it again here:

> "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

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294 *Id*. Article 110 (**Arbitration File Exhibit R-163**).

295 *Id*. Article 115(1) and (3); 1997 Constitutional Law on the Government of the Russian Federation (17 December 1997), Article 2 (**Arbitration File Exhibit R-427**).

296 *Id.* Article 94.

297 *Id.* Article 106 opening words and at d.

298 District Court Judgment, paras. 5.79-5.84.

299 District Court Judgment, para. 5.84.

> envisaged by law, the rules of the international agreement shall be applied."

204. Whether the rule of conflict in Article 15(4) of the Constitution provides for the prevalence of a treaty over legislation was assessed in the section regarding the hierarchy of legal norms.[300] The answer to that question is that only treaties ratified by the Parliament prevail over laws. HVY are nevertheless arguing that *all* treaties, which is understood to include treaties that are provisionally applicable, allegedly prevail over treaties, which is why Article 26 ECT applies. That is not the case.

205. In Russian case law and legal doctrine, it is generally assumed that treaties with inconsistent or supplementary rules must be ratified by the Parliament first.[301] This interpretation of Article 15(4) of the Constitution is supported by the various resolutions of the Supreme Court and the Constitutional Court.[302]

206. As the District Court noted: "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."[303]

(iv) <u>FLIT 1995 and the separation of powers</u>

207. The separation of powers is also confirmed in the FLIT of 1995.[304] Article 6(2) FLIT provides:

> "[d]ecisions to grant consent for the Russian Federation to be bound by international treaties shall be made by state bodies of the Russian

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300 See Section III.B(f)(iii) above.

301 District Court Judgment, paras. 5.85-5.90; see also for separation of powers in general, see Expert Report of Prof. Avtonomov of 10 November 2017, (**Exhibit RF-D4 = iPad-66.a**), paras. 53-69, with sources cited therein

302 See Reply, para. 135, Defence on Appeal, paras. 424-425; RF's Submission paras. 71 *et seq*.

303 District Court Judgment, para. 5.91.

304 Expert Report of Prof. Avtonomov of 10 November 2017, (**Exhibit RF-D4 = iPad-66.a**), para. 83; Second Expert Report of Prof. Avtonomov of 14 August 2019, (**Exhibit RF-D25 = iPad-114.b**), paras. 43-45.

> 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."[305]

208. The primacy of the Russian Parliament is confirmed by Article 15(1) FLIT 1995 and Article 12 of that law's predecessor from 1978.[306] Article 15 ("*International treaties of the Russian Federation subject to ratification*") of the FLIT provides at 1(a):

> "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;" [307] (emphasis added)

209. This provision confirms treaties "the implementation of which requires amendment of existing legislation or the adoption of new federal laws (…)". Such treaties must be ratified by Parliament. They cannot become automatically applicable based on a signature of the executive power.

210. As explained (see para. 190), Article 23(1) FLIT mentions the provisional application of a treaty "or a part of a treaty" pursuant to Article 25(1) VCLT.[308]

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[305] Article 6.2 FLIT (**Exhibit RF-D4 = iPad-66.a**, ASA025).

[306] Also see Defence on Appeal, paras. 167-169; RF's Submission paras. 73; Article 15(1) FLI (**Exhibit RF-D4 = iPad-66.a**, ASA025); USSR Statute "on the Procedure for Concluding, Executing and Denouncing International Treaties of the USSR" of 6 July 1978 (**Exhibit RF-D4**, ASA003), Article 12.

[307] Article 15(1)(a) FLIT (**Exhibit RF-D4 = iPad-66.a**, ASA025)). ("the implementation of which requires amendment of existing legislation or the adoption of new federal laws, or in which certain rules are given that are inconsistent with the rules foreseen by the law").

[308] In the Russian Federation, the provisional application of treaties is, indeed, not categorically ruled out. Article 23(1) FLIT (**Exhibit RF-D4 = iPad-66.a**, ASA025). (English translation*:"[a]n 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"*; Dutch translation: "een internationaal verdrag of deel daarvan, voorafgaand aan de inwerkingtreding, door de Russische Federatie voorlopig kan worden toegepast als het verdrag zelf dit bepaalt of als een overeenkomst van die strekking is bereikt met de partijen die het verdrag hebben ondertekend*."*)

211. For treaties that require ratification pursuant to Article 15(1) FLIT, Article 23(2) FLIT moreover requires a decision pending provisional application for a period of more than six months to be adopted by the Parliament in the form of a federal law.[309]

(v) Powers of President Yeltsin (new argument on appeal)

212. HVY present an entirely new argument that they derived from the Russian Constitution that took effect in 1993.[310] They argue that according to this Constitution, the President has "primacy".[311] They argue that it provides a "super-presidential democracy".[312] They conclude that the President is authorised to provisionally bind the Russian Federation to treaties independently and without any limitation.[313] This new position is the main topic of several chapters of HVY's Statement of Appeal.[314]

213. As explained before, HVY's assertions regarding the allegedly broad powers of President Yeltsin are inadmissible and wrong.[315] The assertion on the purported allegedly dominant role of the Russian President, which supposedly entails that he may apply treaties provisionally without any limitations are in any event also irrelevant. The President played no part in the formation and signing of the

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309 Article 23(2) FLIT (**Exhibit RF-D4 = iPad-66.a**, ASA025): *"[…] 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 Parliament 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 Art. 17 of this Federal Law for the ratification of international treaties."* District Court Judgment, para. 5.94.

310 See in particular Statement of Appeal, paras. 449-490.

311 Statement of Appeal, paras. 72, 94, 496.

312 Statement of Appeal, para. 88.

313 See in particular Statement of Appeal, paras. 449-490.

314 They are prominently addressed in chapters 2.2 and 5.5, among others Zie Statement of Appeal, paras. 454 e.v. The expert opinions referred to are those by prof. Stephan and dr. Mishina (**Exhibits HVY-D3 = iPad-61.a** and **HVY-D4 = iPad-61.a** respectively).

315 Defence on Appeal, paras. 390-343.Expert Report of Prof. Avtonomov of 10 November 2017, (**Exhibit RF-D4 = iPad-66.a**), paras. 106-107.

ECT. Mr Davydov was the person who proceeded to sign the ECT on behalf of the government.[316]

(d) Conclusion

214. The District Court's conclusion leaves no room for doubt: *"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."*[317]

D. Third argument: Derivative shareholder claim (not assessed by the District Court)

(a) Introduction

215. The Russian Federation put forward three independent arguments from which it follows that arbitration of this dispute is inconsistent with Russian law (see para.103). The third and final argument is that the provisional application of Articles 1 and 26 ECT is inconsistent with the legal rule of Russian law that shareholders cannot claim damages on account of damage inflicted to the company by third parties.[318] The Tribunal summarily rejected this argument.[319] The District Court did not address it.

216. HVY have asserted that they are Yukos shareholders. In their opinion, their stakes should be deemed "Investments" within the meaning of Article 1(6) ECT.[320] Subsequently, by virtue of Article 1(6) and 26 ECT they initiated arbitration proceedings. HVY's claims in the Arbitrations related to a decrease in value or loss of their shares in Yukos due to damage caused to Yukos.[321]

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316 Defence on Appeal, paras. 394-396, Expert Report of Prof. Avtonomov of 10 November 2017, (**Exhibit RF-D4 = iPad-66.a**), para. 105.

317 District Court Judgment, para. 5.93.

318 See Summons, paras. 241-244; Reply, paras. 183-185; Defence on Appeal, paras. 242-250.

319 See paras. 223-224 *infra.*

320 See for example the Arbitration Hulley Statement of Claim, paras. 29 and 30.

321 Final Awards, randnr. 1580.

(b) Articles 1(6) and 26 ECT allow shareholder claims due to damage caused to the company

217. The ECT offers investors protection by seeking damages through arbitration. Article 1 paragraph 6 provides:

> "(6) 'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
>
> "(…)
>
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;"[322] (emphasis added)

218. Based on Article 26 ECT "*[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former*" are subject to arbitration.[323] On that basis, shareholders may seek damages due to the reduced value of their shares.

(c) Russian law does not allow shareholder claims due to damage caused to the company

219. In many civil law systems, shareholders of companies cannot bring claims on account of impairment or loss of shares due to damage caused to a company. For the Netherlands, for example, this is evidenced by the *ABP/Poot* judgment.[324]

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[322] Emphasis added. Dutch translation: "*6. "Investering": elke vorm van activa die een investeerder in eigendom heeft of waarover hij direct of indirect zeggenschap heeft, met inbegrip van: (b) een vennootschap of onderneming, of aandelen of andere vormen van vermogensdeelneming in, en obligaties en andere schuldbewijzen van een vennootschap of onderneming*".

[323] Article 26 ECT (Dutch translation): "*Geschillen tussen een Verdragsluitende Partij en een investeerder van een Verdragsluitende Partij over een investering van deze laatste op het grondgebied van eerstgenoemde Partij*".

[324] Supreme Court 2 December 1994, *NJ* 1995, 288 (*ABP/Poot*) para. 3.4.1.: "The assets of the company are separated from those of its shareholders. If a third person inflicts damage to a company (...), only the company is entitled to claim compensation of the damage inflicted to it from the third person. That financial damage incurred by the company, as long as it remains uncompensated, will cause a decrease in the value of the shares of the company. In principle, however, the shareholders

220. Such a derivative claim for damage is also inadmissible under Russian law. To confirm this, the Russian Federation entered two expert opinions into evidence.[325] The first expert report explained that it follows from the Russian Civil Code and the Law on Public Limited Companies that the right to bring a claim is reserved to the person whose rights have been infringed or denied. According to Russian law, a company serves an independent function and can independently challenge the damage caused to the company. A shareholder cannot simply sue a third party. This is confirmed by the joint expert opinion of renowned experts Dr Timmermans and Prof. Simons. Their conclusion is that a claim like that of HVY is inconsistent with Russian law.[326]

(d) HVY did not dispute with reasons that the provisional application of Article 26 ECT is inconsistent with Russian law[327]

221. HVY did not refute – at least not with sufficient reasons – these assertions.[328] They merely asserted that in the Arbitrations, no claim was lodged against the Russian Federation "in accordance with Russian civil law". They invoke alleged violations of their rights as investors on the basis of the ECT.[329]

222. HVY are assuming that as investors they can derive "rights" from a treaty that has not been ratified. They have failed to appreciate that the question to be answered is whether they can derive rights from Articles 1 and 26 ECT. The

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themselves are not entitled to claim damages for the loss that they suffered from the aforementioned third party. (…)"

325 Prof. Sukhanov's expert opinion, entered into evidence in the Arbitrations as **Exhibit RF-03.1.C-1.1.5**.

326 Dr Timmerman's and Prof. Simons' Expert Opinion, (**Exhibit RF-D8 = iPad 66.a**), para. 32.

327 In their Statement of Appeal, HVY devote one footnote to this topic. See Statement of Appeal, footnote 400.

328 Summons, para. 242.

329 HVY's "Submission" of 26 February 2019, paras. 329-331, with reference to the Spanish excerpts about this included in HVY's written submissions.

answer to that question is no, as the Russian Federation only applies the Treaty *to the extent that it is not inconsistent with Russian law.*[330]

(e) The Tribunal erred in rejecting the Russian Federation's third argument

223. The Tribunal rejected the Russian Federation's reliance on the inconsistency with Russian law. The Interim Awards state – without any explanation whatsoever – that the case did not involve a derivative claim. After all, HVY supposedly relied on "rights under the ECT".

> "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."[331]

224. This ruling is incomprehensible. HVY's claims are based on tax and collection measures taken against Yukos (see para. 216, above[332]). Regardless of how these claims on the part of HVY are labelled, they are inconsistent, and will remain inconsistent, with Russian law.[333] The Tribunal and HVY fail to appreciate that HVY's claims must be qualified in terms of Russian law, and not based on the ECT.[334]

(f) Conclusion

225. HVY's claims based on Articles 1(6) and 26 ECT are inconsistent with Russian law. Russian law does not permit a shareholder to initiate a derivative claim.

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330 Article 45 ECT.

331 HULLEY Interim Award, paragraph 372. Dutch translation: "Betreffende de ontvankelijkheidskwestie, concludeert het Scheidsgerecht dat Eiseres een vordering instelt wegens schending van haar eigen rechten op grond van de ECT, niet op grond van de rechten van Yukos. Het Scheidsgerecht is het eens met de door Eiseres gegeven karakterisering van haar vordering, die geen afgeleide vordering is, maar een vordering voor een direct verlies door Eiseres van haar aandelen en hun waarde."

332 Final Awards, randnr. 1580.

333 See Summons, para. 243. See also Reply, paras. 183-185 in response to HVY's circular reasoning in Statement of Defence, paras. II.262-264.

334 Statement of Appeal, footnote 400.

Pursuant to Article 45(1) ECT, therefore, the Russian Federation is not obliged to apply these articles provisionally. This Court of Appeal can therefore simply conclude, based on this independent ground, that arbitration of HVY's claims is inconsistent with Russian law. As a result, no valid arbitration agreement was formed.

IV. FRAMEWORK FOR ASSESSMENT

A. HVY's rejected and new assertions

226. HVY invoked (i) already rejected assertions and (ii) new assertions, which it did not present in the Arbitrations. Such assertions cannot be considered. After all, setting aside proceedings cannot be used as a disguised appeal. Setting aside proceedings offer no options for rectifying errors and omissions, this applies to both the claimant and the defendant. This is set out in Prof. Snijders' Expert Opinion.[335]

(a) HVY cannot rely on the grounds for jurisdiction rejected by the Tribunal[336]

227. The Tribunal rejected certain jurisdictional arguments. It concerns amongst others (a) HVY's appeal to Article 45(2) ECT; and (b) HVY's appeal to acquiescence and estoppel. The District Court properly held that such *negative* rulings on jurisdiction[337] (or: findings on lack of jurisdiction) may not be addressed in these setting aside proceedings[338]:

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335 Prof. Snijders' Expert Opinion (**Exhibit RF-D9 = iPad-66.a**).

336 District Court Judgment, para. 5.25; Statement of Appeal, paras. 636-643; Defence on Appeal, paras. 257-279; HVY's "Submission", paras. 336-354.

337 See also G.J. Meijer, T&C Rv (2018), Deventer: Wolters Kluwer, Article 1065 DCCP, note 2 citing the District Court Judgment: "It is assumed, however, that a ground for setting aside can only be directed against a positive arbitration decision on jurisdiction pursuant to Article 1065(1)(a) DCCP), and that there appears to be no room in these proceedings to form an opinion on the question of whether or not the Tribunal could have assumed its jurisdiction based on another argument it rejected (The Hague District Court, 20 April 2016, ECLI:NL:RBDHA:2016:4229)."

338 Statement of Appeal, Ground 4.2, paras. 636-643; Defence on Appeal, paras. 257-267; HVY's "Submission", paras. 332-367; see also Prof. Snijders' Expert Opinion (**Exhibit RF-D9 = iPad-66.a**).

> "5.25. (...) 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." (emphasis added)

228. The District Court based its holding on the legal system of the setting aside proceedings. This holding is supported by Article 1052 DCCP:

- Article 1052(4) DCCP provides for a positive ruling on jurisdiction that can be contested before a court:

> "The decision whereby the arbitral tribunal assumes jurisdiction can be contested only in conjunction with a subsequent full or partial final award and only by means of the legal remedies stated in Article 1064(1)."

- Article 1052(5) DCCP provides for a negative ruling on jurisdiction that cannot be contested before a court:

> "5. If the arbitral tribunal finds that it lacks jurisdiction, the ordinary court will have jurisdiction to hear the case, unless the parties have agreed otherwise."

229. A tribunal's ruling on jurisdiction is only "provisional" if it is a positive ruling.[339] The holding of the District Court is in line with the legislative history.[340] This holding is also in line with what authoritative authors like Prof.

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[339] *Cf.* Statement of Appeal, paras. 636-637; HVY's "Submission", para. 336.

[340] Meijer & Van Mierlo, Parliamentary History of the Arbitration Act 2015, p. 723 and p. 775 (Explanatory Memorandum). *"According to the fifth paragraph, the jurisdiction of the ordinary court is revived in case the arbitral tribunal declines jurisdiction. Therefore, no proceedings before the domestic court whereby it is requested to rule that the arbitral tribunal does have jurisdiction." (emphasis added) (...) "Ground a [of Article 1065(1) DCCP] also appears in Article 1052. ... If the party appearing in the arbitration later wishes to present a case to a court that relies on the absence of a valid arbitration agreement, then this ground must also have been presented to the arbitrators before all other defences. Ground a is only addressed by a court if the arbitral tribunal holds – despite such reliance – that it has jurisdiction. If the tribunal accepts this reliance and finds that it lacks jurisdiction, this will result in jurisdiction being conferred on an ordinary court pursuant to Article 1052(5)."*

Sanders[341], Prof. Dr. Snijders[342], Prof. Dr. Meijer[343] and Advocate-General Wesseling-Van Gent[344] on the basis of these legal provisions. For the sake of completeness, I incorporated references and a few brief quotations in the footnotes of these pleading notes.

(b) HVY cannot put forward new arguments in setting aside proceedings

230. HVY have advanced a few totally new arguments in these setting aside proceedings. They have taken positions on, for example (a) the interpretation of the phrase "*not inconsistent with*" in Article 45(1) DCCP and (b) the powers of President Yeltsin. In this appeal it is explained extensively that these *nova* could not be put forward.[345] These new arguments are – as explained above –

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[341] P. Sanders, *HET NIEUWE ARBITRAGERECHT* (3rd edition, 1996) p. 202. *"The legislature has now excluded this by immediately imbuing the ordinary courts with jurisdiction to hear the dispute, in the fifth paragraph [of Article 1052 DCCP]. Just like the acceptance of jurisdiction – see the excerpt from the Explanatory Memorandum quoted in note 5.2 – this is also based on the underlying rationale that such proceedings could result in a significant delay. This issue could even be litigated in three forums. The solution which the legislature has chosen – immediate referral to the ordinary courts – thus seems to be the most practical solution."*

[342] H.J. Snijders, *NEDERLANDS ARBITRAGERECHT*, Deventer: Kluwer 2018, p. 413. *"The proceedings are started before an arbitral tribunal, which finds that it lacks jurisdiction. This is the only case in which the national court must often respect that decision and therefore does not have the final word or at least no word that differs from the arbitral tribunal's with regard to jurisdiction; specifically, it is frequently the national court that has jurisdiction."* HVY's assertion that Snijders did not express this view in his academic work is thus also incorrect (HVY's "Submission", paras. 337 *et seq.*).

[343] G.J. Meijer, *OVEREENKOMST TOT ARBITRAGE*, Deventer: Kluwer 2011, para. 11.2.1. *"The judgment of the tribunal that it lacks jurisdiction is final and conclusive. The ordinary court cannot assess the tribunal's judgment that it lacks jurisdiction. … The court will have to hear the case and does not have jurisdiction to review the tribunal's judgment that the tribunal lacks jurisdiction."*

[344] Opinion of A-G Wesseling-van Gent for Supreme Court 27 March 2009, ECLI:NL:HR:2009:BG4003: "The question of whether the parties have opted for arbitration for the settlement of a specific dispute (and, by extension, whether the arbitrator correctly held that it had jurisdiction), concerns one essential preliminary question. … In my opinion, a test for reasonableness by the civil court as to whether the arbitrator correctly held that it had jurisdiction conflicts with the provisions contained in Article 17 of the Constitution and Article 6 ECHR." …." (emphasis added) She formulated this in a previous opinion as follows: "The holding by the tribunal that it has jurisdiction is a 'provisional' opinion. Ultimately, the national court has the last word on 'jurisdiction jurisdiction'. The cases involved here are those such as the present one, in which the tribunal held that it had jurisdiction …." (emphasis added) (Opinion of A-G Wesseling-van Gent for Supreme Court, 25 May 2007, ECLI:NL:HR:2007:BA1523).

[345] Defence on Appeal, paras. 268-277. HVY failed to respond convincingly to this explanation in HVY's "Submission", paras. 322-367. See extensively Prof. Snijders' Expert Opinion, paras 60 and further. (**Exhibit RF-D9 = iPad-66.a**).

little convincing. The many new assertions, arguments and exhibits make this dispute unnecessary complex. They distract from the many positive jurisdictional judgments which, without a doubt, are to be assessed.

B. Burden of proof regarding the validity of the arbitration agreement[346]

231. The burden of proof regarding the existence of a valid arbitration agreement rests on the party relying on the existence of that agreement: the claimant in the arbitration proceedings. It is precisely because of the allocation of the burden of proof regarding a valid arbitration agreement that the principle of free assessment of evidence does not apply in arbitration proceedings.[347] In *setting aside proceedings*, the allocation of the burden of proof is no different than in arbitration. This has been confirmed by the Supreme Court and in the literature.[348]

232. HVY's counter-arguments have been rebutted in detail in the written submissions.[349] They mainly rely on legal sources not applicable here, such as Model Law[350] and case law regarding burden of proof concerning illegal conduct.[351] Whatever the case may be: under Dutch law HVY must state and

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346 District Court Judgment, para. 5.4; Statement of Appeal, paras. 616-625; Defence on Appeal, paras. 457-474; HVY's "Submission", paras. 368-379.

347 See Defence on Appeal, para. 472, citing literature and case law.

348 See Defence on Appeal, paras. 457-467 and Prof. Snijders' Expert Opinion (**Exhibit RF-D9 = iPad-66.a**).

349 The Russian Federation has already rebutted HVY's arguments in paragraphs 468-474 of its Defence on Appeal.

350 G.J. Meijer. van Mierlo, *Parlementaire Geschiedenis Arbitragewet*, Deventer: Wolters Kluwer 2015, pp. 587 -588 (Defence on Appeal): "Elements from this Model Law have been adopted in the memorandum of amendment. The Model Law is merely a model that need not be followed. It is particularly relevant for those countries whose arbitration laws are insufficient. Furthermore, the Model Law only applies to international arbitration. National arbitration is governed by the country's own laws, which the Model Law adopts. None of this diminishes the fact that, where these appeared useful, the proposals in the UNCITRAL Model Law were adopted in the memorandum of amendment." (emphasis added).

351 See HVY's "Submission", para. 377. Their positions are furthermore incorrect, or at least unbalanced. See, for example, *Metal-Tech Ltd. v. The Republic of Uzbekistan, ICSID Case No. ARB/10/3,* Award, 4 October 2013, paras. 239-243 and 257-266 (**Exhibit RF-361**

prove that a valid agreement has been reached. If there is any doubt about this, the Yukos Awards must be set aside.

C. Conclusion

233. From the foregoing, as well as from the written submissions, it follows that all grievances and statements of HVY must fail.[352] I therefore conclude that the District Court's judgment of 20 April 2016 must be upheld.

= iPad-66.c) and *World Duty Free v. Kenya, ICSID Case No. ARB/00/7*, Award, 4 October 2006, paras. 52 and 166 (**Exhibit RF-365 = iPad-66.a**). See also H. Tezuka, *Chapter 3: Corruption Issues in the Jurisdictional Phase of Investment Arbitrations*, in: D. Baizeau and R. Kreindler (eds.), Addressing Issues of Corruption in Commercial and Investment Arbitration, Dossiers of the ICC Institute of World Business Law, Volume 13, Deventer: Kluwer 2015, p. 58; A. Llamzon and A.C. Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct*, in: Albert Jan van den Berg (ed.), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18, Deventer: Kluwer 2015, pp. 487 and 489-490; and C.B. Lamm, E.R.Hellbeck, M. Imad Khan, *Pleading and Proof of Fraud and Comparable Forms of Abuse in Treaty Arbitration*, in: *id.* p. 564.

[352] I refer in particular to the discussion of the individual grievances and statements in Chapter II-E of the Defence on Appeal. Defence on Appeal, paras. 447-503.