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

ORAL ARGUMENTS RE ARTICLE 45 ECT

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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DISTINGUISHED MEMBERS OF THE COURT OF APPEAL,

I. INTRODUCTION

1. In the three pleadings in the first term of 90 minutes today and tomorrow, I will discuss grounds (a) through (e) of Article 1065(1) DCCP, in that order. That is the order used on this side in the Writ of Summons, the submissions, the Defence on Appeal and the Reply Submission (*Akte*). It is the order that this Court of Appeal preferred in its letter of 2 July last. This division is reflected on the slides. During these oral arguments, I cannot discuss everything extensively. The arguments made in the written submissions are maintained, regardless of whether they are orally repeated.

2. This morning, I will therefore start with ground (a) of Article 1065(1) DCCP, jurisdiction ground 1: the Tribunal lacked jurisdiction pursuant to Article 45 ECT.

3. The Russian Oligarchs behind HVY have continued their attempts to turn this case into a political debate. However, there is no room for politics in proceedings to set aside an arbitral award. The question now before this Court of Appeal is whether the District Court's judgment should be upheld and, if not, whether the Yukos Awards must still be set aside for other reasons on the grounds laid down in Article 1065(1) DCCP.

4. For the sake of completeness, I would also note here that due to the devolutive effect of the appeal, this Court of Appeal may opt to treat and dispose of any other ground for setting aside first.

A. A State being bound by an arbitration agreement

5. Before discussing the jurisdictional grounds, I would like to assert a reminder of the basic rule regarding a State being bound by an arbitration agreement: **the consent of a State to arbitration must be "clear and unambiguous" and**

therefore may not be assumed.[1] In case of doubt, the applicability of the arbitration agreement will not be assumed.

6. In the case *Ecuador v. Chevron*, the fundamental character of the sovereignty of a State that is a party to an investment treaty was again confirmed:

> "Although this sovereignty can be surrendered in specific types of cases, for example in a BIT, the answer to the question of whether sovereignty has also been surrendered in the case at hand is fundamental in nature and must therefore be fully reviewed not only by the arbitrators, but also by the district court in the framework of assessing the question of whether a valid arbitration agreement is lacking."[2] (emphasis added)

7. The burden of proof regarding the validity of the arbitration agreement is borne by the party invoking it, in this case HVY.

B. Assumptions for Article 45 ECT

8. There are five assumptions relevant to Article 45 ECT:

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[1] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 198: "*It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous*." (RME-1007; **Exhibit RF-03.2.C-2.1007**). See also the International Court of Justice's holding in *Bosnia-Herzegovina v Yugoslavia*, ICJ Order of 13 September 1993 (**Arbitration File Exhibit R-199**), para. 34 https://www.icj-cij.org/files/case-related/91/091-19930913-ORD-01-00-EN.pdf), which indicates that there must be an 'unequivocal indication' of a 'voluntary and indisputable' consent. See also the NAFTA case *Fireman's Fund v. Mexico*, ICSID Case No. ARB(AF)/02/01, Decision on the preliminary question, 17 July 2003, para. 64 (http://www.italaw.com/sites/default/files/case-documents/ita0330_0.pdf) "*[a claimant] is not entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement*"; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 175 (**Exhibit RF-81 = iPad-2.g**) ("*it is not possible to presume that consent has been given by a state. Rather, the existence of consent must be established. (…) What is not permissible is to presume a state's consent by reason of the state's failure to proactively disavow the tribunal's jurisdiction. Non-consent is the default rule; consent is the exception*."); *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014, para. 117 (**Exhibit RF-73 = iPad-2.g**) "*Consent always is the essential condition precedent to arbitration and, indeed, to any form of consensual adjudication*".

[2] The Hague District Court 20 January 2016, ECLI:NL:RBDHA:2016:385 (*Ecuador / Chevron*), para. 4.4. See also AG Spier in his Opinion, no. 11.13.2, for Supreme Court 26 September 2014, NJ 2015/318 (*Ecuador/Chevron and Texaco*), in which he pleads "*in case of doubt to choose an interpretation … in which the arbitrators' jurisdiction is limited*".

(i) First, the ECT – including the aforementioned Articles 26, 37, 38[3], 39[4], 44[5] and 45 – must be interpreted in accordance with the rules laid down in Articles 31-33 VCLT.

(ii) Second, there is a difference between signing and ratifying the ECT. The ECT must be ratified for it to enter into force (Article 44 ECT); signing it is not enough (Article 39 ECT). That is why the treaty makes a clear distinction between a "*signatory*" and a "*Contracting Party*".[6]

(iii) Third, the main rule is that a treaty is ratified before it is applied. The provisional application of the ECT is an exception to this. This was expressly confirmed by the District Court (para. 5.6).

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[3] Authentic English text: "*This Treaty shall be open for signature at Lisbon from 17 December 1994 to 16 June 1995 by the states and Regional Economic Integration Organizations which have signed the Charter.*" Unofficial Dutch translation in the Treaty Series: "*Dit Verdrag staat te Lissabon van 17 december 1994 tot en met 16 juni 1995 open voor ondertekening door de Staten en regionale organisaties voor economische integratie die het Handvest hebben ondertekend.*" In footnote 134 to the Rejoinder, HVY wrongly assert that it is allegedly undisputed that the Russian representative Davydov, by his signing pursuant to Article 7(1) and Article 12(1)(a) Vienna Convention on the Law of Treaties ('VCLT'), allegedly expressed the Russian Federation's consent to be bound by the Treaty. That is incorrect, see Reply, paragraphs 53, 138; see also Defence on Appeal, paras. 46-47.

[4] English text: "*This Treaty shall be subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Depositary.*" Unofficial Dutch translation (Treaty Series): "*Dit Verdrag dient te worden bekrachtigd, aanvaard of goedgekeurd door de ondertekenende Partijen. De akten van bekrachtiging, aanvaarding of goedkeuring worden nedergelegd bij de Depositaris*." See also Article 14(1)(a) VCLT: *"The consent of a State to be bound by a treaty is expressed by ratification when: a) the treaty provides for such consent to be expressed through ratification"*.

[5] Authentic text: "*2) For each state or Regional Economic Integration Organization which ratifies, accepts or approves this Treaty or accedes thereto after the deposit of the thirtieth instrument of ratification, acceptance or approval, it shall enter into force on the ninetieth day after the date of deposit by such state or Regional Economic Integration Organization of its instrument of ratification, acceptance, approval or accession*". Unofficial Dutch translation (Treaty Series): "*Voor elke Staat of regionale organisatie voor economische integratie die dit Verdrag bekrachtigt, aanvaardt of goedkeurt, dan wel ertoe toetreedt, nadat de dertigste akte van bekrachtiging, aanvaarding of goedkeuring is nedergelegd, treedt het Verdrag in werking op de negentigste dag na de datum waarop deze Staat of regionale organisatie voor economische integratie zijn respectievelijk haar akte van bekrachtiging, aanvaarding, goedkeuring of toetreding heeft nedergelegd."*

[6] In 55 paragraphs of their Statement of Defense, HVY confused at least 123 times, the terms "Contracting Party" and "Signatory" (see Reply, para. 48). They appear to admit that this was a mistake (see Rejoinder, footnote 34).

(iv) Fourth, provisional application depends on the phrasing of the treaty itself. That is also laid down in so many words in Article 25 VCLT.[7]

(v) Fifth, Article 45 ECT was edited so that as many States as possible could sign it as soon as it was drafted.[8]

9. As I will explain below, the District Court's analysis of Article 45 ECT contained in paras. 5.6-5.31 of its judgment is correct. The Russian Federation never ratified, accepted or approved the ECT.[9]

C. Article 45 ECT – Overview

10. In this section, to create a clear understanding, I provide an overview of the full text of Article 45(1) and (2) ECT.

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[7] Article 25 VCLT provides that:

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

(a) the treaty itself so provides; or

(b) the negotiating States have in some other manner so agreed.

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

[8] Sydney Fremantle (chairperson of working group II, charged with drafting and negotiating the ECT), Hearing Transcript, 18 November 2008, p. 163:7-15 (**Arbitration File**): "*To get a maximum application as early as possible, 8 one had to have as many countries signing it as 9 possible. One had to cover as much of a range of 10 government activities as was possible, without 11 overruling the legislature. The only way, therefore, of 12 reconciling the need to apply as much of the treaty as 13 possible, as widely as possible, and as urgently as 14 possible, was to have a provisional application 15 provision which respected the rights of the legislature*".

[9] Summons, para. 117, undisputed by HVY. The government did submit a ratification proposal to the lower chamber of the Russian Parliament in 1996, but the Russian Parliament never accepted that proposal. The Explanatory Memorandum (**Arbitration File C-143**; featuring the correct translation of one of the sentences in **Exhibit RF-66 = iPad-2.g**) in which the Russian government recommends the proposal for ratification was wrongly construed by the Tribunal and HVY as a position taken by the Russian Federation with regard to being bound to the ECT, or as a position taken regarding the question whether the ECT, for the purpose of applying Article 45 ECT, conflicts with Russian law (see Interim Award (**Exhibit RF-1 = iPad-2.g**), paras. 345, 374-375, Statement of Defence, paras. II.202-204 and Rejoinder, paras. 83-88). Wrongly so, see, *inter alia,* Statement of Reply, paras. 117-128; Defence on Appeal, paras. 127-129; see also Expert Report of Prof. Nolte of 22 November 2017 (**Exhibit RF-D2 = iPad-66.a**), paras. 60-74.

11. Article 45(1) provides that every "*signatory*" agrees "*to apply this Treaty provisionally*". That applies "*pending its entry into force for such signatory in accordance with Article 44*". That agreement is not unlimited. Paragraph 1 determines that the ECT will be provisionally applied: "*to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*." This phrase is also referred to below as the 'Limitation Clause'. The first paragraph thus prescribes provisional application to the extent such is not inconsistent with the constitution, laws or regulations of the signatory. That is a reference to national law.

12. A good summary is provided by Professor Rene Lefeber, who is the Head of the International Law Division within the Ministry of Foreign Affairs of the Netherlands:

> "A treaty may, of course, put limits to its own provisional application. Thus a treaty may provide that its provisional application is subject to national law which means that, in case of conflict, national law prevails over the treaty. The 1994 ECT, for example, provides that it is to be applied provisionally by a state 'to the extent that such provisional application is not inconsistent with its constitution, laws or regulations' (Art. 45(1))."[10]

13. Article 45(2)(a) provides that a "signatory" "may" declare that it will not provisionally apply the ECT at all. In that event, the State involved also enjoys none of the benefits of the provisional application by other States (reciprocity; see at b). Nevertheless, Part VII (*Structure and Institutions*) provisionally applies, as does the limitation (at c) "*to the extent that such provisional application is not inconsistent with its laws or regulations*".[11]

14. Thus, there are two regimes. The first (paragraph 1) prescribes provisional application to the extent such is not inconsistent with the constitution, laws or regulations of the signatory. That option applies to States whose national laws

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[10] René Lefeber, *The Provisional Application of Treaties*, in: ESSAYS ON THE LAW OF TREATIES: A COLLECTION OF ESSAYS IN HONOUR OF BERT VIERDAG (Jan Klabbers and René Lefeber, eds. 1998), 89 (**Exhibit RF-27 = iPad-2.g**) quoted in Defence on Appeal, para. 135.

[11] At Japan's proposal. See Defence on Appeal, para. 94.

may restrict the provisional application of treaties. The second regime (paragraph 2) is for States that want to reject entirely the provisional application of the Treaty. I will discuss these two regimes later.[12]

II. ARTICLE 45 – INTERPRETATION

15. The parties dispute the interpretation of Article 45(1) ECT. HVY's approach was referred to in the Arbitrations as the all-or-nothing approach. This interpretation was accepted by the Tribunal. Either "the entire Treaty is applied provisionally" or "it is not applied provisionally at all".[13] According to the Tribunal, the decisive factor was that provisional application was not categorically excluded in the Russian Federation. As a consequence, the Russian Federation was obliged to apply the Treaty provisionally in its entirety, including the arbitration rules.[14]

16. The Russian Federation's approach was referred to in the Arbitrations as the "piecemeal approach". That means – simply put – that the Treaty would be partially applied.[15] The District Court concurred with this interpretation. According to the District Court, *"the possibility of provisional application is focused on and depends on the compatibility of separate treaty provisions with*

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[12] See paras. 36-54 below.

[13] Hulley Interim Award (**Exhibit RF-1 = iPad-2.g**), paras. 303-329 and Statement of Defence, paras. II.105 *et seq.*

[14] Hulley Interim Award (**Exhibit RF-1 = iPad-2.g**), para. 394:

""*394. In this chapter, the Tribunal has found that: [….]*

c) The Limitation Clause of Article 45(1) negates provisional application of the Treaty only where the principle of provisional application is itself inconsistent with the constitution, laws or regulations of the signatory State; and d) In the Russian Federation, there is no inconsistency between the provisional application of treaties and its Constitution, laws or regulations.

395. Accordingly, the Tribunal has concluded that the ECT in its entirety applied provisionally in the Russian Federation until 19 October 2009, and that Parts III and V of the Treaty (including Article 26 thereof) remain in force until 19 October 2029 for any investments made prior to 19 October 2009. Respondent is thus bound by the investor-State arbitration provision invoked by Claimant."

[15] There is no difference between a "*piecemeal"* and *"partial"* provisional application, as asserted by HVY in their "Submission" at paras. 145, 174-175. See RF's Submission, paras. 30-32. See further the second export opinion of Prof. Pellet of 13 August 2019, para. 5 (**Exhibit RF-D24 = iPad-114.b**). In the same sense, see District Court Judgment, para. 5.23.

national law." As I will explain below, the District Court was correct. In so doing, I follow the framework laid down in Articles 31 and 32 VCLT.[16]

A. Limitation clause in Article 45(1)

(a) Text – "to the extent that"

17. As stated, the Limitation Clause in Article 45(1) reads as follows: "*to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*". The ordinary meaning of this text is that the Treaty may be applied provisionally to the extent that that provisional application does not conflict with the signatory's constitution, laws or regulations. Provisional application thus depends on the question of whether the application of a given treaty provision would conflict with the signatory's constitution, laws or regulations.

18. As the District Court aptly asserts, the term "to the extent that" in common parlance signifies "a degree of application, scope or – formulated slightly differently – a differentiation". The official French text: "*dans la mesure où*"; the official German text: "*in dem Maße*"; and in the Dutch translation: "*voor zover*".[17]

19. The Tribunal lost its way when it encountered the phrase "to the extent that". The Tribunal may have correctly stated that the phrase "*requires the Tribunal to examine carefully the words that follow*" (i.e., "*such provisional application is not inconsistent with its constitution, laws or regulations*"). However, after its examination of the "*words that follow*", the Tribunal failed to explain "*the words that follow*" in light of the preceding phrase "*to the extent that*".[18]

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[16] Article 31(1) VCLT: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of the object and purpose of the Treaty*." As the District Court held (District Court Judgment, para. 5.22), no reference to the supplementary means of interpretation provided for in Article 32 VCLT is needed because the text speaks for itself. Superfluously, attention will also be devoted to the *travaux préparatoires* provided for in Article 32 VCLT (see Section II.D).

[17] District Court Judgment, para. 5.11.

[18] Hulley Interim Award (**Exhibit RF-1 = iPad-2.g**), para. 303.

20. Specifically, the Tribunal equated the words "*such provisional application*" with the words "*the provisional application of this Treaty*". In the Tribunal's view, the word "such" referred to "this Treaty".[19] An interpretation that – rightly – was not advocated by any of the parties. As the District Court notes: "*this notional addition provides no clarity*".[20] The phrase "*to the extent that*" would be unaffected and, with the fictitious addition, the Limitation Clause would read: "*to the extent that the provisional application of this Treaty is not inconsistent with the constitution, laws and regulations.*"

21. The Tribunal held that the Treaty must be applied in its entirety if the principle of provisional application as such is not categorically excluded. This is not an interpretation, but a fundamental reformulation of the Treaty. The District Court correctly held that, in essence, the Tribunal had equated the phrase "to the extent that" with the word "if".[21] Incorrect: the phrase "*to the extent that*" means something different than the word "*if*".[22].

(b) Text – "not inconsistent with" (new argument on appeal)[23]

22. There can be no question of misunderstanding the phrase "*not inconsistent with*" in the Limitation Clause of Article 45(1) ECT. It is *litotes*, a figure of speech. Synonyms in the English language are: "*not incompatible with*", "*not differing from*", "*not different to*" or "*not in conflict with*".[24] The official French text reads: "*pas incompatible avec*", the German: "*nicht mit (...) unvereinbar*". The Dutch translation: "niet strijdig met".

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[19] Hulley Interim Award (**Exhibit RF-1 = iPad-2.g**), paras. 304-305.

[20] District Court Judgment, para. 5.12.

[21] District Court Judgment, para. 5.12 "*In the interpretation of the Tribunal – in which the word 'if' would be more fitting (...)*"

[22] HVY's position in Statement of Appeal, paras. 305-306 is incorrect. See also Defence on Appeal, paras. 97-105.

[23] Statement of Appeal, paras. 375-407; Defence on Appeal, paras. 371-386, HVY's Submission of 26 February ("HVY's Submission"), paras. 150-155.

[24] Japanese Comment and Proposal on Article 50 (CONF 91) (**Exhibit HVY-179 = iPad-61.b**).

23. HVY also said nothing about the meaning of these words during the Arbitrations. There was no debate about the words' meaning, and the Yukos Awards devote no attention to it either. As I will explain later, therefore, HVY cannot assert new positions and arguments regarding the phrase 'not inconsistent with' in the present setting aside proceedings.[25] I will nevertheless briefly discuss these assertions, superfluously.

24. At first instance, HVY asserted for the first time that the phrase "*not inconsistent with*" meant that the Russian Federation would have to prove that a provision of Russian law "expressly prohibits" investment arbitration.[26] The District Court rightly rejected HVY's assertion. The District Court held:

> "Given in part the fact that the provisional application finds its legitimacy in the signing (and the sovereignty of the Signatories is at stake in a number of treaty provisions), the provisional application of the arbitral provision contained in Article 26 is [2] also contrary to Russian law if there is no legal basis for such a method of dispute settlement, or – when viewed in a wider perspective – [3] if it does not harmonise with the legal system or [4] is irreconcilable with the starting points and principles that have been laid down in or can be derived from legislation. Whenever the court for the sake of brevity uses "compatibility" of the provisions of the ECT with Russian laws below, the court refers to this interpretation of the term "not inconsistent" in Article 45 paragraph 1 ECT."[27] (emphasis and numbers added)

25. This means that there are four possible ways in which arbitration of investment disputes may be irreconcilable with Russian law:

[1] it is expressly prohibited;

[2] the requisite statutory basis is lacking;

[3] it is inconsistent with the legal system; or

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[25] See paras. **Error! Reference source not found.-Error! Reference source not found.**.

[26] Statement of Defence, para. 194 and Rejoinder, paras. 79-81.

[27] District Court Judgment, para. 5.33. Also see para. 5.41: "*incompatibility with Russian law can also exist if that law does not provide for the option of arbitration as laid down in Article 26 ECT*".

[4] it is irreconcilable with legislative assumptions and principles.

26. That is an entirely reasonable and nuanced interpretation of the phrase "*not inconsistent with its constitution, laws or regulations*" in Article 45(1) ECT.

27. HVY are sowing confusion by inaccurately presenting the District Court's assessment. HVY are in particular creating confusion by asserting that the District Court required the presence of an independent legal basis in Russian law.[28] By so asserting, HVY are twisting the District Court's findings in para. 5.51, in which the District Court concluded that Article 9 of the Law on Foreign Investments of 1991. Therein, the District Court concluded that this provision did not independently provide for arbitration.[29] The District Court's interpretation of the phrase "*not inconsistent with*" however consists of the four possibilities named above, as it was put forth by the District Court in the cited para. 5.33.

28. Furthermore, HVY are constantly changing their position.[30] In any case, the incorrect assertions about the phrase "*not inconsistent with*", which have since been withdrawn, are irrelevant. After all, the Russian Federation has cited clear and explicit statutory provisions which unmistakably indicate that arbitration conflicts with Russian law.[31] The clarity of these statutory provisions has not been disputed. Later, this Court of Appeal will understand that HVY's only defence against them is that those provisions do not apply to federal laws. In particular, HVY assert that the government would have been entitled to accept an exception to these clear statutory provisions without cooperation from the parliament. As will be explained below, that is incorrect.

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[28] Statement of Appeal, paras. 652-660, HVY's Submission, para. 150.

[29] See Defence on Appeal, paras. 487-488, RF's Submission, para. 116.

[30] Defence on Appeal, para. 371-386, RF's Submission, para. 116-118.

[31] Defence on Appeal, para. 375, RF's Submission, para. 118; for specific statutory provisions, see for example Defence on Appeal, paras. 195 and 249.

(c) Context for the phrase "to the extent that"

29. Back to the phrase that is actually relevant: "*to the extent that*". According to Article 31(1) VCLT, the context of this phrase is important to its interpretation. That means, in particular, that all of the provisions of Article 45 ECT must be taken into account.

(i) Context "*regulations*"

30. Article 45(1) ECT concerns not only reconcilability with the constitution and laws, but also with regulations (in the Dutch translation: "voorschriften"). The parties agree that the term 'regulations' refers to lower-level regulatory law.[32] The parties also do not dispute that, normally speaking, a prohibition on the provisional application of treaties is generally laid down in the constitution or in statutory law.[33]

31. According to HVY's expert, Prof. Reisman, "*It is, to say the least, difficult to imagine how an issue as important as the authority of a state to provisionally apply a treaty would be decided by 'regulation'.*" Prof. Reisman is rightly of the view that this "*compels the conclusion that Article 45(1) refers to provisional application of various obligations of the Treaty.*"[34]

32. The District Court also concluded that the reference to regulations supports the conclusion that Article 45(1) ECT concerns the reconcilability of individual treaty provisions with the constitution, statutory law, and lower-level regulatory law.[35]

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[32] See Statement of Appeal, para. 344. HVY's criticism is based on a misreading of the District Court Judgment.

[33] In their Statement of Appeal, para. 346, HVY can only cite one deviating example: the dictatorial Franco regime. Their assertions in that regard are also incorrect and incomplete; see Defence on Appeal, footnote 64.

[34] Emphasis added. See Reply, para. 71 and Defence on Appeal, para. 73; M.H. Arsanjani and W.M. Reisman, Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards, in The Law of Treaties Beyond the Vienna Convention (2011). (**Exhibit RF-21 = iPad-2.g**): *"difficult to imagine how an issue as important as the authority of a state to provisionally apply a treaty would be decided by 'regulation'"* and *"Article 45(1) ECT refers to provisional application of various obligations of the Treaty.")*.

[35] See District Court Judgment, para. 5.13. This is also clear from the *travaux préparatoires*, see District Court Judgment, para. 5.22.

(ii) Context: Article 45(2)(c)

33. As stated (see paras. 13-14), Article 45(2)(a) provides that a signatory may declare that it will not provisionally apply the ECT at all. In that event, however, Part VII (Structure and Institutions) must be provisionally applied "to the extent that such provisional application is not inconsistent with its laws or regulations" (at c). In this case, of course, provisional application is limited to a part of the Treaty: Part VII.[36]

34. Put differently: the same "to the extent" phrase is found twice in the Treaty. The second time it evidently involves partial provisional application. This clearly indicates that the interpretation cannot be "all or nothing". The District Court correctly held that the Tribunal interpreted the Limitation Clause in a way that significantly deviates from the meaning that must be assigned to the exact same words in Article 45(2)(c) ECT.[37] A consistent interpretation of both paragraphs of the article advocates the interpretation assigned by the Russian Federation.[38]

(iii) No context: Article 32 ("*Transitional Provisions*")

35. HVY take the erroneous position that Article 32 ECT ('Transitional Provisions') must play a role in interpreting the phrasing of Article 45(1) ECT.[39] As has been extensively explained in these setting aside proceedings, that position is both incorrect and confusing. Article 32 ECT contains transitional provisions to enable States which were formerly part of the Soviet bloc "*to adapt to the requirements*

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36 Article 45(2)(c) ECT contains no reference to the "*constitution*" because the matters to which Part VII ECT pertains are primarily of an administrative nature, that are laid down in laws and regulations: Cf. Reisman (**Exhibit RF-21 = iPad-2.g**), p. 93.

37 The Tribunal held, without any further explanation, that in the context of Article 45(2)(c) ECT, "*the phrase 'such provisional application' necessarily has a different meaning, referring to the provisional application of only Part VII of the Treaty*", Hulley Interim Award (**Exhibit RF-1 = iPad-2.g**), para. 306.

38 District Court Judgment, paras. 5.15-5.17. This holding is correct; see Defence on Appeal, paras. 74-76 and the references included therein.

39 Statement of Appeal, paras. 322 and 350-362; HVY's Submission of 26 February 2019, paras. 178-186. See also Statement of Defence, paras. 133, 134 and 142-143; Rejoinder, paras. 48-49.

of a market economy". These transitional provisions have nothing to do with arbitration.[40] They also have nothing to do with provisional application.[41]

(d) Article 45(1) and (2) are not complementary – no previous declaration required (argument rejected by the Tribunal)

(i) HVY may not invoke this argument

36. As stated in the overview above (see para. 14), Article 45 ECT provides for two separate regimes. The first regime in Article 45(1) provides for provisional application to the extent the application is reconcilable with the constitution, laws or regulations of the signatory. That regime applies to States who wish to provisionally apply all or part of the Treaty. The second, separate regime in Article 45(2) enables States to reject provisional application of the Treaty in whole or in part.

37. HVY assert that a signatory must provide a prior declaration in order to be able to rely on the Limitation Clause. The Russian Federation did not provide a prior declaration as referred to in Article 45(2). According to HVY, as a result it must provisionally apply the entire Treaty.[42]

38. The Tribunal rejected HVY's interpretation. The Tribunal held that the regimes in Article 45(1) ECT and Article 45(2) are two separate regimes that function independently of one another. Reliance on Article 45(1) ECT does not require a prior notification or declaration.[43]

39. HVY cannot rely on this argument in the present setting aside proceedings, because this is an argument of HVY that was already raised in the arbitration and

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[40] These provisions only relate to Articles 6, 7, 9, 10, 14, 20 and 22 ECT.

[41] Defence on Appeal, para. 77. See also Prof. Pellet's Expert Opinion of 10 November 2017 (**Exhibit RF-D3 = iPad-66.a**), paras. 58-64. See also Reply, paras. 74 and 79 and RF's Submission, para. 29(a).

[42] Statement of Appeal, paras. 241-279; HVY's Submission of 26 February 2019, paras. 189-208.

[43] Hulley Interim Award (**Exhibit RF-1 = iPad-2.g**), paras. 260-269 and 282-285.

rejected by the Tribunal. After all, a negative jurisdiction-related decision can never be asserted.[44] The District Court concurred.[45]

(ii) HVY's assertion also rejected in the District Court's *obiter dictum*

40. The District Court addressed and dismissed HVY's assertion "for the sake of completeness". The District Court correctly concluded that "even if this question were relevant to the decision on the claim, the Russian Federation was not obliged to submit a prior declaration in the sense of Article 45 paragraph 2 for a successful reliance on the Limitation Clause of Article 45 paragraph 1."[46] The District Court's findings are clear:

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

41. The written submissions contain an extensive explanation of why the District Court's interpretation is consistent with the ordinary meaning of the phrasing in

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44 Defence on Appeal, paras. 280-304.

45 District Court Judgment, para. 5.25.

46 District Court Judgment, para. 5.31.

the Treaty.[47] The words “[n]otwithstanding” and “may” show that Article 45(1) ECT and Article 45(2) ECT each provide for a separate regime.

(iii) Transparency is not an argument

42. In support of their argument that reliance on the Limitation Clause in Article 45(1) requires a prior declaration, HVY again invoke transparency in relation to the reliance on the Limitation Clause.[48] Several States pressed for transparency during the negotiations, but that discussion was never expressed in a specific treaty provision.[49] Neither can an implicit obligation to issue a prior declaration be assumed because, in the words of the District Court, “they obviously would have expressly included this, as they also did in paragraph 2.”[50] The Russian Federation has met the provisions on transparency regarding the publication of legislation, which can be found in Article 20 ECT – and HVY do not dispute this.

43. HVY take the view that investors cannot be required to undertake an ‘enormous study’ of Russian law in order to determine the scope of provisional application. That is a gross exaggeration. Prudent investors will have to investigate the local laws and regulations prior to investing in any event. Such investors will also be able to ascertain, without undue effort, that arbitration is prohibited under Russian law when it comes to tax disputes, enforcement disputes and expropriation disputes, just as it is in other States. In the present case, moreover, potential prudent investors in 1999-2001 could and should have recognised the difference between provisional application and ratification of the ECT.[51]

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[47] District Court Judgment, para 5.27; Defence on Appeal, paras. 285-287.

[48] Statement of Defence, II.280-291; Statement of Appeal, paras. 246 *et seq*.

[49] Reply, para. 218 and cited source documents.

[50] District Court Judgment, para. 5.28. Also see the Tribunal, which refers to “*the distinction which must be made between what may have been said to be desirable during the negotiations and what, eventually, became legally required ... the Tribunal cannot read into Article 45(1) of the ECT a notification requirement which the text does not disclose and which no recognized legal principle dictates*” (Hulley Interim Award (**Exhibit RF-1 = iPad-2.g**), paras. 282-283).

[51] See also Defence on Appeal, paras. 317, 325 and 326.

(iv) Reciprocity is not an argument, either

44. HVY also rely in vain on reciprocity.[52] Reciprocity is provided for in Article 45(2)(b) with regard to the declaration referred to in Article 45(2)(a).[53] It is correct that if a State has given a declaration of non-applicability of provisional application pursuant to Article 45(2)(b) ECT, other States need not provisionally apply the ECT in respect of those investors, either. However, Article 45(1) contains no such provision.[54]

45. The only justification on which HVY have based their ground is the opinion of their expert Prof. Klabbers, who qualifies the absence of reciprocity in Article 45(1) as "unfair".[55] The subjective viewpoint of a professor of international public law is not a sufficient legal basis for interpreting a treaty provision.

46. What is more, the absence of reciprocity is logical. National laws, after all, are different in every country. In that event, there can be no reciprocity.

(v) HVY's reliance on Article 45(3) (termination of provisional application) also fails

47. HVY assert that an interpretation of Article 45(1) ECT in which the ECT need not, or need no longer, be provisionally applied without having to follow the mechanisms of Article 45(2) ECT and Article 45(3) ECT would make these mechanisms meaningless.[56] The District Court properly rejected this assertion by HVY as well.[57]

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[52] Statement of Appeal, paras. 255-257.

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

[54] See also District Court Judgment, para. 5.28 *in fine*. See also Defence on Appeal, paras. 299-304.

[55] Expert Report of Prof. Klabbers of 9 March 2017 (**Exhibit HVY-D2 = iPad-61.a**), para. 84.

[56] Statement of Appeal, paras. 251-252.

[57] District Court Judgment, para. 5.29.

48. There is also no question of irreconcilability. Article 45(3)(b) expressly refers to the signatory's obligation to apply Parts III and V of the ECT. In so doing, Article 45(3)(b) limits the continued ('sunset') effect of the Treaty Provisions in the same manner as the Limitation Clause in the first paragraph.[58]

(vi) *Travaux préparatoires* confirm the two regimes

49. I will discuss the *travaux préparatoires* in section D below. Here, I would like to refer to the fact that Article 45(2) came up later in the negotiations and was added to what became the final text of Article 45. The draft text of 31 October 1991 read as follows:

> "The signatories agree to apply this Agreement provisionally following signature, to the extent that such provisional application is not inconsistent with their national laws pending its entry into force in accordance with Article 40 above."[59]

50. Three years later, in 1994, a paragraph (the current second paragraph) was added to this to further accommodate States that did not wish to apply the Treaty provisionally at all.[60]

51. In addition, the documents drawn up at the time make it clear that Article 45(1) ECT and Article 45(2) ECT provide for two separate regimes:

- During the plenary session on 8 March 1994, Mr Jones, secretary general of the Conference on the European Energy Charter Treaty, stated that the decision had been taken "*to include in Article* [45] *a provision that countries could make declarations that they were not going to apply provisional application.*" The later Article 45(2)(a) ECT was implemented specifically in order to give delegations that opposed any provisional application at all a way out.[61] In other words, Article 45(2)(a)

[58] See Reply, para. 203, Defence on Appeal, para. 77 and note 69.

[59] Original English: "*The signatories agree to apply this Agreement provisionally following signature, to the extent that such provisional application is not inconsistent with their national laws pending its entry into force in accordance with Article 40 above.*"

[60] See Defence on Appeal, paras. 288-293.

[61] Meeting of 8 March 1994 (Mr Clive Jones), 14 (**Arbitration File C-924**).

ECT was not added as a procedure for implementing Article 45(1) ECT. It was an optional mechanism for signatories that did not wish to apply the Treaty provisionally.[62]

- Ms Lise Weis, in her capacity as legal adviser to the ECT Secretariat, sent a fax on 10 November 1994. In that fax, she clarified that Article 45 provided for two separate options: "*option 1*" and "*option 2*".[63]

- During the plenary sessions, the chairperson also clarified that Article 45 provided for two "*different possibilities*".[64]

- The Secretary-General of the ECT Secretariat at the time sent a fax on 9 November 1994 in which he wrote, with regard to relying on Article 45(1) ECT: "*no declaration would be necessary*".[65]

(vii) Finally: HVY are attempting to rewrite the ECT

52. If one reads HVY's assertions carefully, it becomes clear that they are advocating a departure from the unambiguous text of the treaty. Their view is that the general principles of transparency[66] and reciprocity[67] imply that the text of the treaty is undesirable or unfair.[68] For example, their expert, Prof. Klabbers, takes the position that it would be unfair if unequal obligations were to arise as a result of the provisional application of the treaty.[69] The Tribunal and the District Court

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[62] See Reply, para. 217.

[63] See Defence on Appeal, para. 290, with reference to Fax from Weis to Bamberger regarding provisional application dated 10 November 1994 (**Exhibit RF-249 = iPad-66.c**).

[64] See Defence on Appeal, para. 290, with reference to Meeting of 8 March 1994 (Mr Clive Jones), 14 (**Arbitration File Exhibit C-924**), pp. 14-15.

[65] See Defence on Appeal, para. 291, with reference to Fax from Jones to (i.a.) Weis, Bamberger regarding draft provisional application dated 9 November 1994 (**Exhibit RF-272 = iPad-66.c**).

[66] The Russian Federation has met the provisions on transparency regarding the publication of legislation, which can be found in Article 20 ECT – and HVY do not dispute this.

[67] Article 45(1) makes no reference whatsoever to absolute reciprocity. See also District Court Judgment, para. 5.28. See also Defence on Appeal, paras. 299-304.

[68] Statement of Appeal, paras. 244, 248-269, 308-309, 367 367-368 and 370-374. For a rebuttal, see, *inter alia*, Defence on Appeal, paras. 299-304.

rightly ignored subjective opinions on what is desirable and fair – whatever else might be said of them – in the assessment:

> Tribunal: "the distinction which must be made between what may have been said to be desirable during the negotiations and what, eventually, became legally required (…) the Tribunal cannot read into Article 45(1) of the ECT a notification requirement which the text does not disclose and which no recognized legal principle dictates"[70]

> District Court: "If the drafters of the Treaty had also wanted to make invocation of the Limitation Clause due to incompatibility with national law conditional on a prior declaration, they obviously would have expressly included this, as they also did in paragraph 2."[71]

B. Object, purpose and principles of international law

53. A treaty must be interpreted in light of its object and purpose (Article 31 VCLT). Treaty provisions on provisional application have a dual purpose: on the one hand, they enable the treaty to be applied as soon as possible pending its ratification, and on the other, they accommodate the many States whose national law would conflict with provisional treaty application.[72] The same is true of the ECT – as evidenced by the *travaux* and the preamble.[73]

54. As was extensively explained in the documents, the District Court's interpretation is consistent with the Treaty's object and purpose. For brevity's sake, the Russian Federation refers to Prof. Gazzini's critical annotation of the Yukos Awards.[74]

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[69] Prof. Klabbers' First Expert Opinion of 9 March 2017 (**Exhibit HVY-D2 = iPad-61.a**), para. 84. "*[i]t would be unfair for a state not to accept provisional application, yet for its investors to benefit from provisional application by other states; and it would be unfair on investors to distort what would otherwise be a 'level playing field'.*"

[70] Hulley Interim Award (**Exhibit RF-1 = iPad**), paras. 282-283.

[71] District Court Judgment, para. 5.28.

[72] Summons, para. 148 and citations to literature; Reply, paras. 93-96 and 102. Prof. Pellet's Expert Opinion of 10 November 2017 (**Exhibit RF-D3 = iPad-66.a**), paras. 58-64. District Court Judgment, para. 5.19.

[73] See Defence on Appeal, paras. 78-81.

[74] "Interpreting Article 45(1) in the sense of admitting partial provisional application would have been perfectly in line with the object and purpose of Article 45, namely making the ECT rapidly applicable between signatories and achieving the broadest possible participation, while accommodating the needs of recalcitrant parties by safeguarding them

55. The Tribunal also took the position that the treaty's object and purpose offered support for its interpretation of Article 45 ECT. In so doing, the Tribunal also referred to principles of international law.[75] As also held by the District Court, that was incorrect.[76] The Tribunal's references to the principle of *pacta sunt servanda* (Article 26 VCLT[77]) and the principle that national legislation cannot be relied upon (Article 27 VCLT[78]) were misplaced. The Russian Federation endorses the principle of *pacta sunt servanda.* The debate here is exclusively related to the scope of the treaty obligations.[79] The text of Article 45(1) ECT expressly provides that no international treaty obligations arise if provisional application conflicts with national law: "*to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*." The ECT itself expressly provides for reliance on national provisions. Article 27 VCLT therefore does not apply here. The District Court, thus, rightly refuted the decision of the Tribunal.[80]

C. State practice

56. State practice confirms the District Court's findings that Article 45(1) ECT provides for partial provisional application.[81] One example of this is the later drafting of the official Russian text.

57. At the time of signing, the six official treaty texts had not yet been completed. After the signing, linguistic experts were engaged to expedite the drafting of the Russian text. These experts examined the text and, based on this examination,

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against the acceptance of commitments inconsistent with their domestic law (…). See Defence on Appeal, para. 81, (**Exhibit RF-232 = iPad-66.c**), p. 299.

[75] Hulley Interim Award (**Exhibit RF-1 = iPad-2.g**), paras. 313-320.

[76] District Court Judgment, para. 5.19. See also Statement of Appeal, paras. 236, 644-646 and Defence on Appeal, paras. 365-370.

[77] Article 26 VCLT: "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*."

[78] Article 27(1) VCLT: "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46*."

[79] For a detailed discussion, see: Defence on Appeal, paras. 365-370.

[80] District Court Judgment, para. 5.19.

[81] See, *inter alia*, Reply, paras. 80-92; Defence on Appeal, paras. 108-122.

they formulated dozens of suggestions and posed dozens of questions. One of the suggestions specifically pertained to the "translation" of the phrase "to the extent that" in Article 45 ECT. The linguistic experts wondered whether this wording should be translated as "in so far as" or as "if".[82] In response to that question, the ECT Secretariat stated that the Russian phrase "in so far as" was preferred.

58. In the Russian version of the amended text, the phrase "in so far as" was used. This text was approved on 1 June 1995 by four high-level Russian Federation officials, including the Minister of Finance and the Minister of Foreign Affairs. Then the text was submitted to all of the other States. None of the States had any objection to this phrasing. This Russian text was thus approved by all of the States and has since been considered an official version of the Treaty.[83] S

D. ***Travaux préparatoires***

59. Pursuant to Article 32 VCLT, the "supplementary means of interpretation" and, in particular, the *travaux préparatoires*, or the circumstances under which the treaty was concluded, can be invoked in the following cases:

(i) to confirm the meaning ensuing from the application of the general rule of interpretation from Article 31 VCLT; or

(ii) to determine the meaning when an interpretation in accordance with Article 31 VCLT

(a) leaves the meaning ambiguous or obscure; or

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

60. Neither the Tribunal nor the District Court saw any reason to rely on the supplementary means of interpretation.[84] The District Court referred "entirely

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[82] See Defence on Appeal, para. 101.

[83] See Defence on Appeal, para. 103.

[84] Hulley Interim Award (**Exhibit RF-1 = iPad-2.g**), para. 328; District Court Judgment, para. 5.22.

superfluously" to the explanation which Mr Bamberger, chairman of the legal advisory committee to the Conference on the ECT, provided to the session on 7 March 1994 with regard to the addition of the word "regulations" to the Limitation Clause:

> "[T]he effect is to suggest that relatively minor impediments in the form of regulations, no matter how insignificant they may be, can be the occasion for failing to apply the Treaty provisionally when in fact those regulations could be brought into conformity without serious effort."[85]

61. The history of Article 45 ECT confirms that this provision provides for partial provisional application.[86] Above, I stated that the original draft text from 1991 was limited to a single paragraph and that the other paragraphs were not added until three years later (see paras. 49-51). A full chronological overview can be found in the "Evolution of Texts"[87]. I will give a few examples of the source documents that were prepared at the time:

- In October 1991, the United States, Canada and Norway were the first to propose using the phrase "*to the extent that such provisional application is not inconsistent with their national laws*". At the time, the United States asserted: *"[W]e do not have any legal difficulty with provisional application per se, so long as it is carefully qualified to ensure that no party is obliged to do, or to refrain from doing, anything for which that party's constitution or law requires an appropriately ratified treaty"* [emphasis added].[88]

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85 District Court Judgment, para. 5.22. Summons, para. 173.

86 For a more extensive discussion, see the Defence on Appeal, paras. 87-105.

87 Evolution of the text of Article 45 ECT (**Exhibit RF-510 = iPad-118.a.)**

88 The United States had problems with several specific treaty obligations. For example, US law prohibits spending funds to cover the costs of an international organisation "*absent the express approval of the Congress*". Defence on Appeal, para. 91 and the references there to multiple source documents. Dutch translation: "*[Wij] hebben geen juridisch probleem met voorlopige toepassing als zodanig, zolang als het zorgvuldig is omschreven om te waarborgen dat geen partij verplicht is om iets te doen of iets na te laten waarvoor de Grondwet of het recht van die partij een op de juiste wijze bekrachtigd verdrag vereist"; "zonder de uitdrukkelijke goedkeuring van het Congres*".

- During the plenary sessions on 10 March 1994, the European Communities confirmed that "*to the extent that*" meant something very different to "*if that*".[89]

- As legal adviser to the ECT Secretariat, Ms Liese Weis was actively involved in the formation of the Treaty. On 10 November 1994, she wrote a fax in which she confirmed as follows: "*Furthermore, the expression 'to the extent' implies that the signatory will apply certain parts of the Treaty provisionally even if it is unable to apply other parts.*"[90]

- Mr Craig Bamberger was the Conference's most important legal adviser. In a fax dated 10 November 1994, he wrote that the phrase "*to the extent not inconsistent with*" did not mean the same thing as the phrase "*subject to*".[91]

- A Memorandum of 22 April 1994 of the Dutch Treaties Department also makes it clear that the Treaty provides for partial provisional application. I quote: "It must be noted that the provisional application can only extend to the provisions of the Treaty based on which the Government has

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89 Defence on Appeal 98, Translation of the Plenary Sessions Report dated March 10, 1994 (**Arbitration File Exhibit C-924**), p. 25 p. 25. *"(...) the language in the existing earlier versions has done two things. It has said that signatories who can, whose constitution allows it may apply provisionally the Treaty and, then, by using the expression 'to the extent that', not 'if that', 'if to the extent that such provisional application', not 'if such provisional application'. It has in addition suggested that there could be provisional application as far as feasible, that is, as much as the provisional application as the existing laws and regulations and constitution allow it. This is the way paragraph I of Article 50 CONF 82 can be read (...)*

90 Defence on Appeal, para. 132. Dutch translation: "*Bovendien impliceert de uitdrukking 'voor zover' dat de ondertekenaar bepaalde delen van het Verdrag zal toepassen, zelfs als zij niet in staat is andere delen toe te passen*."

91 *"[T]he obligation is undertaken 'to the extent not inconsistent with…' This is not quite the same as 'subject to'."* Defence on Appeal, para. 99, with reference to **Exhibit RF-239 = iPad-66.c**. See also Defence on Appeal, para. 133.

independent authority. The Government cannot subsume the rights of Parliament."[92]

- In December 1994, the European Communities and their Member States at the time issued a joint approval statement. It said that Article 45(1) "(...) *does not create any commitment beyond what is compatible with the existing internal legal order of the Signatories (...)".*[93]

62. The District Court correctly ruled that its interpretation is supported by the *travaux preparatoire*.[94] Ever since, HVY and their experts (Prof. Klabbers and Prof. Schrijver) do make some mention of this, albeit in a manner that is confusing and misleading. The Russian Federation rebutted that in its Defence on Appeal and its *Akte*, and this is also supported by Professors Nolte and Pellet.[95] It is important for this Court of Appeal to review the source documents in case of doubt.

E. Estoppel or acquiescence (argument rejected by the Tribunal)[96]

(a) Introduction

63. This is an argument which HVY already raised during the arbitration and which the Tribunal rejected. HVY cannot rely on this argument because a negative

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[92] Defence on Appeal, para. 110; Prof. Heringa's expert opinion of 25 July 2017 (**Exhibit RF-D1, HER 3 = iPad-66.a**).

[93] Defence on Appeal, paras. 114-115, Joint EC Statement (R-352). Dutch translation: "*(...) geen enkele verplichting [schept] die verder gaat dan hetgeen verenigbaar is met de bestaande interne rechtsorde van de Ondertekenende Partijen [...]*".

[94] District Court, para. 5.22.

[95] Defence on Appeal, paras. 84-105; 288-295; 482-48.3; RF's Submission, paras. 34-36. Opinion by Professor Nolte concerning Provisional Application of Article 26 of the Energy Charter Treaty from an International and German Constitutional Law Perspective dated 31 October 2006, paras. 31-33 (**Exhibit RF-03.1.C-1.3.7**); Supplemental Expert Opinion by Professor Nolte of 13 August 2019, paras. 5-8, 26-27 (**Exhibit RF-D23 = iPad-114.b**); Expert Opinion by Professor Pellet of 10 November 2017, para. 70 (**Exhibit RF-D3 = iPad-66.a**).

[96] Hulley Interim Award (**Exhibit RF-1 = iPad-2.g**), paras. 286-288; Statement of Appeal, paras. 138-226; Defence on Appeal, paras. 305-370; HVY's Submission, paras. 129-140.

decision on jurisdiction cannot be put to discussion in the setting aside proceedings.[97] Should this Court of Appeal find otherwise, HVY's argument is also factually and legally incorrect.

64. The Tribunal has rejected HVY's reliance on estoppel, citing the seminal International Court of Justice judgment in *North Sea Continental Shelf Cases*.[98] The Tribunal found:

> "Applying the standard thus established by the ICJ, the Tribunal concludes that the present case does not satisfy the conditions for the existence of a situation of estoppel. The Tribunal finds that the estoppel argument fails principally because Respondent's support for provisional application of the ECT during the negotiations, even if it could be considered 'consistent,' never 'clearly' excluded the possibility that Respondent was in fact relying on its interpretation of the operation of the *Limitation Clause* in Article 45(1) which would in any event exclude or limit provisional application of the Treaty."[99]

65. It is not particularly surprising that HVY never mentioned the doctrines of estoppel and acquiescence in the first instance, which is also why the District Court did not address those doctrines. Even more remarkable is the enormous amount of attention which HVY dedicate to estoppel and acquiescence in their Statement of Appeal[100] – an indication that HVY were also impressed by the District Court's findings regarding the interpretation of Article 45 ECT.[101] However, HVY's reliance on estoppel and acquiescence should not benefit them

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[97] Defence on Appeal 257, 309, Also see the expert report of Prof. Snijders (**Exhibit RF-D9 = iPad-66.a**).

[98] *North Sea Continental Shelf Cases (Germany v. Denmark / Germany v. Netherlands)*, ICJ Judgment of 20 February 1969, ICJ Reports 1969, p.3, **Arbitration File Exhibit R-415**, p.26, para. 30: "*[I]t appears to the court that only the existence of a situation of estoppel could suffice to lend substance to [the contention that the Federal Republic was bound by the Geneva Convention on the Continental Shelf] (...), – that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evidence acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice*." (emphasis added by Tribunal)

[99] Hulley Interim Award (**Exhibit RF-1 = iPad-2.g**), para. 288.

[100] Statement of Appeal, paras. 138-226. See also HVY's Submission, paras. 129-140.

[101] And are thus acting in contravention of due process, see Defence on Appeal, para. 351, read in conjunction with paras. 268-277.

– as the Tribunal rejected this argument – but also cannot benefit them, as explained in detail by the Russian Federation in the Defence on Appeal.[102]

(b) No factual basis

66. First: HVY have asserted that the Russian Federation "repeatedly and unambiguously" confirmed that it considered itself bound by Article 26 ECT.[103] The fact that these and other assertions of fact are incorrect has already been extensively discussed in the written submissions.[104] There is thus no factual basis for a reliance on estoppel or acquiescence[105]. In reality, the following applies:

(i) The Russian Federation has repeatedly and publicly emphasised that the scope of the provisional application of the Treaty was limited.[106] For example, in a memorandum dated 8 July 1997 that was written for the plenary session of the ECT Conference, it asserted:

> "Analysis of provisional (till entry into force) application of international treaties by the Russian Federation shows that in each specific case a detailed study of the scope of provisional application of the treaty is necessary ."[107]

(ii) During the negotiations, the United States correctly emphasised that "an investor must be assumed to have some perception of the risk involved if it invests in a country knowing that that country has signed, but not yet ratified, the Treaty".[108] This is all the more true in relation to investments

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[102] Defence on Appeal, paras. 305-370.

[103] See for example Statement of Appeal, paras. 178-181.

[104] See in particular Defence on Appeal, p. 70 (illustration).

[105] Defence on Appeal, p. 70 (illustration), Defence on Appeal, paras. 124-129, 310-337, RF's Submission of 25 June 2019, para. 112.

[106] See Defence on Appeal, paras. 124-129.

[107] Defence on Appeal, para. 125, with reference to **Arbitration File C-925**. English translation of the original Russian text: "*The analysis shows that provisional application until entry into force and implementation of the treaty is not the same. ... Analysis of provisional (till entry into force) application of international treaties by the Russian Federation shows that in each specific case a detailed study of the legal scope of provisional application of the treaty is necessary.*"

[108] Defence on Appeal, para. 311, with reference to **Arbitration File C-924**, p. 13.

in the Russian Federation because, from the outset, it was a generally known fact that there was a great deal of opposition to the ECT within the Duma.[109]

(iii) The Russian Federation has repeatedly indicated that parts of the Treaty are inconsistent with Russian law.[110] This was emphasized by prominent Russian legislators and Government officials in 1997 and 2001, including Former Prime Minister Viktor S. Chernomyrdin himself.[111] The Russian Federation also expressly confirmed that the same was true for arbitration.[112] By way of example, consider the plenary session held on 17 June 1997 to debate the proposal to ratify the Treaty, during which Prof. Bystrov publicly clarified that Article 26 ECT conflicted with existing laws and regulations:

> "Incidentally, the law on subsoil does not anticipate this possibility – the resolution of disputes, for example, in the International commercial arbitration court in Stockholm. And if we keep the administrative system for the licensing of subsoil, if we keep the related system of State control in this sphere, and the energy market is not structured only according to the law on product-sharing agreements, then the Parliament must reserve a special right when ratifying this agreement. And current law allows us to do that – the Russian Federation retains its special dispute resolution system, not the system that is described as unconditional and compulsory by Article 26 ECT (…)." (emphasis added).[113]

[109] Defence on Appeal, paras. 311-317. As Mr. Katrenko, who then chaired the Duma's Committee on Energy, Transport and Communications, notes, even in 2001, after hearing presentations by numerous high-profile politicians, civil servants and experts, the concern persisted about "*potential positive or negative outcomes that could come to pass if the State Duma of the Federal Assembly of the Russian Federation were to approve the treaty and the ECT would prevail over conflicting Russian statutes*"; see Declaration of Vladimir Semenovich Katrenko, para. 18 (**Exhibit RF-G1 = iPad-66.b**).

[110] Defence on Appeal, paras. 318-325.

[111] Defence on Appeal, para. 333; see the report by Professor Avtonomov of 6 November 2017 (**Exhibit RF-D4 = iPad-66.a**), para. 96.

[112] Defence on Appeal, paras. 326-335.

[113] Defence on Appeal, para. 333, Prof. Avtonomov's opinion of 6 November 2017 (**Exhibit RF-D4 = iPad-66.a**), para. 96, p. 46.

(c) Dutch Supreme Court judgment in IMS/DIO does not apply

67. Second: HVY erroneously rely on the judgment rendered in *IMS/DIO*.[114] That case involved a dispute between an English company, IMS, and the Iranian Ministry of Defence (DIO). After the dispute arose, the parties agreed by telex that they would resolve the dispute through arbitration. In that telex correspondence, DIO had offered to have the disputes that had arisen between the parties resolved through arbitration, and had not in any way made it known that its authority to enter into arbitration agreements might be subject to a special limitation prescribed by the Iranian constitution (requiring consent from the *Majlis*, the Iranian Parliament).[115] After DIO lost the arbitration, it took the position that the arbitration agreement was entered into without authorisation and thus that the consequences of that agreement were invalid.

68. That reliance was rejected on the basis of the rule under Dutch private international law that an invocation of limitations of power is impossible with respect to the counterparty that neither was nor reasonably ought to have been aware of these limitations: in principle, the party that relies in good faith on its counterparty's authority to act in international legal transactions is protected; this is known as the Lizardi rule.[116]

69. HVY's reliance on that judgment fails not only because it concerned an entirely different complex of facts, but also because it is based on several factual and juridical misconceptions on the part of HVY:[117]

    (i) Unlike the *IMS/DIO* case, this case does not involve an arbitration "agreement already entered into". The issue in the present case, therefore,

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[114] Supreme Court 28 January 2005, ECLI:NL:HR:2005:AR3645. See Statement of Appeal, paras. 188-207 and Defence on Appeal, paras. 338-348.

[115] Supreme Court 28 January 2005, ECLI:NL:HR:2005:AR3645, para. 3.7.2.

[116] Later codified in Article 10:167 DCC.

[117] See Defence on Appeal, paras. 338-348.

is not whether an agreement that was expressly entered into proved to be invalid or non-binding after the fact.

(ii) Unlike the *IMS/DIO* case, this case does not involve an official who exceeded their authority.

(iii) In this case no reference is made to national law in order to repudiate or get away from a concluded agreement. Here, Article 45(1) ECT is being invoked.[118]

(iv) In *IMS/DIO*, IMS made a good faith "assumption regarding the counterparty's authority to act". No such situation has arisen in the present case, for no other reason than that Article 45 ECT expressly refers to the existence of limitations of authority or otherwise in the Limitation Clause.[119]

(d) Reliance on international principles fails

70. Third: HVY also cannot rely on the international principles of estoppel and acquiescence.[120] These proceedings are governed exclusively by Dutch law in appellate procedure, which has its own rules on acquiescence, estoppel and abandoned arguments. HVY correctly refrained from relying on those doctrines.[121]

71. In any event, HVY have also failed to present substantiated assertions that satisfy the stringent legal requirements that must be met in order to successfully rely on estoppel or acquiescence under international law.[122] Successful reliance on estoppel requires, *inter alia*, a clear and unambiguous statement that is evidently

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[118] Relevance is assigned to national law only within the context of Article 45(1) ECT.

[119] HVY acknowledged in the Statement of Appeal, para. 199 that "*Article 45(1) ECT points to the possibility of the existence of limitations of authority*."

[120] See Defence on Appeal, paras. 349-364.

[121] See Defence on Appeal, para. 352.

[122] See Defence on Appeal, paras. 356-364 and Prof. G. Nolte's expert opinion of 22 November 2017 (**Exhibit RF-D2 = iPad-66.a**).

linked to a clear intention. The Tribunal correctly held that this case never involved such a statement.[123] In addition, HVY must assert, and if necessary prove, that they relied on such an unambiguous statement to their detriment.[124]

(e) What is this discussion really about?

72. Are HVY actually contending at this stage that, at the time, three letterbox companies based in tax havens on tropical islands in order to evade taxation were sifting through statements because they were worried that the Russian Federation would provisionally apply Article 26 ECT? HVY have not submitted a single document in the proceedings that would indicate this. They have not even met their obligation to furnish facts. It was not until their "Submission" of 26 February 2019 that they asserted that they had relied on statements. That assertion is both tardy and insufficiently reasoned.[125]

F. The District Court's interpretation is widely accepted as the only correct interpretation of Article 45(1) ECT

73. The District Court's interpretation is consistent with that of all of the other States, including the United States, Italy, Finland, Japan and the United Kingdom.[126]

74. The same holds true for the Netherlands. In his undisputed expert opinion, Prof. Heringa discussed the various internal documents that had been drawn up by Dutch officials at the time.[127] By way of example, reference can be made to the previously mentioned Memorandum from the Dutch Treaties Department dated

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[123] Hulley Interim Award (**Exhibit RF-1 = iPad-2.g**), paras. 286-288.

[124] Expert Opinion prof. Nolte of 22 November 2017 on Estoppel, Acquiescence and Good Faith in the Context of the Provisional Application of the Energy Charter Treaty by the Russian Federation, paras. 13-15 (**Exhibit RF-D2 = iPad-66.a**). HVY wrongly submit that "detrimental reliance" would not be required (HVY's Submission, paras. 135-136; see Supplemental Expert Opinion by Professor Nolte of 13 August 2019, paras. 30 and 37 (**Exhibit RF-D23 = iPad-114.b**).

[125] HVY's Submission, para. 136.

[126] See for example Defence on Appeal, paras. 118-122 and the sources cited there.

[127] Prof. Heringa's expert opinion of 25 July 2017 (**Exhibit RF-D1 = iPad-66.a**). See also Defence on Appeal, paras. 108-112.

22 April 1994.[128] Through its own diplomatic channels, moreover, the Netherlands expressly consented to a joint statement of the European Communities and their Member States at the time. That joint statement provides the following: "The Council, the Commission and the Member States agree on the following declaration: (…) Article 45(1) (…) does not create any commitment beyond what is compatible with the existing internal legal order of the Signatories (…)"[129]

75. Mr Bamberger was the ECT Conference's most important legal adviser. HVY engaged him as an "expert" but never submitted any opinion written by him. That is entirely understandable. After all, his published work indicates that his view was that the Treaty provided for partial provisional application. In 2006, he wrote an article in which he stated that provisional application "[may] be particularly problematic if it relates to the acceptance of a legally binding decision via an international forum to resolve a dispute relating to internal matters."[130]

76. Mr Martynov participated in the negotiations on behalf of the Russian Federation. He stated that it was clear at the time that "*Russia would not be able to provisionally apply the provisions in the ECT that concern dispute resolution by means of international arbitration.*"[131]

77. The international literature that was published before the Arbitrations commenced also supports the District Court's interpretation.[132] HVY's all-or-nothing approach was something they formulated specifically for the Arbitrations. Not one author or commentator has advocated for this approach.[133] The all-or-nothing

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[128] Defence on Appeal, para. 110; which refers to Prof. Heringa's expert opinion of 25 July 2017 (**Exhibit RF-D1, HER 3 = iPad-66.a**).

[129] See for example Defence on Appeal, paras. 112-115, 1994 Joint EC Statement (**Arbitration File R-352**).

[130] Summons, para. 183 and Reply, paras. 107-109, Defence on Appeal, para. 133, with reference to R-866.

[131] See A. Martynov, Opinion Concerning Provisional Application of the Energy Charter Treaty (December 14, 2006) **Exhibit RF-03.1.C-1.3.6**, paras. 4-6.

[132] See Defence on Appeal, paras. 135 *et seq.*

[133] S. Pritzkow, *Das völkerrechtliche Verhältnis zwischen der EU und Russland im Energiesektor*, Springer, 2011, p.62 (**Exhibit RF-230 = iPad-66.c**), Dutch translation: "*Het*

approach was indeed mentioned in the literature afterwards, where it was categorised as, amongst other things, "far from logical", "underdeveloped" and "superficial".[134]

78. HVY's own experts apparently also disagree with the all-or-nothing approach. For example, Prof. Klabbers and Prof. Schrijver do not discuss Prof. Heringa's report and decline to address crucial points in Prof. Pellet's report.[135]

G. The Tribunal's interpretation of the treaty leads to absurd consequences

79. As explained in the Defence on Appeal, the position taken by HVY leads to the conclusion that virtually all signatories of the ECT should provisionally apply the Treaty in its entirety. If this opinion is followed, the States should also implement separate provisions of the ECT that are inconsistent with national legislation.[136] This interpretation is diametrically opposed to the interpretation the United States had in mind when it proposed the first formulation of the Limitation Clause in 1991.

80. In HVY's opinion, Minister Wijers, who signed the Treaty on behalf of the Netherlands,[137] apparently acted in breach of Dutch legislation and the Constitution. This is because Dutch government does not have authority to declare the provisional applicability of a treaty that is inconsistent with formal law. It is beyond dispute that the ECT deviates from existing Dutch legislation

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Ad-hoc Scheidsgerecht in de Yukos-zaken heeft ten aanzien van deze norm een – daarvoor niet eerder aan de orde gekomen – alles-of-niets-uitleg voorgestaan. (...) Deze interpretatie van artikel 45, lid 1 ECT moet echter worden afgewezen." Orignele tekst: "*Das Ad-hoc-Tribunal in de Jukos-Fällen hat hinsichtlich dieser Norm einen – zuvor niemals diskutierten – All-or-Nothing-Approach vertreten. (...) Dieses Verständnis des Art. 45 Abs. 1 ECT ist allerdings abzulehnen.*"

[134] See Defence on Appeal, paras. 135-137.

[135] See RF's Submission of 25 June 2019, paras. 26-36.

[136] Defence on Appeal, paras. 138-140.

See the letter regarding the signing of the Treaty by the Kingdom of the Netherlands dated 13 December 1994 (**Exhibit RF-254 = iPad-66.c**).

with regard to numerous important points, including the far-reaching arrangements on arbitration.[138]

81. HVY's all-or-nothing interpretation also implies that countless other governments that signed the Treaty acted in breach of their own laws and constitution.[139] The expert opinions entered into evidence demonstrate that in that event, they would have exceeded their own authority.[140] The treaty interpretation proposed by HVY therefore leads to the absurd conclusion that the governments of countries including the Netherlands[141], France, and the Russian Federation[142] all acted in violation of their own laws and constitutions by signing the ECT.

H. Opinions of other tribunals

82. The only individuals advocating controversial and deviating methods for interpreting treaties are several arbitrators involved in the various Yukos arbitrations.[143] These arbitration decisions are not controlling in the present

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[138] See Prof. Heringa's expert opinion of 25 July 2017 (**Exhibit RF-D1 = iPad-66.a**), para. 22: "*This conclusion also excludes that in the event of provisional application, binding arbitrations are created or legal regimes are otherwise created that deviate from the constitutional rules on jurisdiction, the right to access to the court and the existing rules of legal action*."

[139] Also see the Summons, para. 158, and the Russian Federation's Written Arguments dated 9 February 2016, para. 25. Defence on Appeal, paras. 318-325.

[140] For example, with regard to France and Finland see: Prof. Pellet's 2006 Expert Opinion (**Exhibit RF-03.1.C-1.3.9**), paras. 23-27 and 37; Prof. Nouvel's Expert Opinion of 18 maart 2016 (**Exhibit RF-D10**; iPad-66.a), paras. 98-100; Koskenniemi's Expert Opinion (**Exhibit RF-03.1.C-1.3.4**), paras. 23-24; Prof. Talus's Expert Opinion of 18 maart 2016 (**Exhibit RF-D11 = iPad-66.a**), para. 53. See Summons, paras. 158 *et seq.*, Prof. Nolte's 2006 Expert Opinion (**Exhibit RF-03.1.C-1.3.7**), paras. 29-38 and 65, and Prof. Nolte's Expert Opinion of 18 March 2016 (**Exhibit RF-D12 = iPad-66.a**), para. 72, original English text: "*If the terms of the ECT were such that the German government considered that it was required to commit to provisionally apply the ECT in its entirety, the German government would have been constitutionally unable to commit, by its signature, to such provisional application.*" Dutch translation: "*Als de bewoordingen van de ECT door de Duitse regering zo werden gezien dat een verplichting bestond de ECT in het geheel voorlopig toe te passen, dan zou de Duitse regering grondwettelijk gezien niet, door ondertekening, hebben kunnen instemmen met een dergelijke voorlopige toepassing.*"

[141] See Defence on Appeal, paras. 53-54 and the expert reports mentioned in footnote 36. Prof. Heringa's Expert Opinion (**Exhibit RF-D1 = iPad-66.a**)

[142] See Defence on Appeal, paras. 53-54 and the expert reports mentioned in footnote 36.

[143] A. Boute, *Russian Electricity and Energy Investment Law,* Brill Nijhoff, Leiden, 2015, p. 595: "*As illustrated by the Yukos, Renta and RosInvest cases, the narrow scope and ambiguous*

setting aside proceedings. This Court of Appeal's Swedish counterparts have already irrevocably vacated two of these controversial Yukos decisions.[144]

83. Furthermore, these decisions were not unanimous. In a convincing dissenting opinion, the *prima inter pares* of arbitrators, the vastly experienced French professor Brigitte Stern, indicated that the Russian Federation's interpretation could be the only correct one.[145]

84. Also striking is the fact that the arbitrators each gave different reasons for arriving at the result of their jurisdiction. One interpretation of the text of the treaty should suffice. Varying interpretations arriving at the same result indicate that the arbitration agreement was not "clear and unambiguous".[146] When the validity of an arbitration agreement with a State is involved, this is fatal.

I come to my conclusion. The District Court's decision annulling the awards is correct and should be upheld.

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drafting of some of Russia's 'first generation' BITs – along with Russia's failure to ratify the ECT – have generated an intense debate in the arbitral case law and literature. Confronted with the potential jurisdictional limits of the Russian investment treaties, arbitral tribunals have been pushed to propose innovative and controversial interpretations of dispute-resolution and provisional-application-clauses so as to allow foreign investors access to international arbitration." (emphasis added)

[144] See for example the judgment in *Quasar de Valores* entered into evidence as **Exhibit RF-218 = iPad-21.b**. The arbitration decision regarding *RosInvestCo UK Ltd*. was vacated on 5 September 2013, see **Exhibit RF-76 = iPad-2.g**.

[145] *Yukos Capital S.à r.l. (Luxembourg) v. The Russian Federation*, PCA Case No. 2013-31, Interim Award on Jurisdiction, 18 January 2017, Dissenting Opinion of Professor Brigitte Stern, para. 76 (**Exhibit HVY-145 = iPad 61.b**): "*confirms the understanding by the Russian authorities that provisional application of a treaty was different from implementation of a treaty in force. It also suggests that one has to look at the different provisions of the treaty ('a detailed study of the legal scope of provisional application') to see which rules are and which rules are not consistent with the Russian legal order.*"

[146] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 198. See para. 5 above.