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The Hague Court of Appeal
Hearing 24 September 2019
Case-list number: 200.197.079/01

ORAL ARGUMENTS RE ARTICLE 21 ECT (TAX)
PROFESSOR 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: M.A. Leijten and A.W.P. Marsman

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DISTINGUISHED MEMBERS OF THE COURT OF APPEAL,

I. INTRODUCTION

1. The manner in which the Tribunal interpreted and applied Article 21 ECT leads to two grounds for setting aside the Yukos Awards:

   - Article 1065(1)(a) DCCP: "Jurisdiction Ground 3 – The Tribunal lacked jurisdiction pursuant to Article 21 ECT" and

   - Article 1065(1)(c) DCCP: "Mandate Ground 1 – The Tribunal neglected to present HVY's expropriation argument to the competent tax authorities".

2. Both grounds have been discussed extensively in the parties' procedural documents.[1] I will briefly explain them here.

II. JURISDICTION GROUND 3 – THE TRIBUNAL LACKED JURISDICTION PURSUANT TO ARTICLE 21 ECT

3. The Tribunal wrongly assumed jurisdiction for HVY's claims in respect of the legitimacy of the tax measures taken against Yukos by the Russian Federation.[2] Such measures do not fall within the scope of the ECT. This follows from Article 21(1) ECT (known as the tax carve out):

> (1) Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency

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[1] See Summons §§ 368-385, Reply §§ I.133-143, II.459-490, Reply §§ 328-366, Rejoinder §§ 250-274, 428, 431, Written Arguments RF §§ 66-75, Written Arguments HVY §§ 81-87, 95-98, Statement of Appeal §§ 750-768, Defence on Appeal §§ 844-872, HVY's Motion §§ 507 et seq., RF's Motion § 334.

[2] Final Awards, marginals 1430-1445 (**Productie RF-2 = iPad-2.g**).

between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency." (emphasis added)[3]

4. The unambiguous meaning of the words "*nothing in this Treaty*" in Article 21(1) ECT indicates that the carve out it contains applies to every provision of the ECT – and therefore also to the dispute resolution clause in Article 26 ECT – unless provided otherwise in Article 21 ECT itself. The carve out from Article 21(1) ECT is therefore an exception to the Russian Federation's alleged consent to the resolution of investment disputes pursuant to Article 26 ECT. For the remainder I would like to suffice with a reference to the submissions in first instance and appeal.[4]

5. The Tribunal therefore lacked jurisdiction on the basis of Article 26 ECT in respect of HVY's claims based on the taxation measures of the Russian Federation, within the meaning of Article 21(1) ECT. For this reason, the Yukos Awards must be set aside on the basis of Article 1065(1)(a) DCCP.

III. MANDATE GROUND 1 – THE TRIBUNAL FAILED TO PRESENT THE EXPROPRIATION DISPUTE TO THE COMPETENT TAX AUTHORITIES (ARTICLE 21(5)(B) ECT)

6. Article 21(5) ECT[5] contains a *claw-back* which undoes the *carve-out* of Article 21(1) ECT (exception to the exception), provided that the condition of that *claw-back* are satisfied. One of those conditions is the advise has to be sought at the competent tax authorities.

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[3] In Dutch: "Behalve als bepaald in dit artikel worden door geen enkele bepaling van dit Verdrag rechten verleend of verplichtingen opgelegd met betrekking tot belastingmaatregelen van de Verdragsluitende Partijen. In geval van onverenigbaarheid van dit artikel met andere bepalingen van dit Verdrag heeft dit artikel, wat de onverenigbaarheid betreft, de voorrang." (emphasis added)

[4] See among others, Summons Chapter IV.E; Reply, Chapter III.E; Defence on Appeal, Chapter IV.D; Submission RF, Chapter II.D.

[5] The Dutch translation of Article 21(5)(a) ECT reads: " Artikel 13 [Onteigening] is van toepassing op belastingen."

7. However, because the Tribunal in this case failed to consult the competent tax authorities, the applicability condition for the *claw-back* is not satisfied. In doing so, the Tribunal evidently violated its mandate. Accordingly, the Yukos Awards should be set aside on the basis of Article 1065(1)(c) and (e) DCCP.

8. The parties have extensively debated this in their procedural documents.[6] Briefly summarized, the following applies.

A. Text and practice Article 21(5) ECT

9. Article 21(5)(b)(i) ECT contains an obligation to seek advice from the competent tax authorities. The original English version of this article reads as follows:

> "(5) (a) Article 13 [Expropriation] shall apply to taxes.
>
> (b) Whenever an issue arises under Article 13 [expropriation], to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply:
>
> (i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) shall make a referral to the relevant Competent Tax Authorities; (…)"[7] (emphasis added)

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[6] See Summons §§ 368-385, Reply §§ I.133-143, II.459-490, Reply §§ 328-366, Rejoinder §§ 250-274, 428, 431, Written Arguments RF §§ 66-75, Written Arguments HVY §§ 81-87, 95-98, Statement of Appeal §§ 750-768, Defence on Appeal §§ 844-872, HVY's Motion §§ 507 et seq., RF's Motion § 334.

[7] In Dutch: "*5 a. Artikel 13 is van toepassing op belastingen.*

b. Wanneer in het kader van artikel 13 een geschil rijst, voor zover het betrekking heeft op de vraag of een belasting een onteigening vormt, dan wel of een belasting waarvan wordt beweerd dat deze een onteigening vormt, discriminerend is, geldt het volgende:

10. The word "shall" irrefutably entails a mandatory statutory obligation to make a referral to the tax authorities, either by the investor or by the Arbitral Tribunal.[8] There is no room for a discretionary weighing of interests.

11. In accordance with this, in the past the ECT Tribunals have held on several occasions that the word "shall" in Article 21(5) ECT is of a mandatory nature:

> "The Arbitral Tribunal considers the wording of Article 21 (5) (b) of the ECT to be absolutely clear. (…) In accordance with an interpretation of the ordinary meaning, the use of the future tense "shall refer" reflects an obligatory procedure both for the investor and for the tribunal, which confirms the use of "shall" in the English-language version of the Treaty. (…) [A] tribunal cannot examine [the claim] without having given the Competent Tax Authorities the opportunity to rule on it (…)"[9] (emphasis added)

12. See also *Eiser v. Spain*:

> "The Respondent's fifth objection is therefore sustained. Claimants' claim that the 7% tax is expropriatory is inadmissible to the extent that the Tribunal cannot at this stage of the proceedings decide this claim,

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i. De investeerder of de Verdragsluitende Partij die aanvoert dat er sprake is van onteigening legt het geschil over de vraag of de maatregel een onteigening dan wel discriminerend is, voor aan de bevoegde belastingautoriteiten. Laat de investeerder of de Verdragsluitende Partij dit na, dan leggen de instanties die worden verzocht geschillen te beslechten overeenkomstig artikel 26, tweede lid, letter c), of artikel 27, tweede lid, het geschil voor aan de bevoegde belastingautoriteiten."

[8] Defence on Appeal §§ 846 et seq. Also see S. Nappert, '*The Yukos Awards – A Comment'*, *Journal of Damages in International Arbitration*, 2015, p. 34: "*The language leaves no doubt that the ECT Contracting Parties intended that referral is to be mandatory.*" Incidentally, several tribunals have confirmed that use of the word "*shall*" in BITs is legally binding. For example, see *Wintershall v. Argentina* ARB/04/14, award of 8 December 2008, § 119 (RME-2873). See also THE ENERGY CHARTER TREATY: A READER'S GUIDE (2002), p. 39 where the ECT Secretariat derives from the word "*shall*" that the investor first has to contact the competent tax authorities before he is allowed to submit the case to arbitration: "*(…) the investor is not allowed to submit the case immediately to arbitration, but has first to contact the competent tax authorities*." See furthermore *Plama Consortium Limited v. Republic of Bulgaria*, 27 August 2008, ICSID ARB/03/24, § 266 in which the tribunal held that the claim could not be awarded due to the failure to seek advice from the competent tax authorities: "*The Arbitral Tribunal cannot see how this claim gives rise to a violation of Bulgaria's obligation under the ECT. (…) [I]f a tax constitutes or is alleged to constitute an expropriation or is discriminatory, the Investor must refer the issue to the competent tax authority, which the Claimant did not do*."

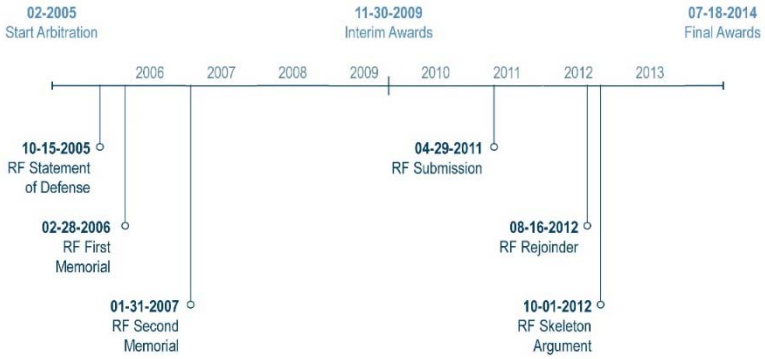
[9] *Isolux Netherlands v. Kingdom of Spain*, 17 July 2016, SCC V2013/153, § 756 et seq.

because Claimants have not complied with ECT Article 21(5)(b)(i)."[10] (emphasis added)

13. Article 21(5) ECT is clear: the investors (HVY) or the Tribunal are obliged to submit the dispute to the competent tax authorities. Therefore, it was not up to the Russian Federation to enter an opinion from the tax authorities into evidence itself. The respondent has no duty to that effect within this framework. That is a story made up by HVY that must be disregarded

B. Course of the proceedings and decision by the Tribunal

14. Furthermore, in the Arbitration, the Russian Federation expressly pointed out the necessity and importance of the applicability of Article 21(5) ECT, and it did so in good time. The Russian Federation made such request as early as 15 October 2005, at the outset of the Arbitration.[11] For this, please refer to the timeline (also included in the Defence on Appeal) in which the Russian Federation sought referral.[12] In no less than 6 (!) submissions, the Russian Federation addressed the referral to the tax authorities:



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[10] **Exhibit RF-509 = iPad-114.a.**, *Eiser Infrastructure Limited and Energia Solar Luxemburg v. Kingdom of Spain,* 4 May 2017, ICSID ARB/13/36, § 296.

[11] See RF's Statement of Defense dated 15 October 2005, §§ 55-56 (**Exhibit RF-03.1.A.2.1-3 = iPad-2.g)**; RF's First Memorial on Jurisdiction dated 28 Feb. 2006, § 135 (**Exhibit RF 03.1.A.3.1-3 = iPad-2.g).**

[12] See Defence on Appeal, § 854.

15. Referral and timely advice was easily achievable during the Arbitrations, which lasted nearly ten years.

16. Despite (i) the clear text of Article 21(5)(b)(i) ECT, (ii) the express wishes of the Russian Federation, (iii) the time available for referral and (iv) the given that the Arbitrations focused on tax questions[13], the Tribunal knowingly and deliberately refused to apply this mandatory provision.

17. The Tribunal curtly ruled that referral to the tax authorities would have been an "exercise in futility"[14]:

> "1428. In conclusion, the Tribunal holds that a referral of the dispute to the 'Competent Tax Authorities' within the meaning of Article 21(5)(b)(i) of the ECT would clearly have been futile at the outset of this arbitration and was therefore not required. It remains futile today."[15] (emphasis added)

18. The Tribunal[16], and HVY following suit, as well, have unsuccessfully attempted to justify this course of events by invoking (i) an alleged futility exception, (ii) the fact that the Russian tax authorities "were one of the lead

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[13] As established by the Tribunal itself, no less: HEL Interim Award, margin no. 583, YUL Interim Award, margin no. 584 and VPL Interim Award, margin no. 595 (**Exhibit RF-1 = iPad-2.g**) "*The Tribunal observes that the background to, and motivation behind, the Russian Federation's measures that gave rise to the present arbitration, be they 'Taxation Measures' or not, go to the heart of the present dispute*." See the Final Awards, margin no. 1401 "*(...) issues that went to the heart of the merits of the dispute*" (**Exhibit RF-2 = iPad-2.g**)

[14] For the bare reason behind this ruling, see the Final Awards, margin nos. 1421-1423, 1426-1428, 1435 (**Exhibit RF-2 = iPad-2.g)**. See the Summons § 369, Reply § 329 and Defence on Appeal §§ 857-858.

[15] In the Dutch translation:

"Resumerend geldt dat het Scheidsgerecht staande houdt dat een voorlegging van het geschil aan de "bevoegde belastingautoriteiten" in de zin van Artikel 21(5)(b)(i) van de ECT, duidelijk nutteloos zou zijn geweest bij de aanvang van deze arbitrage en derhalve niet verplicht was. Ook op dit moment is dit nog nutteloos." (emphasis added)

[16] Final Awards, margin no. 1422 et seq (**Exhibit RF-2 = iPad-2.g**)

players in the expropriation of Yukos" and (iii) the non-binding nature of the advice.[17]

C. There is *no* futility exception to Article 21(5) ECT[18]

19. Article 21(5)(b)(i) ECT does not include any grounds for exception. The Tribunal itself nevertheless created a ground for exception in the form of a futility exception. It being an exception, the Tribunal was required to apply a strict standard [19] and consider the evidence put forward by HVY. However, HVY merely made assertions why a futility exception should apply, without presenting any evidence that a referral to the competent tax authorities would be futile.[20] This made-up ground of exception cannot in any way justify the omission of seeking advice from the competent tax authorities. This futility exception were to be accepted, it would not apply here.

20. This is because the Tribunal had no expert knowledge of Russian, English and Cypriot tax law. It could not anticipate what the competent tax authorities would have advised, let alone how they would have substantively valued this advice, given their lack of relevant knowledge and experience. The decision not to seek advice nevertheless was therefore purely speculative[21], juridically

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17 Statement of Appeal § 762 et seq.

18 See Defence on Appeal §§ 844-871 for the details.

19 See for example Abaclat v. Argentina, Decision on Jurisdiction and Admissibility dated 4 Aug. 2011 ¶¶ 585-587; Urbaser v. Argentina, ICSID Case No. ARB/07/26, Decision on Jurisdiction dated 19 Dec. 2012 ¶¶ 78-105; Ambiente v. Argentina, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 Feb. 2013 ¶¶ 612-623; BG v. Argentina, UNCITRAL, Final Award dated 24 Dec. 2007 ¶¶ 155-157.

20 Claimants' Submission on the Respondent's Request for the Bifurcation of Liability/ Quantum and Objection Based on the Alleged Requirement of Referral under Article 21 ECT, para. 54 et seq., Merits Post-Hearing Brief, para. 229.

21 Cf. **Exhibit RF-509 = iPad-114.a**, *Eiser Infrastructure Limited and Energia Solar Luxemburg v. Kingdom of Spain,* 4 May 2017, ICSID ARB/13/36, § 294 in which the Tribunal penalised the speculative opinion of the investors that the Spanish tax authorities would not be able to adequately advise.

incorrect[22], and also led to various errors.[23] For these reasons alone that advice would have been very useful and helpful to the Tribunal.

21. The Russian Federation would note in this regard that the size of the case file cannot be used as a reason for failing to seek advice.[24]

22. In addition to the assertion that the competent tax authorities could not provide advice in good time[25] being incorrect[26] and speculative, it also cannot justify the omission of seeking advice.[27] It could have sufficed with a selection of those submissions which are relevant for the advice.[28]

D. Submission to *all* of the tax authorities involved

23. Refraining from seeking advance also cannot be justified by the circumstance that the Russian Federation itself took part in the measures against Yukos.[29] By definition, the tax authorities of the party being sued were involved in the litigious taxation measure.[30] This argument was rightly rejected by the ECT Tribunal for that reason in *Eiser v. Spain:*

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22 Defence on Appeal § 861.

23 See Summons §§ 379-383.

24 See in detail Defence, part II, §§ 479-482.

25 Statement of appeal § 764.

26 As noted in the Defence on Appeal § 864, there was a period of about ten years during which this advice could have been sought and preparations could have been made if the Tribunal had not failed to observe its mandatory statutory obligation in this regard.

27 Cf. S. Nappert, 'Square Pegs and Round Holes: *The Taxation Provision of the Energy Charter Treaty and the Yukos Awards*', in: Cahiers de l' arbitrage, 1 January 2015, no. 1, p. 9: "*[T]he Yukos Tribunals' one-sentence assessment that there existed 'no possibility that the relevant authorities would in fact be able to come to some timely and meaningful conclusion about the dispute or make any timely determinations that could potentially serve to assists the Tribunal's decision-making' fails as an objective, reasoned basis for triggering the application of the futility exception*."

28 See, in detail Statement of Defense, part II, §§ 479-482.

29 Statement of Appeal § 765, HVY's Motion § 507.

30 See Defence on Appeal § 868.

> "This final contention – that recourse to the procedure mandated by Article 21(5)(b) would be futile and therefore can be disregarded – largely rests on Claimants' speculation about Spain's response to a properly framed referral under Article 21. The Tribunal cannot assume, as Claimants urge, that the Spanish authorities would ignore such a referral, particularly as the ECT appears to allow Claimants to have recourse as well to their national tax authorities."[31]

24. Furthermore, HVY's argument cannot possibly justify the refusal to submit the matter to the Cypriot and English tax authorities.[32]

25. If this incorrect argument were to be accepted, the Tribunal would always be permitted to omit seeking advice. That is not in line with either the mandatory statutory text of Article 21(5) ECT or the literature and practice in that regard.

E. Seeking and considering the advice is *obligatory*[33]

26. It is correct that the substance of the advice is not binding when an alleged expropriation is involved. However, that does not change the fact that seeking and considering this advice is obligatory.[34]

27. This is an evident violation of the prohibition on conjecture in procedural and arbitration law in the Netherlands (as well as other countries). An arbitrator cannot anticipate the evaluation of any evidence or recommendation that has not even been requested, but which is nonetheless required for the evaluation.[35] Contrary to what HVY assert[36], this prohibition against

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31 **Exhibit RF-509 = iPad-114.a**, *Eiser Infrastructure Limited and Energia Solar Luxemburg v. Kingdom of Spain,* ICSID, 4 May 2017, ARB/13/36, § 294.

32 See also Reply, § 364.

33 Summons § 376, Reply § 365, Defence on Appeal § 869.

34 If it were not, Article 21(5)(b)(i) would become an entirely superfluous provision. In view of the practice of ECT Tribunals, for example in §§ 30 and 31 *supra*, this assertion by HVY is untenable.

35 See Reply §§ 341-342.

36 See Statement of Appeal § 767.

conjecture - most certainly does apply in full in international arbitration.[37] This also applies in respect of advice that must be sought but need not be implemented.

F. Conclusion: the Tribunal violated its mandate and acted contrary to public policy by consciously ignoring Article 21(5) ECT

28. The Tribunal had an absolute obligation to seek advice from the competent tax authorities. On the first row of the slide, you will notice how the mandatory referral process should have worked. On the second row of the slide, you will notice how it actually worked in practice. By omitting the obligation to refer, the Tribunal also robbed the Russian Federation of its right to be heard regarding the conclusions of the competent tax authorities. The Tribunal deliberately failed to observe Article 21(5) ECT, with all of the serious consequences this has[38]. The "grounds for justification" put forward in this matter are not supported by the text of Article 21(5) ECT or the literature and practice in that regard. This involves a serious violation of the mandate and is contrary to public policy, which must lead to the Yukos Awards being set aside (Article 1065(1)(c) and (e) DCCP).[39]

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[37] See Defence on Appeal §§ 866-867. Also see Reply, §§ 344-347, with references including to Fung Fen Chung, Bewijsmiddelen in het arbitraal geding, SDU: The Hague 2004, doctoral thesis, p. 170: "In its opinion, in any event the tribunal is not allowed to involve conjecture regarding the result of the production of evidence in its opinion. This is a task to be addressed at a later stage. The tribunal may only evaluate the evidence after it is provided." Reference is made to a judgment of the Court of Appeal of The Hague of 14 October 2004, Prg. 2005, 14 (*Van den Nieuwelaar/Pastou*) in which the Court of Appeal set aside an arbitral award for this reason.

[38] The Tribunal thus made various blunders. For example, the Tribunal ruled that the Yukos' VAT assessments were incorrect because the tribunal found it "difficult to understand" why the requirement of monthly filing (as applies under Russian law for all tax subjects) should be applied to Yukos. The Tribunal clearly did not base that ruling on what the Russian legislation actual entails (see Summons §§ 379-383, Defence on Appeal § 871).

[39] Defence on Appeal § 871.