The Hague Court of Appeal
Hearing 30 September 2019
Cause-list number: 200.197.079/01

ORAL ARGUMENTS REBUTTAL

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, *mr.* A.W.P. Marsman and *mr.* E.R. Meerdink

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Table of Contents

DISTINGUISHED MEMBERS OF THE COURT OF APPEAL,

I. INTRODUCTION

1. For a long time, the idea was that judges should follow the jurisdictional decisions of investment arbitrators, under the motto: "They will know what they're doing".[1] In recent years, judges have become more critical, partly due to the public debate on Investor-State Dispute Settlement (ISDS). Arbitrators can no longer get away with excessive enthusiasm for investment arbitration or academic fantasies. Take Yukos-related arbitration proceedings as an example. The arbitral award in *Quaesar de Valores v. Russian Federation* was irrevocably set aside by your colleagues in Sweden.[2] Similarly the arbitral award in *RosInvestco v. Russian Federation*.[3] And HVY withdrew their claims for enforcement of the Yukos Awards after an interim decision of 27 June 2017 of your colleagues of the *Cour d'appel* in Paris (as they also did in other countries).

2. Also outside the Yukos-related arbitrations we see that judges do not just leave investment arbitrators to their own devices. The French judge has repeatedly annulled arbitral awards in investment arbitration. At last Tuesday morning's

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[1] Chairman Fortier has an unusually high number of annulments of awards of arbitral tribunals in which he participated: *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award of 16 August 2007 (**Exhibit RF-147 = iPad-12.a)**, annulled by ICSID *ad hoc* committee on 23 December 2010; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award of 5 October 2012 (**Exhibit RF-6 = iPad-2.g**), partially annulled by ICSID *ad hoc* committee, on 2 November 2015; *Esso Exploration and Production Nigeria Limited and Shell Nigeria Exploration and Production Company Limited v. Nigeria National Petroleum Corporation*, Award of 24 October 2011, annulled by Federal High Court in Abuja in 2011, partially confirmd by the Nigerian Court of Appeal. The tribunal also had to rectify its Award for calculation errors for US$ 227 million in *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award van 8 March 2019.

[2] *Quasar de Valores SICAV S.A., et al. v. The Russian Federation*, Award on Preliminary Objections, 20 March 2009 (**Arbitration File Exhibit C-1048**). See Pleading notes RF II, § 116.

[3] Svea Gerechtshof 5 September 2013 (**Exhibit RF-76 = iPad-2.g**), DoA §§ 329 and 834.

hearing, HVY informed this Court that the ruling of the *Cour d'appel* in Paris in the investment case of *Komstroy v. Moldova* had been set aside by the Court of Cassation.[4] HVY argued that no words should be added to the definition of "investment" in Article 1(6) ECT. However, at exactly the same time as HVY argued this before your court, the *Cour d'appel* in Paris issued an interim ruling after this case was referred back to it. In that ruling, the *Cour d'appel* decided to refer the question of the definition of "investment" in Article 1(6) ECT to the European Court of Justice for a preliminary ruling.[5]

3. It need not get to that in the present case. It is clear that there is no "investment", nor is there an "investor" that meets the definitions of the ECT. But these questions do not even need to be addressed by this Court because the Yukos Awards already fail in the absence of a ratified treaty. The Russian Federation has signed the ECT but has not taken the necessary step of ratification for its entry into force. There exists quite some legal daylight between signing and ratification.

4. HVY tried in their oral arguments to make this Court believe that there is no difference between signing and ratification. Indeed, they even tried to give the impression that the Russian Federation has ratified the ECT. That brings me to HVY's own oral arguments. I would describe it as "beautiful packaging, but the contents are not good". The contents are not good because:

    - HVY refuse to discuss the Judgment of the District Court (despite presenting grievances against that Judgment);[6]

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[4] Pleading Notes HVY III, §§ 19 and 61.

[5] Cour d'appel de Paris, 24 September 2019, *Moldava v Komstroy*, https://globalarbitrationreview.com/digital_assets/af099989-9905-456e-951f-a8a3a859830a/Moldova-Komstroy.pdf

[6] HVY Pleading Nots 23 September 2019, part I, § 40, "*HVY [zullen] (…) hun standpunt vrijwel geheel (…) bepleiten alsof het Vonnis niet bestaat.*"

- HVY disregard Articles 31-32 VCLT; they confuse the "ordinary meaning" of Article 31 VCLT with the consultation of travaux under Article 32 VCLT;[7]
- HVY quote selectively and incompletely;[8]
- HYV are visibly having trouble reading texts properly;[9]
- HVY are reliant on "snippets" of texts[10] that have been taken out of context;
- HVY are proving themselves to be the "Masters of Confusion";[11]
- HVY make a vain attempt to conceal the fact that this is a case of Russians against Russians; they tell you what HVY are not, but they leave you in the dark as to who HVY are.[12]

5. And then there is the exceptional nature of this case. It is well known that the Russian economy was "dynamic" in the 1990s, in particular. What is noteworthy is that until 2005, no foreign investor had initiated an ECT arbitration against the Russian Federation. The Russian Oligarchs were the first. Later, other Yukos affiliates also initiated ECT arbitrations. No one else did. Conversely, Russian investors in ECT countries have not initiated ECT arbitration against these countries. All this shows that, except for the Russian Oligarchs, everyone understood that the ECT, which the Russian Federation had not ratified, did not provide a legal basis for investment arbitration.

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[7] See, for example, the confused discussion about the words "to the extent", HVY Pleading Notes 23 September 2019, part I, §§ 72-83

[8] See, for example, HVY Pleading Notes 23 September 2019, part I, § 22, regarding the Court's opinion on the terms "not inconsistent". See also § II.B (d) below on the interpretation of Russian sources of law.

[9] See, for example, § 100 below where it is explained that they do not read their own texts regarding the precise agreement on payments to the red directors.

[10] See also § II.B (d) below on the interpretation of Russian sources of law.

[11] They discuss countless topics that have already been rejected or that have already been judged to be irrelevant. As an example, one can refer to statements about Russian criminal procedure law, see § V below.

[12] See §§ 118-122 below.

6. The time reserved for this Rebuttal does not allow me to explicitly refute all the inaccuracies voiced by HVY in the oral arguments during the first session. I will confine myself to giving a few examples and, for the remainder, maintain the Russian Federation's previous assertions and refutations.

II. NO PROVISIONAL APPLICATION OF ARTICLE 26 ECT

A. Interpretation of Article 45 ECT (paras. 5.6-5.31)

(a) Provisional application as such and provisional application per treaty provision

7. In their arguments, HVY constantly switch - often unnoticed - between two concepts of provisional application:

   (1) **Principle:** Provisional application as such: i.e. whether a State applies treaties provisionally at all;

   and, if (1) answered in the affirmative,

   (2) **Scope:** The limits of provisional application of the individual provisions of a treaty.

8. When interpreting Article 45(1) ECT, HVY argue that the *Limitation Clause* only concerns the principle of provisional application. This is also referred to as the "all-or-nothing" interpretation. The Arbitral Tribunal has followed this interpretation. The District Court rejected this interpretation.

9. As I have argued before, and will summarise again later, the interpretation of the Arbitral Tribunal is indeed not tenable on the basis of the interpretation provisions of Articles 31-32 VCLT. The correct interpretation is that the *Limitation Clause* means that for States that recognise the principle of provisional application, this

clause determines the scope of the provisional application. This is also referred to as the "piecemeal" or "partial" interpretation. [13]

10. This is the interpretation advocated by the Russian Federation, an interpretation that was followed by the District Court.

11. Signatories have the possibility, but are not obliged, to inform other Parties that they do not recognise the principle of provisional application. This possibility is provided for by the second paragraph of Article 45 ECT. This is a separate regime in the sense that it is separate from the first paragraph (see the words "Notwithstanding paragraph (1)").[14]

12. The Russian Federation has not made use of this possibility in the second paragraph of Article 45 ECT, because it recognises the principle of provisional application of treaties under the conditions as particularly set out in Article 23 FLIT.[15] But that is not what the dispute is about. The dispute concerns the scope of the provisional application as expressed in the *Limitation Clause*.

13. The confusion that HVY create is that they argue that the second paragraph of Article 45 ECT is not a separate regime, but a procedural requirement for a Signatory "to opt-out" of provisional application under the first paragraph. This is an interpretation that has been rejected by the Arbitral Tribunal.[16] That cannot be called into question anymore.[17] The Arbitral Tribunal also interprets paragraphs 1 and 2 of Article 45 as two separate regimes. Such need to be, therefore, the starting

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[13] Prof. Pellet explained in his expert report that 'partial' means the same as 'piecemeal'. Production **RF-D24 = iPad 114b**, § 5. Incorrect and misleading are, among other things, the statements HVY Pleading Notes, part I, §§ 42, 70.

[14] See Pleading Notes RF I, §§ 36-62.

[15] Article 23 Federal Law on International Treaties (FLIT), Arbitration File, **Exhibit C-134 = Exhibit RF-DG, appendix SYM-1G = iPad 66.a**.

[16] See SoD § 281, with reference to HEL Interim Award, marg. 262 (**Production RF-1 = iPad-2.g**).

[17] See § 136 infra.

point for your opinion. This already removes an important foundation from the assertions of HVY.

(b) The starting point for interpretation is the text of the treaty

14. Article 25 VCLT ("Provisional application"):

> "1. A treaty or a part of a treaty is applied provisionally pending its entry into force if
>
> (a) the treaty itself so provides; (...)" (underlining added)

15. The VCLT, therefore, refers to the text of the treaty in question. Treaties contain different provisions on provisional application (if any). The text of the treaty in question is, therefore, determinative.

16. The text of Article 45 ECT must be viewed in the context of this Treaty. I repeat here what I said in the first session. In what can be regarded as one of the most important considerations in the Judgment (para. 5.72), the District Court refers to Article 39 ECT, which requires ratification for entry into force. Signing in accordance with Article 37 ECT is nothing more than a stage in the conclusion of the Treaty. Here, signing does not express consent to be bound by the Treaty as referred to in Article 12 VCLT and Article 1(2) ECT.[18] This concerns signing subject to ratification in accordance with Article 14(c) VCLT.[19] Signing only leads to the limited provisional application of the ECT. The scope of provisional application is restricted by the *Limitation Clause* in Article 45(1) ECT.

17. In the words of the District Court: "By its interpretation, the Arbitral Tribunal has essentially deprived the *Limitation Clause* and the requirement for ratification laid down in Article 39 ECT of all meaning. This opinion effectively means that every

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[18] Article 1(2) ECT: "'Contracting Party' means a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force."

[19] See also Defence on Appeal, §§ 41-51.

provision of the treaty, even if its provisional application is not in accordance with national (constitutional) law, has full effect."

(c) Limitation Clause

(i) "to the extent that"

18. One of the most implausible arguments of HVY is that the term "to the extent that" can mean both "to the degree that" and "if".[20] This is incorrect. The term "to the extent that" has in normal speech the meaning of "a degree, a range, or - to put it another way - a differentiation".[21] In the authentic French text: "*dans la mesure où*"; in the authentic German text: "*in dem Maße*"; and in the Dutch translation "*voor zover*".[22]

(ii) "such provisional application"

19. The other arguments of HVY also fail to convince.[23] I refer to my written arguments in the first session.[24] The Arbitral Tribunal considered that the words "such provisional application" were equivalent to the words "the provisional application of this Treaty". In the opinion of the Arbitral Tribunal, the word "such" refers to "this Treaty".[25] An interpretation that was, rightly, not argued by any of the parties. As the District Court notes: "this imaginary addition does not provide any clarification".[26] The term "to the extent that" remains valid and, with the imaginary addition, the Limitation Clause would then read: "*to the extent that the provisional application of this Treaty is not inconsistent with the constitution, laws and regulations.*"

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[20] Pleading Notes HVY I, § 80.

[21] District Court Judgment para. 5.11.

[22] District Court Judgment para. 5.11. See Pleading Notes RF I, §§ 17-21.

[23] Pleading Notes HVY I, §§ 66-79.

[24] Pleading Notes RF I, § 20.

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

[26] District Court Judgment para. 5.12.

20. The far-reaching conclusions that HVY drew on the basis of a Japanese text proposal are incorrect.[27] Contrary to HVY's assertions, there has never been an explicit rejection of Japan's proposal. On the contrary, the earlier proposal of Japan discussed by HVY was subsequently accepted with some modifications.[28]

(iii) "not inconsistent with"

21. For this new argument of HVY, first introduced on appeal (and therefore inadmissible, see § 136), I refer this Court to my oral arguments in the first session.[29] HVY continue to quote the District Court incorrectly.[30] Moreover, the District Court gave a much more balanced explanation than HVY would have us believe.

22. HVY argue that "[t]reaties, and their provisional application, are by their very nature intended to create new obligations. Of course, these new obligations do not yet have an 'independent legal basis' in national law."[31] But that is not the question. The question is whether separate treaty provisions are compatible with national law, as required by the *Limitation Clause*.

(iv) "its constitution, laws and regulations"

23. HVY continue against their better judgment to contradict their own expert Prof. Reisman,[32] "[i]*t 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 correctly draws the conclusion that this "*compels the*

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27 Pleading Notes HVY I, § 76. See also Defence on Appeal, §§ 332-334.

28 See Defence on Appeal, n. 101.

29 Pleading Notes RF I, §§ 22-28 with references.

30 Pleading Notes HVY I, §§ 59-65.

31 Id., § 64.

32 Pleading Notes HVY I, §§ 84-87.

conclusion that Article 45(1) refers to provisional application of <u>various obligations</u> of the Treaty."[33]

24. States lay down the principle of provisional application in the constitution or statutory law, and not in regulations. HVY could only find one curious exception: a Spanish decree from the Franco era.[34]

25. The District Court also concluded that the reference to provisions supports the conclusion that Article 45(1) ECT concerns the compatibility of <u>separate treaty provisions</u> with the constitution, laws and subordinate legislation.[35]

(v) <u>Conclusion</u>

26. In their conclusion, HVY refer to "the principle of provisional application, or in any event the provisional application of (<u>provisions of</u>) the ECT".[36] (underlining added). Does this mean that HVY finally agree with the District Court and the Russian Federation that compatibility by treaty provision applies, according to the Limitation Clause?

(d) Whether or not the Russian Federation has indicated any conflict with Article 26 ECT is irrelevant

27. HVY are clutching at straws by claiming that the Russian Federation had never pointed to any conflict with Article 26 ECT prior to the dispute.[37] This is not only

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[33] See Reply, § 71 and Defence on Appeal, § 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**): "*it is difficult to imagine how an issue of such importance to the competence of a State to provisionally apply treaties is determined by a 'provision' and 'Article 45(1) ECT refers to a provisional application of <u>various obligations</u> of the Treaty.*" (underlining added).

[34] Pleading Notes HVY I, § 86. The explanations of the Luxtona Tribunal is *ex cathedra* and not based on anything. *Id.* § 87.

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

[36] Pleading Notes HVY I, § 88.

[37] Pleading Notes HVY I, §§ 94-133.

irrelevant but also incorrect, as already explained comprehensively by the Russian Federation.[38]

28. It is important to note that **HVY have not been able to produce any document in which the Russian Federation explicitly or implicitly held out the prospect of provisional application of Article 26 ECT.**

B. Inconsistency with Russian Law (Judgment of District Court, paras. 5.32-5.95)

(a) Introduction

29. To decide the key issues of Russian law in this case, the District Court relied upon the Expert Report of Professor Asoskov.[39] HVY had not yet submitted any Expert Reports. Now, on appeal, HVY have submitted six Expert Reports on Russian Law, totaling approximately 400 pages. Half of this was written by Professor Stephan, an American who teaches in Virginia and has never been a member of the Russian bar.[40] The other half was written by Dr. Mishina, who works for one of the Menatep "think tanks".[41]

30. None of HVY's Expert Reports provides any basis, however, to reverse the decision of the District Court. The District Court's reasoning has now been confirmed in the additional Expert Reports of Professor Asoskov and Professor Avtonomov submitted by the Russian Federation.[42] Their expertise cannot be doubted. This is reflected in their CVs, which are in your hearing bundles. As you

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[38] See SoD, §§ 305-364, 100-104 and 123-129. See in particular the image on SoD, p. 70 and the expert report from the renowned German Professor Prof. Dr. G. Nolte, (**Exhibit RF-D12 = iPad-66a**).

[39] District Court Judgment, para. 5.34-5.41.

[40] Submission RF, § 94 in which it is explained that Prof. Stephan has limited knowledge of the Russian language.

[41] SoD, § 502, Submission RF, § 95.

[42] See among others the expert reports from Professors Avtonomov, Asoskov, Marochkin and Yarkov, submitted as **Exhibit RF-D4-D7 = iPad 66.a**.

will see, these Experts are both leading authorities on the specific issues of Russian law, pertaining to the relevant issues of Article 45(1) that are at hand here.

31. This case is about international investor-State dispute settlement (so-called "ISDS"), which relates to such legal issues as "expropriation" and "fair and equitable treatment". ISDS is not comparable to regular commercial arbitration of contractual disputes. ISDS involves the public acts of the State in its sovereign capacity (*puissance publique*). A State's consent to ISDS must be "clear and unambiguous" as a matter of international law, because sovereignty is at its zenith when determining the legality of public acts.[43] HVY does not contest this. But an interpretation that requires HVY to submit 400 pages of Expert Reports, containing forever changing views on Russian law is obviously not "clear and unambiguous".

32. In reality, despite what HVY is telling you, Russian law is not something surreal, exotic or bizarre. It is not even so very different from Dutch law. Just as in the Netherlands, public law disputes about taxation and expropriation are not arbitrable in ordinary circumstances.[44] Just as in the Netherlands, the Parliament is at the top of the hierarchy, and the Government cannot override the statutes of Parliament.[45]

33. This afternoon, I will address specifically the Russian law issues that HVY attempt most to confuse, but which the District Court analyzed correctly. I will address ***three topics***. The first concerns the *first argument* (dispute concerns Russian public law) that I presented during the first session to your Court.[46] The second and third subjects concern the *second argument* (separation of powers) that I presented during the first session to your Court:[47]

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43 See SoD, § 35 and the case law cited there.

44 See SoD, §§ 194 et seq.

45 For the Netherlands, see the undisputed expert report from Professor Heringa, **Exhibit RF-D1 = iPad 66.a.**

46 See Pleading Notes RF re inconsistency with Russian Law, part III.B.

47 See Pleading Notes RF re inconsistency with Russian Law, part III.C.

(i) First, I will revisit Russian law's general rule that public law disputes are not arbitrable, which is confirmed by the 1991 and 1999 Laws on Foreign Investment.[48]

(ii) Second, I will discuss the phrase "international treaties" found in Article 15(4) of the 1993 Constitution and in other statutory provisions, such as the 1991 and 1999 Laws on Foreign Investment.[49] These phrases contemplate ratified treaties only—and thus exclude the ECT for the Russian Federation.

(iii) Third, I will take you through two decisions of the Russian Constitutional Court and show that HVY try to mislead your Court.[50] Those two cases do not at all support the argument of HVY that non-ratified treaties have precedence over laws adopted by the Parliament.

(b) First Topic: Article 26 ECT is inconsistent with Russian law (Judgment of District Court, paras. 5.32-5.65)

(i) Public law disputes are not arbitrable under Russian law (Pleading Notes, Day 1 (Part II – Russian Law), Section B(c))

34. The District Court correctly explained that public law disputes are not arbitrable under Russian law.[51] Belatedly, HVY's own Expert attempted to rebut this for the

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[48] See RF Pleading Notes, Day 1 (Article 45 ECT, Part II - Russian law), Parts B (c) and B (d)) and the cited locations in the documents; Third Expert Report from Asoskov (**Exhibit RF-D5 = iPad 61.a**) §§ 21, 45-52.

[49] See RF Pleading Notes, Day 1 (Article 45 ECT, Part II - Russian law), Parts B (d), B (f) and C (c) and the references cited there in the documents; Third Expert Report from Asoskov (**Exhibit RF-D5 = iPad 61.a**) §§ 30-44; Second Expert Report from Avtonomov (**Production RF-D25 = iPad 114.b**) §§ 21-28, 47-61.

[50] RF Pleading Notes, Day 1 (Article 45 ECT, Part II - Russian law), Part B (f) (ii)) and the locations cited therein in the documents; Third Expert Report from Avtonomov (**Exhibit RF-D30 = iPad 125.b**) §§ 13-40; Second Expert Report from Avtonomov (Production RF-D25 = iPad 114.b) §§ 29-36.

[51] District Court Judgment, para. 5.41.

first time in February 2019, even though he actually agreed with the District Court in his 2017 Expert Report.[52]

35. The District Court correctly analyzed the Russian statutes and procedural codes, which authorize only arbitration of civil law disputes—not of public law disputes or ISDS.[53] The relevant provisions were listed in my Pleading Notes from last Monday.[54] Summarizing these statutes, the Russian Constitutional Court has said twice: "*the current regulatory framework does not allow the referral to an arbitral tribunal of disputes arising out of administrative and other public law relations*".[55]

36. HVY single out Article 1(2) of the Law on International Commercial Arbitration[56] to suggest that this provision makes HVY's claims arbitrable despite the Constitutional Court's decisions to the contrary. HVY's argument is baseless.[57]

37. According to the leading commentator on this same Law, "[i]*f a dispute (…) has a public, rather than private law, nature (…) it cannot be accepted for settlement by international commercial arbitration, even if it was so agreed by both parties to the dispute*."[58] If you actually read the provisions of this Law that HVY cites, it is evident that the Parliament is merely confirming that foreign investors may participate in commercial arbitration relating to civil law disputes. As I explained, HVY's dispute is an example of ISDS, not a regular commercial arbitration. But the Law on International Commercial Arbitration applies only to commercial

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[52] Submission RF, § 48 et seq. this while Prof. Stephan in his expert report of 2017 still shared the opinion of the Court on this point.

[53] District Court Judgment, para. 5.41.

[54] RF Pleading Note, Day 1 (Article 45 ECT, Part II - Russian law), § 125.

[55] SoD, § 197.

[56] Submission RF, § 51; Third Expert Report of Asokov (**Exhibit RF-D5 = iPad 61.a**), §§ 28-29.

[57] Submission RF, § 51; Third Expert Report of Asokov (**Exhibit RF-D5 = iPad 61.a**), §§ 28-29.

[58] Submission RF, § 51; Third Expert Report of Asokov (**Exhibit RF-D5 = iPad 61.a**), §§ 28-29.

arbitrations. It also does not provide consent to arbitration in this case, as the District Court found correctly. HVY have admitted this.[59]

38. As the District Court said, it is "beyond doubt" that this dispute is a public law dispute involving a State's public acts [*puissance publique*], including taxation and alleged expropriation.[60] Public law disputes are not arbitrable in the Russian Federation. The classification and the consequence would be the same under Dutch law.[61]

(ii) The 1991 and 1999 Laws on Foreign Investment
(Pleading Notes, Day 1 (Part II – Russian Law), Section B(d))

39. I now come to the 1991 and 1999 Foreign Investment Laws, which implicate three separate issues. It is important to keep these issues separate:

(1) Arbitration - The first issue is the question of arbitrability of public law disputes, and whether the Foreign Investment Laws themselves do or do not authorize arbitration of public law disputes. As I said last Monday, they do not. There is not much to add to this.

(2) Ratification - The second issue is the Foreign Investment Laws' references to "international treaties", and whether those references include only ratified treaties or also encompass unratified treaties such as the ECT. I will address that issue here and later in Part (c)(ii), because that issue also implicates Article 15(4) of the Constitution.

(3) The referral back – The third issue is the question of the referral back proposed by HVY. That means, whether the reference to the Signatory's laws in Article 45 ECT could ever include domestic laws' references to international treaties—i.e., the supposed references back to the ECT itself. Because the illogical "referral back" proposed by HVY also implicates Article 15(4) of the Constitution, I will respond to this at the end of Part (c)(ii).

40. ***No Authorization of ISDS*** – The Foreign Investment Laws of 1991 and 1999 (FILs) confirm the general principle that public law disputes are not arbitrable under Russian law.[62] Last Monday, I had taken you through Articles 7(3) and 9(1)

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59 RF Submission, Submission RF, § 51.

60 District Court Judgment, para. 5.41.

61 See SoD, § 194 et seq.

62 SoD, § 207 et seq.

of the 1991 FIL and Article 10 of the 1999 FIL. I had already also discussed with you the Arbitral Tribunal's painful mistakes,[63] and how the District Court has correctly analysed those.[64]

41. ***References to International Treaties*** –HVY has focused almost exclusively on the references to "international treaties" in these statutes. As I have explained, these provisions refer only to ratified international treaties. This results directly from Article 15(1)(a) of the 1995 Federal Law on International Treaties (the "FLIT") and its 1978 predecessor. Both required any treaty diverging from a statute of Parliament to be ratified by Parliament.[65] This is confirmed by numerous Explanatory Notes of the Government in relation to Russian BITs, which the District Court summarized at paragraphs 5.62 - 5.64 of its Judgment. Throughout the 1990s, the Government repeatedly said that ISDS diverged from the statutes of Parliament, and that, therefore, it was required that any treaties permitting ISDS to be ratified. This shows how the Government itself actually interpreted the 1991 and 1999 Laws on Foreign Investment.[66]

42. This interpretation of the Government confirms once again that the Foreign Investment Laws' references to "international treaties" only remind the reader of what is already stated in Article 15(4) of the Constitution; ratified treaties prevail over laws adopted by Parliament. They are examples of a legislative technique, which is common throughout the world and even used here in the Netherlands.[67] The Dutch Parliamentary history says about such references that such have a "warning function" [*waarschuwingsfunctie*].[68]

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[63] RF Pleading Notes Day 1 (Article 45 Ect, part II – Russian Law), § 154.

[64] RF Pleading Notes Day 1 (Article 45 Ect, part II – Russian Law), § 155.

[65] SoD, § 208.

[66] District Court Judgment, para. 5.62-64, SoD, § 166-169. See most elaborated Reply, §§ 175-182 with examples.

[67] See for example Article 1 DCCP, Article 10:154 and 10:155 DCC.

[68] See, for example, with regard to Article 1 DCCP, Parliamentary Documents II 1999-2000, 26 855, no. 3 (MvT), p. 27) "Article 1.1.1 primarily has the function of warning. Strictly speaking, its content speaks for itself; reference can also be made here to Article 94 of the Constitution. Nevertheless, we believe that misunderstandings can be avoided if it is

43. In the Russian legal system, these reminders have a name. They are called "duplication" provisions, because these provisions "duplicate", repeat, the pre-existing constitutional rules, without changing their legal effect.[69] Professor Avtonomov and Professor Asoskov confirm this, based on decisions of the Russian Constitutional Court and Supreme Court, numerous commentaries, and the Foreign Investment Laws' drafting history.[70]

(c) Second Topic: Separation of powers and hierarchy of legal norms (Judgment of District Court, paras. *5.66-5.95)*

(i) Article 15(4) of the Constitution

44. I now turn to the Constitution. Do references to "international treaties" in the Russian Constitution allow non-ratified treaties to prevail over statutes adopted by Parliament?

45. Article 15(4) of the Constitution provides: "*If an international treaty of the Russian Federation provides for rules other than those envisaged by law, the rules of the international treaty shall be applied.*"[71]

46. The District Court explained that Article 15(4) of the Constitution only permits **ratified** treaties to prevail over conflicting statutes adopted by the Russian Parliament:

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explicitly stated that the provisions of this section only apply to the extent that no treaties apply. The warning function of the present provision is all the more important now that, in fact, in the vast majority of cases in the field of property law in which the Dutch court deals with questions of jurisdiction, not the present section, but one of the aforementioned Treaties (in particular: the Brussels Convention or the Lugano Convention) will apply. In our opinion, this state of affairs should not be completely ignored in the legal text itself. A similar warning is found in Article 1 of the Swiss Federal Law on Private International Law of 1987 (hereinafter referred to as the Swiss Federal Law). "

69 See, for example, § 233 (c), Submission RF, § 82.

70 Third Expert Report from Asoskov (**Exhibit RF-D5 = iPad-66.a**) §§ 30-44; Second Expert Report from Avtonomov (**Exhibit RF-D25 = iPad-66.a**) §§ 47-61; See SoD, § 233 (c); RF Submission, §§ 82-84.

71 See SoD, § 419 et seq. This provision has already been discussed in the Arbitrations. See for example Arbitration file, expert report Prof. Dr. A. Nussberger (currently ECHR judge).

> "A different interpretation of Article 15 paragraph 4 of the Constitution would allow treaties not approved by the legislature to form part of Russian law and also supersede legislation not compatible with such treaties. Such an interpretation cannot be reconciled with the principle of separation of powers. (…)
>
> The constitutional limitations discussed above require that treaties that deviate from or supplement national Russian laws, cannot be applied based only on their signature, but require prior ratification. In accordance with this, these limitations also apply if treaties, like the ECT, are applied provisionally."[72]

47. Among other things, the District Court based its analysis on Article 15(1)(a) of the 1995 FLIT (and Article 12 of the predecessor of 1978).[73] For forty years, these two statutes have continuously required that any treaty deviating from the laws of the Russian Parliament must be ratified. Until their ratification, the pre-existing provisions of Russian law must apply.

48. The District Court's analysis is correct. It cannot possibly be different. There are approximately seventy ministries, agencies, and services in the Russian Federation, such as the Ministry of Sport, the Federal Agency for Tourism, and the Federal Agency for Youth Affairs. All of them can enter into unratified treaties, and all of them can provisionally apply unratified treaties.[74] None of these entities' unratified treaties can prevail over the statutes adopted by the Parliament. Nor can the unratified treaties concluded by the Government.[75]

49. HVY repeats again and again that Article 15(4) refers to "international treaties" and does not include the word "ratified". But let me read to you another passage from another Constitution, which HVY actually cited last Monday without quoting:

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[72] District Court Judgment, para. 5.91-5.93.

[73] District Court Judgment, para. 5.85-5.86.

[74] SoD, § 409 with reference to Expert Report Prof. Avonomov (**Exhibit RF-D4 = iPad-66.a**), § 51.

[75] See in more detail SoD, §§ 419-434.

> "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties . . . ."[76]

50. This is, of course, Article 94 of the Dutch Constitution. I was grateful to hear HVY cite this, because Article 94 of the Dutch Constitution is also a "priority rule" that addresses the relationship between "treaties" and "statutory regulations". Article 94 of the Dutch Constitution also does not include the word "ratified" before the word "treaties". But nobody would suggest that this provision allows the court to provisionally apply an unratified treaty for the articles that are inconsistent with the laws of Parliament or legal rules.

51. ***Drafting History of the Russian Constitution*** – The Russian Constitution's drafting history does not change this analysis. Last Monday, HVY showed you that the word "ratified" was deleted from the draft Constitution in 1993. HVY suggested that the word was deleted because the drafters wanted to expand the category of "international treaties" and give priority to unratified, provisionally applicable treaties over statutes of Parliament. But HVY cites nothing to support this statement.

52. Professor Avtonomov, by contrast, reviewed the Constitution's drafting history carefully.[77] He identified two reasons why the word "ratified" was deleted in the draft of the Constitution in 1993.

53. First, the Constitution's drafters were advised that the word "ratified" could create confusion. This was because a ratified treaty might not yet have entered into force, (for example) or if the treaty is not yet published, or if the date for entry into force has not yet passed. Moreover, under the Vienna Convention on the Law of Treaties, there are other ways for a legislature to endorse a treaty. "Acceptance", "approval", and "accession" are the alternatives.[78]

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[76] Article 94 Constitution.

[77] See SoD, § 427. This has already been explained in the Arbitrations. See Arbtiration Expert Report Prof. Nusseberger, p. 29.

[78] See SoD, § 427, First Expert Report Prof. Avtonomov (**Exhibit RF-D4 = iPad 66.a**), § 127-133.

54. Second, the Russian legislators were simultaneously drafting the 1995 FLIT, the entire purpose of which was to address technical questions of treaty practice such as the significance of ratification. Accordingly, at the last minute before the final text of the 1993 Constitution was adopted, many terms relating to these technical issues were deleted and moved to the FLIT. This is confirmed in the commentary of Professor Danilenko, which HVY cited last Monday.[79] And, indeed, when the FLIT was submitted to Parliament for debate in early 1994, the Deputy Minister eliminated any doubt about the meaning of the deletion: "*[O]nly those treaties that are ratified in Parliament and therefore are approved in the form of a law will have priority in legislation in the event of a conflict of laws.*"[80]

55. ***Executive Practice*** – Another topic that HVY cites frequently is the question of Executive Practice. HVY has assembled a random collection of instances where the Russian Government or individual ministries supposedly have applied unratified treaties provisionally. According to HVY, these actions were supposedly contrary to statutes adopted by Parliament. The Russian Federation has already rebutted these examples. [81]

56. But this is all a distraction by HVY, in any event. It is not necessary to rebut all of HVY's alleged examples of Executive Practice, because the Constitutional Court and the Supreme Court have repeatedly explained that the Russian Government cannot set the boundaries of its own legal authority.[82] The Government cannot write its own ticket. Article 15(2) of the Constitution states: "[t]*he bodies of state authority . . . shall be obliged to observe the Constitution of the Russian Federation and laws*."[83]

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79 GM Danilenko, The New Russian Constitution and International Law, 88 Am. J. Int'l L. 451, pages 453-454 and footnotes 22, 25, 91 (First Expert Report from Stephan (Production HVY-D3, S-13 = iPad -61.a).

80 See SoD, § 430, See Expert Report Prof. Avtonomov (**Production RF-D4 = iPad 66.a**), § 62.

81 See in general SoD, §§ 441-446.

82 SoD, § 441.

83 Expert report Prof. Avtonomov (**Exhibit RF-D4 = iPad 66.a, ASA-14 appendix**).

57. ***Professor Bystrov and Others*** – I will need to defend the reputation of Professor Bystrov, whom HVY criticized so aggressively on Monday. HVY said that Professor Bystrov was all alone until 2005, as the only person recognizing any conflicts between Article 26 ECT and Russian law.

58. But this is not true. The Secretariat of the Energy Charter in Brussels also confirmed this back then. Transneft (a Russian state company) had wanted to pursue arbitration against Ukraine under the ECT based on a dispute over transit pipelines. But Transneft was told by the Energy Charter Secretariat that arbitration was impossible because the Russian Federation had not ratified the ECT.[84] As the Vice Chairman of Transneft said publicly: "*We cannot resolve this issue because we have no dispute mechanism.*"[85]

59. ***Other ECT Conflicts*** – Moving beyond the question of arbitration, Russian legislators and ministers also noted a wide range of conflicts between the ECT and many statutes of Parliament. Contrary to what HVY said last Monday, these were not just informal statements made during hearings. The same conclusion is reflected in the official correspondence and final resolutions adopted by the Parliament's committees. This history is detailed by Mr. Katrenko, the chairman of one of the relevant Parliamentary committees.[86]

60. ***Conclusion on Article 15(4) of the Constitution –*** This is fatal for HVY's interpretation of Article 15(4) of the Constitution and all of the provisions that duplicate Article 15(4). Moreover, ratification would merely be superfluous after the Government signed the ECT in 1994.[87] If you read the parliamentary history, you will see that HVY's interpretation cannot possibly be correct.

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84 Statement from Katrenko (**Production RF-G1 = iPad 66.b**), § 21.

85 See SoD, § 152, 334 and the source documents cited there.

86 Katrenko statement (**Production RF-G1 = iPad 66.b**), §§ 6-23.

87 Pleading Notes HVY dated 23 September 2019, part II, §§ 29 et seq.

(ii) The District Court's Rejection of HVY's Reliance on Russian law to refer back to the ECT

61. According to HVY's proposal, the ECT refers to Russian law, which then supposedly refers back to the ECT. There is neither a basis for such circle in the language of Article 45(1) ECT, nor under Russian law.

62. The Russian Constitutional Court and the District Court of The Hague have rejected this idea already. In 2012, the Russian Constitutional Court decided as follows in the *Resolution 8-P case* (p.10):

> "The Russian Federation may agree to provisional application of an international treaty (in whole or in part) . . . and precondition provisional application of an international treaty (or any part thereof) prior to its entry into force by compliance with the Constitution of the Russian Federation, laws and other regulatory acts of the Russian Federation".[88]

63. That is the Constitutional Court's endorsement of *limitation clauses* in the same category as Article 45(1) of the ECT. The Russian Federation "may . . . precondition provisional application" on "compliance" with the Constitution, the laws, and the regulatory acts. The text is practically identical to Article 45(1).

64. This is also fatal for HVY's argument, as the District Court confirmed. At paragraph 5.87 of the Judgment, the District Court described Article 15(4) of the Constitution as "a conflict rule" [*conflictregel*].[89] Then, at paragraph 5.92 of the Judgment, the District Court recognized this statement's significance for the interaction between Article 45(1) ECT and Article 15(4) of the Constitution:

> "[A]s is also expressed in the same jurisprudence of the Constitutional Court – a treaty like the ECT *can* limit the scope of the provisional application to those treaty provisions that are compatible with the Russian Constitution and

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[88] Second Expert Report from Avtonomov (**Production RF-D25 = iPad 114.b**) §§ 11-20; RF Submission §§ 61-67.

[89] Second Expert Report from Avtonomov (**Production RF-D25 = iPad-114.**b) §§ 11-20; RF Submission, §§ 61-67.

> other laws and regulations. This jurisprudence also does not offer a basis for the unrestricted provisional application of the provisions of the ECT."[90]

65. This is correct. As provided in the text of Article 45(1) ECT, only Russian law applies in the event of a conflict. HVY's circular reasoning is inconsistent with the text and context and purpose of Article 45(1) ECT, and is not logical. **Article 45 paragraph 1 does, therefore, not refer to articles of internal law that refer back to the ECT itself**.

(d) Third Topic: Decisions of the Constitutional Court

66. Now, as promised earlier, I will discuss two decisions of the Russian Constitutional Court frequently cited by HVY. Contrary to what HVY tell you, this jurisprudence also does not support their interpretation of Article 15(4) of the Constitution.[91]

67. The decisions cited by HVY were meticulously analyzed by Professor Avtonomov in his Second and Third Expert Reports. None of these cases involved a conflict between an unratified, provisionally applicable treaty and a statute of Parliament.

68. **Resolution 8-P.** This case is known as the Chinese Customs case. The facts underlying Resolution 8-P are as follows. Mr. Ushakov was transporting certain goods (tiles) for personal use from China to Russia. When crossing the border a customs levy was imposed, which was set forth in governmental resolution 718. The Government was authorized by the Russian Parliament to take such resolution.[92]

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[90] Second Expert Report from Avtonomov (**Production RF-D25 = iPad-114.**b) §§ 11-20; RF Submission, §§ 61-67.

[91] As Professor Avtonomov explains, Articles 74, 96 and 97 of the Organic Law of the Constitutional Court limit the Constitutional Court to review only the constitutional issues that actually arise in the case before it. "The Constitutional Court's statements on matters outside the scope of the dispute are not binding on future judges." (Avtonomov expert report (**Exhibit RF-D4 = iPad 66.a**)

[92] Law No. 5003-I of the Russian Federation on "Customs Tariff" "dated March 21, 1993 (**Exhibit RF-428 = iPad-106.a**):" The import duties are determined by the Government of the Russian Federation. "

69. Sometime thereafter, Mr. Ushakov received a further levy. Customs applied a higher rate on the basis of a non-ratified provisionally applicable treaty signed by the Government [i.e., *the 2010 Agreement between Russia, Belarus, and Kazakhstan on the Procedure for Movement of Goods by Individuals for Personal Use*]. That treaty has, however, never been published.

70. Mr. Ushakov refused to pay. In litigation before the Russian courts, Mr. Ushakov argued that the higher customs duty violated his rights specifically under Article 15(3) of the Russian Constitution that requires that treaties are published before it can be held against citizens. Here is the text of that provision:

> "Laws shall be officially published. Unpublished laws shall not be used. Any normative legal acts concerning human rights, freedoms and duties of man and citizen may not be used, if they are not officially published for general knowledge."[93]

71. The Constitutional Court said that Mr. Ushakov was correct with respect to the issue of official publication.[94]

72. HVY have quoted this decision many times, because in one of the many considerations the word "equivalent" is used (p. 11). According to HVY, this word, "equivalent", means that an unratified, provisionally applicable treaty of the Government has priority over a statute of Parliament. That was, however, not the legal question that was before the Constitutional Court. It was indeed about the effect of the lack of publication. For the answer to this question, provisionally applicable and ratified treaties are indeed on the same footing. Publication is always required. The decision does not say anything about priority of provisionally applicable treaties over national laws.

73. HVY are incorrectly of the opinion that the decision relates to "*a provisionally applicable treaty that prescribes a higher import duty than was set out in the*

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[93] Constitution of the Russian Federation (**Exhibit RF-D4 = iPad-66.a; appendix ASA-14**), Article 15 (3).

[94] Third Expert Report from Avtonomov (**Exhibit RF-D30 = iPad-25.b**) §§ 26-3.

Russian federal law."[95] That is wrong. HVY did not read the decision correctly. The decision of the lower court clearly demonstrates that the provisionally applicable treaty about customs duties was inconsistent with a *Government's resolution*.[96] It concerns the afore-mentioned Government Resolution no. 718, which contained the authorization of the Government by the Parliament.[97]

74. HVY try to divert your attention from the mistake in their reasoning. They even argued during the oral pleadings that the underlying facts are unimportant.[98] Incorrect: naturally, facts and the point in dispute are important when interpreting a decision of a court.[99]

75. Even more important is your Court's attention to the fundamental legal ground of the Constitutional Court (p. 10) that I referred to previously (see para. 63, which I repeat once again):

> "The Russian Federation may agree to provisional application of an international treaty (in whole or in part) . . . and precondition provisional application of an international treaty (or any part thereof) prior to its entry into force by compliance with the Constitution of the Russian Federation, laws and other regulatory acts of the Russian Federation".

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[95] HVY Submission, § 221. They refer to their own expert reports, which also speak of contravention of domestic legislation. See, for example, expert report from Prof. Stephan of 22 February 2019 (Production HVY-D10 = iPad-98.a), § 34.

[96] See, inter alia, RF Submission, § 77. It concerns Decision No. 718 of the Government of the Russian Federation "on Approval of the Regulation on the Application of Uniform Rates of Customs Duties and Taxes on Goods Transported Across the Customs Border of the Russian Federation by Individuals for Personal Use" dated November 29, 2003 second expert report from prof Avtonomov of August 14, 2019 (**Production RF-D25 = iPad-114.b, Appendix ASA 110**), §§ 28-34.

[97] Mr Viatkin stated - on behalf of the State Duma - in the proceedings that led to Resolution 8-P without being contradicted: "In the light of the above, we understand that in the hierarchy of sources of law, an ratified treaty is ranked higher than a national law. " See SoD § 439.

[98] Pleading Notes HVY September 23, 2019, part II, § 44: "the facts in a case in which the Constitutional Court has ruled are irrelevant; it is the judgment (...)"

[99] When interpreting Supreme Court rulings, it is of great importance to pay attention to the relevant facts. See F.B. Bakels, 'Realization and explanation of Supreme Court rulings, AA 2015, p. 927 et seq. That is no different in the Russian Federation.

76. As the Russian Constitutional Court confirms, therefore, there is nothing in Russian law that prevents the operation of *Limitation Clauses*.

77. **Resolution 6-P (Crimea).** Finally, we come to Resolution 6-P, which decision relates to the Crimea Treaty.[100] Resolution 6-P is irrelevant. I just want to make two points about Resolution 6-P.

78. First, although HVY never mention this fact, the Crimea Treaty was ratified after only three days. But what would be the point of this, if HVY was correct about unratified treaties? Why wouldn't provisional application alone be sufficient, if ratification is completely superfluous, as HVY seem to argue? Once again, HVY's theory does not fit the actual behavior of the Russian officials and the legislators.

79. Second, as Resolution 6-P itself says, the Constitutional Court's only role in that case was to determine whether the Crimea Treaty did or did not conflict with the Constitution.[101] That was the exclusive scope of the Constitutional Court's jurisdiction under Article 125 of the Constitution.[102]

80. Contrary to HVY's contentions, therefore, the Constitutional Court actually had no authority to evaluate any other conflicts between the Crimea Treaty and any other legal norms, such as the laws of Parliament.[103]

81. Last Monday, HVY actually put Professor Karzov's article on a slide, but HVY did not show the most significant parts. Prof. Karzov is right. Resolution 6-P only

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[100] RF Submission § 77 (c); Third Expert Report from Avtonomov (**Exhibit RF-D30 = iPad 125.b**) at §§ 18-19 and footnote 33.

[101] First Expert Report from Avtonomov (**Exhibit RF-D4 = iPad 66.a**) § 144 (d); Third Expert Report from Avtonomov (**Exhibit RF-D30 = iPad 125.b**) at §§ 18-19 and footnote 33.

[102] First Expert Report from Avtonomov (**Exhibit RF-D4 = iPad 66.a**) § 144 (d); Third Expert Report from Avtonomov (**Exhibit RF-D30 = iPad 125.b**) at §§ 18-19 and footnote 33.

[103] This interpretation of Resolution 6-P is confirmed not only by Prof. Avtonomov, but also by two of the legal publications submitted by HVY in this case, the documents by Prof. Bezrukov and Prof. Karzov. Exhibit HVY-537, A.V. Bezrukov, "Redifining and Delimiting the process of accession and formation of new subjects in the Russian Federation" and expert report Dr. Mishina (Exhibit HVY-D4 = 61.a, Annex M-73), written by prof. Karzov and prof. Bezrukov.

relates to the constitutionality of the Crimea Treaty and not to conflicts with laws adopted by the Parliament.[104]

III. NO PROTECTION UNDER THE ECT

A. Article 1(6)-(7) ECT

(a) Introduction

82. I start with a confession from the Oligarch Nevzlin, who now tries to use HVY to obtain US$ 35 billion (plus interest) from the Russian people:

> "If Claimants prevail [HVY in the arbitrations], it would mean there would be additional input of money into GML, so the volume of financial resources in the trusts where I am a beneficiary would be larger. So perhaps my requests for the trustee would increase as a beneficiary."[105] (emphasis added)

83. HVY try to shield the Russian Oligarchs, but to no avail. In this regard, HVY present alternative facts. HVY also propose an incomplete and contradictory interpretation of the ECT.

(b) ECT does not protect domestic investments or U-turn investments

84. HVY's interpretation of Articles 1(6) and 1(7) ECT is confusing. They do not deal with the object, purpose and context of the ECT. HVY resort to a formalistic and isolated reading of only the definitions of Articles 1(6) and 1(7) and to

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104 "It should be recalled that, in accordance with the provisions of Article 125 of the Constitution, the Constitutional Court is required to ascertain whether the content of its rules is consistent with the provisions of the Constitution. Otherwise the Constitutional Court would improperly extend the scope of its own competence (...) No other conflicting event in the context of this type of constitutionality test can serve as a reason to disqualify the normative content of an international treaty." (see expert report dr. Mishina (Exhibit HVY-D4 = 61.a, Appendix M-73, §§ 3.3-3.4).

105 Witness Statement Nevzlin, Day 7, 206:1-4 (**Exhibit RF-03.1.G-4.2**).

supplementary means of interpretation.[106] HVY try to impress with citations – incomplete ones – from arbitral awards.

85. Article 31(1) VCLT stipulates, however, that a "*treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."[107]

86. Treaty interpretation cannot be limited to only an analysis of the definitional provisions of Article 1 ECT.[108] The ICJ has long held that it follows a "*natural and reasonable way of reading the [treaty] text*," rather than a "*purely grammatical interpretation of the text*."[109] That is also what Article 31 VCLT endorses.

87. *Object and Purpose*: HVY agree with the Russian Federation that the object and purpose of the ECT is to protect and promote foreign investments.[110] At the same time, they allege that "*there is no reason to assume that the Russian Federation or any other contracting state has wanted to exclude a foreign entity controlled by its own subject from the protection that it does offer to a foreign entity controlled by subjects from another ECT state*."[111]

88. Prof. Pellet: HVY's interpretation "*clearly contradicts the very* raison d'être *of the ECT which is the protection of foreign investments*".[112] (emphasis added)

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106 HVY Pleading Notes Part III, morning of 24 September 2019, §§ 1 et seq.

107 RF Pleading Notes re Jurisdictional Ground 2, §§ 117 et seq. Article 31 VCLT. *See also* Writ, §§ 256, 267; SoR, §§ 222, 234, 245.

108 Writ, §§ 256, 267; SoR, §§ 222, 234, 245.

109 Original English language: "natural and reasonable way of reading the [treaty] text [rather than a] purely grammatical interpretation of the text", *Anglo-Iranian Oil Co.* (*United Kingdom v. Iran*), ICJ REPORTS 1952 (Judgment of 22 July 1952) (**Exhibit RF-338 = iPad-66.c**), at 104; *see also* Expert Opinion of Prof. Pellet of 9 November 2017 (**Exhibit RF-D16 = iPad-66.a**), § 8: "To paraphrase the ICJ in the Anglo-Iranian case, the Tribunal "cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text."

110 Pleading Notes HVY Part III, morning of 24 September 2019, para. 9.

111 HVY Transcript Day 2, p. 5.

112 In the original English language*: "This is an extremely formal reasoning (…) and clearly contradicts the very raison d'être of the ECT which is the protection of foreign*

Accepting that the object and purpose of the ECT is to protect and promote foreign investments, logically, means accepting that the ECT does not protect "u-turn" or roundtripping investments, as is the case here.

89. *Context*: I had emphasized Articles 10(1), 13, 17 and 26 of the ECT to make it contextually evident that "u-turn" investments are not protected.[113] Numerous additional ECT provisions confirm and repeat the reference to "*Investors of another Contracting Party*" and "*Investments in the Area of another Contracting Party*" (emphasis added). See also Articles 11, 12, 14, 15, 24, 25 and 47 of the ECT.[114]

90. *Travaux préparatoires*: HVY seek refuge in the *travaux préparatoires.*[115] However, those supplementary means of interpretation confirm the Russian Federation's position that the ECT does not protect money carousels. Various

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investments." (emphasis in the original) See Expert report Prof. Pellet § 6 (**Exhibit RF-D16 = iPad-66.a**).

[113] RF Pleading Notes re Jurisdiction Ground 2, § 120.

[114] RF Submission, § 270, footnote 718: See ECT Art.10 ("Each Contracting Party shall (…) encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties," and accord "to Investors of other Contracting Parties (…) [treatment] no less favourable (…)"); Art. 11 ("A Contracting Party shall (…) examine in good faith requests by Investors of another Contracting Party (…) to enter and remain temporarily in its Area," and "shall permit Investors of another Contracting Party (…) to employ any key person (…."); Art. 12 ("[A]n Investor of any Contracting Party who suffers a loss with respect to any Investment in the Area of another Contracting Party (…) shall be accorded by the latter Contracting Party (…) treatment which is the most favourable," and "an Investor of a Contracting Party which (…) suffers a loss in the Area of another Contracting Party (…) shall be accorded restitution (…) ."); Art. 13 ("Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated (…)"); Art. 14 ("Each Contracting Party shall with respect to Investments in its Area of Investors of any other Contracting Party guarantee the freedom of transfer (…)."); Art. 15 ("If a Contracting Party (…) makes a payment under an indemnity or guarantee given in respect of an Investment of an Investor (…) in the Area of another Contracting Party (…)"); Art. 24 ("The provisions of this Treaty which accord [MFN] treatment shall not oblige any Contracting Party to extend to the Investors of any other Contracting Party any preferential treatment (…)"); Art. 45 ("In the event that a signatory terminates provisional application under [Art. 45(3)(a)], the obligation of the signatory under [Art. 45(1)] to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories (…)."); Art. 47 ("The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party (…)."); see also DoA, § 679.

[115] HVY Pleading Notes dated 24 September 2019, § 26 et seq.

States' delegations were concerned by the abuse of shell companies.[116] As a compromise, Article 17 was added and a Joint Ministerial Declaration about the interpretation of Article 1(6) ECT was included *(Understanding*).[117]

91. HVY refer to a number of arbitral awards. HVY also extensively deal with what Prof. Pellet would have declared. I better let Prof. Pellet answer for himself. In his expert report of 13 August 2019, he provides responses to the allegations made against him.[118] He concludes that HVY have not read his report carefully.[119]

92. Of particular interest is the *Komstroy* case referred to earlier. HVY wrongfully argue that it follows from that case that "u-turn" investments are protected.[120] As mentioned earlier, this case has been referred to the European Court of Justice.[121]

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[116] "*[V]arious States' delegations were concerned by the issue of shell companies,*" as a number of passages reflect. Professor Pellet's Third Expert Opinion (**Exhibit RF-D16 - iPad-66.a**), § 52, citing ECT *Travaux Préparatoires*, C. Bamberger Memorandum, 20 November 1992, pp. 5-6; ECT *Travaux Préparatoires*, C. Bamberger Memorandum, 2 March 1993, IEA/OLC(93)39, p. 4. Comments to a draft Article 6 on Trade-Related Investment Measures specify that "*the term 'Investor' is defined in Article 1(7) only by reference to citizenship, nationality, residence or place of organization; it is only through its link with an 'Investment' that the term 'Investor' takes on policy substance.*" Thus, changes to the draft would "*clarify (…) that the Investors spoken of in Article 6 are Investors of other Contracting Parties,*" and "*a controlling investor which did not (…) qualify as 'Investor' of another Contracting Party would have no rights under Article 6.*" Professor Pellet's Third Expert Opinion (**Exhibit RF-D16 = iPad-66.a**), § 34.

[117] *"[A]s a compromise, it seems that it was eventually decided to add a clause of Denial of Benefits in Article 17 and to include criteria relating to the control of an investment into the Joint Ministerial Declaration included in the Final Act of the Conference*." Expert Report of Prof. Pellet of xx (**Exhibit RF-D16 = iPad-66.a**), § 52, citing ECT *Travaux Préparatoires*, H. Olwaeus Letter to T. Müller-Deku, 8 June 1993; ECT *Travaux Préparatoires*, T. Müller-Deku Letter to L. Ervik, 15 June 1993; ECT *Travaux Préparatoires*, C. Bamberger Memorandum, 5 July 1993, IEA/OLC(93)78, p. 3.

[118] Expert Report of Prof. Pellet of 13 August 2019 (**Exhibit RF-D24 = iPad-114.b**), § 20, footnote 30 et seq.

[119] Expert Report of Prof. Pellet of 13 August 2019 (**Exhibit RF-D24 = iPad-114.b**), § 20.

[120] HVY Pleading Notes Part III, para. 19.

[121] In the *Komstroy* case, the Court of Appeal in Paris has asked the European Court of Justice three questions: (1) Is Article 26(1) of the Energy Charter Treaty to be interpreted in such a manner that the receivable belonging to an investor deriving from an electricity sales contract delivered at the border of the host State qualifies as an investment made in the area of another contracting party, in the absence of any economic activity by the investor in the area of the contracting party?
(2) Is Article 1(6) of the Energy Charter Treaty to be interpreted in such a manner that a

(c) ECT does not offer protection in case of abusive corporate structures

93. The Russian Oligarchs are precluded from hiding behind HVY. HVY are only offshore shell companies, created to evade Russian taxes, pay bribes, and conceal illegally obtained property offshore.

94. HVY have not refuted that in case of abuse, no attention is paid to the corporate structure.[122] The Russian Federation referred to, *inter alia*, the *Barcelona Traction* case,[123] and many other cases have been submitted and explained.[124]

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receivable under an electricity sales contract that involved no contribution by the investor in the host state still qualifies as an "investment" pursuant to this provision? (3) Is Article 26(1) of the Energy Charter Treaty to be interpreted in such a manner that the acquisition by an investor of a contracting party of a receivable created by an economic operator of a non-contracting party constitutes an investment?

[122] RF Pleading Notes re Jurisdiction Ground 2, § 125; RF Akte, § 302; *See* DoA, §§ 711-713.

[123] *The Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports 1970 (Judgment of 5 Feb. 1970), § 56 (**Exhibit R-196 = iPad-12.a**) (C-930); see also id. §§ 56, 58; see also DoA, § 711 (addressing *Barcelona Traction*).

[124] This was also discussed in other ECT arbitrations. *See, e.g.*, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award dated 17 Sept. 2009, §§ 155-159 (**Arbitration Exhibit RME-1084**); *Charanne and Construction Investments v. Kingdom of* Spain, SCC case number 062/2012, Award dated 21 Jan. 2016, § 415 (Exhibit HVY-183) (confirming that "*it is perfectly conceivable to lift the corporate veil and ignore the legal personality of an investor in the case of fraud directed at jurisdiction*"); *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction dated 29 Apr. 2004, §§ 53-54 (C-1525) (recognizing *Barcelona Traction* as the "*seminal case*" and considering "*equitable doctrine of 'veil piercing,' to the extent recognized in customary international law*"); *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award dated 17 Mar. 2006, para. 230 (recognizing that "*it might in some circumstances be permissible for a tribunal to look behind the corporate structures of companies involved in proceedings before it (...) where corporate structures had been utilized to perpetrate fraud or other malfeasance*") (C-253); *Rumeli Telekom A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008, § 328 (Annex (Merits) C-992) (recognizing that, "*in Barcelona Traction, the [ICJ] held that piercing the corporate veil might be justified to prevent the misuse of the relevant company's legal personality in the case of fraud or malfeasance*"); 'Index of the Practice of the International Court of Justice: Sources of International Law', in *World Court Practice Guide: Summaries and Index of PCIJ and ICJ Cases* 534, Deventer: Kluwer 2016, pp. 542-45 (**Exhibit RF-488 = iPad-106.a**) (2016) (addressing veil-piercing per *Barcelona Traction* in the context of confirming that "*[i]n its jurisprudence the [ICJ] has referred to a number of general principles of law*"); see also DoA, §§ 712 and 713.

95. HVY would have you believe that this is different in the jurisdictions where the Guernsey and Jersey trusts are established.[125] According to HVY, the trustees of these trusts have legal ownership and control over them. As a reminder: the role of the trustee is in almost all the cases performed by the same company: Rysaffe Trustee Company.[126] I also remind you of the fact that the Russian Oligarchs wear many hats with their trusts: settlor (*oprichter van de* trust), protectors (*heft vetorecht over de* trustee) and beneficiary (*begunstigde*).[127] This makes the trust a joke.

96. The UK Supreme Court confirmed that a legal personality can be ignored in case of abuse.[128] Established case law on the use of sham constructions: "*The requisite 'common intention' to create a sham trust has been found to exist, for example, where the settlor has the conscious intention to establish the sham trust and the trustee acts with 'reckless indifference' by merely 'going along with' whatever the settlor intends to do.*"[129] Key term: "***impotent directors***".

97. In Dutch case law, too, no attention is paid to sham structures in case of abuse. For instance, the Amsterdam Court of Appeal ignored a trust structure for tax purposes, because the claims of the beneficiary to payment were not limited to a bare expectation. The beneficiary was not able to demonstrate that he factually did not control the conduct of the trustee.[130] Also, the District Court of Rotterdam held a

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125 See DoA, §§ 715-718. See Mann Report, with references to UK Supreme Court.

126 This is an anagram of the accounting firm headed by HVY's witness in these proceedings testifying about "independence" and "conflict of interests" of trust, Kevin Hudson. RF Pleading Notes re Jurisdiction Ground 2, § 77, footnote 136, Exhibit HVY-G5.

127 See RF Pleading Notes of 24 September 2019, §§ 75-81.

128 "*It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement."* Prest v. Petrodel, [2013] 2AC, 415, [2013] 2 A C, 415, § 28.

129 High Court decision JSC Mezhdunaraodniy Promyshlenniy Bank v. Pugachev [2017] EWHC 2426 (**Exhibit RF-525 = iPad-125.a**), § 150, see also Expert Report of Mann QC of 12 August 2019 (Exhibit RF-D29 = iPad-114.b), § 30. Akhmedova v. Akhmedov, [2018] EWFC 23, §§ 23, 67.

130 Amsterdam Court of Appeal judgment, 1 May 2014, ECLI:NL:GHAMS:2014:1797, paras. 4.23 and 4.24.

tax adviser liable for advising their client to include the trust structure in Cyprus. They knew it was a sham operation, solely to evade taxes.[131]

(d) ECT does not protect illegally obtained investments

98. The Tribunal decided that investments made in bad faith are not protected.[132] HVY allege that such objections relate to admissibility and, therefore, do not relate to the validity of the arbitration agreement.[133] This is a desperate attempt to escape the full review under Article 1065(1)(a) of the DCCP.

99. Your Court expressly rejected such reasoning in the *Ecuador v. Chevron & Texaco* case.[134] The Court of Appeal ruled that questions about the scope of protection of a treaty should also be fully tested in order to be able to assess whether there is a valid agreement for arbitration.[135]

B. ***Tainted Shares*** **(illegal acts)**

(a) Payments qualify as bribes

100. The factual assertions of the Russian Federation about the manipulation of auctions and bribery have again not been disputed with reasons. HVY merely create confusion on one crucial point. They attempt to classify bribes as "*management participations*". They want Your Court to believe that they offered the *Red*

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131 Rotterdam District Court 29 November 2017, ECLI:NL:RBROT:2017:9390.

132 See DoA, §§ 719-779, Final Awards, § 1352 (**Exhibit RF-02 = iPad-2.g**).

133 HVY Pleading Notes dated 23 September 2019, part III, §§ 74-79.

134 The Hague Cort of Appeal (no. 16): https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2013:1940.

135 See Statement of Reply, § 39, Footnote 51 Van Haersolte-van Hof writes that the question of which investments are protected is a fundamental aspect of the realization of the arbitration agreement and must therefore be fully assessed:"(...) In addition, the Convention generally defines which investments are protected; it is possible to opt for existing investments or only new ones (...). All these are fundamental aspects of the formation of the arbitration agreement. (...)J.J. van Haersolte-van Hof, 'Arbitrage op grond van Bilateral Investment Treaties', *WPNR* 2014(7003), p. 79-85.

Directors hundreds of millions ***in 1996***[136] so that they would continue to work ***for Yukos in the future***.[137] HVY have not read their own documents properly:

- Doug Miller of PwC has reported on his discussion with the Oligarchs Khodorkovsky and Lebedev (see email of 14 August 2002, MP-071, tab 13 hearing bundle). These Russian Oligarchs confirmed that:

  (i) the arrangement had been made ***before* the privatisation** ("was (...) agreed (...) prior to the core shareholders' winning of the privatisation tender");

  (ii) that the fee related to "*services*" provided **at the time of privatisation** ("through privatization, not beyond.")

  (iii) that the fee related exclusively to services provided to the **shareholders** of Yukos, the Russian Oligarchs ("*for services provided to shareholders, not to YUKOS*").[138]

- The Tempo Contract of 1 November 2002 is also clear: the fee was only for so-called "*services*" in the "***period ending 31 December 1995***".[139] This document was signed by the Oligarch Lebedev on behalf of YUL.

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[136] HVY Pleading Notes dated 24 September 2019, Section IV, § 32: *"we continue to follow the timeline in 1996, in which the management participations will be discussed."*

[137] HVY Pleading Notes dated 24 September 2019, Section IV, § 34-35: "*Bank Menatep therefore wanted to retain key persons in these companies. To this end, Bank Menatep offered them management participations: this gave them an interest in continuing to work for the growth and profitability of the company. (...) The four Yukos directors also received this commitment."* See also §§ 43, 50-58."

[138] See RF Pleading Notes dated 24 September 2019 re. Jurisdiction Ground 2, § 41, and the document sources mentioned there. Doug Miller's Email (PwC) of 14 August 2002 was submitted as an appendix to Prof. Pieth's expert report of 27 January 2017. (**Exhibit RF-D13, Appendix MP-071 = iPad-66.a**).

[139] See RF Pleading Notes dated 24 September 2019 re. Jurisdiction Ground 2, § 38, and the document sources mentioned there. The Tempo Contract has been submitted as Appendix MP-075 to the expert report of Prof. Pieth of 27 January 2017. (**Exhibit RF-D13, Appendix MP-075 = iPad-66.a**).

101. HVY's use of "*management participations*" is again another twist that they give to this Tempo contract, which is not supported by the documents. Bribes remain bribes.

102. In any event, the debate about whether the bribe was first promised in 1995 or 1996 is an illogical distraction. The YUKOS privatization was not completed until ***the end of December 1996***.[140] The *Red Directors*' subordinate, Generalov, participated directly in the last phase of the privatization in 1996 as a full voting member of the auction committee.[141] So even if the Oligarchs agreed to pay the bribes in 1996, rather than in 1995 (which anyway contradicts the documents), this would still have improperly influenced the *Red Directors*' actions prior to the completion of the Yukos privatization.

(b) Procedural objections to avoid a substantive assessment have already been rejected.

103. In these appeal proceedings, HVY have done everything possible to avoid a substantive debate on their own illegal actions, and again tried to challenge it in their pleadings. On 13 February 2018, they filed a 91-page submission. In this submission, they argued that illegal actions cannot be discussed because principles of criminal procedure would have been violated.[142] In particular, HVY argued that because of the absence of criminal prosecution the presumption of innocence should prevail.[143]

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[140] Third expert report from Prof. Pieth (**Production RF-D27, Appendix MP-075 = iPad-114.b**).

[141] Third expert report from Prof. Pieth (**Production RF-D27, Appendix MP-075 = iPad-114.b**), § 19 (iii) (e), Minutes no. 2 of the Session of the Tender Commission for Conducting a Commercial Tender with Investment Terms (Signed) (**Production RF-476 = iPad-106.a**).

[142] See HVY Record 13 February 2018, § 11 (iii), 137.

[143] See HVY Record 13 February 2018, § 11(ii): "*The Russian Federation had (...) long ago (...) to institute criminal proceedings.*", § 21: "*After more than two years of new "investigations", no one has yet been prosecuted. (…)*" § 137. "*Instead of adhering to the presumption of innocence, the Russian Federation is acting in breach of that principle by claiming in the setting aside proceedings that certain persons had acted in a criminal way without basing that assumption on*

104. Your Court have summarized,[144] assessed and rejected these objections in the interim judgment of 25 September 2018.[145] Your Court decided among other things:

> "4.4.9 HVY's reliance on the presumption of innocence fails. The purpose of these proceedings is not to impose a punitive sanction on one of the parties. The Russian Federation is free to invoke whatever it deems appropriate in order to defend its position. The fact that the acts on which the unclean hands argument is based were committed by third parties does not mean that the Russian Federation is not free to argue that those acts should be invoked against HVY (...)."

105. HVY wrongly ignore[146] the binding final decision in the interim judgment. The central defence during the oral arguments[147] is once again that the absence of

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a criminal conviction." § 138: "*no criminal prosecution has taken place either.*" HVY summarize their assertions in the conclusion of that record in § 201 as follows: "*The Russian Federation has had more than twenty years to initiate criminal and/or civil proceedings in respect of its complaints about alleged conduct that took place in 1995 and the years thereafter. However, the Russian Federation itself has chosen not to do so. Therefore, it is not permissible for them to now encumber these Dutch setting aside proceedings in 2018 with allegations and accusations that clearly fall outside the context of what is at stake in a Dutch setting aside proceedings."*

144 See para. 3.3, so that "*clarity should be given about the question of which statements are supposed to be part of the (substantive) party debate and which are not part of it*". See para. 4.4.1. *" HVY have substantiated their assertion that the addition of the unclean hands argument to the discussion between the parties is contrary to due process with the following arguments: (...) (iv) the Russian Federation completely disregards the guarantees that apply in criminal proceedings, such as the presumption of innocence; (...)"*

145 See more extensively in RF Record, § 414 et seq.

146 See also RF Record § 414 et seq. HVY did not ask this Court to reconsider the binding final decision. Even if it had been implicitly contained in the assertions, the Russian Federation does not agree herewith. HVY had sufficient opportunity to respond to this defence - which was not elaborated in the Statement of Appeal.

147 See HVY Pleading Notes dated 23 September 2019 (first section), § 3, 4: "*that an obligation to prosecute applies in the Russian Federation (...)* Nothing has been done by the Russian Federation in this area for 24 years (...) *That means the curtains have closed for this reasoning (...)".* See more extensively § 25-29. HVY Pleading Notes dated 24 September 2019 (second section), § 3: "*I will then explain why the failure to prosecute prevents the Russian Federation from relying on these allegations in the context of these setting aside proceedings. (section 1.3 of these written arguments)*." It is stated in § 16-62 that the authorities supposedly knew about the criminal conduct, but that criminal prosecution nevertheless was withheld. It is argued in § 71-79 that the absence of criminal prosecution means that this Court is not allowed to rule on illegal acts. In § 80-87. HVY elaborate on their assertion that there is no credible evidence that could "exculpate" the non-prosecution. Furthermore, the reliance on the failure to prosecute is legally elaborated in § 88-94 (in particular in § 92 and 94). See the conclusions under § 120-121.

criminal prosecution means that Your Court should disregard illegal actions. You should ignore these assertions.[148] That makes this case much simpler.

106. Redundantly: the opinion of Your Court that unlawful conduct may be raised in civil proceedings is correct. There is no rule in Dutch civil procedural law that excludes reliance on illegal conduct. HVY refer only to their own experts.[149] These experts do not write anything about the question whether assertions and evidence may be raised in civil proceedings. Prof Thaman knows nothing about Dutch civil procedural law.[150] Nor does Prof Klip; he writes: "*3 (…) Since I do not have any specific expertise in the field of civil (procedural) law, I cannot assess what The Hague Court of Appeal should or should not do in your case.*"[151]

107. Moreover, even international law does not contain any rules that prevents the tackling of corruption.[152] On the contrary: numerous court decisions confirm that corruption is a serious occurrence and, therefore, should *indeed* be addressed.[153]

(c) HVY's incorrect and irrelevant defences distract from the illegal acquisition

108. HVY continue to avoid a substantive debate about the manipulation of the auctions and corruption. They deflect attention to issues that are irrelevant. HVY

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[148] See the assertions and passages mentioned in footnote 147. In their so-called "submission" of 26 February 2019, they have re-introduced the already rejected assertions with the submission of new expert reports. The record and submitted documents can no longer be discussed. See about this RF Record, § 414 et seq.

[149] HVY Pleading Notes dated 24 September 2019 (second section), § 71: "*The Russian Federation now claims that this does not apply in civil proceedings. Prof. Klip and Prof. Thaman convincingly explain that these are circumstances that must be taken into account.*"

[150] Prof Thaman knows nothing about Dutch civil procedural law. His opinion only relates to "*specific issues of Russian criminal law and procedure*".

[151] Expert report Prof Klip (Exhibit HVY-D15).

[152] HVY Pleading Notes dated 24 September 2019 (second section), § 92 et seq. are thus incorrect

[153] RF Record, § 421. With references to *World Duty Free v. Kenya*, the case *Metal-Tech v. Uzbekistan*, the case *Inceysa v. El Salvador*, and the case *Fraport v. The Philippines*. The Russian Federation has therefore invoked public policy.

primarily take mostly impermissible new positions[154] on what would or would not have happened afterwards.

109. HVY would have You believe that all the facts were supposedly already known in 1995 and that everything was agreed at that time.[155] It is correct that shortly after the first auction there were already initial indications that pointed towards possible foul play. For example, former Vice President Tsjoebajs (also written Chubais) did indeed remark in an interview of 8 December 1995 that the auction had been won by Bank Menatep.[156] The suggestion that all the illegal acts were already known at an early stage is incorrect and misleading.

110. Moreover, the Russian Oligarchs became afraid of the public indignation that existed about the 1995 auctions. HVY orchestrated, therefore, the auction of 1996 with much more secrecy. The facts of that manipulated auction came to light much later. Also, they concealed their shares in Yukos in a vast network of shell companies and "structuring"" and "smurfing.[157]

111. Also in 1996, it was all deception (see slide). After the auction in 1996, representatives of Bank Menatep stated that Bank Menatep did not have any relationship whatsoever with the winning bidder Monblan.[158] Monblan, however, was created and controlled by Bank Menatep. Only more than 23 years later, the

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154 Many factual statements are not to be found in the Statement of Appeal and should already for that reason be ignored.

155 See e.g., HVY Pleading Notes dated 24 September 2019, part IV, §§ 16, 22, 41, 43 and 45.

156 Exhibit HVY-460, video from 8 December 1995, HVY Pleading Notes dated 24 September 2019, part IV, §23.

157 RF Pleading Notes if 24 September 2019 re No protection under ECT, §§ 55-57.

158 See also Defence on Appeal § 621-622. HVY reluctantly admit that. HVY Pleading Notes dated 24 September 2019, part IV, § 40. Another example of deliberate concealment: the Russian Oligarchs carried out dozens of sham transactions in which the shares passed from hand to hand. Prof. Kothari would not unravel this tangle of unnecessary transactions until years later - in 2015.

Russian Oligarch Dubov admitted for the first time that those statements were false.[159]

112. As said, most evidence of fraud and corruption would only be revealed years later (see slide). In 1995 and 1996, Vice President Tsjoebajs (Chubais) and public prosecutors had incomplete and incorrect information.[160] They had at the time no idea at all of the secret agreements with other Oligarchs (*bid rotation*). Nor did they know anything about the bribing of officials (*Red Directors*).[161] Because the officials in key positions had been bribed, it is no surprise that the authorities were initially misled.

113. HVY suggest that the Russian Federation, in first instance, took a "*deliberate strategic turnaround*".[162] They pretend that corruption had not previously been raised by the Russian Federation. In the Arbitrations, the word "bribery" would not even have been used and no evidence would have been submitted. [163]

114. Your Court rejected the suggestion that there was a "*turnaround*" in the interim judgment of 25 September 2018. [164] That is correct. HVY have failed to properly

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159 **Exhibit RF-521 = iPad-125a**.

160 HVY Pleading Notes dated 24 September 2019, part IV, §§22 -26 are incorrect. The first superficial investigation in 1995-1996 did not produce any results because the nature and scope were still hidden.

161 See also Defence on Appeal § 742-747.

162 HVY Pleading Notes dated 24 September 2019, part IV, § 70.

163 HVY Pleading Notes dated 24 September 2019, part IV, §§ 63 -68.

164 See the interim ruling 25 September 2018: "*4.1.1 (...) In this part of the Defence on Appeal the Russian Federation addresses the twenty eight instances of illegal acts of HVY, already put forward in the arbitration proceedings and specified in the Defence on Appeal in footnotes 760 up to and including 763 (...) The alleged illegal acts are divided in the Defence on Appeal into four phases, which phases are described as follows: the Russian Oligarchs acquire the Yukos shares of HVY through fraud, bribery and conspiracy: kickbacks are paid by YUL (phase 1)*" *(...) 4.4.1 HVY substantiate their assertion that it is contrary to due process that theUnclean hands argument is added to the debate between the parties with the following arguments: (...) the late change of claim is very drastic in nature as entirely new subjects are put forward for discussion; this is unacceptable (...) 4.4.4 The Court of Appeal understands the assertions of HVY such that they also, and in particular, assert that due process precludes the expansion that the Russian Federation has made to the unclean hands argument in the Defence on Appeal according to HVY. To the extent that HVY relies in this connection on the introduction of 'entirely new subjects', the Court of Appeal*

read the documents contained in the arbitration file.[165] The bribery was also discussed in the arbitration (see slide). This is clear from the frequent use of such terms as "*corruption*" and "*kickback*".[166] Evidence was submitted and discussed, including the *Tempo Contracts*[167] and the witness statements of the *Red Directors*.[168] I also refer specifically to the witness statement of Yukos' accountant: Doug Miller (PwC):

> "At that meeting [in 2003], Khodorkovsky said (…) that if he confirmed that my assumptions[169] were right and that if he told me the true reasons why the beneficiaries were receiving this money, he could be imprisoned."[170]

(d) Conclusion: substantive defence is lacking

115. The actual issue at hand is that the Yukos shares were acquired by means of fraud and bribery. YUL itself paid, *nota bene*, the bribes amounting to USD 613.5

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rejects this objection. HVY has namely failed to indicate which new subjects they are referring to."

165 Interim Ruling dated 25 September 2018, ground 4.2.3 " *The unclean hands-argument was indeed put forward by the Russian Federation in the arbitration proceedings before all defences (…)*" The subject matter was then fairly immediately moved to the merits phase, see Procedural Order no. 3. RF Statement of Defense dated 3 February 2005, § 9 already mentions the illegal acquisition of Yukos. See also RF First Memorial on Jurisdiction dated 28 February 2006, § 136, 152. Please note: references are to the procedural documents in the Hulley case. Identical assertions were adopted in the other cases.

166 See e.g., RF Counter Memorial on the Merits, Kickback: § 36, 75, 756, 951, 1105 (xiii) and 1601(ix)., see e.g., § 951 "*the most extreme illegalities that are at issue in these proceedings, including (i) the Oligarchs' kickbacks to Yukos' prior management to foster the Oligarchs' corrupt acquisition of control over Yukos*".

167 These agreements were submitted as Exhibits C-1234 and C-1240. See also, Defence on Appeal, § 534.

168 See e.g., RF Rejoinder on the Merits, § 1309, where the witness statements of three red directors are discussed (under reference to RME-3538).

169 These assumptions were: "(…) that they had helped to gain effective control over the company (about YUKOS) after privatization (it is one thing to hold shares, and it is quite a different thing to make people do what you want to them to do); or, my second guess was that they helped some Menatep Group win privatization." (**Arbitration file Production RME-18, p.7**).

170 See RF Counter Memorial on the Merits, §§ 718-720, RME-17 and RME-18.

million. The slide shows a part of YUL's own bank account statement. It is the payment approved by the Oligarch Nevzlin of more than USD 438 million.[171]

116. HVY's defences cannot alter this clear evidence. Do they truly wish to argue that the bribes were not paid because criminal prosecution has not taken place? Do they truly wish to argue that there is any relevance to the question of when specific aspects of the fraud and corruption came to light? The important fact is that the bribes were paid. What happened, happened. They cannot seriously deny that.[172] The Russian Oligarchs do not have a *right to forget*.

117. The only question that remains is this: Will the Russian Oligarchs be allowed to gather the fruits of fraud and corruption in these proceedings? Will they be allowed to claim an additional USD 50 billion with interest beyond the many billions they have already diverted?

C. Ownership and control: who are HVY?

(a) The actual control over HVY: impotent directors

118. After fifteen years of litigation, a simple question remains: who are actually the appellants in these proceedings? The Oligarch Nevzlin's answer is that this involves independent companies with real directors.[173]

119. Last week it was again explained that these statements are incorrect. HVY do not even have a PO Box. They do not have real directors either. At the time, the instruction was given to establish companies "***of the impotent directors' type***".[174]

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171 YUL's bank account statement has been submitted as Expert Report Prof Pieth, **Exhibit RF-D13, appendix MP-66**. Page 4 shows the payment approved by the Oligarch Nevzlin of more than USD 438 million.

172 See RF Record, Chapter III.B and III.C where it is explained in detail that all the procedural (presecription) defences fail.

173 See RF Pleading Notes 24 September 2019, Jurisdiction Ground 2, § 85, 87, 91 with reference to Exhibits HVY- G7 = iPad-98.b and 117.b. Exhibit HVY-G1 = iPad 98.b.

174 Pleading Notes RF 24 September 2019, Jurisdiction Ground 2, § 88.

120. HVY's lawyer apparently finds the term "***impotent directors***" to be "*funny*".[175] However, the letter in which the order was given to set up companies was not intended to be a "*joke*". The suggestion that the letter would not say anything about the actual control is incorrect.[176] It is significant that, according to the articles of association, the directors could **not make any** decision independently about the company's assets.

121. HVY are actually controlled by "***impotent directors***". For example, the Cypriot company "*Excel Serve*" was used to act as a director of Cypriot companies, including VPL (the V of HVY). The agreements were summarised in an email dated 19 January 2004 from **GML's own administration**. Please read along:

> "The whole basis of the agreement between GML and Excel is [for Excel Serve] to act as **front runners** to the Cyprus companies of the group, i.e. to provide individuals who act as directors to these companies and for these individuals **to appear to be managing the companies** by administering their bank accounts and signing all agreements and contracts."[177] (underlining added)

122. This email has **not been refuted**. HVY have not disputed, on any grounds, that they have been managed by false directors who are paid to "**create the impression** that they manage companies." Indeed, Anilionis and Zakharov confirm that RTT and other intermediaries secretly managed the network of shell companies at the instruction of the Russian Oligarchs.[178]

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175 HVY Pleading Notes dated 24 September 2019, Section IV, § 107:

176 HVY Pleading Notes dated 24 September 2019, Section IV, § 107:

177 Email of Panos Papadopoulos to Curtis & Co of 19 January 2004 (**Exhibit RF-471 = iPad-106.a**). Pleading Notes RF 24 September 2019, Jurisdiction Ground 2, § 89. HVY have never responded to the content of this email.

178 See in general Anilionis' statement (**Exhibit RF-200 = iPad-21.b**); Zakharov's statement (**Exhibit RF-201 = iPad-21.b**).

(b) The actual control of GML: Party witnesses

123. Last week, the Russian Federation responded to the testimony of the Russian Oligarch Nevzlin. He firmly denies that, after the establishment of trusts in October 2003, he had exercised de facto control over the group:

> "64. By the end 2003, all of our shares in GML had been transferred into trusts. They have since been owned by the trustees of the trusts, who act completely independently from my former partners and me. (…) I have never intervened with any of the decisions taken by the trustees, nor have I tried to influence any of their decisions or to circumvent them in any manner."[179] (underlining added)

124. The Russian Federation has submitted into these proceedings documents from **GML's own administration**. These documents show – as was explained earlier– that Nevzlin's statement is incorrect.[180] For instance, the million-dollar contracts with Kagalovsky are submitted. You can see on the slide that the contract is signed by "*GML in the person of Nevzlin*".[181] It is one of the documents that show that the Oligarch Nevzlin actually remained in charge after the establishment of the trusts.[182]

125. Nevzlin stated on 26 August 2019 that he "*did not enter into the contracts on behalf of GML*".[183] That is strange. After all, the text - as depicted on the slide - is clear. If one refers to the statement, it becomes clear that Nevzlin claims that the English translation is incorrect.[184] That is strange, too. On 9 September 2019 - after Nevzlin made his statement - the Russian Federation submitted into the proceedings an internal email **from GML's own administration**. This shows that

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179 Exhibit HVY-G1 = iPad-98.b.

180 Pleading Notes RF 24 September 2019, Jurisdiction Ground 2, §§ 91-103.

181 See Exhibit RF-440.

182 See inter alia RF Record § 128-134 for other examples.

183 HVY Pleading Notes dated 24 September 2019, Section IV, § 107: Exhibit HVY-G7 = iPad-117.b.

184 Exhibit HVY-G7 = iPad-117.b, § 24 et seq.

the translation was made by an employee of GML Services and was shared with GML (Exhibit RF-515a).[185] At the time, no one complained about the translation.

126. Osborne (director of Hulley, YUL and GML) stated on 26 August 2019 that the contracts "*have nothing to do with GML*".[186] On 9 September 2019, the Russian Federation submitted into the proceedings further documents **from GML's own administration**. They clearly show that there was a close cooperation between Kagalovsky and GML.[187] GML did what it had to do under the contract.[188]

127. During their oral arguments, HVY maintain that the statements of 26 August 2019 would be accurate.[189] However, in substance, they do not deal with the documents that state the contrary. HVY **recognize** that these documents come from **their own records**. [190]

(c) Conclusion

128. Finally: the Russian Federation wants – if Your Court gets thereto - to hear witnesses on these points. Think about Gitas Anilionis, who gave a detailed

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185 **Exhibit RF-515a = iPad-125.a.**

186 HVY Pleading Notes dated 24 September 2019, Section IV, § 107. Exhibit HVY-G6.

187 Kagalovsky worked closely with the director of GML in the execution of his work. Among other things, to conclude an agreement with a PR spokesman, named Michael Hunter (Exhibit RF-516c, RF-516d).

188 Kagalovsky started to work and engaged service providers. Kagalovsky was in close contact with GML about the payment of these invoices by GML (Exhibit RF-561a, RF-516b, RF-516-e). All in accordance with the contract.

189 HVY Pleading Notes dated 24 September 2019, part IV, § 107. "107 (…) (v) What is also incorrect is that Nevzlin has concluded agreements on behalf of GML (RF-441 and RF-442) with Kagalovsky. As Mr Osborne explains: these agreements have nothing to do with GML. Nevzlin confirms and explains that he has not entered into the agreements on behalf of GML. I invite you to read the statements of Mr Osborne and Mr Nevzlin."

190 HVY argue that it is contrary to the "good order of procedure" that the evidence is submitted "at such a late stage" (HVY Pleading Notes of 24 September 2019, part IV, § 106). The Russian Federation does not agree with this. They are short documents that were submitted on time. Your Court has allowed the parties to bring documents into dispute in response to productions by the other party. The Russian Federation was also allowed to bring documents into the case that prove that HVY's witnesses have spoken Nevzlin and Osborne untruth.

statement about the sham companies, which he established upon instruction of the Russian Oligarchs, among which HVY itself.[191] His statement confirms: this is and remains a case of Russian Oligarchs against the Russian Federation.

IV. OTHER GROUNDS FOR SETTING-ASIDE

A. Artikel 21 ECT (Tax)

129. Article 21(1) ECT contains a *carve-out* for *Taxation Measures*. This is not subject of arbitration. HVY argue that this solely applies to "*bona fide Taxation Measures*". The problem with this assertion is that the text of Article 21(1) ECT does not contain the words "*bona fide*". There is a reason for this. The authors of the ECT did not want to burden arbitral tribunals with investigating whether a tax measure would be "*bona fide*". The authors have overcome this with the *claw back* of Article 21(5) ECT: if the taxation allegedly concerned an expropriation, it can be the subject of arbitration. In that case an arbitral tribunal must observe the prescribed procedure (to be discussed in the next section).[192] HVY did not discuss this in their oral pleadings last week.[193]

130. The ECtHR, including the Grand Chamber, found more than once that the tax measures against Yukos of the Russian Federation were *bona fide*.[194]

B. Article 21(5) ECT (mandatory referral)

131. The Tribunal should have referred the question of whether the tax constitutes an expropriation to the tax authorities of the Russian Federation, Cyprus and the United Kingdom. This is explicitly stated in Article 21(5) ECT. The Russian Federation had brought this to the attention of the Tribunal no fewer than **six times**. It is a gross violation of the mandate that the Tribunal – *nota bene*: deliberately and

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191 **Exhibit RF-200 = iPad 21.b.**

192 Pleading Notes RF of 24 September 2019, part re Article 21 ECT.

193 Pleading Notes HVY III, §§ 84-90.

194 See among others SoD, §§ 831-834 and the cited references therein.

knowingly - did not fulfil this obligation.[195] The futility exception invoked by the Tribunal, behind which HVY try to hide, is not a valid excuse.[196]

C. Damages

132. HVY also do not present convincing arguments when it comes to damages.[197] I would just like to mention the presentation by Kathleen Paisley, a leading lawyer and economist.[198] She has made this analysis completely independent and has no relation with the Russian Federation.

D. Assistant (Valasek)

133. HVY consider this "*perhaps the most bizarre ground for setting aside*".[199] It is indeed bizarre: compare the amounts for the arbitrators, secretaries and assistant in the Final Awards: paras. 1860-1865:

Position	**Name**	**Fees in EUR**
Arbitrator	Price/Poncet	1,617,417.50
Arbitrator	Schwebel	2,011,092.66
Chairman	Fortier	1,732,937.50
Secretaries	Daly and Levine	866,552.60
Assistant	**Valasek**	**970,562.50**

134. And for the sake of clarity, the Russian Federation does not object to the action of the Secretaries. Their duties were described in the Terms of Appointment, other than those of the assistant.[200] The Russian Federation objects to the work of the

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195 Pleading Notes RF re Article 21 ECT, §§ 6-28.

196 Pleading Notes HVY III, §§ 91-97.

197 Pleading Notes HVY III, §§ 98-107.

198 Presentation Paisley, **Exhibit RF-214 = iPad 21.b.**

199 Pleading Notes HVY III, §§ 117-124. See Pleading Notes RF re Assistant.

200 Arbitration file, *Terms of Appointment*, 31 October 2005.

assistant to the drafting of the Final award and his acting as the fourth arbitrator. There was a lack of transparency and consent on the part of the parties.

E. Public order

135. Here it suffices to list the references in the submissions and the Pleading Notes of last week.[201]

V. SOME PROCEDURAL ASPECTS

136. Finally, I would like to give a brief overview of some procedural aspects with references below:

(a) HVY may not invoke any grounds of jurisdiction rejected by the Tribunal.[202]

The interpretation rejected by the Tribunal concerns: (a) the alleged requirement of a prior statement (see Pleading Notes RF I section II.A(d)); and (b) acquiescence and forfeiture of rights (see section II.E).

(b) HVY cannot provide new arguments in the setting aside proceedings.[203]

The new arguments concern (a) the words "*not inconsistent with*" in Article 45(1) DCCP (see Pleading Notes RF I section II.A(b)) and (b) the powers of President Yeltsin (see Pleading Notes RF I §§ 212-213).

(c) HVY may not raise any further grounds for appeal or defences after their first submission.

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[201] Pleading Notes dated 24 September 2019, public policy, see also SoD chapter VII, except for §§ 1195-1200.

[202] See Judgment District Court, ground 5.24-525; Expert report Prof. dr. Snijders (**Production RF-D9**) and G.J. Meijer, T&C Rv, note 2 by art. 1065 RV. See also Pleading Note RF I, §§ 227 et seq. with references.

[203] Pleading Notes RF I, § 230 with references.

This concerns the full application of the "two-submission-rule". See your interim ruling of 18 December 2018 (section 2.7) and your letter of 29 March 2019 (section 8). Points that therefor no longer need to be handled:

(i) HVY's assertion that the Russian Federation may not invoke (in short) the 'unclean hands' of HVY et al. in the context of its claim for setting aside.

(ii) HVY's assertion that the absence of (further) criminal prosecution by the Russian Federation of the (legal) persons involved in the "*unclean hands*" would prevent it from (further) elaborating its reliance on the "*unclean hands*" of HVY et al.

(iii) HVY's assertion that they have had insufficient opportunity to defend themselves against the "*unclean hands*" charges.

Thus, all that HVY have nonetheless put forward in their exhibits and expert reports submitted on 26 August and 9 September 2019, as well as in their oral arguments of 23 and 24 September 2019, must be disregarded by this Court.[204]

(d) All documents submitted by the Russian Federation may be fully taken into account.

By letter of 9 September 2019, HVY withdrew their initial objections to the exhibits submitted by the Russian Federation on 15 August 2019 (D-23 to D-29).

(e) The Russian Federation maintains its objections to the HVY "submision" of 26 February 2019.

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[204] See oral explanation by Prof. M. Koppenol-Laforce (with request for formal note) at the start of oral arguments on 23 September 2019.

See letters of 18 March 2019 and Submission RF of 26 June 2019 (in particular §§ 13, 14, 99, 328-329, 367, 394, 429-430) as well as the letter of this Court of 29 March 2019 (§ 7).

(f) The Russian Federation maintains its objections to many of the exhibits and expert reports submitted by HVY in their records of 26 August and 9 September 2019. [205]

(g) Free choice for this Court to handle different grounds for setting aside.

(h) No cautious review of (i) the validity and scope of the arbitration agreement, (ii) violation of public order, namely regarding corruption, fraud, money-laundering and other serious aspects of illegalities, and (iii) gross violation of the mandate (omission) under Article 21(5) ECT.[206]

(i) Offers of proof.

The Russian Federation expressly maintains all its offers of witness evidence. With regard to - amongst others and in short - (1) the "*unclean hands*" of HVY et al.; (2) also in the context of its reliance on incompatibility with public order of an unexpected recognition of the Yukos Awards (see, *inter alia*, Statement of Appeal § 1246 and 1250, with extra emphasis on Mr Gololobov, given the incorrect allegations and serious threats by HVY against him[207]); (3) the identification of HVY and the trustees with the Russian Oligarchs (see inter alia Statement of Appeal § 1247); and (4) the delegation of a core task to Assistant Valasek without *informed consent* of the parties (see inter alia Statement of Appeal Chapter V).

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[205] See oral explanation by Prof. M. Koppenol-Laforce (with request for formal note) at the start of oral arguments on 23 September 2019.

[206] See § 131 *supra.*

[207] For the perilous threats against the witness Gololobov, see **Exhibit RF-517 and RF-518 = iPad 125.a**.

The Russian Federation also maintains its offer to have all the expert evidence it has submitted clarified by the experts concerned, answering any questions this Court may have, in relation to all areas and purposes for which it has submitted expert reports in these proceedings.

Finally, the Russian Federation recalls its reasoned criticism of the witness and expert evidence submitted by HVY, in particular with regard to the bias of a large number of witnesses and the overly limited expertise and/or excessive dependence of the experts concerned.

VI. FINAL REMARKS

137. I conclude with the key points of this case:

- An arbitration conducted on the basis of a treaty that has not entered into force for the Russian Federation because it has only signed but not ratified it;

- An arbitration conducted on the basis of an exceptional provisional application clause, which requires compatibility of the separate treaty provisions with national law;

- An arbitration conducted in violation of that national law, Russian law, which does not allow arbitration of expropriation and tax disputes because they are public law disputes over which the Russian courts have exclusive jurisdiction.

138. These key points were sufficient for the District Court to set aside the Yukos Awards on the basis of Article 1065(1)(a) DCCP. That assessment was thorough and of high quality. The Russian Federation requests the Court of Appeal to uphold the District Court's judgment.