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Formal Relationships	Conclusion: ECLI:NL:PHR:2021:425 , Contrair In cassation on : ECLI:NL:GHDHA:2020:234 , (Partial) annulment with reference
Jurisdictions	Civil procedural law
Special characteristics	cassation
Content indication	Procedural law. International arbitration. Energy Charter Treaty (ECT). Vienna Treaty. Claim for annulment of arbitral awards (Yukos Awards) on the basis of art. 1065 (old) Rv. Relationship between destruction procedure and revocation procedure (art. 1064 (old) DCCP); can fraud in the arbitration procedure only be raised in a revocation procedure? Power of arbitrators; the Russian Federation is bound by the provisional application of Art. 26 ECT, which allows international arbitration on investment disputes? Explanation of art. 45 ECT ('Provisional application') and the 'Limitation Clause' contained therein. Explanation of the terms 'Investment' and 'Investor' (art. 1, paragraphs 6 and 7 ECT). Do the alleged illegal acts have consequences for the voidability of the arbitral awards? Did the arbitral tribunal violate its mandate by not requesting advice from the relevant tax authorities (Art. 21 para. 5 ECT)?
Locations	Rechtspraak.nl

Pronunciation

SUPREME COURT OF THE NETHERLANDS

CIVIL CHAMBER

Number 20/01595

Date November 5, 2021

JUDGMENT

In the case of

THE RUSSIAN FEDERATION, having its
seat in Moscow, Russia,

CLAIMERS to cassation, defendant in the conditional cross-appeal in cassation,

hereinafter: the Russian Federation,

lawyers: RS Meijer, RR Verkerk and AEH van der Voort Maarschalk,

in return for

1. VETERAN PETROLEUM LIMITED,
established in Nicosia, Cyprus,

hereinafter: VPL,

2. YUKOS UNIVERSAL LIMITED,
based in Douglas, Isle of Man,

hereafter: YUL,

3. HULLEY ENTERPRISES LIMITED,
located in Nicosia, Cyprus,

hereafter: Hulley,

DEFENDANTS in cassation, claimants in the conditional cross-appeal in cassation,

hereinafter jointly: HVY,

lawyers: T. Cohen Jehoram, J. de Bie Leuveling Tjeenk and BMH Fleuren.

1. Process

For the course of the proceedings in factual instances, the Supreme Court refers to:

a. the judgments in cases C/09/477160 / HA ZA 15-1, C/09/477162 / HA ZA 15-2 and C/09/481619 / HA ZA 15-112 of the District Court of The Hague of 11 March 2015, July 8, 2015 and April 20, 2016;
b. the judgments in case 200.197.079/01 of the Court of Appeal of The Hague of 11 October 2016, 25 September 2018, 18 December 2018 and 18 February 2020.

The Russian Federation has lodged an appeal in cassation against the judgments of the Court of Appeal of 25 September 2018 and 18 February 2020.

HVY have filed a conditional incidental appeal in cassation.

The parties have filed a statement of defense rejecting the appeal.

The parties have submitted written explanations and argued their positions orally.

The conclusion of Advocate General P. Vlas is to dismiss the principal appeal in cassation.

The parties' lawyers responded in writing to that conclusion.

2 Introduction and method of treatment

(a) Introduction

2.1 The Russian Federation has been ordered in arbitral proceedings to pay damages to three (former) shareholders of Yukos Oil Company for breach of its obligations under the *Energy Charter Treaty* (hereinafter: ECT) [1] . This case concerns the question of whether the judgments rendered in those proceedings should be quashed.

(b) Method of treatment

2.2 The Supreme Court will first set out (under 3) some principles for assessing the case. This concerns (a) the facts, (b) the applicable law and (c) the claim of the Russian Federation and the decisions of the court and the court in this regard. Also under (d) the most relevant judgments of the Court of Appeal for the assessment in cassation will be presented in broad outline.

2.3 Subsequently (under 4) a summary will be given of the cassation complaints from the Russian Federation and from HVY.

2.4 The Supreme Court will deal with (under 5) the principal appeal of the Russian Federation per part.

In each case, the considerations of the Court of Appeal will always be presented first, insofar as they are important for the assessment of the part. Thereafter, the relevant legal and treaty provisions will be presented when discussing parts 1, 2, 3 and 5; the treaty provisions in the authentic English language version. Subsequently, the complaints of the component will be assessed. In parts 6, 7 and 8, the considerations of the Court of Appeal against which the complaints are directed will not be reproduced, because parts 6 and 7, with an abbreviated motivation on the basis of art. 81 paragraph 1 RO will be dismissed and part 8 does not require separate treatment.

2.5 The Supreme Court will then assess (under 6) whether the conditions under which HVY lodged the cross-appeal have been met.

2.6 The Supreme Court will formulate the conclusion (under 7) .

2.7 Finally (under 8) the decision follows.

3 Principles and facts

(a) Facts

3.1 The following facts can be assumed in cassation.

(i) HVY are, or at least were, a shareholder in Yukos Oil Company (hereinafter: Yukos), an oil company established in the Russian Federation. Yukos was declared bankrupt on August 1, 2006 and delisted from the Russian trade register on November 21, 2007.

(ii) HVY have in 2004 on the basis of art. 26 ECT initiated arbitration proceedings against the Russian Federation (hereinafter: the arbitration proceedings). HVY claimed in the arbitration proceedings that the Russian Federation be ordered to pay them damages. They argued that the Russian Federation had expropriated their investments in Yukos in violation of the ECT and had failed to protect those investments. The place of arbitration was The Hague.

(iii) The arbitral tribunal appointed under the UNCITRAL Rules of Arbitration (hereinafter: the Arbitration Tribunal) has ruled in three separate *Interim Awards* [2] (hereinafter: the *Interim Awards*) on a number of preliminary defenses raised by the Russian Federation, inter alia with regard to the jurisdiction of the arbitral tribunal. In the *interim awards* , the arbitral tribunal rejected certain defenses of jurisdiction and admissibility and decided with regard to other preliminary defenses that the judgment on these would be reserved until the substantive phase (*the merits phase*) of the proceedings.

(iv) In three separate *final awards* [3] (hereinafter: the *final awards*), the arbitral tribunal rejected the remaining defenses of jurisdiction and admissibility of the Russian Federation, ruling that the Russian Federation fulfills its obligations under Art. 13 paragraph 1 ECT and ordered the Russian Federation to pay damages to HVY in the amount of USD 8,203,032,751 (to VPL), USD 1,846,000,687 (to YUL) and USD 39,971,834,360 (to Hulley). In short, the arbitral tribunal ruled that the Russian Federation had directed a number of tax and recovery measures against Yukos towards the bankruptcy of Yukos with no other purpose than the elimination of M. Khodorkovsky (the *chairman* of Yukos and one of its shareholders) as a potential political opponent of President Putin, and acquiring Yukos' assets.

(v) The Russian Federation has signed but never ratified the ECT.

(b) Governing Law

3.2 This procedure for setting aside arbitral awards is governed by the Fourth Book ("Arbitration") of the Code of Civil Procedure, as in force until 1 January 2015. [4] As to will always be referred to below by the term '(old) Rv' even if reference is made to provisions that are identical to provisions with the same number in the currently applicable text of Book Four of the Code of Civil Procedure.

(c) Claim of the Russian Federation and the decisions of the court and court

3.3.1 In these proceedings, the Russian Federation is claiming annulment of the *interim awards* and *final awards rendered* by the arbitral tribunal (see above in 3.1 under (iii) and (iv), hereinafter jointly referred to as: the arbitral awards).

To this end, the Russian Federation invoked the following grounds for annulment (as stated in art. 1065 paragraph 1 (old) DCCP):

(a) there is no valid arbitration agreement, in connection with which the arbitral tribunal was not competent to hear and decide on the claims of the HVY;

(b) the arbitral tribunal was irregularly constituted, in particular because the adjunct to the arbitral tribunal appeared to have played a significant substantive role in reviewing the evidence, in deliberating the arbitral tribunal and in preparing the *final awards* ;

(c) the arbitral tribunal has failed to comply with its mandate;

(d) the arbitral awards are not reasoned on several crucial aspects;

(e) the arbitral awards are contrary to Dutch public order and morality.

3.3.2 The court [5] allowed the claim of the Russian Federation for the lack of a valid arbitration agreement.

HVY have appealed against the judgment of the court.

3.3.3 In the appeal procedure, HVY objected to certain amendments to the claim that would be included in the response statement of the Russian Federation. In an interlocutory judgment [6] (hereinafter referred to as: the interlocutory judgment) the Court of Appeal ruled that this objection is well-founded insofar as it relates to allegations made by the Russian Federation with regard to fraud allegedly committed by HVY in the arbitration proceedings.

3.3.4 In final judgment [7] (hereinafter: the final judgment), the court annulled the court's judgment and rejected the Russian Federation's claim.

(d) Summary of the Court's Judgments

3.4 Broadly speaking, and insofar as relevant in cassation, the judgments of the Court of Appeal boil down to the following.

in interrogation

(i) In the response, the Russian Federation put forward statements that, in short, imply that HVY fraudulently concealed who actually owns and controls HVY in the arbitration proceedings. These propositions, if correct, could provide grounds for claiming on the basis of art. 1068 paragraph 1 (old) Rv to demand revocation of the arbitral awards. Therefore, these allegations cannot be raised in an annulment procedure such as the present one. (para. 5.1-5.7).

in the final judgment

Jurisdiction; explanation of the 'limitation clause' in art. 45 paragraph 1 ECT

(ii) Art. 45 paragraph 1 ECT provides that every state that has signed the ECT will provisionally apply the treaty, but that this only applies "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations" (hereinafter also: the *limitation clause*). HVY may in the setting aside proceedings – and for the first time on appeal – defend a subsidiary interpretation of the *limitation clause* that they had not already defended in the arbitration proceedings. (para. 4.4-4.5)

(iii) The *limitation clause* is to be understood as meaning that a signatory State which does not make the declaration referred to in art. 45 paragraph 2, under a, of the ECT, is obliged to provisionally apply the ECT, except to the extent that the provisional application of one or more provisions of the ECT is contrary to national law in the sense that the laws or regulations of that precludes provisional application of the ECT for certain (types or categories of) treaty provisions. The *limitation clause* cannot therefore be invoked if a provision of the ECT in itself conflicts with any rule of national law. (para. 4.5)

(iv) Based on this explanation of the *limitation clause* , the provisional application of art. 26 ECT (which allows dispute settlement between a Contracting State and an investor of another Contracting State through arbitration) not contrary to the "constitution, laws or regulations" of the Russian Federation. It has not been stated or shown that Russian law contains a rule that excludes the possibility of Art. 26 ECT is provisionally applied. This means that the Russian Federation was bound by art. 26 ECT provisionally and that the court erroneously decided otherwise. (para. 4.6)

(v) The explanation given by the Russian Federation to the *limitation clause* focuses on whether any provision of the ECT is in itself contrary to national law. Even if this interpretation is assumed, Art. 26 ECT not in conflict with Russian law within the meaning of Art. 45 paragraph 1 ECT. (para. 4.7)

Jurisdiction; explanation of 'Investment' and 'Investor' in art. 1 paragraphs 6 and 7 ECT

(vi) It follows from the wording of the ECT that an investment dispute within the scope of Art. 26 ECT falls if the legal person making the investment is established under the law of one (Contracting) State and the investment referred to in Art. 1 paragraph 6 ECT takes place in another (contracting) state. Nor from the context of art. 1 ECT and art. 26 ECT, nor does it follow from the purpose of the ECT that the drafters of the treaty intended to impose further requirements on the foreign character of the investment or investor, or the international character of the dispute. (para. 5.1.7)

(vii) From the text of art. 17 ECT (*denial of benefits clause*) does not follow that investments via the U-turn construction (which, according to the Russian Federation, includes HVY's investments) fall outside the protection of the ECT. Nor is there any rule of customary international law or general principle of law under which there is no claim to protection in a case such as this. (para. 5.1.8)

(viii) The Russian Federation has not demonstrated the existence of a legal principle of investment law that any investment treaty provides protection only to investments that make an economic contribution to the host country, whether or not the treaty contains a definition of the term investment. (para. 5.1.9)

(ix) The Russian Federation has unsuccessfully argued that Russian businessmen involved in the privatization of Yukos (hereinafter: Khodorkovsky et al.) cannot, on the basis of breach of liability principles, hide behind the corporate structure of HVY, which they themselves abused to prevent fraud. commit bribery, and other crimes. Art. 1 paragraph 7 ECT does not provide a basis for the application of rules of national law with regard to breach of liability. (para. 5.1.10)

(x) The ECT does not require an investment to be made in accordance with the law of the host country. Also for access to arbitration as referred to in art. 26 ECT, the text of the ECT contains no restrictions on this point. This means that the arbitral tribunal does not have jurisdiction if it is shown that illegal acts have taken place at the time of or when making the investment. (para. 5.1.11)

(xi) It is concluded that the grounds advanced by the Russian Federation to argue that there is no valid arbitration agreement cannot support that conclusion. (para. 5.3)

Violation of the assignment and composition of the arbitral tribunal

(xii) The arbitral tribunal was in principle obliged to submit the dispute about the tax measures imposed in Russia in any case to the Russian tax authorities. The failure to do so, however, is not sufficiently serious to justify annulment of the arbitral award, because it has not become plausible that the Russian Federation suffered a disadvantage as a result of this failure to act. (para. 6.3)

(xiii) Even if it is assumed that the assistant to the arbitral tribunal has written parts of the arbitral awards, this cannot lead to the conclusion that legal or rules agreed between the parties have been disregarded in the composition of the arbitral tribunal. The fact that the assistant has performed substantive work does not mean that the arbitrators have acted contrary to their assignment in such a way that this should lead to the annulment of the arbitral awards. (para. 6.6)

Justification

(xiv) The complaint that the arbitral tribunal rendered an incomprehensible and unfounded judgment, which is equivalent to a wholly unsubstantiated judgment, with regard to the claim that Yukos used sham companies in low-tax regions, is based on a misreading of the *final awards* . (para. 8.4)

Public order

(xv) The fraudulent, corrupt and illegal activities of Khodorkovsky et al. alleged by the Russian Federation do not lead to the conclusion that the arbitral awards or the way in which they were reached are contrary to public policy within the meaning of art. 1065 paragraph 1, under e, (old) Rv. (para. 9.8)

4 The cassation complaints of the Russian Federation and of HVY

The principal profession of the Russian Federation

4.1.1 The plea in the main appeal of the Russian Federation consists of eight parts, each containing an introduction and various complaints with regard to parts 1 to 7. The parts, in summary, address the following.

4.1.2 Part 1 is directed against the judgment of the Court of Appeal (see above in 3.4 under (i)) that the allegations put forward by the Russian Federation on appeal that HVY acted fraudulently in the arbitration procedure are not at issue in this annulment procedure. can be made.

4.1.3 Subsection 2 argues that the Russian Federation was not bound by the provisions of art. 26 ECT included arbitration clause, because the Russian Federation only signed and never ratified the ECT. The Russian Federation does not agree with the Court's interpretation of the *limitation clause* and with the Court's decision based on it that the Russian Federation was obliged to comply with Art. 26 ECT to be applied provisionally (see above in 3.4 under (ii)-(v)).

4.1.4 Parts 3 and 4 are directed against the judgment of the Court of Appeal (see above in 3.4 under (vi)-(x)) that HVY can invoke the provisions of the ECT. According to the Russian Federation, HVY do not qualify as foreign investors and their investments do not qualify as foreign investments within the meaning of the ECT. In addition, the Russian Federation also argues that HVY's investments were illegal, so that the arbitral tribunal was not competent to hear HVY's claims. The Russian Federation further argues that the arbitral tribunal's decision is contrary to public policy (see above in 3.4 under (xv)).

4.1.5 According to part 5, the court erred in not ruling (see above in 3.4 under (xii)) that the arbitral tribunal violated its mandate by not requesting advice from the tax authorities, as art. 21 paragraph 5 prescribes ECT.

4.1.6 Part 6 objects to the judgment of the court (see above in 3.4 under (xiii)) about the role played by the assistant of the arbitral tribunal in the preparation of the arbitral awards. According to the Russian Federation, the assistant has also performed substantive work and the arbitral tribunal has not been transparent about this. Therefore, the court should have ruled that the arbitral tribunal violated its mandate and was composed irregularly, according to the Russian Federation.

4.1.7 Part 7 focuses on the rejection by the Court of Appeal (see above in 3.4 under (xiv)) of the ground for setting aside raised by the Russian Federation that the arbitral tribunal did not give a valid reasoning for the judgment that it had not found any evidence that the *trading companies* of Yukos were sham companies in low-tax region Mordovia.

4.1.8 Section 8 builds on Sections 1 through 7.

HVY .'s conditional cross-appeal

4.2.1 The plea in HVY's cross-appeal consists of three parts. Part 1 is directed against the rejection by the Court of Appeal of HVY's primary position on the interpretation of the *limitation clause* . Part 2 complains about the court's judgment that the arbitral tribunal was in principle obliged to submit the dispute to the Russian tax authorities. Part 3 complains that the Court of Appeal failed to recognize that the Russian Federation was allowed to challenge the decision of the arbitral tribunal to reject the allegations based on the *unclean hands* argument with a ground for setting aside no later than in the summons.

4.2.2 The parts are all conditionally presented. Part 1 has been proposed on the condition that one or more complaints of part 2 of the ground of appeal succeed in the main appeal, part 2 with the condition that one or more complaints of part 5 of the ground of appeal succeed in the main appeal, and part 3 under the condition that one or more complaints of part 3 or 4 of the plea are successful in the main appeal.

5 Assessment of the plea in the main appeal

Part 1

Can fraud in the arbitration procedure only be raised in a revocation procedure?

(a) Representation of the Court's considerations

5.1.1 In so far as it is relevant for the assessment of the part, the court has considered the following.

(i) HVY object to, inter alia, the statements of the Russian Federation that the arbitral awards are contrary to public policy because of fraud committed by HVY during the arbitration, consisting of making false statements and withholding documents, and that HVY in the arbitration failed to submit various documents and correspondence. (para. 5.1 under (i) and (iii) of the interim judgment)

(ii) HVY's objection to these statements of the Russian Federation consists in the Russian Federation's revocation procedure of Art. 1068 (old) Rv should have filed, or at least should have submitted its change of claim within three months after the facts on which it bases its claim that fraud has been committed or documents have been withheld, had become known to it or should have been known. According to HVY, the change of requirement is also in conflict with the requirements of due process (art. 130 DCCP). (para. 5.3 under (b) and (c) of the interim judgment)

(iii) In the response, the Russian Federation did not adduce any new cases of fraud, but only referred to "new documents" which, in its view, should have been submitted by HVY in the arbitration. It therefore concerns the propositions regarding fraud and the withholding of documents in the arbitration. (para. 5.5 of the interlocutory judgment)

(iv) These statements, if correct, could provide grounds for relying on art. 1068 paragraph 1 (old) Rv to demand revocation of an arbitral award. The accusation that HVY failed to submit certain documents that would have been important for the decision of the arbitral tribunal falls under the ground for revocation of art. 1068 paragraph 1, under c, (old) Rv. The accusations that HVY (intentionally) made false and/or incorrect statements, concealed the actual state of affairs or improperly influenced a witness, fall under the ground for revocation of art. 1068 paragraph 1, under a, (old) Rv. (para. 5.6 of the interim judgment)

(v) HVY rightly argue that these accusations can only be made in a revocation procedure under art. 1068 (old) Rv can be raised and not in an annulment procedure like the present one. The legal effect of annulment on account of one of the grounds of art. 1065 paragraph 1 (old) Rv and due to revocation is the same in both cases: the jurisdiction of the ordinary court revives, unless the parties have agreed otherwise (cf. art. 1068 paragraph 3 (old) Rv). However, there are differences with regard to the time within which remedies must be lodged and with regard to the competent judicial authority. If more than three months have passed since the arbitral award has acquired res judicata, revocation can still be claimed within three months after the fraud or forgery has become known or a party has obtained the new documents. There is no such extra period for the destruction procedure. In addition, the claim for revocation is brought before the court of appeal that would be competent to rule on appeal on the claim for annulment referred to in art. 1064 (old) Rv, while the nullification procedure (in this case, to which the old law applies) is instituted in the court. The revocation procedure therefore has only one de facto body. If it would be possible to claim annulment of the arbitral award on

account of one or more of the grounds for annulment of art. 1065 paragraph 1 (old) DCCP on the basis of the statement that the other party has committed fraud or withheld documents during the arbitration, the same result could be achieved as with a claim for revocation, but both the aforementioned period of three months and the exclusive jurisdiction of the court as the only factual instance can be circumvented in a roundabout way, for example by invoking fraud as a new argument for an already injunction in an annulment procedure pending before the court more than three months after the discovery of the fraud by an increase in claim. the summons invoked art. 1065 paragraph 1, under e, (old) Rv. That is not acceptable. (para. 5.7 of the interlocutory judgment) but could both the aforementioned period of three months and the exclusive jurisdiction of the court as the sole factual instance be circumvented in a roundabout way, for example by setting aside proceedings pending before the court more than three months after the discovery of the fraud by an increase in claim, to invoke fraud as a new argument for an invocation of art. 1065 paragraph 1, under e, (old) Rv. That is not acceptable. (para. 5.7 of the interlocutory judgment) but could both the aforementioned period of three months and the exclusive jurisdiction of the court as the sole factual instance be circumvented in a roundabout way, for example by setting aside proceedings pending before the court more than three months after the discovery of the fraud by an increase in claim, to invoke fraud as a new argument for an invocation of art. 1065 paragraph 1, under e, (old) Rv. That is not acceptable. (para. 5.7 of the interlocutory judgment) to invoke fraud as a new argument for an invocation of art. 1065 paragraph 1, under e, (old) Rv. That is not acceptable. (para. 5.7 of the interlocutory judgment) to invoke fraud as a new argument for an invocation of art. 1065 paragraph 1, under e, (old) Rv. That is not acceptable. (para. 5.7 of the interlocutory judgment)

(vi) HVY's objection that the Russian Federation cannot substantiate its claims about fraud committed by HVY in the arbitrations in these nullification proceedings is therefore well founded. HVY's objection that the amendment of the claim is in conflict with the requirements of due process has not been accepted. (para. 5.8 of the interlocutory judgment)

(vii) In view of the para. 5.1-5.8 of the interlocutory judgment, it is not necessary to rule on the allegations made by the Russian Federation that HVY committed fraud in the arbitrations. (para. 9.7.1-9.7.2 of the final judgment).

(b) Relevant legal provisions

5.1.2 Art. 1064 (old) Rv reads as follows:

1. Against a final arbitral award in whole or in part, which is not subject to arbitral appeal, or against a total or partial final award, rendered in an arbitral appeal, only the remedies of annulment and revocation are available under this section.

2. The claim for annulment shall be lodged with the court at the registry of which the original of the judgment must be deposited in accordance with Article 1058(1).

3. A party may bring an action for annulment as soon as the judgment has acquired the force of res judicata. The authority to do so lapses three months after the date on which the judgment is deposited at the registry of the court. If, however, the judgment, accompanied by a leave for enforcement, is served on the other party, then that party may, irrespective of the expiry of the period of three months referred to in the previous sentence, still file the claim for annulment within three months after such service. Set up.

4. (…)

5. All grounds for annulment must be presented in the summons, on pain of forfeiture of the right to do so.

Art. 1065 paragraph 1 (old) Rv reads as follows:

1. Destruction can only take place on one or more of the following grounds:

a. there is no valid arbitration agreement;

b. the arbitral tribunal has been constituted contrary to the applicable rules;

c. the arbitral tribunal has not complied with its mandate;

d. the judgment is not signed or not substantiated in accordance with the provisions of Article 1057;

e. the verdict, or the way in which it came about, is contrary to public order or morality.

Art. 1067 (old) Rv reads as follows:

Once the award by which an arbitral award has been quashed has become final, the jurisdiction of the ordinary court is revived, unless the parties have agreed otherwise.

Art. 1068 (old) Rv reads as follows:

1. Withdrawal can only take place on one or more of the following grounds:

the award is based wholly or partly on fraud discovered after the award, committed by or with the knowledge of the other party in the arbitral proceedings;

b. the verdict is based wholly or partly on documents that prove to be false after the verdict;

c. After the verdict, a party has obtained documents that would have influenced the decision of the arbitral tribunal and which were withheld through the actions of the other party.

2. The claim for revocation shall be made mutatis mutandis in accordance with Article 1064, paragraph 3, or, if this will be at a later date, within three months after the fraud or forgery has become known or a party has obtained the new documents, brought before the court of appeal that would have jurisdiction on appeal on the claim for annulment, referred to in Article 1064. (…)

3. If the judge considers the ground or grounds advanced for revocation to be correct, he will quash the judgment in whole or in part. Article 1067 applies mutatis mutandis.

(c) Assessment of the complaints

5.1.3 Part 1.2 argues, among other things, that the Court of Appeal wrongly ruled that factual statements that rely on revocation within the meaning of Art. 1068 (old) Rv could have justified, could not also lead to annulment of an arbitral award on the basis of art. 1065 paragraph 1, opening words and under e, (old) Rv for violation of public order. The court wrongly denied the Russian Federation a free choice between the remedies for annulment and revocation, according to the part.

5.1.4 In its initiating summons, the Russian Federation argued as grounds for setting aside the arbitral awards, among other things, that the arbitral awards were concluded contrary to public policy. In its response, it argued on appeal that the arbitral awards are contrary to public policy because HVY acted fraudulently in the arbitration proceedings, including by submitting false statements, by withholding documents that are relevant to crucial disputes in arbitration and by making undisclosed payments to one of HVY's key witnesses.

5.1.5 Against a final arbitral award that is not subject to arbitral appeal, only the remedies available for annulment (hereinafter: the annulment procedure) and revocation (hereinafter: the revocation procedure) are available (art. 1064 (old) DCCP).

5.1.6 Destruction can only take place on the grounds mentioned in art. 1065 paragraph 1, under a to e, (old) Rv. One of those grounds is that the judgment, or the way in which it came about, is contrary to public order.

A party may bring an action for annulment as soon as the judgment has acquired the force of res judicata. The authority to do so lapses three months after the date on which the judgment is deposited at the registry of the court. If the judgment accompanied by a permit for enforcement is served on the other party, that party can still file the claim for annulment within three months after this service (art. 1064 paragraph 3 (old) DCCP).

5.1.7 Revocation is possible pursuant to art. 1068 paragraph 1 (old) DCCP only take place on the grounds (a) that the award is based wholly or partly on fraud discovered after the award, committed by or with the knowledge of the other party in the arbitral proceedings, (b) that the award is wholly or is based in part on documents that

are found to be false after the award, or (c) that after the award a party has in possession of documents which would have influenced the decision of the arbitral tribunal and which were withheld through the fault of the other party got. These grounds are hereinafter collectively referred to as: fraud.

The revocation claim is made within the term of art. 1064 paragraph 3 (old) Rv or, if this results in a later date, within three months after the fraud became known (art. 1068 paragraph 2, first sentence, (old) Rv).

5.1.8 If an arbitral award has been reached under the influence of fraud, this may constitute grounds for the opinion that the award, or the manner in which the award was reached, is contrary to public policy as referred to in art. 1065 paragraph 1, under e, (old) Rv. A party in an annulment procedure can therefore claim annulment of an arbitral award on this ground.

5.1.9 What has been considered above in 5.1.8 does not alter the fact that fraud by one of the parties to the proceedings is also a ground for revocation on the basis of art. 1068 paragraph 1 (old) Rv. It follows neither from the legal text nor from the legislative history that the legislator intended that, if the assertions put forward both constitute a ground for annulment within the meaning of art. 1065 paragraph 1 (old) Rv as a ground for revocation within the meaning of art. 1068 paragraph 1 (old) DCCP, a party can only base its claim on these assertions in a revocation procedure. The way in which both procedures have been designed by the legislator and the differences between the two procedures do not provide grounds for the legal regulation of art. 1064 to 1068 (old) Rv to be explained in that way. The Supreme Court considers the following in this regard.

5.1.10 Just like the annulment procedure, the revocation procedure in the event of a granting decision leads to annulment of the arbitral award (art. 1068 paragraph 3 (old) DCCP). There is therefore no difference in legal effect that would justify that the revocation procedure, with the exclusion of the setting aside procedure, is the only legal course in which it can be argued that an arbitral award was made under the influence of fraud.

The regulation of art. 1068 paragraph 2, first sentence, (old) DCCP has the consequence that a revocation claim can still be brought if the term for filing a nullification action has already expired or the nullification procedure has been completed without this leading to nullification. The provisions of art. 1068 paragraph 2 (old) DCCP aims to broaden the possibility to affect an arbitral award by giving the party who wishes to invoke fraud an additional term for submitting the revocation claim. It would not be consistent with that purport that the assertion that the arbitral award was reached under the influence of fraud can only be based on a revocation claim and not a – timely filed – claim for annulment.

Nor does it follow from the statutory regulation regarding the revocation of court decisions (Article 382 et seq. DCCP) that grounds that may lead to revocation can only be raised in a revocation procedure. Annulment of court decisions should be achieved as much as possible by the use of an ordinary legal remedy. [8] Only when the ordinary legal remedies against a court decision have been exhausted or the terms for this have expired unused, is the extraordinary remedy of revocation available (art. 383 paragraph 1 DCCP).

5.1.11 Pursuant to art. 1064 paragraph 2 (old) DCCP, the claim for annulment must be filed with the court, with the possibility of appeal, [9] while pursuant to art. 1068 paragraph 2 (old) Rv the revocation claim, by way of prorogation, [10]must be brought before the court of appeal that would have jurisdiction on appeal on the claim for annulment. The reason for this difference has not been explained in legislative history. The difference, partly in light of the fact that it no longer exists under current law (see art. 1064a paragraph 1 DCCP), is of insufficient weight to assume that the revocation procedure is intended to be an exclusive legal remedy for fraud, and does not therefore preclude the assertion that the arbitral award was reached under the influence of fraud can also be used as the basis for a timely filed claim for annulment.

5.1.12 The judgment of the Court of Appeal that the Russian Federation in para. 5.5 of the interlocutory judgment could only raise the allegations referred to in a revocation procedure and could therefore not base the claim for annulment at issue in these proceedings, is therefore incorrect. The complaint against it succeeds. The other complaints in part 1 do not require treatment.

5.1.13 The following is worth noting.

5.1.14 Pursuant to art. 1064 paragraph 5 (old) DCCP, the grounds on which the claimant wishes to base the claim for annulment must be included in the initiating summons, on pain of forfeiture of the right to do so. In *Breeders v Burshan* [11]the Supreme Court has ruled that art. 1064 paragraph 5 (old) Rv does not in itself preclude the further elaboration on appeal of the defense in the further course of the proceedings, or as a result of the decision of the first court. grounds put forward in the preliminary summons, and if necessary an omission is corrected. However, the possibility of further elaborating grounds already put forward in the summons on appeal, or of putting forward new factual arguments, is not unlimited. This possibility is limited, among other things, by the ordinary rules applicable to appeals, such as art. 130 Rf. In addition, that possibility is limited by specific provisions that prescribe when a certain ground for destruction must be invoked (for the first time), on pain of forfeiture of the right to invoke it later. If such a provision is at issue, it will have to be assessed in each specific case whether a new factual or legal statement put forward in the course of the setting aside proceedings, partly in view of the requirements of due process, with the purport of such a provision comes into conflict.[12]

5.1.15 From what has been considered above in 5.1.7-5.1.10, it follows that the revocation procedure gives the person who believes that the arbitral award is based on fraud an additional opportunity on that ground to affect the award in court, which is particularly of is relevant if the other remedies, such as the action for annulment, have already been exhausted or the time limits for bringing them have expired unused by the time the fraud is discovered.

The fact that this possibility is limited in time by the term of three months after the fraud has become known (art. 1068 paragraph 2, first sentence, (old) DCCP), means that the other party may, after the unused expiry of that term, assume that the arbitral award is no longer subject to annulment as a result of revocation. This period therefore serves legal certainty. If, however, an annulment procedure is already pending in which it is argued in the summons that the award, or the manner in which it was reached, is contrary to public policy, the other party may take into account the possibility that the arbitral award may not be will remain,

The scope of art. 1068 paragraph 2, first sentence, (old) Rv therefore does not entail that an invocation of fraud must also have been invoked in an annulment procedure within the period referred to in that provision, on pain of forfeiture of the right to invoke it later. . Whether fraud can still be invoked in an annulment procedure at a later stage must otherwise be assessed on the basis of the rules set out above in 5.1.14.

5.1.16 With regard to the application of art. 130(1) DCCP, it must be assessed in each specific case whether the submission of a new argument to substantiate a ground for setting aside already advanced in the summons is contrary to the requirements of due process. In this regard, it may be important, among other things, for the reason for not putting forward the new proposition earlier.

of the in art. 130(1) DCCP referred to in conflict with the requirements of due process may arise, inter alia, if in a case such as the present, in which it is stated that the arbitral award was reached under the influence of fraud, the further elaboration referred to above is given later. then in the next claim or deed after the fraud has become known.

5.1.17 What has been considered above about the relationship between the revocation procedure and the cancellation procedure also applies under current law.

5.1.18 In this case, the Russian Federation has argued that it discovered fraud on the part of HVY after the date of the court's judgment and invoked this in its next statement of appeal (the statement of answer). The question whether this further elaboration of the ground for setting aside already invoked in the initiating summons, as provided by the Russian Federation in the response, is in conflict with the requirements of due process as referred to in art. 130 paragraph 1 DCCP, the Court of Appeal did not deal with.

(d) Conclusion

5.1.19 The conclusion is that part 1 succeeds.

part 2

Is the Russian Federation pursuant to Art. 45 ECT bound by provisional application of art. 26 ECTS?

(a) Representation of the Court's considerations

5.2.1 In so far as it is relevant for the assessment of the part, the Court of Appeal has considered the following in the final judgment.

New grounds for jurisdiction and grounds for jurisdiction in the setting aside proceedings

(i) The arbitral tribunal has considered two interpretations of the *limitation clause* : it must be assessed whether the *principle* of provisional application is contrary to Russian law (position HVY), or whether a *separate provision* of the ECT (in this case art. 26) is contrary to Russian law (Russian Federation position). The arbitral tribunal accepted HVY's position as correct. (para. 4.4.1)

(ii) In these annulment proceedings, for the first time on appeal, HVY have defended as a subsidiary position that the *limitation clause* concerns the question whether the *provisional application* of one or more provisions of the ECT is incompatible with the law of a contracting state , because the law of that state allows provisional application of a treaty in principle, but excludes certain (categories or types of) treaty provisions from provisional application. (para. 4.4.2)

(iii) It is incompatible with the legal system that the setting aside judge should only be allowed to review whether the arbitral tribunal has declared itself competent on the correct grounds and may not assume that competence on grounds that the arbitral tribunal (in the judge's opinion: wrongly) has not dealt with for any reason. It would be contrary to effective arbitral proceedings if an arbitral award had to be quashed because the arbitral tribunal used a false argument for assuming its jurisdiction, when in fact that jurisdiction exists. (para. 4.4.3-4.4.4)

(iv) The foregoing also means that, in principle, there is no objection if the defendant in the setting aside proceedings puts forward new arguments that can support the arbitral tribunal's decision that it has jurisdiction. HVY's alternative position with regard to the interpretation of the *limitation clause* will be taken into account when determining whether a valid arbitration agreement within the meaning of art. 1065 paragraph 1, under a, (old) Rv. (para. 4.4.5-4.4.7)

The explanation of art. 45 paragraph 1 ECT, more in particular of the limitation clause, and the interpretation of art. 45(2)(a) ECT

(v) HVY's alternative position is most consistent with the ordinary meaning of the wording of the *limitation clause* and with the context and subject and purpose of the ECT. From an established state practice within the meaning of art. 31 paragraph 3 of the Vienna Convention on the Convention (hereinafter: CAC) [13] has proved to be insufficient, but in so far as this is the case, it does not oppose HVY's alternative position. This means that the *limitation clause*it should be understood that a signatory State which does not make the declaration referred to in art. 45 paragraph 2, under a, of the ECT, is obliged to provisionally apply the ECT, except to the extent that the provisional application of one or more provisions of the ECT is contrary to national law in the sense that the laws or regulations of that precludes provisional application of the ECT for certain (types or categories of) treaty provisions. The *limitation clause* cannot therefore be invoked if a provision of the ECT in itself conflicts with any rule of national law. (para. 4.5.9-4.5.33)

(vi) This explanation leaves the meaning of Art. 45 paragraph 1 ECT respectively of the *limitation clause is* not ambiguous or obscure and this interpretation does not lead to a result that is clearly incongruous or unreasonable. For application of the additional interpretation rules of art. 32 WVV is therefore not a reason in that regard. It is superfluous to note that the *travaux préparatoires* this interpretation of art. 45 paragraph 1 ECT confirm. (para. 4.5.34-4.5.40)

(vii) The meaning of the words 'not inconsistent' follows from the Court's explanation of the *limitation clause* . In that interpretation, the point is whether there is national law or regulation that excludes provisional application for certain (types or categories of) treaty provisions. If the latter is the case, the provisional application of those (types or categories) of treaty provisions is 'inconsistent' with national law. (para. 4.5.41)

(viii) Tekst en context van art. 26 ECT geven geen aanknopingspunt voor een uitleg waarin voorlopige toepassing van art. 26 ECT (geschilbeslechting door arbitrage) 'inconsistent' is met Russisch recht indien een dergelijke wijze van geschilbeslechting geen wettelijke grondslag heeft in Russisch recht, of dat recht zelf niet voorziet in die mogelijkheid. Het andersluidende oordeel van de rechtbank komt erop neer dat de bepalingen van de ECT alleen dan voorlopig kunnen worden toegepast, indien daarvoor reeds een wettelijke grondslag in het nationale recht aanwezig is. Dat zou de voorlopige toepassing als bedoeld in art. 45 lid 1 ECT van veel van zijn praktische betekenis beroven en niet in overeenstemming zijn met de in die bepaling tot uitdrukking gebrachte wens van de verdragspartijen om de ECT zoveel mogelijk voorlopig toe te passen. (rov. 4.5.47)

(ix) De conclusie is dat de *limitation clause* aldus wordt uitgelegd, dat een ondertekenende staat die niet de verklaring bedoeld in art. 45 lid 2, onder a, ECT heeft afgelegd, gehouden is de ECT voorlopig toe te passen, behoudens voor zover voorlopige toepassing van een of meer bepalingen van de ECT strijdig is met nationaal recht in die zin, dat de wet- of regelgeving van die staat voorlopige toepassing van bepaalde (soorten of categorieën van) verdragsbepalingen uitsluit.

Uitgaande van de interpretatie die de Russische Federatie aan de *limitation clause* geeft, is van 'strijdigheid' in de zin van art. 45 lid 1 ECT in ieder geval sprake indien een verdragsbepaling en een bepaalde regel van nationaal recht niet tegelijkertijd toepassing kunnen vinden omdat toepassing van de ene regel schending van de andere regel meebrengt. Of daarnaast sprake is van 'strijdigheid' hangt af van de specifieke context van de in het geding zijnde regelgeving. Van 'strijdigheid' is in ieder geval niet reeds sprake indien het nationale recht geen grondslag biedt voor, of niet voorziet in, de desbetreffende bepaling van de ECT. (rov. 4.5.48)

Toepassing limitation clause in deze zaak (uitgaande van de uitleg die het hof aan die bepaling geeft)

(x) The provisional application of art. 26 ECT does not conflict with the 'constitution, laws or regulations' of the Russian Federation. It has not been stated or shown that Russian law contains a rule that excludes the possibility of Art. 26 ECT is provisionally applied. This means that the Russian Federation was bound by art. 26 ECT provisionally and that the court erroneously decided otherwise. (para. 4.6.1)

Application of limitation clause in this case (based on the explanation given by the Russian Federation to that provision)

(xi) Nevertheless, superfluously, it is examined whether, based on the explanation given by the Russian Federation and the court to the *limitation clause* , Art. 26 ECT is contrary to any provision of the law of the Russian Federation. (para. 4.6.2)

(xii) The Russian Federation has put forward three self-supporting grounds from which, in its opinion, it follows that arbitration over HVY's claims is contrary to Russian law: (a) it is contrary to the Russian (constitutionally) enshrined principle of the separation of powers; (b) under Russian law, disputes over public law powers, such as tax and expropriation disputes, are not arbitrary; (c) under Russian law, no claim is due to shareholders for depreciation of their shares due to damage caused to the company. (para. 4.7.1)

(a) The separation of powers

(xiii) The Russian *Laws on Foreign Investment* of 1991 and 1999 (hereinafter: LFI 1991 and LFI 1999) make international arbitration on investment disputes possible in so many words. (para. 4.7.5)

(xiv) There is no rule in Russian law that provisional application cannot cover treaties requiring ratification because they contain provisions that deviate from or supplement federal law. Art. 23 paragraph 2 of the *Federal Law on International Treaties*(hereinafter: FLIT) allows treaty provisions that deviate from or supplement federal laws to be provisionally applied. Now that the provisional application under Russian law continues until the moment when the Russian Federation has informed the other contracting parties that it does not intend to

become a party to the relevant treaty, which in this case happened in August 2009, this cannot be different. then that the provisional application of the ECT before that time is not 'inconsistent' with Russian law within the meaning of Art. 45 paragraph 1 ECT. (para. 4.7.9-4.7.21 and 4.7.30)

(xv) The Constitutional Court of the Russian Federation considers it permissible for the government to oblige the Russian Federation to provisionally apply treaty provisions pending ratification, even if these treaty provisions deviate from federal law. (para. 4.7.29)

(xvi) Although the ECT does not fall within the scope of art. Article 23(2) FLIT referred to in the six-month period referred to in the State Duma, this has no consequences for the provisional application of the ECT. This means that the provisional application of the ECT is not limited by the operation of the *limitation clause* of art. 45 paragraph 1 ECT in combination with art. 23 paragraph 2 FLIT. The Russian Federation's appeal to the separation of powers does not hold. (para. 4.7.30-4.7.32)

(b) Are disputes about public law powers arbitrable?

(xvii) A dispute between a foreign investor and the host country is not of a public law nature. However, even if it is assumed that arbitration is only open to civil disputes under Russian law and that the present dispute is not such a civil dispute, international arbitration on the basis of Art. 26 ECT not 'inconsistent' with Russian law. One pursuant to art. 26 ECT appointed arbitral tribunal must decide a dispute submitted to it "in accordance with this Treaty and applicable rules and principles of international law". It is inconceivable that such a form of international arbitration could not coexist with the legal provisions cited by the Russian Federation. The fact that Russian law only opens up the possibility of arbitration for national situations for civil law disputes does not conflict with the fact that the ECT opens international arbitration for the cases regulated therein, in addition to the existing possibilities under national Russian law. The treaty practice of the Russian Federation also shows no reluctance with regard to international arbitration of disputes about investment treaties. (para. 4.7.35-4.7.37) The treaty practice of the Russian Federation also shows no reluctance with regard to international arbitration of disputes about investment treaties. (para. 4.7.35-4.7.37) The treaty practice of the Russian Federation also shows no reluctance with regard to international arbitration of disputes about investment treaties. (para. 4.7.35-4.7.37)

(xviii) Also from the *Explanatory Note* that the government submitted to the State Duma on August 26, 1996 as an explanatory memorandum to the bill to ratify the ECT, in which pursuant to art. 16 paragraph 4 FLIT had to be included "a report on its conformity with the legislation of the Russian Federation", does not show any problem with the arbitration clause of art. 26 ECT or with provisional application of that provision. (para. 4.7.38)

(xix) Based on the foregoing, it cannot be concluded that art. 26 ECT is contrary to Russian law within the meaning of the *limitation clause* , even if the explanation given by the Russian Federation is assumed. (para. 4.7.39)

(xx) Also the art. 25 and 27 of the Russian Code of Civil Procedure allow no other conclusion than that treaties can contain rules that have the effect that disputes other than civil law can be submitted to arbitration. This also applies to art. 1 paragraph 5 of the International Trade Arbitration Act and art. 21 and 23 of the Code of Civil Procedure in Commercial Matters. (para. 4.7.40-4.7.42)

(xxi) Both the LFI 1991 and the LFI 1999 expressly leave open the possibility that a dispute between a foreign investor and the Russian Federation will be settled in a different way than by a Russian court. Art. 9 LFI 1991 points to the possibility of "international means for settling disputes" and art. 10 LFI 1999 on "international arbitration (arbitration tribunal)". Arbitration on the basis of art. 26 ECT falls under both descriptions. Art. 9 LFI 1991 and art. 10 LFI 1999 assume a broad conception of what can be regarded as an investment dispute under these laws and do not limit that possibility to disputes under private law. (para. 4.7.47-5.7.52)

(xxii) The Fundamental Principles Act also stipulates that an international treaty can prescribe that investment disputes between an investor and the then USSR can be resolved by other means than by the Russian court. It does not contain any limitation to private law disputes. (para. 4.7.54)

(xxiii) Even if the LFI 1991 and the LFI 1999 would not provide a basis for submitting a dispute such as that between HVY and the Russian Federation to international investment arbitration in a treaty, it cannot in any event be deduced from these laws that a such form of arbitration is "inconsistent" with Russian law. Nor does this follow from other sources of Russian law. Nor has there been any evidence of a general legal belief in the Russian Federation that international arbitration of international investment disputes is unlawful. (para. 4.7.57)

(xxiv) The conclusion is that art. 26 ECT is not in conflict with Russian law within the meaning of the *limitation clause* . (para. 4.7.58)

(c) Under Russian law, do shareholders have a claim for depreciation of their shares?

(xxv) The assertion that HVY as (former) shareholders of Yukos cannot institute legal proceedings under Russian law in connection with damage caused to the company, is not relevant to the question whether the arbitral tribunal pursuant to art. 26 ECT was competent to adjudicate on the dispute between the parties. (para. 4.7.62)

(xxvi) The arbitral tribunal has interpreted HVY's claim in such a way that they argue that the Russian Federation has expropriated their shares (not explicitly but *de facto*). The arbitral tribunal awarded HVY's claims on this ground. The Court of Appeal endorses this reading of HVY's statements. Based on this, the arbitral tribunal correctly ruled that HVY did not institute legal proceedings for damage caused to the company (Yukos). (para. 4.7.63)

(xxvii) To the extent that it should be held that the ECT allows shareholders' claims that shareholders cannot bring under Russian law, it does not follow that the ECT is inconsistent (within the meaning of the *limitation clause*) with Russian law on this point. straight. (para. 4.7.64)

(b) Relevant treaty provisions

5.2.2 Art. 26 ECT (“Settlement of Disputes between an Investor and a Contracting Party”) reads, in so far as relevant, as follows:

1. Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably .

2. If such disputes can not be settled according to the provisions of paragraph 1 within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

b) in accordance with any applicable, previously agreed dispute settlement procedure; or

c) in accordance with the following paragraphs of this Article.

3. a) Subject only to subparagraphs b) and c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

b) (…)

c) (…)

4. In the event that an Investor chooses to submit the dispute for resolution under subparagraph 2 c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

a) (…)

b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as “UNCITRAL”); or

c) (…)

5. (…)

6. A tribunal established under paragraph 4 shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

7. (…)

8. (…).

from art. 45 ECT ("Provisional application"), paragraphs 1 and 2 read as follows:

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

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

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

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

(c) Assessment of the complaints

Has the Russian Federation unambiguously and voluntarily consented to arbitration?

5.2.3 Parts 2.2 and 2.8 argue that for the jurisdiction of the arbitral tribunal it is not sufficient that art. 26 ECT contains an arbitration clause. The arbitral tribunal could only have jurisdiction if the Russian Federation has clearly, unambiguously and voluntarily agreed to arbitration. The parts complain that this requirement is not met in the present case.

5.2.4 These complaints cannot lead to cassation. The Supreme Court is not required to provide reasons for its decision. In assessing these complaints, it is not necessary to answer questions that are important for the unity or development of the law (see art. 81 paragraph 1 RO).

Should the court take into account new jurisdictional arguments?

5.2.5 Part 2.3 addresses various complaints against the judgment of the Court of Appeal (see above in 5.2.1 under (i)-(iv)) that on the basis of arguments presented by HVY for the first time in the setting aside proceedings, it may rule that the arbitral tribunal was competent to to take cognizance of HVY's claims, although the arbitral tribunal itself has not based its jurisdiction on them.

5.2.6 These complaints cannot lead to cassation because there is no interest in them. After all, the judgment of the Court of Appeal on the jurisdiction of the arbitral tribunal is not only based on the jurisdictional argument put forward by HVY for the first time in the setting aside proceedings and the accompanying interpretation of the *limitation clause* (para. 4.5.8-4.6.2 of the final judgment).), but also – superfluously – to the position adopted by the court of the Russian Federation on the interpretation of the *limitation clause* (para. 4.7.1-4.7.58 of the final judgment). Below in 5.2.11-5.2.20 it will become apparent that the complaints against that superfluous judgment do not succeed.

5.2.7 Nor are the complaints substantively effective. To this end, it is considered as follows.

Pursuant to art. 1052 paragraph 1 (old) Rv, the arbitral tribunal itself may judge its jurisdiction. However, if the arbitral tribunal deems it competent, that judgment is not final. The final word on the jurisdiction of the arbitrators rests with the judge. [14] This is related to the fundamental nature of the right of access to justice. [15]

If on the basis of art. 1065, paragraph 1, opening words and under a, (old) Rv it is claimed that the arbitral award be quashed because a valid arbitration agreement is lacking, the court must assess whether a valid arbitration agreement exists. That assessment should be made without restraint, [16]and is not limited to whether the arbitrators have properly assumed their jurisdiction. The public interest in an effectively functioning arbitral procedure means that the judge will not annul the arbitral decision on the sole ground that the arbitral tribunal has incorrectly motivated the decision that it has jurisdiction to hear the dispute. The court is therefore free to rule on grounds other than those used by the arbitral tribunal that it has rightly considered itself competent to take cognizance of the dispute. After all, a different view would lead to a judge who finds that the grounds used by the arbitral tribunal are insufficient for the jurisdiction assumed by the arbitral tribunal, but finds that the arbitral tribunal does have jurisdiction on other grounds, should nevertheless annul the arbitral award. The consequence of this would be that, although there is a valid arbitration agreement, the dispute must be decided by the ordinary court, unless the parties agree otherwise (art. 1067 (old) DCCP). This is not in line with the apparent intention of the parties to submit their dispute not to government court but to arbitration.

Explanation of the limitation clause

5.2.8 Part 2.4 is directed against the interpretation of the *limitation clause* given by the Court of Appeal (para. 4.5.8-4.6.1 of the final judgment, briefly summarized above in 5.2.1 under (v)-(x)). Parts 2.5 and 2.6 are directed against the superfluous judgments given by the Court of Appeal on the basis of the interpretation of the *limitation clause* advocated by the Russian Federation and endorsed by the Court (para. 4.7.1-4.7.58 of the final judgment, above). in 5.2.1 under (xii)-(xxiv) briefly shown).

According to parts 2.4 and 2.5, the *limitation clause* concerns whether the provisional application of individual treaty provisions in a specific case is contrary to national laws and regulations. The parts agree with the *limitation clause imposed* by the courtexplanation, which means (see para. 5.33 of the judgment of the court) that provisional application of the possibility of arbitration as regulated in art. 26 ECT is not only incompatible with Russian law if what follows from that provision is prohibited by national law, but also if arbitration in a dispute such as the present has no legal basis or does not fit into the legal system, or is incompatible with the principles laid down in or known from the legislation. According to the parts, the court rightly considered that a conflict with Russian law can also exist if that law itself does not provide for the possibility of arbitration as provided for in art. 26 ECTS. According to the parts, the Court should therefore not have assessed whether Art.

5.2.9 The interpretation of the provisions of the ECT must be based on the criteria of art. 31-33 CAC. Pursuant to art. 31 paragraph 1 CAC, a treaty must be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in light of the object and purpose of the treaty. From art. 31 paragraph 3, opening words and under b, CAC, it follows that, in addition to the context, account must be taken of any later use in the application of the treaty that has resulted in agreement between the contracting parties on the interpretation of the treaty, which means that the prevailing opinion in the case law and literature of the treaty countries constitutes a primary means of interpretation in the interpretation of that treaty (hereinafter: state practice). [17]Additional means of explanation can be invoked to clarify the meaning resulting from the application of Art. 31 CCA to confirm or determine the meaning if the interpretation is made in accordance with art. 31 CAC, leaves the meaning ambiguous or obscure, or leads to a result that is clearly incongruous or unreasonable (art. 32 CAC). With due observance of the provisions of art. 32 CAC, the preparatory work (*travaux préparatoires*) of that treaty can be invoked for the interpretation of a treaty. [18]

5.2.10 The interpretation given by the Court of Appeal to the *limitation clause* (para. 4.5.48, first sentence, of the final judgment, see above in 5.2.1 under (ix)) appears to the Supreme Court to be correct for the time being, on the basis of the Court's to that end in ref. 4.5.9-4.5.47 arguments used (see above in 5.2.1 under (v)-(viii)). However, also in view of the divergent interpretations that the arbitral tribunal, the court and the court of appeal have given to the *limitation clause* in this case , it cannot be assumed that this interpretation is an *acte clair* in all respects . If necessary, the Supreme Court should submit to the Court of Justice of the European Union how the *limitation clause*must be explained. Contrary to what part 2.7 argues, however, there is no need

to do so in this case, because the answer to the question whether the interpretation accepted by the Court of Appeal is correct, is not decisive for the decision in cassation. The complaints cannot lead to cassation on other grounds. To this end, the Supreme Court considers the following.

5.2.11 The court has in para. 4.7.5-4.7.32 of the final judgment (see above in 5.2.1 under (xiii)-(xvi)) considered that Russian constitutional law and federal law do not preclude provisional application of treaties. in r. 4.7.5 and 4.7.47-4.7.52 of the final judgment (see above in 5.2.1 under (xiii) and (xxi)), the Court of Appeal has considered that Russian law in art. 9 LFI 1991 and art. 10 LFI 1999 expressly enables international arbitration on investment disputes and that both laws confirm that a dispute such as the present is arbitralable. The Court of Appeal therefore not only – in accordance with its interpretation of the *limitation clause*– assessed whether provisional application of art. 26 ECT is contrary to Russian law and whether art. 26 ECT and Russian law can simultaneously apply, but also – superfluously, in accordance with the interpretation of the *limitation clause* advocated by the Russian Federation – whether Russian law itself offers a basis for a form of dispute settlement as in art. 26 ECT is foreseen and as at issue in this case.

5.2.12 Part 2.5 complains, among other things, that the Court of Appeal applied "a legally incorrect *petitio principii* " because it ruled that Russian law provides for the possibility of international arbitration in a dispute such as the one at issue here, via art. 9 LFI 1991 and art. 10 LFI 1999 based on art. 26 ECT itself, while the question is whether the existing internal legal order – the Supreme Court understands: disregarding the ECT – provides for such arbitration. This complaint fails because it is based on an interpretation of the *limitation clause* which in any event cannot be correct to that extent. The following is the reason for this.

5.2.13 The interpretation of the words "not inconsistent with its constitution, laws or regulations" in the *limitation clause* , as presented in 5.2.12 above, is not in accordance with its wording. The text of the *limitation clause* does not provide any points of reference for the interpretation which means that for the provisional application of art. 26 ECT is not a place if Russian law does not itself provide for the possibility of arbitration as provided for in art. 26 ECTS. The terms "not inconsistent with" used indicate that there should be no conflict between the relevant provision of the ECT and national law, and not that the provision of the ECT must be consistent with a similar provision in national law.

5.2.14 The explanation advocated by the Russian Federation also does not arise from the context of the *limitation clause* and is not consistent with the object and purpose of the ECT.

The preamble to the ECT includes:

"Wishing to implement the basic concept of the European Energy Charter initiative which is to catalysis economic growth by means of measures to liberalize investment and trade in energy."

Art. 2 ECT ("Purpose of the Treaty") reads as follows:

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

In the European Energy Charter 1991, to which the preamble and art. 2 ECT, is stated under 4. ("Promotion and protection of investments"):

"In order to promote the international flow of investments, the signatories will at national level provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade.

They affirm that it is important for the signatory States to negotiate and ratify legally binding agreements on promotion and protection of investments which ensure a high level of legal security and enable the use of investment risk guarantee schemes."

Art. 10 paragraph 1 ECT reads as follows:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable and transparent conditions for Investors of other Contracting Parties to Make Investments in its Area. (…)

The ECT, in particular Part III of the ECT ("Investment Promotion and Protection"), also contains various provisions aimed at encouraging foreign investment and protecting investors and their investments. All this shows that an important objective of the ECT is to promote investment in the energy sector, including by encouraging and creating stable, fair, favorable and transparent investment conditions for investors from other Contracting States. Also art. 26 ECT, which provides a mechanism for investors to enforce the rights deriving from the ECT, should be viewed in that light.

The provisional application of the ECT is apparently intended to allow these favorable investment conditions to take effect as soon as possible from the signing of the ECT. This is not compatible with an interpretation of the *limitation clause* on the basis of which an investor cannot invoke the protection provided for in the ECT if the law of the signatory state does not also provide for this itself. This would mean that the in art. 45 paragraph 1 ECT provisional application of provisions of the ECT after all have no practical significance.

5.2.15 The explanation of the *limitation clause* presented in 5.2.12, as advocated by the Russian Federation , also finds no support in state practice. In order to establish that there is a later use in the application of the treaty that has resulted in agreement between the contracting parties on this interpretation, it is necessary that all contracting states have, expressly or otherwise, that interpretation in the application of the treaty concerned. accepted.

The Russian Federation has relied on statements by parties to or signatories to the ECT. It invoked, inter alia, the *1994 EU Joint Statement* [19] and a statement of the European Commission of 21 September 1994 [20] (see ground 4.5.29 of the final judgment). It has not been shown that the other contracting states support the interpretation of the *limitation clause* according to the Russian Federation from the *1994 EU Joint Statement* . Moreover, this *Joint Statement* and the said statement of the European Commission were made prior to the establishment of the ECT, so that no later use can be inferred from it.

The declaration of the European Council of 13 July 1998 [21] quoted by the Russian Federation , however it must be understood, has not shown that all the Contracting States support that declaration.

Nor can the statements regarding the preparation and approval of the authentic Russian text of the ECT be regarded as a subsequent use within the meaning of Art. 31 paragraph 3, under b, CAC. The same applies to the comments made during or after the negotiation process by (officials of) some other countries, such as the Netherlands, Finland and the United Kingdom.

Nor has there been any evidence of a later use in the application of the ECT, as a result of which agreement has been reached between the contracting parties on the explanation defended by the Russian Federation.

5.2.16 The conclusion is that the interpretation that the Russian Federation gives to the *limitation clause* , insofar as that interpretation means that the national law of a signatory state itself must provide for the treaty arrangement whose provisional application is at issue, is not in accordance with the wording thereof, does not arise from the context, is not consistent with the object and purpose of the ECT, nor is it supported by state practice. That to the *limitation clause*in any event to the extent that the explanation advocated by the Russian Federation cannot be given, it is not ambiguous or obscure and does not lead to a result that is clearly incongruous or unreasonable. There is therefore no reason to apply the additional rules of interpretation of art. 32 CAC, including consultation of the *travaux préparatoires* .

In view of what has been considered above, there can be no reasonable doubt about the opinion that the interpretation of the *limitation clause* advocated by the Russian Federation is incorrect in any event to that extent. For the submission of preliminary questions on the basis of art. 267, paragraph 3 TFEU, as advocated in section 2.7, there is therefore no reason to do so.

5.2.17 The judgment of the Court of Appeal that Russian law expressly allows arbitration in a dispute such as the present one rests for the rest on its interpretation of Russian law. Pursuant to the provisions of art. 79 paragraph 1, opening words and under b, RO cannot be complained in cassation.

5.2.18 Insofar as part 2.6 opposes the considerations of the Court of Appeal with substantiation complaints about the question whether Russian law provides a basis for a form of dispute settlement as in art. 26 ECT, these complaints cannot be assessed without also taking into account the correctness of the judgment of the Court of Appeal regarding the content and interpretation of that right. This means that these motivational complaints also run counter to art. 79 paragraph 1, opening words and under b, RO.

5.2.19 The complaint in part 2.6.5 that the Court of Appeal should not have taken into account HVY's defenses regarding the scope of application of the LFI 1991 and the LFI 1999, which were only put forward on appeal after the exchange of pleadings, fails. After all, the Court of Appeal must apply foreign law ex officio, and in its judgment in this regard was not bound by the arguments put forward by the parties. Moreover, the HVY was free to further elaborate and specify in deed their position already taken with regard to the applicability and interpretation of these laws.

5.2.20 Since the complaints in parts 2.5 and 2.6 against the superfluous judgments of the court based on the interpretation of the *limitation clause* advocated by the Russian Federation cannot lead to cassation, there is no interest in part 2.4. After all, these judgments cannot affect the judgment of the Court of Appeal that the Russian Federation is bound by the provisions of art. 26 ECT included arbitration clause, independently carry.

This means that part 2.4 cannot lead to cassation either.

(d) Conclusion

5.2.21 The conclusion is that the complaints in part 2 cannot lead to cassation.

part 3

Have HVY made an Investment and are they an Investor within the meaning of art. 1 and 26 ECTS?

(a) Representation of the Court's considerations

5.3.1 In short, and insofar as it is relevant for the assessment of the part, the Court of Appeal has considered the following in the final judgment.

The standards to be observed when interpreting the ECT

(i) The provisions of the ECT must be interpreted according to the standards of Art. 31 and 32 WVV. (para. 4.2.1-4.2.5)

Investment/Investor, art. 1 paragraphs 6 and 7 ECT

(a) Introduction

(ii) Art. 1 paragraphs 6 and 7 ECT provide a definition of the terms 'Investment ' (hereinafter also referred to as: Investment) and 'Investor ' (hereinafter also referred to as: Investor). According to the Russian Federation, the arbitral tribunal misinterpreted these terms with the result that it wrongly declared itself competent to hear HVY's claim. (para. 5.1.1)

(b) (…)

(c) Position of the Russian Federation and the Court's Premises

(iii) The position of the Russian Federation in this setting aside proceedings is that the arbitral tribunal had no jurisdiction because HVY and their shares in Yukos are not protected by the ECT, so the arbitral awards must be set aside pursuant to Art. 1065 paragraph 1, under a, (old) Rv. HVY are, according to the Russian Federation, fake foreign investors with a fake foreign investment. (para. 5.1.3)

(iv) The starting point for the interpretation of art. 1 paragraphs 6 and 7 ECT constitutes the text of these provisions and the ordinary meaning to which they are worded. It is not in dispute that HVY are companies that are "organized in accordance with the law applicable in that Contracting Party". This means that - from a textual point of view - the requirements laid down in art. 1 paragraph 7 ECT proposes to an Investor. Textually speaking, the definition of Investment as referred to in art. 1 paragraph 6 ECT. The article paragraph provides a non-exhaustive list of 'assets ', which also includes shares ('shares'; Article 1(6)(b) ECT). The Yukos shares held by HVY can therefore be regarded as an Investment within the meaning of the ECT. Finally, from a textual point of view, the requirement as referred to in art. 26 ECT that there is a dispute between a Contracting Party (the Russian Federation) and investors from another Contracting Party (HVY, companies under the law of Cyprus and Isle of Man) "relating to an Investment of the latter in the Area of the Former". (para. 5.1.6)

(d) Foreign investment, foreign investor

(v) The ECT has chosen "the law of the country under the laws of which the Investor is organized" to determine an Investor's nationality. The drafters of the ECT could have opted for additional conditions in art. 1 paragraph 7 ECT (as has been done in other investment treaties), on the basis of which it could have been established whether HVY have a real link with Cyprus or the Isle of Man respectively. They have not done this. (para. 5.1.7.2)

(vi) The ECT determines exactly when there is an Investor and an Investment and when an investment dispute has an international character that falls within the scope of art. 26 ECTS. Nor from the context of art. 1 and 26 ECT, nor does it follow from the purpose of the ECT that the drafters of the treaty intended to impose further requirements on the foreign character of the Investment or Investor, or the international character of the dispute. (para. 5.1.7.3)

(vi) Art. 1 paragraph 6 ECT states that Investment is understood to mean any form of asset owned or controlled by an Investor. It is established that the Yukos shares are held by HVY. It is therefore not necessary to determine who controls the shares. The *Understanding* in art. 1 paragraph 6 ECT, in which it is specified in more detail how to determine whether an Investment in one Contracting State is directly or indirectly controlled by an Investor from another Contracting State, is also irrelevant. (para. 5.1.7.4)

(e) Control over the investing company (U-turn)

(viii) From the text of art. 17 ECT (*denial of benefits clause*) does not follow that investments via the U-turn construction (as HVY's investments should be classified according to the Russian Federation) fall outside the protection of the ECT. Art. 17 ECT gives contracting states the right to deny to a precisely defined category of investors the protection of part of the treaty, i.e. investors who are established on formal grounds in a contracting state, but who are materially predominantly linked to a non-contracting state . This circumstance does not mean that Art. 1 ECT must therefore be understood as meaning that an exception must be read for a different category of investors, namely sham companies and/or investors controlled by nationals of the contracting state in which they make investments. (para. 5.1.8.4)

(ix) The arbitral awards confirming (to a certain extent) that U-turn constructions do not deserve protection do not provide sufficient leads to assume that there is an international legal principle that investment treaties do not (should) protect U-turn constructions. (para. 5.1.8.9)

(x) It can be deduced from the arbitral case law cited by HVY that there is no generally accepted legal principle that investment treaties do not provide protection to companies that are wholly controlled by nationals of the host country. (para. 5.1.8.10)

(xi) The state practice referred to by the Russian Federation is given little weight, as the correct interpretation of the ECT does not mean that U-turn investments are excluded. In addition, the circumstances to which the Russian Federation refers do not comply with the provisions of Art. 31 paragraph 3(b) CAC, because they do not

refer to state practice in applying the ECT, but to choices made by states when concluding new treaties. (para. 5.1.8.11)

(f) Economic Contribution to Host Country

(xii) There may be an unwritten rule of law governing an investment within the meaning of the ICSID Convention [22]can only exist if the investor makes an economic contribution to the host country. This does not imply the existence of an internationally recognized legal principle of investment law, which means that any investment treaty provides protection only to investments that make an economic contribution to the host country, regardless of whether the treaty contains a definition of the term investment. Although the Russian Federation has referred to an arbitral award in which the existence of such a legal principle was accepted, that is not sufficient to demonstrate the existence of a legal principle in the sense it intended. The Russian Federation further states that there are arbitral case law and recent treaties in which it is determined on the basis of objective criteria whether there is an international investment. However, it has not made it plausible that such criteria also apply to an Investment within the meaning of art. 1 paragraph 6 ECT. (para. 5.1.9.4)

(xiii) The drafters of the treaty had in art. 1 paragraph 6 ECT can define the term 'Investment' more narrowly than they have done. However, it appears from the wording of the ECT that only an 'asset based' definition, i.e. a non-exhaustive list of assets, determines whether there is an Investment within the meaning of the ECT. Against this background, the circumstance that art. 1 paragraph 6 ECT refers to an Investor who "makes" an Investment and (in the *Understanding*) to an Investment that "is made", insufficient guidance to read in this paragraph the requirement that the foreign investor must make an economic contribution to the host country. (para. 5.1.9.5)

(b) Relevant treaty provisions

5.3.2 Art. 1 paragraphs 6 and 7 ECT read as follows:

6. "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

d) Intellectual Property;

e) Returns;

f) any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

7. "Investor" means:

a) with respect to a Contracting Party:

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

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

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

(c) Assessment of the complaints

Should further requirements be imposed on being an Investor and Investor within the meaning of the ECT?

5.3.3 According to part 3.2.2, the explanation given by the Court of Appeal in para. 5.1.5-5.1.8 of the final judgment has given to the terms 'Investment' and 'Investor' in violation of art. 31 paragraph 1 CAC. The Court of Appeal wrongly based its explanation on a purely grammatical explanation of only part of the text of the ECT, namely the definitions of art. 1 paragraphs 6 and 7 ECT, and have attached little weight to the on the basis of art. 31 paragraph 3, under b, CAC, later state practice to be taken into account. The Court of Appeal therefore wrongly referred to the four by art. 31 paragraph 1 WVV not as equivalent and applied in their mutual relationship, according to the section.

Subsection 3.2.3 argues in essence that when interpreting the terms 'Investment' and 'Investor', the Court of Appeal misjudged that for the assessment of whether a company is protected as an Investor under the ECT, it is not sufficient that it has been incorporated in accordance with the law of a Contracting State other than the host country and that it is the formal owner of shares in a company in that host country. If the ownership and control (Article 1(6) ECT refers to "owned or controlled") actually lie with nationals of the host country, that company is not a foreign investor and that company therefore does not fall under the protection of the ECT, the part said. According to the part, the Court of Appeal misunderstood the ordinary meaning of the terms in the ECT.

Subsection 3.2.3 continues that the Court of Appeal wrongly assigned no or insufficient significance to the object and purpose of the ECT, namely to promote and protect foreign investments.

In addition, the court has interpreted the context of art. 1 paragraphs 6 and 7 ECT misunderstood, according to the section. The coherence of these provisions with the *Understanding* in art. 1 paragraph 6 ECT and art. According to the complaint, 10 paragraphs 1 and 3, 13, 17 and 26 ECT makes it clear that the ECT only applies if an investor of one contracting party invests in the territory of another contracting party.

The section also complains that the Court of Appeal erroneously ruled, at least without sufficient motivation, that the state practice invoked by the Russian Federation has little weight. The Court of Appeal's judgment is also incorrect that this state practice does not relate to the (interpretation and) application of the ECT, because it concerns choices made afterwards when concluding new treaties.

Finally, the part complains that the court has disregarded clear rules and fundamental principles of international law and thereby acted contrary to art. 31 paragraph 3, under c, CAC. In this context, the section points to the principles that international investment treaties only protect international – and therefore not domestic – investments and offer protection to actual investors and not to those who are only investors on paper.

Part 3.3, which is directed against para. 5.1.9.1-5.1.9.5 of the final judgment, complains that the court wrongly rejected the position of the Russian Federation that HVY's shares in Yukos do not qualify as an Investment within the meaning of Art. 1 paragraph 6 ECT can be regarded as because HVY have not made an actual economic contribution to the Russian Federation. It is complained that the court wrongly assumed a purely grammatical interpretation and that the court wrongly considered that the Russian Federation failed to demonstrate the existence of such an internationally recognized legal principle of investment law, because the court must establish the existence of a legal principle in the context of his obligation to interpret a treaty (if necessary ex officio). According to the part, the Court of Appeal wrongly considered that the requirement of the economic contribution only applies to an investment as referred to in the ICSID Convention. In that regard, the section refers, among other things, to the requirements set in the case*Salini Costruttori SpA/Morocco* [23] (hereinafter: *Salini*).

5.3.4 The parts, which lend themselves to joint treatment, raise a question of interpretation of the provisions of the ECT. That question must be answered on the basis of the criteria of art. 31-33 CC, as explained above in 5.2.9. In addition, pursuant to art. 31(4) CAC a term in the ECT must be given special meaning if it is established that this was the intention of the parties. [24]

5.3.5 Art. 1 ECT is entitled 'Definitions' and contains definitions in paragraphs 6 and 7 of the terms 'Investment' ('Investment') and 'Investor' ('Investor'). From the text of art. 1 paragraphs 6 and 7 ECT it follows that the parties to the ECT have assigned a special meaning to these terms.

Art. 1 paragraph 7 ECT notes as an Investor to companies or other organizations that are established in accordance with the legislation applicable in the territory of a contracting party ("organized in accordance with the law applicable in that Contracting Party"). [25] HVY are companies governed by the law of the contracting parties Cyprus and the Isle of Man.

Art. 1(6), first subparagraph, ECT provides that an Investment is any form of asset ('asset') owned or controlled by an Investor directly or indirectly, after which subparagraphs (a) to (f) list follows from forms of assets. In order to qualify as an Investment within the meaning of this provision, two cumulative conditions must be met: (i) it must be a form of asset that an Investor owns or has direct or indirect control over, and ((ii) those assets must include at least one of the items referred to in points (a) to (f) of that provision. [26]HVY hold, or at least held, shares in the Russian Federation-based oil company Yukos. Shares ('shares') in a company or enterprise are included in art. 1(6), first subparagraph, point (b), ECT.

5.3.6 It follows from what has been considered in 5.3.5 above that HVY meet the definition of Investor as laid down in art. 1 paragraph 7 ECT, and that the shares they hold meet the definition of Investment as laid down in the first paragraph of Art. 1(6)(b) ECT.

Not all investments that meet the requirements in the first paragraph of Art. 1 paragraph 6 of the ECT definition fall within the scope of the ECT. For this purpose, the Investment must be related to an economic activity in the energy sector within the meaning of the third paragraph of art. 1 paragraph 6 ECT. [27] The shares held by HVY in the oil company Yukos relate to an economic activity in the energy sector. This is not in dispute between the parties. Therefore, the requirements set out in art. 1(6), third subparagraph, ECT.

5.3.7 The wording of art. 1(6)(b) and 7 ECT point out that for the purpose of assessing whether a company is protected as an Investor under the ECT, it is sufficient that it is incorporated under the law of a Contracting State other than the host country and that it formally entitled to shares in a company in that host country. The contracting parties in art. 1 paragraphs 6 and 7 ECT has been assigned a special meaning by the descriptions of these terms included therein. Therefore, in this case, the interpretation of the term 'Investment' in Art. 1(6)(b) ECT does not give meaning to the requirements set out in *Salini* have been formulated to determine whether there is an investment within the meaning of the ICSID Convention, which, unlike the ECT, does not itself determine when an international investment is involved.

5.3.8 The explanation referred to above in 5.3.5-5.3.7 in accordance with the wording of art. 1 paragraphs 6 and 7 ECT is consistent with the context of these provisions and the object and purpose of the ECT.

Concerning the context, the following is important.

Part 3.2.3 invokes the *Understanding* in art. 1 paragraph 6 ECT as included in the Final Act of the European Energy Charter Conference [28] . This *Understanding* relates to the criterion of 'control'. HVY are entitled to the Yukos shares ('owned'), so that this *Understanding* when interpreting art. 1 paragraph 6 under (b) ECT does not play a role.

Art. 10 paragraph 3 and art. Although ECT does make a distinction between the own Investors of a contracting party and Investors of other contracting parties or third states, there is no indication that additional requirements must be imposed on the international character of an Investment or Investor.

Art. 17 ECT (*denial of benefits clause*) gives contracting states the right to deny the protection of Part III of the ECT to investors who are formally established in a contracting state, but who are materially predominantly linked to a non-contracting state. This provision allows the States Parties to limit the scope of application of the

ECT and thereby confirms the broad scope of application of the ECT if (as is the case with the Russian Federation) Art. 17 ECT no application is given.

Not only the context, but also the aim of the ECT – which (also) includes the promotion of international cooperation in the field of energy and the stimulation and protection of international investments (see also above in 5.2.14) – indicates that no other requirements must be imposed on the foreign character of an Investment than the requirements arising from the wording of art. 1 paragraphs 6 and 7 ECT. This goal is served by broad, easily applicable and predictable definitions of the terms 'Investment' and 'Investor'.

5.3.9 Furthermore, account should be taken of any subsequent use in the application of the treaty that has led to an agreement of the parties on the interpretation of the treaty (Article 31(3)(b) CAC).

The fact that a number of contracting parties to the ECT have excluded investments via a U-turn construction from the scope of application in subsequent investment treaties does not affect the application of the ECT. This means that on the basis of art. 31 paragraph 3 under b CAC are therefore not taken into account. The same applies to the proposals for the modernization of the ECT, as these proposals do not concern the application of the current ECT, but a possible new, amended treaty. Nor has there been any evidence of a later use in the application of the ECT, as a result of which agreement has been reached between the contracting parties about an interpretation other than that which follows from the text, context, object and purpose of the ECT.

5.3.10 Furthermore, account must be taken of any relevant rule of international law that can be applied to the relations between the parties (Article 31(3)(c) CAC). Also general legal principles as referred to in art. 38(1)(c) of the Statute of the International Court of Justice may be relevant.

No rule of international law can be inferred from arbitration case law relating to treaties other than the ECT that can be applied to the relations between the parties. Moreover, this case law is not unambiguous. For that reason alone, it is not necessary to take into account the statements of the Russian Federation about internationally recognized legal principles of investment law which, in its view, can be derived from that case law. No other sources have been found to indicate that internationally recognized principles of international investment law exist, according to which any investment treaty – including the ECT – would only protect investments that make an economic contribution to the host country, regardless of whether the treaty contains a definition of the term 'investment',

5.3.11 The interpretation given by the court to art. 1 para. 6(b) and 7 ECT are correct in the light of the foregoing. This means that the requirement as laid down in art. 26 ECT that there must be a dispute between a Contracting Party (the Russian Federation) and an Investor from another Contracting Party (HVY) "relating to an Investment of the latter in the Area of the Former".

5.3.12 It is superfluous to take into account that the *travaux préparatoires* of art. 1 paragraphs 6 and 7 ECT confirm this explanation. It is apparent from this history that the parties to the ECT have deliberately opted for a broad meaning of the terms 'Investor' and 'Investment' and, despite proposals to the contrary, have refrained from including additional criteria.

5.3.13 The complaints in parts 3.2.2, 3.2.3 and 3.3 are inconsistent with the foregoing.

Is there an 'acte clair'?

5.3.14 In view of what has been considered above, there is no reasonable doubt about the interpretation of the ECT insofar as it is relevant to the decisions set out above. Contrary to what part 3.5 advocates, the Supreme Court therefore sees no need to refer questions for a preliminary ruling as referred to in art. 267 paragraph 3 TFEU.

Other complaints

5.3.15 The other complaints in part 3 cannot lead to cassation either. The Supreme Court is not required to provide reasons for its decision. In assessing these complaints, it is not necessary to answer questions that are important for the unity or development of the law (see art. 81 paragraph 1 RO).

(d) Conclusion

5.3.16 The conclusion is that the complaints in part 3 cannot lead to cassation.

part 4

Do the alleged illegal acts of HVY and Khodorkovsky et al have consequences for the voidability of the arbitral awards?

(a) Representation of the Court's considerations

5.4.1 In so far as it is relevant for the assessment of the part, the Court of Appeal has considered the following in the final judgment.

(i) There is an international legal principle that international investments made in violation of the law of the host country do not deserve protection. This also applies if the relevant investment treaty does not stipulate this in so many words. In order to lose the protection of an investment treaty, it has to be cases where "the illegality affects the "making", ie arises when initiating the investment itself and not just when implementing and/or operating it". A distinction must be made between "(1) legality as at the initiation of the investment ("made") and (2) legality during the performance of the investment". Illegal actions by HVY in the period after HVY have made their investment in Yukos cannot therefore lead to a lack of jurisdiction of the arbitral tribunal. (para. 5.1.11.2)

(ii) The ECT does not fall into the category of investment treaties in which the definition of the term 'investment' includes a phrase that the investment must have been made "in accordance with the law", or words to that effect. With regard to a treaty that does not contain a legality requirement, the arbitral law is divided on the question of what consequence should be attached if an investor acts 'illegally' when making the investment. (para. 5.1.11.3-5.1.11.4)

(iii) The Russian Federation has not made it sufficiently plausible that a generally accepted legal principle exists that an arbitral tribunal must (always) declare itself incompetent in the case of an 'illegal' investment. under art. 1 paragraph 6 ECT does not include a legality requirement. Also for access to arbitration as referred to in art. 26 ECT, the text of the ECT contains no restrictions on this point. In this case, the ordinary meaning of the wording of Art. 1 paragraph 7 ECT. This means that the arbitral tribunal does not have jurisdiction if it is shown that illegal acts have taken place at the time of or when making the investment. In the context of the present ground for setting aside (art. 1065 paragraph 1, under a, (old) Rv) not relevant. (para. 5.1.11.5)

(iv) Even if it were to be assumed that illegal acts at the time of making the investment under the ECT do lead to the lack of jurisdiction of the arbitral tribunal, this does not help the Russian Federation. The arbitral tribunal correctly ruled in no. 1283 of the *final awards* that the alleged conduct of Khodorkovsky et al. is too distantly related to the transactions in which HVY itself acquired their shares in Yukos. The statement of the Russian Federation that the jurisdiction of the arbitral tribunal precludes the fact that HVY were directly involved in the illegal acquisition of the Yukos shares in 1995/1996 therefore does not hold. (para. 5.1.11.6-5.1.11.7)

(v) Even if the shares that HVY acquired in 1999-2001 were acquired by other persons/companies in 1995/1996 through illegal acts, this does not mean that HVY itself was acting illegally at the time of their investment. . There is insufficient connection between the (alleged) illegalities in 1995/1996 and the making of the investment by HVY. This will not change if the – possible – involvement of HVY in the payment of bribes is taken into account. The statements made by the Russian Federation in this regard do not show a sufficient connection between the investment of HVY (more particularly of YUL) and the alleged bribery. In any case, there is no such obvious illegality that it must lead to the arbitral tribunal's lack of jurisdiction. (para. 5.1.11.8)

(vi) Possible illegal acts by Khodorkovsky et al. at the time of the privatization of Yukos is too distantly related to the investment by HVY. (para. 5.1.11.9)

(vii) The Russian Federation argues under the heading of 'unclean hands' that the enforcement of the arbitral awards will lead to a violation of public order with regard to fraud, corruption and other serious illegalities. (para. 9.8.1)

(viii) What the arbitral tribunal has considered in that regard, as well as the allegations against it by the Russian Federation, is stated in para. 5.1.11.1-5.1.11.9 discussed and rejected respectively. (para. 9.8.5)

(ix) In addition, the following is considered. The arbitral tribunal ruled that the alleged illegalities are not relevant for the award of HVY's claims in the arbitration because (i) only an illegality in making the investment is relevant for protection under the ECT, (ii) the alleged illegalities by parties other than HVY and (iii) HVY have legally acquired the shares in Yukos. Even if it must be assumed that the alleged illegalities have taken place and that they affect public order, it is not clear why this judgment of the arbitral tribunal would be contrary to public order. (para. 9.8.7)

(x) The complaint that the arbitral tribunal erroneously ruled that HVY are "separate" from Khodorkovsky et al and that they are not "under the control" of the trustees in Guernsey and Jersey, has no factual basis. In this regard, the arbitral tribunal only considered that a number of the alleged illegal behaviors took place before HVY became a shareholder and that those behaviors were consequently performed by “others”, such as Bank Menatep or Khodorkovsky et al. The arbitral tribunal therefore decided no more than that Bank Menatep and Khodorkovsky et al. are (legal) persons other than HVY and that no conduct can be invoked against HVY that was performed by others before HVY became a shareholder. That judgment, insofar as it could be tested in these setting aside proceedings, is correct and has not been contested by the Russian Federation, or in any case insufficiently motivated. (para. 9.8.8)

(xi) At the time of the acts of the Russian Federation qualified as expropriation by the arbitral tribunal, Khodorkovsky was *chairman* and – indirectly or indirectly – shareholder of Yukos and the arbitral tribunal ruled that by expropriating Yukos *de facto* , the Russian Federation also intended Khodorkovsky to meet. That judgment is not incompatible with the judgment that HVY and Khodorkovsky are different legal entities. There has therefore been no evidence of an improper, incomplete and superficial assessment of the evidence present in the file by the arbitral tribunal. (para. 9.8.9)

(b) Assessment of the complaints

Is there a sufficient connection between the alleged illegal act and the investment by HVY?

5.4.2 Part 4.3.1 complains that in answering the question of whether the shares were legally acquired, the Court of Appeal should not have limited itself to an assessment of the transactions through which HVY acquired the shares in Yukos, but also the involvement of Khodorkovsky et al. in the acquisition of the shares in 1995/1996 should have been included in the assessment. The judgment of the Court of Appeal is based on an incorrect legal conception of the scope of the ECT and is in any case insufficiently substantiated, according to the part.

5.4.3 The legal complaint in part 4.3.1 is based on an incorrect reading of the judgment of the Court of Appeal and cannot therefore lead to cassation because of a lack of factual basis.

After all, the Court of Appeal (in grounds 5.1.11.7-5.1.11.9 of the final judgment) took into account the transactions in 1995/1996 that preceded the acquisition of the shares by HVY in 1999-2001. It is assumed here that the shares were acquired in 1995/1996 by other persons or companies through illegal acts. The Court of Appeal has therefore not limited itself to an assessment of the transactions through which HVY acquired the shares in Yukos.

5.4.4 The Court of Appeal concluded that there is insufficient connection between the alleged illegal act in 1995/1996 and the making of the investment by HVY. This judgment is based on a consideration and assessment of the facts put forward by the Russian Federation in this regard and assumed by the Court of

Appeal to be correct. That assessment and assessment are reserved for the Court of Appeal as judge who judges the facts. The judgment is not incomprehensible and is sufficiently substantiated. Accordingly, the substantiation complaint of the part is dismissed.

5.4.5 Part 4.3.2 complains that the judgment of the Court of Appeal (in ground 5.1.11.2 of the final judgment) is incorrectly or insufficiently motivated that illegal actions by HVY in the period after HVY have made their investment in Yukos cannot lead to lack of jurisdiction on the part of HVY. the arbitral tribunal.

5.4.6 In the absence of factual basis, this part cannot lead to cassation either.

The Russian Federation has taken the position in factual instances (Defence of Reply, paragraph 723) that it is undisputed that the protection offered by the ECT can only be withheld from investments of which the making, and not the subsequent implementation, is illegal. is. It has not argued that the arbitral tribunal should have declined jurisdiction because of illegal acts by HVY in the period after HVY made their investment in Yukos. This assertion, which also requires an assessment of a factual nature, cannot be advanced for the first time in cassation.

5.4.7 The judgment of the Court of Appeal, unsuccessfully contested under parts 4.3.1 and 4.3.2, that the alleged illegal act is not sufficiently related to the acquisition of the shares by HVY, can independently support the Court of Appeal's judgment that the alleged illegal act is not subject to the precludes the jurisdiction of the arbitral tribunal. This means that there is no interest in dealing with part 4.2, which complains about the judgment of the court (in ground 5.1.11.3-5.1.11.5) that now that the ECT does not contain an explicit legality requirement, illegal acts at the time of HVY's investments do not. preclude the jurisdiction of the arbitral tribunal. That part cannot therefore lead to cassation either.

Are there grounds for the conclusion that the arbitral awards, or the manner in which they were reached, are contrary to public policy?

5.4.8 Part 4.4 addresses various complaints against the judgment of the Court of Appeal (in ground 9.8 of the final judgment) that there are no grounds for the judgment that the arbitral awards, or the way in which they were reached, are contrary to public order.

Section 4.4.2 complains that this decision does not comply with the international standard that no protection is due to goods or rights obtained through illegal acts or exploited for illegal purposes, and furthermore that the court failed to recognize that it violates national and international public policy that treaty-based claims in respect of an illegally acquired or illegally exploited investment might be eligible for protection.

Part 4.4.3 complains that the judgment of the Court of Appeal (in ground 9.8.8 of the final judgment) that the Russian Federation has not contested, or has insufficiently substantiated, is incomprehensible. against HVY.

These parts lend themselves to joint treatment.

5.4.9 Pursuant to art. 1065, paragraph 1, under e, (old) Rv, an arbitral award can be set aside on the ground, among other things, that the award, or the way in which it was reached, is contrary to public order. According to settled case-law, an arbitral award can only be set aside on this ground if the content or execution of the award conflicts with mandatory law of such a fundamental nature that compliance with it may not be prevented by restrictions of a procedural nature. [29]

In assessing the claim for annulment, the court must exercise restraint, except insofar as this claim is based on the absence of a valid arbitration agreement or on the fact that the parties have acted contrary to the adversarial procedure. An annulment procedure should not be used as a disguised appeal. After all, the public interest in an effectively functioning arbitral procedure means that the civil court should only intervene in arbitral decisions in significant cases. [30]

The parts do not – rightly – complain that the Court of Appeal misunderstood the standard set out above.

5.4.10 The court has in para. 9.8.7 of the final judgment referred to what was stated in the par. 5.1.11.7-5.1.11.9 of the final judgment. In assessing the alleged violation of public order, it presumably assumed the illegal acts of Khodorkovsky et al. alleged by the Russian Federation and assumed that they affect public order. in r. 9.8.8 of the final judgment subsequently reflects the judgment of the arbitral tribunal that, insofar as it is now relevant, this means that Bank Menatep and Khodorkovsky et al. are other (legal) persons than HVY and that no conduct can be invoked against HVY that has been performed. by others before HVY became a shareholder.

The judgment of the Court of Appeal that this judgment of the arbitral tribunal is correct and has not been contested by the Russian Federation, or at least with insufficient reasons, must be understood as meaning that the Russian Federation has not contested, or has not contested with sufficient reasons, that the alleged illegal acts were committed by other (legal entities other than HVY and that they took place before HVY became a shareholder. The judgment must also be viewed in conjunction with the judgment of the Court of Appeal, which has been unsuccessfully contested, according to what has been considered above in 5.4.4. alleged illegal act of Khodorkovsky et al. and the making of the investment by HVY that is the subject of this case.

5.4.11 The judgment of the Court of Appeal that the arbitral awards, or the manner in which they were reached, are not contrary to public order, is based on the considerations referred to in 5.4.10 above and, in the light of the above in 5.4 .9 yardstick does not indicate an error of law. It is based on considerations and assessments that are reserved for the court as judge who judges the facts. That decision cannot therefore be further examined for correctness in cassation. The contested decision is sufficiently reasoned and is not incomprehensible in the light of the documents before the Court. The complaints presented above in 5.4.8 are not met.

Other complaints

5.4.12 The other complaints in part 4 cannot lead to cassation either. The Supreme Court is not required to provide reasons for its decision. In assessing these complaints, it is not necessary to answer questions that are important for the unity or development of the law (see art. 81 paragraph 1 RO).

(c) Conclusion

5.4.13 The conclusion is that the complaints in part 4 cannot lead to cassation.

part 5

Did the arbitral tribunal violate its mandate by not requesting advice from the relevant tax authorities (Art. 21 para. 5 ECT)?

(a) Representation of the Court's considerations

5.5.1 In so far as it is relevant for the assessment of the part, the Court of Appeal has considered the following in the final judgment.

(i) Art. 21 paragraph 5 ECT contains the obligation for the arbitral tribunal, if the question arises whether a tax measure constitutes an expropriation, to submit the question referred to to the relevant tax authorities. The arbitral tribunal was therefore in principle obliged to submit the dispute about the tax measures imposed in Russia in any case to the Russian tax authorities. However, the failure to do so is not sufficiently serious to justify annulment of the arbitral awards because it has not become plausible that the Russian Federation suffered any disadvantage as a result of this failure. (para. 6.3.2)

(ii) It is difficult to see what additional information the arbitral tribunal could have obtained from the Russian tax authorities that would have led to a different conclusion. It cannot therefore be concluded that material disadvantage has occurred for the Russian Federation as a result of the arbitral tribunal's failure to submit to the Russian tax authorities the question whether the tax measures taken in Russia constitute an expropriation. (para. 6.3.3)

(iii) The claim that the dispute should have been submitted to the tax authorities of Cyprus and the United Kingdom does not hold, as Art. 21 paragraph 5(b) of the ECT only prescribes that advice must be sought from the "relevant competent tax authority" when it comes to the question "whether a tax constitutes an expropriation". However, HVY have not argued that tax measures by Cyprus or the United Kingdom constitute an expropriation. (para. 6.3.4)

(iv) The prognosis ban, on which the Russian Federation has invoked, is a Dutch procedural law concept that means that the judge may not prejudge the outcome of a possible witness examination. Even if it must be assumed that arbitrators in an international arbitration are bound by this prohibition, there has been no prognosis on a witness statement. Art. 21(5)(b)(iii) ECT has a completely different character from the obligation not to waive the hearing of witnesses on the basis of a prognosis. The adversarial principle, which the Russian Federation has also invoked, is a fundamental principle of procedural law that cannot be equated with the duty of the arbitral tribunal to refer the dispute to the competent tax authorities and the (discretionary) competence to take into account the conclusions drawn by the tax authorities. There is therefore no question of a violation of the assignment that justifies the annulment of the arbitral award. (para. 6.3.5)

(b) Relevant treaty provisions

5.5.2 Art. 21 ("Taxation") paragraphs 1 and 5 ECT read as follows:

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

5. a) Article 13 shall apply to taxes.

b) Whenever an issue arises under Article 13, to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply:

(i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Article 26(2)c) or 27(2) shall make a referral to the relevant Competent Tax Authorities;

(ii) The Competent Tax Authorities shall, within a period of six months of such referral, strive to resolve the issues so referred. Where non-discrimination issues are concerned, the Competent Tax Authorities shall apply the non-discrimination provisions of the relevant tax convention or, if there is no non-discrimination provision in the relevant tax convention applicable to the tax or no such tax convention is in force between the Contracting Parties concerned, they shall apply the non-discrimination principles under the Model Tax Convention on Income and Capital of the Organization for Economic Cooperation and Development;

(iii) Bodies called upon to settle disputes pursuant to Article 26(2)c) or 27(2) may take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the tax is an expropriation. Such bodies shall take into account any conclusions arrived at within the six-month period prescribed in subparagraph b)(ii) by the Competent Tax Authorities regarding whether the tax is discriminatory. Such bodies may also take into account any conclusions arrived at by the Competent Tax Authorities after the expiry of the six-month period;

(iv) Under no circumstances shall involvement of the Competent Tax Authorities, beyond the end of the six-month period referred to in subparagraph b)(ii), lead to a delay of proceedings under Articles 26 and 27.

(c) Assessment of the complaints

Should failure to submit a question to the tax authorities lead to the annulment of the arbitral awards?

5.5.3 Section 5.2.1 complains that the court made serious errors by failing to accept that the arbitral tribunal refused to refer the dispute over the tax measures imposed in Russia to the tax authorities. The court thus has the mandatory nature of the provisions laid down in art. 21(5)(b)(i) ECT prescribed referral obligation denied or non-existent futility exception applied. The arbitral tribunal's refusal to refer is a violation of its mandate and of (the procedural aspect of) public policy, which justifies annulment of the arbitral awards, according to the part.

5.5.4 Pursuant to art. 1065 paragraph 1, opening words and under c, (old) Rv, an arbitral award can be set aside if the arbitral tribunal has not complied with its instructions. In assessing whether the arbitral tribunal has exceeded the limits of its mandate, it must also be taken into account whether the dispute has been settled in accordance with the procedural rules that apply in the particular case. The judge must exercise restraint when examining whether the arbitral tribunal has complied with the procedural rules. This is partly related to the fact that a procedure on the basis of art. 1065 (old) Rv may not be used as a disguised appeal, and that the public interest in an effectively functioning arbitral procedure means that the civil court should only intervene in arbitral decisions in significant cases. If in such a case there is a conflict with the principles of due process, the arbitral award will be subject to annulment on the basis of art. 1065 paragraph 1, opening words and under e, (old) Rv (breach of public order). By its very nature, that provision must also be applied with caution.[31] It follows from this, among other things, that if the violation of the instruction is not serious, this does not lead to annulment of the arbitral award. In answering the question whether the seriousness of the violation of the assignment justifies annulment of the arbitral award, the court has discretion.

5.5.5 Pursuant to art. 21 paragraph 1 ECT, in principle, the ECT does not preclude the power of contracting states to take tax measures. Art. 21 paragraph 5 ECT contains an exception to this, which means that tax measures do not include expropriation in violation of art. 13 ECT may be withheld. Pursuant to art. 21(5)(b)(i) ECT shall require the Investor or the Contracting State which alleges that a tax measure is in fact one of Art. 13 ECT conflicting expropriation is to submit to the competent tax authorities the question whether that is indeed the case. If the Investor or the Contracting State fails to do so, that obligation rests on the dispute settlement body, in this case the arbitral tribunal. Art. 21(5)(b) ECT covers both a dispute about whether a tax constitutes an expropriation,

5.5.6 According to the first sentence of para. 6.3.1 of the final judgment, the Court of Appeal has established – not contested in cassation – that the complaints of the Russian Federation about the arbitral tribunal's failure to (correctly) apply art. 21 paragraph 5 ECT relate to the question of whether there is an expropriation. With regard to that question, art. 21 paragraph 5(b)(iii) ECT provides that the dispute settlement body may take into account any conclusions of the competent tax authorities. To that extent, the obligation of the dispute settlement body differs from the issue of whether a tax alleged to constitute expropriation is discriminatory. In the latter case, Art. 21(5)(b)(iii),

5.5.7 In the light of the power of the arbitral tribunal, where the question is submitted to the tax authorities as to whether a tax measure constitutes an expropriation, may or may not take into account the conclusions made by those authorities, and in view of the express reference to that jurisdiction in the *final awards* (no. 1427) by the arbitral tribunal, it is not incomprehensible to the court's finding that it is inconceivable that the arbitral tribunal should, upon submission of that question to the tax authorities, another judgment would have come. The conclusion based on this that the failure to submit the dispute to the tax authorities – accepted by the Court of Appeal – is not sufficiently serious to justify annulment of the*final awards* , partly in view of the restraint to be observed by the court (as described above in 5.5.4), does not show an incorrect interpretation of the law and is not incomprehensible or insufficiently motivated.

This is where the complaints in section 5.2.1 fail.

Other complaints

5.5.8 The other complaints in part 5 cannot lead to cassation either. The Supreme Court is not required to provide reasons for its decision. In assessing these complaints, it is not necessary to answer questions that are important for the unity or development of the law (see art. 81 paragraph 1 RO).

(d) Conclusion

5.5.9 The conclusion is that the complaints in part 5 cannot lead to cassation.

part 6

Does the way in which the assistant to the arbitral tribunal was involved in the preparation of the arbitral awards constitute grounds for annulment of the arbitral awards?

5.6.1 Part 6 is directed against para. 6.6 of the final judgment. In that legal consideration, the court rejected the objections of the Russian Federation against the way in which the assistant of the arbitral tribunal was allegedly involved in the preparation of the arbitral awards.

5.6.2 The subdivision's complaints cannot lead to cassation. The Supreme Court is not required to provide reasons for its decision. In assessing these complaints, it is not necessary to answer questions that are important for the unity or development of the law (see art. 81 paragraph 1 RO).

part 7

Are the arbitral tribunal's decisions about the alleged abuse by Yukos of sham companies without a valid reasoning?

5.7.1 Part 7 is directed against the rov. 8.4.13 and 8.4.16 of the final judgment. In those legal considerations, the court rejected the objections of the Russian Federation against the judgment of the arbitral tribunal in no. 639 of the *final awards* , which means, among other things, that "[t]the Tribunal has not found any evidence in the massive record that would support Respondent's submission that there was a basis for the Russian authorities to conclude that the entities in Mordovia, for example, were 'shams'" and against the conclusions drawn by the arbitral tribunal in no. 648 of the *final awards,* which include, inter alia, that the *Tax Ministry* had provided too little evidence to conclude that all Yukos subsidiaries located in the Republic of Mordovia were abusing the low-tax regime.

5.7.2 The subdivision's complaints cannot lead to cassation. The Supreme Court is not required to provide reasons for its decision. In assessing these complaints, it is not necessary to answer questions that are important for the unity or development of the law (see art. 81 paragraph 1 RO).

Part 8

5.8 Part 8 builds on parts 1 to 7 and does not require independent treatment.

6 Assessment of the plea in the conditional cross-appeal

The cross-appeal has been lodged conditionally (see 4.2.2).

It follows from the assessment of the main appeal that the conditions have not been met, so that the conditional cross-appeal does not need to be dealt with.

7 Conclusion

7.1 The conclusion is that parts 2 to 7 of the plea in the main appeal cannot lead to cassation and that part 8 does not require independent treatment. Part 1 succeeds. The appealed judgments of the Court of Appeal will therefore be quashed.

The conditional incidental appeal does not require treatment.

7.2 The case will be referred to another court for further consideration and decision.

8 Decision

The high Council:

in the main appeal:

- annuls the judgments of the Court of Appeal in The Hague of 25 September 2018 and 18 February 2020;

- refers the case to the Amsterdam Court of Appeal for further consideration and decision;

- orders HVY to pay the costs of the proceedings in cassation, up to this judgment estimated by the Russian Federation at € 7,082.07 in disbursements and € 2,600 for salary, plus the statutory interest on these costs if HVY have not paid these within fourteen days of today.

This judgment was delivered by Vice-President CA Streefkerk as Chairman and Counsel TH Tanja-van den Broek, MJ Kroeze, CH Sieburgh and FJP Lock, and pronounced in public by Counsel HM Wattendorff on November 5, 2021 .

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[1] Energy Charter Treaty, Lisbon, December 17, 1994, Trb. 1995, 108.

[2] Hulley Enterprises v. The Russian Federation, PCA Case No. 226, Interim Award on Jurisdiction and Admissibility, Nov. 30, 2009; Yukos Universal v. The Russian Federation, PCA Case No. 227, Interim Award on Jurisdiction and Admissibility, Nov. 30, 2009; Veteran Petroleum v. The Russian Federation, PCA Case No. 228, Interim Award on Jurisdiction and Admissibility, Nov. 30, 2009.

[3] Hulley Enterprises v. The Russian Federation, PCA Case No. 226, Final Award, July 18, 2014; Yukos Universal v. The Russian Federation, PCA Case No. 227, Final Award, July 18, 2014; Veteran Petroleum v. The Russian Federation, PCA Case No. 228, Final Award, July 18, 2014.

[4] Art. IV paragraph 4 in connection with art. IV paragraph 2 of the Act of 2 June 2014 amending Book 3, Book 6 and Book 10 of the Civil Code and Book Four of the Code of Civil Procedure in connection with the modernization of the Arbitration Court (Stb. 2014, 200) , entered into force on 1 January 2015 (Stb. 2014, 254).

[5] Court of The Hague 20 April 2016, ECLI:NL:RBDHA:2016:4229.

[6] The Hague Court of Appeal 25 September 2018, ECLI:NL:GHDHA:2018:2476.

[7] The Hague Court of Appeal 18 February 2020, ECLI:NL:GHDHA:2020:234.

[8] cf. Parliamentary Papers II 1999/2000, 26855, no. 3, p. 170.

[9] Parliamentary Papers II 1985/86, 18464, no. 6, p. 37.

[10] Parliamentary Papers II 1983/84, 18464, no. 3, p. 31.

[11] HR 27 March 2009, ECLI:NL:HR:2009:BG4003.

[12] cf. HR 27 March 2009, ECLI:NL:HR:2009:BG4003, para. 4.3.3-4.3.4.

[13] Vienna Convention on the Law of Treaties, Vienna, May 23, 1969, Trb. 1972, 51 and 1985, 79.

[14] Parliamentary Papers II 1983/84, 18464, no. 3, p. 21. Cf. HR 27 March 2009, ECLI:NL:HR:2009:BG6443, para. 3.4.1.

[15] cf. HR 26 September 2014, ECLI:NL:HR:2014:2837, para. 4.2.

[16] HR 26 September 2014, ECLI:NL:HR:2014:2837, para. 4.2.

[17] cf. HR 29 June 1990, ECLI:NL:HR:1990:AD1191, para. 3.7; HR 29 May 2020, ECLI:NL:HR:2020:956, para. 3.1.3.

[18] HR 29 May 2020, ECLI:NL:HR:2020:956, para. 3.1.3.

[19] Council of the European Union, 'Statement by the Council, the Commission, and the Member States on Article 45 of the European Energy Charter Treaty', 'A' Item Note, Brussels, 14 December 1994, Document 12165/94, Annex I.

[20] Annex ('Summary of the contents of the "European Energy Charter Treaty") to Communication from the Commission to the Council and the European Parliament on the signature and provisional application by the European Communities of the European Energy Charter Treaty, 21 September 1994, COM(94) 405 final, 94/0214 (CNS).

[21] Council Decision of 13 July 1998 approving the amendment of the trade-related provisions of the Energy Charter Treaty and its provisional application as agreed by the Energy Charter Conference and the International Conference of the Signatory Parties of the Energy Charter Treaty, 98/537/EC, L 252/21.

[22] Convention on the Settlement of Disputes Relating to Investments between States and Nationals of Other States, Washington, March 18, 1965, Trb. 1981, 191.

[23] Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco, ICSID Case No. ARB/00/4, July 23, 2001.

[24] HR 26 September 2014, ECLI:NL:HR:2014:2837, para. 5.2.

[25] cf. also CJEU 2 September 2021, Case C-741/19, ECLI:EU:C:2021:655 (Republic of Moldova v Komstroy), paragraph 70.

[26] CJEU 2 September 2021, Case C-741/19, ECLI:EU:C:2021:655 (Republic of Moldova v Komstroy), paragraph 69.

[27] CJEU 2 September 2021, Case C-741/19, ECLI:EU:C:2021:655 (Republic of Moldova v Komstroy), paras 67-68.

[28] trb. 1995, 108, p. 209 ev

[29] HR 21 March 1997, ECLI:NL:HR:1997:AA4945, para. 4.2.

[30] HR 4 December 2020, ECLI:NL:HR:2020:1952, para. 3.3.1.

[31] For this, see HR 17 January 2003, ECLI:NL:HR:2003:AE9395, para. 3.3.