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The Hague Court of Appeal Reinstates the *Yukos* Awards

*Cees Verburg**

Abstract

In February 2020, the Court of Appeal in The Hague rendered its long-awaited judgment in the *Yukos* v. *Russian Federation* cases. These cases concern a series of awards rendered by an UNCITRAL tribunal constituted on the basis of the Energy Charter Treaty. In 2016, the District Court of The Hague had annulled the awards due to the UNCITRAL tribunal's alleged lack of jurisdiction. That decision is now overturned and the awards are revived. This case note recalls and comments on the findings of the Court of Appeal.

1 Introduction

After several years of relative silence, the *Yukos* cases made headlines again on 18 February 2020 when the Court of Appeal in The Hague (the Court) reinstated the USD 50 billion awards that a trio of investors had obtained in arbitral proceedings brought under the Energy Charter Treaty (ECT) against the Russian Federation.[1] The Court thereby overturned a 2016 decision of the District Court of The Hague.[2] In line with previous decisions in this case, the appeals procedure was protracted (almost four years) and resulted in an unusually elaborate judgment – by Dutch standards – of 117 pages.

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1 Court of Appeal The Hague, *Yukos* v. *Russian Federation,* 18 February 2020, ECLI:GHDHA:2020:234.

2 District Court The Hague, *Russian Federation* v. *Yukos,* 20 April 2016, ECLI:NL:RBDHA:2016:4229. C Verburg, 'Case Note: District Court of The Hague Quashes Yukos Awards' [2016] 19(3) IALR N-25.

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The dispute between a trio of former majority shareholders of Yukos (the investors) and the Russian Federation dates back to the turn of this century. In a nutshell, the Russian Federation forced Yukos into bankruptcy and, through a State-owned enterprise, acquired its most valuable assets.[3] An UNCITRAL tribunal constituted on the basis of the ECT and seated in The Hague (the *Yukos* Tribunal) concluded in 2014 that the Russian Federation had violated Article 13 of the ECT and awarded the former shareholders USD 50 billion in damages in a series of three awards.[4]

This case note will recall the most important findings of the judgment of 18 February and briefly comment on some of them in the following section. The adopted structure mirrors that of the judgment.

2 Considerations

After the final awards were rendered by the *Yukos* Tribunal in 2014, the Russian Federation turned to the competent court in The Hague to seek set aside of the awards on a variety of grounds. The District Court merely analysed – and accepted – the argument that the *Yukos* Tribunal lacked jurisdiction because the Russian Federation was not bound by Article 26 ECT.[5] Due to the devolutive effect of the appeal procedure under Dutch law, the Court of Appeal examined all grounds for annulment put forward by the Russian Federation under Article 1065(1) of the Dutch Code of Civil Procedure (DCCP). These will be addressed in turn.

2.1 *Lack of Jurisdiction: Article 1065(1)(a) DCCP*

The Russian Federation brought forward various arguments according to which the *Yukos* Tribunal had allegedly wrongly assumed jurisdiction. This ground for annulment is, on the basis of the Dutch Supreme Court's (Supreme

3 *Yukos Universal Limited* (*Isle of Man*) v. *The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014 <https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf> accessed on 25 March 2020. *Veteran Petroleum Limited* (*Cyprus*) v. *The Russian Federation*, UNCITRAL, PCA Case No. 2005-05/AA228, Final Award, 18 July 2014 <https://www.italaw.com/sites/default/files/case-documents/italaw3280.pdf> accessed on 25 March 2020. *Hulley Enterprises Limited* (*Cyprus*) v. *The Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, Final Award, 14 July 2014 <https://www.italaw.com/sites/default/files/case-documents/italaw3278.pdf> accessed on 25 March 2020.

4 *Ibid*.

5 District Court The Hague, *Russian Federation* v. *Yukos,* (n 2), paras. 5.95–5.97.

Court) jurisprudence, one that is not to be reviewed with restraint by supervening courts.[6]

2.1.1 Provisional Application of the ECT

Since the Russian Federation signed but never ratified the ECT, a pivotal question was whether it was nevertheless bound by the treaty – and the investor-State arbitration clause of Article 26 in particular – due to provisional application under Article 45 ECT. This provision states:

> 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.[7]

This provision, and the limitation clause in the second part of the provision in particular, is rather ambiguous.[8] The *Yukos* Tribunal, as well as other ECT tribunals, interpreted this provision as allowing for provisional application of the ECT as a whole unless "the principle of provisional application itself were inconsistent "with its constitution, laws or regulations.""[9] The District Court of The Hague had nevertheless adopted an alternative interpretation under "which the option of provisional application is focused on and depends on the compatibility of separate treaty provisions with national laws."[10]

On appeal, the investors argued in favour of the former while the Russian Federation proposed the latter. In addition, the investors put forward a new subsidiary argument, namely that "even if it should be assumed that the

6 Supreme Court, *Republic of Ecuador* v. *Chevron,* 26 September 2014, ECLI:NL:HR:2014:2837, para. 4.2.

7 Article 45(1), Energy Charter Treaty (ECT) (adopted 17/12/1994, entered into force 16/04/1998).

8 M H Arsanjani and W M Reisman, 'Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011).

9 *Yukos Universal Limited* (*Isle of Man*) v. *The Russian Federation*, Interim Award on Jurisdiction and Admissibility (n 3), para. 301 <https://www.italaw.com/sites/default/files/case-documents/ita0910.pdf> accessed on 25 March 2020. *Ioannis Kardassopoulos* v. *The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, paras. 223 and 246 <https://www.italaw.com/sites/default/files/case-documents/ita0444.pdf> accessed on 25 March 2020. This issue also plays a crucial role in the 'second wave' of *Yukos* related cases brought under the ECT, *see*, Ontario Superior Court of Justice, *The Russian Federation* v. *Luxtona Limited,* 2019 ONSC 4503, 13 December 2019, paras. 2–7.

10 District Court The Hague, *Russian Federation v. Yukos,* (n 2), para. 5.18.

limitation clause does not relate to the principle of provisional application, the question is, in any event, whether the provisional application of any provision of the ECT is incompatible with a rule of national law, not whether any provision of the ECT in itself is inconsistent with national law."[11]

The Court considered that this subsidiary argument was not submitted belatedly by the investors since there is "in principle [...] no objection if the defendant in the annulment proceedings puts forward new arguments that may support the arbitral tribunal's decision that it has jurisdiction."[12]

After analyzing the various arguments and interpreting Article 45 ECT in line with the rules of treaty interpretation as enshrined in the Vienna Convention on the Law of Treaties (VCLT), the Court ruled that "the limitation clause must be interpreted in such a way that a signatory State that does not submit a statement as referred to in Article 45(2)(a) ECT is obliged to apply the ECT provisionally, except to the extent that 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 State excludes provisional application of a treaty for certain (types or categories of) treaty provisions."[13] This was, in essence, the interpretation as proposed by the investors.

The next question that the Court had to address was whether provisional application of the investor-State arbitration clause of Article 26 was inconsistent with Russian law. In this regard, the District Court had stated that Article 26 ECT was contrary to Russian law not only when it was explicitly prohibited, but also when there was no legal basis in Russian law for Article 26.[14] This extremely narrow interpretation was rejected by the Court from the outset.[15] By reference to the Russian Federal Law on International Treaties, the Court ruled that Article 26 was not contrary to the "constitution, laws or regulations" of the Russian Federation.[16]

Consequently, the Russian Federation was provisionally bound by Article 26 ECT, which meant that the Russian offer of consent to arbitrate was valid and – by extension thereof – the acceptance of that offer by the investors resulted in a valid arbitration agreement.[17]

11 Court of Appeal The Hague, *Yukos* v. *Russian Federation,* (n 1), para. 3.3.2. Informal translation.
12 *Ibid,* para. 4.4.5. Informal translation.
13 *Ibid,* paras. 4.5.33 and 4.5.48. Informal translation.
14 District Court The Hague, *Russian Federation* v. *Yukos,* (n 2), para. 5.33.
15 Court of Appeal The Hague, *Yukos* v. *Russian Federation,* (n 1), para. 4.5.48.
16 *Ibid,* para. 4.6.1.
17 *Ibid,* para. 4.9.1.

2.1.2 The Definitions of 'Investor' and 'Investment'

The Russian Federation subsequently argued that the *Yukos* Tribunal had wrongly assumed jurisdiction because it failed to interpret properly the terms 'investor' and 'investment', as defined in Article 1 ECT.[18] Since these terms define both the scope of the ECT's investment chapter and the jurisdiction of an ECT tribunal, an incorrect interpretation might lead to the acceptance of jurisdiction by the tribunal where there is none.

Concerning the definition of 'investor', the Russian Federation argued that the investors were in fact Russian nationals who, through foreign corporations, tried to benefit from the ECT's protections in an unlawful manner. On the basis of Article 1(7) ECT, an investor from a Contracting Party qualifies as such when it is a "company or other organization organized in accordance with the law applicable in that Contracting Party."[19] After analysing the Russian Federation's argument in light of the VCLT's rules on treaty interpretation, arbitral jurisprudence under various international investment agreements (IIAs) as well as relevant definitions contained in other IIAs, the Court maintained the textual and formalistic interpretation of Article 1(7) ECT that it had pronounced from the outset.[20] To qualify as an 'investor', the seat of incorporation is determinative in the eyes of the Court. The Court hereby joined a long line of courts and tribunals that have adopted a formalistic interpretation of Article 1(7) ECT, firmly cementing the ECT's inclusion of the 'incorporation doctrine' that allows for nationality planning.[21]

Regarding the notion of 'investment', the Russian Federation argued that the investors had 'unclean hands' due to the alleged unlawful manner in which they had acquired Yukos and the subsequent tax avoidance by the company. This should, according to the Russian Federation, have deprived the *Yukos* Tribunal of its jurisdiction.

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18 *Ibid,* para. 5.1.1.

19 Article 1(7)(a)(ii) ECT, (n 7).

20 Court of Appeal The Hague, *Yukos* v. *Russian Federation,* (n 1), paras. 5.1.6-5.1.10.4.

21 *See* for example: *SolEs Badajoz GmbH* v. *Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019, para. 224 <https://www.italaw.com/sites/default/files/case-documents/italaw10836.pdf> accessed on 27 March 2020. *Plama Consortium Limited* v. *Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 124 <https://www.italaw.com/sites/default/files/case-documents/ita0669.pdf> accessed on 27 March 2020. *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras. 176–177 <https://www.italaw.com/sites/default/files/case-documents/italaw9710.pdf> accessed on 27 March 2020. *Charanne B.V. and Construction Investments S.A.R.L.* v. *Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, paras. 414–416 <https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf> accessed 27 March 2020.

As noted by the Court, IIAs generally deal with 'legality requirements' in two manners. Firstly, there are IIAs that, under the definition of 'investment', require that investments must be "made in accordance" with domestic law.[22] Secondly, there are IIAs which do not contain such a requirement.[23] As rightly noted by the Court, in case of the former an illegal investment would deprive the tribunal of its jurisdiction while in relation to the second category of IIAs the situation is less clear. The Court neglected to mention, however, that many IIAs that do not contain a legality requirement in the definition of investment contain such a requirement in the provision on the admission of investments.[24] To complicate matters for ECT cases, the ECT does neither.[25] However, as evidenced by ECT awards, some of which are recalled by the Court, such a requirement applies to investments under the ECT as well.[26] The prevailing view in ECT arbitration is, in line with the ruling of the Court, that ECT claims regarding illegal investments might be inadmissible and investors would not be entitled to the substantive protections of the ECT, but a tribunal would not be deprived of its jurisdiction.[27]

An interesting consideration of the Court regarding the definition of 'investment' relates to the relevance of the so-called *Salini* criteria, in particular the requirement that an investment has to contribute to the economic development of the host State.[28] According to the Russian Federation, there was no contribution to the Russian economy since the investors were Russian investors that were acquiring shares in a Russian company via foreign corporations.

22 Court of Appeal The Hague, *Yukos* v. *Russian Federation,* (n 1), para. 5.1.11.3.

23 *Ibid.*

24 A Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection' in A Reinisch (ed), *Standards of Investment Protection* (OUP 2008).

25 *Mamidoil Jetoil Greek Petroleum Products Societe S.A.* v. *Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, para. 360 <https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf> accessed 27 March 2020.

26 Court of Appeal The Hague, *Yukos* v. *Russian Federation,* (n 1), para. 5.1.11.4.; *Plama Consortium Limited* v. *Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 138–146 <https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf> accessed 27 March 2020. *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein* v. *Italian Republic*, ICSID Case No. ARB/14/3, Final Award, 27 December 2016, para. 264 <https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf> accessed 27 March 2020.

27 *Mamidoil* v. *Albania*, Award, (n 25) para. 494.

28 Court of Appeal The Hague, *Yukos* v. *Russian Federation,* (n 1), paras. 5.1.9.1-5.1.9.4. *Salini Costruttori S.p.A. and Italstrade S.p.A.* v. *Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, para. 52 <https://www.italaw.com/sites/default/files/case-documents/ita0738.pdf> accessed on 26 March 2020.

The *Salini* criteria were developed in the context of the concept of 'investment' under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention).[29] Since the *Yukos* cases were conducted on the basis of the UNCITRAL Arbitration Rules and the ECT, the Court notes that the *Salini* criteria are irrelevant for the definition of 'investment' under the ECT.[30] Strictly speaking, this observation of the Court is correct.

It has to be noted however, that ECT arbitral practice is significantly less outspoken on this point which makes the ease with which the Court accepts this point notable.[31] Some tribunals consider that the term 'investment' has an inherent meaning which an investment must meet in addition to falling into one of the categories of assets subsequently listed in the applicable IIA.[32]

In the SCC case *Isolux* v. *Spain* for example, where the ICSID Convention was equally not applicable, the tribunal explicitly embraced the *Salini* criteria.[33]

Furthermore, in another UNCITRAL ECT arbitration, the *Energoalians* v. *Moldova* case, the relevance of the requirement of contribution to the economic development of the host State lead to a protracted debate. In essence, Dominic Pellew, the presiding arbitrator in that case that considered the criterion to be relevant, was – in a rather exceptional turn of events – overruled by the party-appointed arbitrators that formed the required majority to assume jurisdiction.[34]

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29 Article 25(1), Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) (adopted 18/03/1965, entered into force 14/10/1966).

30 Court of Appeal The Hague, *Yukos* v. *Russian Federation,* (n 1), para. 5.1.9.4.

31 *Masdar* v. *Spain*, Award, (n 21), paras. 193–200. *Alapli Elektrik B.V.* v. *Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012, para. 382 <https://www.italaw.com/sites/default/files/case-documents/italaw4306.pdf> accessed 27 March 2020. *Alapli Elektrik B.V.* v. *Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, para 80 <https://www.italaw.com/sites/default/files/case-documents/italaw3261.pdf> accessed 27 March 2020. *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd* v. *Kazakhstan*, SCC Case No. V 116/2010, Award, 19 December 2013, para. 806 <https://www.italaw.com/sites/default/files/case-documents/italaw3083.pdf> accessed on 26 March 2020.

32 *Masdar* v. *Spain*, Award, (n 21), para. 196.

33 *Isolux Netherlands, BV* v. *Kingdom of Spain*, SCC Case V2013/153, Final Award, 17 July 2016, paras. 683–686 <https://www.italaw.com/sites/default/files/case-documents/italaw9219.pdf> accessed 27 March 2020.

34 *Energoalians TOB* v. *Republic of Moldova*, UNCITRAL, Award, 23 October 2013, paras. 184, 225–227, 237–241. <https://www.italaw.com/sites/default/files/case-documents/italaw10494.pdf> accessed on 26 March 2020. *Energoalians TOB* v. *Republic of Moldova*, UNCITRAL, Dissenting Opinion of Dominic Pellew, 13 October 2013, paras. 3 and

However, the Paris Court of Appeal – on comparable grounds as espoused by Pellew – annulled the award.[35] The French *Cour de Cassation* would subsequently overturn that decision – stating that the 'contribution' requirement could not be found in the text of the ECT – and refer the matter back to the Paris Court of Appeal.[36] Most likely in despair, the latter decided to refer the matter to the Court of Justice of the European Union (CJEU) for guidance.[37]

In light of practice under the ECT, the Court might thus have oversimplified matters. Also, the Court seems to require from the Russian Federation that it proves the existence of an:

> internationally recognized legal principle of investment law which implies that any investment treaty protects only investments which make an economic contribution to the host country, regardless of whether the treaty contains a definition of the term investment.[38]

However, this requirement probably sets the bar too high. After all, an interpretation of the definition of either 'investor' or 'investment' – of the *applicable* IIA rather than *any* IIA – by the tribunal that is too broad may lead to the acceptance of jurisdiction where there is, in fact, none.

As was held by the Court from the outset, under Dutch arbitration law "the fundamental nature of the right of access to the court" means that an alleged lack of a valid arbitration agreement is not to be reviewed with restraint by the supervening court.[39] This means that the Court should merely interpret the relevant provisions of the ECT in light of the treaty interpretation rules of the VCLT and analyse whether the tribunal interpreted and applied the relevant provisions properly. If the term 'investment' indeed has an inherent meaning under the ECT that includes the contribution requirement, the Court should annul the award if it would subsequently find that no contribution has been

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20–26 <https://www.italaw.com/sites/default/files/case-documents/italaw10495.pdf> accessed on 26 March 2020.

35 Court of Appeal Paris, *Republique de Moldavie* v. *Société Komstroy*, 1e Ch, 12 April 2016, nº 13/22531, 6.

36 Court of Cassation, *Energoalians SARL* (*Komstroy*) v. *Republique de Moldavie*, Civ 1ère, 28 March 2018, nº 16–16568, ECLI:FR:CCASS:2018:C100352, para. 16.

37 Court of Appeal Paris, *Republique de Moldavie* v. *Société Komstroy,* 1e Ch, 24 September 2019, nº 18/14721. At the CJEU the case is currently known as Case C-741/19.

38 Court of Appeal The Hague, *Yukos* v. *Russian Federation,* (n 1), para. 5.1.9.4. Informal translation.

39 *Ibid,* para. 3.1.2. Informal translation.

made.[40] It should not require the existence of a legal principle of investment law of which there are most likely rather few since the nature of investment law is so diffuse.

2.1.3 Taxation Carve-Out

Since Yukos was essentially driven into bankruptcy by taxation measures, the ECT's taxation carve-out of Article 21 plays a crucial role is this case.[41] In the set aside proceedings, the Russian Federation refers to it in the context of three annulment grounds.

Under the header of lack of jurisdiction, the Russian Federation argues that Article 21 ECT deprives a tribunal of jurisdiction to hear investment claims arising as a result of the imposition of taxation measures.[42]

The Court does not concur. Since the jurisdiction of a tribunal is governed by Article 26 ECT, situations governed by Article 21(1) ECT do not affect a tribunal's jurisdiction.[43] Interesting in this regard is that most ECT tribunals actually do consider arguments based on Article 21 as objections to jurisdiction even though some choose to defer them to the merits.[44] According to the *Watkins*

40 It has to be noted in this regard that the *Salini* criteria are interdependent, which means that there might still be an investment even if one of the criteria is not met: *Salini* v. *Morocco*, Decision on Jurisdiction, (n 28), para. 52.

41 *Yukos* v. *The Russian Federation*, Final Award, (n 3), para. 756.

42 Court of Appeal The Hague, *Yukos* v. *Russian Federation,* (n 1), para. 5.2.3.

43 *Ibid,* paras. 5.2.5-5.2.10.

44 *RREEF Infrastructure* (*G.P.*) *Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l.* v. *Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, paras. 197–198 <https://www.italaw.com/sites/default/files/case-documents/italaw7429.pdf> accessed 27 March 2020. *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l.* v. *Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, para. 272 <https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf> accessed 27 March 2020. *Cube Infrastructure Fund SICAV and others* v. *Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, para. 233 <https://www.italaw.com/sites/default/files/case-documents/italaw10692.pdf> accessed 27 March 2020. *WA Investments Europa Nova Ltd.* v. *Czech Republic*, PCA Case No. 2014–19, Award, 15 May 2019, paras. 309–310 <https://www.italaw.com/sites/default/files/case-documents/italaw10671.pdf> accessed 27 March 2020. *Voltaic Network GmbH* v. *Czech Republic*, PCA Case No. 2014–20, Award, 15 May 2019, para. 242 <https://www.italaw.com/sites/default/files/case-documents/italaw10668.pdf> accessed 7 April 2020. *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG* v. *Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, para. 405. *Stadtwerke München GmbH, RWE Innogy GmbH, and others* v. *Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019, para. 161 <https://www.italaw.com/sites/default/files/case-documents/italaw11056.pdf> accessed 7 April 2020. *Masdar* v. *Spain*, Award, (n 21), para. 295; *CEF Energia BV* v. *Italian Republic*, SCC Case No. 158/2015, Award,

v. *Spain* and *Isolux* v. *Spain* tribunals for instance, Article 21 "entails a lack of jurisdiction *ratione materiae* of the tribunal, whose jurisdiction is limited to the disputes relating to the rights and obligations stemming from the ECT."[45]

Another notable point regarding Article 21 concerns its applicability. The *Yukos* Tribunal had concluded that Article 21 ECT did not apply since the taxation measures were not *bona fide*.[46] As was to be expected, many investors in subsequent ECT cases referred to this finding in cases involving taxation measures. Even though several tribunals were hesitant to confirm the findings of the *Yukos* Tribunal, it has received the support of tribunals in, amongst others, the *PV Investors* v. *Czech Republic* cases and the *Cube Infrastructure v. Spain* case.[47] Adopting a reasoning comparable to that of the tribunal in *PV Investors* v. *Czech Republic*, the Court also had little difficulty accepting this point as a finding to the contrary:

> [...] would open up the possibility of circumventing the applicability of the Treaty by classifying a measure as a tax measure or using a tax measure for *mala fide* reasons for another purpose, thereby undermining the

16 January 2019, para. 194 <https://www.italaw.com/sites/default/files/case-documents/italaw10557_0.pdf> accessed 7 April 2020. Less outspoken on whether Article 21 ECT affects the jurisdiction of the tribunal were: *RWE Innogy GmbH and RWE Innogy Aersa S.A.U.* v. *Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019, para. 393 <https://www.italaw.com/sites/default/files/case-documents/italaw11004.pdf> accessed 27 March 2020. *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V.* v. *Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019, paras 372–373 <https://www.italaw.com/sites/default/files/case-documents/italaw10569.pdf> accessed 7 April 2020.

45 *Isolux* v. *Spain*, Final Award, (n 33), para. 721. *Watkins Holdings S.à.r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020, para. 268 <https://www.italaw.com/sites/default/files/case-documents/italaw11234_0.pdf> accessed 7 April 2020.

46 *Yukos* v. *The Russian Federation*, Final Award, (n 3), para. 1407.

47 *Eiser* v. *Spain*, Final Award, (n 44), para. 269. *RWE Innogy* v. *Spain*, Decision on Jurisdiction, Liability and Certain Issues of Quantum, (n 44), para. 389. *WA Investments* v. *Czech Republic*, Award, (n 44), paras. 332–333. *Voltaic Network* v. *Czech Republic*, Award, (n 44), paras. 265–266. *Photovoltaic Knopf* v. *Czech Republic*, PCA Case No. 2014–21, Award, 15 May 2019, paras. 254–255 <https://www.italaw.com/sites/default/files/case-documents/italaw10674.pdf> accessed 7 April 2020. *I.C.W. Europe Investments Limited* v. *Czech Republic*, PCA Case No. 2014–22, Award, 15 May 2019, paras. 313–314 <https://www.italaw.com/sites/default/files/case-documents/italaw10678.pdf> accessed 7 April 2020. *Cube Infrastructure* v. *Spain*, Decision on Jurisdiction, Liability and Partial Decision on Quantum, (n 44), para. 221. *See* also: *Antaris Solar GmbH and Dr. Michael Göde* v. *Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, para. 252 <https://www.italaw.com/sites/default/files/case-documents/italaw9809.pdf> accessed 7 April 2020.

> protection afforded by the Treaty to investors. Such an interpretation would be inconsistent with the Court's obligation to interpret the Treaty in good faith.[48]

Superfluously, the Court considered that the claw-back provision of Article 21(5), according to which the expropriation provision applies to taxation measures, would have applied in any case.[49]

2.2 *Non-Compliance with Its Mandate: Article 1065(1)(c) DCCP*

Under the header of non-compliance with its mandate, the Russian Federation submitted various arguments, two of which will be discussed here. These concerned the manner in which the Tribunal quantified damages and the role of the Tribunal's assistant.[50]

That the damages awarded in the *Yukos* cases led to furrowed eyebrows around the world should not come as a surprise. If the sheer size of the damages awarded, USD 50 billion, does not suffice to achieve that effect then the contrast with the damages awarded in the *Yukos* case before the European Court of Human Rights should. In the latter, the Yukos company in its entirety was awarded EUR 1,9 billion for violations of Article 6 of the European Convention on Human Rights and Article 1 Protocol 1 to that Convention.[51] A leading scholar in the field also called certain aspects of the methods adopted by the *Yukos* Tribunal 'novel'.[52]

According to the Russian Federation, the tribunal did not comply with its mandate "because it awarded damages on the basis of its own new and rather flawed calculation method, which deviated from the party debate and about which the parties were not heard, leading to a surprise decision."[53] After recalling the methods adopted by the *Yukos* Tribunal, the Court states in general

48 Court of Appeal The Hague, *Yukos* v. *Russian Federation,* (n 1), para. 5.2.13, informal translation.

49 *Ibid,* paras. 5.2.21-5.2.22.

50 Other arguments concerned Article 21(5) ECT (para. 6.3) and that the tribunal decided by guessing and going beyond the legal dispute (para. 6.5).

51 *Case of OAO Neftyanaya Kompaniya Yukos* v. *Russia* (Application no. 14902/04), Judgment of 20 September 2011. *Case of OAO Neftyanaya Kompaniya Yukos* v. *Russia* (Application no. 14902/04), Judgment on Just Satisfaction of 31 July 2014.

52 I Marboe, 'Case Comment – *Yukos Universal Limited* (*Isle of Man*) v. *the Russian Federation*: Calculation of Damages in the Yukos Award: Highlighting the Valuation Date, Contributory Fault and Interest' [2015] 30(2) ICSID Rev – FILJ 326, p. 329.

53 Court of Appeal The Hague, *Yukos* v. *Russian Federation,* (n 1), para. 6.4.1. Informal translation.

that, under international law, investment tribunals have a "wide margin of discretion when it comes to the quantification of damages."[54]

While rejecting this argument of the Russian Federation, the Court stressed that the Russian Federation did not propose its own method to quantify damages even though it criticized the suggested approach of the investors.[55] According to the Court, by adopting this strategy the Russian Federation should not have been surprised that the *Yukos* Tribunal would adopt a method that it considered acceptable, taking into account the propositions of the investors and the criticisms of the Russian Federation.[56] Many of the other criticisms put forward by the Russian Federation in this regard were dismissed by the Court by a simple reference to the fundamental difference between appeal procedures in regular court proceedings and annulment proceedings in the context of arbitration.[57]

Perhaps the most remarkable argument put forward by the Russian Federation in these annulment proceedings concerned the alleged disproportionate role of the Tribunals' assistant, Martin Valasek. On the basis of recorded hours that Mr. Valasek spent on the case and reports of linguistic experts, the Russian Federation argued that the Tribunal violated "the rule that arbitrators must fulfil their substantive task personally" in violation of Articles 1065(1)(c) and (1)(b) DCCP.[58]

The Court refrained from issuing a general statement on the division of tasks between arbitrators and secretaries/assistants and merely limits itself to applicable grounds for annulment, namely whether the Tribunal was composed in violation of the applicable rules (Article 1065(1)(b) DCCP) or whether it violated its mandate (Article 1065(1)(c) DCCP).[59]

In relation to the former, the Court stated that, even if Mr. Valasek had written significant parts of the awards, that would not lead to the conclusion that the Tribunal was not composed properly.[60] This is underlined by the fact that the awards were signed by the three validly appointed arbitrators. In relation to the latter annulment ground, the Court considered that it should review these matters with restraint and merely annul an award when the non-compliance

54 *Ibid,* para. 6.4.5. Informal translation.
55 *Ibid,* para. 6.4.6.
56 *Ibid.*
57 *Ibid,* para. 6.4.24. Parket bij de Hoge Raad 9 January 2004, ECLI:NL:PHR:2004:AK8380, para. 8.
58 Court of Appeal The Hague, *Yukos* v. *Russian Federation,* (n 1), para. 6.6.1, informal translation.
59 *Ibid,* para. 6.6.12.
60 *Ibid,* para. 6.6.13.

with the mandate is 'serious'.[61] The Court considered that this threshold would have been met in case:

> [...] taking substantive decisions relevant to the arbitral awards had been delegated to Valasek, and/or if Valasek would have been ultimately responsible for (certain parts of) those awards. If such a situation should arise, the arbitrators are no longer personally fulfilling the core tasks of their assignment. The submission of draft texts by Valasek which are drafted under the responsibility of the arbitrators and which are accepted by them, does not justify the conclusion that the arbitral tribunal has (seriously) violated its mandate.[62]

Consequently, the Court rejected the complaints based on both Articles 1065(1)(b) and (c) DCCP.

2.3 *Failure to State Reasons: Article 1065(1)(d) DCCP*

The Russian Federation's next argument was that the awards should be annulled since they fail to state reasons in violation of Articles 1065(1)(d) and 1057(4)(3) DCCP. The Court firstly recalled that it is required to review complaints under this header with restraint and adds to this that a flaw in the reasoning of an award does not justify an annulment.[63] The Russian Federation particularly targeted sections of the awards related to quantum, the auction of Yukos's main production asset and evidence regarding Mordovian companies.

The Court rejected all of these complaints, amongst other reasons because the Russian Federation misinterpreted the awards at various points.[64]

2.4 *Violation of Public Policy: Article. 1065(1)(e) DCCP*

Finally, the Russian Federation argued that the awards should be annulled because they are contrary to public policy. Depending on the exact content of the complaint, the Court recalled, such complaints are to be reviewed more or less intrusively.[65] The Russian Federation submitted no less than seven reasons as to why the awards would violate public policy, many of which were already discussed by the Court under one of the headers addressed above (and therefore

61 *Ibid,* para. 6.6.14.1. Informal translation.
62 *Ibid.* Informal translation.
63 *Ibid,* para. 8.1.2.
64 *Ibid,* paras. 8.4.13 and 8.6.8.
65 *Ibid,* paras. 9.1.1-9.1.6.

quickly dismissed).[66] The argument that captured the Court's attention concerns, again, the investors' alleged 'unclean hands'.

According to the Russian Federation, the enforcement and execution of the awards will violate public policy because it entails fraud, corruption and other serious illegalities and the ultimate outcome of the awards amounts to justifying and conserving the investor's, fraudulent, corrupt and illegal activities.[67] The Court did not concur. It recalled that the unclean hands argument of the Russian Federation was considered extensively by the *Yukos* Tribunal.

Consequently, neither the judgment of the *Yukos* Tribunal nor the manner in which the final awards came into being violate public policy according to the Court.[68] In this regard, it is notable that the Court seemed to pay more deference to the judgment of the *Yukos* Tribunal than it recently did to the judgment of an ICC tribunal when the Court set aside an ICC award where the underlying contract was tainted with corruption.[69]

3 Conclusion

The conclusion of this extensive judgment is that the 2016 decision of the District Court is overturned, and the present judgment of the Court is declared provisionally enforceable. The *Yukos* awards are thus revived. As final comments, the following remarks seem appropriate.

Firstly, the Courts' judgment of 18 February 2020 will not end the *Yukos* saga before the Dutch courts since the Russian Federation has already announced that it will appeal to the Supreme Court.[70] Before the Supreme Court, much of the case can be reargued. Under the Dutch Judiciary Organisation Act, the Supreme Court can set aside judgments "on account of an infringement of the law, with the exception of the law of foreign States."[71] The latter part of that sentence is highly relevant for arbitral awards rendered by investment tribunals seated in the Netherlands. If the Netherlands is not a Contracting Party

66 *Ibid,* paras. 9.3–9.7.

67 *Ibid,* para. 9.8.1.

68 *Ibid,* para. 9.8.7.

69 *Ibid,* compare to: Court of Appeal The Hague, *Bariven S.A.* v. *Wells Ultimate Service LLC,* 22 October 2019, ECLI:NL:GHDHA:2019:2677, paras. 5.2 and 5.6.

70 T Jones, 'Russia Reels as Yukos Awards Are Revived', Global Arbitration Review, 18 February 2020 <https://globalarbitrationreview.com/article/1214667/russia-reels-as-yukos-awards-are-revived> accessed on 26 March 2020.

71 Article 79(1)(b), Dutch Judiciary Organisation Act. English translation available at: <http://www.dutchcivillaw.com/judiciaryact.htm> accessed 27 March 2020.

to the applicable IIA, the abovementioned provision limits the review of the Supreme Court in such cases. This was explicitly confirmed by the Supreme Court in the *Chevron* v. *Ecuador* case.[72] In such cases, rulings of the Court of Appeal regarding the content and interpretation of the applicable IIA cannot be examined for their correctness in cassation.[73]

Since the Netherlands is a Contracting Party to the ECT, the ECT is to be considered as Dutch law. This means that all questions regarding the proper interpretation of ECT provisions, such as Articles 1, 21, 26, and 45, can be reviewed by the Supreme Court. Matters relating to Russian law are, consequently, beyond the scope of review for the Supreme Court. The finding by the Court that Article 26 ECT is not contrary to Russian law is therefore of profound importance for the remainder of this case.

To further complicate matters, since the ECT is not only Dutch law, but also European Union law – as the European Union is also a Contracting Party to the treaty – the Supreme Court may even request a preliminary ruling from the CJEU. It is not inconceivable, for instance, that the Supreme Court would ask for guidance on the proper interpretation of Article 45(1) ECT.[74]

Moreover, if the CJEU would rule in the *Energoalians* case (C-741/19), contrary to the Court in the present case, that a contribution to the economic development of the host State constitutes a requirement for an 'investment', it will be of interest to see how that would enter into the equation in the *Yukos* cases.

Secondly, as evidenced by the abundant references to other IIAs and investment jurisprudence, the Court certainly attempted to render a judgment where it properly navigates the unclear waters of international (investment) law and investment jurisprudence. It must be concluded that, in general, the Court succeeded in that attempt. Another point that stands out is that the judgment is rather arbitration-friendly. Attempts by the Russian Federation to broaden jurisdictional terms such as 'investor' and 'investment' were rejected by the Court which also qualified Article 21 ECT as a 'merits' issue, even though ECT tribunals most often consider objections based on Article 21 as objections to jurisdiction. Those that were afraid that the 2016 judgment of the District Court in the *Yukos* cases adversely reflected on the Netherlands as a seat of arbitration should thus feel comforted by the present judgment.

72 Supreme Court, *Republic of Ecuador* v. *Chevron,* (n 6), paras. 4.4.1-4.4.4.

73 *Ibid.*

74 It appears that the Russian Federation is requesting the Supreme Court to refer the case to the CJEU: A Ross, 'Will Yukos now go before the ECJ?', Global Arbitration Review, 15 May 2020 <https://globalarbitrationreview.com/article/1226901/will-yukos-now-go-before-the-ecj> accessed on 8 June 2020.

Finally, since the judgment is declared provisionally enforceable by the Court, this will properly trigger enforcement efforts by the investors worldwide within a short period of time.

In light of the above, this story is sure to be continued.