THE ARBITRATION OPTION IN ARTICLE 26 OF THE ENERGY CHARTER TREATY AND ITS APPLICABILITY TO DISPUTES WITH THE RUSSIAN FEDERATION:

THE ISSUE OF JURISDICTION IN THE PCA CASES AA 226, 227 AND 228 (*YUKOS*) AND ITS AFTERMATH

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Abstract

Some twenty years ago now, Martha was working as an expert lawyer on energy law in my then law firm Trenité Van Doorne. As the leader in fact of that firm's energy group, Martha had invited a gentleman of the secretariat of the Energy Charter Conference for the purpose of enlightening us about the Energy Charter Treaty (ECT). When we were told that the ECT at the time was only provisionally applicable, my mind drifted away from the subject and towards the concept of provisional application, a concept I vaguely remembered from the time I studied international law. I am afraid I lost track of the speaker's discourse, and the issue of

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provisional application slowly disappeared behind the horizon. It was not before 20 April 2016 (the date when the arbitral awards in the Yukos case were set aside by the District Court of The Hague) that my attention was again focused at the relevance and importance of the concept of provisional application. This chapter is the fruit of some thoughts on that concept, the seed of which was planted by professor Martha Roggenkamp.

1 Background: the ECT and the Yukos case

The Energy Charter Treaty ('*ECT*') is a multilateral treaty on cooperation in the energy sector. To the extent relevant for the present chapter, it seeks to promote and protect investments in that sector. Its text was agreed between the negotiating parties on 17 December 1994. Article 26 ECT provides that at an investor's request, disputes between investors and a host State shall be resolved by arbitration.[2]

The occurrence of criminal investigations against Yukos OJSC ('*Yukos*'), formerly one of the biggest energy companies in Russia, of arrest warrants against its officials, of the freezing of its assets, and of a USD 10 billion tax reassessment in 2003 and 2004, culminating in Yukos' bankruptcy in 2006, gave rise to claims under Articles 10 and 13 ECT (on protection of investments and on the regulating of expropriation respectively), filed by three of Yukos' (former) shareholders against the Russian Federation under the UNCITRAL arbitration rules. These shareholders[3], were all established outside of the Russian Federation.[4] They will from now on collectively be referred to as '*HVY*'.[5]

2 Arbitration proceedings and Court proceedings

The Russian Federation's alleged non-observance of the rules of Article 10 and of Article 13 ECT, caused HVY to initiate arbitration proceedings against the Russian Federation, under the arbitration clause set out in Article 26 ECT. By three final arbitral awards of 14

2 This is a very concise reflection of the complex set of provisions comprised in Article 26 ECT. For a comprehensive commentary to the article, see Hobér, Kai, 'The Energy Charter Treaty', Oxford 2020, p. 389 *et seq*.

3 These are Hulley Enterprise Limited (Cyprus), Veteran Petroleum Limited (Cyprus) and Yukos Universal Limited (Isle of Man).

4 On the Isle of Man and in Cyprus respectively.

5 which is an acronym of the first letters of their names.

July 2014[6], an aggregate amount of approximately USD 50 billion was awarded to the claimants. In the present chapter, the merits of the arbitral awards will not be discussed. Instead we will focus on the issue of the arbitral tribunal's jurisdiction, on the debate on that topic in the arbitration proceedings and in the setting aside proceedings.

Interestingly, the Russian Federation, though being a signatory to the ECT, had never given its consent to be bound by that treaty.[7] Yet, it was held by the arbitral tribunal (the '*Tribunal*') that, according to Article 45(1) ECT, the whole treaty would provisionally apply to its signatories.

Arguing that Article 26 ECT was not provisionally applicable under the rule of Article 45(1) ECT, it was the Russian Federation's case that the Tribunal had no jurisdiction. By three arbitral interim awards, the Tribunal decided in favour of its jurisdiction.[8]

In the setting aside proceedings in the Netherlands[9], the Russian Federation's argument of the Tribunal's lack of jurisdiction was first endorsed by the District Court of The Hague, thus causing the setting aside of all the Tribunal's awards.[10] The District Court's judgment was reversed by the Hague Court of Appeal's judgment of 18 February 2020.[11] The latter's judgment was reversed on points of law by the Supreme Court's judgment of

6 See: www.pca-cpa/cases/pastcases, 2005-03/AA 226 (Hulley), 2005-04/AA 227 (Yukos Universal) and 2005-05/AA 228 (Veteran Oil).

7 As a treaty, the ECT is governed by the Vienna Convention on the Law of Treaties of 1969. According to the Vienna Convention (Articles 12 -15) the consent to be bound is a term indicating a State's unconditional intention to be bound by a specific treaty.

8 These Interim Awards on Jurisdiction and Admissibility, each dated 30 November 2009, are all similar to each other but not identical. They can be found on the site mentioned in footnote 6. For the purpose of this chapter, the differences between the awards are of no consequence. For convenience's sake, whenever hereinafter reference shall be made to the Tribunal's decision on jurisdiction, we will solely refer to the Award 2005-03/AA226 (Hulley) (hereinafter: the '*Award*').

9 The seat of arbitration was The Hague, Netherlands. Hence the jurisdiction of the Dutch Courts on the issue of setting aside. See Article 1073 Dutch Code of Civil Procedure ('*DCCP*').

10 District Court (*Rechtbank*) of The Hague 20 April 2016, ECLI:NL:RBDHA:2016:4229 (Dutch) and ECLI:NLRBDHA:2016:4230 (English (unofficial) translation) (hereinafter: '*Judgment DC*').

11 Court of Appeal (*Gerechtshof*) The Hague, 18 February 2020, ECLI:NL:GHDHA:2020:234 (hereinafter: '*Judgment CA*'); case note by C. Verburg: 'The Hague Court of Appeal Reinstates the Yukos Awards', *European Investment Law and Arbitration Review Online,* 5(1), 297-314.

5 November 2021[12], but the Court of Appeal's decision in favour of the Tribunal's jurisdiction was upheld.[13]

3 The main issue: the provisional applicability of Article 26 ECT and the Tribunal's jurisdiction

Provisional application is a concept of international law, embodied in Article 25 of the Vienna Convention on the Law of Treaties of 1969 ('*VCLT*')[14], providing that, subject to agreement between the negotiating parties, a treaty shall provisionally apply from its signature onwards, instead of being applicable subject to the expression of one or more consents to be bound.[15]

Provisional application is a compromise between (i) the desire for immediate application of an agreement reached by the negotiating States in the international sphere and (ii) the prominence of the constitutional balance of powers in the internal sphere of each of these States. The latter will often require the involvement of bodies designated to control the executive branch of government. As a result, delays may occur, which may run counter to a desire of urgency, as may be felt in the international sphere.

In order to reconcile these two approaches, the practice has arisen in the international sphere to limit the scope of a treaty's provisional application, by clauses aimed at avoiding infringements of the constitution or laws of each of the negotiating States. Such clauses are commonly referred to as *limitation* clauses[16] and Article 45(1) ECT is one of them. This Article provides that '*(e)ach signatory agrees to apply this Treaty provisionally*

12 Supreme Court (*Hoge Raad)* 5 November 2021, ECLI:NL:HR:2021:1645 (hereinafter: '*Judgment SC*'). It was held by the Supreme Court that the Court of Appeal was wrong for having failed to substantively discuss the Russian Federation's argument of HVY's fraudulent conduct during the arbitration proceedings. See Judgment SC, §§ 5.1.3 – 5.1.18. The matter was referred to the Court of Appeal of Amsterdam for judgment to be rendered in accordance with the Supreme Court's decisions.

13 See Judgment SC, §§ 5.2.3 – 5.2.21.

14 The VCLT applies only to treaties between States. The conclusion of treaties between international organisations is governed by the Vienna Convention on the Law of Treaties between States and International Organisations of 1986.

15 The expression of the consent to be bound is often subject to parliamentary approval. On the rationale for provisional application see for instance: First Report on the Provisional Application of Treaties by Mr Juan Gómez Robledo, special rapporteur, Document A/CN.4/664 of 3 June 2013, Chapter I, §§ 25 – 35; Deley, Tim, 'De voorlopige toepassing van verdragen', Ghent, 2018 – 2019, §§ 7 – 15 and Klabbers, J., '*Verdragenrecht*', in Horbach, Lefeber and Ribbelink (eds.), 'Handboek Internationaal Recht', The Hague 2007, in § 5.

16 See for instance: Deley, *oc.,* § 93.

pending its entry into force for such signatory (……), to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.'

From the outset, the Russian Federation argued that situations of *inconsistency* in Article 45(1) are to be assessed on a case by case basis. The provisional application of each single provision of the ECT would need to be assessed by checking its consistency with Russian law. This approach is referred to as the *piecemeal approach*.[17]

In arbitration and in the proceedings in the District Court it was argued by HVY that *inconsistency* in Article 45(1) ECT refers to the inconsistency between the *principle* of provisional application and domestic law[18]. Once in a given State the principle of provisional application would be recognised, the entire ECT should be applied to disputes in which such a State would be involved. This approach is referred to as the *all or nothing approach*.

The applicability of Article 26 ECT between the Russian Federation and an investor will, accordingly, in all cases depend on the interpretation of Article 45(1) ECT. This is a matter of treaty interpretation, a topic which will be addressed in the next paragraph.

4 The interpretation of treaties

The interpretation of treaties is a matter governed by international law. The relevant provisions are the Articles 31 and 32 of the VCLT. Treaties are to be interpreted in good faith, in (i) accordance with the ordinary meaning of the terms of the treaty, (ii) in their context and (iii) in the light of the treaty's object and purpose (Article 31(1) VCLT).[19]

Other means of interpretation, such as interpretation based on the treaty's history (including the *travaux préparatoires*) may only be relied on in order to confirm an interpretation based on the rule of Article 31(1), or in case an interpretation based on that provision would lead to an ambiguous or absurd result (Article 32 VCLT).

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17 A term, coined by the Tribunal; see for instance § 292 of the Award.

18 As held by the arbitral tribunal in its decison on jurisdiction in the matter of *Kardassopoulos vs. Georgia* of 6 July 2007 (ICSID Case No. ARB/05/18). This decision is extensively reviewed in connection with the Yukos case by Hobér, *oc.*, p. 520 – 526. The Kardasopoulos decision is also referred to in §§ 269, 309 and 391 of the Award. The term '*all or nothing approach*' is likewise coined by the arbitral tribunal. See § 292 of the Award. The discussion on the applicability of the piecemeal approach or the all or nothing approach is reflected in §§ 290 – 329 of the Award and in §§ 5.8 *et seq.* of the Judgment DC.

19 On the interpretation of treaties, see for instance: Aust, Anthony, 'Modern Treaty Law and Practice', Cambridge 2013, p. 205 *et seq.* and (more in depth): Gardiner, Richard, 'Treaty Interpretation', Oxford 2015.

5 The discussion of the Tribunal's jurisdiction by the Tribunal and the Dutch Courts

In the discussions on jurisdiction before the Tribunal and before the District Court, the focus was on the carve-out provision of the first paragraph of Article 45 ('*to the extent that such provisional application is not inconsistent with* [a signatory's] *constitution, laws and regulations*'). In this respect, two issues were found to be of peremptory importance: (i) what is meant by *'such provisional application*'? and (ii) what is meant by *inconsistency*?

5.1 'Such provisional application'

(a) *All or nothing or piecemeal? The Tribunal and the District Court*
Essentially, the debate on the concept of *'such provisional application*' before the Tribunal and the District Court was about the applicability of either the *all or nothing approach* (as advocated by HVY) or the *piecemeal approach* (as advocated by the Russian Federation).[20] The Tribunal found in favour of the all or nothing approach.[21] The District Court found in favour of the piecemeal approach.[22]

Taking the ordinary meaning of Article 31(1) VCLT as its point of departure, the Tribunal found that (i) in its initial part Article 45(1) ECT[23] provides for the provisional application of the ECT in its entirety ('*(e)ach signatory agrees to apply this Treaty*'[24]), and (ii) on account of the word *such* in the following part, the carve-out provision towards the end of Article 45(1) ('*to the extent* such *provisional application*…..') therefore refers to the concept of provisional application of the treaty as a whole.[25] Hence the Tribunal's position that solely an inconsistency between the *principle* of provisional application with a signatory's constitution, laws and regulations would preclude the provisional application of the entire ECT.

This ordinary meaning based argument was further supported by arguments relating to context, State practice, and to the ECT's object and purpose (Articles 31(1) and 31(3)(b) VCLT). The Tribunal found that in context a reference to the entire treaty accords better

20 See § 3 above *in fine*.
21 Award, § 329.
22 Judgment DC §§ 5.12, 5.18 and 5.23.
23 as partly quoted in § 3 above.
24 Article 45(1) ECT first line; emphasis added.
25 Award, § 304.

to the ordinaty meaning of Article 45(1) than a reference to only part of the treaty.[26] No State practice in favour of the *piecemeal* approach was found by the Tribunal. Moreover, according to the Tribunal, such an approach would run squarely against the ECT's object and purpose and against the grain of international law, for allowing too much importance to a State's internal law for the purpose of interpretation of a provision of international law (such as Article 45 ECT).[27] The disregarding of such principle of preponderance of international law, would require unambiguous and clear wording, which the Tribunal found to be lacking in the ECT.[28] Hence the Tribunal's preference for an all or nothing approach.

In the setting aside proceedings initiated by the Russian Federation, the Hague District Court, likewise, took the ordinary meaning of Article 45(1) ECT as its point of departure. By its judgment of 20 April 2016[29], the Court discarded the importance attached by the Tribunal to the word *such*, for stating the obvious.[30] Instead, the Court emphasised the importance of the words *to the extent*, followed by the reference to inconsistency with a signatory's constitution, laws and regulations. By the said expression, Article 45(1) would – in the Court's view – refer to multiple occurrences rather than to one single occurrence of inconsistency. This led the Court to expressing a preference for the *piecemeal approach*: each single provision of the ECT would be provisionally applicable unless the provision at hand were inconsistent with Russian law.[31]

Like the Tribunal, the Court found support for its ordinary meaning approach in arguments relating to context. Finding that the principle of provisional application is unlikely to be refuted by a signatory's *regulations*, the Court held that the use of that term would provide support for the piecemeal approach.

Support for the piecemeal approach was also found in the principle that similar terms in one and the same instrument should preferably be given the same meaning.[32] Noting that a carve-out provision, similar to that of Article 45(1) was applied in Article 45(2)(c) with respect to the sole provisional applicability of Part VII ECT (relating to the ECT's institutions and structure), the Court found that logically, the concept of inconsistency in Article 45(2)(c) cannot relate to the *principle* of provisional application, but can only relate to inconsistencies between the provisions of Part VII and the relevant laws of the State in question. Relying on the principle that identical terms, used at different spots,

26 Award, § 208.

27 Award, §§ 312 – 320.

28 Award, §§ 321 – 328.

29 ECLI:NL:RBDHA:2016:4229; an unofficial English version is set out in ECLI:NL:RBDHA:2016:4230.

30 Judgment DC, § 5.12.

31 Judgment DC, § 5.12.

32 Gardiner, *oc.*, p. 209, § 4.2.7.

shall have the same meaning, the Court found that just like Article 45(2)(c), Article 45(1) ECT should be deemed to refer to the case of the inconsistency of single provisions with a signatory's laws rather than to the *principle* of provisional application.[33]

Hence the Court's preference for the piecemeal approach.

(b) Tertium; an alternative approach on the interpretation of Article 45 ECT presented and discussed in the appeal proceedings; the Court of Appeal and the Supreme Court

In the appeal proceedings initiated by HVY against the District Court's judgment an *alternative approach* was presented and relied on by HVY: Article 45(1) should be interpreted as providing that the entire ECT is to be applied provisionally, save to the extent that in the State in question the application of *certain categories of provisions* would be inconsistent with its constitution, laws, or regulations.[34] This approach was endorsed by the Court of Appeal, based on the ordinary meaning of Article 45(1) ECT, and on arguments relating to context, object and purpose.[35]

Noting that in Article 45(1) ECT the use of the words *such provisional application* appears to rule out the piecemeal approach on the one hand, and that the use of the words *to the extent* seems to rule out the all or nothing approach on the other hand, the Court of Appeal found that each of the referenced wordings would have a logical meaning if the *alternative approach* were applied. On the one hand, the alternative approach would, as a matter of principle, refer to the provisional application of the entire ECT, which is in line with the use of the reference *such* to *this Treaty*. On the other hand the alternative approach would provide for more than one occurrence of inconsistency, which would be in line with the use of the words *to the extent*. Hence the Court's finding that on account of the ordinary meaning criterion, the alternative approach should be preferred to the piecemeal approach and the all or nothing approach.[36]

Context driven arguments would, in the Court's view, militate against the all or nothing approach. In this respect the Court of Appeal appears to share the District Court's argument relating to Article 45(2)(c) (provisional application of Part VII).[37]

Arguments based on the ECT's object and purpose would in the Court's view lead to discarding the piecemeal approach. It being one of the purposes of the ECT to promote and protect investments in the energy sector, *inter alia* by creating stable, equitable, favourable and transparent investment conditions, an approach requiring the testing of

33 Judgment DC, § 5.15; also shared by the Court of Appeal in § 4.5.19 of its judgment.
34 Judgment CA, § 4.4.2.
35 Judgment CA, §§ 4.5.48, 4.61, 4.7.32, 4.7.58, 4.7.65 and 4.9.2.
36 Judgment CA, § 4.5.13.
37 Judgment CA, § 4.5.18.

the consistency between each and any provision of the ECT on the one hand and the law of the host Sate on the other hand would be likely to create a situation of uncertainty for the beneficiaries of such protection and promotion. As a result of such uncertainty, the piecemeal approach (as advocated by the Russian Federation) would not – in the Court's view – be as effective for the reaching of the purpose of protecting and promoting investments as the all or nothing approach or the alternative approach.[38]

By its judgment of 5 November 2021, the Supreme Court found that, based on its reasoning, the Court of Appeal's interpretation of Article 45(1) ECT was correct in principle.[39] However, the Supreme Court refrained from further analysing such initial qualification on the ground that the Court of Appeal's finding was not only based on the *alternative approach* but also on the Court's analysis of piecemeal-approach based arguments advanced by the Russian Federation.[40]

5.2 Inconsistency[41]

At this point, the different approaches and decisions on *inconsistency* by the Tribunal, the District Court, the Court of Appeal and the Supreme Court respectively will be reviewed.

Having found in favour of the all or nothing approach and noting that from the days of the USSR onwards, the provisional application of treaties had been allowed and provided for, the Tribunal found there to be no inconsistency between the principle of provisional application and Russian law.[42] Nevertheless, in spite of its preference for the all or nothing approach, the Tribunal, subsequently also approached the issue of inconsistency by specifically investigating the inconsistency between the arbitration clause of Article 26 ECT and Russian law, thus employing the piecemeal approach.[43] Based on a thorough analysis of Russian law, the Tribunal again decided against inconsistency and in favour of its jurisdiction.[44]

The main cause of the District Court's decision to the contrary, having brought about the setting aside of the arbitral awards, seems to rest on the Court's rather broad defini-

38 Judgment CA, §§ 4.5.26, 4.5.27.

39 Judgment SC, § 5.2.10.

40 Judgment SC, §§ 5.2.6 and 5.2.10

41 For a summary of the discussion of the issue of *consistency* in the arbitration proceedings: Hobér, *oc.*, Part VIII (H), § iv, at p. 520 *et seq.*

42 Award, §§ 330 – 345.

43 Award, §§ 346 – 392, see also Hobér, *oc.* p. 525, 525.

44 Award, §§ 394, 396 and 397.

tion of inconsistency. By a hardly reasoned statement in its judgment of 20 April 2016, the Court held that an inconsistency between Article 26 ECT and Russian law would not only occur in the event of an outright prohibition of dispute resolution by arbitration as provided in Article 26 ECT, but also in the absence of a legal basis for arbitration as provided for by Article 26 or – when viewed in a wider perspective – if dispute resolution by arbitration would not harmonise or would be irreconcilable with the starting points and principles of the Russian legal system.[45] Based on that test, the District Court decided against the provisional applicability of Article 26 ECT and against the Tribunal's jurisdiction.[46]

Based on (i) the alternative approach[47], which it had endorsed, (ii) its rejection of the District Court's ample definition of *inconsistency* for being at variance with the ordinary wording of Article 45(1) and for depriving that provision of any practical meaning[48], (iii) the adoption of the test for inconsistency of the *impossibility of joint compliance*[49], and (iv), its finding that under Russian law, no category of treaty provisions was barred from being applied provisionally[50], the Court of Appeal concluded in favour of a duty for the Russian Federation to apply Article 26 ECT, and accordingly in favour of the Tribunal's jurisdiction.[51] Notwithstanding such finding, the Court of Appeal, just like the Tribunal, and superfluously[52], proceeded to apply the piecemeal approach by an analysis of the grounds adduced by the Russian Federation for inconsistency between Article 26 ECT and Russian law.[53] These grounds were: (i) inconsistency with the principle of separation of powers, (ii) the non-arbitrability of the dispute under Russian law and (iii) no title to sue for shareholders under Russian law under circumstances similar to those of the case at hand. Applying a rule based approach rather than – as the District Court did – an approach reflecting the principle of the Russian legal system, the Court of Appeal did not find any *inconsistencies* between Article 26 and Russian law.[54] Accordingly it was held that Article 26 is to be provisionally applied and that the Tribunal had jurisdiction after all.

45 Judgment DC, § 5.33.
46 Judgment DC, §§ 5.34 – 5.92.
47 Judgment CA, §§ 4.5.33 and 4.5.48.
48 Judgment CA: § 4.5.43.
49 Judgment CA, § 4.5.46.
50 Judgment CA, §§ 4.5.41, 4.6.1.
51 Judgment CA, § 4.6.1.
52 Judgment CA, § 4.6.2.
53 Judgment CA, §§ 4.6.2 and 4.7.1 *et seq.*
54 Judgment CAd §§ 4.7.32, 4.7.58 and 4.7.65.

The Court of Appeal's rejection of the Russian Federation's argument that Article 26 ECT would be inconsistent with Russian law in the absence of a legal basis for arbitration in cases contemplated by the ECT[55], was confirmed by the Supreme Court on the ground that such broad interpretation (i) is not justified by Article 45(1)'s ordinary meaning,[56] (ii) is not corroborated by the ECT's object and purpose[57] and (iii) is not supported by State practice.[58]

The Russian Federation's grievances against the Court of Appeal's judgment on the issue of the Tribunal's jurisdiction were accordingly rejected.[59]

6 Observations

The scope of this chapter does not really allow the presentation of a detailed and comprehensive set of concluding remarks. Instead, the following observations are presented that may provide food for further thought.

With the Supreme Court's judgement of 5 November 2021, the saga of the Yukos arbitration has not come to an end. The Court of Appeal's judgment of 18 February 2020 was set aside on the sole ground that the Court of Appeal was wrong in declaring the inadmissibility of the Russian Federation's claims based on HVY's alleged fraudulent conduct in the arbitration proceedings. All other grounds of appeal were rejected. That means that the Court of Appeal's judgment of 18 February 2020 stands firm but for the issue of HVY's alleged fraud.[60] Habitually, when providing clarification on a point of law and when setting aside a lower Court's judgment for that reason, the Supreme Court will refer the matter to a lower Court for judgment to be rendered by applying the Supreme Court's clarifications to the facts of the matter. In accordance with that way of working, the matter was referred to the Amsterdam Court of Appeal. That Court shall investigate whether or not the Russian Federation's allegations of fraudulent conduct by HVY are evidenced, and if so, whether such fraudulent conduct would justify the setting aside of the arbitral awards in the Yukos case. This will be the sole issue to be dealt with by the Amsterdam Court of Appeal. The issue of jurisdiction is finally dealt with, for the Russian Federation's arguments against the Court of Appeal's decision on that issue being dismissed.

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55 Judgment CA, §§ 4.5.47 and 4.7.47.

56 Judgment SC, §§ 5.2.12, 5.2.13.

57 Judgment SC, § 5.2.14.

58 Judgment SC, § 5.2.15; for further clarification see Gardiner, *oc*, p.223. *et seq*. and p. 253 *et seq.*

59 Judgment SC, § 5.2.16.

60 See Asser Procesrecht/Korthals Altes & Groen 7 2015/328 *et seq.*

In essence, the Tribunal's interpretation of Article 45(1) ECT rests on the primacy of international law and on the emphasis laid by the Tribunal on the protection of the ECT's object and purpose. By contrast, the District Court laid particular emphasis on the right of a negotiating State to protect its constitutionally based system of separation and attribution of powers. The Tribunal's approach can be legitimised by the rules of Article 31(1) and of Article 31(3) VCLT. However, Article 45(1) ECT unmistakably refers to rules of domestic law. For the dilemma thus created, the VCLT does not offer a solution since no weight or hierarchy is attached to the different elements that are to be taken into account for the purpose of interoperation.[61]

The Court of Appeal, cautiously opting for the *alternative approach,* and emphasising the ECT's object and purpose, decided in favour of the Tribunal's jurisdiction on grounds shared and confirmed by the Supreme Court.

The Supreme Court did not decide that the *alternative approach* is the approach to be elected instead of the *piecemeal approach* or the *all or nothing approach*. The Supreme Court simply did not make a choice between the two lines of argument underlying the Court of Appeal's decision in favour of jurisdiction. Such decision was not only based on the *alternative approach* (first line of argument) but also on its analysis of piecemeal-based arguments advanced by the Russian Federation (second line of argument). A grievance by the Russian Federation was directed against the Court of Appeal's applying the *alternative approach* but no grievance was directed against the Court of Appeal's finding in favour of the Tribunal's jurisdiction based on an analysis of arguments as advanced by the Russian Federation itself. It being the case that decisions and their underlying arguments shall stand firm in the absence of any grievance directed against them, the Supreme Court expressed that even if it were to hold that the Court of Appeal was wrong in deciding in favour of the Tribunal's jurisdiction on the basis of the *alternative approach*, a setting aside of the Court of Appeal's judgment on the issue of jurisdiction would not follow, absent a grievance against the second line of argument applied by the Court of Appeal. For the same reason, the request for the filing of preliminary questions to the ECJ was declined.

The Supreme Court also did not pronounce on the lower Courts' analysis of Russian law to the extent it would potentially give rise to an inconsistency with Article 26 ECT. The Supreme Court has no jurisdiction to decide on points of foreign law.[62]

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61 In this respect reference is often made to the '*crucible approach*'; see for instance Gardiner, *oc.*, p. 10, 32, 38, 162 and 495.

62 Article 79(1) of the Act on the organisation of the judiciary (*Wet R.O.*); The lower Courts have the duty to apply foreign law (if found applicable) *ex officio* (Articles 25 DCCP and 10:2 DCC).

The tool of provisional application is a tool within the context of international law with effects in the internal legal order of States. As such, wherever provisional application is relied on, it may potentially lead to clashes of arguments by those in favour of the protection of internal state law and those in favour of protecting and strengthening the position of international law. In so far as the Yukos case is concerned this means a difference between USD 50 billion and naught.