WRIT OF SUMMONS

Today, the tenth day of November two thousand fourteen (2014), at the request of the RUSSIAN FEDERATION, seated in Moscow, the Russian Federation, choosing as its address for service the office address of Hanotiau & van den Berg, 480 Avenue Louise B.9 (IT Tower, 9th floor), 1050 Brussels, Belgium, of which firm Prof. Dr. A.J. van den Berg will act as counsel in this case, as well as the office address of Wessel Tideman en Sassen on Van Stolkweg 8 in (2585 JP) The Hague, of which firm Mr. L.Ph.J. baron van Utenhove, who will act as local counsel,

I have

SUMMONED:

a company incorporated in accordance with, and subject to, the laws of Cyprus **VETERAN PETROLEUM LIMITED** (listed under number HE 118058 in the Cypriot Commercial Register) with its registered offices and business address at Spyrou Kyprianou, 20A, Chapo Central, Floor 1, Flat/Office 3, 1075, Nicosia, Cyprus ("**Defendant**"), therefore, having no place of domicile or actual residence in the Netherlands but a known address abroad, and consequently pursuant to Article 56(2) Dutch Code of Civil Procedure, and in my capacity as transmitting agency within the meaning of Regulation (EC) no. 1393/2007 of the European Parliament and of the Council of November 13, 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (Service Regulation), I have

TRANSMITTED TO THE FOLLOWING RECEIVING AGENCY

Ministry of Justice and Public Order
Athalassa Avenue 125
CY-1461 Lefkosia (Nicosia)
Cyprus

two copies of this writ (the exhibits will be submitted on the first court day). This transmission is effected today by UPS couriers, and included the following documents:

- two English translations of this writ, and
- the form referred to in Article 4(3) of the said Service Regulation, completed in the English language,

I have requested the receiving agency to serve this writ, accompanied by an English translation of this writ, on VETERAN PETROLEUM LIMITED in the manner set forth at 5 of the above-mentioned form “request for service of documents”, i.e. service in accordance with the laws of the requested State (form 5.1).

IN ADDITION, FOR THE PURPOSE OF SERVICE ON THE AFOREMENTIONED VETERAN PETROLEUM LIMITED,

I will send a copy of this writ, as well as an English translation of this writ, today, in accordance with Article 56(3) Dutch Code of Civil Procedure and Article 14 of the aforementioned Service Regulation, by UPS couriers, to the address of the aforementioned VETERAN PETROLEUM LIMITED, accompanied by the standard form mentioned in Article 8 of the Service Regulation, included in Schedule II to the Service Regulation, with notification that VETERAN PETROLEUM LIMITED may refuse to accept this document if it is not written in a language, or is not accompanied by a translation, as referred to in Article 8(1) of the Service Regulation and that the refused documents are to be returned within the period mentioned in that Article,

AND IN ADDITION

I have, for the purpose of service on the aforementioned VETERAN PETROLEUM LIMITED, served my writ on **RODNEY SIMON HODGES** (director of VETERAN PETROLEUM LIMITED), residing at Seaton Place 17-19, Suite 12, St. Helier JE2 JQL, Jersey, Channel Islands, therefore, having no place of domicile or actual residence in the Netherlands but a known address abroad, and consequently serving my writ at the civil servant of the Public Prosecutor's Office at the district court of The Hague, the Netherlands, located at Prins Clauslaan no. 60, The Hague, the Netherlands, and leaving two copies of this writ (the exhibits will be submitted on the first court day) and a translation in the English language of this writ, to:

, employed at this address,

stating that service of this writ is requested in accordance with Articles 3-6 of the Convention on the Service in the Member States of the European Union of Judicial and Extrajudicial Documents in Civil or Commercial Matters of November 15, 1965, by delivery, or – if this is not possible – by service in accordance with local laws, in both instances against simultaneous delivery of a receipt, and that a third copy of this writ, accompanied by an English translation of this writ will be sent by registered post to RODNEY SIMON HODGES at the above-mentioned address, and that a fourth copy of this writ, accompanied by an English translation of this writ, will be sent by UPS couriers to the address of the aforementioned RODNEY SIMON HODGES.

TO:

1. **appear on** Wednesday January 28, 2015 at 10:00 hours CET, not in person but represented by counsel, at the session of the district court in The Hague, location The Hague, civil-law sector, to be held in the court building of the Palace of Justice on Prins Clauslaan no. 60 in (2595 AJ) The Hague, the Netherlands;

2. **with notification that** if VETERAN PETROLEUM LIMITED does not appear at the aforementioned session, represented by counsel, or fail to timely pay the court fee it owes in connection with its appearance, the district court will grant leave to proceed without VETERAN PETROLEUM LIMITED and will award the below-mentioned claim, unless the formalities and terms for summonsing have not been observed and/or the court deems the claim unlawful or without ground;

3. **with notification that** if VETERAN PETROLEUM LIMITED does appear, VETERAN PETROLEUM LIMITED will owe a court fee that has to be paid within four (4) weeks after VETERAN PETROLEUM LIMITED has appeared before the court, the amount of which is published in the most recent schedule to the *Wet griffierechten burgerlijke zaken* (Court Fees (Civil Cases) Act) published on http://www.rechtspraak.nl/Procedures/Tarieven-griffierecht/Pages/Griffierecht-bij-de-rechtbank.aspx and that a person of limited means owes an amount to be determined by or pursuant to the law, provided that he has submitted at the time when the court fee is due:

    - a copy of the decision of assignment within the meaning of Article 29 Wet op de rechtsbijstand (Legal Aid Act), or if this not possible due to circumstances that cannot in reason be attributed to that person, a copy of the application within the meaning of Article 24(2) Legal Aid Act, or

    - a statement from the Legal Aid Council, within the meaning of Article 7(3)(e) Legal Aid Act, showing that his income does not exceed the income referred to in the order in council pursuant to Article 35(2) of that Act,

IN ORDER:

To hear it claimed and moved on behalf of the Russian Federation as follows:

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I. INTRODUCTION

1. This case arises from a Russian tax dispute between Russian oligarchs and the Russian Federation concerning Russian tax assessments against a Russian company that the Russian oligarchs owned and controlled. That company, Yukos Oil Company ("**Yukos**"), evaded hundreds of billions of rubles in Russian corporate profit tax and other taxes, and then refused to pay the taxes that were predictably assessed against it by the Russian authorities when they finally uncovered the company's previously concealed tax evasion scheme. These same Russian oligarchs now control Claimants, and as matters stand today these oligarchs would receive more than USD 50 billion under the arbitral awards that are the subject of this Writ, even though the oligarch entitled to receive by far the largest amount – roughly USD 30 billion – has openly acknowledged that he paid nothing for his Yukos shares.[1]

2. Yukos' tax assessments were based on the application of fundamental principles of tax law that are commonly used to combat tax evasion around the globe, including in the Netherlands, and were upheld by Russia's first instance and appellate courts, and in unanimous rulings by two separate Chambers of the European Court of Human Rights (the "**ECtHR**").

3. Despite the Russian authorities' collection efforts, Yukos continued to refuse to pay its tax liabilities. It also defaulted on its loan from a consortium of private banks. In due course, bankruptcy proceedings were commenced against Yukos, and its assets were sold at public auctions to partially defray its creditors' claims.

4. Even though this case concerns a Russian tax dispute, the Russian oligarchs contrived to transform their domestic dispute into three parallel international investment treaty arbitrations (the "**Arbitrations**") under the Energy Charter Treaty (the "**ECT**"). These proceedings ultimately resulted in the awarding of damages unprecedented in their amount, exceeding by more than 20 times the amount of damages awarded in any prior international arbitration.

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[1] As used in this Writ, "**Claimants**" refers to all three of the defendants: Hulley Enterprises Limited, Veteran Petroleum Limited and Yukos Universal Limited, which were the Claimants in the arbitrations that are the subject of this Writ.

5. In particular, the oligarchs attempted to convert (and, in effect, re-litigate) their domestic dispute with their own country's tax authorities into an international investment treaty arbitration by asserting their claims through Claimants, three offshore shell companies that the oligarchs created to hold their Yukos shares. The oligarchs incorporated these shell companies in the tax havens of Cyprus – in the cases of Claimants Hulley Enterprises Limited ("**Hulley**") and Veteran Petroleum Limited ("**VPL**") – and the Isle of Man, in the case of Claimant Yukos Universal Limited ("**YUL**"). Both Cyprus and the Isle of Man (through the United Kingdom) are parties to the ECT.

6. The object and purpose of the ECT, however, was to capitalize on the complementarities between oil producing States in the East – principally, the Russian Federation – and oil consuming States in the West, principally the members of the European Union. The ECT was not intended to provide a forum for settling domestic disputes between a State and citizens or nationals of that State, not involving an investment of foreign capital, as was the case here. This purpose would be completely frustrated if domestic investors were allowed to bring claims under the ECT against their own State merely by having those claims asserted by shell companies organized under the law of a party to the ECT, but having no business activities there, as was again the case here.

7. The Russian Federation objected to the jurisdiction of the arbitral tribunal appointed to hear Claimants' claims (the "**Tribunal**") on a number of grounds. On November 30, 2009, the Tribunal issued three parallel Interim Awards on Jurisdiction and Admissibility (the "**Interim Awards**"), rejecting the Russian Federation's objections to the Tribunal's jurisdiction. The Interim Awards are entered into the proceedings as Exhibit RF-1.

8. One of the Russian Federation's jurisdictional objections that the Tribunal rejected was based on the fact that the Russian Federation never ratified the ECT, but instead only agreed to apply it on a provisional basis in accordance with Article 45 ECT "*to the extent that such provisional application*" is not inconsistent with Russia's Constitution, laws or regulations. Russian law does not permit public law disputes (including tax disputes and expropriation claims) to be resolved by arbitration except pursuant to a federal law or a ratified treaty. The ECT was never ratified, and no Russian law has ever provided for such disputes to be resolved by arbitration. The arbitration of Claimants' claims under the ECT's investor-State dispute settlement mechanism is accordingly inconsistent with Russian law, and the Tribunal had no jurisdiction to decide Claimants' claims.

9. The Tribunal also rejected the Russian Federation's jurisdictional objection based on Article 1(6) and 1(7) ECT, which defines the investors and investments eligible for protection under the Treaty, even though Claimants are shell company proxies for Russian nationals, and thus are not entitled to invoke against their own country the protections intended to be afforded by the ECT to the investments of citizens or nationals of another State that is a party to the ECT.

10. The Russian Federation also objected to the Tribunal's jurisdiction because Article 21(1) ECT provides that "*nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures*," and Claimants' claims manifestly concerned "*Taxation Measures*," in particular, the tax assessments and related collection efforts that the Tribunal subsequently found to constitute measures tantamount to the expropriation of Claimants' interests in Yukos. In the Interim Awards, the Tribunal deferred its decision on this jurisdictional objection until its ruling on the merits.

11. Following the parties' submission of evidence and memorials on the merits, and a merits hearing held in The Hague from October 10 to November 9, 2012, the Tribunal issued three parallel Final Awards (the "**Final Awards**") (together with the Interim Awards, the "**Yukos Awards**") on July 18, 2014. The Final Awards are entered into the proceedings as Exhibit RF-2.[2] In the Final Awards, the Tribunal held that it had jurisdiction notwithstanding Article 21 ECT, and that Yukos' tax assessments and other measures taken by the Russian authorities constituted measures having an effect "*equivalent to nationalization or expropriation*," in breach of the Russian Federation's obligations under Article 13(1) ECT.

12. In holding that it had jurisdiction to decide Claimants' claims notwithstanding Article 21 ECT, the Tribunal disregarded the plain meaning of the ECT's text and fundamental principles of treaty interpretation, as well as the treaty's object and purpose.

13. In upholding Claimants' expropriation claim under Article 13(1) ECT, the Tribunal (a) disregarded established principles of Russian tax law that are consistent with international tax practice, including in the Netherlands, in basing its decisions on its own view as to what Russian tax law *should* provide, rather than what it *actually does* provide; (b)

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[2] Exhibit RF-3 contains the complete case file of the three arbitral proceedings, and, for the Court's convenience, has been stored on a USB data carrier. When reference is made to documents from the case file, the numbering of the case file is used. Exhibit RF-3 also contains an overview of the abbreviations used for the documents in the case file.

disregarded principles of international law; (c) relied on internally inconsistent factual conclusions, including with respect to what the Tribunal described as one of the "*but for*" causes for its expropriation finding; and (d) openly conceded that certain of its rulings were based on its own speculation about what the Russian Federation *might have* done, for example, if Yukos had properly paid its tax liabilities, rather than proven facts as to what the Russian Federation *actually did.*

14. The Tribunal also exceeded its mandate by awarding Claimants more than USD 50 billion in damages, based on a valuation date and its own non-standard methodology that departed significantly from the parties' submissions and fell outside the parties' debate. Had the Russian Federation been afforded an opportunity to be heard on the methodology the Tribunal developed on its own, it would have demonstrated that this methodology effectively double-counted a significant portion of Claimants' purported losses, and in addition failed to take consistent account of the adjustments made by the Tribunal in the data presented by the parties. These flaws in the Tribunal's own non-standard methodology resulted in a surprise award, and the economically unwarranted awarding of not less than USD 21.651 billion in damages, a sum in itself more than eight times larger than the largest award of damages in any prior international arbitration.

15. This domestic Russian tax dispute – between Russian nationals and the Russian Federation concerning Russian tax assessments against a Russian company – should never have been the subject of an international investment treaty arbitration at all, and certainly should not have resulted in awards that are so fatally flawed, and on so many grounds, as are the Yukos Awards. The Russian Federation therefore files this Writ to respectfully request that the Court set aside the Yukos Awards:

    (a) pursuant to Article 1065(1)(a) DCCP, because there was no valid arbitration agreement between Claimants and the Russian Federation with respect to the subject matter of Claimants' claims, and the Tribunal thus lacked jurisdiction over Claimants' claims;

    (b) pursuant to Article 1065(1)(c) DCCP, because the Tribunal violated its mandate in numerous respects;

    (c) pursuant to Article 1065(1)(b) DCCP, because the Tribunal was irregularly composed;

(d) pursuant to Article 1065(l)(d) DCCP, because the Tribunal did not provide any reason for several key aspects of its rulings; and

(e) pursuant to Article 1065(1)(e) DCCP, because the Yukos Awards reflect the Tribunal's partiality and prejudice, and the violation of public policy and good morals, including the Russian Federation's fundamental due process rights.

16. The Court has jurisdiction to receive this Writ. The place of the Arbitrations within the meaning of Article 1037(1) and 1073(1) DCCP was The Hague, and the Interim and Final Awards were deposited at the registry of this Court on August 11, 2014, in accordance with Article 1058(1)(b) DCCP. Thus, pursuant to Article 1064(2) DCCP, in conjunction with Article 1058(1) DCCP, this Court has jurisdiction to hear the Russian Federation's request to set aside the Yukos Awards.

17. Following a background section, the remainder of this Writ details in five sections the reasons why the Court should set aside the Yukos Awards. Each of these reasons standing alone constitutes an independent ground why these awards should be set aside. This is followed by a final section dealing with exhibits, joinder and costs. For ease of reference, the matters addressed in each section are summarized below.

18. *Section II* provides an overview of the pertinent background facts, including (a) the Russian oligarchs' fraudulent acquisition and consolidation of control over Yukos; (b) the principal features of Yukos' tax evasion scheme; (c) the Russian authorities' efforts to collect the taxes Yukos evaded; (d) the ECT's history and purpose; (e) the claims asserted by Claimants under the ECT; (f) the procedural history of the Arbitrations; and (g) a summary of the Yukos Awards. These matters are discussed at paragraphs 26 to 99.

19. *Section III* provides in paragraphs 100 to 105 a brief summary of the grounds for setting aside the Yukos Awards pursuant to Article 1065(1)(a) DCCP, Article 1065(1)(b) DCCP, Article 1065(1)(c) DCCP, Article 1065(1)(d) DCCP and Article 1065(1)(e) DCCP.

20. *Section IV* establishes in paragraphs 106 to 362 that the Court should set aside the Yukos Awards pursuant to Article 1065(1)(a) DCCP, because there was no valid arbitration agreement between Claimants and the Russian Federation with respect to Claimants' claims, and the Tribunal accordingly lacked jurisdiction over these claims. In particular, Section IV demonstrates that the Tribunal lacked jurisdiction over Claimants' claims:

(a) under Article 45 ECT, because (i) the Russian Federation never ratified the ECT, but instead agreed to apply it on a provisional basis pursuant to Article 45(1) ECT only "*to the extent that such provisional application*" is not inconsistent with Russian law, and (ii) the arbitration of Claimants' claims under the ECT's investor-State dispute settlement mechanism is inconsistent with Russian law;

(b) under Article 1(6) and (7) ECT, because (i) Claimants are shell company proxies for Russian nationals, and did not inject any foreign capital into the Russian Federation, and (ii) their Yukos shares are accordingly not investments entitled to the benefits of the ECT; and

(c) under Article 21 ECT, because (i) Article 21(1) ECT provides that "*nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties*," and (ii) the Tribunal's holding that the Russian Federation expropriated Claimants' interests in Yukos is based on "*Taxation Measures"* (other than "*taxes*") taken by the Russian authorities.

21. *Section V* demonstrates in paragraphs 363 to 510 that the Court should set aside the Yukos Awards pursuant to Article 1065(1)(c) DCCP, because the Tribunal violated its mandate in three principal respects. In particular, the Tribunal violated its mandate:

(a) because it failed to comply with Article 21(5)(b)(i) ECT, which required the Tribunal to refer Claimants' expropriation contentions to the appropriate tax authorities in Cyprus (in the case of Hulley and VPL), the United Kingdom (in the case of YUL) and the Russian Federation, so that they could provide their conclusions concerning these contentions to the Tribunal;

(b) because the Tribunal awarded damages to Claimants based on the Tribunal's own novel and deeply flawed methodology (i) that departed significantly from the parties' submissions and is outside the scope of the parties' debate; (ii) as to which the parties were not afforded an opportunity to be heard; and (iii) that resulted in the awarding of tens of billions of dollars to Claimants without any economic basis; and

(c) because the arbitrators did not personally fulfill their mandate, based on information recently provided to the parties showing that an assistant to the Tribunal, previously

represented by the Tribunal to be responsible only for administrative tasks, instead devoted substantially more time to the Arbitrations than did any of the Tribunal members, and thus almost certainly performed a substantive role in analyzing the evidence, in the Tribunal's deliberations, and in preparing the Final Awards, in breach of the Tribunal's mandate to personally perform these tasks.

22. *Section VI* demonstrates in paragraphs 511 to 515 that the Final Awards should be set aside pursuant to Article 1065(1)(b) DCCP because the Tribunal was not properly composed. This is based upon the apparent performance by the assistant to the Tribunal of a substantive role in analyzing the evidence, in the Tribunal's deliberations and in preparing the Final Awards, one of the same reasons why the Tribunal violated its mandate, as described immediately above.

23. *Section VII* demonstrates in paragraphs 516 to 535 that the Yukos Awards should be set aside pursuant to Article 1065(1)(d) DCCP because the Tribunal failed to give reasons for several aspects of its rulings, including in its damages award, its overlooking of evidence supporting Yukos' corporate profit tax assessments, its openly basing conclusions on the Tribunal's own speculation, and its internally inconsistent findings concerning the auction of one of Yukos' production subsidiaries.

24. *Section VIII* establishes in paragraphs 536 to 578 that the Court should set aside the Yukos Awards pursuant to Article 1065(1)(e) DCCP, because they reflect the Tribunal's partiality and prejudice, and the violation of public policy and good morals, including the Russian Federation's right to due process. In particular:

(a) because the Tribunal based many of its rulings on what it openly described as its own speculation as to what the Russian Federation might have done rather than what the record showed the Russian Federation to have actually done;

(b) because in holding that Yukos' VAT assessments were improper, the Tribunal expressly relied on its own views as to what Russian tax law should provide, rather than what it actually does provide;

(c) because in finding that the auction of the shares of one of Yukos' production subsidiaries was "rigged," the Tribunal relied on its own speculation rather than

proven facts, and contradicted its own findings concerning the price achieved at the auction; and

(d) for the same reasons that the Tribunal violated its mandate, as shown in Section V.

25. *Section IX* concerns exhibits, joinder and costs, and appears at paragraphs 579 to 584.

II. BACKGROUND

26. In part A of this Section, a brief description is given of (a) the circumstances surrounding the acquisition of the control of Yukos by the same Russian oligarchs – principally, Mikhail Khodorkovsky, Leonid Nevzlin, Vladimir Dubov and Platon Lebedev – who now control Claimants, (b) the principal features of Yukos' tax evasion scheme, which lies at the heart of the parties' dispute, and (c) the Russian authorities' efforts to collect the corporate profit tax and VAT that was assessed against Yukos.

27. In providing this summary, the Russian Federation is mindful that this Court does not sit as an appellate body in reviewing the Yukos Awards, and that the legal infirmities surrounding Yukos' founding are not one of the grounds on which the Russian Federation is seeking to have the Yukos Awards set aside. The Russian Federation nonetheless believes that this background may be helpful to the Court in understanding the actions taken by Claimants subsequent to the founding of Yukos.

28. The description that follows is based on facts that are either not disputed by Claimants, have been widely reported in the Western press by responsible journalists, have been unanimously found by two different Chambers of the ECtHR or by Russian courts at multiple levels, or have been subsequently acknowledged by the Yukos oligarchs themselves.

29. Part B of this Section then briefly summarizes (a) the history and purpose of the Energy Charter Treaty, (b) the claims asserted by Claimants under the Energy Charter Treaty, (c) the procedural history of the Arbitrations, and (d) the Yukos Awards, which are discussed at greater length in subsequent Sections of this Writ.

A. Yukos

(a) The Circumstances Surrounding The Acquisition By The Yukos Oligarchs Of Control Of Yukos

(a)(i) 1993–1996: The Yukos Oligarchs' Acquisition Of A Controlling Interest In Yukos

30. Yukos was created by the Russian Government in 1993 as part of a large-scale reorganization of the former Soviet oil production and processing industry. In March 1995, a consortium of Russian commercial banks, including Bank Menatep, part of the Menatep Group, offered to lend money to the then cash-strapped Russian Government, to be secured by a pledge of the shares of several large State-owned companies, including Yukos. Mikhail Khodorkovsky, then the Chairman of Bank Menatep, was an early and steadfast supporter of the banks' proposal.[3]

31. In August 1995, the Russian Government approved a modified version of the plan, which became known as the "loans-for-shares" program. Under this program, the shares in each participating State-owned company were to be pledged to the lender offering the largest loan in exchange for the right to manage that company for the term of the loan. On maturity, the Russian Government could either repay the loan and reclaim the pledged shares, or allow the lender to sell the shares, with the Government receiving 70% of the difference between the sale price and the amount of the loan, and the lender retaining the balance.[4]

32. In the case of Yukos, the contemplated auctioning of its shares to the highest bidder was widely reported to have been subverted by the Russian oligarchs who then controlled Bank Menatep[5] and today control Claimants. Mr Nevzlin himself later acknowledged that he and his colleagues undermined the integrity of the Yukos auction, by agreeing with the other potential Russian lenders that Bank Menatep would be the winning bidder. As Mr Nevzlin

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[3] The plan was initially dismissed by many businessmen, politicians and commentators as too brazen to succeed. *See* DAVID HOFFMAN, THE OLIGARCHS: WEALTH AND POWER IN THE NEW RUSSIA (2002), p. 309 (RME-4); CHRYSTIA FREELAND, SALE OF THE CENTURY: THE INSIDE STORY OF THE SECOND RUSSIAN REVOLUTION (2005), pp. 165-166 (RME-5); Ira W. Lieberman & Rogi Veimetra, *The Rush for State Shares in the "Klondyke" of Wild West Capitalism: Loans-for-Shares Transactions in Russia*, p. 29 Geo. Wash. J. Int'l L. & Econ. (1996), pp. 737-738 (RME-6).

[4] *See* FREELAND, P. 172 (RME-5); Juliet Johnson, *Russia's Emerging Financial-Industrial Groups*, 13 Post-Soviet Affairs (1997), pp. 333, 355 (RME-8).

[5] *See* Expert Report of Professor Reinier Kraakman, dated April 1, 2011 ("**Kraakman Report**"), ¶ 24.

put it, "*We reached an agreement on who would take what. We agreed not to get in each other's way* […]. *In this respect there was an element of insider dealing*."[6]

33. Bank Menatep arranged to have itself appointed to manage the auction of Yukos' shares, and then proceeded to arrange for Bank Menatep to acquire control of Yukos at a small fraction of its market price. After warning other Russian bidders not to participate,[7] and dissuading potential Russian competitors from partnering with foreign banks,[8] Bank Menatep circumvented the prohibition on its own participation by establishing two front companies (Laguna and Regent) to submit bids on its behalf,[9] falsely creating the appearance that there were in fact two independent bidders, as was legally required.

34. When the auction was held in December 1995, Laguna, supported by a Bank Menatep guarantee, "won" the right to hold and manage a 45% stake in Yukos as security for what was reported to be a USD 159 million loan to the Russian Government. Laguna also agreed to invest an additional USD 200 million in Yukos, and separately acquired an additional 33% stake in Yukos by pledging to make just over USD 150 million in further investments at a simultaneous "investment tender." There is no evidence that Laguna ever made either of the promised investments. Bank Menatep then completed its acquisition of a controlling interest in Yukos at a fraction of its fair value by acquiring Laguna's stake in Yukos under a rule that assigned a bidder's rights to its guarantor if the bidder failed to present its balance sheet to the auction committee, as Laguna predictably did.[10]

35. It was later discovered that a portion of Bank Menatep's loan to the Russian Government was also not what it purported to be, as it turned out to have been funded with the Russian Government's own deposits at Bank Menatep. Thus, in addition to arranging for Yukos' shares to be auctioned at less than their fair value, Bank Menatep "won" that auction by effectively lending the Russian Government its own money.[11]

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6 FREELAND, P. 166 (RME-5).

7 PAUL KLEBNIKOV, GODFATHER OF THE KREMLIN: THE DECLINE OF RUSSIA IN THE AGE OF GANGSTER CAPITALISM (2000), 204 (RME-9).

8 FREELAND, PP. 175-176 (RME-5).

9 *See* Order of the State Property Management Committee of the Russian Federation No. 1458-R (October 10, 1995), ¶ 26, Appendix 1 (RME-10).

10 *See* Vadim Kravets, *Yukos and Menatep: Three Years that Shook Everyone*, Oil & Capital Magazine, Vol. 2 (1999) (RME-11); FREELAND, P. 178 (RME-5); Lieberman & Veimetra, p. 751 (RME-6).

11 *See* 2004 Audit Chamber Report, Analysis of Processes of Privatization of State Ownership in the Russian Federation for the Period from 1993 to 2003, pp. 60-62 (RME-19).

36. In 1996, Bank Menatep used another auction that it managed and another shell affiliate that it created to purchase (for USD 160.1 million) the 45% stake in Yukos that Bank Menatep had acquired from Laguna, thereby obtaining an 85% controlling interest in Yukos for approximately USD 300 million. Several months later, Yukos was valued on the Russian stock exchange at USD 6 billion.[12]

37. Many years later, a senior Yukos official warned in an internal memorandum that *"disclosing the beneficiary holders of its shares and how they acquired them the Company may trigger the attempts for the revision of the entire privatization."*[13]

(a)(ii) The Oligarchs' Consolidation Of Their Control Over The Yukos Group

38. As has been widely reported in the Western press, the Yukos oligarchs next set out to eliminate the minority holdings in Yukos and its subsidiaries, through share dilutions, asset stripping, self-interested transfer pricing, and the manipulation of shareholder meetings to achieve complete control over the Yukos group. In doing so, the Yukos oligarchs also engaged in non-financial crimes, which are described below, in paragraph 49.

39. At the time, foreign and Russian investors held significant minority stakes in Yukos' three main production subsidiaries.[14] The Russian oligarchs controlling Yukos first caused the company to require its subsidiaries to sell oil to Yukos at below-market prices. Yukos then sold this oil abroad at international market prices through sham trading companies, depositing the profits in offshore accounts free from the claims of the subsidiaries' minority shareholders and Russia's tax authorities.[15] The Yukos oligarchs in turn pledged this cheaply acquired oil, valued at much higher export prices, to Western lenders in exchange for hundreds of millions of dollars in loans to the off-shore companies they alone controlled.[16]

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[12] Paul Klebnikov, *The Khodorkovsky Affair*, Wall St. J. (November 17, 2003), A20 (RME-15).

[13] Memorandum of P.N. Maly to Vice-President/Director of Corporate Finance Department O.V. Sheyko (April 22, 2002), ¶ 4 (RME-184).

[14] *See* HOFFMAN, 398-400 (RME-4); Oleg Fedorov, 3 Cases Studies on Abusive Self-Dealing, *in OECD/World Bank Corporate Governance Roundtable for Russia, Shareholders Rights and Equitable Treatment, Moscow* (February 24-25, 2000), pp. 73, 75 (RME-23); DAVID LANE & ISKANDER SEIFULMULUKOV, THE POLITICAL ECONOMY OF RUSSIAN OIL (1999), pp. 15, 24 (RME-21).

[15] *See* HOFFMAN, PP. 446-47 (RME-4); Bernard Black, Reinier Kraakman, & Anna Tarassova, *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 Stan. L. Rev. (1999-2000), pp. 1769-1770 (RME-24); *see also* Kraakman Report, ¶¶ 39-41.

[16] *See* HOFFMAN, PP. 398-399 (RME-4).

40. The Menatep Group controlled by the oligarchs thus stripped Yukos' subsidiaries of substantially all their value while reaping huge gains for itself. One observer estimates that from 1997 to 1998 alone, Yukos deprived its production subsidiaries of assets with a book value of around USD 3.5 billion,[17] with predictable results – from January 30, 1997 to January 30, 1998, the share price of Yukos' production subsidiaries fell between 30% and 45%, while Yukos' own share price increased by 185%.[18]

41. In 1999, Yukos' oligarchic owners devised a final comprehensive scheme – described as a "*theft so blatant and extreme as to defy simple explanation*"[19] – to eliminate the group's minority shareholders without compensating them for the value of their shares. First, at extraordinary general shareholder meetings held by each production subsidiary in March 1999, Yukos forced its subsidiaries to approve share dilution, asset stripping, and transfer pricing measures that favored Yukos at its subsidiaries' expense.[20] Millions of new shares in Yukos' production subsidiaries were issued to obscure offshore entities linked to Group Menatep (to be paid for with promissory notes issued by other production subsidiaries), resulting in the dilution of the minority shareholders' interest by 194%, 239%, and 243%,[21] and the "*transfer [of] control from Yukos to the offshore entities*."[22]

42. The new shares were acquired by offshore entities established in a variety of tax haven jurisdictions – including the Bahamas, the Isle of Man, Cyprus, the British Virgin Islands, the Marshall Islands, and Niue – that were controlled by the same Russian oligarchs who controlled Yukos.[23] Under Russia's interested-party transaction rules, which are intended to prevent self-dealing by a company's largest (more than 20%) shareholders, all of these share transactions should have been approved by a majority of the production subsidiaries' minority (disinterested) shareholders. Presumably fearing that no minority shareholder would vote in favor of diluting its own holdings, the oligarchs actively concealed their

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17 Lee S. Wolosky, *Putin's Plutocrat Problem*, Foreign Affairs, Vol. 79, No. 2 (March./April 2000), pp. 18, 23 (RME-26).

18 Nat Moser & Peter Oppenheimer, *The Oil Industry: Structural Transformation and Corporate Governance*, pp. 301, 316 (RME-25).

19 James Fenkner & Elena Krasnitskaya, Troika Dialog, *How To Steal an Oil Company*, *in* CORPORATE GOVERNANCE IN RUSSIA: CLEANING UP THE MESS (1999), p. 93 (RME-35).

20 *See* Kraakman Report, ¶¶ 44-62; Black, Kraakman, & Tarassova, 1770 (RME-24); Moser & Oppenheimer, 301, 317 (RME-25); Fenkner & Krasnitskaya, p. 94 (RME-35); Fedorov, p. 73 (RME-23); HOFFMAN, PP. 448-449 (RME-4).

21 *See* Press Release, Acirota Limited, Three Days in March Are Critical for Russia's Oil Sector, Yukos Prepares Final Blows to Shareholders of Major Oil Producers (March 15, 1999), pp. 2-3 (RME-36).

22 *Ibid.*

23 *See* Press Release, Acirota Limited, 2-3 (RME-36); David Hoffman, *Out of Step with Russia?; Outsider's Battle Over Stake in Oil Giant Offers a Glimpse of Nation's Uncertain Capitalist Ways*, Wash. Post (April 18, 1999), pp. 3-4 (RME-42).

common control over Yukos and the offshore entities,[24] and the transactions were consummated without the legally required consent of the minority shareholders.

43. The oligarchs were also found by the Tribunal to have subsequently used the company's Cypriot affiliates to avoid hundreds of millions of euros in taxes, by improperly claiming the benefit of the Russia-Cyprus Double Taxation Treaty. However, the company's Cypriot affiliates were not the beneficial owners of the dividends they received and had a "permanent establishment" in the Russian Federation, twice disqualifying them from obtaining the reduced tax rate available under the Treaty.[25]

44. The oligarchs further reduced the value of the minority shareholdings in Yukos' production subsidiaries by (a) obtaining their retroactive consent to prior sales of oil to Yukos and its affiliates at artificially depressed prices, (b) committing them to continue to make future sales to Yukos and its affiliates on disadvantageous terms,[26] and (c) approving their past and unidentified future asset transfers to obscure companies controlled by the oligarchs.[27] Minority shareholders who objected to these plans were offered the opportunity to sell their shares at contrived prices that valued all three subsidiaries at USD 33 million, or USD 0.0025 per barrel of proven reserves, representing a tiny fraction of their real value.[28] The three subsidiaries together then had 13 billion barrels of proven reserves, and each subsidiary was "worth many billions of dollars."[29]

45. When representatives of the largest minority shareholders attempted to attend the shareholder meetings, they were refused entry based on the false assertion that a provincial court had arrested their shares.[30] At another shareholder meeting several months later, the

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24 *See* Kraakman Report, ¶¶ 53-57; HOFFMAN, P. 449 (RME-4); Fenkner & Krasnitskaya, p. 93 (RME-35); Alan Cowell & Edmund L. Andrews, *Undercurrents at a Safe Harbor; Isle of Man (and Corporations) Is an Enclave of Intrigue*, N.Y. Times (September 24, 1999) (RME-43).

25 Resp. C-Mem., ¶¶ 112-224; Resp. Rej., ¶¶ 1443-1510. Final Awards, ¶¶ 1620-1621.

26 *See* Press Release, Acirota Limited, p. 2 (RME-36); Fenkner & Krasnitskaya, pp. 93-94 (RME-35); Fedorov, p. 73 (RME-23); Black, Kraakman, & Tarassova, p. 1770 (RME-24).

27 *See* Kraakman Report, ¶ 46; Press Release, Alcirota Limited, pp. 2-3 (RME-36); Fedorov, p. 73 (RME-23); Black, Kraakman, & Tarassova, p. 1770 (RME-24); *see also* OAO Yuganksneftegaz Board of Directors, Materials for the Board Meeting on February 26, 1999, p. 14 (RME-37); Minutes No. 1 of the OAO Yuganksneftegaz Extraordinary General Shareholders Meeting, March 30, 1999, pp. 20-25 (RME-38); Minutes No. 1 of the OAO Samaraneftegaz Extraordinary General Shareholders Meeting, March 23, 1999, pp. 19-23 (RME-39); Minutes No. 9 of the OAO Tomskneft Extraordinary General Shareholders Meeting, March 16-29,1999, pp. 15-17 (RME-40).

28 Black, Kraakman, & Tarassova, p. 1770 (RME-24); Fedorov, p. 73 (RME-23).

29 Black, Kraakman, & Tarassova, p. 1770 (RME-24).

30 *See* Press Release, Misoki Enterprises Limited, Major Russia Assets Are Seized Illegally (March 30, 1999) (RME-64); Alan S. Cullison, *Russian Firm Bars Minor Holders, Passes Contentious Share Increase*, Wall St. J. (March 24, 1999) (RME-65);

minority shareholders arrived at the appointed location in Moscow, only to find a notice that the meeting had been relocated to a town hundreds of kilometers away and would begin in two hours. When the minority shareholders finally reached the new location, they found an empty room, and were told the meeting had ended.[31]

46. The near-total diminution in the value of the minority shareholders' holdings, and the prospect of still further dilutive action, ultimately forced the minority shareholders to sell or swap their stock on terms highly advantageous to the oligarchs.[32]

47. Having acquired control over Yukos and its subsidiaries, the oligarchs promptly secured the cancellation of the new share issuances and offshore asset transfers they had engineered,[33] thereby confirming that these measures were in fact designed only to squeeze out the minority shareholders.

48. During this same period, the oligarchs were also widely reported to have wielded improper influence over the Russian Duma to advance their own interests. Mr Dubov, for example, served as Chairman of the Tax Sub-Committee of the Russian Duma after the December 1999 Duma elections, and was thus able to exercise significant influence over tax legislation, a topic of great interest to Yukos.[34] Following the 1999 elections, approximately 100 Deputies, many of whom had leadership positions, were said to be "*under arms' for Yukos*."[35] Indeed, Yukos' influence was so pervasive that a former Speaker of the State Duma remarked that "[w]*hen bills affecting YUKOS's interest were discussed in the Duma, I had the impression that there were 250 Dubovs in the Chamber,*" or more than the simple majority required to pass or defeat proposed legislation.[36] It was broadly understood at the time, and was subsequently confirmed in a book written by a

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Floyd Norris, *The Russian Way of Corporate Governance*, N.Y. Times (April 5, 1999) (RME-66); Hoffman (RME-42); Ben Aris, *Khodorkovsky – the Making of a Myth*, Business News Europe (September 6, 2010) (RME-67).

31 *See* Fedorov, p. 74 (RME-23); HOFFMAN, P. 450 (RME-4). *See* Kraakman Report, ¶¶ 38-42, 44-62.

32 *See* Black, Kraakman, & Tarassova, p. 1771, fn.71 (RME-24); Fedorov, pp. 75-76 (RME-23); HOFFMAN, PP. 456-57 (RME-4); Cullison, p. 3 (RME-27);, Cullison, *Yukos Cancels Controversial Share Issue*, Wall St. J. (February 29, 2000) (RME-83).

33 HOFFMAN, P. 547 fn.23 (RME-4); Cullison, *Yukos Cancels Controversial Share Issue*, Wall St. J. (February 29, 2000) (RME-83).

34 SAKWA, THE QUALITY OF FREEDOM (2009), p. 114 (quoting Natal'ya Arkhangel'skaya, *Dumskaya monopol'ka*, Ekspert, No. 3, Jan. 26, 2004) (RME-73).

35 Vladimir Perekrest, *Why Khodorkovsky is in jail (Part 3)*, Izvestiya, June 7, 2006, p. 2. (RME-74).

36 *Ibid*.

Western professor specializing in Russian politics, that Yukos used this power to shape Government policies in its favor.[37]

49. The oligarchs controlling Yukos also engaged in violent crime to silence their opponents. Mr Nevzlin, formerly in charge of Yukos' security services, and Alexei Pichugin, Yukos' former head of security, were both convicted of the murder of the mayor of Nefteyugansk – where Yukos' largest production subsidiary was headquartered – who had protested against Yukos' evasion of local taxes and the reduction of workers' wages.[38] Messrs Nevzlin and Pichugin were also convicted of the attempted assassination of the head of an Austrian oil company[39] that had sued Yukos for terminating a contract with one of its subsidiaries,[40] and of the attempted murder of a former adviser to Mr Khodorkovsky (and the head of public relations at Moscow City Hall), who had supposedly acted against Yukos' and Mr Nevzlin's interests.[41] Finally, Mr Pichugin was separately convicted of the murder of the husband and wife implicated in the attempted murder of Mr Khodorkovsky's former advisor, apparently because they threatened to disclose his involvement. Although Mr Nevzlin was not convicted of those attempted murders, Mr Pichugin was found to have carried them out on his order.[42] Mr Nevzlin never served any portion of his sentence, having in the meantime fled the Russian Federation and taken up residence in Israel, where Mr Dubov also now resides.

(a)(iii) 2000–2003: The Yukos Oligarchs' Control Of Claimants

50. The Russian oligarchs who orchestrated the fraudulent acquisition of Yukos and then illegally consolidated their control over the Yukos group – in particular, Messrs Khodorkovsky, Nevzlin, Dubov and Lebedev – are the same Russian oligarchs who now control Claimants, and in February 2005 caused Claimants to commence the Arbitrations, alleging that they had been illegally deprived of the value of their Yukos shares. As

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37 RICHARD SAKWA, P. 114 (RME-73).

38 *Nevzlin found guilty of organizing murders, sentenced to life*, Russia & CIS Business & Investment Weekly (August 8, 2008) (RME-166).

39 *Ibid*.

40 Sentence against Evgeny Reshetnikov, Moscow City Court, Case 2 – 350/2000 (November 13, 2000), pp. 1-2 (RME-167).

41 *Criminal Trial of Alexei Pichugin*, Moscow City Court, Closing Submissions of the Russian Prosecutor, (March 2005), pp. 1-2 (RME-165); Upheld by the Supreme Court of the Russian Federation on July 14, 2005; *Nevzlin found guilty of organizing murders, sentenced to life*, Russia & CIS Business & Investment Weekly (August 8, 2008) (RME-166).

42 *Criminal Trial of Alexei Pichugin*, Moscow City Court, Closing Submissions of the Russian Prosecutor, (March 2005), pp. 1-2 (RME-165). Upheld by the Supreme Court of the Russian Federation on July 14, 2005.

matters stand today, Mr Nevzlin would receive USD 30 billion under the Yukos Awards, even though he testified in the Arbitrations that he never paid anything for his shares,[43] Mr Dubov would receive USD 3.5 billion, even though he testified that he paid USD 10,000 for his shares,[44] and Mr Khodorkovsky, who is now living in Switzerland, is allegedly not entitled to anything, having in the meantime, according to press reports, surrendered his economic interest in Claimants.

(b) The Principal Features Of Yukos' Tax Evasion Scheme, Which Lies At The Heart Of The Parties' Dispute

51. The ECtHR has twice unanimously found that, from 1999 to 2004, Yukos evaded billions of euros in Russian taxes by systematically shifting the company's own profits to sham trading shells that it registered in Russia's low-tax regions for no purpose other than to reduce Yukos' tax bills. In so doing, Yukos unlawfully abused Russia's low-tax region program, which was intended to foster economic development in designated areas by encouraging genuine investments and genuine business activities there, and also violated basic "substance over form" principles under Russian tax law. As shown below, similar anti-abuse principles are applied by most other States, including the Netherlands.[45]

52. Yukos never disputed in its Russian tax enforcement proceedings or before the ECtHR the four key facts, described below, that made its tax evasion scheme unlawful, nor did Claimants meaningfully dispute these facts in the Arbitrations.[46]

    (a) Yukos registered dozens of sham trading shells in Russia's low-tax regions through "straw man" nominees, including "*a street sweeper*" who had "*never seen*" the corporate seal of the sham trading shell he was supposedly managing,[47] and several directors who where identified in corporate registration documents by passport numbers corresponding to passports that had "*never been issued*,"[48] had been

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43 Nevzlin Testimony, Transcript Day 8 at 198:13-199:19.

44 Dubov Testimony, Transcript Day 5 at 37:17-38:3.

45 Resp. C-Mem., ¶¶ 225-277; Resp. Rej., ¶¶ 110-111, 578-579; Resp. Op. Ppt., Vol. 1, pp. 2-17 (RME-4678); Expert Report of Oleg Y. Konnov, dated April 1, 2011 ("First Konnov Report"), ¶¶ 12-22, 35-38; Second Export Report of Oleg Y. Konnov, dated August 15, 2012 ("Second Konnov Report"), ¶¶ 5-6.

46 Second Konnov Report, ¶ 5.

47 *See* Resp. C-Mem., n. 298. *See* Explanation of S.A. Varkentin (Aug. 9, 2001) (RME-259).

48 *See* Resp. C-Mem., n. 298. *See* Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 30-3-15/3 (Sep. 2, 2004), p. 7 (Annex (Merits) C-155).

stolen,[49] or had been sold "*to receive additional income*."[50] The shell companies had no (or virtually no) assets or personnel, conducted no genuine sales of their own, were managed entirely from Moscow,[51] and had no purpose other than to reduce Yukos' corporate profit tax.

(b) The sham trading shells bought oil from Yukos' operating companies at artificially low prices, and then "traded" the oil among themselves on a non-arm's length basis, raising the price step by step, until the oil was ultimately sold to third parties at full market prices. The "paper" profits accumulated by the sham trading shells were then taxed at the significantly lower rates available in the low-tax regions, and not at the higher regional rate applicable in Moscow, where Yukos, the real exporter, was located.[52]

(c) The sham trading shells then transferred these profits back to Yukos through payments made on sham promissory notes, "gifts" to Yukos' so-called Production Development Financial Support Fund,[53] and dividends paid to Yukos' complex and opaque offshore structure that were also ultimately round-tripped back to Yukos.[54]

(d) The sham trading shells made no or minimal investment in the low-tax regions relative to the tax benefits they received, and thus did not advance the purposes of the low-tax region program.[55] Yukos' tax evasion scheme also deprived Moscow's regional budget of billions of euros of tax revenue that should have been paid by Yukos at its home office.[56]

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49 *See* Resp. Op. Ppt., Vol. 1, p. 20 (RME-4678). *See* Explanations of the Interregional Tax Inspectorate of the Federal Tax Service for Major Taxpayers No. 1, in response to Yukos' cassation appeal, No. 52-05-10/05354 (May 4, 2005), pp. 15-16 (RME-257).

50 *See* Resp. C-Mem., n. 296. *See* Explanations of the Interregional Tax Inspectorate of the Federal Tax Service for Major Taxpayers No. 1, in response to Yukos' cassation appeal, No. 52-05-10/05354 (May 4, 2005), pp. 13-14 (RME-257).

51 Resp. C-Mem., ¶¶ 237-243; Resp. Rej., ¶ 579(i) and (iii); Resp. Op. Ppt., Vol. 1, pp. 18-25 (RME-4678); First Konnov Report, ¶¶ 17-21; Second Konnov Report, ¶ 6.

52 Resp. C-Mem., ¶¶ 244-248; Resp. Rej., ¶ 579(ii) and (iii); Resp. Op. Ppt., Vol. 1, 26-34 (RME-4678); First Konnov Report, ¶¶ 21-22; Second Konnov Report, ¶ 6.

53 The lawfulness of these "gifts" was questioned by Yukos' own auditors in a 2003 confidential report to management. *See Yukos v. Russia*, ECHR, Appl. No 1490/04, Judgment (Sept. 20, 2011), ¶¶ 207-208 (RME-3328).

54 Resp. C-Mem., ¶¶ 256-277; Resp. Rej., ¶ 579 (v); Resp. Op. Ppt., Vol. 1, 42-52 (RME- 4678).

55 Resp. C-Mem., ¶¶ 249-255; Resp. Rej., ¶¶ 579 (iv), 670-671; Resp. Op. Ppt., Vol. 1, 35-41 (RME-4678); Second Konnov Report, ¶¶ 33-35

56 Second Konnov Report, ¶ 36.

53. Claimants have also not disputed that this scheme would be condemned by the tax authorities of other ECT signatories,[57] including the Netherlands.[58]

54. The ECtHR has twice considered virtually the same claims as were asserted in the Arbitrations, once in a proceeding brought by Yukos and once in a proceeding brought by Messrs Khodorkovsky and Lebedev. These claims were heard by two separate Chambers of the Court on substantially the same record as was present in the Arbitrations, and both Chambers unanimously upheld all of the corporate profit tax and VAT assessed against Yukos.

55. Claimants nonetheless argued in the Arbitrations that Yukos' tax scheme was "*fully consistent*" with Russian law.[59] According to Claimants, "*the Russian Federation's actions can only be reasonably understood as a deliberate and sustained effort to destroy Yukos* [...] *and eliminate Mr Khodorkovsky as a potential political opponent.*" If "*viewed any other way,"* Claimants argued, the Russian Federation's actions "*make no sense*."[60]

56. In rejecting these claims when advanced by Yukos and Messrs Khodorkovsky and Lebedev, both Chambers of the ECtHR unanimously held that:

(a) Yukos' tax assessments were based on well-developed Russian legal principles that had been applied by Russia's tax authorities and courts since the mid-1990s to condemn similar tax evasion schemes perpetrated by other taxpayers. As found by the ECtHR, Russia's "*tax authorities had broad powers in verifying the character of the parties' conduct and contesting the legal characterisation of such arrangements before the courts. This was made clear* […] *by* […] *relevant and applicable statutory provisions which were available to* [Yukos] *and other taxpayers at the time.* [...] [T]*he power to re-characterise or to cancel bad faith activities of companies existed and had been used by the domestic courts in diverse contexts and with varying consequences for the parties concerned since as early as 1997.*" Russian tax law thus "*made it quite clear that, if uncovered, a taxpayer faced the risk of tax reassessment of its actual economic activity in the light of the relevant*

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57 Resp. C-Mem., ¶¶ 1135-1165; Resp. Op. Ppt., Vol. 1, 186-203 (RME-4678); Hart Rep., ¶ 2; Cullen Rep., ¶¶ 140-169.

58 Resp. C-Mem., ¶ 1147; O.C.R. Marres, The Abuse of Law Doctrine, a Powerful Weapon Against Base Erosion, Weekly Journal for Tax Law 2008/1431 (Dec. 18, 2008), Section 7 (RME-1260); V. Thuronyi Rules in OECD Countries to Prevent Avoidance of Corporate Income Tax, 2003, p. 8 (RME-3367).

59 Claim. Cl, Day 16 Tr. 96:7, 127:21-23.

60 Claim. Skel., ¶ 61.

findings of the competent authorities. And this is precisely what happened to [Yukos] *in the case at hand.*"[61]

(b) Yukos' scheme *"was obviously aimed at evading the general requirements of the Tax Code."*[62] According to the ECtHR, Yukos' scheme "*consisted of switching the tax burden from* [Yukos] *and its production and service units to letter-box companies in domestic tax havens in Russia,*" which had "*no assets, employees or operations of their own* [and] *were nominally owned and managed by third parties, although in reality they were set up and run by* [Yukos] *itself.*"[63]

(c) Yukos actively sought to conceal its tax evasion scheme. The ECtHR found, for example, that the "*system of oil sales set up by Yukos was kept deliberately opaque,*"[64] that sham trading shells located in one low-tax region were wound up and then immediately re-reorganized in another low-tax region "*in order to render it more difficult for the authorities to scrutinize the business operations of these companies,*"[65] and, more generally, that Yukos' "*scheme was organized in such a way as to complicate possible investigations into it.*"[66]

(d) Yukos' corporate tax assessments were proper. According to the ECtHR, Yukos' corporate profits tax assessments "*pursued a legitimate aim of securing the payment of taxes and constituted a proportionate measure in pursuance of this aim*,"[67] and there "*existed a sufficiently clear legal basis for finding [Yukos] liable*"[68] for these assessments.

(e) Yukos' VAT assessments were also proper, and could have been avoided if Yukos had "*claim[ed] the tax exemptions or refunds under its own name under the*

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61 *OAO Neftyanaya Kompaniya Yukos v. Russia*, ECtHR, Appl. No. 14902/04, Judgment (Sept. 20, 2011) ("First ECtHR Ruling"), ¶¶ 597-598 (RME-3328); *see also Khodorkovskiy and Lebedev v. Russia*, ECtHR, Appls. Nos. 11082/06 and 13772/05, Judgment (July 25, 2013) ("Second ECtHR Ruling"), ¶¶ 786, 796 (Exhibit RF-4).

62 First ECtHR Ruling, ¶ 593 (RME-3328).

63 First ECtHR Ruling, ¶ 591 (RME-3328).

64 Second ECtHR Ruling, ¶¶ 808, 811 (Exhibit RF-4). *See also* First ECtHR Ruling, ¶ 592, 614 (RME-3328).

65 Second ECtHR Ruling, ¶ 808 (Exhibit RF-4).

66 Second ECtHR Ruling, ¶ 818 (Exhibit RF-4).

67 First ECtHR Ruling, ¶ 606 (RME-3328); *see also* Second ECtHR Ruling, ¶ 796 (Exhibit RF-4).

68 First ECtHR Ruling, ¶ 599 (RME-3328).

procedure set out" in the applicable VAT rules, which *"made the procedure for VAT refunds sufficiently clear and accessible for [Yukos] to able to comply with it.*"[69]

(f) Yukos was not the subject of discriminatory treatment, and "*failed to demonstrate that any other companies were in a relevantly similar position.*"[70]

(g) Yukos' tax assessments were not politically motivated. After first finding that there was "*no indication*" that any of contested taxations measures had been "*misused […] with a view to destroying [Yukos] and taking control of its assets,*"[71] the ECtHR held that these measures were a legitimate exercise of the Russian Federation's taxation powers, and that Yukos was not the victim of a politically motivated vendetta.[72]

57. In the Arbitrations, the Russian Federation presented compelling evidence consistent with the key findings made by the ECtHR. This evidence is discussed at paragraphs 302 to 362 below, where the Russian Federation demonstrates that the Tribunal erred in holding that the taxation measures taken by the Russian authorities were for *"a purpose extraneous to taxation."*

(c) The Russian Authorities' Efforts To Collect The Corporate Profit Tax And VAT That Was Assessed Against Yukos

58. In December 2003, Yukos received the tax authorities' first audit report, and learned that the Russian authorities had uncovered the previously concealed links between Yukos and the sham trading shells established by Yukos in the low-tax regions. Yukos could then have fully discharged all of the USD 21.9 billion of corporate profit tax and VAT that it was ultimately assessed for tax years 2000 through 2003, by paying less than USD 9 billion under protest, requesting a refund, and filing amended profit tax and VAT returns.[73] Had Yukos taken these steps, it would have avoided 89% of its VAT liability, 24% of its default interest liability, 90% of its liability for fines, and 100% of its enforcement fee liability.[74] Claimants never disputed that Yukos could have calculated the amount of its future

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69 Final Award, ¶ 699.

70 First ECtHR Ruling, ¶ 615 (RME-3328).

71 First ECtHR Ruling, ¶ 665 (RME-3328).

72 First ECtHR Ruling, ¶¶ 606, 664-666 (RME-3328). *See also* Second ECtHR Ruling, ¶¶ 821, 903-906 (Exhibit RF-4).

73 Resp. C-Mem., ¶¶ 366-372; Resp. Rej., ¶¶ 829-855; Resp. Reb. Ppt., Vol. 2, pp. 8-9 (RME-4700). *See also generally* Resp. Op. Ppt., Vol. 4 (RME-4681); Resp. Cl. Ppt., Vol. 4 (RME-4690).

74 Resp. Op. Ppt., Vol. 4, pp. 10-41 (RME-4681); Resp. Cl. Ppt., Vol. 4, pp. 7-29 (RME-4690).

assessments based on the findings made in its first audit report, that Yukos had the necessary cash on hand to make this payment, or that if the company had made this payment it would have avoided more than half of its overall tax exposure.[75]

59. Yukos, however, decided not to voluntarily pay any of its assessed taxes, and instead challenged – and otherwise sought to obstruct – all of the Russian authorities' efforts to collect its assessed taxes. During this period, Yukos dissipated Yukos-group assets that might otherwise have been used to satisfy the company's outstanding tax liabilities, and in addition:

(a) caused its subsidiaries to refuse to provide records requested by the tax authorities;[76]

(b) continued to deny that it owned or controlled the sham trading shells;[77]

(c) hid its production subsidiaries' share registries so that their shares could not be seized by Russia's bailiffs;[78]

(d) voluntarily prepaid a USD 225 million loan to a company owned by Group Menatep;[79]

(e) caused its production subsidiaries to issue multi-billion dollar upstream guarantees, which an international arbitral tribunal later held to be abusive and unlawful;[80] and

(f) made settlement proposals that the tax authorities could not lawfully accept, or would have discharged only a portion of the company's tax liabilities or have significantly increased the risk of Yukos' non-payment.[81]

60. Yukos' aggressive defense of its tax evasion scheme and continuing refusal to pay its outstanding tax liabilities ultimately led to the auction of Yukos' largest production subsidiary Yuganskneftegaz ("**YNG**") to satisfy a portion of the company's overdue taxes,

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75 Resp. Rej., ¶¶ 837-847; Resp. C-Mem., ¶ 372, n. 500.

76 Tax audit report for year 2001 (June 30, 2004), ¶ 1.10.1 (RME-345); Letter from OAO Samaraneftegaz to the tax authorities (Apr. 23, 2004) (RME-3291); Letter from OAO Yuganskneftegaz to the tax authorities (Apr. 21, 2004) (RME-3292); Letter from OAO Syzransky Refinery to the tax authorities (Apr. 26, 2004) (RME-3294); Resp. Cl., Day 18 Tr. 255:22-257:12; Resp. Cl. Ppt., Vol. 5, pp. 59-64 (RME-4691); Resp. Rej., n. 1145; Resp. C-Mem., ¶¶ 355 and n. 1963.

77 Transcripts of the hearing before the Moscow Arbitrazh Court (May 21-26, 2004), p. 2 (C-114) and Appellate Court (June 18-29, 2004), pp. 13-16, 41-42 (RME-342); Resp. Cl., Day 18 Tr. 257:13-258:7; Resp. Cl. Ppt., Vol. 5, p. 65 (RME-4691); Resp. Rej., ¶¶ 579(vi), 620-621; Resp. C-Mem., ¶¶ 730-732 and n. 491.

78 Resp. Rej., ¶ 31; Resp. C-Mem., ¶ 403.

79 Misam. Test., Day 9 Tr. 208:22-25. *See also* Theede Test., Day 11 Tr. 9:10-13; Resp. Cl., Day 18 Tr. 258:8-259:11; Resp. Rej., ¶¶ 881, 889; Resp. C-Mem., ¶¶ 390, 1397.

80 Misam. Test., Day 9 Tr. 209:1-8; Resp. Rej., ¶¶ 882; Resp. C-Mem., ¶¶ 391.

81 *See* Resp. PHB., ¶¶ 101-105.

to the filing of a bankruptcy petition by a syndicate of Yukos' bank creditors, and to the sale in bankruptcy auctions of the company's remaining assets.

B. The ECT And The Arbitrations

(a) The History And Purpose Of The Energy Charter Treaty

61. The ECT is intended to promote international cooperation in the energy sector. There are 48 countries Party to the Treaty, including the European Union and each of its Member States. The purpose of the ECT, as expressed in Article 2, is to establish "*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 [European Energy Charter]*." The most important provisions of the ECT deal with the protection of investments, trade in energy materials and products, energy transit, and mechanisms for resolving inter-State and investor-State disputes.

62. The ECT has its origins in the European Energy Charter, a non-binding declaration signed in December 1991, in response to a (then) European Community initiative following the fundamental political changes in Eastern Europe in the late 1980s and the subsequent dissolution of the Soviet Union. At the June 1990 European Council summit in Dublin, Ruud Lubbers, the Prime Minister of the Netherlands, proposed the creation of a European Energy Community between the European Community, the Soviet Union, and Eastern and Central European States,[82] "*to capitalize on the complementary relationship between the European Economic Community, the USSR and the countries of Central and Eastern Europe*."[83]

63. The main elements and goals of the cooperation provided for in the European Energy Charter were to be implemented by a basic agreement, which became the ECT, and several binding protocols. The ECT was negotiated by the Conference on the European Energy Charter, comprising 50 negotiating States and the European Community.

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82 Communication from the EC Commission on European Energy Charter, COM(91) 36 (Feb. 14, 1991), p. 2 (Exhibit RF-5).

83 *Ibid. See also* S. Fremantle Opinion Concerning the Provisional Application of the Energy Charter Treaty (Jan. 21, 2007) ("Fremantle Opinion"), ¶ 15.

64. Part V of the ECT sets forth mechanisms for the resolution of specified disputes between Contracting Parties and foreign investors (Article 26 ECT), and between the Contracting Parties themselves (Article 27 ECT). The latter will not be addressed here any further.

65. Article 26(2) and (3) of the ECT oblige Contracting Parties to arbitrate investment disputes with investors of another Contracting Party concerning the alleged breach of an obligation under Part III ECT, entitled "*Investment Promotion and Protection*."[84] Article 26 ECT covers a wide range of disputes arising from the exercise of a Contracting Party's sovereign powers, and empowers an arbitral tribunal to review and assess sovereign acts and omissions. Disputes under Article 26 ECT may be heard by an arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") or the rules of particular arbitral institutions,[85] and must be decided "*in accordance with the Treaty and applicable rules and principles of international law*."[86]

(b) The Claims Asserted By Claimants Under The ECT

66. As set out in the previous section, Claimants form part of the extensive network of shell companies that the Russian oligarchs controlling Yukos established in various tax havens to hold their controlling stake in Yukos.[87] Hulley and VPL are shell companies organized under the laws of Cyprus; YUL is a shell company organized under the laws of the Isle of Man.

67. In February 2005, Claimants commenced three parallel arbitrations against the Russian Federation under the ECT in their capacities as the nominal former majority shareholders of Yukos, holding in the aggregate 70.5% of Yukos' shares. Although Claimants are incorporated under the laws of other ECT Contracting States, they are beneficially owned through an opaque network of trusts and other holding structures by the Yukos oligarchs, all of whom are Russian nationals.[88] Yukos was thus, in substance and effect, a Russian

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84 Energy Charter Treaty, Art. 26(1) (C2).

85 Energy Charter Treaty, Art. 26(4) (C2).

86 Energy Charter Treaty, Art. 26(6) (C2).

87 *See* Appendix to the Interim Awards.

88 *See* Appendix to the Interim Awards.

company controlled by Russian nationals, and substantially all of its business was conducted in the Russian Federation.

68. Claimants claimed that the taxes assessed against Yukos for the years 2000-2004 and the measures taken to enforce those assessments violate Article 10(1) ECT. Article 10 ECT requires Contracting States to treat investments made by investors of another Contracting State in their territories fairly and equitably. Claimants also claimed that these taxes and enforcement measures are unlawful "*measures having effect equivalent to nationalization or expropriation*" in violation of Article 13 ECT. Specifically, Claimants asserted that these allegedly improper tax enforcement measures included the Russian authorities' purported failure to respond in good faith to Yukos' settlement proposals, the issuance by Russia's courts of injunctions and asset freezes that purportedly prevented Yukos from settling its tax debts, and the sale of YNG at auction, supposedly at a substantial discount to its market value. Claimants further alleged that the Russian Federation harassed Yukos and sought to intimidate its management by criminally prosecuting Messrs Khodorkovsky and Lebedev for tax evasion and other wrongs, and by conducting purportedly improper searches of Yukos' facilities and seizures of its records. According to Claimants, the Russian Federation's actions were politically motivated and part of a broader effort to destroy Yukos and neutralize Mr Khodorkovsky and his supporters as political opponents, allegedly in retaliation for their criticism of the Russian Government.[89]

69. In the Arbitrations, Claimants requested that they be compensated for the loss of their shares in Yukos, which they valued at USD 114 billion.[90]

(c) Procedural History Of The Arbitrations

(c)(i) Commencement Of The Proceedings

70. Notices of Arbitration and Statements of Claim requesting arbitration pursuant to Article 26 ECT under the UNCITRAL Arbitration Rules were submitted by Claimants

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[89] *See* Claimants' Memorial on the Merits of September 15, 2010 (¶¶ 7-890), and Claimants' Reply on the Merits of March 15, 2012 (¶¶ 5-838).

[90] *See* Claimants' Memorial on the Merits of September 15, 2010 (Request for relief), and Claimants' Reply on the Merits of March 15, 2012 (Request for relief).

Hulley and YUL on February 3, 2005, and by Claimant VPL on February 14, 2005.[91] On August 1, 2005, the parties agreed on The Hague as the seat of the arbitrations.[92]

71. On October 15, 2005, the Russian Federation submitted its Statements of Defense, in which it objected to the Tribunal's jurisdiction and denied Claimants' allegations of expropriation and unfair and inequitable treatment.[93]

72. On October 31, 2005, a preliminary procedural hearing was held in The Hague, at which the parties and members of the Tribunal signed Terms of Appointment. The Tribunal also set a procedural calendar and determined that it would rule on the Russian Federation's objections to the Tribunal's jurisdiction and the admissibility of the claims as preliminary questions.

(c)(ii) Preliminary Phase And The Interim Awards On Jurisdiction And Admissibility

73. Following submissions by the parties, the Tribunal issued Procedural Order No. 3 on October 31, 2006, which deferred consideration of certain of Respondent's jurisdiction and admissibility objections to the merits phase.

74. A Hearing on Jurisdiction and Admissibility was conducted at the Peace Palace in The Hague, on November 17 to 21, November 26 to 29 and December 1, 2008. Seven witnesses gave testimony during the Hearing, and the parties presented their arguments on jurisdiction and admissibility. On November 30, 2009, the Tribunal issued three parallel Interim Awards, dismissing Respondent's objections to jurisdiction and/or admissibility based on Article 1(6) and (7), Article 17, Article 26(3)(b)(i) and Article 45 ECT. The Tribunal also deferred its decision on the Russian Federation's objection to jurisdiction and/or admissibility based on Article 21 ECT to the merits phase of the Arbitrations.

75. The Russian Federation objected to the jurisdiction of the Tribunal on three main grounds. First, the Russian Federation never ratified the ECT and agreed to its provisional

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91 Hulley Enterprises Limited Notice of Arbitration and Statement of Claim of February 3, 2005; Yukos Universal Limited Notice of Arbitration and Statement of Claim of February 3, 2005; Veteran Petroleum Limited Notice of Arbitration and Statement of Claim of February 14, 2005.

92 Respondent's letter of July 29, 2005 and Claimants' letter of August 1, 2005.

93 Russian Federation's Statement of Defense, Hulley Enterprises Limited, October 15, 2005; Russian Federation's Statement of Defense, Yukos Universal Limited, October 15, 2005; Russian Federation's Statement of Defense, Veteran Petroleum Limited, October 15, 2005.

application under Article 45(1) ECT only "*to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*." Since arbitration of Claimants' claims pursuant to Article 26 ECT is inconsistent with Russian law, the Russian Federation never agreed under Article 45(1) ECT to resolve this dispute pursuant to the ECT's dispute resolution clause.

76. The Tribunal rejected this objection and erroneously upheld its own jurisdiction, holding that (a) the Russian Federation cannot invoke the "*to the extent*" clause of Article 45(1) ECT, because the principle of provisional application is known in Russian law, and (b) arbitration of Claimants' claims is in any event consistent with Russian law.

77. The Court should accordingly set aside the Yukos Awards pursuant to Article 1065(1)(a) DCCP, because, for the reasons discussed at paragraphs 106 to 247 below, the Tribunal lacked jurisdiction over all of Claimants' claims pursuant to Article 45(1) ECT.

78. Second, the actions complained of by Claimants are outside the scope of the Tribunal's jurisdiction based on the taxation carve-out in Article 21(1) ECT, pursuant to which, except as otherwise provided in Article 21, the ECT does not create rights or impose obligations with respect to "*Taxation Measures*."[94] In its Interim Awards, the Tribunal deferred a decision on this objection to the merits phase of the Arbitrations.[95] In the Final Awards, the Tribunal rejected this objection, retaining jurisdiction on the grounds that (a) the claw-back for expropriation claims in Article 21(5) is coextensive in scope with the carve-out in Article 21(1), and (b) the taxation carve-out does not apply to taxation measures taken for *"a purpose extraneous to taxation."*[96]

79. These rulings are mistaken as a matter of law and fact, and this Court should accordingly set aside the Yukos Awards pursuant to Article 1065(1)(a), (c) and (e) DCCP, because, for the reasons discussed below, the Tribunal lacked jurisdiction over Claimants' claims, failed to comply with its mandate, and violated public policy.

80. Third, Claimants are not protected "*Investors*" for purposes of Article 1(7) ECT and did not make a protected "*Investment*" within the meaning Article 1(6) ECT since the ECT does

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[94] Energy Charter Treaty, Art 21(1) (C2).

[95] *See* Interim Award on Jurisdiction (Hulley), ¶¶ 582-585; Interim Award on Jurisdiction (YUL), ¶¶ 583-586; Interim Award on Jurisdiction (VPL), ¶¶ 594-597.

[96] Final Awards, ¶¶ 1401-1447.

not afford investment protections to domestic investments made by a respondent State's own nationals.[97] The Tribunal erroneously rejected these objections in the Interim Awards, and upheld its jurisdiction.[98]

81. These rulings are wrong as a matter of law, and this Court should accordingly set aside the Yukos Awards pursuant to Article 1065(1)(a) DCCP, because, for the reasons discussed at paragraphs 106 to 362 below, the Tribunal lacked jurisdiction over Claimants' claims.

(c)(iii) Bifurcation And Other Scheduling Matters

82. On February 24, 2010, the parties informed the Tribunal that they disagreed on the bifurcation of the proceedings between a liability and damages phase, as to referral pursuant to Article 21(5)(b) ECT, and as to the sequence and timing of document production.[99] Following an exchange of submissions on these issues, a hearing was held in London on May 7, 2010.

83. On May 13, 2010, the Tribunal issued Procedural Order No. 10, which (a) ordered that documentary discovery take place in a single phase, after the first round of written pleadings on the merits; (b) deferred a decision on the bifurcation of liability and damages and on the issue of referral to the competent tax authorities pursuant to Article 21(5)(b) ECT until after the first round of written pleadings on the merits; and (c) fixed a procedural calendar for the merits phase of the proceedings.

84. Following a further hearing on these subjects on May 9, 2011, the Tribunal on May 31, 2011 issued Procedural Order No. 11, which (a) denied the Russian Federation's request that the proceedings be bifurcated between a liability and a damages phase; (b) reserved the Tribunal's decision on referral to the competent tax authorities under Article 21(5)(b) ECT to a later stage of the proceedings; and (c) ordered the parties to proceed in accordance with an amended procedural calendar.

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97 Energy Charter Treaty, Art. 1 (C2); *see below* ¶¶ 248 to 276.

98 *See* Interim Award on Jurisdiction (Hulley), ¶ 600; Interim Award on Jurisdiction (YUL), ¶ 601; Interim Award on Jurisdiction (VPL), ¶ 612.

99 Claimants' letter of February 24, 2010, pp. 3-4; Respondent's letter of February 24, 2010, p. 2.

(c)(iv) Hearing On The Merits And The Final Awards

85. The Hearing on the Merits took place at the Peace Palace in The Hague, from October 10 to November 9, 2012. During the Hearing, the Tribunal heard testimony from seven fact witnesses, one expert on Russian tax law and the parties' experts on damages.

86. The parties filed their post-hearing briefs on December 21, 2012 and their cost claims on April 17, 2014, and submitted comments on the opposing side's cost claims on May 6, 2014.

87. On July 18, 2014, the Tribunal issued the three Final Awards, which were subsequently registered at the District Court of The Hague on August 11, 2014, under numbers 123/2014, 124/2014 and 125/2014.

(d) Summary Of The Final Awards

88. In the Final Awards, the Tribunal concluded that the Russian Federation's treatment of Yukos, and Claimants' investments in Yukos, amounted to an unlawful expropriation in violation of Article 13(1) ECT, and awarded Claimants in excess of USD 50 billion in damages. Having found for Claimants on their claim under Article 13(1) ECT, the Tribunal declined to rule on Claimants' contention that the Russian Federation violated Article 10(1) ECT.[100]

(d)(i) The Tribunal's Ruling Concerning Yukos' Tax Evasion

89. In the case of the sham trading shells established by Yukos in the low-tax regions of Lesnoy and Trekhgorniy, the Tribunal agreed with the Russian Federation that:

    (a) Yukos fraudulently misattributed its own sales of oil to its sham trading shells;

    (b) this was done to evade taxation of the profits from those sales at the full Moscow-region rate applicable to Yukos' own sales of oil;

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[100] Final Awards, ¶¶ 1580, 1585, 1888.

(c) Yukos' attribution of these sales to its sham trading shells was unlawful under Russia's *"jurisprudential 'good faith taxpayer' doctrine ('substance over form' or 'anti-abuse' doctrine)*;"[101]

(d) *"within the senior management of Yukos, there were a number of persons who were aware that Yukos was vulnerable in respect of"* this scheme, in part due to the Russian authorities' investigation of the sham trading shells that began in 1999;[102] and

(e) Yukos took measures intended to prevent the Russian authorities from discovering and prosecuting these wrongs.[103]

90. In the case of the sham trading shells established by Yukos in the low-tax region of Mordovia, the Tribunal held that the Russian Federation had not submitted any evidence that Yukos' Mordovian trading shells were shams, and that Mr Dubov's hearing testimony, first presented in the Arbitrations and never previously presented to the Russian tax authorities or a Russian court, established that Yukos had *"informed the authorities" that Yukos "was using the legislative arrangements in [Mordovia] to minimize its taxes"* and no one had objected.[104] The Tribunal's failure to take account of important evidence inconsistent with these findings is discussed at paragraphs 316 to 324 below.

91. Even though the Tribunal found that Yukos' Lesnoy and Trekhgorniy trading companies were sham shells and had engaged in tax evasion, the Tribunal held that the attribution to Yukos of the income of the these trading shells was improper because, according to the Tribunal, *"there was no precedent"* in Russian case law for what the Tribunal referred to as the *"re-attribution"* of sales and income to Yukos *"at the time that the tax assessment and related decisions were issued in respect of Yukos."*[105]

92. The errors made by the Tribunal in holding that the attribution to Yukos of the income of the sham trading shells was improper are discussed at paragraphs 325 to 334 below. The Tribunal's ruling with respect to Yukos' corporate profit tax assessments is also

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101 Final Awards ¶ 494.

102 Final Awards, ¶ 494.

103 Final Awards ¶¶ 604-605.

104 Final Awards, ¶¶ 486, 500.

105 Final Awards, ¶ 625.

inconsistent with the unanimous holdings of two different Chambers of the ECtHR, both of which upheld these assessments as proper and in compliance with Russian law, as discussed more fully at paragraphs 344 to 350 below.

93. The Tribunal held that Yukos' VAT assessments were improper because, according to the Tribunal, the Russian authorities, for *"purely technical reasons,"* refused *"to attribute to Yukos the trading companies' VAT refunds."*[106]

94. The errors made by the Tribunal in holding Yukos' VAT assessments to have been improper are discussed at paragraphs 335 to 343 below. The Tribunal's ruling with respect to Yukos' VAT assessments is also inconsistent with the unanimous holdings of two different Chambers of the ECtHR, both of which upheld these assessments as proper and in compliance with Russian law, as discussed more fully at paragraphs 344 to 350 below.

(d)(ii) The Tribunal's Rulings Concerning The Russian Federation's Enforcement Actions

95. The Tribunal's conclusions concerning the Russian authorities' enforcement efforts are predicated on its condemnation of Yukos' tax assessments. In also condemning the Russian authorities' enforcement efforts, the Tribunal did not take into account the Russian Federation's showing that its enforcement actions were an appropriate response to Yukos':

(a) refusal to acknowledge its wrongdoing;

(b) refusal to timely pay its overdue taxes, bizarrely endorsed by the Tribunal on the ground that Yukos itself "*considered the tax assessments to be ill-founded,*" notwithstanding the upholding of those assessments by Russia's courts at multiple levels;[107]

(c) dissipation of its own assets and encumbering its operating subsidiaries' assets;

(d) payment (largely to Claimants) of an unprecedented dividend,

(e) transfer of substantial assets beyond the reach of the Russian authorities; and

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[106] Final Awards, ¶ 626.

[107] Final Awards, ¶ 945.

(f) politicization of this domestic tax dispute by falsely attributing it to a Government-sponsored "tax racket" and a purported political vendetta against Mr Khodorkovsky.[108]

96. In condemning the Russian authorities' enforcement efforts, the Tribunal placed significant weight on its finding that the YNG auction was "rigged."[109] However, this finding was based in large part on the Tribunal's erroneous conclusion that YNG's shares were sold at far below their fair value.[110] This issue is discussed at greater length at paragraphs 532 to 534 below.

(d)(iii) The Tribunal's Rulings Concerning Damages

97. The Tribunal awarded Claimants total damages in the unprecedented amount of USD 50,020,867,798, by far the largest award ever rendered in an international arbitration, exceeding the prior record by a multiple of 20.[111]

98. In determining the amount of Claimants' damages, the Tribunal adopted a novel methodology of its own devising that had not been proposed by any of the parties or their damages experts. The Tribunal's methodology is deeply flawed and resulted in the erroneous awarding of not less than USD 21.651 billion in damages having no economic basis.

99. The Tribunal's development of its own damages methodology, and its failure to afford the parties an opportunity to review and comment on its methodology, constitute grounds for this Court to set aside the Yukos Awards pursuant to Article 1065(1)(c), (d) and (e) DCCP. This issue is discussed in greater detail at paragraphs 386 to 467 below.

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108 Resp. C-Mem., ¶¶ 349-488, 528-539; Resp. Rej., ¶¶ 809-823, 829-969.

109 Final Awards, ¶¶ 986, 1036.

110 Final Awards, ¶¶ 1020, 1023, 1815.

111 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award of October 5, 2012 (Exhibit RF-6) (Claimants awarded USD 1.77 billion in compensation, USD 2.3 billion with interest applied); *Dow Chemical Co. v. Petrochemical Industries Corporation*, ICC Arbitration, Awards May 2012 and February 2013 (Claimant awarded USD 2.16 billion in compensation, USD 2.48 with interest and costs applied).

III. SUMMARY OF GROUNDS FOR SETTING ASIDE THE YUKOS AWARDS PURSUANT TO ARTICLE 1065(1) DCCP

100. The grounds for setting aside the Yukos Awards are presented below in Sections IV through VIII of this Writ, as follows:

101. *Section IV* establishes that the Court should set aside the Yukos Awards pursuant to Article 1065(1)(a) DCCP, because there was no valid arbitration agreement between Claimants and the Russian Federation with respect to Claimants' claims, and the Tribunal accordingly lacked jurisdiction over these claims:

> (a) under Article 45 ECT, because (i) the Russian Federation never ratified the ECT, but instead agreed to apply it on a provisional basis pursuant to Article 45(1) ECT only "*to the extent that such provisional application*" is not inconsistent with Russian law, and (ii) the arbitration of Claimants' claims under the ECT's investor-State dispute settlement mechanism is inconsistent with Russian law;
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> (b) under Article 1(6) and (7) ECT, because (i) Claimants are shell company proxies for Russian nationals, and did not inject any foreign capital into the Russian Federation, and (ii) their Yukos shares are accordingly not investments entitled to the protections of the ECT; and
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> (c) under Article 21 ECT, because (i) Article 21(1) ECT provides that "*nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties*," and (ii) the Tribunal's holding that the Russian Federation expropriated Claimants' interests in Yukos is based on "*Taxation Measures"* (other than "*taxes*") taken by the Russian authorities.

102. *Section V* demonstrates that the Court should set aside the Yukos Awards pursuant to Article 1065(1)(c) DCCP, because the Tribunal violated its mandate in three principal respects:

> (a) because it failed to comply with Article 21(5)(b)(i) ECT, which required the Tribunal to refer Claimants' expropriation contentions to the appropriate tax authorities in Cyprus (in the case of Hulley and VPL), the United Kingdom (in

the case of YUL) and the Russian Federation so that they could provide their conclusions concerning these contentions to the Tribunal;

(b) because the Tribunal awarded damages to Claimants based on the Tribunal's own novel and deeply flawed methodology (i) that departed significantly from the parties' submissions and is outside the scope of the parties' debate, (ii) as to which the parties were not afforded an opportunity to be heard, and (iii) that resulted in the awarding of tens of billions of dollars to Claimants without any economic basis; and

(c) because the arbitrators did not personally fulfill their mandate, based on information recently provided to the parties showing that an assistant to the Tribunal, previously represented by the Tribunal to be responsible only for administrative tasks, instead devoted substantially more time to the Arbitrations than did any of the Tribunal members, and thus almost certainly performed a substantive role in analyzing the evidence, in the Tribunal's deliberations, and in preparing the Final Awards, in breach of the Tribunal's mandate to personally perform these tasks.

103. *Section VI* demonstrates that the Final Awards should be set aside pursuant to Article 1065(1)(b) DCCP because the Tribunal was not properly composed, based upon the apparent performance by the assistant to the Tribunal of a substantive role.

104. *Section VII* demonstrates that the Final Awards should be set aside pursuant to Article 1065(d) DCCP because the Tribunal failed to give reasons for several aspects of its rulings, including in its damages award, its failure to consider evidence supporting Yukos' corporate profit tax assessments, its openly grounding conclusions in the Tribunal's own speculation, and its internally inconsistent findings concerning the YNG auction.

105. *Section VIII* demonstrates that the Court should set aside the Final Awards pursuant to Article 1065(1)(e) DCCP because they reflect the Tribunal's partiality and prejudice, and thus the violation of public policy and good morals, including the Russian Federation's right to due process:

(a) because the Tribunal based many of its rulings on what it openly described as its own speculation as to what the Russian Federation *might have* done rather than what the record showed the Russian Federation to have *actually* done;

(b) because in holding that Yukos' VAT assessments were improper, the Tribunal expressly relied on its own views as to what Russian tax law *should* provide, rather than what it *actually does* provide;

(c) because in finding that the auction of YNG shares was "*rigged,"* the Tribunal relied on its own speculation rather than proven facts, and contradicted its own findings concerning the price achieved at the auction; and

(d) for the same reasons that the Tribunal violated its mandate, as shown in Section 5.

IV. GROUND FOR SETTING ASIDE 1: THE ABSENCE OF A VALID ARBITRATION AGREEMENT (ARTICLE 1065(1)(A) DUTCH CODE OF CIVIL PROCEDURE)

A. Introduction

106. In the absence of a valid arbitration agreement, an arbitral award can be set aside pursuant to Article 1065(1)(a) DCCP. In the present case the Tribunal wrongfully assumed jurisdiction because there was no valid arbitration agreement. Consequently, the Russian Federation requests that the Yukos Awards be set aside due to the lack of a valid arbitration agreement. After a general explanation of the legal framework regarding the absence of a valid arbitration agreement (see B), the Russian Federation demonstrates that:

(a) the Russian Federation never ratified the ECT, and provisional application of the Treaty pursuant to Article 45(1) ECT does not extend to an obligation to arbitrate Claimants' claims pursuant to Article 26 ECT (see C);

(b) Claimants' shares in Yukos are not protected under Article 1(6) and (7) ECT (see D); and

(c) the Tribunal does not have jurisdiction to rule on "*Taxation Measures*" under Article 21(1) ECT (see E).

B. Legal Framework

107. If the place of arbitration is located in the Netherlands, it is ultimately up to a Dutch court to rule whether the parties have consented to an arbitration agreement and whether the dispute falls under the scope of that agreement.[112] When determining whether an arbitral award can be set aside on the basis of Article 1065(1)(a) DCCP, the court shall *not* exercise restraint.[113] This was previously assumed, and was recently confirmed, by the Supreme Court in the case *Ecuador/Chevron & Texaco*:

> "Pursuant to article 1020(1) DCCP, parties can submit by agreement disputes that arose between them by virtue of a certain legal relationship to arbitration proceedings. The arbitral tribunal that is so appointed is competent to determine its own jurisdiction (article 1052(1) DCCP), but the fundamental right to access to a court means that the question whether or not a valid arbitration agreement has been entered into, is ultimately to be answered by the court (cf. article 1022(1) DCCP and article 1065(1), preamble and under a DCCP, as well as Supreme Court 9 January 1981, ECLI:NL:HR:1981:AG4130, NJ 1981/203). This fundamental right also means that the court shall not exercise restraint in assessing the validity of a claim for setting aside the arbitral award on the basis of article 1065(1)(a) DCCP."[114]

108. In the present case, the arbitral clause on which the claim of jurisdiction rests is included in Article 26 ECT. Insofar as relevant here, Article 26 ECT reads 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 cannot 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 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 […]."

109. In the case of investment arbitrations between investors and the host States where investments have been made, the possibility of arbitration is often provided for in a treaty

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[112] Cf. Supreme Court September 26, 2014, ECLI:NL:HR:2014:2837 (*Ecuador/Chevron & Texaco*) ground 4.2. Supreme Court March 2009, *NJ* 2010, 170 (*Smit et al / Ruwa Bulbs*), ground 3.4.1; Supreme Court January 9, 1981, *NJ* 1981, 203 (*De Raad / Wagemaker*). *See also* Meijer 2014, annotation 2.a.; Meijer 2011, p. 939; Snijders 2011, article1052 DCCP, annotation 1.

[113] Snijders 2011, article 1065 DCCO, annotation 2; Meijer 2014, article 1065, annotation 2.a; Meijer 2011, p. 939; Sanders 2001, p. 187. *See also* Court Rotterdam May 18, 2011, ECLI:NL:RBROT:2011:BQ5670 (*Eiser / Cimcool*), ground 4.5.

[114] Supreme Court 26 September 2014, ECLI:NL:HR:2014:2837 (*Ecuador/Chevron & Texaco*) ground 4.2.

between the host State and the investor's home State (instead of a contract concluded by the investor with the host State). It is assumed that an arbitration clause that is included in an investment treaty can be regarded as an offer of arbitration by the host country, insofar as a proviso to the investment treaty does not provide otherwise, and that this may be accepted by the investor in accordance with the provisions of the treaty.[115]

110. That the arbitration clause of Article 26 ECT establishes a link between the dispute and the scope of application of the ECT (for example, by including, *inter alia*, the terms "*Contracting Party*," "*Investor*" and "*Investment"* in Article 26 ECT) also means that the scope of application of the ECT is submitted to your District Court for a full review to determine the competence of the Tribunal. This follows from the Court of Appeal of The Hague in *Ecuador / Chevron & Texaco*:

> "The phrase that is underlined by the Court of Appeal demonstrates that the arbitration clause itself (at least with respect to the ground for setting aside that is currently being discussed) establishes a link between the dispute and the scope of application (also referred to by parties as "the scope of protection") of the treaty. Indeed, ground for setting aside as referred to under c) offers arbitration as a manner to settle disputes concerning rights that are created or granted by the treaty. In this context, Chevron invokes the right that is granted to it in article II paragraph 7 BIT. Consequently, it becomes important whether Chevron can claim that right and it is undeniable that the application of the BIT is assessed ratione materiae and ratione temporis. Consequently, that the determination of 'the scope of protection' of the treaty (i.e. to determine the competence of the Tribunal) is submitted to the domestic court for a full review is a result of the manner in which the contracting parties have drafted the arbitration clause."[116]

111. The Supreme Court confirmed the ruling of the Court of Appeal:

> "Pursuant to article 1020(1) DCCP, parties can submit by agreement disputes that arose between them by virtue of a certain legal relationship to arbitration proceedings. The arbitral tribunal that is so appointed is competent to determine its own jurisdiction (article 1052(1) DCCP), but the fundamental right to access to a court means that the question whether or not a valid arbitration agreement has been entered into, is ultimately to be answered by the court (...). This fundamental right also means that the court shall not exercise restraint in assessing the validity of a claim for setting aside the arbitral award on the basis of article 1065(1)(a) DCCP. The District Court (ground 4.5) and Court of Appeal (ground 10) have

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115 Supreme Court September 26, 2014, ECLI:NL:HR:2014:2837 (*Ecuador/Chevron & Texaco*).

116 Court in The Hague June 18, 2013, ECLI:NL:GHDHA:2013:1940 (*Ecuador / Chevron & Texaco*), ground 16.

correctly ruled in this manner, which ruling was therefore not contested in these Supreme Court proceedings."[117]

112. The defendant in a setting aside proceeding bears the burden of proof as to the existence of a legally valid arbitration agreement in respect of its defence that there *is* a valid arbitration agreement between the parties.[118] This was decided by the Supreme Court in 1913.[119]

C. Jurisdiction Ground 1 – The Tribunal Lacked Jurisdiction Pursuant To Article 45 ECT

(a) Introduction

113. The first reason that the Court should set aside the Final Awards under Article 1065(1)(a) is that the Russian Federation never ratified the ECT, but instead agreed to apply it only on a provisional basis pursuant to Article 45(1) ECT, and thus only "*to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*." Because the arbitration of Claimants' claims pursuant to Article 26 ECT is inconsistent with Russian law, the Russian Federation's agreement to apply the ECT on a provisional basis does not include an agreement to arbitrate such claims under the ECT. Thus, the Tribunal lacked jurisdiction over Claimants' claims here.

114. A State is only bound by a treaty if it has consented to be bound by it. Under the Vienna Convention on the Law of Treaties of 1969 ("**VCLT**"),[120] States may express their consent to be bound by a treaty by several means, including signature and ratification. Ratification is typically required if the treaty contains provisions that amend or supplement the Contracting States' domestic laws, requiring their parliaments to enact legislation to enable their authorities to comply with the treaty. Ratification of treaties is therefore not a mere formality, but rather an important safeguard of separation of powers.

115. The ECT contains numerous provisions that modify and supplement the Contracting States' domestic laws in the energy sector in several areas, including investment, trade and

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[117] Supreme Court September 26, 2014, ECLI:NL:HR:2014:2837 (*Ecuador/Chevron & Texaco*) ground 4.2.

[118] Meijer 2011, p. 944; Meijer 2014, article 1065, annotation 2.a.; Snijders 2011, article 1065 DCCP, annotation 2.

[119] Supreme Court February 21, 1913, *NJ* 1913, p. 584 (*Offermeier / Portheine*): "(…) that where the civil court is requested to rule on a dispute and where arbitrators have exclusive jurisdiction to render a decision, if parties have thus agreed, then the party asserting that such an agreement exists shall bear the burden of proof if the other party disputes it." This was recently confirmed by the Court in Rotterdam, *see* Court Rotterdam May 18, 2011, ECLI:NL:RBROT:2011:BQ5670 (*Eiser / Cimcool*), ground 4.6.

[120] Vienna Convention on the Law of Treaties, Art. 11 (R-296).

competition. Pursuant to Article 39 ECT, consent to be bound by the ECT is expressed through ratification, acceptance or approval, not by signature:

> "This Treaty shall be subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Depository."

116. The Deputy Chairman of the Russian Government signed the ECT, subject to ratification, on December 17, 1994.

117. It is undisputed that the Russian Federation never ratified the ECT. Pursuant to Article 106(d) of the 1993 Constitution of the Russian Federation, ratification of a treaty by the Russian Federation requires the enactment of a federal law by the State Duma, the lower chamber of the Russian parliament. The Russian Government presented the ECT to the State Duma for ratification in August 1996. The State Duma did not ratify the ECT, however, and the draft law on its ratification was eventually withdrawn.[121] The Russian Federation therefore never consented to be bound by the ECT.

(a)(i) Provisional Application

118. States can agree to apply a treaty on a provisional basis before its entry into force. The adjective "*provisional*" indicates that the treaty is being applied "*in anticipation of something more definite*": the moment a State becomes a party to the treaty by ratification.[122] States may agree to provisional application of a treaty for various reasons, including because of the urgency of the matters dealt with in the treaty – in the case of the ECT, the perceived threat of a breakdown in energy supplies due to the precarious state of Soviet energy infrastructure and the growing instability in the Middle East.[123]

119. However, for most States, provisional application of a treaty that requires ratification by their parliament raises serious problems under domestic law, including constitutional law, as several States confirmed during discussions in the United Nations General Assembly's

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121 Electronic Registration Card for draft Law No. 96043844-2 on Ratification of the Energy Charter Treaty and the Protocol to the Energy Charter on Energy Efficiency and Related Environmental Aspects (Exhibit RF-7).

122 *See* Kamerstukken II, 1982-83, 17 798 (R 1227), nrs. 1-4, 16.

123 *See* S. Fremantle Opinion Concerning the Provisional Application of the Energy Charter Treaty (Jan. 21, 2007) ("Fremantle Opinion"), ¶ 16(a). *See also* J. Doré, The Negotiating History of the European Energy Charter Treaty, *in* ENERGY CHARTER TREATY: SELECTED TOPICS (T.W. Wälde and K.M. Christie, eds. 1995), 1.2 (Exhibit RF-8).

Legal Committee in 2012 and 2013.[124] For instance, the representative of the Federal Republic of Germany stated:

> "In many countries, including his own, domestic law determined the extent to which provisional application of a treaty could be agreed or implemented. If the implementation of a treaty required the amendment or adoption of a negotiating State's domestic law, provisional application by that State was impossible, at least until the relevant legislation had been changed or adopted. The same might apply if the funding demanded by the treaty required parliamentary approval. Therefore, States would often limit a treaty's provisional application to the framework of their applicable domestic law, making it clear that they might not be in a position to meet its obligations completely. Alternatively, they might agree to the provisional application of a treaty as from notification of completion of the necessary internal procedures."[125]

120. To avoid conflicts between a State's international obligations and domestic law, provisional application is often expressly limited to treaty provisions that are consistent with the State's constitution or laws[126] or within the competence or powers of its executive

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124 *See* United Nations, General Assembly, Statement by the Hellenic Republic during meeting of the Sixth Committee (Nov. 4, 2013), ¶ 40 (Exhibit RF-9): "Some States might be reluctant to provisionally apply international treaties, both for policy reasons and because of constitutional constraints relating to procedural requirements for accession to treaties."; United Nations, General Assembly, Statement by the United Kingdom of Great Britain and Northern Ireland during meeting of the Sixth Committee (Nov. 6, 2012), ¶ 34 (Exhibit RF-10): "Turning to the topic 'Provisional application of treaties', she noted that it could be of genuine practical importance to States, though in practice it could also conflict with the constitutional and other laws of States."; United Nations, General Assembly, Statement by New Zealand during meeting of the Sixth Committee (Nov. 4, 2013), ¶ 100 (Exhibit RF-11): "Provisional application could be a legitimate tool, but domestic procedures for entering into binding international obligations and accepting provisional application were of the utmost importance and were a matter for individual States to determine in the context of their constitutional framework. Provisional application should not be used to circumvent domestic constitutional processes."

125 United Nations, General Assembly, Statement by the Federal Republic of Germany during meeting of the Sixth Committee (Nov. 5, 2012), ¶ 6 (Exhibit RF-12); *see also* United Nations, General Assembly, Written Statement by the Kingdom of the Netherlands during meeting of the Sixth Committee (Nov. 5, 2012), ¶ 14 (Exhibit RF-13): "We consider provisional application an important instrument of international treaty practice. However, we would like to draw attention to the importance of domestic law in this respect. It is after all for individual States to determine whether or not their legal system allows for provisional application and, if so, on what conditions and to what extent. It may be difficult to draw any general rules from this diversity." [emphases added]

126 *E.g.*, 1974 Agreement on an International Energy Program, Art. 68(1) (R-275); 1955 Agreement Relating to the International Convention for Regulating the Police of the North Sea Fisheries, Art. 3 (R-277); 2004 Agreement Between the Government of the United States of America and the Government of Liberia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, Art. 17(2) (R-273); 1971 Convention on the Establishment of the International Institute for the Management of Technology, Art. 8(3) (R-280); 1995 International Grains Agreement, Art. 26 (R-284); 1995 Food Aid Convention, Art. XIX (Exhibit RF-14); 1992 Constitution and Convention of the International Telecommunication Union, Art. 54(3) (R-278); 1981 Sixth International Tin Agreement, Art. 53(1) (R-287); 1994 Agreement Relating to the Implementation of Part XI of the Convention of the Law of the Sea, Art. 7(2) (R-276); 1962 Protocol Relating to the Provisional Application of the Protocol Concerning the Establishment of European Schools, Sole Article (Exhibit RF-15); 1991 Final Act of the Eleventh Antarctic Treaty Special Consultative Meeting (R-369); 1997 Agreement Between the Government of the Federal Republic of Germany and the Government of Mongolia Concerning Cultural Cooperation, Art. 16(2) (R-370); 1999 Food Aid Convention, Art. XXII(c) (R-282); 1949 General Agreement on Privileges and Immunities of the Council of Europe, Art. 22 (Exhibit RF-16); 1964 Convention on the Elaboration of a European Pharmacopoeia, Art. 17 (Exhibit RF-17); 1954 Agreement Concerning the International Institute of Refrigeration Replacing the Convention of 21st June 1920 as modified on 31st May 1937, Art. XXXIV(3) (Exhibit RF-18); 1921 Agreement Between the Government of the French Republic and the Government of the Republic of Czechoslovakia on the Settlement of Questions of Properties, Rights And Interests of Their Nationals in Their Respective Countries, Art. 18 (Exhibit RF-19); 2008 Economic Partnership Agreement between CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part, Art. 243(3) (Exhibit RF-20).

branch.[127] Provisional application of the ECT is so limited by Article 45(1), which provides for provisional application by each signatory "*to the extent not inconsistent with its constitution, laws or regulations*." The purpose and effect of this limitation is to restrict a signatory's obligation to apply the treaty prior to ratification to those treaty provisions that are consistent with its domestic laws.

121. Article 45(2) ECT, introduced with "*notwithstanding*," a word of derogation, provides for an exception to the provisional application obligation in Article 45(1) ECT. Article 45(2) *litera* a allows a signatory to opt out of provisional application of the ECT altogether by making a declaration to the depositary, the Portuguese Republic, that it is not able to accept provisional application. Pursuant to Article 45(2) *litera* c, a signatory making such a declaration applies only Part VII ECT ("Structure and Institutions") and then only "*to the extent that such provisional application is not inconsistent with its laws or regulations*."

122. Articles 45(1) and (2) ECT in their entirety in the English authentic version 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 Depository 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 Depository.
>
> (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."

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[127] *E.g.*, 1953 Agreement for a Cooperative Program of Agriculture Between the Government of the United States of America and the Government of the United States of Brazil, Art. XIV (R-274); 1947 General Agreement on Tariffs and Trade, Art. XXIX(1) (R-283).

(a)(ii) The Russian Federation's Jurisdictional Objection Based On Article 45(1) ECT

123. The Russian Federation objected to the Tribunal's jurisdiction on the ground that the express limitation on the scope of provisional application set forth in Article 45(1) ECT, "*to the extent not inconsistent with its constitution, laws or regulations*" (the "Limitation Clause"), limits its obligation to apply the ECT provisionally to those provisions that are consistent with the Russian Federation's domestic law.[128] The Russian Federation demonstrated that arbitration of Claimants' claims pursuant to Article 26 ECT is inconsistent with the Russian Federation's Constitution and the 1995 Federal Law on International Treaties, which does not allow provisional application of treaty provisions that amend or supplement Russian law without the approval of the State Duma, at least beyond the six-month period provided for provisional application of such treaties.[129] The arbitration of Claimants' claims is also inconsistent with other Russian law. Russian laws prohibit the arbitration of disputes arising from sovereign acts or omissions, including disputes concerning tax assessments, tax enforcement and collection measures.[130] In addition, Russian laws do not allow shareholders in a joint stock company to claim damages based on injury caused to the company by a third party.[131] Thus, the Russian Federation established that its obligation to apply the ECT on a provisional basis pursuant to Article 45(1) ECT does not extend to the alleged obligation to arbitrate Claimants' claims pursuant to Article 26 ECT, and accordingly the Tribunal lacked jurisdiction.

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128 Respondent's Second Memorial on Jurisdiction and Admissibility, ¶¶ 31-32.

129 Respondent's First Memorial on Jurisdiction and Admissibility, ¶¶ 32-37; Respondent's Second Memorial on Jurisdiction and Admissibility, ¶¶ 139-142, 177-188; A. Nußberger Opinion Concerning the Provisional Application of the Energy Charter Treaty by the Russian Federation (Jan. 17, 2007) ("Nußberger Expert Opinion"), Theses 3 and 4; I.I. Lukashuk Opinion on Provisional Application of the Energy Charter Treaty ("Lukashuk Expert Opinion"); S.A. Avakiyan Expert Opinion on the Constitutional Legal Aspects of the Conclusion and Application of International Treaties of the Russian Federation (Feb. 21, 2006) ("Avakiyan I Expert Opinion"); M.V. Baglay Opinion on Provisional Application of International Treaties According to the Constitution of the Russian Federation (Feb. 26, 2006) ("Baglay Expert Opinion"); Expert Comments by Professor C.A. Avakiyan regarding expert opinion of V. Gladyshev of June 29, 2006 ("Avakiyan II Expert Opinion"); Letter No. 07/11254-SV of the Ministry of Justice of the Russian Federation (Dec. 13, 2006).

130 Respondent's First Memorial on Jurisdiction and Admissibility, ¶ 38; Respondent's Second Memorial on Jurisdiction and Admissibility, ¶¶ 149-150; Kostin Expert Opinion.

131 Respondent's First Memorial on Jurisdiction and Admissibility, ¶ 112; Respondent's Second Memorial on Jurisdiction and Admissibility, ¶¶ 161-165; Y.A. Sukhanov Opinion on the Issue of Possibility of a Shareholder's Claims Against Counter-Parties of the Joint-Stock Company in Connection with Damage Caused by the Latter to the Company (Feb. 22, 2006) ("Sukhanov Expert Opinion").

(a)(iii) The Tribunal's Ruling

124. The Tribunal agreed that the Russian Federation was not required to provide an opt-out declaration under Article 45(2) ECT or a notification that provisional application is inconsistent with its domestic law pursuant to Article 45(1) ECT in order to invoke the Limitation Clause in Article 45(1) ECT,[132] as Claimants had argued.

125. The Tribunal nonetheless assumed jurisdiction over Claimants' claims. The Tribunal concluded that Article 45(1) ECT "*contains an 'all-or-nothing' proposition: either the entire Treaty is applied provisionally, or it is not applied provisionally at all*."[133] While the Tribunal agreed that the phrase "*to the extent that*" is "*often the language used when drafters of a clause in a treaty or statute wish to make clear that a provision is to be applied only insofar as what then follows is the case*,"[134] it considered that, in the context of Article 45(1) ECT, that phrase refers to provisional application of the ECT as a whole.[135] The Tribunal relied on the fact that the phrase "*to the extent that*" is followed by "*such provisional application*," which it deemed to refer to provisional application of the ECT.[136] The Tribunal also noted that Article 27 of the Vienna Convention on the Law of Treaties, which prohibits a State from invoking its domestic law as a justification for failure to perform a treaty, and the *pacta sunt servanda* rule, militate against what the Tribunal characterized as the Russian Federation's piecemeal approach.[137] The Tribunal thus ruled that the Russian Federation agreed to apply the ECT in its entirety unless the principle of provisional application itself is inconsistent with Russian domestic law.[138]

126. The Tribunal also ruled that the principle of provisional application *per se* is recognized in the Russian Federation's domestic legal system,[139] and thus concluded that it may not invoke any potential inconsistency of Article 26 ECT with its domestic law in the context of its objection to the Tribunal's jurisdiction under Article 26 ECT.[140]

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132 HUL Interim Award, ¶¶ 260-269, 282-288.

133 HUL Interim Award, ¶ 311. [*English quote in Dutch text omitted*]

134 HUL Interim Award, ¶ 303. [*English quote in Dutch text omitted*]

135 HUL Interim Award, ¶ 308.

136 HUL Interim Award, ¶¶ 305-308.

137 HUL Interim Award, ¶¶ 312-315.

138 HUL Interim Award, ¶ 329.

139 HUL Interim Award, ¶¶ 330-338.

140 HUL Interim Award, ¶ 339.

127. Finally, the Tribunal ruled *obiter dictum* that arbitration of Claimants' claims is not inconsistent with the Russian Federation's Constitution, laws or regulations.[141] The Tribunal ruled that the six-month limit imposed on provisional application of treaties subject to ratification under the 1995 Federal Law on International Treaties is "*merely an internal requirement*."[142] The Tribunal also found that investor-State disputes are arbitrable under the 1991 and 1999 Laws on Foreign Investment, and that Claimants' claims are not derivative in nature.[143] The Tribunal therefore held that the Russian Federation is required to arbitrate this dispute pursuant to Article 26 ECT.[144]

128. The Tribunal summarized its findings as follows:

> 394. In this chapter, the Tribunal has found that:
>
> […]
>
> c) The Limitation Clause of Article 45(1) negates provisional application of the Treaty only where the principle of provisional application is itself inconsistent with the constitution, laws or regulations of the signatory State; and
>
> d) In the Russian Federation, there is no inconsistency between the provisional application of treaties and its Constitution, laws or regulations.
>
> 395. Accordingly, the Tribunal has concluded that the ECT in its entirety applied provisionally in the Russian Federation until 19 October 2009, and that Parts III and V of the Treaty (including Article 26 thereof) remain in force until 19 October 2029 for any investments made prior to 19 October 2009. Respondent is thus bound by the investor-State arbitration provision invoked by Claimant.
>
> 396. The Tribunal is comforted in its decision by its further finding that, had it been an essential consideration under the Limitation Clause of Article 45(1) - which it is not – Article 26 of the ECT, as well as Articles 1(6) and 1(7), are consistent with Respondent's Constitution, laws and regulations.
>
> 397. The Tribunal therefore has jurisdiction over the merits of this claim.[145]

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141 HUL Interim Award, ¶ 370.

142 HUL Interim Award, ¶ 387.

143 HUL Interim Award, ¶ 372.

144 HUL Interim Award, ¶ 395.

145 HUL Interim Award, ¶¶ 394-397.

(a)(iv) Summary Of The Arguments

129. *First*, the Tribunal concluded that "[t]*he Limitation Clause of Article 45(1) negates provisional application of the Treaty only where the principle of provisional application is itself inconsistent with the constitution, laws or regulations of the signatory State*."[146] As set forth in paragraphs 133 to 186 below, the Tribunal misinterpreted Article 45(1) ECT, which provides for provisional application only to the extent that *individual treaty provisions* are not inconsistent with a signatory's Constitution, laws or regulations.

130. *Second*, the Tribunal concluded that "[i]*n the Russian Federation, there is no inconsistency between the provisional application of treaties and its Constitution, laws or regulations*."[147] This conclusion is incorrect. Arbitration of Claimants' claims under Article 26 ECT is inconsistent with the Constitution, laws and regulations of the Russian Federation.

131. As explained in paragraphs 191 to 204 below, arbitration of Claimants' claims is inconsistent with the Russian Constitution. As explained in paragraphs 205 to 244 below, arbitration of Claimants' claims under Article 26 ECT is also inconsistent with Russian laws. Russian arbitration laws and the civil and commercial (arbitrazh) procedure codes prohibit the arbitration of public law disputes.[148] In addition, Russian civil and corporate law does not permit shareholders of a company to claim compensation for impairment or loss of their shares based on injury suffered by that company.

132. For these reasons, further detailed below, the Court should conclude that the Tribunal's ruling is mistaken, and the Tribunal lacked jurisdiction and the Yukos Awards must accordingly be set aside under Article 1065(1)(a) DCCP.

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146 HUL Interim Award, ¶ 394. [*English quote in Dutch text omitted*]

147 *Ibid*. [*English quote in Dutch text omitted*]

148 The term "arbitrazh" in the legal system of the Russian Federation refers to the commercial nature of a court or procedure. "Arbitrazh courts" form part of the general system of Russian courts and have jurisdiction over commercial disputes; "arbitrazh procedure" denotes the procedural rules applicable in proceedings before arbitrazh courts.

(b) Article 45(1) ECT Limits Provisional Application To Those ECT Provisions That Are Consistent With The Russian Federation's Constitution, Laws And Regulations

133. The Tribunal upheld its own jurisdiction based on its erroneous conclusion that Article 45(1) ECT is an "*all-or-nothing*" provision, which requires the Russian Federation to apply the ECT in its entirety if the principle of provisional application *per se* is known in its domestic legal system. In doing so, the Tribunal ignored the ordinary meaning of the terms of the Limitation Clause in their context, the purpose of the Limitation Clause, as well as the ECT's drafting history and the signatories' practice in interpreting and applying the Limitation Clause.

134. Under the basic rule of treaty interpretation set forth in Article 31(1) VCLT, a treaty "*shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*." Subsequent practice in the application of a provision, establishing the parties' agreement regarding its interpretation, shall also be taken into account in accordance with Article 31(2) and (3)(b). Under Article 32, supplementary means of interpretation, including the preparatory works of the treaty and the circumstances of its conclusion, may be considered to confirm the meaning resulting from the application of Article 31(1) VCLT or to determine the meaning when such interpretation leaves the meaning ambiguous or obscure.

135. Pursuant to Article 45(1) ECT, a signatory must apply the Treaty provisionally pending its entry into force for that signatory "*to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*." This clause limits each signatory's obligation to apply the ECT provisionally to those treaty provisions that are not inconsistent with its domestic law.

136. The Tribunal's interpretation of the Limitation Clause in Article 45(1) ECT of the English authentic version of the ECT is incorrect based on each of the following grounds, both independently and together. The Tribunal:

(a) deprived the term "*to the extent*" in the Limitation Clause of its ordinary meaning (see section (b)(i) below);

(b) ignored the ordinary meaning of the terms of the Limitation Clause in their context, in particular the inclusion of "*regulations*," which indicates that the

Limitation Clause concerns specific inconsistencies between the provisions of the ECT and domestic laws and regulations (see section (b)(ii) below);

(c) ignored the ordinary meaning of the terms of the Limitation Clause in their context, in particular Article 45(2) ECT (see section (b)(iii) below);

(d) advanced an interpretation of Article 45(1) ECT that defeats the very object and purpose of the Limitation Clause (see section (b)(iv) below);

(e) misjudged the ECT signatories' practice in interpreting and applying Article 45(1) ECT (see section (b)(v) below);

(f) wrongly disregarded the ECT's preparatory works (see section (b)(vi) below); and

(g) failed to support its interpretation with cogent reasoning, while neglecting numerous sources that contradicted the Tribunal's conclusions (see section (b)(vii) below).

(b)(i) The Ordinary Meaning Of The Limitation Clause

137. The ordinary meaning of the term "*to the extent*" is "*space or degree to which anything is extended*,"[149] "*width of application, operation, etc, scope*,"[150] "*range (as of inclusiveness or application) over which something extends: scope […], the limit to which something extends*."[151] The ECT consistently uses the term "*to the extent*" in its ordinary meaning to denote scope or width of application.[152] The ordinary meaning of "*to the extent*" in the other authentic language versions of the ECT is to the same effect.[153]

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149 OXFORD ENGLISH DICTIONARY (2nd ed. 1989), 599 (R-864).

150 *Ibid*.

151 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1961), 805 (R-865).

152 *See, e.g.*, Energy Charter Treaty, Art. 6(5) (C-2): "[…] The notified Contracting Party shall inform the notifying Contracting Party of its decision or the decision of the relevant competition authorities and may if it wishes inform the notifying Contracting Party of the grounds for the decision. If enforcement action is initiated, the notified Contracting Party shall advise the notifying Contracting Party of its outcome and, to the extent possible, of any significant interim development."; Art. 21(1): "(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."; Art. 21(5)(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: […]."; Art. 27(3)(f): "In the absence of an agreement to the contrary between the Contracting Parties, the Arbitration Rules of UNCITRAL shall govern, except to the extent modified by the Contracting Parties parties to the dispute or by the arbitrators. The tribunal shall take its decisions by a majority vote of its members;" Para. 2 of Annex G: "Contracting Parties shall apply the provisions of the 'Declaration on

138. Thus, pursuant to the plain language of the Limitation Clause, the scope of each signatory's provisional application depends on the consistency of each provision of the ECT with that signatory's "*constitution, laws or regulations*." The Tribunal, however, restricted the Limitation Clause to one type of inconsistency with domestic law – a prohibition of provisional application *per se* – and thereby deprived the term "*to the extent*" of any meaning, effectively substituting "*if*," "*unless*" or "*where*" in its place, as Professor Reisman, one of Claimants' own experts in the Arbitrations, later confirmed in a publication.[154]

139. According to the Tribunal, "*the key to the interpretation of the Limitation Clause rests in its use of the adjective '<u>such</u>' in the phrase 'such provisional application,'*"[155] as this phrase can only refer to *"the provisional application previously mentioned in [Article 45], namely the provisional application of 'this Treaty.'*"[156]

140. This argument, however, begs the question, because Article 45(1) as reformulated by the Tribunal would read as follows:

> "Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, <u>to the extent that the provisional application of this Treaty</u> is not inconsistent with its constitution, laws or regulations." [emphasis added]

141. The Tribunal's grammatical parsing of the word "*such*" in Article 45(1) ECT therefore changes nothing. If anything, it confirms the Russian Federation's interpretation of the Limitation Clause, namely, that the ECT is to be provisionally applied only to the extent that it is not inconsistent with a signatory's constitution, laws or regulations.

142. In sum, the Tribunal's interpretation of Article 45(1) ECT defies the ordinary meaning of that provision and would reformulate the clause to read as follows:

Trade Measures Taken for Balance-of-Payments Purposes' to measures taken by those Contracting Parties which are not parties to the GATT, <u>to the extent practicable</u> in the context of the other provisions of this Treaty." [emphases added]

153 *See, e.g.*, French: "Les signataires conviennent d'appliquer le présent traité à titre provisoire, en attendant son entrée en vigueur pour ces signataires conformément à l'article 44, <u>dans la mesure où</u> cette application provisoire n'est pas incompatible avec leur Constitution ou leurs lois et règlements."; German: "Jeder Unterzeichner ist damit einverstanden, diesen Vertrag bis zum Inkrafttreten für den Unterzeichner nach Artikel 44 <u>in dem Maße</u> vorläufig anzuwenden, in dem die vorläufige Anwendung nicht mit seiner Verfassung und seinen Gesetzen und sonstigen Rechtsvorschriften unvereinbar ist." [emphases added]

154 M.H. Arsanjani and W.M. Reisman, *Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION (2011), 92 (<u>Exhibit RF-21</u>).

155 HUL Interim Award, ¶ 304.

156 *Ibid*.

> "Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, if the provisional application of this Treaty is not inconsistent with its constitution, laws or regulations." [emphasis added]

(b)(ii) The Ordinary Meaning Of The Limitation Clause In Its Context: The Inclusion Of "Regulations"

143. The Limitation Clause plainly and broadly refers to inconsistencies with a signatory's "*constitution, laws or regulations*." A prohibition of provisional application, as such, typically results from constitutional requirements or constraints, such as the principle of separation of powers,[157] or (although not typically), from legislation that implements constitutional principles[158] – not from hierarchically lower legal acts, such as regulations. Indeed, it would be highly unusual for a regulation to address (and prohibit) the principle of provisional application. As also confirmed by Professor Reisman,[159] the inclusion of "*regulations*" in the Limitation Clause shows that specific inconsistencies of particular treaty provisions with domestic laws and regulations – and not only conceptual inconsistencies – are covered.

(b)(iii) The Ordinary Meaning Of The Limitation Clause In Its Context: Article 45(2) ECT

144. Article 45(2)(c) ECT further demonstrates that the Limitation Clause in Article 45(1) ECT encompasses inconsistencies of individual treaty provisions with domestic law. Article 45(2)(c) ECT requires a signatory that has declared itself unable to accept provisional application of the ECT as a whole pursuant to Article 45(2)(a) to nevertheless provisionally apply Part VII ECT ("Structure and Institutions"), but only "*to the extent that such provisional application is not inconsistent with its laws or regulations*." Since a

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157 *See* U.N. CONFERENCE ON THE LAW OF TREATIES (April 9-May 22, 1969) (R-410): Statement by Uruguay, ¶ 77: "[…] provisional application, conflicted with his country's Constitution, under which a preponderant part in forming the will of the State was given to the Legislature, whose consent was essential for the entry into force and application of every international agreement that had been concluded by the Executive."; U.N. CONFERENCE ON THE LAW OF TREATIES (March 26-May 24, 1968) (R-270): Statement by Switzerland, ¶ 46: "[…] There was also the question of the limits to the power of a Government and that of the power of individuals to bind a State provisionally."; United Nations, General Assembly, Statement by China during meeting of the Sixth Committee (Nov 5, 2013), ¶ 15 (Exhibit RF-22); United Nations, General Assembly, Statement by Austria during meeting of the Sixth Committee (Nov. 4, 2013), ¶ 67 (Exhibit RF-23); United Nations, General Assembly, Statement by the Kingdom of Belgium during meeting of the Sixth Committee (Nov. 5, 2013), ¶ 1 (Exhibit RF-24); United Nations, General Assembly, Statement by Chile during meeting of the Sixth Committee (Nov. 4, 2013), ¶ 76 (Exhibit RF-25); United Nations, General Assembly, Statement by South Africa during meeting of the Sixth Committee (Nov. 5, 2012), ¶ 125 (Exhibit RF-26).

158 *See, e.g.*, The Netherlands, 1994 Kingdom Act on the Approval and Publication of Treaties (July 7, 1994), Articles 15(1) and (2).

159 Arsanjani and Reisman, *cit.*, 93 (Exhibit RF-21).

signatory that applies the institutional provisions in Part VII on a provisional basis pursuant to Article 45(2)(c) ECT has already opted out of provisional application entirely, the Limitation Clause in Article 45(2)(c) ECT cannot refer to a prohibition of provisional application *per se* – even though it uses the same "*to the extent*" language as Article 45(1) ECT – but only to inconsistencies between that signatory's "*laws or regulations*" and specific obligations under Part VII ECT, such as the obligation in Article 37(3) ECT to contribute to the expenses of the Energy Charter Secretariat.

145. Indeed, the United States, which proposed the Limitation Clause in the first instance, made clear during the ECT negotiations that it does not have a conceptual difficulty with provisional application. The United States nonetheless insisted on the inclusion of the Limitation Clause in order to exempt itself from provisional application of specific obligations under the ECT, including the obligation to make financial contributions to the Energy Charter Secretariat pursuant to Part VII ECT.[160]

146. Norway, which had explained during the ECT negotiations that it "*cannot accept the principle of provisional application*,"[161] and opted out of provisional application pursuant to Article 45(2)(a) ECT, expressly confirmed that it would comply with the obligation in Article 37(3) ECT to contribute to the costs of the Energy Charter Secretariat "*subject to the approval by the Norwegian Storting (Parliament) in accordance with the Norwegian Constitution*."[162]

147. The Limitation Clause in Article 45(1) ECT should be interpreted in accordance with the ordinary meaning of its terms in their context, including the limitation clause in Article 45(2) ECT.

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160 U.S. Department of State: Fax from T. Borek to Energy Charter Secretariat (Feb. 24, 1994), 1 (R-844): "[W]e do not have any legal difficulty with provisional application per se, so long as it is carefully qualified to ensure that no party is obliged to do, or to refrain from doing, anything for which that party's constitution or law requires an appropriately ratified treaty. Our law, for example, generally speaking prohibits expediture [sic] of funds to pay the U.S. share of the expenses of an international organization absent the express approval of the Congress. For such reasons language along the lines 'to the extent permitted by its constitution or laws' is essential to any provisional application obligation[.]" [emphasis added] *See also* Session of December 14, 1993 (United States Representative) (C-924), 4: "Quite apart from the question of the ultimate resolution of whether there should be institutions, the difficulty of participating in the financing of a provisional organization is particularly acute for the United States. We cannot under our law do it for more than a certain period and so, certainly, we could not provisionally apply the Treaty in respect to the United States in that connection."

161 Session of December 14, 1993 (Norway Representative), 3 (C-924).

162 Signatories of the Energy Charter Treaty which made a declaration that they cannot accept provisional application of the Treaty in accordance with Article 45(2)(a): Texts of Declarations, 5 (R-372). [*English quote in Dutch text omitted*]

(b)(iv) The Object And Purpose Of The Limitation Clause

148. The Tribunal's restriction of the Limitation Clause to one type of inconsistency, a prohibition of provisional application *per se*, defeats the very purpose of the Limitation Clause. As set forth above, the purpose of such a limitation clause, including Article 45(1) ECT, is to accommodate the domestic law problems that provisional application raises for many States, and specifically to avoid conflicts between domestic law and the international obligations that States assume in agreeing to provisional application.[163] A limitation clause is designed to permit as many States as possible, including those that in the absence of a limitation clause would not be in a position to commit to provisional application because of domestic legal constraints, to apply provisionally a treaty from the dates of their signature.

149. This concern was especially relevant to the drafting of the ECT. As discussed above, the ECT was introduced to strengthen the relationship between the European Union and energy exporting countries – the Russian Federation and the countries of Central and Eastern Europe – that were then undergoing fundamental political change. It was thus important to the drafters that the ECT was promptly signed by the Russian Federation, by far the largest energy exporter covered by the Treaty, even if the Russian Federation was going to apply provisionally only those parts of the Treaty that were not inconsistent with its domestic law.

150. The Tribunal entirely misconstrued the nature and purpose of limitation clauses when it concluded that allowing the Russian Federation to invoke specific inconsistencies with its domestic law would run counter to the *pacta sunt servanda* rule and the "*cardinal principle of international law*" set forth in Article 27 of the Vienna Convention on the Law of Treaties, prohibiting a State from invoking its domestic law as a justification for failure to perform a treaty.[164] A State that invokes a limitation clause does not invoke domestic law as a justification for failure to perform a treaty. Rather, the State's treaty obligations are limited by the terms of the treaty, precisely to avoid conflicts between the State's laws and

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[163] *See also* R. Lefeber, *The Provisional Application Of Treaties*, *in* ESSAYS ON THE LAW OF TREATIES: A COLLECTION OF ESSAYS IN HONOUR OF BERT VIERDAG (J. Klabbers & R. Lefeber, eds. 1998, 89 (Exhibit RF-27): "[A] treaty may provide that its provisional application is subject to national law which means that, in case of conflict, national law prevails over the treaty."; *See also* H. Krieger, *Article 25: Provisional Application*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (O. Dörr & K. Schmalenbach, eds. 2012), 418 (Exhibit RF-28): "Another way to solve the potential conflict [between domestic law and treaty obligations] is to include a clause subjecting the provisional application to the requirements of national law so that national law might prevail in case of conflict, also in relation to budgetary appropriations."

[164] HUL Interim Award, ¶ 313.

its treaty obligations. In other words, neither the *pacta sunt servanda* rule nor Article 27 of the Vienna Convention on the Law of Treaties determines the scope and content of the *pactum*. As Professors Nolte and Koskenniemi explained:

> "The real question is which treaty obligations the States have accepted. Article[] 27 […] of the Vienna Convention on the Law of Treaties [is] simply not helpful to finding the answer to that question since [it] concern[s] the invocation of internal law that was *not* incorporated into the agreement in the first place."[165]

> "To claim that the principle behind Article 27 […] VCLT ought to be applied against what the parties to the ECT have specifically agreed in Article 45(1) ECT is to conflate provisional application with the regular operation of the treaty in a way that fails to respect some of the most basic principles of treaty law."[166]

151. Indeed, the Tribunal seems to have conflated two basic concepts of the law of treaties: a State's expression to be bound by a treaty, in the case of the ECT through ratification pursuant to Article 39 ECT, on the one hand, and provisional application of an unratified treaty in the manner agreed by the signatories, on the other hand, when it concluded:

> "Article 45(1) of the ECT establishes beyond the shadow of a doubt, and notwithstanding Article 39 of the ECT, that the Russian Federation and other signatories agreed that their signature of the Treaty would have the effect of expressing consent of the Russian Federation (and each other signatory) to be bound by its terms."[167]

152. The Tribunal thus erroneously assimilated provisional application under Article 45(1) ECT with expression of consent to be bound by a treaty.

153. Pursuant to Article 12 of the Vienna Convention on the Law of the Treaties, States may agree to be bound by a treaty through signature. However, pursuant to Article 14(1)(a), when "[t]*he treaty provides for such consent to be expressed by means of ratification*," the consent of a State to be bound by a treaty is expressed <u>by ratification</u>. Article 39 of the ECT explicitly requires ratification for a signatory to express consent to be bound by the ECT. The Tribunal's findings ignore this fact and effectively attribute to the signature of the ECT by the Deputy Chairman of the Russian Federation, which was subject to ratification pursuant to Article 14(1)(c) of the Vienna Convention on the Law of Treaties,

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165 Nolte Expert Opinion, ¶ 22.

166 Koskenniemi Expert Opinion, ¶ 47.

167 HUL Interim Award, ¶ 382.

the effect of an expression of consent to be bound through signature pursuant to Article 12 of the Vienna Convention on the Law of Treaties. In doing so, the Tribunal deprived the ratification requirement set forth in Article 39 ECT of any effect.

154. The Tribunal's interpretation and application of the Limitation Clause in Article 45(1) are thus fundamentally flawed.

(b)(v) The Limitation Clause: The Signatories' Practice

155. The Tribunal's "*all-or-nothing*" approach is inconsistent with the ECT signatories' practice in interpreting and applying Article 45(1) ECT. Such practice confirms that the ECT signatories intended the Limitation Clause to cover conceptual inconsistencies as well as inconsistencies of laws or regulations with individual treaty provisions. The Tribunal entirely misunderstood and misinterpreted this practice as supporting its "*all-or-nothing*" approach and ignored clear statements that contradicted its approach.

156. Most of the ECT signatories did not make an express statement at the time of the ECT's signature as to whether or to what extent they would apply the ECT on a provisional basis pursuant to Article 45(1) ECT. Six States – Austria, Luxembourg, Italy, Romania, Portugal and Turkey – expressly stated that they will not apply the ECT on a provisional basis pursuant to Article 45(1) ECT, primarily for constitutional reasons.[168] Twelve other States – Australia, Bulgaria, Cyprus, Hungary, Iceland, Japan, Liechtenstein, Malta, Norway, Poland, Switzerland and Turkmenistan – opted out of provisional application pursuant to Article 45(2)(a) ECT.[169]

157. Several signatories that made no declaration nonetheless considered themselves entitled to apply only those provisions of the ECT that were consistent with their constitutions, laws or regulations.

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[168] *See*, Austria, National Assembly, Government Bill No. 56, Committee Report, 143 (R-10): "This far reaching constitutional and legal reservation allowed Austria, Italy, Luxembourg, Portugal, Romania, and Turkey to declare that in accordance with Art. 45(1) ECT they are not in a position for constitutional reasons to apply the Treaty on a provisional basis. Austria made a declaration to that effect upon signing the Energy Charter Treaty. This has the effect that so far the Treaty has not been applied on a provisional basis in Austria[.]" [Unofficial translation]; Luxembourg, Projet de Loi portant approbation de l'Acte final de la Conférence sur la Charte Européenne de l'Energie et de ses Annexes, signés à Lisbonne, le 17 décembre 1994, N° 4130, Chambre de Députés, 1995-1996, 3 (R-11): "The Treaty includes a clause providing that meanwhile it will be provisionally applied as from the date of its signature (December 17, 1994) insofar as authorized by the Constitution, laws or regulations of the signatory parties. The adoption of this Treaty being based on Article 37 of the Constitution of the Grand Duchy of Luxembourg, there will be no provisional application of this Treaty in Luxembourg up until its due and proper ratification." [Unofficial translation]

[169] Signatories of the Energy Charter Treaty which made a declaration that they cannot accept provisional application of the Treaty in accordance with Article 45 (2)(a): Texts of Declarations (R-372).

158. Indeed, the Tribunal's "*all-or-nothing*" approach to the Limitation Clause would necessarily mean that, by agreeing to provisional application of the ECT, the Governments of several EC Member States acted in plain breach of their constitutions, which do not allow the executive branch to agree to unrestricted provisional application of the ECT. The German Government, for example, may only agree to the unrestricted provisional application of a treaty if that treaty does not require parliamentary approval pursuant to Article 59(2) of the German Constitution:

> "On the German side, unrestricted provisional application of a treaty may, in principle, only be agreed to if the treaty does not require either parliamentary consent in accordance with Article 59(2) of the German Constitution (Grundgesetz) or any other domestic implementation. Otherwise, provisional application would infringe the legislature's exclusive sphere of competence. […] This question is closely connected with the question of the need for a law granting parliamentary consent to a treaty (treaty law (Vertragsgesetz)): to the extent that treaty provisions trigger the aforesaid requirement, they can, in principle, not be applied provisionally. The provisional application of a treaty may in such cases only be agreed to, if made dependent on a unilateral statement that the domestic requirements for provisional application are fulfilled, or if it is agreed upon that provisional application is only foreseen within the limits of domestic law."[170]

159. As the Russian Federation demonstrated in the expert opinions it submitted to the Tribunal, each of the French, German and Finnish Governments, whose domestic legal systems do not prohibit provisional application *per se*,[171] could not have agreed to the ECT's provisional application unless provisional application was limited to those treaty provisions that were consistent with their domestic laws.[172] The Tribunal ignored these uncontested expert opinions, simply stating that

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170 AUSWÄRTIGES AMT, Richtlinien für die Behandlung völkerrechtlicher Verträge – Entwurf 2014 (German Federal Foreign Office, Guidelines on the Treatment of International Treaties – Draft 2014), effective as of February 2014, 27 (Exhibit RF-29). [Unofficial translation] [emphases added] *See also* AUSWÄRTIGES AMT, Richtlinien für die Behandlung völkerrechtlicher Verträge – Neufassung 2004 (German Federal Foreign Office, Guidelines on the Treatment of International Treaties – New Version 2004), 26, ¶ 4 (Exhibit RF-30).

171 A. Pellet Legal Opinion on the Provisional Application of a Treaty under French Constitutional Law (Taking the Example of the Energy Charter Treaty) (Dec. 13, 2006) ("Pellet Expert Opinion"), ¶¶ 23-27; M. Koskenniemi Expert Opinion on the Provisional Application of International Treaties in the Finnish Constitutional Law Context, Especially with Regard to the Energy Charter Treaty (Oct. 27, 2006) ("Koskenniemi Expert Opinion"), ¶¶ 23-24; G. Nolte Opinion Concerning Provisional Application of Article 26 of the Energy Charter Treaty from an International and German Constitutional Law Perspective (Oct. 31, 2006) ("Nolte Expert Opinion"), ¶ 37-38.

172 Pellet Expert Opinion, ¶ 27: "When it comes to the Energy Charter Treaty, it seems undeniable that France may not apply on a provisional basis the articles of the treaty which: are of a legislative nature; or commit the finances of the State; or even which concern the creation of an international organization, absent legislative authorization."; Koskenniemi Expert Opinion, ¶ 39(3) and (5): "Provisional application [of the ECT] was decided with the express understanding that it would take place within the limits of the Finnish constitution and other legislation, […] The decision [of the Finnish President] on provisional application made express mention that certain provisions of the ECT were 'of legislative nature.' Under the recent constitutional practice in Finland, this has the immediate effect of also lifting the provisions of dispute settlement to the category of provisions that needed parliamentary approval and thus could not be applied provisionally."; Nolte Expert

> "Respondent has not, however, provided any evidence that France, Finland or Germany represented to its counterparts, at the time of the negotiation of the Treaty, that it understood Article 45(1) as meaning that it could rely at any time on this provision in order to single out for exclusion individual ECT provisions that were 'inconsistent' with its domestic law."[173]

160. The Tribunal's ruling is incorrect. For instance, Finland plainly interpreted Article 45(1) ECT as requiring provisional application only "*in so far as the provisions of the treaty are not inconsistent with the legislation of the signatories*."[174] With respect to the signatories' specific obligation to contribute to the Energy Charter Secretariat's expenses, a Finnish Ministry of Foreign Affairs memorandum of November 1994 states:

> "With regard to the provisional application of the Treaty, Finland may not apply Article 37(3) regarding the costs of the Secretariat due to the provisions concerning the budget authority of the Finnish Parliament. Such procedure is permissible in accordance with Article 45(1) of the Treaty and does not require separate notification."[175]

161. The Finnish practice accords with the position of the European Community, which is itself a party to the ECT, and of each of its Member States, which are also parties to the ECT. A joint statement on Article 45 ECT by the Council and the Commission of the European Communities and the then twelve EC Member States, (the "1994 Joint EC Statement"),[176] which was approved at the December 15-16, 1994 meeting of the Council of the European Union where the European Community's decision to apply the ECT on a provisional basis was adopted,[177] declares:

> "The Council, the Commission and the Member States agree on the following declaration:

Opinion, ¶ 65: "German constitutional law does not allow for the provisional application of the arbitration mechanism in Article 26 ECT without specific authorisation by way of parliamentary legislation. Since Article 45(1) ECT provides for the consideration of domestic legal impediments such a position is in conformity with the regime of provisional application of the ECT."

173 HUL Interim Award, ¶ 324.

174 Finnish Government Proposal to the Parliament regarding the ratification of the ECT, ¶ 4.1 (Exhibit RF-31). [emphasis added]

175 Finnish Ministry of Foreign Affairs Memorandum (Nov. 22, 1994), 5 (Exhibit RF-32). [emphases added]

176 "A" Item Note from the Permanent Representatives Committee to the Council of the European Union, Doc. 12165/94, Annex 1 (Dec. 14, 1994), 3 (R-352).

177 Council of the European Union Approval of List "A" Items, Doc. 6418/95 (Apr. 7, 1995), 1 (R-353), approving the Draft Minutes of the 1817th meeting of the Council (Environment) (Dec. 15-16, 1994), Doc. 11980/94 (R-354), which in turn approved the List of "A" Items incorporating the "A" Item Note cited above.

> Article 45(1) of the European Energy Charter Treaty should be interpreted as defining the conditions and limits for the provisional application of the ECT by the Signatories:
>
> (a) it does not create any commitment beyond what is compatible with the existing internal legal order of the Signatories;
>
> (b) on the basis of this interpretation of Article 45(1) to the ECT, a Signatory is not bound to enter a declaration of non-application, as is provided for in Article 45(2) ECT;
>
> (c) this interpretation allows the Community to limit provisional application to the matters which fall under its competence."[178]

162. The European Community thus relied on the Limitation Clause in Article 45(1) ECT to limit the scope of its provisional application of the ECT to those provisions that fell within its competence, such as the trade provisions, to the exclusion of other treaty provisions that (then) fell within the competence of the EC Member States, such as investment protection. The EC Member States, in turn, relied on the Limitation Clause to limit their provisional application of the ECT to treaty provisions within their competence, as well as treaty provisions that are not otherwise incompatible with their internal legal orders.

163. Accordingly, the Communication from the Commission to the Council and the European Parliament on the ECT's signature and provisional application by the European Communities states:

> "The Treaty shall enter into force when thirty signatories will have ratified it. In the meantime, a provision on provisional application of the Treaty by the signatories is provided for <u>insofar as allowed by their constitution, laws or regulations</u>."[179]

164. When the Council of the European Union approved an amendment to the trade-related provisions of the ECT on July 13, 1998, it described the ECT's provisional application, past and future, as follows:

> "Whereas since the day of its signature the Energy Charter Treaty has been applied, <u>to the extent possible</u>, on a provisional basis and will continue to be

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178 1994 Joint EC Statement, *cit.*, (R-352).

179 European Commission, Communication from the Commission to the Council and the European Parliament on the signing and provisional application by the European Communities of the European Energy Charter Treaty (Sept. 21, 1994), Annex, 6 (<u>Exhibit RF-33</u>). [emphasis added]

so applied to the extent possible, by those signatories who have not yet ratified the Treaty[.]"[180]

165. The Tribunal fundamentally misunderstood the nature, and grossly misinterpreted the content, of the 1994 Joint EC Statement. As an initial matter, the Tribunal did not appreciate that the 1994 Joint EC Statement is a joint statement of the European Community and its Member States and therefore sets forth the interpretation of Article 45(1) ECT by the European Community and the (then) twelve EC Member States, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom. The Tribunal instead treated the 1994 Joint EC Statement as a statement by one signatory, the European Community, not that of thirteen signatories, and on this basis concluded that the "*weight of State practice*" supports its "*all-or-nothing*" approach to the Limitation Clause.[181] To the contrary, in the 1994 Joint EC Statement, each of the twelve EC Member States stated that, under Article 45(1) ECT, provisional application of the ECT is limited to those treaty provisions that do not create commitments "*beyond what is compatible with the existing internal order of the Signatories*."[182]

166. The Tribunal also erroneously concluded that the 1994 Joint EC Statement "*does not say, and cannot be read as meaning, that certain elements of the ECT will not be provisionally applied by the European Community because they are inconsistent with the Community's internal legal order*."[183] According to the Tribunal, the 1994 Joint EC Statement is "*not so much an example of partial provisional application of the ECT due to inconsistency with the EC's legal order, as it is an example of the EC's partial jurisdiction for the provisional application of the whole ECT*."[184]

167. The European Community and its Member States signed the ECT as a whole, however. As a matter of EC law, the ECT's subject matter fell within the competence of both the European Community and its Member States, and therefore qualified as a "*mixed*

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[180] Council Decision of July 13, 1998 approving the text of the amendment to the trade-related provisions of the Energy Charter Treaty and its provisional application agreed by the Energy Charter Conference and the International Conference of the Signatories of the Energy Charter Treaty, 98/537/EC, L 252/21 (Exhibit RF-34). [emphases added]

[181] HUL Interim Award, ¶ 327.

[182] 1994 Joint EC Statement, *op. cit.*, (R-352).

[183] HUL Interim Award, ¶ 327. [*English quote in Dutch text omitted*]

[184] *Ibid*. [*English quote in Dutch text omitted*]

agreement,"[185] requiring approval of provisional application (and later ratification) by the competent organs of both the European Community and the EC Member States.[186]

168. The ECT contains no provision regarding the division of competence between the European Community and EC Member States. This division is therefore – in the words of the European Court of Justice – a "*domestic question*"[187] or, – in the words of Advocate General Tesauro – a "*purely internal matter*" for the European Community and its Member States.[188] Therefore, neither the European Community nor its Member States could have invoked vis-à-vis signatories that were not EC Member States the fact that they lacked competence to apply certain portions of the ECT under the European Community's constituent treaties or secondary legislation. The Limitation Clause permitted the European Community and the EC Member States to provisionally apply the ECT in a manner consistent with the EC's legal order.

169. Having disregarded such evidence of the practice of numerous signatories, which supports the interpretation of the Russian Federation, the Tribunal based its approach on the purported "*weight of State practice*." This "*weight*" consisted solely of statements made by six signatories that were categorized in two lists prepared by the Energy Charter Conference Secretariat during the ECT negotiations "*to keep track of the intentions of the signatories*,"[189] as States "*which will not apply the Treaty provisionally in accordance with Article 45(1)*."[190] There is no evidence that any of these signatories – Austria, Luxembourg, Italy, Romania, Portugal and Turkey – believed that the Limitation Clause in

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185 *See* P. EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION – LEGAL AND CONSTITUTIONAL FOUNDATIONS (2004), 190 (Exhibit RF-35). [*English quote in Dutch text omitted*]

186 *Ibid*., 218-219.

187 ECJ, Ruling 1/78 delivered pursuant to the third paragraph of Article 103 of the EAEC Treaty (Nov. 14, 1978), ¶ 35 (Exhibit RF-36): "It is further important to state, as was correctly pointed out by the Commission that it is not necessary to set out and determine, as regards other parties to the convention, the division of powers in this respect between the Community and the Member States, particularly as it may change in the course of time. It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which third parties have no need to intervene." [emphasis added]

188 *Hermes International v. FHT Marketing Choice BV*, ECJ Case C-53/96, Opinion of Advocate General Tesauro, [1998] ECR I-3603, ¶ 14 (Exhibit RF-37): "[…] it must not be forgotten that both the Community and the Member States signed all the WTO agreement and are therefore contracting parties vis-à-vis contracting non-member States. And while it is true that the approval of those agreements on behalf of the Community is restricted to 'matters within its competence', it is also true that the Final Act and the WTO Agreement contain no provisions on competence and the Community and its Member States are cited as original members of equal standing. In these circumstances, it should be recognised that the Member States and the Community constitute, vis-à-vis contracting non-member States, a single contracting party or at least contracting parties bearing equal responsibility in the event of failure to implement the agreement. This clearly means that, in that event, the division of competence is a purely internal matter." [emphasis added]

189 HUL Interim Award, ¶ 322. [*English quote in Dutch text omitted*]

190 European Energy Charter Conference Secretariat, Document 41/94 – CONF 114 (Dec. 19, 1994) (C-1003); Update – Position of March 1, 1995 (C-1004) [*English quote in Dutch text omitted*]; HUL Interim Award, ¶¶ 321-322, 327.

Article 45(1) ECT covers only one type of inconsistency, namely, the prohibition of provisional application *per se*. In fact, Italy, one of the six signatories categorized as not applying the ECT provisionally in accordance with Article 45(1) ECT, stated exactly the opposite. In a letter to the Secretary General of the Energy Charter Conference, Italy referred to States that provisionally apply the ECT pursuant to Article 45(1) ECT as including States "*who do apply provisionally at least some part of the Treaty*."[191]

170. Contrary to the Tribunal's findings, State practice therefore clearly shows that the ECT signatories understood the Limitation Clause in Article 45(1) ECT to cover specific inconsistencies with their constitutions, laws and regulations and applied the ECT on a provisional basis only to the extent that individual treaty provisions were not in conflict with their constitutions, laws or regulations.

(b)(vi) The Travaux Préparatoires

171. The Tribunal disregarded the ECT preparatory works, noting that "[i]*n light of* [its] *conclusion on the interpretation of Article 45(1),*" it "*does not find it necessary to consider*" them.[192] The Tribunal thereby ignored several documents that unambiguously confirm that the States that negotiated the ECT understood the Limitation Clause to cover inconsistencies between specific treaty provisions and a signatory's constitution, laws and regulations. For example, the US representative made clear at the December 1993 plenary session that the United States understood the Limitation Clause to provide for partial provisional application:

> "[W]e, again as I say, have no difficulty with provisional application in principle where provisional application would be appropriate and where the rules with respect to provisional application make it very clear that a country provisionally applying the Agreement nevertheless is not obliged, as a matter of law, a matter of international law, to refrain, for example, from changes in its law or from other measures that would, if the Treaty were in force for that State, be inconsistent with it."[193]

172. In January 1994, Japan stated in a letter to the Energy Charter Secretariat:

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191 Letter from the Permanent Representation of Italy to Secretary General of the European Energy Conference (Sept. 1, 1994) (C-1012): "I am glad to inform you that my authorities agree that the inclusion in Annex PA is necessary only for certain States who do apply provisionally at least some part of the Treaty." [emphases added]

192 HUL Interim Award, ¶ 328.

193 Session of December 14, 1993 (United States Representative) (C-924), 4. [emphases added]

> "According to the present draft, provisional application means to 'apply provisionally to the extent that such provisional application is not inconsistent with laws and constitutional requirements.' This, in other words, means that the extent to which this Treaty applies will differ from country to country according to their constitutions and legislations."[194]

173. Subsequently, at the March 1994 plenary session, the term "*regulations*" was added to the draft Limitation Clause, confirming that the clause extends even to "*relatively minor impediments*," not just a prohibition on provisional application, as such. In response to a question from Mr Clive Jones, the Secretary General of the European Energy Charter Conference, concerning the addition of "*regulations*," Mr Bamberger, the Chairman of the legal advisory committee to the European Energy Charter Conference, explained the effect of this addition as follows:

> "[T]he effect is to suggest that relatively minor impediments in the form of regulations, no matter how insignificant they may be, can be the occasion for failing to apply the Treaty provisionally when in fact those regulations could be brought into conformity without serious effort."[195]

(b)(vii) The Tribunal's Reasoning

174. In support of its "*all-or-nothing*" approach, the Tribunal relied on a single arbitral award, in *Kardassopoulos v. Georgia*, and one commentator. The *Kardassopoulos* award was rendered by a tribunal chaired by Mr Fortier, the Chairman in the Arbitrations here, shortly before the hearing on jurisdiction in this matter.[196]

175. The commentary quoted by the Tribunal, "Adoption and Implementation of Treaty Obligations by States" by Professor Osminin, is inapposite. Professor Osminin's statement that "[t]*he regime of provisional application presupposes that the obligations arising from the provisionally applied treaty will be complied with in full*," does not support the Tribunal's findings. Professor Osminin does not discuss provisional application that, like Article 45(1) ECT, contains a limitation clause.[197]

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194 Letter from Japanese Mission to the European Communities to Energy Charter Secretariat (Jan. 20, 1994), 2 (R-843). [emphasis added]

195 Session of March 7, 1994 (Mr Craig Bamberger), 11-12 (C-924).

196 *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (July 6, 2007) (RME-994).

197 B.I. OSMININ, ADOPTION AND IMPLEMENTATION OF TREATY OBLIGATIONS BY STATES (2006), 319 (C-267).

176. The Tribunal entirely ignored the testimony of the only fact witnesses appearing in the Arbitrations who were directly involved in the drafting of Article 45(1) ECT – Mr Sidney Fremantle, former Head of the International Energy Unit of the UK Department of Trade and Industry and Chairman of the Working Group that prepared the initial draft of the ECT and where most of the ECT negotiations were conducted, and Mr Anatoly Martynov, former Head of the Legal and Treaty Department of the Russian Ministry of Foreign Economic Relations and a member of the Russian delegation to the ECT negotiations. Both confirmed that the Limitation Clause in Article 45(1) ECT was intended to cover inconsistencies of individual treaty provisions with a signatory's constitution, laws and regulations.[198]

177. The Tribunal also ignored authorities that expressly confirm that the Limitation Clause covers inconsistencies of specific treaty provisions with a signatory's constitution, laws or regulations. For example, the Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom, when asked in 2006 in the House of Commons "*what assessment the Government have made of whether the practice of the Russian Federation meets the standards under the Energy Charter Treaty*,"[199] stated:

> "The obligations of the Energy Charter Treaty (ECT) on a signatory depend on whether it has ratified the treaty, is applying provisionally or has opted out of provisional application. The Russian Federation has not ratified the Treaty but has agreed to provisional application in accordance with Article 45 of the Treaty. This places <u>some obligations</u> on the Russia [*sic*] Federation, <u>but only to the extent that such provisional application is not inconsistent with its constitution, laws or regulations</u>."[200]

178. The description of the Energy Charter Secretariat of the Russian Federation's obligations under the ECT is in accord:

> "Russia signed the Energy Charter Treaty in 1994 and has accepted provisional application of the Treaty pending ratification. This means that Russia has agreed to apply <u>the provisions of the Treaty to the extent that they are consistent with Russia's constitution, laws and regulations</u>."[201]

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198 Fremantle Opinion, ¶¶ 32-52; A. Martynov Opinion Concerning Provisional Application of the Energy Charter Treaty (Dec. 14, 2006) ("Martynov Opinion"), ¶¶ 4-6.

199 [*English quote in Dutch text omitted*]

200 House of Commons Hansard Written Answers, pt. 3, column 1045 W *et seq.* (Feb. 7, 2006), 1 (R-365). [emphases added]

201 Energy Charter Secretariat Annual Report (2006) 9 (C-1038). [emphasis added]

179. The Tribunal also ignored two articles by Mr Craig Bamberger, the Chairman of the legal advisory committee to the European Energy Conference at which the ECT was negotiated (the Energy Charter Conference). In his first article, published in 2006, but circulated privately by Mr Bamberger at the time of its composition in 1995 and 1996,[202] he discusses provisional application of the ECT's dispute resolution provisions in energy transit disputes. The article concludes that the operation and effectiveness of the transit dispute settlement mechanism, including arbitration pursuant to Article 27 ECT, depends upon the consistency of that mechanism with each signatory's domestic laws.[203] Absent an ECT signatory's voluntary commitment to international dispute settlement, "*the extent of a* [State's] *provisional application obligation could only be evaluated on an ad hoc basis*"[204] – that is, by reference to that State's constitution, laws and regulations. Mr Bamberger could have referred to *"the extent*" of a signatory's provisional application obligation only if he was of the view that this obligation depended on whether the signatory applied some – but not all – of the ECT's provisions.

180. In his second article, originally presented at a conference in March 1996, Mr Bamberger discussed some of the political concerns raised by the ECT's provisional application, and in particular by the Russian Federation's provisional application of the Treaty:

> "Thus, <u>it could become important to clarify</u> the duties owed between a Treaty signatory for which the Treaty is in force and one that is applying the Treaty provisionally, <u>the duties owed to their respective investors, and the extent to which these relationships are subject to the Treaty's dispute settlement mechanisms</u>. If ratification by important countries such as the Russian Federation should trail behind, the political skills of the [Energy Charter] Conference leadership and its Secretariat could prove as important to the Treaty's success as the Treaty's rights and obligations."[205]

181. Mr Bamberger here acknowledged the *political* importance of clarifying "*the extent to which*" the relationship between investors and an ECT signatory "*are subject to the Treaty's dispute settlement mechanisms.*" In doing so, he invoked the "to the extent"

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202 C. S. *Bamberger, Adjudicatory Aspects of Transit Dispute Conciliation Under The Energy Charter Treaty*, 3 TDM (Apr. 2006), Preface (R-866).

203 Bamberger, *op. cit.*, 16 (R-866): "In states where the Legislative Branch of the Government has not been asked to consent to provisional application, such a commitment often rests on the actual or implied authority of the Executive Branch, the scope of which may not be clear, and which may be <u>especially problematical as concerns the acceptance of legally binding resolution in an international forum of disputes over domestic matters</u>." [emphases added]

204 Bamberger, *op. cit.*, 19 (R-866).

205 C. S. Bamberger, Epilogue: The Energy Charter Treaty As A Work In Progress, *in* The Energy Charter Treaty – An East-West Gateway for Investment and Trade (T. Wälde, ed. 1996), 602 (<u>Exhibit RF-38</u>) [emphases added].

language of Article 45, and assumed, contrary to the Tribunal's ruling, that a Treaty signatory might – or might not – provisionally apply Article 26 ECT. As an example of the Treaty signatories he had in mind, Mr Bamberger noted that a possible delay in the Russian Federation's ratification of the ECT could be *politically* challenging. Mr Bamberger's political concern would have arisen only if the Russian Federation did not provisionally apply the ECT's dispute settlement mechanisms and there was a delay in the Russian Federation's ratification of the ECT.

182. Mr Bamberger's articles set out both his legal views and his political concerns. As a legal matter, the principal legal advisor to the Energy Charter Conference was of the view that (a) the ECT was to be provisionally applied by an ECT signatory only to the extent that a particular provision was consistent with its constitution, laws and regulations, and (b) provisional application of the ECT's dispute settlement mechanisms was especially problematic, given the lack of legislative authority for resolving disputes over domestic matters in an international forum. He was also concerned, as a political matter, that the ECT's success would remain doubtful until important signatories, such as the Russian Federation (by far the largest oil exporter among signatories), had also ratified the ECT, because the Russian Federation would not be provisionally applying the ECT's dispute settlement mechanisms.

183. Claimants retained Mr Bamberger as a consultant and then chose not to present his testimony in the Arbitrations, no doubt because his views, as reflected in his articles, would have supported the Russian Federation's position on the Limitation Clause. In doing so, Claimants denied the Tribunal the benefit of hearing Mr Bamberger's testimony – a fact to which the Russian Federation drew the Tribunal's attention during the Hearing on Jurisdiction and Admissibility.[206] Under the UNCITRAL Rules and the procedures adopted for the Arbitrations, the Russian Federation also did not have the right to cross-examine Mr Bamberger because Claimants had not submitted a written report prepared by him.[207]

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[206] Hearing on Jurisdiction and Admissibility, Day 10 (Dec. 1, 2008), 72:5 – 73:8.

[207] *See* UNCITRAL Arbitration Rules of 1976, Art. 25 (Exhibit RF-39); *see also, e.g.*, Procedural Order No. 1 (Nov. 8, 2005), ¶¶ 1-2 (requiring witness statements to be presented with a party's memorial); Procedural Hearing (Oct. 31, 2005), 87:8-11 (Arbitrator Price) (reciting that there would not be live direct testimony and that each party would decide which of the opponent's witnesses who had submitted written statements would be cross-examined).

184. In support of its view that the ECT as a whole should be applied provisionally, the Tribunal reasoned that the Russian Federation "*cannot be heard, during the pendency of these proceedings, to claim the benefits of provisional application of the ECT while disclaiming the obligations which that status imposes*."[208] This statement, too, is based on a fundamental misunderstanding of the Energy Charter process.

185. The "*benefits*" allegedly claimed by the Russian Federation were its membership in the Energy Charter Conference, its participation in Energy Conference meetings and in the quinquennial review of the ECT provided for in Article 34(7) ECT, as well as the fact that the Deputy Secretary-General of the Energy Charter Secretariat was (then) a Russian national.[209] However, none of these are "*benefits of provisional application*." Under the Energy Charter Conference Rules of Procedure, any signatory, whether it applies the ECT on a provisional basis or not, is automatically a member of the Energy Charter Conference.[210] Moreover, the Energy Charter Secretariat's Staff Rules and Regulations expressly provide that the nationals of any ECT signatory are eligible for appointment to senior Secretariat positions, such as Deputy Secretary-General.[211] For instance, Norway – a signatory of the ECT that does not apply the ECT on a provisional basis[212] – is not only a member of the Energy Charter Conference,[213] but the current Vice-Chair of the Energy Charter Conference and Chair of the Strategy Group is a Norwegian national.[214]

(b)(viii) Conclusion

186. In conclusion, the Tribunal's "*all-or-nothing*" approach (a) runs counter to the ordinary meaning of the terms of the Limitation Clause read in their context, the signatories' practice in interpreting and applying Article 45(1) ECT and the ECT's preparatory works; (b) is incompatible with the very purpose of limitation clauses; (c) is based on fundamental

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208 HUL Interim Award, ¶ 390. [*English quote in Dutch text omitted*]

209 *Ibid*.

210 *See* Rules of Procedure of the Provisional Energy Charter Conference of February 28, 1996 (CC 53 Corr. 2) *as cited in* Decision of the Energy Charter Conference (Nov. 22-23, 1995) (CCDEC 1995 30 GEN) (Exhibit RF-40), *e.g.*, Rules 1, 4, 9, 14, 17-18, 20.

211 *See* Energy Charter Secretariat, Staff Regulations and Rules, Rule 8.1 *as cited in* Decision of the Energy Charter Conference of June 29, 2000 (CCDEC 2000 2 GEN), note 3 (Exhibit RF-41): "A person shall not be appointed as an official unless he or she is a national of a Contracting Party or a Signatory."

212 Signatories of the Energy Charter Treaty which made a declaration that they cannot accept provisional application of the Treaty in accordance with Article 45(2)(a): Texts of Declarations, (R-372).

213 Energy Charter Treaty Website, "Members and Observers" (Exhibit RF-42).

214 Decision of the Energy Charter Conference (Dec. 6, 2013) (CCDEC 2013 24 APP) (Exhibit RF-43).

misconceptions of the law of treaties, EC law, and the Energy Charter process; and (d) is contradicted by the authorities that the Tribunal ignored.

(c) Arbitration Of Claimants' Claims Pursuant To Article 26 ECT Is Inconsistent With The Constitution, Laws And Regulations Of The Russian Federation

187. Having found that the Russian Federation is not entitled to invoke the inconsistency of Article 26 ECT with its domestic law because the principle of provisional application is known in Russian law, the Tribunal held *obiter dictum* that arbitration pursuant to Article 26 ECT is consistent with Russian law.[215] The Tribunal's *obiter dictum* is based on a fundamentally flawed and unsupported interpretation of Russian law, which in most instances rests exclusively on the Tribunal's impression of specific terms or paragraphs of translations of certain Russian laws. That impression ignores the context of the specific terms on which the Tribunal based its *obiter dictum* and the expert opinions and Russian legal authorities submitted by the Russian Federation that contradict the Tribunal's findings.

188. As set forth above, the Limitation Clause in Article 45(1) ECT covers three types of inconsistencies with domestic law, namely, inconsistencies with a signatory's constitution, a signatory's laws or a signatory's regulations. Arbitration of the present dispute pursuant to Article 26 ECT is inconsistent with (a) the Russian Constitution, specifically, the principle of separation of powers, and (b) Russian legislation, specifically, Russian arbitration laws and the civil and commercial procedure codes, which prohibit arbitration of disputes involving sovereign acts or omissions, as well as Russian civil and corporate law, which does not authorize shareholders to claim compensation for the impairment or loss of their shares based on injury to the company or its management. The Russian Federation therefore did not consent to arbitrate the present dispute under Article 26 ECT in conjunction with Article 45(1) ECT.

189. Provisional application of Article 26 ECT would also have been inconsistent with the laws of many other ECT signatories, including those of France, Germany and Finland, as confirmed by the uncontested expert testimony submitted by the Russian Federation in the Arbitrations.[216]

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[215] HUL Interim Award, ¶ 370.

[216] Pellet Expert Opinion, ¶¶ 33-36; Koskenniemi Expert Opinion, ¶¶ 26-30; Nolte Expert Opinion, ¶¶ 50, 62-65.

190. Those involved in the ECT negotiations had reached the same conclusion. Mr Bamberger, the Chairman of the legal advisory committee to the Energy Charter Conference, emphasized that provisional application "*may be especially problematical as concerns the acceptance of legally binding resolution in an international forum of disputes over domestic matters*."[217] Mr Fremantle, chairman of the Working Group that prepared the initial draft of the ECT, testified that he "*expected that <u>few, if any, states would be applying the arbitration articles provisionally</u>*."[218] He also expressed this view in a facsimile sent to the Chairman of the plenary session, Ambassador Rutten, in August 1994, in which he pointed out that he was "*not clear how paragraph 1 of this Article applies either to sub-federal measures or to international arbitration*" and that "*most national and sub-national laws provide for disputes under those laws to go to the local courts, not through international arbitration unless there is special provision*."[219] Mr Fremantle testified, without contradiction, that the Chairman of the legal advisory committee, Mr Bamberger, "*did not challenge that opinion*."[220]

(c)(i) Arbitration Of Claimants' Claims Pursuant To Article 26 ECT Is Inconsistent With The Russian Constitution

191. The 1993 Constitution of the Russian Federation, which largely follows international constitutional practice,[221] is based on the principle of separation of powers. Pursuant to its Article 10:

> "State power in the Russian Federation shall be exercised on the basis of its division into legislative, executive and judicial. The legislative, executive and judicial authorities shall be independent."[222]

192. Executive authority is exercised by the Government of the Russian Federation.[223] The Government may act only on the basis of the Constitution, federal laws and regulatory decrees of the President.[224]

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217 Bamberger, *op. cit.*, 16 (R-866). [*English quote in Dutch text omitted*]

218 Fremantle Opinion, ¶ 34. [emphasis added] [*English quote in Dutch text omitted*]

219 Fremantle Opinion, Annex A. [*English quote in Dutch text omitted*]

220 Fremantle Opinion, ¶ 34. [*English quote in Dutch text omitted*]

221 L.A. OKUNKOV (ed.), COMMENTARY TO CONSTITUTION OF THE RUSSIAN FEDERATION (ARTICLE-BY-ARTICLE) (1996), (<u>Exhibit RF-44</u>).

222 Constitution of the Russian Federation, Art. 10 (R-163).

223 *Ibid*., Art. 110.

193. In the context of the treaty making process, the principle of separation of powers requires the enactment by the Russian parliament of federal laws on the ratification of treaties that amend or supplement Russian law. Pursuant to Article 106(d) of the Russian Constitution, federal laws on the "*ratification and denunciation of international treaties and agreements of the Russian Federation*" must be adopted by the State Duma (the lower chamber of the Federal Assembly) and are subject to mandatory consideration by the Council of the Federation (the upper chamber of the Federal Assembly).[225] Since the Constitution and the Federal Constitutional Law on the Government of the Russian Federation prohibit the Government from interfering with the Federal Assembly's legislative powers,[226] treaties that amend or supplement federal laws are subject to mandatory ratification by the Federal Assembly pursuant to Articles 10 and 106(d) of the Constitution.[227]

194. The Federal Law on International Treaties, which entered into force on July 21, 1995, six months after the ECT's signature in December 1994, implements the constitutional principle of separation of powers in the context of the treaty making process. Pursuant to its Article 6(2):

> "[d]ecisions to grant consent for the Russian Federation to be bound by international treaties shall be made by state bodies of the Russian Federation in accordance with their competence as established by the Constitution of the Russian Federation, this Federal Law and other legislative acts of the Russian Federation."[228]

195. In accordance with the principle of separation of powers enshrined in Article 10 of the Constitution, Article 15 of the Federal Law on International Treaties requires that certain categories of treaties, including those "*whose implementation requires amendment of existing legislation or enactment of new federal laws, or that set out rules different from those provided for by a law*" must be ratified,[229] in the manner set forth by the Constitution, *i.e.*, through the enactment of a federal law.[230] The Federal Law on International Treaties

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224 *Ibid*, Art. 115(1) and (3); 1997 Constitutional Law On the Government of the Russian Federation (Dec. 17, 1997), Art. 2 (R-427).

225 Constitution of the Russian Federation, Art. 106(d) (R-163). [*English quote in Dutch text omitted*]

226 *See* Y.A. DMITRIEV, THE CONSTITUTION OF THE RUSSIAN FEDERATION. DOCTRINAL COMMENTARY (ed. 2013) (Exhibit RF-45); E.Y. BARKHATOVA (ed.), COMMENTARY TO THE CONSTITUTION OF THE RUSSIAN FEDERATION (2010) (Exhibit RF-46).

227 Avakiyan I Expert Opinion; Baglay Expert Opinion.

228 1995 Law On International Treaties, Art. 6.2 (Exhibit RF-47).

229 *Ibid*., Art. 15(1)(a). [*English quote in Dutch text omitted*]

230 *Ibid*., Art. 14: "In accordance with the Constitution of the Russian Federation the ratification of international treaties of the Russian Federation shall be effected through the enactment of federal law." *See also ibid*., Arts. 16(1) and 17.

thus confirms that consent to be bound by treaties that are subject to ratification require the Federal Assembly's approval in the form of a federal law.

196. The Tribunal held *obiter dictum* that the ratification requirement may somehow be ignored because Article 6(1) of the Federal Law on International Treaties lists "*signature*" among the means by which the Russian Federation may express consent to be bound by a treaty and because the definition of "*signature*" set forth in Article 2(c) states: "*'signature' means either a stage in the conclusion of a treaty, or a form of expressing consent […] to be bound by an international treaty, if the treaty provides that signature shall have that effect*."[231] The Tribunal refrained from any further analysis, considering that "[t]*hese provisions of the [Federal Law on International Treaties] are very clear. There is no room for ambiguity*."[232]

197. The Tribunal was wrong. As an initial matter, the 1995 Federal Law on International Treaties entered into force on July 21, 1995 and was therefore not applicable on December 17, 1994, when the Russian Federation signed the ECT.

198. Moreover, the Tribunal's analysis of Articles 2 and 6 of the Federal Law on International Treaties is fundamentally flawed. Article 6(1) of the Federal Law on International Treaties[233] tracks Article 11 of the Vienna Convention on the Law of Treaties, pursuant to which a State may express consent to be bound by a treaty by several means, including signature. It is, however, axiomatic that the mere fact that a State *may* agree to express consent to be bound by a treaty through signature does not convert a State's signature of a treaty subject to ratification into an expression of its consent to be bound. As Article 2(c) of the Federal Law on International Treaties expressly provides, signature of a treaty expresses the Russian Federation's consent to be bound by a treaty "*if the treaty provides that signature shall have that effect*."[234] The ECT does not so provide. Article 39 ECT identifies ratification as the required means for a signatory to express consent to be bound

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231 HUL Interim Award, ¶¶ 381-382.

232 HUL Interim Award, ¶ 382 [*English quote in Dutch text omitted*]; *see also* ¶ 384: "As shown above, however, under the [Federal Law on International Treaties], […] signature can express consent where the treaty, such as the ECT, so provides, as it does by specifying in Article 45 the obligations not of a party to the treaty but of a 'signatory.'"

233 1995 Law On International Treaties, Art. 6(1) (Exhibit RF-47): "Consent of the Russian Federation to be bound by an international treaty may be expressed by means of: signature of the treaty; exchange of the documents constituting the treaty; ratification of the treaty; approval of the treaty; acceptance of the treaty; accession to the treaty; or any other means of expressing consent agreed by the contracting parties."

234 [*English quote in Dutch text omitted*]

by the ECT. Thus, there can be no doubt that for purposes of Article 2(c) of the Federal Law on International Treaties, signature of the ECT by the Deputy Chairman of the Russian Government was merely "*a stage in the conclusion of a treaty*," and not the Russian Federation's expression of consent to be bound by the ECT.

199. The Tribunal should therefore have focused exclusively on Article 23 of the Federal Law on International Treaties, the provision that deals with provisional application. Pursuant to a Presidential Instruction,[235] Article 23(2) is applicable to treaties whose provisional application commenced before the law's entry into force.

200. Article 23(1) of the Federal Law on International Treaties, which essentially restates Article 25(1) of the 1969 Vienna Convention on Treaties, provides that "*[a]n international treaty or a part of a treaty may, prior to its entry into force, be applied by the Russian Federation provisionally if the treaty itself so provides or if an agreement to that effect has been reached with the parties that have signed the treaty*."[236] With respect to provisional application of treaties that must be ratified pursuant to Article 15(1) of the Federal Law on International Treaties, Article 23(2) requires that a decision to prolong provisional application beyond six months must be taken by the State Duma through the enactment of a federal law.[237]

201. The Tribunal mischaracterized the six-month limit in Article 23(2) of the Federal Law on International Treaties as "*merely an internal requirement*"[238] that does not create an inconsistency for purposes of the Limitation Clause in Article 45(1) ECT. However, as commentators have explained, this requirement ensures that the legislative prerogative of participation in the conclusion of treaties is not circumvented:

> "[O]wing to the danger of circumventing national ratification requirements, national law may prohibit a State from agreeing to provisional application of a

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235 Regulation of the President No. 370-RP (Aug. 7, 1995) (C-141).

236 1995 Law On International Treaties, Art. 23(1) (Exhibit RF-47). [*English quote in Dutch text omitted*]

237 1995 Law On International Treaties, Art. 23(2) (Exhibit RF-47): "[…] If an international treaty – the decision on the consent to the binding character of which for the Russian Federation is, under this Federal Law, to be taken in the form of a Federal Law – provides for the provisional application of the treaty or a part thereof, or if an agreement to that effect was reached among the parties in some other manner, then this treaty shall be submitted to the State Duma within six months from the start of its provisional application. The term of provisional application may be prolonged by way of a decision taken in the form of a federal law according to the procedure set out in Article 17 of this Federal Law for the ratification of international treaties."

238 HUL Interim Award, ¶ 387. [*English quote in Dutch text omitted*]

treaty or regulate in detail the prerequisites for provisional application, such as in the case of Russia."[239]

"The decision on the provisional application of [a treaty subject to ratification] beyond six month period is taken in accordance with the ratification procedure in the form of a federal law. […] From the standpoint of parliamentary control this cumbersome mechanism is justified and prevents possible abuse of right by the executive power. Indeed without the limits determined in Article 23(2) executive power would have the possibility to circumvent to some extent requirements to ratify some categories of treaties."[240]

202. Provisional application beyond six months of a treaty subject to ratification without approval by the Federal Assembly is therefore inconsistent with Article 10 of the Russian Constitution and Article 23(2) of the Federal Law on International Treaties.[241]

203. There can be no doubt that the ECT, and specifically Parts III and V ECT, including Article 26 ECT, required ratification. The Russian Federation is currently a party to 57 bilateral investment treaties, which contain investment treaty protections similar to, and in many instances less far-reaching than, those in the ECT. Each of these 57 bilateral investment treaties was subject to ratification and has been ratified by the State Duma.[242]

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239 Krieger, *op. cit.*, 417 (Exhibit RF-28).

240 S.M. Pounjin, The New Federal Law On International Treaties Of The Russian Federation, *in* CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE (R. Müllerson, M. Fitzmaurice and M. Andenas, eds. 1998), 274-275 (R-688).

241 *See* Nußberger Expert Opinion, Thesis 4; Lukashuk Expert Opinion; Avakiyan II Expert Opinion, ¶¶ 3-7; Letter No. 07/11254-SV of the Ministry of Justice of the Russian Federation (Dec. 13, 2006).

242 *See* Federal laws on ratification of BITs by the State Duma, (Exhibit RF-48): (1) Federal Law No. 48-FZ (May 23, 1996); (2) Federal Law No. 192-FZ (Oct. 25, 1999); (3) Federal Law No. 167-FZ (Dec. 20, 2005); (4) Resolution of the Supreme Council of the USSR No. 2208-1 (May 29, 1991); (5) Resolution of the Supreme Council of the USSR No. 2200-1 (May 29, 1991); (6) Federal Law No. 142-FZ (Nov. 8, 2005); (7) Resolution of the Supreme Council of the USSR No. 2198-1 (May 29, 1991); (8) Federal Law No. 54-FZ (Apr. 9, 2009); (9) Federal Law No. 70-FZ (June 13, 1996); (10) Federal Law No. 47-FZ (May 23, 1996); (11) Federal Law No. 89-FZ (July 8, 1996); (12) Federal Law No. 46-FZ (Apr. 8, 2000); (13) Resolution of the Supreme Council of the USSR No. 2203-1 (May 29, 1991) (Protocol on amendments – by Federal Law No. 58-FZ (Mar. 30, 1999); (14) Resolution of the Supreme Council of the USSR No. 2206-1 (May 29, 1991); (15) Resolution of the Supreme Council of the USSR No. 2205-1 (May 29, 1991); (16) Federal Law No. 69-FZ (June 13, 1996); (17) Federal Law No. 52-FZ (May 23, 1996); (18) Federal Law No. 50-FZ (May 23, 1996); (19) Federal Law No. 222-FZ (Sept. 27, 2009); (20) Federal Law No. 154-FZ (Dec. 17, 1996); (21) Resolution of the Supreme Council of the USSR No. 2207-1 (May 29, 1991); (22) Federal Law No. 44-FZ (Feb. 29, 2000); (23) Federal Law No. 97-FZ (May 23, 2009); (24) Federal Law No. 34-FZ (Jan. 2, 2000); (25) Resolution of the Supreme Council of the USSR No. 2210-1 (May 29, 1991); (26) Federal Law No. 188-FZ (Dec. 26, 2005); (27) Federal Law No. 49-FZ (May 23, 1996); (28) Federal Law No. 187-FZ (Dec. 26, 2005); (29) Federal Law No. 23-FZ (Feb. 9, 1998); (30) Federal Law No. 252-FZ (Sept. 30, 2010); (31) Federal Law No. 30-FZ (Apr. 26, 2004); (32) Federal Law No. 80-FZ (May 30, 1998); (33) Federal Law No. 60-FZ (May 28, 2001); (34) Federal Law No. 186-FZ (Dec. 26, 2005); (35) Resolution of the Supreme Council of the USSR No. 2201-1 (May 29, 1991); (36) Federal Law No. 37-FZ (Mar. 23, 1998); (37) Federal Law No. 166-FZ (Oct. 29, 1998); (38) Federal Law No. 96-FZ (May 23, 2009); (39) Federal Law No. 71-FZ (June 13, 1996); (40) Federal Law No. 92-FZ (July 8, 1996); (41) Federal Law No. 47-FZ (Apr. 8, 2000); (42) Resolution of the Supreme Council of the USSR No. 2204-1 (May 29, 1991); (43) Federal Law No. 46-FZ (May 23, 1996); (44) Resolution of the Supreme Council of the USSR No. 2202-1 (May 29, 1991); (45) Federal Law No. 122-FZ (June 30, 2007); (46) Federal Law No. 220-FZ (Dec. 30, 1999); (47) Federal Law No. 21-FZ (Jan. 2, 2000); (48) Resolution of the Supreme Council of the USSR No. 2199-1 of May 29, 1991; (49) Federal Law No. 51-FZ (May 23, 1996); (50) Federal Law No. 79-FZ (July 2, 2005); (51) Federal Law No. 93-FZ (July 8, 1996); (52) Federal Law No. 139-FZ (July 2, 2013); (53) Federal Law No. 43-FZ (May 3, 2012); (54) Federal Law No. 394-FZ (Dec. 28, 2013); (55) Federal Law No. 250-FZ (Sept. 30, 2010); (56) Federal Law No. 200-FZ (July 27, 2010); (57) Federal Law No. 221-FZ (Sept. 27, 2009).

Consistent with this uniform investment treaty practice that admits of no exceptions, the ECT was also submitted to the State Duma for ratification but the State Duma refused to ratify it.

204. Provisional application of the ECT, at least beyond six months,[243] is therefore inconsistent with the Russian Federation's "*constitution*" and "*laws*" for purposes of Article 45(1) ECT.

(c)(ii) Arbitration Of Claimants' Claims Pursuant To Article 26 ECT Is Inconsistent With Russian Laws

205. Provisional application of Article 26 ECT to Claimants' claims has at all relevant times been inconsistent with Russian arbitration laws and the civil and commercial procedure codes, which prohibit the arbitration of disputes arising out of public law relations. Indeed, Russian law has at all relevant times prohibited the arbitration of any type of public law dispute, as Professor Anton V. Asoskov demonstrates in his Expert Report, prepared for these set-aside proceedings.[244]

206. In addition, arbitration of Claimants' claims is inconsistent with Russian civil and corporate law, which does not authorize a shareholder to claim compensation for the impairment or loss of its shares as a result of injury inflicted on a company or its management.

207. On these independent grounds, provisional application of Article 26 ECT is inconsistent with the Russian Federation's "*laws*" for purposes of Article 45(1) ECT.[245] The Tribunal either ignored these specific inconsistencies entirely, or made passing reference to them without substantive analysis.[246]

(a) Claimants' Claims Are Not Arbitrable Under Russian Laws

208. Public law disputes, including disputes concerning the assessment of taxes and imposition of sanctions by tax authorities, the enforcement of tax liens, and other actions or omissions

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[243] Whether the provisions of the Federal Law on International Treaties on provisional application, including the six-month period, are in conformity with the Constitution is a question on which the Constitutional Court expressly reserved when it decided a constitutional complaint that challenged the constitutionality of the provisional application of a treaty subject to ratification on the ground that the treaty was not published in the Official Gazette. *See* Resolution No. 8-P of the Constitutional Court (Mar. 27, 2012), 3, 13 (Exhibit RF-49).

[244] Expert Report of Professor Anton V. Asoskov (Exhibit RF-50) ("Asoskov Expert Opinion").

[245] *See also* Martynov Opinion, ¶ 6.

[246] *See* HUL Interim Award, ¶¶ 370-392.

of State authorities in enforcement proceedings, as well as bankruptcy issues, are not arbitrable under Russian law. The resolution of Claimants' claims by arbitration is therefore contrary to Russian law.

209. As in many other jurisdictions, disputes arising out of public law relations are not arbitrable under Russian law.[247] As Professor Kostin testified and Professor Asoskov explains:

> "Claims of public nature are not arbitrable under Russian legislation."[248]
>
> "Russian law has always stressed the civil law nature of parties' relations as a criterion of arbitrability, which directly entails the non-arbitrability of any type of public law dispute."[249]

210. Professor Asoskov's Expert Opinion quotes a large number of statutory provisions presently and previously in force, which clearly state that only civil law disputes are arbitrable in the Russian Federation. Article 1(2) of the 1993 International Commercial Arbitration Law, for example, provides:

> "The following kinds of disputes shall be submitted for international commercial arbitration by agreement between the parties: disputes arising from contractual and other civil law relationships arising from the maintenance of foreign trade and other international economic relations, if the commercial enterprise of at least one of the parties is located abroad […]."[250]

211. The 2002 Commercial Procedure Code states in Article 4(6):

> "By agreement of the parties, before an arbitrazh [commercial] court of the first instance has rendered a judgment concluding the trial on the merits, a dispute arising out of civil law relations and falling within the jurisdiction of arbitrazh [commercial] courts can be referred by the parties to an arbitral tribunal, unless otherwise provided by federal law."[251]

212. The 2002 Civil Procedure Code provides in Article 3(3):

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247 *See* A.A. Kostin Opinion on Certain Issues of Arbitrability (Feb. 21, 2006) ("Kostin Expert Opinion"), 3-4; Asoskov Expert Opinion, ¶¶ 11-24. *See also* 1993 Law On International Commercial Arbitration, Art. 1(2) (R-311); 1964 RSFSR Civil Procedure Code, Art. 27 (R-900); 1992 Arbitrazh Procedure Code, Art. 21 (Asoskov Expert Opinion Annex 2); Resolution of the Supreme Council No. 3115-1 on Approval of the Provisional Regulation on Arbitral Tribunal for Resolving Economic Disputes (June 24, 1992), Art. 1(1) (Asoskov Expert Opinion Annex 3); 1995 Arbitrazh Procedure Code, Art. 23 (Asoskov Expert Opinion Annex 4); 2002 Arbitrazh Procedure Code, Art. 4(6) (Asoskov Expert Opinion Annex 5); 2002 Law on Arbitral Tribunals, Art. 1(2) (R-306); 2002 Civil Procedure Code, Art. 3(3) (Asoskov Expert Opinion Annex 6).

248 Kostin Expert Opinion, 5.

249 Asoskov Expert Opinion, ¶ 22.

250 Asoskov Expert Opinion, ¶ 13.

251 Asoskov Expert Opinion, ¶ 19.

> "By agreement of the parties, before a court of the first instance has rendered a judgment concluding the civil trial on the merits, a dispute arising out of civil law relations and falling within the jurisdiction of the court can be referred by the parties to an arbitral tribunal, unless otherwise provided by federal law."[252]

213. As Professor Asoskov explains, it is unequivocally accepted in Russian doctrine (and case law) that public law disputes cannot be resolved by means of arbitration. Professor Asoskov for example quoted a leading treatise on international commercial arbitration, commenting on Article 1(2) of the 1993 International Arbitration Law:

> "Therefore, if relations between the parties are of a public law nature, then a dispute arising out of such relations cannot be referred to international commercial arbitration."[253]

214. The non-arbitrability of disputes arising from public law relations was also confirmed in 2011 by the Russian Constitutional Court:

> "[T]he current regulatory framework does not allow the referral to an arbitral tribunal of disputes arising out of administrative or other public law relations […]."[254]

215. Whether a dispute arises from public law or private law relations is determined by the nature of the legal relations giving rise to the dispute. Disputes arising out of relations of subordination, *i.e.*, relations in which one party may take coercive measures against the other party, are public law disputes. By contrast, disputes that arise from relations of coordination, *i.e.*, relations between equal parties in which neither party may impose mandatory rules or decisions on the other, are private law disputes. Disputes that do not arise from relations of subordination may nonetheless qualify as public law disputes if there is a "*concentration of socially significant public elements*," *i.e.*, apparent public interest, involvement of a public entity or impact on budgetary funds.[255]

216. Disputes concerning the assessment of taxes and imposition of sanctions by tax authorities, the enforcement of tax liens, and other actions or omissions of State authorities in enforcement proceedings, as well as bankruptcy issues, are by their very nature public law

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[252] Asoskov Expert Opinion, ¶ 21.

[253] Asoskov Expert Opinion, ¶ 24.

[254] Resolution No. 10-P of the Constitutional Court (May 26, 2011), Section 3.1, ¶ 2 (Asoskov Expert Opinion Annex 1).

[255] Asoskov Expert Opinion, ¶ 34. [*English quote in Dutch text omitted*]

disputes. In his Expert Opinion, Professor Asoskov quotes several Russian legal sources that confirm the public law nature of such disputes. Professor Asoskov concludes:

> "Disputes concerning the assessment by tax authorities of additional taxes and tax sanctions, disputes concerning the enforcement of decisions of tax authorities and other actions performed by governmental authorities pursuant to legislation on enforcement proceedings, as well as bankruptcy cases have always been non-arbitrable under Russian law."[256]

217. The Tribunal did not take issue with the Russian Federation's showing that such disputes are not arbitrable under Russian arbitration laws and the civil and commercial procedure codes. The Tribunal nonetheless held *obiter dictum*, based on its impression of certain terms in English translations of the 1991 and 1999 Laws on Foreign Investment – and without any analysis of the laws themselves or of Russian legal authorities – that the present dispute is arbitrable pursuant to Article 9 of the 1991 Law on Foreign Investment and Article 10 of the 1999 Law on Foreign Investment:

> "The terms of the Russian Federation's Law on Foreign Investment (both the 1991 and 1999 versions) are crystal clear. Investor-State disputes such as the present are arbitrable under Russian law."[257]

218. This unsubstantiated and unsupported statement is wrong.

219. As a preliminary matter, the 1991 and 1999 Laws on Foreign Investment are not applicable to Claimants' claims. Both laws apply only to transactions that involve an injection of foreign capital into the territory of the Russian Federation:

> "Foreign investments are all types of material assets and intellectual property <u>injected by foreign investors into objects of entrepreneurial and other types of activity</u> with the aim of obtaining profit (income)."[258]
>
> "[F]oreign investment – the injection of foreign capital in objects of entrepreneurial activity in the territory of the Russian Federation in the form of objects of civil law rights belonging to a foreign investor, […]."[259]

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[256] Asoskov Expert Opinion, ¶ 105. *See also* E.A. SUKHANOV, ARTICLE BY ARTICLE COMMENTARY TO THE RUSSIAN ABITRATION LAW (DOMESTIC) OF 2002 (2003), 7 (R-191); O.Y. SKVORTSOV, ARBITRATION OF ENTREPRENEURIAL DISPUTES IN RUSSIA. PROBLEMS. TENDENCIES. PERSPECTIVES (2005), 427 (R-190); O.Y. Skvortsov, About Certain Matters Concerning Recovery of Damages in Arbitration Proceedings, *in* DAMAGES AND PRACTICE OF THEIR RECOVERY. COLLECTION OF PUBLICATIONS (M. A. Rozhkova, ed. 2006), 525-526 (<u>Asoskov Expert Opinion Annex 27</u>); S.A. KUROCHKIN, ARBITRATION OF CIVIL LAW DISPUTES IN THE RUSSIAN FEDERATION: THEORY AND PRACTICE (2007), 50 (R-875).

[257] HUL Interim Award, ¶ 370.

[258] 1991 Law On Foreign Investments, Art. 2 (R-176). [emphasis added]

[259] 1999 Law On Foreign Investments, Art. 2 (R-178). [emphasis added]

220. To qualify as a "*foreign investment*," a transaction must therefore inject foreign capital into "*objects of entrepreneurial activity*" in the territory of the Russian Federation. As Professor Lisitsyn-Svetlanov testified, such a transaction must result in a capital increase in the Russian economy from foreign resources.[260] As set forth in paragraph 319, Claimants did not inject any foreign capital into the territory of the Russian Federation.

221. The Tribunal ignored this requirement entirely, and simply noted that:

> "the definitions of 'foreign investor' and 'foreign investment' in both the 1991 and 1999 versions of the Law on Foreign Investment are consistent with the definitions of 'Investor' and 'Investment' in Article 1 of the ECT."[261]

222. The 1991 and 1999 Laws on Foreign Investment in any event do not authorize arbitration of investment disputes arising out of public law relations. Pursuant to Article 43 of the 1991 Fundamentals of Legislation on Foreign Investments in the USSR (the "1991 Fundamentals"), which was enacted at the level of the Soviet Union and set forth general principles of investment protection, disputes with the State could only be submitted to arbitration if the State was acting as a private party:

> "(1) Disputes between foreign investors and the State are subject to consideration in the USSR in courts, unless otherwise provided by international treaties of the USSR.
>
> (2) Disputes of foreign investors and enterprises with foreign investments with <u>Soviet State bodies acting as a party to relationships regulated by civil legislation</u>, enterprises, social organizations and other Soviet legal entities, disputes between participants of the enterprise with foreign investments and the enterprise itself are subject to consideration in the USSR in courts or, upon agreement of the parties, in arbitration proceedings, inter alia, abroad, and in cases provided by legislative acts of the Union of SSR and the republics – in arbitrazh [commercial] courts, economic courts and others."[262]

223. By contrast, disputes involving sovereign acts and omissions could only be resolved in Russian courts, as Professor Asoskov confirms.[263] The 1991 Law on Foreign Investment, which implemented the 1991 Fundamentals at the level of the Russian Soviet Federative Socialist Republic, equally distinguishes between investment disputes arising out of civil

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260 *See* Opinion of Professor A.G. Lisitsyn-Svetlanov (Feb. 22, 2006) ("Lisitsyn-Svetlanov Expert Opinion"), 2-4.

261 HUL Interim Award, ¶ 371.

262 1991 Fundamentals of Legislation, Art. 43(2) (R-902). [emphasis added]

263 Asoskov Expert Opinion, ¶ 73.

law relations, which may be submitted to arbitration, and disputes involving sovereign acts and omissions, which must be submitted to Russian courts.[264]

224. Article 9(2) of the 1991 Law on Foreign Investment, read in context and in conformity with the 1991 Fundamentals, applies only to investment disputes arising out of civil law relations, as confirmed by the authorities submitted by the Russian Federation.[265] These civil law disputes may be resolved through arbitration, if the parties so agree.

225. The Tribunal, in finding that the terms of Article 9(2) of the 1991 Law on Foreign Investment are "*crystal clear*" in authorizing arbitration of investment disputes involving sovereign acts or omissions, omitted any reference to Articles 9(1) and 7(3). These provisions actually address the resolution of disputes involving sovereign acts and omissions. Article 9(1) provides:

> "Investment disputes, including disputes over the amount, conditions and procedure of the payment of compensation, shall be resolved by the Supreme Court of the RSFSR or the Supreme Arbitrazh Court of the RSFSR, unless another procedure is established by an international treaty in force in the territory of the RSFSR."[266]

226. Article 7(3) expressly provides that decisions on expropriation of investments are to be contested in Russian courts:

> "Decisions of governmental bodies on expropriation of foreign investments may be contested in the RSFSR courts."[267]

227. As Professor Asoskov concludes in his expert opinion with respect to investment disputes involving sovereign acts or omissions:

> "The 1991 Law provides for resolution of this kind of dispute only in State courts (recognizing that international treaties may provide for another resolution procedure with respect to matters concerning the amount of compensation for expropriation of foreign investments and the conditions and procedure of its payment, where a State court has already recognized that an expropriation of foreign investments has taken place)."[268]

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264 Asoskov Expert Opinion, ¶¶ 76, 79.

265 B.N. Topornin, Russian Law And Foreign Investments: Current Problems, *in* LEGAL REGULATION OF FOREIGN INVESTMENTS IN RUSSIA (A.G. Svetlanov, ed. 1995), 30-31 (R-903).

266 1991 Law On Foreign Investments, Art. 9(1) (Asoskov Expert Opinion Annex 30). [emphases added]

267 *Ibid.*, Art. 7(3).

268 Asoskov Expert Opinion, ¶ 79.

228. Article 9(1) includes "*disputes over the amount, conditions and procedure of the payment of compensation*" within the category of arbitrable disputes. The wording of Article 9(1) corresponds to the USSR's and the Russian Federation's investment treaty practice at the time, which limited investor-State arbitration to the determination of the amount of compensation and the procedure for its payment in the event of expropriation and other issues that do not involve a review of sovereign acts or omissions.[269] As the Dutch explanatory memorandum to the *Agreement Between the Kingdom of the Netherlands and the Union of Soviet Socialist Republics Regarding the Mutual Encouragement and Protection of Investments* states:

> "Artikel 9:
>
> Het opnemen van een regeling met betrekking tot een internationale geschillenbeslechtingsprocedure bij geschillen tussen een investeerder en het gastland stuitte aanvankelijk op principiële bezwaren bij de Sovjet-delegatie. Uiteindelijk kon zij instemmen met een opsomming van geschillen waarvoor een dergelijke regeling zou gelden. Dit betreft de vrije transfer (artikel 4) en het bedrag en/of de procedure van compensatie ingeval van onteigening of nationalisatie (artikel 6). Niet arbitrabel zijn de beslissingen tot onteigening of nationalisatie zelf, aangezien de Sovjet-delegatie dit in strijd achtte me de nationale soevereiniteit. Eveneeens kunnen geschillen inzake de eerlijke en rechtvaardige behandeling van investeringen niet aan arbitrage worden onderworpen. De USSR vreest namelijk dat vanwege de reikwijdte van de eerlijke en rechtvaardige behandeling het beperkende karakter van de opsomming in de artikelen 4 en 6 zou worden ondergraven."[270]

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[269] *See* 1990 Agreement Between the Government of the People's Republic of China and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Art. 9 (Exhibit RF-51); 1989 Agreement Between the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Art. 10 (Exhibit RF-52); 1989 Agreement Between the Government of Finland and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Art. 8 (Exhibit RF-53); 1989 Agreement Between the Government of the Republic of Italy and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Art. 9 (Exhibit RF-54); 1990 Agreement Between the Government of the Kingdom of Spain and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Art. 10 (Exhibit RF-55) 1990 Agreement Between the Government of the Republic of Austria and the Government of the Union of Soviet Socialist Republics Regarding the Promotion and Reciprocal Protection of Investments, Art. 7 (Exhibit RF-56); 1989 Agreement Between the Federal Republic of Germany and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Art. 10 (Exhibit (Exhibit RF-57); 1989 Agreement Between the Kingdom of the Netherlands and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Art. 9; 1990 Agreement Between the Swiss Federal Council and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Art. 8 (Exhibit RF-58); 1990 Agreement Between the Government of the Republic of Turkey and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Art. 6 (Exhibit RF-59); 1990 Agreement Between the Government of the Republic of Korea and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocald Protection of Investments, Art. 9 (Exhibit RF-60); 1989 Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments, Art. 8(1) (C-849).

[270] Overeenkomst met de USSR inzake de bevording en wederzijdse bescherming van investeringen [Kamerstukken II, 1989/90, 21 462 (R 1383), nr. 1.(Nota bij de brief van de Minister d.d. 7 februari 1990)]. [emphasis added]

229. Issues concerning the amount, conditions and procedure of the payment of compensation, which do not involve a review of the sovereign act of expropriation itself, are considered civil law issues. By contrast, determination of the existence and legality of an expropriation are considered public law issues and are reserved for the jurisdiction of State courts. As Mr Nagapetyants, who negotiated Russian bilateral investment treaties, explains:

> "In treaties for the protection of investments that the USSR concludes with foreign States, the USSR gives its consent to the consideration [of investment disputes] in international arbitral tribunals. The scope of such disputes is limited to civil law issues only (primarily, determination of the amount of compensation and the procedure for its payment in the event of nationalization of investments and transfer of profits and other payments due to the investor)."[271]

230. The 1999 Law on Foreign Investment is to the same effect. Investment disputes involving sovereign acts or omissions are arbitrable under Article 10 of the 1999 Law on Foreign Investment only "*in accordance with international treaties of the Russian Federation and federal laws*."[272] As explained in Professor Asoskov's expert report, Article 10 is a declaratory or "*blanket provision*," *i.e.*, a provision containing a general reference to other sets of rules that may authorize investor-State arbitration, namely, international treaties and federal laws.[273] Article 10 does not address the issue of arbitrability, much less provide in "*crystal clear*" terms, that investment disputes are arbitrable. Nor does it establish a legislative basis for investor-State arbitration. Instead, as a blanket provision, Article 10 conditions an investor's right to submit investment disputes to arbitration on the existence of an international treaty or a federal law providing for such a right. In sum, as Professor Ripinsky concludes in a 2013 commentary, the 1999 Law on Foreign Investment "*does not provide for investor-State arbitration*."[274]

231. The ECT was never ratified by the Russian Federation and, in any event, provides for investor-State arbitration only to the extent not inconsistent with Russian "*laws*." No

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[271] R. Nagapetyants, Treaties for the Promotion and Reciprocal Protection of Investments, 5 Foreign Trade (1999), 14 (Asoskov Expert Opinion Annex 32).

[272] 1999 Law On Foreign Investments, Art. 10 (Asoskov Expert Opinion Annex 31): "A dispute of a foreign investor arising in connection with its investments and business activity conducted in the territory of the Russian Federation shall be resolved in accordance with international treaties of the Russian Federation and federal laws in courts, arbitrazh [commercial] courts or through international arbitration (arbitral tribunal)."

[273] Asoskov Expert Opinion, ¶¶ 81 to 94.

[274] S. Ripinsky, Chapter 14: Russia, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (C. Brown, ed. 2013), 594 (Exhibit RF-61). [*English quote in Dutch text omitted*]

federal law has been enacted that authorizes the arbitration of disputes arising out of public law relations, including claims for compensation based on allegedly unlawful taxation measures, enforcement measures related to tax assessments or actions or omissions of State organs in bankruptcy matters, as set forth above and in ¶¶ 43 to 92 and 105 of Professor Asoskov's opinion. Article 10 of the 1999 Law on Foreign Investment therefore does not authorize arbitration of Claimants' claims.

232. The Tribunal's unsubstantiated *obiter dictum* that Article 9 of the 1991 Law on Foreign Investment and Article 10 of the 1999 Law on Foreign Investment authorize arbitration of the present dispute are also contradicted by the explanatory notes accompanying the ratification instruments for bilateral investment treaties ratified by the Russian State Duma. As the explanatory notes expressly state, neither law provides for or authorizes investor-State arbitration. For instance, the explanatory note to the *Agreement between the Government of the Russian Federation and the Government of the Republic of Argentina on Encouragement and Reciprocal Protection of Investments* expressly states:

> "Considering that the Agreement contains provisions different from those provided by the Russian legislation, it is subject to ratification in accordance with clause 1a, Article 15 of the Federal Law No. 101-FZ of July 15, 1995 'On International Treaties of the Russian Federation."
>
> The key issues by virtue of which the above Agreement is subject to ratification are as follows
>
> […]
>
> the settlement in an international arbitration court of investment disputes between one Party and an investor of the other Party, as well as disputes between the Parties concerning the interpretation and application of the Agreement –
>
> the Federal Law No. 1545-1 of July 4, 1991 'On Foreign Investment in the RSFRS' does not provide for a mechanism of settlement of such type of disputes by international arbitration[.]"[275]

233. The explanatory note for the *Agreement between the Government of the Russian Federation and the Government of the South African Republic for the Promotion and Reciprocal Protection of Investments* also states:

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[275] Explanatory Note on the Issue of Ratification of the Agreement between the Government of the Russian Federation and the Government of the Republic of Argentina on Encouragement and Reciprocal Protection of Investments (Oct. 25, 1999) (R-402). [emphases added]

> "The principle issues due to which the above Agreement is subject to ratification are as follows: […] consideration in international arbitration of investment disputes between one Party and an investor from the state of the other Party (Article 10) - the Federal Law 'On Foreign Investments in the RSFSR' No 1545-1 dated July 4, 1991 does not set forth for the mechanism of consideration of such disputes by international arbitration, […]."[276]

234. Likewise, the explanatory note for the *Agreement between the Government of the Russian Federation and the Government of Japan for the Promotion and Protection of Investments* explicitly states:

> "The Russian Federation Law 'On Foreign Investments in the Russian Federation' No. 160-FZ dated July 14, 1999 that is currently in effect does not provide for the mechanism of consideration of such disputes in international arbitration."[277]

235. After considering such explanatory notes in the context of whether provisional application of the ECT is inconsistent with the Russian Federation's Constitution, and concluding that they are "*of little assistance to either party*,"[278] the Tribunal then ignored these unambiguous statements entirely in its *obiter dictum* that Claimants' claims are arbitrable under Article 9 of the 1991 Law on Foreign Investment and Article 10 of the 1999 Law on Foreign Investment.[279]

236. The Tribunal instead cited to sweeping statements in an explanatory note to the ECT prepared by the Ministry of Energy as part of its unsuccessful attempt to persuade the State Duma to ratify the ECT.[280] This note,[281] which was eventually withdrawn, does not contain a review of the consistency of the investment treaty protections to be accorded under the

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276 Explanatory Note on the Issue of Ratification of the Agreement between the Government of the Russian Federation and the Government of the South African Republic for the Promotion and Reciprocal Protection of Investments (Apr. 8, 2000) (R-406). [emphases added] *See also* Explanatory Note to the Draft Federal Law "On Ratification of the Agreement between the Government of the Russian Federation and the Government of the Republic of Macedonia on Encouragement and Reciprocal Protection of Investments" (May 30, 1998) (Exhibit RF-62); Explanatory Note on the Issue of Ratification of the Agreement between the Government of the Russian Federation and the Government of the Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments (Apr. 8, 2000) (Exhibit RF-63).

277 Explanatory Note to the Draft Federal Law "On Ratification of the Agreement between the Government of the Russian Federation and the Government of Japan for the Promotion and Protection of Investments" (Feb. 29, 2000) (Exhibit RF-64); Explanatory Note to the Draft Federal Law "On Ratification of the Bilateral Investment Treaty between the Government of the Russian Federation and the Government of the Syrian Arab Republic" (June 30, 2007) (Exhibit RF-65). *See also* Explanatory Note Regarding the Draft Federal Law "On Ratification of the Agreement between the Government of the Russian Federation and the Government of the Republic of Yemen on the Promotion and Reciprocal Protection of Investments" (July 2, 2005) (R -403).

278 HUL Interim Award, ¶¶ 376-377.

279 HUL Interim Award, ¶ 370.

280 HUL Interim Award, ¶ 374.

281 Explanatory Note to the Draft Federal Law On Ratification of the Energy Charter Treaty (C-143).

ECT. In fact, the note – unlike the explanatory notes to the bilateral investments treaties that were ratified by the State Duma – does not even mention investor-State arbitration. Nor does it express a view on whether provisional application of any particular provision of the ECT was in conformity with Russian law. The note simply states that the ECT's "*provision regarding provisional application*," *i.e.*, Article 45(1) ECT, which limits the Russian Federation's provisional application of the ECT "*to the extent not inconsistent with its constitution, laws or regulations*," was in conformity with Russian law at the time of the ECT's signature.[282]

237. The Tribunal relied on a mistaken translation of this statement submitted by Claimants, which was corrected by the Russian Federation during the arbitration but subsequently ignored by the Tribunal,[283] to suggest that provisional application of each and every provision of the ECT was consistent with Russian law.[284] This proposition is also contradicted by the note itself, which acknowledges that the ECT's ratification would require the enactment of new legislation.[285]

238. The Tribunal's *obiter dictum* is also not supported by other sweeping statements in the note, such as the statement that the *"legal regime of foreign investments envisaged under the ECT*" is consistent with the 1991 Law on Foreign Investment. Notably, the note continues that "[t]*he ECT is also consistent with the provisions of Russian bilateral international treaties on the promotion and protection of investment*."[286] This reference to the Russian Federation's bilateral investment treaties, also ignored by the Tribunal, in fact confirms the opposite of the Tribunal's *obiter dictum*. As the explanatory notes that

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282 Certified translation of Explanatory Note to the Draft Federal Law On Ratification of the Energy Charter Treaty originally submitted as C-143, 1 (Exhibit RF-66): "At the time of signing of the ECT, the provision regarding provisional application was not in contravention of the Russian legal acts."

283 Claimants provided the following erroneous translation: "At the time of the signing of the ECT, its provisions on provisional application were in conformity with the Russian legal acts." Explanatory Note to the Draft Law On Ratification of the Energy Charter Treaty (C-143). The Russian Federation corrected this translation at the Hearing on Jurisdiction and Admissibility as follows: "At the time of the signing of the ECT, the provision on provisional application was in conformity with Russian legal acts." Hearing on Jurisdiction and Admissibility, Day 10 (Dec. 1, 2008), 42:4-10 (Counsel for Respondent); Respondent's Presentation at the Hearing on Jurisdiction and Admissibility (Dec. 1, 2008), Closing Statement, Slide 52. Chairman Fortier acknowledged the corrected translation at the hearing (Hearing on Jurisdiction and Admissibility, Day 10 (Dec. 1, 2008), 42:11: Chairman Fortier: "Somewhat different."), but the Tribunal then ignored the correction in the Interim Award.

284 HUL Interim Award, ¶ 374. *See also* Hearing on Jurisdiction and Admissibility, Day 6 (Nov. 26, 2008), 160: 11-17.

285 Explanatory Note to the Draft Federal Law On Ratification of the Energy Charter Treaty (C-143), 4: "The ECT contains a number of legally binding provisions, based on the GATT provisions, that have yet to be reflected (or fully reflected) in the Russian legislation"; *see also ibid.*, 5 (referring to amendments to the procedure for levying customs duties).

286 Explanatory Note to the Draft Law On Ratification of the Energy Charter Treaty (C-143), 4. [*English quote in Dutch text omitted*]

accompanied the ratification instruments for these treaties – which, unlike the ECT, were ratified by the State Duma – expressly state, the Laws on Foreign Investment do not provide for investor-State arbitration.[287]

239. The reference to bilateral investment treaties also makes clear that, by using the term "*legal regime*," the note does not express an opinion on the consistency of any particular provisions of the ECT with Russian law. As the note itself states, bilateral investment treaties create rights and obligations applicable solely in relations with a particular Contracting State, not statutory protections applicable to investors from all ECT Contracting States, including the 21 Contracting States that did not have a bilateral investment treaty in force with the Russian Federation on the date of the note.[288] And unlike the ECT, several bilateral investment treaties with ECT Contracting States, such as the UK-Soviet BIT,[289] also limit investor-State arbitration to civil law issues, excluding arbitral review of sovereign acts or omissions, such as expropriation.

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287 *See, e.g.*, Explanatory Note on the Issue of Ratification of the Agreement between the Government of the Russian Federation and the Government of the Republic of Argentina on Encouragement and Reciprocal Protection of Investments (Oct. 25, 1999) (R-402). *See also* Explanatory Note on the Issue of Ratification of the Agreement between the Government of the Russian Federation and the Government of the South African Republic for the Promotion and Reciprocal Protection of Investments (Apr. 8, 2000) (R-406); Explanatory Note to the Draft Federal Law "On Ratification of the Agreement between the Government of the Russian Federation and the Government of the Republic of Macedonia on Encouragement and Reciprocal Protection of Investments" (May 30, 1998) (Exhibit RF-62); Explanatory Note on the Issue of Ratification of the Agreement between the Government of the Russian Federation and the Government of the Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments (Apr. 8, 2000) (Exhibit RF-63); Explanatory Note to the Draft Federal Law "On Ratification of the Agreement between the Government of the Russian Federation and the Government of Japan for the Promotion and Protection of Investments" (Feb. 29, 2000) (Exhibit RF-64).

288 These States are: Afghanistan, Armenia, Azerbaijan, Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Ireland, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Macedonia, Malta, Moldova, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

289 1989 Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics Regarding the Mutual Encouragement and Protection of Investments, Art. 8(1) (C-849): "This Article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement." [emphasis added] *See also, e.g.*, 1989 Agreement Between the Federal Republic of Germany and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Art. 10(2) (Exhibit RF-57): "If a dispute relating to the amount of compensation or the method of its payment, in accordance with Article 4 of this Agreement, or to freedom of transfer, in accordance with article 5 of this Agreement, is not settled within six months from the time when a claim is made by one of the parties to the dispute, either party to the dispute shall be entitled to refer the matter to an international arbitral tribunal."; 1989 Agreement Between the Kingdom of the Netherlands and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Art. 9(2): "Disputes concerning the amount or procedure of payment of compensation under Article 6 of this Agreement or concerning the free transfer as defined in Article 4 of this Agreement which cannot be settled amicably within a period of six months from the date either party to the dispute requested amicable settlement, may be referred by the investor to international arbitration or conciliation. […] "; 1990 Agreement Between the Swiss Federal Council and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Art. 8(2)(a) (Exhibit RF-58): "A dispute relating to the consequences of the failure or improper performance of obligations with respect to the free transfer of payments as defined in Article 5 of this Agreement, or a dispute regarding the method of payment and the amount of compensation relating to a deprivation pursuant to Article 6 of this Agreement shall, at the request of one of the parties to the dispute, be submitted to an arbitral tribunal." [Unofficial translation]; 1989 Agreement Between the Government of the Republic of Italy and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Art. 9 (Exhibit RF-54): "(1) Disputes arising between the host

240. In sum, and as is true of the domestic laws of many other ECT signatories, Claimants' claims are not arbitrable under the Russian Federation's domestic laws. Arbitration of the present dispute pursuant to Article 26 ECT is therefore inconsistent with Russian "*laws*" and the Tribunal lacked jurisdiction over all of Claimants' claims.

(b) Shareholder Claims For Impairment Or Loss Of Shares Based On Injury To The Company Are Inconsistent With Russian Laws

241. In many civil law systems shareholders of joint-stock companies may not assert claims for impairment or loss of their shareholdings based on measures that inflict injury on the company in which they hold shares or its management. The Dutch Supreme Court, for example, ruled in *ABP v. Poot*:

> "[…] companies with limited liability are legal persons that independently participate in legal transactions as carriers of their own rights and duties […] also if they are controlled by a single person (sole shareholder and sole director). The assets of the company are separated from those of its shareholders. If a third person inflicts damages to the company by violating contractual duties or by acts that constitute a tort against the company, only the company is entitled to claim the damages thereby caused and incurred by the company.
>
> Those economic damages incurred by the company will, as long as these remain uncompensated, cause a decrease in the value of the shares of the company. In principle, the shareholders themselves are however not entitled to claim damages for the loss that they suffered caused by the aforementioned third party. It is for the company, in order to protect the interests of those that

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Contracting Party and an investor from the other Contracting Party over the amounts and procedures for the payment of compensation in connection with the expropriation, nationalization, requisitioning, or other measures having like consequences shall be settled, if possible, amicably. (2) Failing such amicable settlement within six months of the day on which an investor from either of the Contracting Parties addressed the other Contracting Party with a relevant written request, such disputes may be referred, at such investor's own choice: [either to an *ad hoc* tribunal pursuant to the UNCITRAL Arbitration Rules or to a competent court of the Contracting Party in the territory of which the investment has been made]." [Unofficial translation]; 1990 Agreement Between the Government of the Kingdom of Spain and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments, Art. 10 (Exhibit RF-55): "(1) Disputes between one of the Contracting Parties and an investor of the other Contracting Party relating to the amount or method of payment of compensation pursuant to Article 6 of the present Agreement, shall be notified in writing and accompanied by a detailed memorandum from the investor to the Contracting Party concerned. The dispute shall be settled amicably, to the extent possible. (2) If the dispute cannot be settled amiably within six months from the date of the written notification referred to in paragraph 1, it can be submitted, at the choice of the investor [either to the to the Stockholm Chamber of Commerce or an *ad hoc* tribunal pursuant to the UNCITRAL Arbitration Rules]. […]" [Unofficial translation]; 1990 Agreement Between the Government of the Republic of Austria and the Government of the Union of Soviet Socialist Republics Regarding the Promotion and Reciprocal Protection of Investments, Art. 7 (Exhibit RF-56): "(1) Disputes between one Contracting Party and an Investor of the other Contracting Party concerning the amount or the procedure of payment of compensation due pursuant to Article 4 of this Agreement, as well as the transfer of payments pursuant to Article 5 of this Agreement, shall be settled through negotiations. (2) In case such a dispute cannot be settled by these means within three months from the date of application in writing by one Party to the dispute to the other Party to the dispute, it may be submitted at the Investor's choice for settlement to the Arbitration Institute of the Stockholm Chamber of Commerce or to an *ad hoc* Arbitral Tribunal established under the UNCITRAL Arbitration Rules. […]". [Unofficial translation] [emphases added]

> have an interest in the conservation of the company's assets, to claim damages from the third party […]."[290]

242. Equally, Russian law does not allow shareholders to assert claims for compensation for impairment or loss of their shareholdings based on measures that inflict injury on the company in which they hold shares.[291] As Professor Sukhanov testified – and Claimants did not dispute – a company is an independent legal entity, with its own rights and obligations, separate and independent from those of its shareholders;[292] and a shareholder may not arrogate to itself rights belonging to the company, including with respect to loss or injury suffered by the company.[293]

243. The Tribunal did not take issue with Professor Sukhanov's expert testimony. Dismissing the Russian Federation's objection, the Tribunal contented itself with the statement that Claimants' claims were "*for direct loss by* [each] *Claimant of its shares and their value*."[294] But labeling Claimants' claims in that manner does not change the fact that they are based on taxation measures taken against Yukos. However Claimants' contentions are characterized, a claim for loss of their shares resulting from measures taken against Yukos (and not from measures taken against those shares) is not recognized under Russian law.

244. In conclusion, Article 26 ECT in conjunction with Article 1(6) ECT, authorizing shareholders to bring claims in arbitration for damages based on injury to the company in which they own shares, is inconsistent with Russian "*laws*." On this independent basis, the Tribunal lacked jurisdiction over all of Claimants' claims.

(d) Conclusion

245. The Russian Federation never ratified the ECT, but instead agreed to apply it on a provisional basis pursuant to Article 45(1) ECT, and thus only "*to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*."

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290 Dutch Supreme Court December 2, 1994, NJ 1995, 288 (*ABP v. Poot*) at 3.4.1. The Dutch Supreme Court has upheld this decision ever since. *See* in general Asser/Maeijer/Van Solinge & Nieuwe Weme 2-II* 2009 nr. 209.

291 Sukhanov Expert Opinion, ¶¶ III.3 and IV.21.

292 Sukhanov Expert Opinion, ¶¶ IV.14-18.

293 Sukhanov Expert Opinion, ¶¶ IV.1-13, IV.21.

294 HUL Interim Award, ¶ 372. [*English quote in Dutch text omitted*]

246. Arbitration of the present dispute pursuant to Article 26 ECT is inconsistent with the Russian Constitution. Arbitration of Claimants' claims under Article 26 ECT is also inconsistent with Russian laws that (a) prohibit the arbitration of public law disputes, and (b) do not permit a shareholder to bring claims for compensation based on injury to the company in which it owns shares.

247. In light of the foregoing, the Tribunal lacked jurisdiction over Claimants' claims pursuant to Article 45 ECT, which provides the first reason why the Court should set aside the Yukos Awards under Article 1065(1)(a) DCCP.

D. Jurisdiction Ground 2 – The Tribunal Lacked Jurisdiction Because Claimants' Shares In Yukos Are Not Protected Under The ECT

(a) Introduction

248. The Russian Federation objected to the Tribunal's jurisdiction under Article 1(6) and (7) ECT on the ground that Claimants' shares in Yukos are not protected under the ECT. As noted at the outset of this Writ, this is a domestic Russian dispute. All three Claimants are shell companies that were established by Russian nationals – the Yukos oligarchs – in offshore tax havens solely to hold the oligarchs' Yukos shares and secure favorable tax treatment for the dividends they received. Claimants are beneficially owned by those Russian nationals, and their claims are based entirely on taxation measures taken against Yukos, the Russian company that these Russian nationals beneficially owned and controlled through Claimants. Thus, this dispute is not a truly international one within the ambit of the ECT. Rather, it is a domestic Russian dispute between Russian nationals and the Russian Federation concerning "*Taxation Measures*" taken by the Russian authorities in response to a Russian tax evasion scheme aggressively pursued by Yukos, a Russian company. Accordingly, it falls outside the Tribunal's jurisdiction under Article 26 ECT in conjunction with Articles 1(6)-(7) ECT, as construed and applied in their context and in light of the object and purpose of the ECT.

249. Under Article 26 ECT, the Tribunal's jurisdiction was limited to:

> "[d]isputes 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." [emphasis added]

250. Articles 1(6) and (7) ECT provide the definitions of "Investment" and "Investor," which determine the ECT's scope of application *ratione personae* and *ratione materiae*. Article 1(6) ECT defines "Investment" as "*every kind of asset, owned or controlled directly or indirectly by an Investor.*"

251. Article 1(7) ECT defines "Investor" as "*a company or other organization organized in accordance with the law applicable in that Contracting Party*."

252. As shown at paragraphs 61 to 65 above, the object and purpose of the ECT is to promote international cooperation in the energy sector, in particular, "*to capitalize on the complementary relationship between the European Economic Community, the USSR and the countries of Central and Eastern Europe*."[295] The former Socialist States were in need of Western capital, advanced technologies and know-how to modernize their outdated energy infrastructure and improve the stability of their energy economies. In exchange, the European Community and its Member States sought to provide for the security of their oil and gas supplies. Article 2 ECT therefore describes the ECT's purpose as:

> "establish[ing] 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."[296]

253. Importantly, the Tribunal accepted that the ECT:

> "[…] is directed towards the promotion of foreign investment, especially of investment by Western sources in the energy resources of the Russian Federation and the other successor States of the USSR."[297]

254. Equally importantly, the Tribunal also accepted that:

> "[if] the States that took part in the drafting of the ECT had been asked in the course of that process whether the ECT was designed to protect – and should be interpreted and applied to protect – investments in a Contracting State by nationals of that same Contracting State whose capital derived from the energy resources of that State, it may well be that the answer would have been in the negative, not only from the representatives of the Russian Federation but from the generality of the delegates."[298]

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295 *See* ¶ 62 above.

296 Article 2 ECT.

297 Hulley Interim Award, ¶ 433; YUL Interim Award, ¶ 434; VPL Interim Award, ¶ 490.

298 *Ibid*.

255. The Tribunal nonetheless ruled that Claimants and the shares they held in Yukos are protected under the ECT, solely because Claimants are incorporated in Cyprus (Hulley and VPL) and the Isle of Man (YUL)[299] and they nominally owned the Yukos shares at issue. The Tribunal made this ruling despite the fact that:

(a) the beneficial owners of Claimants, and thus of the Yukos shares they owned, are all Russian nationals;

(b) as the Tribunal itself found, the "*ultimate source of [each] Claimant's investments* […] *may be Russian*"[300] and that "[t]*he fortunes of the 'oligarchs'* [...] *may derive from investments by Russians in Russian resources;*"[301]

(c) Claimants are mere shell companies, having no purpose other than to hold Claimants' Yukos shares; and

(d) the oligarchs held their Yukos shares through Claimants solely to reduce (or even eliminate) the tax that would otherwise be owed on the dividends they received from Yukos in the tax havens of Cyprus and the Isle of Man.

256. In making this ruling, the Tribunal relied on an unduly formalistic reading of the definitions of "*investor*" and "*investment*" in Article 1(6) ECT and Article 1(7) ECT that disregards: (a) the object and purpose of the ECT; (b) the ECT Contracting States' intentions; and (c) basic principles of international law. The Tribunal's unduly formalistic reading of the ECT to uphold its own jurisdiction is contrary to the general rule of interpretation of Article 31 of the Vienna Convention on the Law of Treaties, which requires that a treaty be interpreted in good faith and "*in accordance with the ordinary meaning to be given to the terms of the treaty* <u>*in their context and in the light of its object and purpose*</u>," as confirmed by the intentions of the ECT Contracting States. The Court should accordingly conclude that Claimants and their Yukos shares are not protected under the ECT, and that the Yukos Awards should be set aside under Article 1065(1)(a) DCCP because the Tribunal lacked jurisdiction.

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299 Hulley Interim Award, ¶¶ 411-417; YUL Interim Award, ¶¶ 411-417;VPL Interim Award, ¶¶ 411-417.

300 Hulley Interim Award, ¶ 433; YUL Interim Award, ¶ 434; VPL Interim Award, ¶ 490; Claimants' letter to the Tribunal of November 3, 2006; Appendix to the Interim Awards; Hulley Counter-Memorial, ¶ 288; YUL Counter-Memorial, ¶ 287; VPL Counter-Memorial, ¶ 290.

301 YUL Interim Award, ¶ 434; Hulley Interim Award, ¶ 433, VPL Interim Award, ¶ 490.

(b) Claimants Are Mere Shell Companies That Are Beneficially Owned And Controlled By Russian Nationals

257. Claimants concede that they were at all relevant times mere shell companies created solely to hold the oligarchs' Yukos shares, and that they had no business activities in Cyprus or the Isle of Man, their countries of incorporation.[302]

258. Nor have Claimants disputed that, to the extent they paid anything for their shares in Yukos, they did so with financial resources of Russian origin.[303]

259. Prior to October 2003, Claimant Hulley was owned by Claimant YUL, which in turn was owned by GML, which was in turn owned and controlled by Messrs Khodorkovsky, Nevzlin, Lebedev, Dubov, Brudno, and Shaknovsky.[304] In October 2003, the oligarchs transferred their GML shares into trusts constituted under the laws of Guernsey and appointed themselves, along with family members, as protectors and beneficiaries.[305] In 2005, Mr Khodorkovsky ceased to be a beneficiary of the Guernsey trusts, having been replaced by Mr Nevzlin.[306]

260. Claimants did not contest, and the Tribunal confirmed, that Messrs Khodorkovsky, Nevzlin, Lebedev, Dubov, Brudno and Shaknovsky were, at all relevant times, the beneficiaries of the Guernsey trusts.[307] Therefore, if the Final Awards are upheld, Russian nationals would receive the amounts awarded to Hulley and YUL, as they have confirmed on multiple occasions.[308]

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302 Claimants' letter to the Tribunal of November 3, 2006; Hulley Counter-memorial on Jurisdiction and Admissibility, ¶ 288; YUL Counter-memorial on Jurisdiction and Admissibility, ¶ 287; VPL Counter-memorial on Jurisdiction and Admissilibity, ¶ 290.

303 YUL Rejoinder on Jurisdiction and Admissibility, ¶¶ 269-297; Hulley Rejoinder on Jurisdiction and Admissibility, ¶¶ 296-298; VPL Rejoinder on Jurisdiction and Admissibility, ¶ 298.

304 Information for the Management of OAO NK 'Yukos' (2002) (R-4), pp. 2-3.

305 Appendix to the Interim Awards.

306 Hulley Interim Award, ¶¶ 469-471, 481; YUL Interim Award, ¶¶ 470-472, 482; Appendix to the Interim Awards.

307 *See* Hulley Interim Award, ¶¶ 462; 469, 474-481; YUL Interim Award, ¶¶ 463, 470, 475-482; Appendix to the Interim Awards.

308 Radio Free Europe, *Former Yukos Official Satisfied With Court Award*, (Jul. 29, 2014) (Exhibit RF-67) (Mr Nevzlin stated that he is satisfied with the USD 50 billion Final Award and noted that "his Group Menatep Limited (GML), the holding company for Yukos' main owners in which Nevzlin has a 70-percent stake, was seeking more than $100 billion' but 'it is impossible to say that we are not satisfied with the $50 billion."); Financial Times, *Leonid Nevzlin is biggest winner from Yukos ruling at The Hague*, (Jul. 28, 2014) (Exhibit RF-68) (noting that "For nearly a decade, 54 year-old Leonid Nevzlin has been at the centre of the legal fight for compensation for Yukos shareholders. On Monday his patience and persistence paid off. As the biggest shareholder of GML, the former Yukos holding company that brought the legal case, with a 70 per cent stake, Mr Nevzlin stands to be the biggest single beneficiary from The Hague's 50 $bn award ruling."); Reuters, *Nevzlin 'very pleased' with Hague court ruling on Yukos*, (Jul. 28, 2014) (Exhibit RF-69) ("Leonid Nevzlin, the biggest ultimate

261. Claimant VPL forms part of the VP Trust, which was set up in 2001 to administer the Veteran Social Support Program for the benefit of eligible former Yukos employees. The dividends on the Yukos shares held by VPL were paid to Claimant YUL.[309] A portion of the proceeds from a sale of VPL's Yukos shares was to be donated to former Yukos employees. The remaining portion was to be paid to YUL.[310] As of October 8, 2007, a portion of the proceeds from the sale of VPL's shares was to be distributed to former Yukos employees eligible under either the Veteran Social Support Program or a new program that included Messrs Khodorkovsky, Nevzlin, Lebedev, Doubov, Broudno, and Shakhnovsky.[311] Russian nationals would therefore also ultimately receive the proceeds of the Final Award in favor of VPL, if the Court does not set it aside.

(c) The ECT Does Not Protect Claimants' Investments In Yukos Because Those Investments Were Made By Nationals Of A Contracting State In The Territory Of, And With Resources From, That Same Contracting State

262. Unlike human rights treaties, investment treaties are solely aimed at promoting and protecting foreign, not domestic, investments. This is particularly true for the ECT, whose purpose, as set forth in Article 2 ECT, is to capitalize on complementarities between the East and West, as the Tribunal acknowledged.[312] Therefore, protection of Russian nationals who made investments in the Russian Federation, from Russian resources, is squarely incompatible with the ECT's object and purpose and with the intentions of the ECT Contracting States. Yet that is precisely what the Tribunal has permitted here.

263. In support of its ruling, the Tribunal relied on the literal wording of Articles 1(6) and (7) ECT, without interpreting these provisions in their context and in light of the object and purpose of the Treaty, as required by Article 31(1) VCLT. Article 10(1) ECT provides: "*Each Contracting State shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other*

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beneficial owner of defunct oil giant Yukos, expressed satisfaction with the Hague's arbitration court ruling that Russia must pay a group of shareholders around $50 billion for expropriating its assets.").

309 Appointment of Custodian Trustee in respect of "the Veteran Petroleum Trust" (Apr. 25, 2001, "VP Trust Agreement") (R-441), Clause 4; Appendix to Interim Awards.

310 VP Trust Agreement, Clause 3. Under the terms of the VP Trust Agreement, the so-called "Russian Service Provider," a Russian bank and a Yukos' agent, was empowered to select from time to time and at its sole discretion portions of the VPL's Yukos shares for sale on the market, *ibid*.

311 Deed of Amendment of the VP Trust Agreement (Oct. 8, 2007) (C-1186 VP).

312 Hulley Interim Award, ¶ 433; YUL Interim Award, ¶ 434; VPL Interim Award, ¶ 490.

Contracting Parties to make Investments in its Area."[313] Article 26(1) ECT refers to 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*."[314] Thus, the ECT is clearly directed towards investments by investors from other Contracting States, and not by investors who make an investment in their own State through a shell company in another Contracting State.

264. This conclusion is also supported by Article 17(1) ECT, which allows a Contracting State to deny a legal entity the advantages of the ECT "*if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized*."[315] The purpose of this provision is to deny the advantages of the ECT to parties from states that are *not* parties to the ECT, but nonetheless attempt to avail themselves of these advantages by incorporating shell companies in a Contracting State. Therefore, *a fortiori*, where citizens or nationals of one Contracting State own or control a shell legal entity in another Contracting State – as is true of Claimants here – the advantages of the ECT should not be available to those individuals in respect of investments made in their own country, merely because they have routed their investment through shell entities located in another Contracting State.[316]

265. In the portion of its Interim Awards in which it discussed Article 1(7) ECT (definition of "Investor"), the Tribunal noted: (a) that it "*is not unmindful of Respondent's assertions concerning ownership and control of Claimant;*" and (b) that these assertions must be investigated in the context of an analysis of Article 17 ECT, "*according to which ownership or control of a claiming party by citizens or nationals of a third State may, if certain other conditions are met, entitle a responding State to deny benefits of Part III of*

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313 emphasis added. Article 10(1) ECT in the authentic English text: "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."

314 emphasis added. Article 26(1) ECT in the authentic English text: "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."

315 Article 17(1) ECT in the authentic English text: "Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized."

316 Hulley Interim Award, ¶¶ 543-545; YUL Interim Award, ¶¶ 544-546; VPL Interim Award, ¶¶ 555-557.

the Treaty to the claiming party," before concluding that the Russian Federation in the present case is not a "*third State*" within the meaning of Article 17(1) ECT.[317]

266. In other words, the ECT concerns a relationship between State A (the host State) and State B (the Investor's State). According to the Tribunal, Article 17(1) ECT adds to this the relationship between State A's and State B's relationship with a third State - State C (whose nationals own or control the Investor), and provides, under the specific circumstances set out in Article 17(1) ECT, that the Investor may be denied the advantages of the ECT. In ruling that the Russian Federation could not deny Claimants the advantages of the ECT because it found the Russian Federation not to be a "third state" for these purposes, the Tribunal overlooked the threshold fact that the ECT does not apply at all to the State A – State B – State A relationship (host State – investor's State – host State's nationals), sometimes referred to as the "U-turn" construction.

267. Affording domestic investors international investment protections is also incompatible with Article 31(3)(c) VCLT, which requires that the interpretation of a treaty take into account "*any relevant rules of international law applicable in the relations between the parties*."[318] Investment treaties, like other international treaties, are not insulated from general international law. Absent the Contracting States' clear intention to derogate from general principles of international law, the ECT must be interpreted in harmony with, and not in conflict with, general international law.[319] This rule is consistent with Article 26(6) ECT, which expressly provides that "[a] *tribunal established under paragraph (4) shall decide*

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317 Hulley Interim Award, ¶¶412, 543-545; YUL Interim Award, ¶¶ 412, 544-546; VPL Interim Award, ¶¶ 412, 555-557.

318 *Case Concerning Oil Platforms* (Iran v. US), Judgment of Nov. 6, 2003, ICJ Rep. 2003, p. 161 (R-330), p. 182, ¶ 41 ("[u]nder the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Art. 31, para. 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force […]"); *Right of Passage over Indian Territory* (Portugal v. India), Preliminary Objections, 1957 I.C.J. Rep., p. 125 (R-225), p. 142 ("It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."); *Territorial Jurisdiction of the International Commission of the River Oder*, (Czech., Den., Fr., Germ., Gr. Brit. and Swed. v. Pol.), P.C.I.J. 1929 (ser. A) No. 23 (R-230), p. 26; OPPENHEIM'S INTERNATIONAL LAW, Vol. I, pp. 1274-1275 (R. Jennings & A. Watts eds. 9th ed. 1996) (R-256); I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (7th ed. 2008) (Exhibit RF-70), pp. 632-633; *Nasser Esphahanian* v. *Bank Tejarat*, Award No. 31-157-2 of March 29, 1983, 2 IUSCTR 157 (Exhibit RF-71), pp. 161-167; *Elettronica Sicula S.p.A.* (U.S. v. Italy), 1989 I.C.J. Rep., p. 15 (R-208).

319 *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of Oct. 3, 2006 (R-452), ¶ 97 ("The Tribunal concludes, as the tribunal concluded in the *Asian Agricultural products, Ltd. (AAPL) v. Democratic Socialist Republic of Sri Lanka*, Award of June 27, 1990, that the Treaty 'is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.'"); *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID ARB/87/3, Final Award of June 27, 1990 (R-451), ¶ 21.

the issues in dispute in accordance with this Treaty <u>*and*</u> *applicable rules and principles of international law*."

268. Under general international law, a national is not allowed to bring an international law claim against its own State. This prohibition includes companies in which nationals of the respondent State hold a controlling interest, as is true of Claimants here:

> "In some cases, juristic persons, and in particular joint-stock companies organized under the laws of a State other than that in which they operate, are not 'foreign' except in name only, because the controlling interest is held by nationals of the respondent State. In these circumstances it would certainly be wrong to allow such persons to exercise the right to bring a claim which, under [treaties that vest in an international body the competence to decide claims for reparation for injury suffered by individuals], is recognized in cases where the juristic person is foreign both in name and in fact."[320]

269. Investment treaty tribunals have confirmed the applicability of this fundamental principle to claims asserted under investment treaties. For example, *Phoenix v. Czech Republic* involved a restructuring of a domestic Czech investment that resulted in "*a rearrangement of assets within a family*."[321] The tribunal held that "*BITs are not deemed to create a protection for rights involved in purely domestic claims, not involving any significant flow of capital, resources or activity into the host State's economy*."[322] The tribunal relied on the object and purpose of investment treaties, which "*are signed to foster the flow of international investments*" and "*to intensify the economic cooperation to the mutual benefit of both countries*"[323] to exclude such investments from investment treaty protection.

270. Likewise, the arbitral tribunal in *ST-AD v. Bulgaria*, which involved an investment treaty claim against Bulgaria by a German company ultimately owned by a Bulgarian national, also confirmed that "*a national of a State, whether a natural or a legal person, cannot, in principle, sue its own State in an international arbitration*."[324]

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320 Third report by F. V. García Amador, YILC (1958) vol. II (R-234), p. 64, ¶ 13; *see also* L. Caflisch, La Protection des Sociétés Commerciales et des Intérêts Indirects en Droit International Public, p. 140 (1969) (R-242); L. Caflisch, *The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case*, 31 ZaöRV 179 (1971) (R-243); *S.S. "I'm Alone"* (Can. v. U.S.), Special Agreement, Convention of January 23, 1924, R.I.A.A Vol. III. 1610, 1617-18 (1935) (R-202); *Burthe v. Denis*, 133 U.S. 514 (1890) (R-201)

321 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of April 15, 2009 (RME-1078), ¶ 140.

322 *Phoenix v. Czech Republic* cit., ¶ 97.

323 *Ibid.*

324 *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction of July 18, 2013 (<u>Exhibit RF-72</u>), ¶ 408; *see also* ¶ 423 ("The Tribunal has to ensure that the BIT mechanism does not protect investments that it was not designed to protect, that is, domestic investments disguised as international investments or domestic disputes repackaged as international disputes for the sole purpose of gaining access to international arbitration.").

271. Similarly, the arbitral tribunal in *Loewen v. United States* held:

> "The format of NAFTA is clearly intended to protect the investors of one Contracting Party against unfair practices occurring in one of the other Contracting Parties. It was not intended to and could not affect the rights of American investors in relation to practices of the United States that adversely affect such American investors. Claims of that nature can only be pursued under domestic law and it is inconceivable that sovereign nations would negotiate treaties to supplement or modify domestic law as it applies to their own residents. Such a collateral effect on the domestic laws of the NAFTA Parties was clearly not within their contemplation when the treaty was negotiated."[325]

272. In the same spirit, investment treaty tribunals have declined jurisdiction over a locally incorporated company controlled by nationals of the respondent State which the parties have agreed to treat as a national of another Contracting State for purposes of the ICSID Convention. As the tribunal in *National Gas v. Arab Republic of Egypt* held earlier this year:

> "In the Tribunal's view, there is a significant difference under Article 25(2)(b) between (i) control exercised by a national of the Contracting State against which the Claimant asserts its claim and (ii) control by a national of another Contracting State. The latter situation violates no principle of international law and is consistent with the text of the ICSID Convention. On the other hand, the former situation violates the general limitation in Article 25(1) and the first part of Article 25(2)(b) of the ICSID Convention in regard to both Contracting States and nationals (including dual nationals). In other words, the latter is consistent with the object and purpose of the ICSID Convention; but the former is inconsistent: it would permit the use of the ICSID Convention for a purpose for which it was clearly not intended and it would breach its outer limits."[326]

273. In sum, when the investment and investor definitions in Articles 1(6) and (7) ECT are interpreted in light of the ECT's object and purpose and in accordance with general international law, as they must be, they do not cover investments made by nationals of the respondent State, such as Claimants' investments in Yukos.

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[325] *Loewen Group Inc. & Raymond Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award of June 26, 2003 (R-217), ¶ 223 [emphasis added].

[326] *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7/, Award of April 3, 2014 (Exhibit RF-73), ¶ 136; *see also TSA Spectrum De Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award of December 19, 2008 (Exhibit RF-74), ¶ 145.

274. Although the Tribunal acknowledged that granting ECT protection to Claimants is contrary to the ECT's object and purpose and the intentions of the ECT Contracting States,[327] it nevertheless granted their Russian investments, channeled through offshore shell companies, international protections under the ECT, including the right to arbitrate. To support this erroneous finding, the Tribunal relied upon the arbitral awards in *Saluka v. Czech Republic*,[328] *Plama v. Bulgaria*,[329] and *Petrobart v. Kyrgyz Republic*.[330] However, all of these cases concerned companies owned or controlled by parties from third states, i.e., State A – State B – State C relationships, of the type discussed above. None involved a claim brought by a shell company established and controlled by nationals of the respondent State as a conduit for their domestic investments, i.e., a State A – State B – State A relationship.

275. The only award relied upon by the Tribunal that did involve a company owned and controlled by nationals of the host State, *Tokios Tokeles v. Ukraine*, was rendered by a split tribunal, with a leading minority opinion by the presiding arbitrator (the eminent French Professor Prosper Weil). This case also is distinguishable because Tokios Tokeles, although owned by Ukranian nationals, was not a shell company, as are Claimants here, but rather had been established in Lithuania more than ten years before the alleged violations, was managed from Lithuania, and was engaged in the businesses of advertising, publishing and printing in Lithuania and outside its borders.[331] Moreover, the approach of that tribunal has also been correctly criticized by other investment treaty tribunals. For example, as the tribunal in *TSA Spectrum v. Argentina* stated:

> "This text may be interpreted in a strict constructionist manner to mean to that a tribunal has to go always by the formal nationality. On the other hand, such a strict literal interpretation may appear to go against common sense in some circumstances, especially when the formal nationality covers a corporate entity controlled directly or indirectly by persons of the same nationality as the host State.

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327 Hulley Interim Award, ¶ 433; YUL Interim Award, ¶ 434; VPL Interim Award, ¶ 490.

328 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award of March 17, 2006 (C-253), ¶ 1 (concerning a claim brought by a Dutch company ultimately owned by the Japanese bank Nomura).

329 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of August 27, 2008 (Annex (Merits) C 994), ¶ 95 (concerning a claim brought by a Cypriot company ultimately owned by a French national).

330 *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award of March 29, 2005(RME-3516), p. 63 (concerning a claim brought by Gibraltar company ultimately owned and/or controlled by UK nationals having "*substantial business activities*" in the UK).

331 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of April 29, 2004 (Annex (Merits)C 1525), ¶¶ 1-2, 37, 43.

> In the two cases of *Tokios Tokelés v. Ukraine and Rompetrol Group N.V. v. Romania*, the Tribunals adopted the strict constructionist interpretation in spite of control of the foreign companies by nationals of the host States. However, this interpretation has not been generally accepted and was also criticised by the dissenting President of the *Tokios Tokelés* Tribunal."[332]

276. In sum, the Tribunal lacked jurisdiction because the Russian Federation did not consent under Article 26 ECT to arbitrate disputes relating to investments made by offshore shell companies established and beneficially owned by Russian nationals as conduits for their investments in Russian companies in the Russian Federation. Accordingly, the Court should set aside the Yukos Awards under Article 1065(1)(a) on this ground.

E. Jurisdiction Ground 3 – The Tribunal Lacked Jurisdiction Pursuant To Article 21(1) ECT

(a) Introduction

277. The third reason that the Court should set aside the Yukos Awards under Article 1065(1)(a) DCCP is that Claimants' claims challenge the Russian Federation's "*Taxation Measures*" against Yukos, and those claims therefore are within the taxation carve-out from the Tribunal's jurisdiction under Article 21(1) ECT. This provision states that, "[e]*xcept 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*."[333] Taxation carve-outs are a common feature of investment treaties and serve the important function of preserving the Contracting States' sovereign taxation prerogatives and avoiding conflicts between investment and double taxation treaties.

278. Pursuant to the plain meaning of "*nothing in this Treaty*," the taxation carve-out in Article 21(1) ECT is an exception to Respondent's purported consent to arbitrate investment disputes under Article 26 ECT. Claims based on taxation measures are therefore outside the Tribunal's jurisdiction, unless Article 21 ECT itself provides otherwise.

279. The structure of Article 21 ECT is the result of lengthy negotiations among representatives of the negotiating States' tax authorities. Paragraph 1 – quoted above – contains the basic taxation carve-out. Paragraphs 2 to 5 contain "claw-backs" that reinstate certain rights and

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332 *TSA v. Argentine* cit. (Exhibit RF-74), ¶¶ 145-146.

333 Art. 21(1) ECT [emphasis added].

obligations with respect to certain taxation measures. Article 21(5)(a) provides that Article 13 ECT ("*Expropriation*") "*shall apply to taxes*." Article 21(5)(b)(i) provides that "*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 investor "*shall*" refer this issue to the tax authorities of its home State and those of the respondent State, and that, if the investor does not do so, the arbitral tribunal "*shall make a referral to the relevant Competent Tax Authorities*."

280. This mandatory referral procedure mirrors the mutual agreement procedures that apply under double taxation treaties, and ensures that arbitral tribunals have access to the specialized expertise of the Contracting States' tax authorities in assessing taxes. As shown in paragraphs 368 to 385 below, the Tribunal in the Yukos Awards violated its mandate under the ECT by refusing to make the referral to the relevant Competent Tax Authorities mandated by Article 21(5)(b) ECT, a violation that requires the Court to set aside the Yukos Awards pursuant to Article 1065(1)(c) DCCP even if the Court finds the Tribunal had jurisdiction over Claimants' contentions.

281. Article 21(7)(a) contains an illustrative list of "*Taxation Measures*" covered by Article 21 ECT, which clarifies that both international and domestic taxation measures are covered by the taxation carve-out.

282. In the Final Awards, the Tribunal rejected the Russian Federation's objection that the Tribunal lacked jurisdiction under Article 21 ECT over Claimants' claims for two reasons.

First, the Tribunal ruled that any taxation measure excluded from the ECT's scope due to the taxation carve-out in Article 21(1) ECT is reinstated by the expropriation claw-back in Article 21(5) ECT, based on the Tribunal's view that the term "*Taxation Measures*" in Article 21(1) ECT and the term "*taxes*" in Article 21(5) ECT are coextensive.[334]

Second, the Tribunal concluded that the taxation carve-out in Article 21(1) ECT does not apply here, because, in the Tribunal's view, it only applies to measures that are motivated by the purpose of raising general revenue for the State. According to the Tribunal, the assessments made against Yukos were not a *bona fide* exercise of the

[334] Final Awards, ¶ 1413.

Russian Federation's taxation powers,[335] but rather were intended to impose massive liabilities on Yukos,[336] and the subsequent measures to enforce those assessments were intended to drive it into bankruptcy.[337]

283. For the reasons detailed below, the Court should conclude that the Tribunal lacked jurisdiction because all of the measures the Tribunal found to be expropriatory were "*Taxation Measures*" or directly linked with "*Taxation Measures,*" and measures that were *sine qua non* for the Tribunal's finding that the Russian Federation expropriated Claimants' shares were not within the claw-back in Article 21(5)(a) ECT.

First, as shown at paragraphs 285 to 293, the Tribunal misinterpreted Article 21(1) ECT when it concluded that all "*Taxation Measures*" carved out from an ECT tribunal's jurisdiction are reinstated by the claw-back in Article 21(5)(b) ECT for expropriatory "*taxes*."

Second, as shown at paragraphs 294 to 301, the Tribunal adopted an unprecedented and mistaken interpretation of "*Taxation Measures*." Under the Tribunal's interpretation, the term "*Taxation Measures*," and thus the taxation carve-out, does not include measures that were motivated by "*a purpose extraneous to taxation,*" which is how the Tribunal characterized the measures taken against Yukos.[338] Under the standard that the Tribunal *should have* applied, the *"Taxation Measures"* at issue here are plainly within the Article 21(1) ECT taxation carve-out.

Third, as shown at paragraphs 302 to 343, these measures are within the taxation carve-out even under the Tribunal's mistaken standard because, among other things, they were supported by numerous provisions of Russian tax law and were motivated by a desire to raise public revenue, and the Tribunal's core findings on which it relied to conclude otherwise are unsupportable.

Fourth, as shown at paragraphs 344 to 350, both ECtHR rulings demonstrate that the *"Taxation Measures"* taken against Yukos were a legitimate exercise of the Russian

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335 Final Awards, ¶¶ 1430-1445.

336 Final Awards, ¶ 1444.

337 Final Awards, ¶ 1445.

338 Final Awards, ¶ 1442.

Federation's taxation power, and thus within the taxation carve-out of Article 21(1) ECT.

Fifth, and finally, as shown in paragraphs 351 to 361, the measures taken by the Russian authorities are consistent with internationally recognized tax policies and practices, including those followed in the Netherlands, further attesting to the fact that they are indeed "*Taxation Measures"* within the Article 21(1) taxation carve-out from the Tribunal's jurisdiction.

(b) The Tribunal Lacked Jurisdiction Because The Measures That It Found To Be Sine Qua Non For The Expropriation Are Within The Taxation Carve-Out in Article 21(1) ECT, And Not Reinstated Under Article 21(5) ECT

284. Taxation measures within the scope of the taxation carve-out in Article 21(1) ECT that are not reinstated by the expropriation claw-back in Article 21(5) ECT are outside Respondent's alleged consent to arbitrate in Article 26 ECT. Investment treaty tribunals have consistently dismissed claims based on taxation measures covered by a taxation carve-out for lack of jurisdiction.[339] The Court should conclude that the Tribunal's failure to rule that it lacked jurisdiction on this ground is plainly mistaken.

(b)(i) The Tribunal Misinterpreted The Terms "Taxation Measures" And "Taxes" When it Ruled They Are Coextensive

285. Under the basic rule of treaty interpretation contained in Article 31(1) VCLT, a treaty "*shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*." In concluding that the term "*Taxation Measures*" in Article 21(1) ECT and the term "*taxes*" in Article 21(5) are coextensive – and thus any taxation measure excluded from the ECT's scope due to the taxation carve-out is reinstated by the expropriation claw-back in Article 21(5) ECT – the Tribunal ignored the ordinary meaning of the terms used in Article 21 ECT, their context, and the object and purpose of the taxation carve-out, as well

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339 *EnCana Corporation v. Republic of Ecuador*, LCIA, UNCITRAL, Award (Feb. 3, 2006), ¶ 145 (R-328); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID ARB/04/19, Award (Aug 18, 2008), ¶ 188 (Annex (Merits) C 993); *El Paso Energy International Company v. The Argentine Republic*, ICSID ARB/03/15, Award (Oct. 31, 2011), ¶ 449 (Annex (Merits) C 1544); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID ARB/08/5, Decision on Jurisdiction (June 2, 2010), ¶ 249 (RME-992).

as the presumption that, in the absence of evidence to the contrary, a difference in wording connotes a difference in meaning.[340]

286. Neither the term "*Taxation Measures*" nor the term "*taxes*" is defined in the ECT. Pursuant to Article 21(7)(a) ECT, the term "*Taxation Measure*" "*includes*" domestic law and treaty provisions relating to taxes. The term "*includes*" is non-exhaustive,[341] and the ECT consistently uses "*includes*" for illustrative provisions,[342] while it uses the term "*means*" for definitions.[343] The ECT's *travaux préparatoires* confirm that the ECT Contracting Parties intentionally left the term "*Taxation Measures*" undefined.[344] The meaning of the terms "*Taxation Measures*" and "*taxes*" must therefore be determined pursuant to their ordinary meaning, read in context and in line with the purpose of Article 21 ECT.

287. As international courts and tribunals have confirmed,[345] the term "*measure*" in its ordinary meaning covers any legislative, executive or judicial action.[346] The ECT uses the term "*measure*" consistently in this ordinary meaning to refer collectively to legislative, judicial

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340 *Simon v. Court of Justice of the European Communities*, Court of Justice of the European Communities, Judgment (June 1, 1961), 32 I.L.R. 354 (1966), p. 357 (RME-1036) ("without evidence to the contrary, it must be presumed that every difference in wording connotes a difference in meaning, if the new wording leads to a different interpretation."); *Certain Expenses of the United Nations* (Art. 17, Paragraph 2, of the Charter), Advisory Opinion (July 20, 1962), 1962 I.C.J. Rep. 151, p. 159 (RME-1037); *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction (Oct. 17, 2006), ¶ 52 (RME-3414).

341 WEBSTER'S NEW WORLD DICTIONARY, 2nd ed., 1984, p. 711 (Annex C-1448, RME-1012); THE OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE, 1999, p. 495 (Annex C-1447, RME-1013); THE CENTURY DICTIONARY1985, VOL. 4, p. 3038 (Annex C-1446, RME-1014); NEW OXFORD DICTIONARY OF ENGLISH, OXFORD UNIVERSITY PRESS 2001, p. 924 (Annex C-1449, RME-1011).

342 *See*, e.g., Art. 1(6) and (12) ECT.

343 *See*, e.g., Art. 1(1) to (11), 1(13) to (14), 7(10), 19(3) and 25(2) ECT.

344 *See* Memorandum from the Chairman of the Legal Sub-Group to the Chairman of Working Group II, Document No. LEG-14 (Mar. 5, 1993), pp. 3-4 (RME-1020, R-331) (confirming that "'*taxation measure' is identified only by illustration*" and that Art. 21(7)(a) ECT "*is an illustrative list, not a definition*."); Canada Department of Finance, Tax Policy Branch: Fax from A. Castonguay to F. Mullen *et al*. (Mar. 19, 1993), p. 4 (RME-1010), (R-858) ("*it would be counterproductive to attempt to come up with anything more precise*"); Telefax from Ole Kirkvaag, Advisor - Norwegian Royal Ministry of Finance and Customs, to Leif Ervik, European Energy Charter Secretariat (Mar. 19, 1993), p. 3 (Annex C-986) ("[there is no] *need for a closed definition of tax measures*."); Memorandum from the Ministère du Budget of France to the ECT Secretariat (Mar. 19, 1993), p. 3 (Annex (Merits) C-1045) and European Energy Charter Conference Secretariat, Document 30/93 - CONF 54 (April 1, 1993), p. 4 (RME-3429), (Annex C-988) (France 's proposal to replace "*includes*" with "*means*," which was not accepted).

345 *Fisheries Jurisdiction (Spain v. Canada)*, Judgment on Jurisdiction, 1998 I.C.J. Rep. 432 (Dec. 4, 1998), p. 460 ¶ 66 (RME-1028); *see also The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID ARB(AF)/98/3, Decision on hearing of Respondent's objection to competence and jurisdiction (Jan. 5, 2001), ¶ 47 (RME-1021); *Burlington v. Ecuador* cit., ¶ 168 (RME-992).

346 WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3rd College Ed. 1988) ("*a procedure; course of action; step*" and "*a legislative bill, resolution, etc.* […]."))(RME-1025);OXFORD ENGLISH DICTIONARY (online version), ("*plan, a course of action*" and specifically a "*plan or course of action intended to attain some object; a suitable action* […] *legislative enactment proposed or adopted*.")(RME-1026); Longman Dictionary Of Contemporary English (5th ed. 2009) ("*an action, especially an official one, that is intended to deal with a particular problem*.")(RME-1027).

and executive measures,[347] while the narrower terms "*laws*" or "*laws and regulations*" are used to refer to measures of general application only.[348] The term "*taxation*" in its ordinary meaning equally encompasses tax legislation, enforcement and collection.[349] This ordinary meaning of the term "*taxation measure*" is consistent with the purpose of taxation carve-outs – to preserve a State's sovereign taxation powers.[350]

288. By contrast, in its ordinary meaning, a "*tax*" is a charge or contribution imposed by the State for public purposes, and does not include enforcement and collection measures.[351] The term "*taxes*" is generally not defined in international treaties, including tax treaties.[352] Tax treaties instead refer to the definition of "*taxes*" under the domestic law of the State that imposes the tax.[353] Russian law defines a tax as a mandatory payment collected from legal and natural persons to provide financial support to the government, excluding default interest and fines, which are defined separately as amounts payable for late payment and penalties for a tax violation.[354]

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347 *See*, e.g., Preamble; Art. 7(1) and (2)(c); 10(1) and (9); 13(1); 20(1); and 26(8) ECT.

348 *See*, e.g., Art. 8(1); 10(9); 11(1); and 14(4) ECT.

349 BLACK'S LAW DICTIONARY (9th ed. 2009) (RME-1022) ("*The imposition or assessment of a tax; the means by which the state obtains the revenue required for its activities.*"); Oxford English Dictionary (Online Version), http//www.oed.com (RME-1023) ("*The imposition or levying of taxes (formerly including local rates); the action of taxing or the fact of being taxed; also transf. the revenue raised by taxes.*"); Webster's New World Dictionary Of American English (3rd College ed. 1988) (RME-1024) ("*1 a taxing or being taxed 2 a tax or tax levy 3 revenue from taxes.*").

350 *See El Paso v. Argentina* cit., ¶ 730 (Annex (Merits) C 1544). *See also Opinion on the Scope of the Term 'Taxation Measures' in the Energy Charter Treaty* of Professor D.M. Berman dated January 22, 2007 filed by Respondent in the arbitration, ¶ 10 (explaining that the taxation carve-out in the 1984 US Model BIT was designed to preserve the freedom of a contracting party to impose, administer, and enforce its own domestic tax laws, and to ensure that the US BITs defer completely to the dispute resolution procedures of tax treaties); *Nations Energy Inc and others v. Panama*, ICSID ARB/06/19, Award (Nov. 24, 2010), ¶¶ 480-482 (RME-1032) (holding that the purpose of the taxation carve-out in the 1982 Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments is to preserve the State's prerogatives in taxation matters).

351 *See* BLACK'S LAW DICTIONARY (9TH ED.) (RME-3415) ("a charge, usu. monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue"); OXFORD ENGLISH DICTIONARY (Online Version), http//www.oed.com (RME-3416) ("[a] compulsory contribution to the support of government, levied on persons, property, income, commodities, transactions, etc., now at fixed rates, mostly proportional to the amount on which the contribution is levied"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (RME-3417) ("a usu. pecuniary charge imposed by legislative or other public authority upon persons or property for public purposes,"); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN (RME-3418) ("a compulsory payment, usually a percentage, levied on income, property value, sales, prices, etc. for the support of a government.").

352 A notable exception is Art. 3(1)(b) of the 1988 Convention on Mutual Administrative Assistance in Tax Matters, which defines "*tax*" as "*any tax or social security contribution to which the Convention applies pursuant to Article 2*."

353 *See*, e.g., 1998 Agreement between the Government of the Republic of Cyprus and the Government of the Russian Federation for the Avoidance of Double taxation with Respect to Taxes on Income and on Capital, Art. 3(2) (Annex (Merits) C-916) and 2010 Articles of the OECD Model Tax Convention on Income and Capital, Art. 3(2) (RME-1017), which are also referenced in Art. 21(5) ECT; 1994 General Agreement on Trade in Services, Note 6 to Art. XIV(d), the negotiations of which overlapped with those of the ECT (RME-4644) (interpretive footnote to the carve-out providing that tax terms or concepts in Art. XIV(d) are defined as they are under the domestic law of the State taking the concerned measure).

354 Tax Code of the Russian Federation, Part One, No. 146-FZ (July 31, 1998) (as amended), Art. 8 (RME-551); Arts. 75(1) and (3), 114(1) (RME-3419).

289. The Tribunal ignored this fundamental difference between what the taxation carve-out applies to – "*Taxation Measures"* – and what the expropriation claw-back applies to – "*taxes"* – in favor of a policy argument of the Tribunal's own making. According to the Tribunal, if the meaning of "*taxes*" were narrower than that of "*Taxation Measures*," tax collection and enforcement measures would be excluded from the ECT, and thus the ECT would not protect investors from expropriatory taxation.[355] But that approach is contrary to the well-established rule of treaty interpretation that the plain meaning of a treaty, and limitations in a treaty's text, cannot be overridden by an interpretation that places undue weight on an overly broad interpretation of the treaty's purpose. In the words of the International Court of Justice, "[r]*ights cannot be presumed to exist merely because it might seem desirable that they should*,"[356] and the Tribunal's approach has been rejected by other investment treaty tribunals[357] and widely criticized by commentators.[358]

290. Contrary to the Tribunal's surmise, Contracting States are entitled to, and often do, withhold investment treaty protections, particularly in the field of taxation. Accordingly, some investment treaties, such as the Russia-Denmark bilateral investment treaty ("BIT"),

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355 Final Awards ¶ 1413.

356 *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) (Second Phase)*, Judgment (July 18, 1966), 1966 I.C.J. Rep. 6, at p. 48 ¶ 91 (RME-1004); *Competence of Assembly regarding admission to the United Nations*, Advisory Opinion of March 3rd 1950, I.C.J. Rep. 1950, 4, at p. 8 (Exhibit RF-75).

357 *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of Philippines*, ICSID ARB/03/25, Award (Aug. 16, 2007), ¶ 340 (RME-1006) ("It is also clear that the parties were anxious to encourage investment, which was the *raison d'être* of the treaty. But while a treaty should be interpreted in the light of its objects and purposes, it would be a violation of all the canons of interpretation to pretend to use its objects and purposes, which are, by their nature, a deduction on the part of the interpreter, to nullify four explicit provisions."); *Plama Consortium Limited v. Bulgaria*, ICSID ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005), 20 ICSID Rev. 262 (2005), 323 ¶ 193 (RME-1007); *U.S.A. and The Federal Reserve Bank of New York v. Iran and Bank Markazi*, IUSCT, Case A28, Decision (Dec. 19, 2000), ¶ 58 (RME-1008); WTO, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany*, Report of the Panel (July 3, 2002), ¶ 8.46 (RME-1009).

358 I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2nd ed. 1984), p. 131 (RME-1003): "There is also the risk that the placing of undue emphasis on the 'object and purpose' of a treaty will encourage teleological methods of interpretation. The teleological approach, in some of its more extreme forms, will even deny the relevance of the intentions of the parties; it in effect is based on the concept that, whatever the intentions of the parties may have been, the convention as framed has a certain object and purpose, and the task of the interpreter is to ascertain that object and purpose and then interpret the treaty so as to give effect to it."; *see also* A. MCNAIR, THE LAW OF TREATIES (1961), p. 383 (RME-1001) ("[I]t is the duty of a tribunal to ascertain and give effect to the *intention of the parties as expressed in the words used by them in the light of the surrounding circumstances.* Many treaties fail – and rightly fail – in their object by reason of the words used, and tribunals are properly reluctant to step in and modify or supplement the language of the treaty.") [italics in original]; M. K. Yasseen, *L'interprétation des traités d'après la Convention de Vienne sur le droit des traités*, 151 Rec. des Cours 1 (1976), p. 58 (RME-1002) ("L'interprétation à la lumière du but et de l'objet comme le prévoit la Convention de Vienne ne diminue pas la valeur du texte. L'objet et le but ne peuvent pas être la source directe et unique d'une disposition. Ils ne sont qu'un élément entre autres, en fonction duquel le sens susceptible d'être attribué aux termes doit être examiné. Cet examen peut d'ailleurs ne pas aboutir nécessairement à écarter une solution qui ne semble pas être en harmonie avec l'objet et le but du traité s'il paraît évident que cette solution est celle que les parties veulent. L'objet et le but du traité peuvent en effet ne pas être l'objet et le but de toutes les dispositions du traité. Certains traités peuvent même avoir plus d'un seul objet et d'un seul but étant donné les questions très variées sur lesquelles ces traités portent et les solutions nuancées qu'ils consacrent.").

the Russia-Hungary BIT and the France-Singapore BIT, exempt taxation measures from investment treaty protections and do not reinstate any of those protections.[359]

291. Article 21 ECT first exempts taxation measures from the ECT's scope and then reinstates the expropriation provision, but only with respect to *"taxes,"* a subcategory of "*Taxation Measures.*" The Tribunal was required to respect the ECT Contracting Parties' deliberate choice in this regard. Accordingly, the Court should reject the Tribunal's misinterpretation of Article 21 ECT and its conclusion based on its misinterpretation that any taxation measure excluded by the taxation carve-out in Article 21(1) ECT is reinstated by the expropriation claw-back for "*taxes*" in Article 21(5) ECT.

(b)(ii) Measures Found To Be Sine Qua Non For The Alleged Expropriation Are "Taxation Measures" Or Are Linked With "Taxation Measures," And Thus Within The Taxation Carve-Out Of Article 21(1) ECT

292. Article 21(1) ECT provides that "*nothing in this Treaty shall create rights or impose obligations* <u>*with respect to Taxation Measures*</u> *of the Contracting Parties*."[360] In its ordinary meaning, the term "*with respect to*" is broad in effect and embraces any direct or indirect link with "*Taxation Measures.*" For example, when the UK High Court reviewed the application of the taxation carve-out in the US-Ecuador BIT by the arbitral tribunal in *OEPC v. Ecuador*, it held:

> "The words <u>'with respect to'</u> in their ordinary meaning connote 'as concerns', or 'with reference to', or 'in connection with' and so are broad in effect."[361]

293. Here, the Tribunal held that Claimants' shares in Yukos were unlawfully expropriated through a series of measures, including, in particular, the tax assessments and related fines imposed on Yukos and the auction of YNG to pay Yukos' unpaid taxes.[362] All of these measures are "*Taxation Measures*" or linked with "*Taxation Measures*" that, pursuant to

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[359] 1993 Agreement between the Government of the Russian Federation and the Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, Art. 11(3) (RME-3449); 1995 Agreement between the Government of the Russian Federation and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments, Art. 11(2) (RME-3450); 1975 Agreement between the Government of the French Republic and the Government of the Republic of Singapore for the Promotion and Reciprocal Protection of Investments, with three exchanges of letters, Exchange of letters No. 2 (RME-3457).

[360] [emphasis added].

[361] *The Republic of Ecuador v. Occidental Exploration & Production Co.*, QB Division, Comm. Court Case No. 04/656, Judgment (Mar. 2, 2006), [2006] EWHC 345 (Comm.), ¶ 98 (RME-999) [italics in original].

[362] Final Awards, ¶¶ 1578-1585.

Article 21(1) ECT, are outside the scope of the Russian Federation's alleged consent to arbitrate, and thus outside the Tribunal's jurisdiction. Not all of these "*Taxation Measures*" are, however, "*taxes*." Critically, measures that the Tribunal found to be *sine qua non* for the expropriation,[363] in particular, those involving the auction of YNG, are tax collection measures, not "*taxes*." The Tribunal's jurisdiction over these tax collection measures is therefore not reinstated by the expropriation claw-back in Article 21(5) ECT, and the Tribunal lacked jurisdiction over Claimants' claims.

(c) The Tribunal Also Lacked Jurisdiction Because The Taxation Carve-Out In Article 21(1) ECT Applies To Any Measure That Implements Tax Legislation, As Did The Taxation Measures Here

294. The Tribunal also erred in holding that it had jurisdiction to hear Claimants' claims based on the Tribunal's conclusion that the taxation carve-out in Article 21(1) ECT does not apply to measures taken "*under the guise of taxation*" and that are "*motivated not by the aim of raising public revenue but by a purpose extraneous to taxation*,"[364] as the Tribunal found with respect to the measures taken against Yukos.[365] However, the standard that the Tribunal applied – that Article 21(1) ECT does not apply to measures taken for "*a purpose extraneous to taxation*" – is one of the Tribunal's own devising and is unsupported by the ECT's text or relevant jurisprudence. Under the standard that the Tribunal *should have* applied, the taxation carve-out in Article 21(1) ECT was applicable to the taxation measures taken by the Russian authorities. Finally, even if the Court were to apply the Tribunal's erroneous standard, the "*Taxation Measures*" at issue here are plainly within the scope of the taxation carve-out of Article 21(1) ECT.

(c)(i) The Tribunal Applied An Unprecedented And Improper Standard, And Under The Standard The Tribunal Should Have Applied, The "Taxation Measures" Here Plainly Are Within The Article 21 Taxation Carve-Out

295. The term "*Taxation Measures*" in Article 21(1) ECT refers to – and thus the taxation carve-out applies to – *any* taxation measure, whether lawful or unlawful, under domestic or international law. Indeed, the purpose and effect of the taxation carve-out is to exempt "*Taxation Measures*" from scrutiny under the ECT's substantive standards.

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363 Final Awards, ¶¶ 1038 1579.

364 Final Awards, ¶¶ 1407, 1442.

365 Final Awards, ¶ 1407, 1444-1445.

296. The Tribunal's differentiation between "*Taxation Measures"* that are – and are not – taken for "*extraneous*" reasons, and its ruling that the Article 21(1) ECT taxation carve-out applies only to those "*Taxation Measures*" that are *not* taken for "*extraneous*" reasons under a guise of taxation measures, finds no support in the text of Article 21(1) ECT or in the jurisprudence of investment treaty tribunals. To the contrary, as stated in an article by Professor Park, which the Tribunal endorsed,[366] the purpose of the mandatory referral to the competent tax authorities that is required by Article 21(5) ECT *"whenever"* an issue arises as to whether a *tax* constitutes an expropriation is "*to distinguish normal and abusive taxes*."[367] Abusive *taxes* are thus covered by the claw-back in Article 21(5) ECT. They therefore cannot be outside the Article 21(1) ECT carve-out, because the exception to the carve-out cannot include measures that are not covered by the carve-out itself.

297. The standard that the Tribunal should have applied to determine whether a measure falls within the scope of a taxation carve-out was correctly articulated by the tribunal in *EnCana v. Ecuador*. Under that standard, a measure falls within a taxation carve-out if it is "*sufficiently clearly connected to a taxation law or regulation (or to a procedure, requirement or practice of the taxation authorities in apparent reliance on such a law or regulation)*,"[368] and a measure falls outside the scope of the carve-out if it is "*an arbitrary demand unsupported by any provision of the law of the host State*."[369]

298. Although the Tribunal purported to rely on the *EnCana* award as authority for the Tribunal's conclusion that a tax demand is arbitrary if it is "*effectively motivated not by the aim of raising public revenue but by a purpose extraneous to taxation,*" that conclusion is inconsistent with the *EnCana* tribunal's standard. According to the *EnCana* tribunal, a measure is outside the scope of the taxation carve-out only if it is "*unsupported by any provision of the law of the host State*." The *EnCana* tribunal elaborated on this standard as follows:

> "Even if [the tax authority] has applied the VAT rules in an 'idiosyncratic' manner, this does not lead to the conclusion that its conduct falls outside the scope of the exclusion for taxation measures. The demands were made by authorised tax officials

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366 Final Awards, ¶ 1423.

367 William Park, *Tax Arbitration and Investor Protection*, INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY (G. Coop & C. Ribeiro eds., 2008), pp. 115, 131 (RME-3410) [emphasis added].

368 *EnCana v. Ecuador* cit., ¶ 142 (R-328).

369 *Ibid*; *see also Nations Energy Inc and others v. Panama* cit., ¶¶ 480-482 (RME-1032) (holding that to restrict the scope of a taxation carve-out is contrary to the object and purpose of the taxation carve-out).

in purported compliance with the relevant law; they were subject to review by the tax courts and eventually by the Taxation Chamber of the Supreme Court. They bear all the marks of a taxation measure - whether a lawful one under Ecuadorian law it is not for the Tribunal to decide."[370]

299. The tribunal in *Burlington v. Ecuador* similarly confirmed that even claims alleging that a State used its taxation power "*in bad faith*" are excluded from Ecuador's consent to arbitrate under the taxation carve-out in the US-Ecuador BIT.[371] As the Tribunal acknowledged here,[372] Burlington claimed that Ecuador had used its taxation power for extraneous reasons – to force Burlington to surrender its contractual rights under production sharing contracts.[373] The Tribunal seems to have accepted that Burlington's claim was predicated on Ecuador's use of its taxation power for extraneous reasons, but asserted that "[t]*here was no suggestion in that case that Ecuador had taken any measures against the investor that were entirely unrelated to the raising of public revenue*"[374] – an assertion that finds no support in *Burlington*.[375]

300. There is in any event no basis for finding, under the *EnCana* standard and the circumstances present here, that the "*Taxation Measures*" taken by the Russian authorities are "*unsupported by any provision of* [Russian] *law*." To the contrary, the Tribunal: (a) agreed that "the bad-faith taxpayer doctrine" on which Yukos' corporate profit tax assessments were based "*existed in the Russian Federation*" at the time the assessments were made; (b) agreed that "*even Claimants acknowledged the existence of the doctrine*;"[376] (c) upheld the assessments made on account of Yukos' Lesnoy and Trekhgorniy sham trading shells; and (d) agreed that VAT was assessed against Yukos in conformity with applicable Russian law.[377]

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370 *EnCana v. Ecuador* cit., ¶ 146 (R-328) [emphasis added].

371 *Burlington v. Ecuador* cit., ¶ 207 (RME-992) ("Claimant's second fair and equitable treatment claim is that Respondent used its tax power in bad faith in order to force Claimant to surrender its rights under the PSCs. In the view of the Tribunal, this claim ostensibly challenges Law 42, as well as Respondent's tax power, and therefore raises 'matters of taxation'." [emphasis added].

372 Final Awards, ¶ 1443.

373 *Burlington v. Ecuador* cit., ¶¶ 175, 207 (RME-992).

374 Final Awards, ¶ 1443 [emphasis added].

375 *Burlington v. Ecuador* cit., ¶ 207 (RME-992).

376 Final Awards, ¶¶ 494, 611.

377 Final Awards, ¶¶ 593-598.

301. The Court should thus conclude that the taxation carve-out in Article 21(1) ECT applies to Claimants' claims.

(c)(ii) Even Under The Tribunal's Mistaken Standard, The Taxation Measures Here Are Within The Article 21(1) ECT Carve-Out Because They Were Motivated By The Russian Authorities' Desire To Raise Public Revenue And Were Supported By Numerous Provisions Of Russian Tax Law

302. Even if the Court were to apply what has been shown in the previous section to be the Tribunal's mistaken standard, it would need to conclude that the Tribunal erred in ruling under that standard that the Russian authorities' "*Taxation Measures*" were "*motivated not by the aim of raising public revenue but by a purpose extraneous to taxation.*"

First, the Tribunal's own factual findings establish that Yukos' tax assessments were neither "*entirely unrelated to the raising of public revenue*" nor for "*a purpose extraneous to taxation.*" To the contrary, as the Tribunal itself found, the assessments were based on well-settled principles of Russian tax law.[378] And while the Tribunal erroneously found that there was no prior *judicial* precedent for the attribution to Yukos of the income of its sham trading shells, even here the Tribunal agreed that the Russian "*'anti-abuse' doctrine would be eviscerated if the tax authorities were unable to attribute*" the trading companies' "*income to the person responsible for the wrongdoing*,"[379] and acknowledged that there were then pending cases not involving Yukos that ultimately upheld this remedy.[380] It is also undisputed that all of the taxes levied against and collected from Yukos were deposited with the Treasury of the Russian Federation and used for public purposes.

Second, as detailed below, the Tribunal overlooked important factual evidence and effectively overruled applicable Russian law when it held that the taxation measures taken by the Russian authorities were for a "*purpose extraneous to taxation*" in connection with its conclusions that (a) the Russian Federation had failed to submit

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378 Final Awards, ¶¶ 497, 614 ("at the time of the issuance on 29 December 2003 of the Field Tax Audit Report, the 'bad faith taxpayer' doctrine […] had been recognized and applied in some Russian court decisions" and it was therefore "open to the Russian authorities and the courts to rely on the 'bad faith taxpayer' doctrine to challenge a tax evasion scheme at the time of the Yukos tax assessments, whether based on 'substance over form' or 'business purpose'"); Final Awards, ¶¶ 593, 685-686 (a "zero percent VAT" on exports "is not automatic, but available when the taxpayer files a monthly or quarterly VAT return," a requirement with which Yukos failed to comply and which the Tribunal found to have "practical justification[s]").

379 Final Award, ¶ 625.

380 Final Awards, ¶¶ 620(1), 621.

any evidence that the Mordovian trading shells were shams and that Yukos had informed the Russian authorities of its Mordovian tax scheme, and at that time no one had objected, (b) there was no prior judicial precedent for the attribution to Yukos of the sham trading shells' income, and (c) Yukos' VAT assessments were improper.

303. It bears noting that, in ruling on the propriety of the Russian Federation's taxation measures, the Tribunal acknowledged that its mandate under the ECT did not permit it to "*sit as a court applying Russian law*," and it denied having done so.[381] Nonetheless, it repeatedly relied upon its own *de novo* interpretations of Russian tax law, in the process effectively overruling numerous Russian court decisions at multiple levels.

304. Claimants also did not proffer a Russian tax expert as a witness. As a result, the only expert evidence of Russian tax law heard by the Tribunal was that provided by the Russian Federation's expert, Mr Oleg Konnov. He testified without expert contradiction that there was a sound basis in Russian law for finding that Yukos had evaded Russian corporate profit taxes by attributing its sales of oil to the company's sham trading shells in the low-tax regions, including Mordovia, and that Yukos was properly assessed VAT after it failed to make appropriately amended filings to qualify for a zero VAT rate in its own name as the real exporter of the oil.[382] The Tribunal, none of whose members is a Russian tax lawyer, nonetheless impermissibly preferred its own unaided interpretation of Russian tax law to Mr Konnov's expert opinion and the decisions of the Russian courts.

(a) The Tribunal's Own Factual Findings Confirm That The Measures Taken By The Russian Authorities Were Supported By Numerous Provisions Of Russian Tax Law, For The Purpose Of Raising Public Revenue

305. Yukos' tax assessments were based on the Russian authorities' application of Russia's anti-tax avoidance principles that reject "*form over substance*." The Tribunal found that these principles were well established under Russian law, and that the Russian authorities had an appropriate basis for applying them to Yukos. Specifically, the Tribunal found that the tax authorities' investigation of Yukos' Lesnoy and Trekhgorniy trading shells was based on Russian tax law's "*jurisprudential 'good faith taxpayer' doctrine ('substance over form' or*

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381 Final Awards, ¶ 499.

382 *See*, e.g., Second Konnov Report, ¶¶ 84-97; Resp. Rej., ¶¶ 705-719.

'anti-abuse' doctrine),"[383] and that these doctrines had "*existed*" since at least "*2002*." The Tribunal also referred to the views expressed in 2002 by the "*eminent Russian tax lawyer, Mr Sergey Pepeliaev, who later represented Yukos in the Russian tax litigation*"[384] – "*'If it appears that parties act both unreasonably and not in good faith* <u>*then this constitutes a ground for reassessment*</u> *of the parties' tax liabilities.*"'[385]

306. To the same effect is the Tribunal's finding that the *"'bad faith taxpayer' doctrine* […] *had been recognized and applied in some Russian court decisions*"[386] prior to the issuance of Yukos' first tax audit report. According to the Tribunal, it was therefore "*open to the Russian authorities and the courts to rely on the 'bad faith taxpayer' doctrine to challenge a tax evasion scheme at the time of the Yukos tax assessments, whether based on 'substance over form' or 'business purpose.'*"'[387] Indeed, as the Tribunal found, "*the circumstances surrounding Yukos' tax optimization scheme suggest* […] *that this is precisely the kind of case in which the doctrine could be relied upon by the authorities and the judiciary,*"[388] and no other Russian oil company "*breached the legislation and abused the tax law regimes as the Tribunal has found Yukos did through the sham-like nature*" of its trading operations.[389]

307. The Tribunal likewise found that Yukos' VAT assessments were based on well-established principles of Russian tax law. Specifically, the Tribunal concluded that:

(a) the "*approach taken by the Tax Ministry*" for VAT purposes was "*consistent*" with the approach it took for profit tax purposes in that the trading shells' revenue "*was recognized as revenue of Yukos for both profit tax and VAT purposes;*"[390]

(b) a "*zero percent VAT*" on exports "*is not automatic, but available when the taxpayer files a monthly or quarterly VAT return;*"[391] and

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383 Final Awards, ¶ 494. See also Final Awards, ¶ 611 ("[T]he Tribunal notes that […] the 'bad-faith taxpayer doctrine existed in the Russian Federation at the time of the issuance of the 2000 Tax Audit in December 2003 and, therefore, at the time of subsequent audits as well. Indeed, even Claimants acknowledged the existence of the doctrine").

384 Final Awards, ¶ 498.

385 Final Awards, ¶¶ 318-319, 498 [emphasis added].

386 Final Awards, ¶¶ 319, 497.

387 Final Awards, ¶ 614.

388 Final Awards, ¶ 614.

389 Final Awards, ¶ 1611.

390 Final Awards, ¶ 668; Resp. Rej., ¶¶ 705-708; Respondent's Post-Hearing Brief, ¶ 39.

(c) the "*Russian Tax Code requires the VAT return to be filed by the 'taxpayer,'*"[392] and "*Yukos had not filed the return itself.*"[393]

308. While the Tribunal did ultimately hold Yukos' tax assessments to have been improper because, in its view, there was no prior judicial precedent for attributing the sham trading shells' income to Yukos as the real party in interest – an erroneous reading of Russian law, as is shown at paragraphs 325 to 334 below – the Tribunal did acknowledge that this remedy was then under consideration by Russia's courts in other cases not involving Yukos, and was ultimately upheld. When this acknowledgement is coupled with the Tribunal's findings with respect to the existence of the doctrine in Russian law that rejects form over substance and its appropriate application to Yukos' tax scheme, it simply cannot be said, even on the Tribunal's own incorrect view of Russian tax law, that Yukos' tax assessments were not supported by *any* provision of Russian law.

309. The Tribunal's separate ground for rejecting Yukos' VAT assessments was based on the Tribunal's finding that the Russian authorities should *not* have applied a provision of Russian law that the Tribunal itself found to be applicable to Yukos, and thus provides even less support for the Tribunal's holding that Yukos' assessments were not *"Taxation Measures."* According to the Tribunal, the Russian authorities should have accepted Yukos' admittedly improper VAT returns, because the Tribunal itself found it "*difficult to understand*" why Russia's VAT law – a law of general application – did not make a "*practical*" exception for Yukos in the circumstance present here. This issue, and the Tribunal's related erroneous findings, are discussed at paragraphs 335 to 343 below.

310. The Tribunal also found that Yukos was aware of the illegality of its tax evasion scheme, and that the company would incur substantial tax liabilities, and possibly criminal liability as well, if its scheme was ever discovered. Specifically, the Tribunal found that Yukos' senior managers were aware that its tax evasion scheme – always referred to internally as the company's tax *optimization* scheme[394] – was "*vulnerable*" to challenge, and that a tax challenge would result in "*substantial tax claims*," "*significant losses*," and "*even criminal*

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391 Final Awards, ¶ 593; Resp. Rej., ¶ 712.

392 Final Awards, ¶ 670; Resp. Rej., ¶¶ 712-714; Respondent's Post-Hearing Brief, ¶ 39.

393 Final Awards, ¶ 596; Resp. Rej., ¶ 714; Respondent's Post-Hearing Brief, ¶¶ 39-40.

394 *See*, e.g., Svetlana Bakhmina and Dmitry Gololobov, *Law and Rights: Oligarchs and Legal Counsel*, Vedomosti (Aug. 19, 2010), p. 2 (RME-1476). See *also* Fax from Natalia Kuznetsova of PwC to Stephen Wilson of PwC dated July 23, 2002 attaching an excerpt from Yukos' Draft From F-1, pp. 133-134 (RME-1477).

liability."[395] According to the Tribunal, "*within the senior management of Yukos, there were a number of persons who were aware that Yukos was vulnerable in respect of certain facets of its tax optimization scheme*,"[396] and had "*concerns about the legality of its trading operations*"[397] due to their "*sham-like nature*."[398]

311. The Tribunal in addition found that Yukos implemented an "*extensive corporate restructuring*" of its trading operations[399] as a result of its sham shells having "*run afoul of the tax authorities*."[400] As part of this corporate restructuring, Yukos liquidated the shells multiple times over and reincorporated them thousands of miles away in other low-tax regions in order to avoid detection by the Russian authorities, a practice that the Tribunal found "*does raise troubling questions which were never answered to the satisfaction of the Tribunal*."[401] The Tribunal also took note of the "*e-mail from Mr Maruev (from* [Yukos'] *Treasury Department) to employees in 2002 to 'clean your folders' of references to the Lesnoy trading companies*."[402]

312. The Tribunal specifically referred to several documents in which Yukos' senior managers acknowledge that the company's tax scheme was illegal and would give rise to very substantial tax liabilities, including the following:

(a) an internal Yukos memorandum of April 22, 2002, in which the Deputy Head of Yukos' Corporate Finance Department "*expressed his concern that if Yukos' affiliation with the trading entities were included in the* [company's planned but later abandoned] *SEC filing, that information 'may be used by the Russian tax authorities to challenge* [Yukos'] *approach to certain transactions and, consequently, <u>will result in substantial tax claims against the Company'</u>*;"[403]

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395 Final Awards, ¶ 513.

396 Final Awards, ¶ 494.

397 Final Awards, ¶ 488.

398 Final Awards, ¶¶ 488, 515 ("[T]here were audit reports and memoranda that attest to an investigation of whether the practices of some of the Yukos trading companies in those regions were abusing the system, since those companies were acting in conformity with the relevant legislation in form only and not in substance").

399 Final Awards, ¶¶ 489, 511.

400 Final Awards, ¶ 604.

401 Final Awards, ¶ 604.

402 Final Awards, ¶¶ 405, 491.

403 Final Awards, ¶ 491 [emphasis added].

(b) an email sent by one of Yukos' auditors to the company's International Tax Director, proposing that the following language be deleted from its draft SEC filing: *"We use tax optimization mechanisms that may be challenged by the tax authorities"* and *"If a number of regional tax incentives we have used to reduce our tax burden are successfully challenged by the Russian tax authorities, <u>we will face significant losses associated with the additionally assessed amount of tax and related interest and penalties</u>;"*[404] and

(c) an internal email of December 2001 from Yukos' General Counsel to the company's Chief Accountant, "*advising* [her] *not to draw the attention of the authorities to the use of tax incentives in the ZATO Lesnoy, since '<u>an investigation into the legality of the use of the incentives</u> […] <u>entails substantial risks, including under criminal law</u>.* ""[405]

313. On this basis, the Tribunal concluded (a) that no other company "*breached the legislation and abused the tax law regimes as the Tribunal has found Yukos did through the sham-like nature*" of its trading operations,[406] (b) that Yukos was aware of the illegality of its scheme, (c) that Yukos actively sought to prevent the discovery of its scheme, and (d) that Yukos expected that the discovery of its scheme would lead to "*substantial tax claims*," "*significant losses*," and even "*criminal liability*."[407] The Tribunal nonetheless erroneously held that the substantial taxes and tax claims anticipated by Yukos' managers, when actually assessed by the Russian authorities, were not "*Taxation Measures*."

314. The Tribunal was thus also in error in finding that the measures taken by the Russian authorities were "*<u>entirely unrelated</u> to the raising of public revenue.*"

(b) The Tribunal's Core Findings On Which It Based Its Conclusion That Yukos' Assessments Were Unjustified Under Russian Law, And Thus Not Intended To Collect Taxes But Rather to Bankrupt Yukos, Are Unsupportable

315. The Tribunal's own factual findings were therefore not sufficient to establish the measures taken by the Russian authorities were outside the taxation carve-out of Article 21(1) ECT.

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404 Final Awards, ¶ 491 [emphasis added].

405 Final Awards, ¶ 491 [emphasis added].

406 Final Awards, ¶ 1611.

407 Final Awards, ¶¶ 513-515.

Moreover, even if one were to accept the contrary view of the Tribunal as to the meaning of Article 21(1) ECT, the Tribunal's conclusion that Yukos' tax assessments were not supported by Russian law, and were for "*a purpose extraneous to taxation,*" would still be based on what the Court should conclude are three fundamentally erroneous conclusions:

(a) that the Russian Federation failed to submit *any* evidence that the Mordovian trading shells were shams and that Yukos informed the Russian authorities of its Mordovian tax scheme, and no one objected;

(b) that there was no prior precedent for the attribution to Yukos of the sham trading shells' income; and

(c) that Yukos' VAT assessments were improper.

i. The Tribunal's Unsupportable Finding Concerning Yukos' Corporate Profit Tax Evasion Through Its Mordovian Trading Shells

316. The Tribunal found – after rejecting the findings of numerous Russian courts at multiple levels – that the Russian Federation had not submitted *any* evidence that Yukos' Mordovian trading shells were shams, and that Mr Dubov's hearing testimony, first presented in the Arbitrations and never previously presented to the Russian tax authorities, a Russian court or the ECtHR, established that "*Mr Dubov informed the authorities*" that "*Yukos was using the legislative arrangements in place to minimize its taxes*" in Mordovia, and that, at that time, no one had objected.[408]

317. In making these findings, the Tribunal overlooked the voluminous evidence demonstrating that Yukos' trading shells in Mordovia, as well as those registered in Evenkia, Kalmykia, and Baikonur, were, like the Lesnoy and Trekhgorniy trading shells, *all* shams created by Yukos solely to evade taxes. The evidence overlooked by the Tribunal included documents showing (a) that Yukos used straw-men to act as the nominal directors of the trading shells in all these regions, (b) that the trading shells in all these regions had no (or virtually no) assets or employees, (c) that all of the business and affairs of the trading shells in all these regions were managed by Yukos from Moscow, and (d) the enormous disproportion between the tax benefits obtained by the trading shells in all these regions

[408] Final Awards, ¶¶ 486, 500.

and the local investments they made (the latter, according to the Tribunal, being a factor that could warrant application of Russia's anti-avoidance tax rules).[409]

318. It was on the basis of the same factual showing that the Tribunal held that Yukos' Lesnoy and Trekhgorniy trading shells were shams, and that Yukos had engaged in illegal tax evasion in those low-tax regions.[410] It was also on the basis of a similar factual showing that two Chambers of the ECtHR unanimously held that the tax shells located in all of the low-tax regions were shams, and that Yukos had engaged in illegal tax evasion in all of those regions. As found by the ECtHR, without distinguishing among the low-tax regions, "*the relevant case files contained abundant witness statements and documentary evidence to support the connections between* [Yukos] *and its trading companies and to prove the sham nature of the latter entities*."[411]

319. Set out below is a sampling of the evidence relating to the Mordovian sham companies presented to but ignored by the Tribunal on each of these issues.

(a) *Yukos' Use Of Straw-Men As Nominal Directors Of The Mordovian Trading Shells*

- G.K. Zhukova, supposedly a director of OOO Makro-Trade, located in Mordovia:

  "*I have never heard of the existence of OOO Makro-Trade* [...], *I did not establish it. I have never been to the Republic of Mordovia.*"[412]

- A.V. Tsigura supposedly a director of Mars XXII (later renamed OOO Energotrade), located in Mordovia:

  "*I do not remember whether the company operated in 2000, and whether I entered into contracts as the General Director.* [...] *I cannot answer with certainty whether there were oil products; if they existed, I do not remember*

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409 Final Awards, ¶ 647.

410 *See* e.g., Final Awards, ¶ 488 ("those companies were acting in conformity with the relevant legislation in form only and not in substance").

411 First ECtHR Ruling, ¶¶ 590, 591 (RME-3328) (Yukos' trading shells had "no assets, employees or operations of their own" and "were nominally owned and managed by third parties, although in reality they were set up and run by [Yukos] itself").

412 Transcript of interrogation of G.K. Zhukova (Russian tax proceedings, court case file vol. 288, pp. 85, 51, and 66-68), referenced by excerpt in the tax authorities' response to Yukos' cassation appeal in Case No. KA-A40/3222-05, pp. 15-16 (May 4, 2005) (RME-257). *See also* Resp. C-Mem., note 296.

where they were stored. [...] *I do not remember how long I was the General Director and who took the decision to dismiss me*."[413]

- Y.Y. Yegorov, supposedly a director of OOO Makro-Trade, located in Mordovia:

  "*I did not know that I was the head of OOO Makro-Trade and never occupied a managerial position.* [...] *During the period from autumn 2001 through the end of 2002 Mr V.V. Reva several times (approximately 5 times) brought a set of documents to me for signature; I did not look into the contents of the documents; I signed where I was asked to sign.* [...] *I never saw the seal; I do not know where it is kept.* [...] *I do not know what activities OOO Makro-Trade was involved in and I have nothing to do with the business activities of this company.* [...] *I am not aware of OOO Makro-Trade's entering into contracts, their performance and payments under the contracts. I do not know what documents I signed, but contracts may have been among them.* [...] *I do not know who signed and prepared accounting and tax statements. I do not know what documents I signed, but financial documents may have been among them.* [...] *I know nothing about entering into investment agreements and tax incentives for OOO Makro-Trade.*"[414]

- M.N. Silayev, supposedly a founder and director of OOO Fargoil, located in Mordovia:

  "[…] *Vadim proposed me to sign several documents relating to registration of an enterprise; after sneak-peeking through documents I understood that those documents were necessary for registration of a certain organization. I did not go through the documents proposed for signature more thoroughly as I am a mechanical engineer by education. I signed the documents. Then Vadim lent me money in the amount of 200 US dollars, so I drew up a bill of debt.* […] *I cannot tell anything specific about* [OOO Fargoil]*; perhaps this organization was registered by Vadim with the use of my passport.*"[415]

(b) <u>The Mordovian Trading Shells Had No (Or Virtually No) Assets Or Employees</u>

- Alta-Trade, located in Mordovia, had "*no property, plant or equipment*" in 2000,[416] "*a computer and a printer*" in 2001,[417] "*machinery and equipment*"

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413 Transcript of interrogation of A.V. Tsigura No. 19-09/26 (Feb. 19, 2004) (RME-256). *See also* Resp. C-Mem., note 296.

414 Transcript of interrogation of Y.Y. Yegorov, referenced by excerpt in the tax authorities' response to Yukos' cassation appeal in Case No. KA-A40/3222-05, pp. 13-14 (May 4, 2005) (RME-257). *See also* Resp. C-Mem., note 296.

415 Transcript of Interrogation of M.N. Silayev (Aug. 11, 2004), pp. 1-2 (RME-255). *See also* Resp. C-Mem., note 295.

416 Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 14-3-05/1609-1 (Apr. 14, 2004), p. 26 (Annex (Merits) C 104).

417 Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 30-3-15/3 (Sep. 2, 2004), p. 54 (Annex (Merits) C 155).

worth less than Euro 800 in 2002-2003,[418] and on average two employees in 2001-2003 (its putative CEO and its putative executive director).[419]

- Fargoil, located in Mordovia, had "*no fixed assets*" in 2001-2002.[420]

- Makro-Trade, located in Mordovia, had fixed assets consisting of a "*computer, a printer, and office equipment*" in 2003,[421] and no employees in 2001-2002.[422]

- Mars XXII (Energotrade), located in Mordovia, had "*no fixed assets*" in 2000, 2001 and 2003,[423] and one employee in 2001 (its putative CEO).[424]

- Yu-Mordovia, located in Mordovia, had "*no fixed assets*" in 2000, a computer in 2001, fixed assets worth less than Euro 400 in 2003, and two employees in 2001 and 2003."[425]

(c) *The Mordovian Trading Shells' Business And Affairs Were Managed By Yukos From Moscow*

- T.G. Subbotina, supposedly a director of Mars XXII (later renamed OOO Energotrade), located in Mordovia:

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418 Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 52/985 (Dec. 6, 2004), p. 55 (Annex (Merits) C-190). *See, e.g.*, Resp. C-Mem., ¶ 250, note 312.

419 Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 30-3-15/3 (Sep. 2, 2004), p. 46 (Annex (Merits) C-155); Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 52/985 (Dec. 6, 2004), p. 55 (Annex (Merits) C-190). *See, e.g.*, Resp. C-Mem., ¶ 249, note 310.

420 Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 30-3-15/3 (Sep. 2, 2004), p. 102 (Annex (Merits) C-155); Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 52/896 (Nov. 16, 2004), 109 (Annex (Merits) C-175). *See, e.g.*, Resp. C-Mem., ¶ 239, note 289.

421 Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 52/985 (Dec. 6, 2004), p. 95 (Annex (Merits) C-190). *See also* Resp. C-Mem., ¶ 250, note 312.

422 Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 52/985 (Dec. 6, 2004), p. 96 (Annex (Merits) C-190). *See also* Resp. C-Mem., ¶ 249, note 310.

423 Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 14-3-05/1609-1 (Apr. 14, 2004), p. 13 (Annex (Merits) C-104); Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 30-3-15/3 (Sep. 2, 2004), p. 121 (Annex (Merits) C-155); Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 52/985 (Dec. 6, 2004), p. 83 (Annex (Merits) C-190). *See, e.g.*, Resp. C-Mem., ¶ 250, note 312.

424 Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 30-3-15/3 (Sep. 2, 2004), p. 118 (Annex (Merits) C-155). *See also* Resp. C-Mem., ¶ 250, note 312.

425 Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 14-3-05/1609-1 (Apr. 14, 2004), p. 43 (Annex (Merits) C-104); Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 30-3-15/3 (Sep. 2, 2004), pp. 66, 79 (Annex (Merits) C-155); Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 52/985 (Dec. 6, 2004), p. 43 (Annex (Merits) C-190). *See also, e.g.*, Resp. C-Mem., ¶¶ 249-250, notes 310, 312.

"*The contract documentation was prepared by the management of OAO NK Yukos; the payments under the contracts were processed through the centralized accounting department of OAO NK Yukos; I cannot recall the counterparties in the contracts.* […] *The financial statements and tax reports were prepared by the centralized accounting department of OAO NK Yukos in the office. I signed the reports as needed.*"[426]

"*The corporate seal* [of OOO Mars XXII] *was kept in the safe of the Centralised Accounting Office of OAO Yukos Oil Company, through which business agreements were drawn up, payments were made under business agreements, and accounting and tax reports were prepared.*"[427]

- Y.V. Gavrilina, supposedly a founder of Yu-Mordovia, located in Mordovia:

"*Between March 1, 2001 and June 26, 2003, I held the position of executive director at OOO Yu-Mordovia. I have merely a vague idea about the company's financial and business operations. My duties only included filing with the tax authorities of the tax declarations I received from Moscow by mail. I would do so on the same day the intended submissions arrived from Moscow.* […] *The financial statements and tax declarations were executed in Moscow, but I have no knowledge about the signatories*."[428]

"*Yu-Mordovia OOO carried out no financial operations* [in Mordovia]. *The Yu-Mordovia OOO Director-General and Chief Accountant were actually located in Moscow the entire time, where all book-keeping documents, as well as financial and tax records of Yu-Mordovia OOO, were drawn up and then sent from Moscow to Saransk by mail*."[429]

- M.A. Sutyaginskiy, director of Titan, a supposed trading partner of Fargoil and Alta-Trade, both located in Mordovia:

"[N]*egotiations on deliveries of oil and oil products by Fargoil OOO and Alta-Trade OOO were conducted with OAO Yukos Oil Company representatives.*"[430]

- The Mordovian trading shells were "*deprived of the ability to independently manage the funds on their* [bank] *accounts*,"[431] with all withdrawals subject

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426 Written testimony of T.G. Subbotina, Record No. 43/1a (May 18, 2004) (RME-258). *See also* Resp. C-Mem., note 297.

427 Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 30-3-15/3 (Sep. 2, 2004), p. 7 (Annex (Merits) C-155). *See also* Resp. C-Mem., ¶ 241, note 294.

428 Transcript of interrogation of Y.V. Gavrilina (Russian tax proceedings, court case file vol. 228, pp. 93-96), referenced by excerpt in the tax authorities' response to Yukos' cassation appeal in Case No. KA-A40/3222-05, p. 16 (May 4. 2005) (RME-257). *See also* Resp. C-Mem., note 297.

429 Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 30-3-15/3 (Sept. 2, 2004), 67 (Annex (Merits) C 155). *See also* Resp. C-Mem., ¶ 241, note 294.

430 Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 30-3-15/3 (Sept. 2, 2004), 7 (Annex (Merits) C 155). *See also* Respondent's Opening Statement Presentation on Taxation, slide 20.

431 *See, e.g.*, Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 30-3-15/3 (Sept. 2, 2004), p. 8 (Annex (Merits) C-155), finding that "[p]ursuant to supplement agreement No. 1 to the unnumbered bank account agreement of 21/06/1999 between OAO Trust Investment Bank and Siberian Leasing Company OOO, a special procedure was set for

to the prior approval of ZAO Yukos-EP, a Moscow based company wholly-owned by Yukos.

- The accounting and bookkeeping of Alta Trade, Fargoil, Makro-Trade, Mars XXII, Ratmir, and Yu-Mordovia, all located in Mordovia, were carried out in Moscow by companies wholly-owned by Yukos.[432]

(d) *The Enormous Disproportion Between The Tax Benefits Obtained By The Mordovian Trading Shells And The Local Investments They Made*

- The investments made by the trading shells in Mordovia represented roughly the same small fraction of the tax benefits they obtained – 0.8% in 2001, and 2.0% in 2002 and 2003[433] – as did the investments made by the trading shells in Lesnoy, where the investments made by Business Oil, which obtained the largest single share of the tax benefits, represented 1.12% of the tax benefits it received.[434]

320. The evidence submitted by the Russian Federation also showed that, in late 2001, Yukos' senior managers were monitoring not only the Russian authorities' investigation of the Lesnoy and Trekhgorniy sham trading shells, but also their investigation of Alta Trade (Mordovia),[435] Ratmir (Mordovia),[436] Ratibor (Evenkia),[437] Mega-Alyans (Baikonur),[438] and

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drawing funds from the current account. Under the procedure, the customer could submit to the bank those orders for withdrawing funds from its account, which were related to its payment of expenses in accordance with the registers drawn up by Yukos-EP ZAO […] which acted as a management body for Siberian Leasing Company OOO. Thus, the entities, in particular, Siberian Leasing Company OOO, were deprived of the ability to independently manage the funds on their accounts, which confirms the dependent nature of their activity and the dependence on [Yukos]." See also Resp. C-Mem., ¶ 240, note 292.

432 Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 14-3-05/1609-1 (Apr. 14, 2004), pp. 2, 12, 23, 43, 46 (Annex (Merits) C-104); Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 30-3-15/3 (Sep. 2, 2004), pp. 8-9 (Annex (Merits) C-155); Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 52/896 (Nov. 16, 2004), pp. 59-60 (Annex (Merits) C-175); Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 52/985 (Dec. 6, 2004), pp. 18-19 (Annex (Merits) C-190). *See also* Resp. C-Mem., ¶ 241, note 294.

433 Resp. C-Mem., ¶¶ 252, 253. *See also* Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 30-3-15/3 (Sep. 2, 2004), pp. 20-21 (Annex (Merits) C-155); Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 52/896 (Nov. 16, 2004), p. 86 (Annex (Merits) C-175); Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 52/985 (Dec. 6, 2004), p. 36 (Annex (Merits) C-190).

434 Field Tax Audit Report No. 08-1/1 (Dec. 29, 2003), p.73 (Annex (Merits) C-103) ("the investments made by [Business Oil] amount to 1.12 per cent of the unpaid amount of tax"). See also Resp. C-Mem., ¶ 359, note 476.

435 E-mail from V.N. Kartashov to I.E. Golub (Nov. 23, 2001) (RME-3338) reporting on "[c]*ross tax audits*" with respect to Alta Trade (Mordovia). *See also* Respondent's Post-Hearing Brief, ¶ 9, note 34.

436 E-mail from V.N. Kartashov to I.E. Golub (Nov. 23, 2001) (RME-3338) reporting on "[c]*ross tax audits*" with respect to Ratmir (Mordovia). *See also* Respondent's Post-Hearing Brief, ¶ 9, note 34.

437 E-mail from V.N. Kartashov to I.E. Golub (Nov. 23, 2001) (RME-3338) ("Improper use of low tax rates without legal basis. A cross audit involving LLC Ratibor"). See also Respondent's Post-Hearing Brief, ¶ 9, note 34.

Sibirskaya (Elista).[439] Here and later, Yukos' own "concern" over the legality of its tax scheme, due to the "sham-like nature" of its trading shells, was not confined to Lesnoy and Trekhgorniy, but extended, without distinction, to all of its trading shells, including those located in Mordovia. Indeed, there is not a single example in the record before the Tribunal of a Yukos official suggesting that its tax scheme in Mordovia, unlike its tax scheme in Lesnoy and Trekhgorniy, was not at risk because its Mordovian trading companies had real officers and directors, and real assets and employees, and managed their own business and affairs.

321. In light of the massive volume of evidence presented by the Russian Federation showing that the trading shells located in Mordovia, as well as those located in Evenkia, Kalmykia and Baikonur, were *all* shams established solely for the purpose of tax evasion, one can only surmise about the reasons why this evidence has been overlooked by the Tribunal.

322. The Tribunal's different treatment of the sham shells located in Mordovia was also in large part based on Mr Dubov's hearing testimony that Yukos had "*informed the authorities*" that Yukos "*was using the legislative arrangements in* [Mordovia] *to minimize its taxes*" and that no one objected.[440] It should go without saying that it is one thing to inform the Russian authorities that Yukos was using Mordovia's low-tax region program to minimize its taxes, and a very different thing to inform them that the company's trading shells did *not* engage in genuine business activities in Mordovia, and thus did not qualify for the favorable tax treatment they received. It is thus troubling that Mr Dubov's important concession made under cross-examination – that he *never* told the authorities that the company's trading shells did *not* engage in genuine business activities in Mordovia – is nowhere mentioned in the Final Awards.[441]

323. The record before the Tribunal in fact showed that, among other things, Mr Dubov "*never discussed*" with the authorities:

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438 E-mail from V.N. Kartashov to I.E. Golub (Nov. 23, 2001) (RME-3338) ("An attempt to hold unlawful the registration of the firm. A cross audit involving LLC Mega-Alians"). See also Respondent's Post-Hearing Brief, ¶ 9, note 34.

439 E-mail from V.N. Kartashov to I.E. Golub (Nov. 23, 2001) (RME-3338) ("A claim filed with the Arbitrazh Court of Elista").. See also Respondent's Post-Hearing Brief, ¶ 9, note 34.

440 Final Awards, ¶¶ 486.

441 Final Awards, ¶¶ 486, 639 ("Mr Dubov informed the authorities, at least in respect of the Yukos trading companies in Mordovia, that Yukos was using the legislative arrangements in place to minimize its taxes, and that none of his interlocutors, including the then First Deputy of Finance, Alexei Kudrin, formulated any objection").

- that the "*founders of the trading shells would be selected by Yukos*,"[442]
- that "*persons would be registered as the founders of these companies without their knowing that their names were being used for that purpose*,"[443]
- that "*Yukos would compensate these persons for the use of their passports for the purpose of employing their names and passport numbers on the registration forms for the trading shells*,"[444]
- that "*the managers of these companies, the executives of these companies, were being selected by Yukos*,"[445]
- that "*the trading companies' purchase and sale contracts would be prepared by Yukos in Moscow*,"[446]
- that "*Yukos would arrange for the trading companies' executives to sign these contracts on behalf of the trading companies, even though the contracts would be written and the transactions would be negotiated by Yukos itself*,"[447] or
- that the "*trading companies' accounting reports would be prepared by Yukos in Moscow*."[448]

324. Indeed, the ECtHR found that Yukos not only failed to inform the Russian authorities of the sham nature of its Mordovian shells, but also never informed them about Yukos' *"true relation to the trading companies*" – that they were in fact owned or controlled by Yukos – noting that the *"trading companies were registered in the names of third persons not formally connected to Yukos or its managers, and had been managed by fictional directors.*"[449] The ECtHR's finding, which is abundantly supported by other evidence

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442 Testimony of Mr Dubov, Day 5, Tr. 80:15-23.

443 Testimony of Mr Dubov, Day 5, Tr. 81:14-21.

444 Testimony of Mr Dubov, Day 5, Tr. 81:22-82:4.

445 Testimony of Mr Dubov, Day 5, Tr. 82:5-18.

446 Testimony of Mr Dubov, Day 5, Tr. 82:19-83:1.

447 Testimony of Mr Dubov, Day 5, Tr. 83:2-18.

448 Testimony of Mr Dubov, Day 5, Tr. 83:19-25

449 Second ECtHR Ruling, ¶ 808 (Exhibit RF-4).

before the Tribunal,[450] thus calls into question the credibility of Mr Dubov's testimony that was relied on by the Tribunal.

ii. The Tribunal's Unsupportable Finding Concerning The Remedy Applied To Yukos' Evasion Of Profit Tax

325. The Tribunal found that Yukos had evaded corporate profit tax through its use of the Lesnoy and Trekhgorniy sham trading shells, but held that the attribution to Yukos of the income of these sham trading shells was nonetheless improper because, according to the Tribunal, *"there was no precedent"* in Russian case law for this remedy *"at the time that the tax assessment and related decisions were issued.*"[451] The Tribunal conceded that this conclusion left the Russian Federation without an effective remedy for Yukos' acknowledged tax evasion, because the sham trading shells had no assets to satisfy the taxes that should have been paid. As the Tribunal observed, "*the 'anti-abuse' doctrine would be eviscerated if the tax authorities were unable to attribute*" the trading companies' "*income to the person responsible for the wrongdoing.*"[452]

326. The Tribunal's ruling was mistaken in at least five respects. First, what the Tribunal mischaracterized as a "*'re-attribution' remedy*"[453] was in fact the attribution to Yukos of the revenues and profits of the company's *own* business operations. It was Yukos that improperly shifted these amounts from the Moscow region, where these operations were actually carried out by Yukos, to the low-tax regions where the sham trading shells only purported to be conducting business. The Russian tax authorities accordingly did not "*re-attribute*" anything to Yukos, but simply recognized that the income fraudulently claimed by the sham trading shells should always have been treated as Yukos' own income. The mislabelled "*re-attribution"* remedy was thus nothing more than the straightforward application to Yukos of Russia's anti-abuse doctrine, which the Tribunal itself acknowledged "*may constitute a ground for the reassessment of a party's tax liabilities*."[454]

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450 The record is replete with evidence showing the falsehoods that Yukos proffered in respect of its relationship with the sham trading shells, including to (a) the Russian tax authorities (by claiming that it did not have information about the "constituent documents" and "tax liabilities" of the Lesnoy and Trekhgorniy sham trading shells; see, e.g., Resp. Rej., ¶¶ 616-619); (b) Russia's courts (by claiming that that it "didn't influence the Russian entities referenced in the decision"; see, e.g., id., ¶¶ 620-621); (c) the ECtHR (by claiming that "there had been no links of dependency between the trading companies and itself"; see, e.g., id., ¶ 622); and (d) its own auditors, PwC (which in response to Yukos' repeated misrepresentations, withdrew its audit certifications of Yukos' financial statements from 1995 to 2004; see, e.g., id., ¶¶ 624-627).

451 Final Awards, ¶ 625.

452 Final Awards, ¶ 625.

453 Final Awards, ¶ 502, 648.

454 Final Awards, ¶¶ 612, 614 [emphasis added].

327. Second, if the Tribunal's reasoning (for which, perhaps ironically, it cited no precedent) were to be adopted more generally, no judicial remedy for tax abuse could *ever* be sustained, because the first judicial application of that remedy would always lack a precedent. It is thus not at all surprising that the Tribunal's holding – that the Russian tax authorities were powerless to fashion a remedy for Yukos' acknowledged tax evasion – is contrary to the tax laws of other ECT signatories, including the Netherlands, as shown below at paragraphs 352 to 359.

328. Third, contrary to the Tribunal's statement that "*there was no precedent for re-attribution at the time that the tax assessments and related decisions were issued in respect of Yukos,*"[455] Mr Konnov, the only expert on Russian tax law to submit evidence to the Tribunal, testified without expert contradiction that there was Russian precedent for this remedy, and referred the Tribunal to two separate lines of authority – Korus Kholding and the Bashkirian refineries cases – that applied this remedy before it was applied to Yukos.

329. The Tribunal agreed that the Korus Kholding case was "*on all fours with the Yukos case, in terms of the re-attribution remedy*,"[456] but found that it was not a precedent for Yukos because it was "*decided in 2006, well after the assessments against Yukos in 2003 and 2004*."[457] In so holding, the Tribunal ignored the Russian Federation's showing (a) that the tax authorities first challenged Korus Kholding's "tax optimization" scheme on February 28, 2005, and issued a formal tax assessment on March 29, 2005,[458] and (b) that the Korus Kholding case was heard by Russia's courts while the Yukos cases were still *sub judice*.[459]

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455 Final Awards, ¶ 625.

456 Final Awards, ¶ 621. Like Yukos, Korus Kholding purported to conduct activities in the low-tax region of Baikonur through Korus Baikonur, a trading shell similar to those used by Yukos in Lesnoy, Trekhgorny, Mordovia, and elsewhere. The Russian courts upheld Korus Kholding's tax assessments, finding (a) that Korus Baikonur had no economic substance in Baikonur or elsewhere, (b) that Korus Kholding entered into sale and purchase agreements for oil and oil products through Korus Baikonur for the sole purpose of avoiding taxes, and (c) that neither Korus Kholding nor Korus Baikonur contributed to the local economy of the Baikonur region. The courts thus upheld the tax authorities' decision to look to the substance (and not the form) of the actions taken, and to hold Korus Kholding liable for the tax consequences of actions formally taken by Korus Baikonur. Resp. Rej., ¶¶ 687, 688. Resolution of the Federal Arbitrazh Court of the Moscow District, Case No. KA-A40/5876-06 (July 28, 2006) (RME-1487).

457 Final Awards, ¶ 621.

458 Resolution of the Federal Arbitrazh Court of the Moscow District, Case No. KA-A40/5876-06 (July 28, 2006) (RME-1487).

459 The 2000 tax assessment was finally upheld on October 4, 2005 (*see* Resolution of the Presidium of the Supreme Arbitrazh Court No. 8665/04 (Oct. 4, 2005) (RME-1552)); the 2001 tax assessments was finally upheld on December 9, 2005 (*see* Resolution of the Federal Arbitrazh Court of the Moscow District, Case No. KA-A40/3573-05 (Dec. 9, 2005) (RME-588)); the 2002 tax assessment was finally upheld on June 30, 2005 (*see* Resolution of the Federal Arbitrazh Court of the Moscow District, No. KA-A40/3222-05 (June 30, 2005) (RME-1569)); the 2003 tax assessment was finally upheld on December 5, 2005 (*see* Resolution of the Federal Arbitrazh Court of the Moscow District, Case No. KZ-A40/11321-05 (Dec. 5, 2005) (Annex (Merits) C 197)). As noted, the 2004 tax assessment had not yet been issued.

330. Equally erroneous is the Tribunal's finding that not even the "*Bashkirian refineries cases*" can "*serve as a pre-Yukos precedent*." The Tribunal found that in these cases the "*tax authorities did 're-attribute' sales revenue from a Baikonur entity to the three selling oil refineries,*"[460] but held that they also did not constitute a precedent for Yukos, because their assessments were *judicially* upheld in January 2005. The Tribunal here again apparently ignored the chronology of events – the Bashkirian refineries' assessments were in fact issued on July 16, 2003,[461] *or nine months before any of Yukos*' assessments.[462]

331. The record before the Tribunal thus included two cases of Russian companies being assessed taxes by the Russian authorities *on the same basis* as Yukos was *subsequently* assessed for some or all of *its* taxes, and in all three cases Russia's courts upheld the tax authorities' assessments. The picture presented is of the tax authorities uncovering a novel tax evasion scheme and developing an appropriate and consistent remedy based on Russia's well established "substance over form" anti-avoidance tax rules, and of this remedy then being challenged in Russia's courts and ultimately upheld. The Tribunal's ruling notwithstanding, this is the way novel tax evasion schemes are addressed by the tax authorities in many countries. Indeed, the Dutch Supreme Court recently held that the tax authorities in the Netherlands can rely on the doctrine of *fraus legis* to develop new remedies to close legislative tax loopholes in the interest of collecting public revenue.[463] Dutch anti-tax avoidance practice and the *fraus legis* doctrine are discussed at greater length at paragraphs 352 to 359 below.

332. Even if Yukos' initial assessment was the first one to be *judicially* upheld by Russia's courts, as discussed above, one of the three cases had to be decided first, and the Yukos holdings were promptly followed by Russia's courts in the two other cases (not involving Yukos) that even the Tribunal found to be indistinguishable from the facts present here.

333. Fourth, the Tribunal failed to take account of Yukos' own acknowledgment in internal memoranda that disclosing Yukos' affiliation with its sham trading shells "*may be used by*

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460 Final Awards, ¶ 620(1).

461 Final Awards, ¶ 620(1). *See* Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation, Case No. 10767/04 (Jan. 25, 2005) (RME-1488); Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation, Case No. 10755-04 (Jan. 25, 2005) (RME-1489); Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation, Case No. 10750/04 (Jan. 25, 2005) (RME-1490).

462 Yukos was first assessed taxes for 2000 on April 14, 2004. *See* Decision to Hold the Taxpayer Fiscally Liable for a Tax Offense No. 14-3-05/1609-1 (Apr. 14, 2004), p. 91 (Annex (Merits) C-104).

463 Dutch Supreme Court March 15, 2013, *BNB* 2013/151.

the Russian tax authorities to challenge [Yukos'] *approach to certain transactions and, consequently, will result in substantial tax claims against the Company*."[464] This could *only* have been true if the income of its sham trading shells was attributed to Yukos. Thus, contrary to the Tribunal's ruling that this remedy was novel and unforeseeable, Yukos itself anticipated that the sham shells' income would be attributed to the company.

334. Fifth, the Tribunal ignored a tax commentary written in 2002 by Yukos' own external tax counsel, Sergey Pepeliaev, and an article written in 2004 by one of his partners. Both confirm that the remedy applied by Russia's tax authorities and upheld by Russia's courts was based on existing Russian law. Writing in 2002, Mr Pepeliaev noted that "*If it appears that parties act both unreasonably and not in good faith then this constitutes a ground for reassessment of the parties' tax liabilities*" based on the "*actual relations between the parties*."[465] Two years later, his partner Mr Vadim Zaripov agreed, writing that "[w]*ell-known judicial doctrines ('substance over form,' 'step transaction,' etc.) make it possible to* […] *regard several entities as a single economic entity (for instance, where tax optimization schemes are in place)*."[466] Treating "*several entities* [in a *"tax optimization scheme"*] *as a single economic entity*" for tax purposes necessarily includes taxing the real party in interest, and disregarding the purported separate identity of parties who participate only formally. This is precisely the remedy that was applied to Yukos, but unduly rejected by the Tribunal solely because it was judicially unprecedented at the time.

iii. The Tribunal's Unsupportable Finding Concerning Yukos' VAT Assessments

335. The Tribunal held that Yukos' VAT assessments were improper because, according to the Tribunal, the Russian authorities, for *"purely technical reasons*," refused "*to attribute to Yukos the trading companies' VAT refunds.*"[467] In particular, the Tribunal held that the Russian authorities' position – that Yukos, as the real exporter, was required to file monthly VAT returns in its own name – was inconsistent with a 1999 Russian

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464 Memorandum from P.N. Malyi of Yukos to O.V. Sheyko of Yukos regarding "Risks Associated with the Listing on the New-York Stock Exchange/Public Offering of Securities in the USA" (prepared on Apr. 22, 2002; transmitted on May 14, 2002), ¶ 2 (RME-184).

465 S.G. Pepelyaev, Commentary to Ruling of the Constitutional Court of the Russian Federation No. 138-O dated July 25, 2001, Your Tax Attorney, No. 1, First Quarter of 2002, p. 2 (RME-352); *see also* Final Awards, ¶¶ 318, 319.

466 V. Zaripov, *Optimization or Evasion*, EZh-Yurist, No. 16 (Apr. 2004), p. 1 (RME-3223); *see also* Respondent's Post-Hearing Brief, ¶ 27.

467 Final Awards, ¶ 626.

Constitutional Court decision holding, according to the Tribunal, "*that courts must not limit themselves to a purely formalistic analysis in assessing tax claims by the State, but rather must examine the actual facts in order to respect the taxpayer's right to a fair opportunity to defend itself against the claim.*"[468]

336. The Tribunal here again mistakenly preferred its own unaided interpretation of Russian law to the unrebutted expert testimony of Mr Konnov and to the relevant decisions of the competent Russian courts and the ECtHR. As Mr Konnov explained with detailed citations to Russian tax law and practice, (a) the requirement that a monthly (or, in the case of smaller companies, quarterly) VAT filing must be made in the name of the true taxpayer in order to claim a VAT refund was applied generally by the Russian tax authorities, and was justified by important administrative considerations; (b) Yukos could have avoided most of its VAT assessments by filing properly amended monthly VAT returns for the periods in question; and (c) Yukos nonetheless chose not to file properly amended VAT returns even though it is undisputed that it could have done so.[469]

337. As discussed above, the Tribunal agreed with Mr Konnov that a monthly or quarterly filing was required, noting that the *"practical justification does seem to support the monthly/quarterly filing requirement when the tax authorities are auditing the underlying transactions.*" The Tribunal nonetheless ruled that Yukos was not required to make a monthly or quarterly filing, holding that "*it is more difficult to understand how that justification applied to Yukos' attempts to obtain credit for the trading companies' VAT refunds, in a situation where those VAT refunds had already been vetted and approved by the authorities at the time they had been claimed (for the first time) by the trading entities.*"[470] It was obviously improper for the Tribunal to overrule an express requirement of Russian law applicable to all taxpayers simply because the Tribunal found it "*difficult to understand*" why that requirement should be applied to Yukos.

338. As an initial matter, the Tribunal's reliance on the Russian Constitutional Court's ruling is misplaced. That ruling merely sets out Russia's *general* "substance over form" tax rule. No Russian court has ever held, and no Russian tax commentator has ever suggested, that

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468 Final Awards, ¶ 671.

469 Had Yukos filed properly amended VAT returns, it would have avoided 89% of its total VAT liability (the time allotted for amended filings with respect to the remaining 11% having expired). *See* Resp. Rej., ¶¶ 831(ii), 832(ii), 833.

470 Final Awards, ¶ 686.

the Constitutional Court's ruling should be interpreted to overturn the express requirement of Russian law that VAT returns be submitted in the name of the real taxpayer.

339. There are two related answers to the "*practical*" questions raised by the Tribunal's holding. First, Yukos was required to file a monthly export VAT return, and documents confirming the export, in its own name because that is what the Russian legislature said is required of *all* similarly situated Russian taxpayers in order to be eligible for a 0% VAT rate on exported goods.[471] If the Tribunal elsewhere impermissibly acted as if it were a Russian appellate court, it here acted even more impermissibly as a super-Russian legislature, entitled to effectively repeal a duly enacted tax law of the Russian Federation. Second, the Russian Federation's legislature, in requiring large companies to file monthly VAT returns in all cases, was doing what legislatures the world over do – adopting a law of general application that would allow VAT returns to be computer-processed, without the need for individualized, manual review. As shown below, this is why many other States, including the Netherlands, follow a similar practice in requiring taxpayers to file the same VAT return regardless of whether the underlying transactions have been previously vetted by the tax authorities.[472]

340. The Tribunal's ruling, in addition, ignores the fact that Yukos indisputably could have filed the monthly returns required by Russian law, but chose for its own reasons not to do so.[473] The Tribunal offered no explanation as to why Claimants should be entitled to damages for a loss that Yukos elected not to avoid.

341. The Tribunal also did not provide an explanation of the basis on which it reached a conclusion that is directly contradicted by the unanimous holdings of two separate Chambers of the ECtHR, which confirmed the earlier Russian court decisions. As discussed above, the ECtHR unanimously held that Yukos' VAT assessments as upheld by the Russian courts were proper, and could have been avoided if Yukos had "*claim*[ed] *the tax exemptions or refunds under its own name under the procedure set out*" in the

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471 Law of the Russian Federation No. 1992-1 (On Value Added Tax), December 6, 1991; Chapter 21 of the Russian Tax Code. *See* Tax Code of the Russian Federation, Part I, entered into force on January 1, 1999, and Part II, entered into force on January 1, 2001 (as amended), pp. 29-43 (Annex (Merits) C 1704). *See also* Second Konnov Report, ¶ 84, note 137.

472 Resp. C-Mem., ¶¶ 1204-1214.

473 Claimants never provided any credible explanation as to why Yukos failed to file proper amended VAT returns, even after its improper "annual" filings were rejected. For the reason set forth in Respondent's Post Hearing Brief, ¶¶ 40-41, the last minute justification proffered by Claimants at the hearing for those belated and improper filings - that Yukos could not submit the requisite documents because the authorities had seized them (*see* Respondents' Closing Statements, Vol. 1, Slides 246, 247) - is not credible.

applicable VAT rules, which "*made the procedure for VAT refunds sufficiently clear and accessible for* [Yukos] *to be able to comply with it*."[474]

342. Finally, the Tribunal speculated that even if Yukos had filed the required monthly VAT returns, the "*Russian Federation was determined to impose the VAT liability on Yukos, and would have done whatever was necessary to ensure that the VAT liability was imposed on Yukos.*"[475] There is no basis in the record for the Tribunal's unsupported speculation, which unfortunately suggests a tribunal searching for a reason to find Yukos' VAT assessments to have been improper when all of its other reasons have been shown to be demonstrably unsupportable. This and other examples of the Tribunal's unwarranted speculation – in each instance resulting in a finding against Respondent – are addressed in greater detail in Section VIII.C(a) below.

343. In sum, the Court should conclude that the taxation carve-out under Article 21(1) ECT applies to Claimants' claims, and that the Tribunal lacked jurisdiction over those claims, for one or more of three reasons described above, namely:

(a) the Tribunal applied the wrong standard in determining whether the measures taken by the Russian authorities were "*Taxation Measures*" within the scope of Article 21(1) ECT, and under the proper standard as articulated by the *EnCana* tribunal – pursuant to which a measure falls within a taxation carve-out if it is "*sufficiently clearly connected to a taxation law or regulation*," and a measure falls outside the scope of the carve-out only if it is "*an arbitrary demand unsupported by any provision of the law of the host State*"[476] – the measures taken here plainly are within the carve-out;

(b) even if the Tribunal's improper standard is applied to the facts here, the Tribunal's own findings confirm that Yukos' assessments were neither entirely "*unrelated to the raising of public revenue*" nor "*for a purpose unrelated to the raising of public revenue*", and thus are within the carve-out; and

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474 Final Awards, ¶ 699.

475 Final Awards, ¶ 694.

476 *Ibid*, ¶¶ 1440.

(c) the Tribunal's conclusion, again based on its application of the incorrect standard, that the measures taken by the Russian authorities are not "*Taxation Measures*" within the scope of Article 21(1) ECT, is based on its unsupportable and mistaken findings (i) that the Russian Federation failed to submit *any* evidence that the Mordovian trading shells were shams and that Yukos informed the Russian authorities of its Mordovian tax scheme, and no one objected, (ii) that there was no precedent for the attribution to Yukos of the sham trading shells' income, and (iii) that Yukos' VAT assessments were improper under Russian law.

(d) The ECtHR's Rulings Demonstrate That The Measures At Issue Were A Legitimate Exercise Of The Russian Federation's Taxation Power, And Thus Within The Article 21(1) ECT Taxation Carve-Out

344. The Tribunal's finding that the measures taken against Yukos were "*motivated not by the aim of raising public revenue but by a purpose extraneous to taxation*"[477] is contradicted by the unanimous rulings of two separate Chambers of the ECtHR (based on substantially the same factual record as was established in the Arbitrations) upholding the same tax assessments that the Tribunal condemned.[478] The ECtHR concluded that "*each of the Tax Assessments 2000-2003 pursued a legitimate aim of securing the payment of taxes and constituted a proportionate measure in pursuance of this aim*,"[479] and found that the measures taken by the Russian authorities were a legitimate exercise of the Russian Federation's taxation powers, and were not animated by "*improper motive*."[480]

345. In ruling on the charge that these measures violated Article 18 of the European Convention on Human Rights, which provides that the restrictions permitted under the Convention to the rights and freedoms enshrined in the Convention – here, a State's right to assess and collect taxes – "*shall not be applied for any purpose other than those for which they have been prescribed*,"[481] the ECtHR held as follows*:*

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477 Final Awards, ¶¶ 1407, 1442.

478 On April 24, 2004, Yukos filed an application against the Russian Federation claiming that the taxation measures taken by the Russian authorities violated Articles 6(1), 7, 13 and 14 of the European Convention on Human Rights, Article 1 of Protocol No. 1, and Article 18 in conjunction with Article 1 of Protocol No. 1. On March 12, 2006, Mr Khodorkovsky filed an application against the Russian Federation claiming that his criminal conviction for tax evasion and fraud was politically motivated in breach of Article 18 of the European Convention on Human Rights. Mr Lebedev filed a virtually identical application on March 28, 2005. Messrs Khodorkovsky's and Lebedev's cases were joined on July 2, 2013.

479 First ECtHR Ruling, ¶¶ 588-606 (RME-3328).

480 First ECtHR Ruling, ¶¶ 663-666 (RME-3328). *See also* Second ECtHR Ruling, ¶¶ 821, 903 (Exhibit RF-4).

481 European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 18.

> "[T]he Court finds no indication of any further issues or defects in the proceedings against [Yukos] which would enable it conclude that there has been a breach of Article 18 of the Convention on account of the applicant company's claim that the State had misused those proceedings with a view to destroying the company and taking control of its assets. [T]he Court finds that there has been no violation of Article 18 of the Convention, taken in conjunction with Article 1 of Protocol No. 1, on account of the alleged disguised expropriation of the company's property and the alleged intentional destruction of the company itself."[482]

346. The ECtHR's specific rulings concerning Yukos' corporate profit tax and VAT assessments confirm that these measures were not *"unsupported by <u>any</u> provision"* of Russian law but, to the contrary, were based on the application to the facts in the record of established principles of Russian tax law. In particular, the ECtHR found (a) that the case files for all of the low-tax regions, Mordovia not excepted, included "*abundant*" evidence showing that all of Yukos' trading shells were shams; (b) that attributing to Yukos the tax consequences of its own actions was neither an unprecedented remedy nor, as discussed above, misused by the Russian Federation to bankrupt Yukos; and (c) that Russian law clearly required Yukos to file a properly amended VAT return in its own name and that Yukos was not singled out for invidious treatment.

347. In particular, the ECtHR found with respect to Yukos' corporate profit tax assessments that:

- Russia's "*tax authorities had broad powers in verifying the character of the parties' conduct and contesting the legal characterisation of such arrangements before the courts;*"[483]

- "*the power to re-characterise or to cancel bad faith activities of companies existed and had been used by the domestic courts in diverse contexts and with varying consequences for the parties concerned since as early as 1997;*"[484]

- the "*conclusions of the domestic courts in the Tax Assessment proceedings 2000-2003 were sound. The factual issues in <u>all</u> of these proceedings were substantially similar and <u>the relevant case files contained abundant witness statements and documentary evidence to support the connections between</u>*

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482 First ECtHR Ruling, ¶ 665-666 (RME-3328); Second ECtHR Ruling, ¶¶ 905-906 (<u>Exhibit RF-4</u>).

483 First ECtHR Ruling, ¶ 597 (RME-3328); Second ECtHR Ruling, ¶ 786 (<u>Exhibit RF-4</u>).

484 First ECtHR Ruling, *ibid*.; Second ECtHR Ruling, *ibid*.

[Yukos] *and its trading companies and to prove the sham nature of the latter entities;*"[485] and

- "*the applicable legal norms made it quite clear that, if uncovered, a taxpayer faced the risk of tax reassessment of its actual economic activity.* […] *And this is precisely what happened to* [Yukos] *in the case at hand.*"[486]

348. With respect to Yukos' VAT assessments, the ECtHR found that:

- "*both Section 5 of Law no. 1992-1 of 6 December 1991 'On Value-Added Tax' governing the relevant sphere until 1 January 2001 as well as Article 165 of the Tax Code applicable to the subsequent period provided unequivocally that a zero rate of value-added tax in respect of exported goods and its refund could by no means be applied automatically, and that* [Yukos] *was required to claim the tax exemptions or refunds under its own name*;"[487]

- Yukos' VAT assessments could have been avoided if Yukos had "*claim*[ed] *the tax exemptions or refunds under its own name under the procedure set out*"[488] in the applicable VAT rules;

- "[Yukos] *failed to submit any proof that it had made a properly substantiated filing in accordance with the established procedure;* "[489] and

- "[Yukos] *did not receive any adverse treatment*."[490]

349. The Tribunal conspicuously ignored these findings, and instead took unwarranted comfort in the merits awards rendered in *RosInvestCo. v. Russian Federation* and *Quasar de Valores et al. v. Russian Federation*.[491] But each of these awards applied a bilateral investment treaty that, in contrast to the ECT, does not contain a taxation carve-out. The Tribunal's extensive quotations from the expropriation analyses in these merits awards,

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485 First ECtHR Ruling, ¶¶ 590, 591 (RME-3328) [emphasis added]; Second ECtHR Ruling, ¶¶ 786, 811 (Exhibit RF-4).

486 First ECtHR Ruling, ¶ 598 (RME-3328) [emphasis added]; Second ECtHR Ruling, ¶ 786 (Exhibit RF-4).

487 First ECtHR Ruling, ¶ 601 (RME-3328) [emphasis added].

488 *Ibid*.

489 First ECtHR Ruling, ¶ 602 (RME-3328) [emphasis added].

490 *Ibid*.

491 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Arbitration V (079/2005), Final Awards (Sept. 12, 2010) (Annex(Merits) C-1049) and *Quasar de Valores SICAV S.A., et al. v. The Russian Federation*, SCC Arbitration, Award (July 20, 2012), (RME-3383) cited in the Final Awards at ¶¶ 1436-1438.

holding that abusive taxation measures may amount to an expropriation,[492] obviously have no bearing on the question present here – whether taxation measures taken for extraneous purposes are outside the ECT's taxation carve-out. Notably, under the narrow arbitration clause of the BIT between the UK and the Soviet Union applied by the *RosInvestCo* tribunal, that tribunal lacked jurisdiction to determine whether the taxation measures taken against Yukos were expropriatory, and the *RosInvestCo* award was subsequently annulled by the Svea Court of Appeal.[493]

350. Thus, contrary to the Tribunal's unsupported holding, the taxation measures taken by the Russian authorities "*pursued a legitimate aim of securing the payment of taxes and constituted a proportionate measure in pursuance of this aim,*" and are "*Taxation Measures*" covered by the taxation carve-out of Article 21(1) ECT.

(e) The Taxation Measures Taken By The Russian Authorities Are Consistent With Internationally Recognized Tax Policies And Practices And, In Particular, With Dutch Tax Policies And Practices

351. The taxation measures taken by the Russian authorities are also consistent with internationally recognized tax policies and practices, and with the public revenue collection measures that other European countries, including the Netherlands, would have taken against a tax evader like Yukos. This fact further demonstrates that these measures were a legitimate exercise of the Russian Federation's taxation power, and are within the taxation carve-out in Article 21(1) ECT.

(e)(i) Yukos' Corporate Profit Tax Assessments

352. There is today a broad consensus among national tax authorities and courts that anti-tax avoidance rules, akin to the bad-faith taxpayer doctrine relied upon by the Russian authorities, would be illusory if national tax authorities were prevented from holding the real party in interest liable for the tax consequences of the actions taken by sham entities they own or control.[494] Indeed, the Tribunal accepted that the "*anti-avoidance provisions of*

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492 *RosInvestCo v. Russia* cit., ¶ 628 (Annex(Merits) C-1049); *Quasar de Valores SICAV S.A., et al. v. The Russian Federation*, SCC Arbitration, Award (July 20, 2012), ¶ 179 (RME-3383).

493 Judgment of the Svea Court of Appeal, *The Russian Federation v. RosInvestCo UK Ltd.*, Case No. T 10060-10 (Sept. 5, 2013), p. 1 (Exhibit RF-76).

494 Resp. C-Mem., ¶¶ 1156-1165.

other countries, such as the United States, France, Germany, Canada and Australia […] *grant the taxation authorities*" the right "*to attribute income to the person responsible for the wrongdoing*,"[495] but nonetheless mistakenly concluded that, in Russia, "*there was no precedent for re-attribution at the time the tax assessments and related decisions were issued in respect of Yukos*."[496] Although not mentioned by the Tribunal, the Netherlands is among the many countries that provide for transactions to be re-characterized for tax purposes to reflect their economic substance, and for the related income to be attributed to the real party in interest.

353. In the Netherlands, tax authorities and courts commonly rely upon the doctrine of *fraus legis* to re-characterize transactions that are predominantly aimed at avoiding taxes in a manner that, like Yukos' scheme, is contrary to the purpose of the applicable tax law.[497] Where a transaction is re-characterized for tax purposes, the Dutch tax authorities attribute the income in question to the real party in interest, and Dutch courts uphold that remedy.[498]

354. The Tribunal found that Yukos' sham trading shells existed solely to avoid taxation, and that neither Yukos nor its sham trading shells ever contributed to the economic development of the low-tax regions, which the Tribunal held to be the goal of the low-tax region legislation.[499] The tax authorities in the Netherlands would thus be entitled under the *fraus legis* doctrine to re-characterize Yukos' tax scheme as in fact involving the sale of oil by Yukos, and to attribute to Yukos, as the real exporter, the income realized from the export sales nominally carried out by the sham trading shells.

355. A decision rendered by the Dutch Supreme Court on October 6, 2011 clearly shows that, under Dutch tax law, the Netherlands could have attributed to Yukos, as the real exporter, the income realised from the export sales nominally made by Yukos' sham trading shells.[500] The Dutch Supreme Court confirmed the lower courts' upholding of the taxes assessed against a Dutch B.V. that had reduced Dutch profit tax by purporting to conduct business through a Swiss A.G. The A.G. entity was established by the managing director and

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495 Final Awards, ¶ 625.

496 Final Awards, ¶ 625.

497 The Dutch *fraus legis* doctrine was developed for tax law in the early 1920s to fill in loopholes existing in tax legislation in the interest of collecting public revenues (Dutch Supreme Court May 26 1926, *LJN:* PW12157, *NJ* 1926, 723).

498 *See* note 501 below.

499 Final Awards, ¶¶ 277, 280, 327, 372-379; Respondent's Counter Memorial, table 3, p. 104, and Chart 7, p. 105.

500 Dutch Supreme Court October 6, 2011, *BNB* 2013/77.

ultimate beneficial owner of the B.V. entity, who also appointed a Swiss tax lawyer as its sole director. The business of the A.G. entity was carried out in the Netherlands by the managing director and ultimate beneficial owner of the B.V. entity, just as Yukos carried out in Moscow the activities of Yukos' sham trading shells that purported to carry out business in Russia's low-tax regions. The Dutch authorities re-characterized the transactions nominally carried out by the A.G. entity, treated these transactions as if they had instead been carried out by the B.V. entity, and then held the B.V. entity liable for the profit tax on the income nominally earned by the A.G. entity, just as the Russian authorities held Yukos liable for the profit tax on the income nominally earned by the sham trading shells.

356. The tax authorities in the Netherlands[501] and elsewhere[502] have also recharacterized other transactions and held the real party in interest responsible for the tax on the income nominally earned by other parties.

357. This principle has been recently endorsed by the OECD, which, in its Action Plan on Base Erosion and Profit Shifting, drew the distinction between lawful tax minimization and abusive tax evasion:

> "No or low taxation is not per se a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it. In other words, what creates tax policy concerns is that, due to gaps in the interaction of different tax systems, and in some cases because of the application of bilateral tax treaties, income from cross-border activities may go untaxed anywhere, or be only unduly lowly taxed."[503]

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501 Among other measures, Dutch tax authorities and courts have (i) disregarded intermediate steps in a transaction that did not have a real business economic purpose and could instead result in the avoidance of taxes (Dutch Supreme Court September 6, 1995, *BNB* 1996/4); (ii) re-characterized dividend payments used to repay receivables that were treated by the taxpayer as tax-free repayments of debt (Dutch Supreme Court December 1967, *BNB* 1968/80); (iii) re-characterized sales of shares, subject to capital gain tax, as dividends (which are taxed at a higher rate) where the taxpayer retained ultimate beneficial ownership in the "sold" shares (Dutch Supreme Court July 11, 1990, *BNB* 1990/292); (iv) disregarded entities interposed in a dividend payment chain for the sole purpose of benefitting from the reduced withholding tax rate on dividends (Dutch Supreme Court June 28, 1989, *FED* 1991/569); (v) denied a deduction of interest on intragroup loans entered for no other purpose than to erode the taxable base of a group entity (Dutch Supreme Court March 10, 1993, *BNB* 1993/197); and (vi) disregarded an entity that had been interposed between a parent company and its subsidiary after the subsidiary had decided to distribute dividends, for no purpose other than to minimize the applicable withholding dividend tax by taking advantage of a double-taxation agreement between the country of establishment of the subsidiary and that of the entity interposed between the parent company and the subsidiary (Dutch Supreme Court January 8, 1986, *BNB* 1986/127). In these and other instances, Dutch tax authorities and courts relied upon *fraus legis* to challenge transactions (or disregard intermediate steps in a transaction) that were solely or predominantly aimed at tax evasion that was contrary to the object and purpose of the tax law, and re-characterized (or disregarded) the challenged transaction based on economic reality, and taxed the party with the real economic interest in the transaction.

502 Resp. C-Mem., ¶¶ 1156-1165; Respondent's Closing Ppt., Vol. 1, 234-235 (RME-4687).

503 OECD, Action Plan on Base Erosion and Profit Shifting (July 19, 2013), p. 10 (Exhibit RF-77). The Dutch government supports the OECD Action Plan and other international co-operation initiatives intended to counter "aggressive" tax avoidance. Thus, for instance, as explained by the Dutch State Secretary of Finance in a circular dated 10 December 2013,

358. This is precisely what happened here, though as a result of income being "*artificially*" segregated across domestic borders, rather than international borders. Income that should have been attributed to Yukos and taxed in Moscow was instead claimed by the sham trading shells and taxed at the much lower rates applicable in the low-tax regions.

359. As a result of Yukos' tax evasion, (a) the budget of the Moscow region, where Yukos was headquartered, was deprived of the substantial tax revenues that it would have received if Yukos had lawfully paid its taxes there,[504] (b) the economies of the low-tax regions were deprived of the substantial investments they should have received in exchange for the tax benefits obtained by the trading shells, [505] and (c) Russia's federal budget was burdened by the need to provide financial assistance to the low-tax regions to make up for the investments that were promised but never made.[506]

(e)(ii) Yukos' VAT Assessments

360. The Russian Federation presented uncontested evidence that many countries which levy VAT or a similar tax do so in a strictly formal and mechanistic way, and that one of the main attractions of this method of taxation from the standpoint of national treasuries is that it facilitates simple and efficient tax administration.[507] Accordingly, once the Russian tax authorities determined that Yukos was the real party in interest in the transactions purportedly carried out by its sham trading shells, and that Yukos had failed to file properly amended VAT returns in its own name as the true exporter of the oil nominally sold by the sham trading shells, Yukos' VAT assessments followed automatically as a matter of Russian law.

361. The Russian Federation also demonstrated that applicable national rules for obtaining a zero VAT rate in respect of exports are strictly and mechanistically applied by most countries, including the Netherlands. The Dutch tax authorities and courts have denied the zero VAT rate for exports where the taxpayer did not substantiate its claim with sufficient documentation, even if the exporter would otherwise be entitled to the claimed

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"*the issue that multinationals are able to influence the total tax burden by using mismatches in various national tax systems is a global matter that needs a global solution. Therefore, the Netherlands actively cooperates with activities that take place in the OECD context to address this issue*."

504 Resp. Rej., ¶ 681(i).

505 Resp. C-Mem., ¶¶ 251-255. *See also* Resp. Rej. ¶ 681(iii).

506 Resp. C-Mem., ¶ 255. *See also* Resp. Rej., ¶ 681(ii).

507 Resp. C-Mem., ¶¶ 1204-1214.

exemption.[508] For example, a VAT decduction can be denied by the Dutch tax authorities if it is not reported in the tax period in which the VAT is incurred and if an objection to the VAT assessment is not filed within the time permitted. Applying this rule strictly, the Dutch Supreme Court recently held that a taxpayer who deducted export VAT for the wrong period could not later deduct it for the correct period even though the taxpayer would have been entitled to a VAT deduction if he had initially deducted the VAT for the correct period.[509] In light of the foregoing, a Dutch court would almost certainly have upheld Yukos' VAT assessments based on its incorrect filing of annual VAT returns rather than the monthly returns required under Russian law for all large companies like Yukos. If Dutch law required the filing of monthly VAT returns (as Russian law required of Yukos), then a Dutch court would likely have deemed insufficient Yukos' filing of annual VAT returns.

F. Conclusion

362. On the basis of the above, the Court should annul the Yukos Awards on the ground that the Tribunal lacked jurisdiction because:

(a) Article 45(1) ECT limits provisional application of the ECT to specific provisions that are consistent with the Russian Federation's constitution, laws and regulations, and arbitration of Claimants' claims under Article 26 ECT is inconsistent with the Constitution of the Russian Federation and Russian law;

(b) Claimants are not protected "investors" with a protected "investment" under the ECT; and

(c) the measures adopted by the Russian Federation, including the assessment of Yukos' taxes and the steps taken to enforce those assessments, constitute "*Taxation Measures*" within the taxation carve-out in Article 21(1) ECT.

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508 *See* the uncontested case law referenced in Resp. C-Mem., ¶ 1205, note 1866.

509 Dutch Supreme Court October 8, 2010, V-N 2010/53, 26. *See also* Dutch Supreme Court March 20, 2009 *BNB* 2009/134, 19.

V. GROUND FOR SETTING ASIDE 2: FAILURE TO COMPLY WITH THE TRIBUNAL'S MANDATE (ARTICLE 1065 (1) (C) DCCP)

A. Introduction

363. The second ground for setting aside the Russian Federation invokes is the Tribunal's failure to comply with its mandate within the meaning of Article 1065 (1) (c) DCCP. After an explanation of the legal framework (see below under (B)) the Russian Federation demonstrates that the Tribunal has failed to comply with its mandate because:

(a) the Tribunal wrongly failed, as was required by Article 21(5)(b) ECT, to submit to the competent tax authorities the question whether the "*tax*" in dispute here constituted an expropriation of Claimants' interest in Yukos, as Claimants assert and the Russian Federation disputes;

(b) the Tribunal developed its own novel methodology for determining damages, outside the debate of the parties, that led to its awarding tens of billions of dollars in damages without justification; and

(c) the Arbitrators did not personally fulfil their mandate.

B. Legal Framework

364. The mandate of a tribunal consists of a formal aspect and a substantive aspect.[510]

(a) The Formal Aspect Of The Mandate

365. The formal aspect of the mandate concerns the statutory and agreed procedural rules that a tribunal needs to observe.[511]

366. In the present proceedings, the procedural rules laid down in the fourth book of the Dutch Code of Civil Procedure,[512] Article 21 ECT and the provisions of the UNCITRAL Rules are primarily important. In addition, in the application of international treaties the rules of

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510 Parliamentary Papers II 1983/84 18 464 VI, no. 3, page 29 (Explanatory Memorandum). Meijer 2014, article 1065, annotation 4; Meijer & Van Mierlo 2014, paragraph 2.2(c) and Sanders 2001, p. 193.

511 Dutch Supreme Court January 17, 2003, *NJ* 2004, 384 (*IMS vs. Modsaf-IR*), ground 3.3. *See also* Parliamentary Papers II 1983/84, 18 464, no. 3, p. 29 (Explanatory Memorandum), Dutch Supreme Court January 29, 2010, *NJ* 2011, 270 (*Van Wassenaar/Knowsley*) ground 3.6.2.

512 *See, inter alia*, article 1073(1) DCCP. "The contents of this [First] Title shall apply if the place of arbitration is the Netherlands."

treaty interpretation and international practice must be taken into account.[513] To answer the question whether a tribunal exceeded the scope of its mandate, the court has to establish the formal mandate of the Tribunal on the basis of an interpretation of the applicable rules. The interpretation of the ECT must be conducted on the basis of the literal meaning of the applicable rules, as these must be understood in their context and according to their object and purpose.[514]

(b) The Substantive Aspect Of The Mandate

367. The substantive aspect of the Tribunal's mandate concerns, *inter alia*, the limits of the legal dispute.[515] A tribunal could not lawfully award anything more or other than what was claimed. The limits of the legal dispute are determined by the Claimants' claims and the Russian Federation's defences.[516] Failure to comply with the mandate can also be found if a tribunal has wrongly supplemented facts or certain legal grounds[517] or if a tribunal has failed to render a decision on an essential defence.[518]

C. Mandate Ground 1 – The Tribunal Failed To Comply With Its Mandate Because It Was Required To, But Failed To Refer Claimants' Expropriation Contentions To The Competent Tax Authorities

(a) Introduction

368. As shown above, the Tribunal ignored the plain meaning of the terms of Article 21(1) ECT – that "*nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties*" – and thus wrongly asserted jurisdiction over Claimants' contentions. Even if the Tribunal's decision that it had jurisdiction were correct, the Tribunal still violated its mandate, and the Yukos Awards should be set aside, because the Tribunal failed to comply with Article 21(5)(b)(i) ECT. That provision

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513 Dutch Supreme Court January 17, 2003, *NJ* 2004, 384 (*IMS vs. Modsaf-IR*), ground 3.3.

514 *See* Article 31 of the Vienna Convention on the Law of Treaties. Cf. Dutch Supreme Court 26 September 2014, ECLI:NL:HR:2837 (*Ecuador/Chevron & Texaco*) ground 4.3. *See also* Dutch Supreme Court January 17, 2003, *NJ* 2004, 384 (*IMS vs. Modsaf-IR*), ground 3.3.

515 Cf. Meijer 2014, article1065, annotation 4(e). *See also* Snijders 2011, article 1065 annotation 4 wherein various categories of violations of the substantive aspect of the mandate are mentioned.

516 Sanders 2001, p. 193.

517 Supreme Court, 21 March 1997, NJ 1998/207 (*Eco Swiss/Benetton*), ground 4.5.

518 Cf. Supreme Court December 30, 1977, *NJ* 1978/449 (*De Ploeg/Kruse*); Supreme Court February 14, 1997, *NJ* 1998/109 (*Mannaerts q.q./Van Rhienen*). *See also* Snijders 2001, article 1065 DCCP, note 4, under dd; Meijer 2014, article 1065 DCCP, note 4, under h.

requires an investor who claims that a tax is expropriatory to refer the issue whether the tax constitutes an expropriation, or whether a tax alleged to constitute an expropriation is discriminatory, to the relevant tax authorities. If the investor fails to make such a referral, an arbitral tribunal constituted under the ECT to hear the investor's claim must make the referral. Pursuant to Article 21(5)(b)(ii), the "*Competent Tax Authorities*," to which referral must be made are then required to provide their conclusions within six months. An arbitral tribunal "*may take into account the tax authorities' conclusions as to whether a tax is expropriatory*," but "*shall take into account any conclusions arrived at within the six-month period […] regarding whether the tax is discriminatory*." [emphasis added] The Tribunal may also take into account such conclusions after the expiration of the six-month period. A "*Competent Tax Authority*" is defined under Article 21(7)(c) ECT as "*the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when no such agreement is in force, the minister or ministry responsible for taxes or their authorized representatives*."

369. Here, the Tribunal declined to comply with its mandatory referral obligation under Article 21(5) ECT. It held that it was not required to comply with this referral obligation for four reasons.

First, the Tribunal ruled, such a referral would be "*an exercise in futility*" as "*the record before the Tribunal is enormous*" and could not have been reduced to a size and scope that would have allowed the competent tax authorities to provide guidance to the Tribunal.

Second, the Tribunal ruled, the conclusions of the competent tax authorities would not have been binding on the Tribunal.[519]

Third, the Tribunal held that the competent tax authorities' conclusions would not be helpful, asserting that their expertise does not extend to the issue of whether a measure that on its face appears to be a taxation measure was in reality motivated by improper purposes.[520]

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519 Final Awards, ¶ 1427.

520 Final Awards, ¶ 1423.

Finally, the Tribunal ruled that, because the Russian Federation's tax authorities themselves applied the measures at issue, their assessment would "*add little value for an arbitral tribunal*."[521]

370. For the reasons detailed below, the Tribunal's refusal to comply with Article 21(5) ECT violated its mandate, and requires that the Yukos Awards be set aside pursuant to Article 1065(1)(c) DCCP.

(b) The Tribunal Was Required Under Article 21(5) ECT To Refer Claimants' Contentions To The "Competent Tax Authorities"

371. Article 21(5)(b)(i) ECT unambiguously requires that, if an investor has failed to refer the issue whether a tax constitutes an expropriation or a tax alleged to constitute an expropriation is discriminatory, an arbitral tribunal appointed to hear the investor's claims "*shall make a referral to the relevant Competent Tax Authorities*."[522]

372. Having decided that Claimants' expropriation claim was covered by the claw-back in Article 21(5) ECT, the Tribunal was therefore *required* to refer this issue to the competent tax authorities of Claimants' States of incorporation - for Claimants Hulley and VPL, the Cypriot Ministry of Finance, and for Claimant YUL, UK Inland Revenue, as well as the Ministry of Finance of the Russian Federation. By failing to refer this issue to these tax authorities, the Tribunal violated Article 21(5)(b)(i) ECT, and failed to apply the procedure for dispute settlement agreed by the ECT Contracting Parties.

373. The use in Article 21(5)(b)(i) ECT of the mandatory term "*shall*" leaves no room for discretion.[523] The Tribunal was therefore required to refer this matter to the relevant tax authorities regardless of whether it believed that the tax authorities' conclusions would be helpful, or that a referral would be futile.

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521 Final Awards, ¶ 1435 [*English quote in Dutch text omitted*].

522 [emphasis added].

523 *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award of December 2, 2008, ¶ 119 ("The word 'shall' in treaty terminology means that what is provided for is *legally binding*." [emphasis in the original]) (RME-2873). *See also Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent of July 3, 2013, ¶ 28 (Exhibit RF-78); *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction of December 19, 2012, ¶ 130 (Exhibit RF-79); *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction of February 10, 2012, ¶¶ 247, 249 (Exhibit RF-80); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award of August 22, 2012, ¶ 181 (Exhibit RF-81); *Ambiente Ufficio S.P.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility of February 8, 2013, ¶ 592 (Exhibit RF-82).

374. In support of its conclusion that the referral requirement is subject to a futility exception, the Tribunal drew inappropriate analogies to exceptions to the requirement of exhaustion of local remedies under customary international law, as well as the requirement occasionally included in investment treaties[524] – but not in the ECT – that an investor must resort to the respondent State's domestic courts prior to commencing arbitration.[525] Under customary international law, a State may present a claim on behalf of one of its nationals only if the national has exhausted local remedies before the claim is presented. By way of exception, such a claim may be presented prior to exhaustion of local remedies if the available local remedies provide no reasonable possibility of redress. The exhaustion of local remedies rule ensures that the State has an opportunity to redress the alleged wrong by its own means, within the framework of its own domestic system.[526] By contrast, the referral requirement in Article 21(5)(b) ECT has an entirely different purpose. Tracking the mutual agreement procedures provided in double taxation treaties,[527] the referral requirement preserves the essential role of the Contracting States' tax authorities in assessing taxation measures, including, as the Tribunal recognized, whether a tax is abusive.[528] That purpose would be frustrated if arbitral tribunals had the discretion to conclude that such a referral would be futile.

375. Similarly, investment treaty tribunals that have accepted a futility exception in the context of a requirement that an investor submit a dispute to domestic courts prior to resort to arbitration have done so because this requirement serves the purpose of affording the State

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524 *See*, for instance, 1992 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Argentine Republic Art. 10 (investor-State disputes are first to be submitted to the administrative or judicial organs of the host State and, if within a period of eighteen months no final decision is rendered or if, despite a decision has been issued, the parties are still in dispute, then the investor may resort to international arbitration.) (Exhibit RF-83).

525 Final Awards, ¶ 1425.

526 *See* Report of the International Law Commission (2006), Suppl. No. 10 (A/61/10), p. 71, citing the decision of the ICJ in the *Interhandel* case (*Switzerland v. United States of America*), Preliminary objections, I.C.J. Rep. 1959, p. 6, at p. 27 (Exhibit RF-84).

527 *See* 2010 OECD Model Tax Convention on Income and Capital, Art. 25 (RME-1017); *see also* 1998 Agreement between the Government of the Republic of Cyprus and the Government of the Russian Federation on the Avoidance of Double Taxation with Respect to Taxes on Income and Capital, Art. 25 (Annex (Merits) C 916); 1994 Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Russian Federation for the Avoidance of Double Taxation with and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, Art. 25 (Annex (Merits) C 915). Many States, including the Russian Federation, the UK and Cyprus have entered into several treaties to avoid double taxation, most of which are based on the *OECD Model Tax Convention.* In particular, these treaties provide that disputes concerning taxation measures be settled by the competent tax authorities through consultations (*Mutual Agreement Procedure*).

528 Final Awards, ¶ 1423.

an opportunity to settle a dispute in its own fora.[529] Again, that consideration is not relevant here. Notably, other investment treaty tribunals have refused to read a futility exception into this requirement.[530]

376. The fact that the result of the referral required by Article 21(5)(b)(i) ECT would not bind the Tribunal did not authorize it to dispense with the mandatory referral requirement. The plain language of Article 21(5)(b)(i) ECT *required* the Tribunal to refer to the relevant tax authorities the issue of whether the taxation measures taken against Yukos were expropriatory, despite the fact that the authorities' conclusions would not bind the Tribunal. Importing into Article 21(5)(b)(i) ECT an exception to the referral requirement merely because this provision does not contemplate that the results of the referral would be binding would make this provision self-negating, and thus would be absurd.

377. The Tribunal's conclusion that the file would be too voluminous to refer to the tax authorities also cannot be a justification for not complying with the obligation of Article 21(5)(b) ECT, taking into account the six month period that this article provides for the competent authorities to provide their views. The tax questions at issue are neither too great in number nor too complex for the competent tax authorities, and these tax authorities must be deemed to possess special expertise and experience in these matters.

378. In conclusion, the Tribunal violated its mandate because it was required, but failed, to refer to the relevant tax authorities the issue whether the taxes assessed against Yukos were expropriatory. Even if the subjective prognoses of the Tribunal about the manner in which the tax authorities would have addressed this referral can be deemed plausible, the Tribunal was obligated under the ECT to test these prognoses by making a referral and considering the results.

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529 *Ambiente Ufficio and others v. Argentina* cit., ¶¶ 601-602 (Exhibit RF-82). The Tribunal's reliance on *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award of December 24, 1007 (*see* Final Awards, fn. 1865), is misplaced. The tribunal in *BG Group* found that BG Group's reliance on the exceptions to the customary international law rule of exhaustion of local remedies is inapplicable (¶ 146) and concluded that the requirement to submit the dispute to the Argentine courts for a period of 18 months prior to commencement of arbitration was inapplicable if "*recourse to the domestic judiciary is unilaterally prevented or hindered by the host State*," not if recourse is deemed to be futile (RME-3576, ¶ 147).

530 *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, Award on Jurisdiction of February 10, 2010, ¶¶ 263-273 (rejecting claimant's attempt to read a futility test into the jurisdictional clause on the ground that "judicially-crafted exceptions must find support in more than a tribunal's personal policy analysis of the provisions at issue.") (Exhibit RF-80).

(c) If The Tribunal Had Complied With The Referral Requirement Of Article 21(5) ECT, It May Have Avoided Its Clearly Erroneous Rulings Concerning Russian Tax Law

379. The Tribunal's refusal to submit Claimants' expropriation contention to the competent tax authorities can hardly be deemed immaterial, because if the Tribunal had made the required referral, the competent tax authorities could have prevented the Tribunal from making the gross errors in its interpretation and application of Russian tax law described above.

380. The Tribunal's first clear error in its interpretation and application of Russian tax law was its ruling that the Russian tax authorities' attribution to Yukos of the income of the sham Lesnoy and Trekhgorniy trading shells was improper because, the Tribunal wrongly concluded, *"there was no precedent"* in Russian case law for this remedy *"at the time that the tax assessment and related decisions were issued."*[531] As shown above, the Tribunal's ruling in this regard – which it conceded would *"eviscerate"* the anti-abuse doctrine by precluding the tax authorities from "*attribut*[ing] *the trading companies' income to the person responsible for the wrongdoing*"[532] – is mistaken in five respects:

(a) what the Tribunal mischaracterized as a *"re-attribution remedy"* was in fact the attribution to Yukos of the revenues and profits of its *own* business operations;

(b) under the Tribunal's reasoning, no judicial remedy for tax abuse could ever be sustained, because the first judicial application of that remedy would always lack a precedent;

(c) it is undisputed that there *was* Russian precedent for this remedy;

(d) Yukos' own internal memoranda confirm its understanding that, if Yukos' affiliation with its sham trading shells were uncovered, that *"will result in substantial tax claims against the Company;"* and

(e) Yukos' own external tax counsel had confirmed in their publications that this remedy was grounded in existing Russian law.[533]

381. If the Tribunal had complied with its mandate under Article 21(5) ECT, and had afforded the competent tax authorities of the United Kingdom, Cyprus and the Russian Federation the opportunity to address Claimants' contentions, they could be expected to have

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[531] Final Awards, ¶ 625.

[532] Final Awards, ¶ 625.

[533] *See* ¶ 312 above [emphasis added].

explained to the Tribunal that the remedy applied by the Russian tax authorities in response to Yukos' fraud conforms to international standards and practices, as shown above.

382. The Tribunal also erred in its interpretation and application of Russian tax law in ruling that Yukos' VAT assessments were improper, because it was "*difficult* [for the Tribunal] *to understand*" why the Russian VAT filing requirements should be applied to Yukos. Despite its ruling, the Tribunal acknowledged that the Russian authorities' position – that Yukos, as the real exporter, was required to file monthly VAT returns in its own name – was consistent with applicable law and that this law has a "*practical justification*."[534] It was obviously improper for the Tribunal to overrule an express requirement of Russian law applicable to all taxpayers simply because the Tribunal found it *"difficult to understand"* why that requirement should be applied to Yukos. As shown above, (a) the VAT filing requirement applied to Yukos and all other similarly situated Russian taxpayers is similar to the filing requirements applied by many other States, including the Netherlands, and (b) the Tribunal's ruling ignores the fact that Yukos could have filed the monthly tax returns that Russian law required, but chose for its own reasons not to do so.

383. Once again, had the Tribunal complied with its mandate under Article 21(5) ECT, and afforded the competent tax authorities of the United Kingdom, Cyprus and the Russian Federation the opportunity to address Claimants' contentions, they could be expected to have explained to the Tribunal that Yukos' VAT assessments are consistent with international standards and practices.

(d) Conclusion

384. In sum, the Court should conclude that the Tribunal failed to comply with its mandate by failing to submit Claimants' claims to the competent tax authorities, contrary to the express requirement of Article 21(5)(b) ECT. As a consequence, the Yukos Awards must be set aside pursuant to Article 1065 (1) (c) DCCP.

385. Further, the Tribunal expressly addressed the question whether it was required to refer this matter to the competent tax authorities in the context of its jurisdiction to hear the parties' dispute.[535] If the Tribunal only had jurisdiction on the condition that it complied with

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534 Final Awards, ¶ 686.

535 Final Awards ¶¶ 1409-1429.

Article 21(5)(b) ECT, then its failure to comply with Article 21(5)(b) ECT requires the Court to conclude that the Tribunal lacked jurisdiction, and that the Yukos Awards must accordingly be set aside pursuant to Article 1065(1)(a) DCCP.

D. Mandate Ground 2 – The Tribunal Rendered A Surprise Award In Assessing Damages And Failed To Afford The Russian Federation An Opportunity To Be Heard, In Violation Of Its Mandate And Public Policy

386. In awarding Claimants USD 50,020,867,798.02 in damages, the Tribunal rejected the approach proposed by Claimants on the basis of the reports submitted by their damages expert, Mr Brent Kaczmarek, and developed its own methodology that differed in significant respects from anything submitted or discussed by the parties. The Tribunal's approach mixed and matched bits and pieces of Mr Kaczmarek's valuation models that the Tribunal previously rejected as a basis for determining damages, and then combined them in novel ways that were neither proposed nor endorsed by either side. The fundamental flaws in the Tribunal's methodology resulted in the effective double counting of Claimants' losses and the awarding at least USD 21.651 billion in damages having no basis, economic or otherwise. This figure is based on conservative assumptions and represents USD 20.228 billion improperly awarded as dividends and interest and USD 1.422 billion improperly awarded in equity value.

387. Many of the problems in the Tribunal's novel approach follow from its rejection of both Claimants' November 21, 2007 valuation date (the date on which Yukos was struck from the companies register) and Claimants' valuation models. The Tribunal chose to fill the resulting gaps in the record by developing its own methodology, outside the parties' debate, to award Claimants damages as of a date (June 30, 2014) that had not previously been discussed. Both in their submissions on damages and in earlier submissions, both sides informed the Tribunal that calculating damages as of a date other than November 21, 2007 would require further expert analysis.[536] Because the Russian Federation thought this date was not an appropriate valuation date (as the Tribunal ultimately agreed in the Final Awards), the Russian Federation twice asked the Tribunal to hear the parties' views on damages after it decided the liability issues, including, in particular, the date on which

[536] *See* Respondent's Short Submission on Bifurcation of Liability and Quantum, And on Referral Under Article 21 ECT, ¶ 22 (April 29, 2011); May 9, 2011 Hearing on Bifurcation of Liability and Quantum and on Referral Under Article 21 ECT, at 147:11-14 (Claimants' counsel), 151:7-21 (Russian Federation's counsel); First Dow Report ¶¶ 21, 28-33; Second Kaczmarek Report ¶ 155.

Yukos should be valued. The Tribunal rejected both requests and instead decided to develop its own methodology without affording the parties an opportunity to be heard on its novel approach.[537]

388. The Tribunal's failure to afford the Russian Federation an opportunity to be heard on the Tribunal's own novel damages methodology denied the Russian Federation its right of defense. The Final Awards are thus a "surprise decision" outside the parties' debate, in breach of the parties' right to be heard set out in Article 1039(1) DCCP. The Tribunal accordingly acted in breach of its mandate, resulting in the issuance of Final Awards that violate public policy. In awarding damages notwithstanding the Tribunal's own acknowledgment of Claimants' failure to establish the amount of their purported losses, the Tribunal impermissibly relieved Claimants of their burden, under Article 24(1) of the UNCITRAL Rules, to prove "*the facts relied on to support* [their] *claim*," and thus again violated its mandate. For these two reasons, the Yukos Awards should be set aside pursuant to Articles 1065(1)(c) and (e) DCCP.

(a) The Tribunal Rejected Claimants' Valuations

389. The Tribunal did not award Claimants the damages they requested and did not determine damages in the way that Claimants requested. The following discussion explains what Claimants asked for, how the Russian Federation responded, and why the Tribunal rejected both the amount and method of calculation requested by Claimants.

390. Claimants asked for damages that would put them in the position they would have been in "but for" the claimed breaches of the ECT[538] – that is, if their interest in Yukos had not been expropriated.

391. Throughout the arbitral proceedings, Claimants maintained that they were entitled to three main heads of damages:[539]

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537 Final Awards ¶¶ 23-29; *see also* Letter from Cleary Gottlieb to Tribunal, March 15, 2010; Respondent's Short Submission on Bifurcation Of Liability and Quantum, And On Referral Under Article 21 ECT (April 29, 2011).

538 Claimants' Memorial on the Merits ¶¶ 904, 913; Claimants' Reply on the Merits ¶ 912.

539 Claimants also sought additional heads of damage that were rejected by the Tribunal, Final Awards ¶¶ 1779-1780. For example, Claimants asserted that they were entitled to be compensated for (a) the alleged loss in the value of their Yukos shares attributable to Yukos' failure to list its shares on the New York Stock Exchange, Claimants' Memorial on the Merits ¶ 969, and (b) the losses allegedly suffered by a company they referred to as "YukosSibneft" – a fictitious entity that Claimants asserted would have resulted from the proposed (but never consummated) merger of Yukos and Sibneft. Claimants' Memorial on the Merits ¶ 926. The Tribunal concluded that the "potential listing . . . on the NYSE and the potential benefits

(a) the value of their Yukos shares on November 21, 2007 (the date on which Yukos was struck from the companies register in Russia),[540] assuming the Russian Federation had not taken the disputed tax and enforcement measures;

(b) Claimants' share of the dividends they claimed Yukos would have paid from the end of 2004 to November 21, 2007;[541] and

(c) pre-award interest on those two amounts to the date of the awards.[542]

392. Claimants submitted two reports prepared by Mr Kaczmarek in support of their request for damages. In response, the Russian Federation submitted two reports prepared by its damages expert, Professor James Dow.

393. Mr Kaczmarek used a combination of three different valuation methodologies to determine Yukos' equity value.

(a) a discounted cash flow ("**DCF**") model, based on Yukos' hypothetical cash flows, assuming that Yukos had not been assessed the disputed taxes and had continued as a going concern;

(b) a comparable companies model, which valued Yukos by comparing its hypothetical revenues, EBITDA, production and oil reserves to those of other companies with known values; and

(c) a comparable transactions model, which valued Yukos by analogy to the prices paid in acquisition transactions involving firms that Mr Kaczmarek deemed to be comparable to Yukos.

394. Mr Kaczmarek then calculated a "synthesized" "but for" value for Yukos, based on a weighted average of the results of his three methods. In their request for damages, Claimants asserted that the amount of their loss resulting from the actions taken by the

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[to] Claimants […] are too uncertain," and that "assuming a merger in the 'but for' scenario is too speculative," and rejected Claimants' related requests for damages. Final Awards ¶¶ 1779-1780.

540 Claimants' Memorial on the Merits ¶¶ 911-912; Claimants' Reply on the Merits ¶ 939.

541 Final Awards ¶ 1711.

542 Final Awards ¶ 1724.

Russian authorities was equal to their proportionate share – roughly 70.5% – of this "*synthesized*" value.[543]

395. Claimants' second head of damages was for their share of the hypothetical dividends that Yukos would have paid between 2004 and November 21, 2007.[544] Claimants used as a proxy for these dividends the hypothetical cash flow that Mr Kaczmarek's DCF model assumed would be available to Yukos after the payment of all its expenses (referred to in his DCF model as Yukos' "*Free Cash Flow to Equity*").[545]

396. Finally, Claimants sought pre-award interest on the "but for" value of their Yukos shares and dividends at 1-year US dollar LIBOR plus 4%.[546]

397. The Russian Federation criticized each aspect of Claimants' valuation in two reports prepared by Professor Dow and in its own submissions.[547] In the Final Awards, the Tribunal accepted virtually all of the Russian Federation's criticisms of Claimants' approach to damages.[548]

398. First, the Tribunal rejected November 21, 2007 as the valuation date. The parties both cited authority establishing that "*where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of property, the date of the expropriation is the day when the interference has ripened into a more or less irreversible deprivation of the property*."[549] Under that standard, the Tribunal agreed with the Russian Federation that "*21 November 2007 cannot be the date of Yukos' expropriation.*"[550] Instead, "*it is clear to the Tribunal that a substantial and irreversible deprivation of Claimants' assets occurred on 19 December 2004, the date of the YNG auction*," and the Tribunal found this to be the date on which Yukos was expropriated.[551]

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543 Final Awards, ¶ 1717.

544 Claimants' Memorial on the Merits ¶ 950-53; Claimants' Reply on the Merits ¶ 963.

545 First Kaczmarek Report ¶ 83.

546 Final Awards, ¶ 967; Claimants' Memorial on the Merits ¶¶ 967-968.

547 *E.g.* First Dow Report ¶¶ 6-8; Second Dow Report ¶¶ 3-12; Resp. C-Mem. On The Merits ¶¶ 520, 1345; Resp. Rej. On The Merits Section ¶¶ 996, 1160.

548 Final Awards ¶¶ 1786 (date of expropriation) and 1785-86 (Claimants' valuation models).

549 *Azurix Corp. v. Argentine Republic*, ICSID ARB/01/02, Award (July 14, 2006), ¶ 417 (Annex (Merits) C 1002). quoted at Resp. Rej. ¶ 1666 n. 2854 and cited at Claimants' Memorial on the Merits ¶ 912 n. 1314 and Claimants' Reply on the Merits ¶ 940.

550 Final Awards, ¶ 1762. *See* Resp. Rej. on the Merits ¶¶ 1665, 1670.

551 Final Awards, ¶ 1762.

399. Second, the Russian Federation demonstrated that Mr Kaczmarek's DCF models – on which Claimants based the entirety of their claim for lost dividends and 50% of their claim for their share of Yukos' "but for" equity value – "*do not reflect an unbiased and independent assessment, but rather result from an effort to reverse-engineer a particular result*."[552] The Tribunal observed that Mr Kaczmarek's DCF model "*was convincingly criticized by The Russian Federation's expert and its counsel*,"[553] and found that this model was not "*sufficiently reliable to ground a determination of damages for this case*," explaining that "*the Tribunal was persuaded by Professor Dow's analysis of Claimants' DCF model, and is compelled to agree that little weight should be given to it*."[554] Underlying the Tribunal's conclusion was its finding that "*Claimants' expert admitted at the Hearing that his DCF analysis had been influenced by his own pre-determined notions as to what would be an appropriate result*."[555]

400. Third, the Russian Federation demonstrated that Mr Kaczmarek's two market-based models – his comparable companies model and his comparable transactions model – were no more reliable than his DCF model and also did not provide a valid basis for assessing damages. The Tribunal concluded that it could "*put little stock in Claimants' calculations based on the comparable transactions method, since both Parties agree that, in fact, there were no comparable transactions, and thus no basis that would allow a useful comparison*,"[556] and also rejected the USD 92.924 billion valuation produced by his "*comparable companies*" model because 70% of that value came from a comparison between Yukos and Rosneft. As the Tribunal explained, including Rosneft in Mr Kaczmarek's comparable companies model "*effectively valued Yukos as if it were a State-owned strategic enterprise, which it never was*."[557]

401. Finally, the Tribunal declined to adopt any of the alternative values for Yukos proffered by Claimants as "*reasonableness tests*."[558] According to Claimants, these values were

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552 Resp. Rej. on the Merits ¶ 1602.

553 Final Awards, ¶ 1799.

554 Final Awards, ¶ 1785.

555 Final Awards, ¶ 1785.

556 Final Awards, ¶ 1785.

557 Final Awards, ¶ 1804.

558 Kaczmarek Testimony, Hearing Transcript, Day 11 at 194:10-19.

presented "*to give an idea of the reasonableness of the value of Yukos*."[559] The Tribunal concluded (a) that "*Claimants use[d] these secondary valuations primarily in support of their main valuation*," (b) that they were "*only introduced by Claimants at a very late stage of the proceedings (through demonstrative exhibits at the Hearing and in Claimants' Post-Hearing Brief) and could not be properly addressed by the Russian Federation*," and (c) that "*none of these secondary valuation methods can serve as a suitable independent basis for determining the value of Yukos*."[560]

402. Thus, while the Tribunal accepted that Claimants were entitled to recover the "but for" value of their investment and their "but for" dividends (as well as interest on those amounts),[561] the Tribunal found that Claimants had failed to establish the amount of their loss. Claimants' burden of proof with respect to this issue is well established and was accepted by the Tribunal.[562] In the absence of such proof, the Tribunal should have declined to award Claimants any damages, or at least invited the parties to make further damage submissions. In the leading case of *Factory at Chorzów*,[563] on which the Tribunal heavily relied,[564] the Permanent Court of International Justice, after noting in respect of one head of purported damages that it did "*not [have] before it the data necessary to decide as to the existence and extent of the damage resulting*" from the respondent's wrongful conduct "*observe[d] that the damages alleged to have resulted from [that wrongful conduct] is insufficiently proved*," and awarded no damages.[565] In the case of the other heads of damages, the Court deferred its decision on compensation because the evidentiary record was inadequate and requested that an expert opinion be prepared.

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559 Claimants' Closing Statement, Hearing Transcript, Day 20 at 275:5-8. *See* Final Awards, ¶ 1782.

560 Final Awards, ¶ 1786.

561 Final Awards, ¶ 1791.

562 See Resp. C-Mem. on the Merits ¶¶ 1603-1615; Resp. Rej. on the Merits ¶¶ 1703-1719; Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law*, p. 224 (British Institute of International and Comparative Law 2008), p. 162 (Exhibit RF-86) ("[T]he claimant bears the burden of proof in relation to the fact and the amount of loss, as well as to the causal link between the respondent's conduct and the loss."); *see also* Final Awards, ¶¶ 1771-1772.

563 *Case concerning the Factory at Chorzów (Germany v. Poland)*, Merits, Judgment, September 13, 1928, P.C.I.J., Series A, No. 17 (Annex (Merits) C 925).

564 *See* Final Awards, ¶¶ 1587-1589.

565 *Case concerning the Factory at Chorzów (Germany v. Poland)*, Merits, Judgment, September 13, 1928, P.C.I.J., Series A, No. 17, ¶ 154 (Annex (Merits) C 925).

403. At the very least, the Tribunal should here have solicited further submissions from the parties.[566] The Tribunal, however, neither declined to award Claimants damages because they had failed to satisfy their burden of proof nor requested further submissions from the parties, but instead developed its own novel methodology. This resulted in a denial of the Russian Federation's right to be heard and, consequently, a surprise award. The Tribunal thus violated its mandate by (a) not granting the Russian Federation the right to defend its rights and present its arguments (Article 1039(1) DCCP), and (b) ignoring the requirement of Article 24(1) of the UNCITRAL Rules, that each party has the burden of proving the facts that it relies on to support its claim. The Tribunal also violated the fundamental purpose of the Russian Federation's right to be heard (Article 1056(1)(e) DCCP).

404. The Tribunal's approach to damages exceeded by a fair margin the discretion sometimes exercised by arbitral tribunals in awarding damages. Where a tribunal departs significantly from the parties' submissions and goes beyond the parties' debate, as was the case here, a tribunal is no longer exercising its discretion, but rather is exceeding its mandate, and the resulting award constitutes a surprise decision, in breach of the parties' fundamental rights. In his Report submitted with this Writ as Exhibit RF-85 ("**Dow Report**"), Professor Dow identifies a number of circumstances where he believes a tribunal's exercise of its discretion, even if based on the parties' submissions, is likely to lead to error. In particular, he notes that there is a substantial risk of economic error (a) where a tribunal uses a non-standard methodology, (b) where it mixes and matches in novel ways bits and pieces drawn from valuation models submitted by the parties, (c) where it relies on a model whose outputs have been found to be reverse-engineered to achieve a desired result, (d) where the valuation issues are especially complex, outside the normal realm of valuation practice and have no readily available precedent, (e) where the choices made by the tribunal have a very large effect on the amount of damages awarded, and (f) where the parties' and their experts' views have not been heard on issues made relevant by the tribunal's own liability findings.[567]

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566 *See Amoco International Finance Corporation v. The Islamic Republic of Iran,* No. 310-56-3, Partial Award of July 14, 1987, 15 IRAN-U.S. C.T.R. 189, ¶¶ 266-67 (Annex (Merits) C 939), cited at Claimants' Memorial on the Merits ¶ 917 n.1317 ("The Tribunal, therefore, is not in possession of the data necessary to take a meaningful decision, and such data as has been provided has not been properly discussed by either of the Parties outside of the context of its favorite theory. In any event, therefore, it would not be fair for the Tribunal to use that data in another context without asking the Parties to present their comments.").

567 Dow Report, ¶¶ 48-56.

405. As discussed below, all of the circumstances mentioned above were present here, and the Tribunal's decision to award Claimants more than USD 50 billion in damages without affording the parties an opportunity to be heard on its own novel damages methodology constituted a surprise award, and not an appropriate exercise of the Tribunal's discretion.

(b) The Tribunal Developed Its Own Damages Methodology Without Affording The Parties An Opportunity To Be Heard

406. After rejecting Claimants' valuations and valuation methodology, the Tribunal developed its own methodology and thus went beyond the debate of the parties. The following discussion addresses the Tribunal's newly created methodology and the Tribunal's failure to give either the Russian Federation or Claimants an opportunity to be heard, in violation of its mandate pusuant to Article 1065(1)(c) DCCP.

407. As a predicate for all of its quantitative conclusions concerning Yukos' value, the Tribunal determined (after rejecting Claimants' proposed valuation date)[568] that Claimants were entitled to the greater of:

(a) the "but for" value of their Yukos shares on the date of expropriation (December 19, 2004), plus the amount of the "but for" dividends they would have received through that date, plus interest on those amounts to the date of the Final Awards (assumed for these purposes to be June 30, 2014); and

(b) the "but for" value of their Yukos shares on the date of the Final Awards, plus the amount of the "but for" dividends that Claimants would have received from the end of 2004 to the date of the Final Awards (plus interest on the amount of those dividends to the date of the Final Awards).[569]

408. The Tribunal, however, was not able, for four related reasons, to determine the amount of the damages to be awarded to Claimants based on its own liability findings and the parties' submissions.

First, neither side had proffered a valuation of Yukos as of either of the Tribunal's valuation dates.

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568 *See supra* ¶ 398.

569 Final Awards, ¶¶ 1769, 1777-1778.

Second, the Tribunal rejected all of the valuations Claimants had presented for other dates.

Third, data relevant to Yukos' "but for" dividends for the period following 2007 was included in only one of Mr Kaczmarek's models; and, as he acknowledged, this model, which was presented solely "*for comparison purposes*,"[570] overstated the amount of Yukos' dividends.

Fourth, this data, as well as the data Claimants presented with respect to Yukos' assumed dividends for other periods, all derived from the same DCF models that the Tribunal rejected because they were unreliable.

409. Rather than asking the parties to fill these acknowledged holes in the record, the Tribunal chose to develop its own valuation model and to determine its own new valuations. It did so by picking and choosing among bits and pieces of the parties' submissions, and then mixing and matching those pieces in ways that were unforeseeable, incompatible with Mr Kaczmarek's original models and demonstrably incorrect. Neither side could have anticipated the Tribunal's novel approach, or have been expected to address that approach in its pleadings.[571] The Russian Federation refers the Court to the accompanying Report of Professor Dow, summarized below, which describes in detail the Tribunal's approach to damages and how that approach differed in significant respects from the parties' submissions.

(b)(i) The Tribunal's Assessment Of Yukos' Equity Value

410. The Tribunal's first step in creating its own new valuation model was to take, out of context, a single figure from one of Professor Dow's reports, and to adopt it as if it were a *bona fide*, stand-alone valuation that Professor Dow had endorsed. The background to the Tribunal's decision is the following. In criticizing Mr Kaczmarek's comparable companies model, Professor Dow provided[572] an illustration of the model's fundamental unreliability by correcting only a few of its more obvious errors – in particular, removing Rosneft and

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570 Claimants' Reply on the Merits ¶ 946.

571 In his Report, Professor Dow notes that he could not have prepared a valuation of Yukos without knowing the date that the Tribunal would determine to be the relevant valuation date. Dow Report ¶ 30. The Russian Federation in its submissions demonstrated that at least 22 different dates *prior* to the valuation December 19, 2004 date ultimately adopted by the Tribunal were also potentially relevant for assessing Claimants' possible damages. Resp. Rej. on the Merits ¶ 1676.

572 Second Dow Report ¶¶ 394 –419.

Gazprom Neft as comparable companies (which the Tribunal agreed was necessary, because, as State-owned companies, they were not actually comparable) and assigning equal weightings to the remaining companies.[573] He then showed that these corrections alone reduced Yukos' "but for" equity value by about one-third, or roughly USD 31.7 billion. Professor Dow referred to the resulting figures produced by Mr Kaczmarek's model as "corrected" figures, but was careful to state that they were not actually "correct."

411. As Professor Dow explained:

> "where appropriate I have revised Mr Kaczmarek's analysis in such a way as to make it more consistent with his stated methodology or to correct instances in which Mr Kaczmarek's approach is simply indefensible. In either case, unless otherwise stated, I do not intend that the valuation resulting from these corrections is correct. … Mr Kaczmarek's models are so badly designed and so riddled with errors and inconsistent, weakly supported, or totally unsupported assumptions that it is not realistic for me to fully correct his model. Rather, the purpose of making such revisions is to illustrate the extent to which Mr Kaczmarek's analysis is unreliable and to indicate by order of magnitude the extent of his errors."[574]

412. Because his aim was to demonstrate the unreliability of Mr Kaczmarek's comparable companies model *per se*, Professor Dow did not put forward his own estimate for the value of Yukos using that model. He also did not present the full effect on that model of correcting Mr Kaczmarek's DCF model, whose outputs served as the key inputs for Mr Kaczmarek's comparable companies model.

413. As Professor Dow again explained:

> "Though Mr Kaczmarek uses his Yukos DCF model to provide inputs to his comparable trading multiples valuation of Yukos, and although these inputs are flawed, to illustrate the magnitude of the errors he commits [in the comparable companies model] – independent of the errors he commits in his DCF valuation of Yukos – I do not correct the inputs from his DCF analysis into his Comparable Companies."[575]

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573 Second Dow Report ¶ 417.

574 Second Dow Report ¶ 7 [emphasis added].

575 Second Dow Report ¶ 395 [emphasis added]. Professor Dow also made clear, when questioned at the hearing in The Hague, that the "corrections" illustrated in his report were *not* a valuation of Yukos, explaining that while they "could be a useful valuation" for some purposes, "I do not think it would be responsible of me to endorse them for a purpose that they weren't reported in [my report] as being useful for." Dow Testimony, Hearing Transcript Day 12, 48.

414. Professor Dow then demonstrated that correcting the errors he identified in Mr Kaczmarek's DCF model would have further reduced Yukos' November 2007 "but for" equity value by approximately USD 2.5 billion.[576]

415. Mr Kaczmarek acknowledged that Professor Dow's "corrected" figures did *not* represent Professor Dow's view as to the "correct" value of Yukos, and dismissively referred to his figures as "*a series of what he calls 'corrections'*" that "*doesn't lead to anything* [Professor Dow] *thinks is correct*."[577]

416. The Tribunal was thus fully aware that neither Professor Dow nor Mr Kaczmarek regarded the figures in Professor Dow's illustration, showing the *unreliability* of Mr Kaczmarek's comparable companies model, to be a "correct" valuation of Yukos. It was also fully aware that both experts had recognized the impropriety of using those figures for that purpose. The Tribunal nonetheless concluded that Professor Dow's "corrected" (but not "correct") "*comparable companies figure is the best available estimate for what Yukos would have been worth*,"[578] and then proceeded to treat this "estimate" *as the actual amount* of Yukos' "but for" equity value on November 21, 2007.[579]

417. Having previously held that November 21, 2007 was not an appropriate valuation date, the Tribunal decided to develop its own methodology to determine Yukos' "but for" equity value on December 19, 2004 and June 30, 2014. Rather than inviting the parties to provide valuations for those dates, or to comment on whether the November 2007 figure adopted by the Tribunal could be used to derive valuations for those other dates, the Tribunal instead decided to determine "*the value of Yukos as of the relevant valuation dates by adjusting Yukos' value as of November 2007 on the basis of the development of a relevant index*,"[580] an approach that neither side had proposed or endorsed.

418. The Tribunal unilaterally adopted the RTS Oil and Gas Index (the "RTS Index") – which it claimed "[b]*oth parties have referred to […] as a reliable indicator reflecting the changes in the value of Russian oil and gas companies – to adjust Yukos' 'but for' equity value*

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576 Second Dow Report Appendix 16.1, note 10.

577 Kaczmarek Testimony, Hearing Transcript, Day 11, 144:5-9.

578 Final Awards, ¶ 1784.

579 Final Awards, ¶ 1788.

580 Final Awards, ¶ 1788.

forward and backward in time."[581] The Tribunal adopted this methodology even though neither side had presented a valuation of Yukos based on indexing across time or claimed that it would be economically defensible to do so.[582]

419. After using the change in the RTS Index to adjust Yukos' November 2007 "but for" equity value – that is, the figure presented by Professor Dow to illustrate the *unreliability* of Mr Kaczmarek's comparable companies model – the Tribunal determined on its own that Yukos' "but for" equity value would have been USD 21.176 billion on December 19, 2004[583] and USD 42.625 billion on June 30, 2014,[584] and that Claimants' proportionate interest in Yukos' "but for" equity value would have been USD 14.929 billion on December 19, 2004 and USD 30.049 billion on June 30, 2014.[585]

(b)(ii) The Tribunal's Calculation of Yukos' "But For" Dividends

420. The Tribunal next sought to determine the amount of the "but for" dividends that Yukos would have hypothetically paid in the ten-and-a-half year period between 2004 and June 30, 2014, had there been no expropriation.[586] The Tribunal here again developed its own methodology to fill the gaps in the evidentiary record resulting from the Tribunal's rejection of Mr Kaczmarek's DCF models, as his comparable companies and comparable transactions models did not include any projected dividends or even any dividend-related data.

421. The Tribunal's methodology involved two steps. In the first step, the Tribunal identified figures (drawn from Mr Kaczmarek's 2012 DCF model) that it believed could be used as the "*starting point*" for determining Yukos' "but for" dividends. In the second step, the Tribunal adjusted those figures to arrive at the annual amount of Yukos' "but for" dividend for each year from 2004 to 2014.

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581 Final Awards, ¶ 1788.

582 *See* Second Dow Report ¶ 185; First Kaczmarek Report ¶¶ 454-456

583 Final Awards, ¶ 1815.

584 Final Awards, ¶ 1821.

585 Final Awards, ¶¶ 1816, 1822.

586 Final Awards, ¶ 1791. As explained in paragraph 407 above, the Tribunal determined Yukos' "but for" dividends for only a portion of 2004 in connection with its valuation of Yukos as of December 19, 2004. *See* Final Awards, Table T1.

422. The Tribunal took as the "*starting point*" for its novel dividends methodology the hypothetical Free Cash Flow to Equity figures included in Mr Kaczmarek's 2012 DCF model.[587] Mr Kaczmarek had previously suggested that these figures could be used as a proxy for Yukos' "but for" dividends, but also acknowledged that his figures overstated the amount of Yukos' "but for" dividends, because some of the Free Cash Flow to Equity included in his model would "*in practice*" have been reinvested in Yukos and not distributed to shareholders. According to Mr Kaczmarek, this was not, however, a matter of concern because his DCF model proportionately reduced Yukos' "but for" equity value to reflect his overstated Free Cash Flow to Equity figures.[588]

423. The Tribunal's use of figures taken from Mr Kaczmarek's DCF model is flawed for at least three related reasons.

First, the Tribunal rejected both of his DCF models as the basis for determining Yukos' value because, as noted above, they were not "*sufficiently reliable to ground a determination of damages for this case*" and "had been influenced by his own pre-determined notions as to what would be an appropriate result."[589]

Second, although the Tribunal observed that the DCF model Mr Kaczmarek prepared in 2012 was "*presented as being based on actual historical information*,"[590] that "*historical information*" was not information about *Yukos* (an entity that no longer existed), but rather information on the results achieved by Yukos' former principal operating subsidiaries under their new owners, as part of very different oil and gas groups. Mr Kaczmarek had collected this information from a number of different sources and then stitched it together to generate figures that even he conceded were reverse engineered.[591]

Third, Mr Kaczmarek's 2012 DCF model obviously did not include any historical information for the period from January 1, 2012 through June 30, 2014.

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587 Final Awards, ¶ 1793. Professor Dow's report describes Mr Kaczmarek's 2007 and 2012 DCF models. Dow Report ¶¶ 16-17, 80-85.

588 First Kaczmarek Report ¶ 392 n.488.

589 Final Awards, ¶ 1785.

590 Final Awards, ¶ 1794.

591 Final Awards, ¶¶ 1785, 1799.

424. Just as the Tribunal did not seek the parties' views on its novel valuation methodology, so too it did not invite the parties to provide information about Yukos' hypothetical performance during the years 2012 to 2014, even though the approximately USD 6 billion of "but for" dividends and interest awarded for those years account for more than 21% of the total amount of "but for" dividends and interest awarded by the Tribunal.[592]

425. In the second step of the Tribunal's dividends methodology, the Tribunal first adjusted Mr Kaczmarek's Free Cash Flow to Equity figures to reflect in unspecified ways some (but not all) of the "corrections" Professor Dow made to Mr Kaczmarek's 2007 DCF model, and then further adjusted those figures to take account of three issues that, according to the Tribunal, the parties had not addressed.

426. The second step of the Tribunal's approach is illustrated by a table prepared by the Tribunal, found at paragraph 1811 of the Final Awards (page 560). The Free Cash Flow to Equity figures taken from Mr Kaczmarek's 2012 DCF model are shown in the left-hand column of the table.[593] The middle column of the table shows figures drawn from a partially revised version of Mr Kaczmarek's earlier 2007 DCF model, prepared by Professor Dow. Although the Tribunal labeled this column "Dow," it acknowledged that Professor Dow never in fact presented these figures as representing his own views as to Yukos' hypothetical Free Cash Flow to Equity, but only as figures resulting from his *partial* correction of Mr Kaczmarek's DCF model. In fact, Professor Dow told the Tribunal that this model's defects were so substantial that it "cannot be 'corrected.'"[594]

427. In placing the two sets of figures side-by-side, the Tribunal appears to imply that it was comparing two different versions of the same thing – Yukos' hypothetical Free Cash Flow to Equity figures – and that the Tribunal's task was to assess the relative merit of each expert's figures. In fact, the figures were not at all alike. Mr Kaczmarek's figures were taken from his 2012 DCF model, which included historical information (though not, as discussed in paragraph 423 above, historical information concerning Yukos) for the years up to the end of 2011, while Professor Dow's figures came from his partly corrected

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592 Dow Report ¶¶ 86-91.

593 The Tribunal claimed that for 2012-2014 it was "able to establish the relevant figures on the basis of Mr Kaczmarek's methodology, using data provided elsewhere in Mr Kaczmarek's reports." Final Awards ¶ 1795. The figures referred to by the Tribunal are the same type of Free Cash Flow to Equity figures that Mr Kaczmarek had previously acknowledged overstated the amount of Yukos' "but for" dividends.

594 Second Dow Report ¶ 316.

version of Mr Kaczmarek's 2007 DCF model, which did not include any post-November 2007 historical information. These partially corrected figures were instead based on Mr Kaczmarek's forecasts and projections for the period after November 21, 2007, which, importantly, did not anticipate the Great Recession of 2008.

428. One example will suffice to show the inappropriateness of comparing the two sets of figures (as well as the lack of reliability of Mr Kaczmarek's DCF models more generally). Mr Kaczmarek's 2007 DCF Model assumed that the price of a barrel of oil in 2009 would be USD 84 and that Yukos would produce 102,084,601 tons of oil (or oil equivalents) that year, while his 2012 DCF model used the actual historical price per barrel of USD 60 and his stitched-together figure of 92,847,111 tons for the amount of oil produced that year by Yukos' former operating subsidiaries under new ownership.[595] Mr Kaczmarek's 2012 model nonetheless implausibly generated a *higher* Free Cash Flow to Equity figure for 2009 than his 2007 model, even though his 2012 model used a lower oil price and lower oil production, by far the two most important determinants of any oil company's free cash flow to equity.[596]

429. Returning to the table found at Paragraph 1811 of the Final Awards, the Tribunal included in the third column figures representing what the Tribunal, "in the exercise of its discretion," determined were the amounts at which "*it is appropriate to […] fix the dividend payments that it assumes Yukos would have paid to its shareholders*."[597] After indicating that its own figures took into account those of Professor Dow's "corrections" to Mr Kaczmarek's 2007 DCF model that it accepted,[598] the Tribunal stated "*that Professor Dow's corrections […] do not take into account all the risks that Yukos would have had to contend with in carrying on business during the period 2004 through the present if the company had not been expropriated.*"[599] The Tribunal then identified three further significant risks that, in its view, would have affected the level of Yukos' "but for" dividends.

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595 Dow Report ¶¶ 82-83.

596 Dow Report ¶ 84.

597 Final Awards, ¶ 1811.

598 Final Awards, ¶¶ 1800-1802.

599 Final Awards, ¶ 1803.

430. The "*first significant risk*" identified by the Tribunal was "*the risk of substantially higher* [non-income] *taxes*." According to the Tribunal, "*Yukos' cash flows could be significantly affected by such taxes*."[600] The second risk "*related to the Company's dividend policy*,"[601] in particular, the risk that a change in Russian law might have required Yukos to reduce the amount of its hypothetical dividends. The third, and "*perhaps most significant*" risk, was the risk "*associated with the complex and opaque structure set up by Claimants, or by others on their behalf, in order to transfer money earned by Yukos out of the Russian Federation through a vast offshore structure*,"[602] in order not to share Yukos' earnings with the company's minority shareholders.

431. The right-hand column in the table is the result of all the adjustments made by the Tribunal, and lists the Tribunal's final determination of the amount of Yukos' "but for" dividend for each year. In most years, the Tribunal arrived at a figure lower than the figure in the "Dow" column, but for 2012, 2013, and 2014, the Tribunal, without explanation, found that Yukos' "but for" dividends would have been higher than Professor Dow's figures.

432. Although the Tribunal acknowledged that the parties did not address any of the three additional factors that it took into account in determining the amount of Yukos' "but for" dividends,[603] it again did not invite either side to present evidence on the adjustments required to take account of these factors. Perhaps because of the lack of evidence bearing on this issue, the Tribunal did not in fact provide *any* reason for the *size* of the adjustments it made to Mr Kaczmarek's and Professor Dow's figures. The Tribunal's surprise award in respect of Yukos' "but for" dividends and its failure to motivate this portion of its damages award constitute separate grounds for setting aside the Yukos Awards pursuant to Article 1065(1)(d) (failure to provide reasoning) and (e) (violation of public policy) DCCP, and is discussed further in paragraphs 524 to 525 and 578 below.

(b)(iii) The Tribunal's Award Of Interest

433. Having determined that Claimants' "but for" damages as of the date of the Final Awards (deemed to be June 30, 2014) was greater than their "but for" damages as of the date of

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600 Final Awards, ¶ 1805.

601 Final Awards, ¶ 1807.

602 Final Awards, ¶ 1808.

603 Final Awards, ¶ 1803-1810.

expropriation (December 19, 2004), the Tribunal decided that it would be "appropriate" to award Claimants interest on their share of Yukos' "but for" dividends at a rate of 3.389% per annum, equal to the average yield on the ten-year U.S. Treasury bond during the period from January 1, 2005 to June 30, 2014.[604] The Tribunal assumed that Yukos' "but for" dividends would have been paid on the last day of each year, beginning with December 31, 2004, and held that Claimants' pre-award interest on these dividends accrued from the first day of the year following their deemed receipt to June 30, 2014.

(c) The Tribunal's Novel Damages Methodology Resulted In The Awarding Of Billions Of Dollars Of Unwarranted Damages

434. The following discussion addresses how the Tribunal's non-standard and flawed approach without input from the parties effectively resulted in double-counting billions of dollars in damages and awarding Claimants a windfall. This approach led to a surprise award that should be set aside under Articles 1065(1)(c) and (e) DCCP.

435. In what is by all accounts the largest arbitral award in history, the Tribunal decided to develop its own novel methodology to determine the hypothetical value of a hypothetical company, and the amount of hypothetical dividends that this hypothetical company would have paid, during the ten-and-a-half years after the Tribunal found that the company "*had become incapable of operating as a business*."[605] In doing so, the Tribunal neither sought the parties' views on its methodology nor subjected its analysis to the scrutiny of the parties and their experts.[606] It is thus perhaps not surprising that the Tribunal erred in significant ways in determining the amount of Claimants' damages.

436. As shown below, the Tribunal mixed and matched incompatible valuation methods and overlooked fundamental concepts of corporate finance. As a result of the Tribunal's decision to determine Yukos' "but for" equity value independently of its "but for" dividends, Claimants were effectively compensated twice for the same hypothetical loss – once in the form of "but for" dividends and a second time as a portion of Yukos' "but for" equity value. These flaws in the Tribunal's methodology led the Tribunal to award Claimants (a) more than USD 20 billion in "but for" dividends having no basis, economic

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604 Final Awards, ¶ 1687. Neither party proposed the use of this rate in this manner. *See* Final Awards ¶¶ 1644-1647.

605 Final Awards, ¶ 1662 (internal quotation marks omitted).

606 It is not uncommon, especially in complex cases, for arbitral tribunals to bifurcate the proceedings, and afford the parties an opportunity to express their views on damages issues after the tribunal has rendered its ruling on liability. *See, e.g.*, *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11 Oct. 5, 2012, ¶¶ 50-96 (Exhibit RF-6).

or otherwise, and (b) more than USD 1.4 billion in respect of Yukos' "but for" equity value that likewise has no basis.

(c)(i) The Tribunal Significantly Overstated Yukos' "But For" Dividends

437. The Tribunal significantly overstated the amount of Yukos' "but for" dividends. This overstatement resulted principally from the Tribunal's use of the Free Cash Flow to Equity figures included in Mr Kaczmarek's 2012 DCF model without appreciating that the rate at which a company's equity value grows is inversely related to the rate at which it pays dividends. As a result, the dividends awarded by the Tribunal exceed by more than USD 20 billion the amount of the "but for" dividends that would have been consistent with the growth of Yukos' own "but for" equity value as determined by the Tribunal.

438. As Professor Dow explains in his Report submitted with this Writ, a dividend amounts to a distribution to shareholders of a portion of a firm's equity value.[607] A firm's equity value, and the growth in its equity value, are thus related to the portion of its equity value that is paid out to shareholders as dividends. In other words, all things being equal, the equity value of a company that pays dividends at a higher rate than other comparable companies (referred to below as "peer" companies) will grow more slowly than the equity value of a company that pays dividends at the same rate as its peers. This is because a company that pays dividends at a higher rate will have less cash than its peers, and the cash that is distributed to its shareholders will not be available to contribute to the company's current or future equity value. The corollary is also true. All other things being equal, a company whose equity value grows at the same rate as that of its peer companies cannot pay dividends at a higher (or lower) rate than its peers.[608]

439. In the Final Awards, the Tribunal found that all other things were in fact equal, or at least sufficiently similar, as between Yukos and the companies included in the RTS Index. In particular, the Tribunal's use of the RTS Index to adjust Yukos' "but for" equity value is based on its conclusion that Yukos and the Russian oil and gas companies included in the RTS Index were comparable in all relevant respects. It was expressly on this basis that the Tribunal found it appropriate to use the change in the value of the RTS Index before and

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[607] Dow Report ¶¶ 58-59.

[608] Dow Report ¶¶ 60-61. *See* First Kaczmarek Report ¶ 392 n.488.

after November 2007 to adjust Yukos' November 2007 "but for" equity value to determine Yukos' "but for" equity value on December 19, 2004 and June 30, 2014.[609]

440. The inverse relationship between Yukos' "but for" equity value and dividends was explicitly acknowledged by Mr Kaczmarek, who claimed that his DCF model had been designed to take account of this relationship. In discussing the reliability of the Free Cash Flow to Equity figures included in his DCF model, he admitted that not all of this Free Cash Flow to Equity would (as his model assumed) be used to pay "but for" dividends, but claimed that his model would automatically take account of any Free Cash Flow to Equity that was instead reinvested in the company by proportionately increasing Yukos' "but for" equity value:

> "As a practical matter, <u>we recognize that not all of the free cash flows to equity generated by YukosSibneft would have been issued as dividends to the shareholders</u>, and a portion of this free cash flow would have been invested in positive net present value (NPV) initiatives such as development of existing properties or acquisition of new properties. However, since our valuation of YukosSibneft does not consider such reinvestments of free cash flows, it is reasonable to assume these free cash flows would have been issued as dividends. Said differently, <u>if a portion of these free cash flows had been invested in positive NPV initiatives in lieu of dividends, then our equity value for YukosSibneft calculated in Section X would have been proportionately higher</u>."[610]

441. In other words, Mr Kaczmarek claimed that his DCF models did exactly what the Tribunal failed to do – they took account of the inverse relationship between Yukos' "but for" dividends and its "but for" equity value.

442. In light of this inverse relationship, once the Tribunal decided to adjust Yukos' "but for" equity value before and after November 2007 in proportion to the change in the value of the RTS Index, it necessarily follows that the Tribunal should have fixed Yukos' "but for" dividends at a level consistent with the rate at which the companies in the RTS Index actually paid dividends to their shareholders from January 1, 2005 to June 30, 2014. As Professor Dow explains, the awarding of any higher level of dividends would necessarily have reduced Yukos' "but for" equity value below the level that was determined by the Tribunal itself.[611]

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609 Final Awards, ¶ 1788.

610 First Kaczmarek Report ¶ 392 n.488 [emphases added].

611 Dow Report ¶¶ 63-70.

443. As demonstrated below, the Tribunal's methodology produces two inconsistent outcomes: (a) the changes in Yukos' "but for" equity value during the period from December 2004 to June 2014 exactly tracks the changes in the equity value of the companies included in the RTS Index, but (b) the level of "but for" dividends awarded by the Tribunal for this period is significantly higher than the level of dividends that was actually paid by those companies. As a matter of fundamental principles of corporate finance, both of these results cannot be correct if, as the Tribunal concluded, Yukos was comparable in all relevant respects to the companies in the RTS Index.

444. In comparing the level of dividends paid by different companies of different sizes, economists refer to a company's "dividend yield" – the percentage of the company's equity value that is distributed each year as a dividend. Although the Tribunal did not make express findings concerning Yukos' "but for" dividend yields, these yields can be readily calculated for each year by dividing the amount of Yukos' "but for" dividend (as determined by the Tribunal) by Yukos' "but for" equity value for that year (as calculated using the Tribunal's methodology).[612] The same calculation can also be made in respect of the actual dividends and actual equity values of the companies in the RTS Index.

445. In his Report accompanying this Writ, Professor Dow calculated, for each year from 2005 to 2014, both Yukos' "but for" dividend yield and the actual average dividend yield of all the companies included in the RTS Index (weighted by the same weighting scheme used by the RTS to determine the Index). His calculations show that during this period, Yukos' "but for" dividend yield consistently exceeded 8%, and in some years was as high as 22%. By contrast, his calculations show that the weighted average dividend yield of the RTS Index companies in this period ranged from 1.7% to 3.9%.[613]

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612 Dow Report ¶¶ 72-73, Appendix A.1.

613 *Ibid.*

446. For the reasons explained by Professor Dow and acknowledged by Mr Kaczmarek, Yukos' distribution of a larger share of its "but for" equity value in the form of dividends – in comparison to the portion of their equity value that was distributed as dividends by the companies in the RTS Index – would necessarily have resulted in Yukos' "but for" equity value growing at a slower rate than the actual equity value of the companies included in the RTS Index. This is so because the additional cash hypothetically paid out by Yukos as dividends would not be available in the future to contribute to the company's "but for" equity value. The Tribunal, however, determined that Yukos' "but for" equity value grew at exactly the same rate as the indexed companies. The only possible conclusion is that the Tribunal's methodology was deeply flawed in determining the amount of Yukos' "but for" dividends without regard to its separate determination of the company's "but for" equity value. In doing so, the Tribunal in effect double-counted a portion of Yukos' "but for" dividends, awarding them not only as dividends but also as part of Claimants' interest in Yukos' "but for" equity value.

447. In his Report, Professor Dow calculates the amount of Yukos' "but for" dividends that would have been consistent with the level of dividends actually paid by the companies in the RTS Index. As Professor Dow there explains, the difference between this amount and the amount of "but for" dividends actually awarded by the Tribunal represents a fair approximation of the portion of Yukos' "but for" dividends that were awarded without any economic basis. Professor Dow calculates the amount of Yukos' unwarranted "but for" dividends and interest at roughly USD 12.17 billion.[614] Based on only this flaw in the Tribunal's methodology, Claimants should have been awarded not more than USD 7.26 billion of "but for" dividends and interest, as opposed to the USD 27.48 billion actually awarded by the Tribunal – an excess of USD 20.22 billion.[615]

448. The fundamental flaw in the Tribunal's methodology is further illustrated in the graph below, drawn from Professor Dow's Report accompanying this Writ. This graph shows (a) the cumulative rate of return (change in equity value plus dividends received and interest on those dividends) that would actually have been realized in June 2014 by an investor who, from November 21, 2007, to June 2014 held an investment in companies in the RTS Index in proportion to their RTS weights, and (b) the comparable cumulative rate of return for the same period that would have been hypothetically realized by Claimants based on the "but for" amounts awarded to Claimants. As shown by the graph, an investor in the companies included in the RTS Index would have lost more than 8% of its original investment, in striking contrast to the roughly 29% gain that Claimants would realize if the Yukos Awards are not set aside.

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614 Dow Report, ¶ 75.

615 Dow Report, ¶¶ 79, Appendix A.1. These figures take account of (a) Claimants' roughly 70% interest in Yukos, (b) the interest that would have accrued on Yukos' economically unwarranted dividends, and (c) the Tribunal's 25% reduction (due to Claimants' own contributory fault) of the amount it would otherwise have awarded. *See* Final Awards ¶1827.

449. More generally, this graph illustrates the fundamental flaw in the novel damages methodology developed by the Tribunal on its own initiative. On the one hand, the Tribunal determined that Yukos' performance and that of the companies included in the RTS Index were comparable in all relevant respects, and on this basis used the RTS Index to adjust Yukos' "but for" equity value forward and backward in time. On the other hand, the Tribunal determined the amount of Yukos' "but for" dividends without taking account of the inverse relationship between Yukos' "but for" equity value and dividends, and awarded Claimants over USD 20 billion of "but for" dividends that are not at all comparable to the level of dividends actually paid by the same indexed companies that the Tribunal found to be comparable to Yukos in all relevant respects.[616]

[616] Dow Report, ¶¶ 76-78.

(c)(ii) The Tribunal Failed To Take Account Of Its Adjustments To Yukos' Dividends In Determining Yukos' Equity Value

450. The Tribunal's failure, in determining Yukos' "but for" equity value, to take account of the adjustments it made in determining Yukos' "but for" dividends, also resulted in the awarding of substantial damages having no economic or other basis.

451. In particular, the adjustments made by the Tribunal to Mr Kaczmarek's Free Cash Flow to Equity figures would also have reduced two of the key inputs used in his comparable companies model, namely, Yukos' "but for" revenues (referred to as "earnings" in the experts' reports) and its EBITDA.[617] These reductions would, in turn, have reduced Yukos' "but for" equity value using the Tribunal's own methodology (a partially corrected version of Mr Kaczmarek's comparable companies model) because, as discussed in paragraphs 19 to 20 and 104 to 106 of the Dow Report, the equity value for Yukos produced by this model varied directly with changes in the amount of Yukos' "but for" earnings and EBITDA. More specifically, Mr. Kaczmarek's model multiplied Yukos' hypothetical earnings and EBITDA by fixed valuation "multiples" that he derived from the ratio between (a) the actual earnings and EBITDA of other companies he regarded as comparable to Yukos, and (b) the actual equity values of those companies. Any reduction in Yukos' earnings and EBITDA would therefore also have necessarily reduced Yukos' "but for" equity value, as a result of the multiplication of Yukos' reduced earnings and EBITDA by Mr. Kaczmarek's fixed valuation "multiples."

452. In determining Yukos' "but for" equity value, the Tribunal nonetheless decided not to reduce Yukos' 2007 "but for" earnings and EBITDA, even though the adjustments to Mr Kaczmarek's 2007 Free Cash Flow to Equity figures made by the Tribunal in fixing the amount of Yukos' "but for" dividends would necessarily also have reduced its "but for" earnings and EBITDA. This aspect of the Tribunal's new methodology is described in detail at paragraphs 104 to 116 of Professor Dow's Report.

453. In his Report, Professor Dow notes that the Tribunal listed the total amount of the adjustments it made in each year to Mr Kaczmarek's Free Cash Flow to Equity figures, but did not indicate the amount of the adjustment that was attributable to either Professor Dow's "corrections" of those figures or to the Tribunal's own further adjustments. This

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[617] EBITDA is a company's revenues minus all of its expenses except for interest, taxes, depreciation, and amortization.

breakdown is important because the different adjustments would have affected Yukos' "but for" earnings and EBITDA in different ways. Professor Dow was nonetheless able to establish the "lower bound" of the effect of the Tribunal's failure to make the corresponding adjustments in calculating Yukos' "but for" equity value, by conservatively assuming that the Tribunal's adjustments had the minimum possible effect on Yukos' "but for" earnings and EBITDA.

454. Professor Dow re-calculated Yukos' "but for" equity value using the Tribunal's own methodology, with only one change – he conservatively reduced Yukos' 2007 earnings and EBITDA to reflect the adjustments made by the Tribunal to Mr Kaczmarek's 2007 Free Cash Flow to Equity figure. Professor Dow states in his Report that, on assumptions he regards as conservative, the Tribunal awarded Claimants not less than USD 1.422 billion in respect of Yukos' "but for" equity value which has no economic basis and is solely attributable to this flaw in the Tribunal's methodology.[618] He also notes that, in his view, this amount is a significant underestimate, in light of the Tribunal's own finding that Yukos would likely have diverted a portion of its earnings to its "*vast*" and "*opaque*" off-shore structure, in order to "'*segregate these profits from minority shareholders whenever it served the majority shareholders' or managements' interests*.'"[619]

455. The Tribunal's decision to determine Yukos' "but for" equity value and dividends independently of each other, and, in particular, the Tribunal's decision not to apply its own adjustments to Mr Kaczmarek's Free Cash Flow to Equity figures in determining Yukos' "but for" equity value, (a) could not have been anticipated, (b) was made without affording the parties an opportunity to be heard, and (c) like the Tribunal's determination of Yukos' "but for" dividends, resulted in a surprise award. The Tribunal's surprise award constitutes a separate ground for setting aside the Yukos Awards pursuant to Article 1065(1)(c) DCCP, and also a violation of public policy pursuant to Article 1065(1)(e) DCCP.

(d) The Deprivation of the Russian Federation's Right To Be Heard Was Partly The Result Of The Tribunal's Decision Not To Bifurcate The Proceedings

456. The Tribunal's denial of the Russian Federation's right to be heard on these issues was entirely avoidable, even if it was not foreseeable that the Tribunal would develop its own

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618 Dow Report, ¶ 116, Appendix B.2.; Final Awards, ¶ 1808.

619 Dow Report, ¶116.

novel methodology for determining Claimants' damages. Once the Tribunal concluded that the record was inadequate to enable the Tribunal to make the damage determinations required by its own liability findings (and, in particular, its valuation date ruling), the Tribunal should, at the very least, have invited the parties to make additional factual and expert submissions on the relevant damages issues identified by the Tribunal.

457. The Russian Federation in fact formally requested that the Tribunal afford the parties a separate opportunity to express their views on damage issues if, and when, the Tribunal found the Russian Federation to be liable for damages. The bifurcation of liability and damages proposed by the Russian Federation would have provided an efficient procedure for obtaining the parties' views on damages based on the Tribunal's specific liability findings, including its findings regarding the date on which damages should be assessed and the heads of damages to be awarded to Claimants.

458. The Russian Federation first requested that the Tribunal bifurcate its consideration of liability and damage issues before the Tribunal had fixed the schedule for the filing of memorials and evidence on the merits.[620] The Tribunal then decided to defer its decision on bifurcation until after the first round of merits submissions.[621] The Russian Federation accordingly renewed its application in April 2011, explaining:

> "Without first receiving determinative rulings by the Tribunal as to what constellation of actions (if any) by the Russian Federation, Yukos and/or Claimants and other acting on their behalf is actually relevant for determining damages, and the timing of those actions, efforts by the parties to calculate damages for the relevant liability scenarios will be based entirely on guesswork."[622]

459. Even though Claimants opposed bifurcation *per se*, they did agree that it would be appropriate for the Tribunal to make additional inquiries of the parties and their experts after the merits hearing in order to resolve specific damage issues raised by the Tribunal's liability findings. As Claimants' counsel stated:

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620 Letter from Cleary Gottlieb to Tribunal, March 15, 2010; *see also* Tr. of May 7, 2010 Procedural Hearing, 4:10-24:8.

621 Procedural Order No. 10, ¶ 4-5.

622 Respondent's Short Submission on Bifurcation Of Liability and Quantum, And On Referral Under Article 21 ECT, ¶ 10 (April 29, 2011). *See id*. ¶ 12 ("It would be virtually impossible – and entirely unjust – to require the Russian Federation to address all aspects of a US$104 billion damages claim without knowing for which conduct, if any, the Tribunal determines it bears legal responsibility.").

> "I do not quibble with the fact that you may have questions. Having heard both experts and having understood fully the methodology, you may ask question and you say 'Please experts give us the results – hypothetically we decide nothing at this stage, but give me the results if you take that date or this date, or if you do not take account of VAT or you do.'"[623]

460. Claimants specifically acknowledged that such inquiries would be necessary, and would not be accommodated by their model, if the Tribunal concluded that damages should be assessed as of a date other than November 21, 2007, the valuation date used by Mr Kaczmarek's models. As explained by Claimants' counsel, "*Now, it is a lot more difficult to play with the dates [...]. It is not something you can do in five minutes live but the experts can do that*."[624]

461. The Tribunal also acknowledged that if there was a failure of proof it might make additional inquiries of the parties, stating "*If the Claimants haven't discharged their burden of proof, [the Russian Federation] will know what to do*."[625] The Russian Federation's counsel noted in response that this should lead to a denial of damages, but observed that "*it is not unheard of for tribunals to seek additional submissions at that time*," to which the Tribunal replied, "*Yes, <u>at that time</u>*."[626]

462. Even though this precise contingency arose when the Tribunal rejected Claimants' valuation date,[627] the Tribunal inexplicably failed to do what both parties expected – as Claimants' counsel stated, "[p]*lease experts give us the results[...] if you take that date or this date.*"[628] Instead, the Tribunal decided to fill the gaps in the record by developing its own novel damages methodology, outside the debate of the parties and their experts. As a result, the Arbitrations progressed in precisely the prejudicial manner that the Russian Federation had tried to avoid by proposing the bifurcation of liability and damages issues.

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623 May 9, 2011 Hearing on Bifurcation of Liability and Quantum and on Referral Under Article 21 ECT, at 69:16-23.

624 May 9, 2011 Hearing on Bifurcation of Liability and Quantum and on Referral Under Article 21 ECT, at 147:11-14. *See id.* at 151:7-21 (Russian Federation's counsel's discussion of significance of changing the date of valuation).

625 May 9, 2011 Hearing on Bifurcation of Liability and Quantum and on Referral Under Article 21 ECT, at 49:10-11 and 49:12-14.

626 May 9, 2011 Hearing on Bifurcation of Liability and Quantum and on Referral Under Article 21 ECT, at 49:9-14 [emphasis added].

627 Final Awards, ¶¶ 1760-1762.

628 May 9, 2011 Hearing on Bifurcation of Liability and Quantum and on Referral Under Article 21 ECT, at 69:19-22 (Claimants' counsel).

463. While the UNCITRAL Rules grant tribunals discretion to conduct an arbitration "*in such manner as it considers appropriate*," this discretion is subject to the proviso "*that at any stage of the proceedings each party is given a full opportunity of presenting his case*."[629] This is consistent with the requirement of Article 1039(1) DCCP that an arbitral tribunal "*give each party an opportunity to substantiate his claims and to present his case*." In exercising its discretion to structure the proceedings, it was thus incumbent on the Tribunal to exercise it discretion "*within the parameters of the rules granting the discretion and subject to mandatory due process norms*."[630] With due respect to the Tribunal, it failed in this fundamental aspect of its mandate by going outside the debate of the parties to develop its own novel damages methodology, without affording the parties or their experts the right to be heard. The resulting surprise award should accordingly also be set aside pursuant to Article 1065(1)(e) DCCP.

(e) The Tribunal's Valuation Of Yukos As Of The Date Of The Final Awards Violated Its Mandate

464. The Tribunal's ruling that Claimants were entitled to damages determined as of the date of the Final Awards constitutes a separate ground for setting aside the Yukos Awards. Article 13 ECT expressly provides that compensation for the expropriation of an investment shall be equal to "*the fair market value of the Investment expropriated immediately before the expropriation.*" In awarding Claimants damages based on Yukos' value on the date of the Final Awards, the Tribunal exceeded its mandate, and the Court should accordingly set aside the Yukos Awards pursuant to Article 1065(1)(c) DCCP.

465. The Tribunal's use of the date of the Final Awards as the date for determining Claimants' damages is also arbitrary and punitive. For that reason as well the Yukos Awards should be set aside pursuant to Article 1065(1)(c) and (e) DCCP. The Tribunal's damages award was intended to put Claimants in the same position they would have been in "but for" the measures taken by the Russian authorities that were found to be in breach of the ECT. The amount of the damages awarded to Claimants must therefore be related to the Russian Federation's conduct. The Tribunal's awarding of damages as of the date on which the Final Awards were issued broke the required link with the Russian Federation's conduct,

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629 UNCITRAL Rules Art. 15(1) (Exhibit RF-39).

630 JEFF WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION (2012), p. 751 § 10.3.2.3 (Exhibit RF-87).

and resulted in the awarding of billions of dollars of damages that are solely attributable to the arbitrary date on which the Tribunal elected to issue the Final Awards.

466. If, for example, the Final Awards had been issued on November 5, 2014, Yukos' "but for" equity value, based on the Tribunal's methodology and using the RTS Index closing value on that day, would have been approximately USD 6 billion *less* than the June 30, 2014 value found by the Tribunal.[631] The amount of damages awarded to Claimants in respect of Yukos' "but for" equity value would be reduced proportionately, by more than USD 3 billion. This substantial swing in value is unrelated to any action taken by the Russian Federation.

467. The Tribunal's use of the date of the Final Awards as the date to determine Claimants' damages is also inconsistent with the Tribunal's own acceptance in the Final Awards that "*an expropriation relieves the owner not only of the value of the asset on the date of expropriation, but also of the risk associated with owning it*."[632] As Professor Dow observed, "[t]*he only way to recognize both aspects is to assess the value of the asset on the date of expropriation, when neither its owner nor the State knows whether the asset will increase or decrease in value*."[633]

E. Mandate Ground 3 – The Arbitrators Did Not Personally Fulfill Their Mandate

(a) Introduction

468. This section concerns a matter of principle that goes to the essence of the arbitral function, namely, the arbitrator's obligation to review the evidence and arguments and to decide the case personally, without delegation. Information provided to the parties following the registration of the Final Awards demonstrates that the members of the Tribunal violated this mandate.

469. In particular, this information indicates that an assistant to the Tribunal, who the Tribunal had previously represented to the parties would be responsible only for administrative tasks, instead devoted between 40% and 70% more time to the Arbitrations than did any of

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631 Dow Report, ¶ 43.

632 Final Awards, ¶ 1803 (quoting Respondent's Post-Hearing Brief ¶ 239).

633 First Dow Report ¶ 13.

the arbitrators, and thus must be presumed to have performed a substantive role in analysing the evidence and arguments, in deliberations, and in preparing the Final Awards. This discrepancy cannot be explained by the assistant's logistical or administrative role because the logistics and administration of the Arbitrations were the purview of the Permanent Court of Arbitration ("PCA"). Two members of the PCA staff served as Tribunal Secretary and Assistant Secretary, and the PCA reported that it spent over 5000 hours on these arbitrations. The fact that, in addition, the assistant spent dramatically more time on these cases than did the arbitrators indicates that the arbitrators delegated to the assistant substantive responsibilities that are not lawfully delegable. This is corroborated by the Tribunal's very recent refusal to provide any further details concerning the assistant's work, on the ground that doing so would jeopardize "*the confidentiality of the Tribunal's deliberations.*" This delegation constitutes a breach of the arbitrators' mandate to perform their duties personally, to the exclusion of anyone else, and justifies annulment of the Yukos Awards on the basis of Article 1065(1)(c) DCCP.

(b) Arbitrators' Tasks

470. The parties retain an arbitrator based on his knowledge and experience and to secure his time. Accordingly, the mandate the arbitrators are obliged to fulfill is of a strictly personal character ('*intuitu personae*').[634] Contrary to a judge, an arbitrator is approached to resolve a specific dispute and can determine the types and number of cases he hears.[635] This means that an arbitrator may only accept a mandate if he will be able to personally give the arbitration sufficient time and attention, for which arbitrators are usually personally and adequately compensated.[636]

471. All arbitrators must in fact participate in the formation of the important parts of the arbitral award.[637] The rule laid down in Article 1057 DCCP that, in case of a tribunal consisting of more than one arbitrator, all arbitrators must sign the award is specifically intended to safeguard that the arbitrators have in fact personally analysed and decided the dispute in

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634 *See e.g.* M.P.J. Smakman, 'De rol van de secretaris van het scheidsgerecht belicht', TvA 2007, 2, para 4; C. Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 2002, Kluwer Law International, number 2, p. 147 (Exhibit RF-88).

635 Partasides, 2002, number 2, p. 156 (Exhibit RF-88).

636 IBA Rules of Ethics for International Arbitrators, article 2(3) (Exhibit RF-89).

637 Snijders 2011, article 1057 note 1.

mutual cooperation and that they alone are responsible for the result. This principle of collegiate responsibility also applies in international cases.[638]

472. Since the arbitrators are obliged to personally carry out their mandate, they cannot delegate this to others.[639] The personal duties of arbitrators that cannot be delegated to third parties include attending hearings and deliberations, the assessment of documents and other evidence in the case, reviewing and analysing the parties' submissions, and resolving the dispute.[640] An arbitrator may not even (partly) delegate his mandate to resolve the dispute to the other arbitrators, let alone to a third party.[641] Partasides formulates this starting point in the following manner:

> "It is axiomatic to say of an arbitrator's mission that it is '*intuitu personae*.' A party's choice of arbitrator is, of essence, personal. And so is the chosen arbitrator's mandate. In accepting appointment, an arbitrator necessarily accepts a duty not to delegate that mandate."[642]

(c) Task Of The Administrative Secretary

473. It is generally assumed that the tribunal may use the assistance of an administrative secretary (hereinafter also referred to as "arbitral secretary"). The arbitral secretary supports the tribunal in carrying out the administrative activities related to the organisation of the arbitration. However, the tribunal remains responsible for the specific activities entailed in deciding the dispute, including personally analysing the parties' evidence and submissions.[643]

474. The arbitrator may not delegate all or part of his personal mandate to an arbitral secretary.

475. In order to establish the job description of the arbitral secretary, one should consult the applicable procedural rules, which may differ from case to case. As set out above, the applicable procedural rules in this case are the Dutch Code of Civil Procedure and the

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638 Supreme Court December 5, 2008, *NJ* 2009, 6.

639 Partasides, 2002, p. 147 (Exhibit RF-88).

640 G. Born, *International Commercial Arbitration, Kluwer Law International*, 2014, p. 1999 (Exhibit RF-90).

641 *See* Amsterdam District Court January 29, 2014, ECLI:NL:RBAMS:2014:793.

642 Partasides, 2002, p. 147 (Exhibit RF-88).

643 M.P.J. Smakman, 2007, para 4.

UNCITRAL Rules. Because it concerns regulations that are applied in an international case, an interpretation must also take international practice into account.[644]

476. The Dutch Code of Civil Procedure only contains one provision about the role and function of the arbitral secretary, Article 1058 (in conjunction with Article 1061 DCCP), which provides that the arbitral secretary is authorised to sign a copy of the arbitral award that is sent to the parties. This is a purely administrative function. In addition, Articles 1033 through 1035 and 1073 DCCP provide that the arbitral secretary can be challenged for the same reasons as an arbitrator, such as lack of impartiality or independence.

477. The Dutch legal literature is unambiguous in stating that when, as is the case here, at least one of the arbitrators is a lawyer, the role of the arbitral secretary must be construed as very limited. In that case, the arbitral secretary may also play a preparatory role when the time comes to write the award, by conducting research into relevant legal literature and case law. In a case like the present Arbitrations, where the parties' memorials were comprehensive in nature and had appended to them copies of every document and legal authority on which they relied, there would be little need for any such research assistance. But in all events, the tribunal may not be discharged from conducting its own research, and the writing of the award is reserved to the tribunal.[645]

478. The Tribunal was appointed according to the UNCITRAL Rules. Like the Dutch Code of Civil Procedure, these arbitration rules do not contain any explicit provisions regarding the role of the arbitral secretary that are relevant here. This means that the job description of the arbitral secretary is mostly to be found in international practice.

479. The UNCITRAL Notes on Organizing Arbitral Proceedings 1996 (not to be confused with the UNCITRAL Rules) reflect international practice and provide that the arbitral secretary may only carry out purely administrative activities, including the booking of meeting accommodation and providing secretarial support, but that he may not play any role in resolving the legal dispute.[646] As another noted arbitration text states, "*a central premise of the role of the secretary is that he or she may not assume the tribunal's (or an arbitrator's)*

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644 Supreme Court January 17, 2003, *NJ* 2004, 384 (*IMS vs. Modsaf-IR*), ground 3.3.

645 Therefore: P. Sanders, '*De secretaris van het scheidsgerecht*' [The arbitral secretary of the tribunal], *TvA* 2007, 29, para 2. Also: F.D. von Hombracht-Brinkman, '*Er zijn secretarissen en secretarissen!* [There are arbitral secretaries, and then there are arbitral secretaries!] Reaction to the article by prof. Mr Sanders, '*De secretaris van het scheidsgerecht*' [The arbitral secretary of the tribunal],*TvA* 2008, 17.

646 UNCITRAL Notes on Organizing Arbitral Proceedings 1996, ¶¶ 26-27 (Exhibit RF-91).

functions and may not influence the tribunal's decision."[647] The ICC Note Concerning the Appointment of Administrative Secretaries provides a further indication of what is customary in international practice.

> "The duties of the administrative secretary must be strictly limited to *administrative tasks* … Such person must not influence in any manner whatsoever the decisions of the Arbitral Tribunal.
>
> In particular, the administrative secretary must not assume the functions of an arbitrator, notably by becoming involved in the decision-making process of the Tribunal or expressing opinions or conclusions with respect to the issues in dispute."[648]

480. The Young ICCA Guide on Arbitral Secretaries (2014) provides the following in article 1(4):

> "Article 1. General Principles on the Appointment and Use of Arbitral Secretaries
>
> [...]
>
> (4) It shall be the responsibility of each arbitrator not to delegate any part of his or her personal mandate to any other person, including an arbitral secretary."[649]

481. It also includes the following explanation:

> "Article 1(4):
>
> The most common reason for objecting to the use of arbitral secretaries is that the mandate of the arbitrator is intuitu personae ("according to the person") and that any use of arbitral secretaries that goes beyond the purely administrative risks derogating from the arbitrator's personal responsibility. Indeed, of those respondents who opposed the use of arbitral secretaries in the 2012 Survey, 80.0% gave as the principal reason for their objection the potential for the "[d]erogation from an arbitrator's responsibilities", when given the choice between this option and "costs". Any arbitrator who appoints an arbitral secretary must, therefore, do so appropriately and with great care not to delegate any part of his or her decision-making in a way that would dilute the arbitrator's mandate. [...]"[650]

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647 Born, 2014, p. 2000 (Exhibit RF-90).

648 Note from the Secretariat of the ICC Court Concerning the Appointment of Administrative Secretaries by Arbitral Tribunals 1995. Incidentally, this ICC Note was replaced in 2012 by the ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries 2012 (Exhibit RF-92).

649 Article 1(4) Best Practices for the Appointment and Use of Arbitral Secretaries, Young ICCA Guide on Arbitral Secretaries (Exhibit RF-93).

650 Best Practices for the Appointment and Use of Arbitral Secretaries, Young ICCA Guide on Arbitral Secretaries, p. 6 (Exhibit RF-93).

482. The results of a representative survey conducted in 2012 of participants in international arbitration illustrates what is decisive for the tasks of the arbitral secretary in international arbitrations. This survey showed that approximately 90% of the participants were of the opinion that the arbitral secretary is not permitted to formulate important parts of the award, and moreover should refrain from discussing the merits of the dispute with any of the arbitrators.[651]

483. In short, the arbitral secretary may not partly or wholly take over the mandate of the arbitrator, nor may he function as a fourth arbitrator.[652] This means that the arbitral secretary may not actively participate in the deliberations leading to the arbitral award,[653] which, indeed, is a task exclusively allocated to the arbitrators.[654] Drawing up the reasoning of the award or parts thereof is the exclusive task of the tribunal, which the arbitrators will have to do in their own words.[655] Only by participating personally in drafting the award and testing its reasoning can the arbitrator fulfil his personal mandate. G. Born formulates the standard as follows:

> "[I]t is widely agreed that the secretary must not assume the tribunal's functions of hearing the evidence, evaluating the legal arguments, deciding the case or preparing a reasoned award."[656]

(d) Task Of The Arbitral Assistant

484. The position of "arbitral secretary" should be distinguished from that of "assistant" of the tribunal. The arbitral secretary has been anchored in legislation in the Dutch Code of Civil Procedure, which is not the case for an assistant. For example, an arbitral secretary assigned to the tribunal can be challenged for the same reasons as an arbitrator (Article 1033 DCCP), while this possibility does not exist for an assistant. Another difference is that a secretary has the authority to sign a copy of the arbitral award that is sent to the parties (Article 1058 DCCP). An assistant does not have this power.

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651 White & Case, International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, 2012, p. 12 (Exhibit RF-94).

652 Sanders, 2007, para 2.

653 Redfern, Hunter e.a., Redfern and Hunter on International Arbitration, Oxford University Press, 2009, para 4.185 (Exhibit RF-95).

654 Born, 2014, p. 2043 (Exhibit RF-90).

655 *See* e.g. Sanders, 2007, para 2; Von Hombracht-Brinkman, 2008, 17; J. Waincymer, Procedure and Evidence in International Arbitration, Kluwer Law International 2011, p. 444-445; ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries 2012 (Exhibit RF-92).

656 Born, 2014, p. 2045 (Exhibit RF-90).

485. The fact that the position of arbitral secretary, contrary to the position of assistant, has been anchored in the Dutch Code of Civil Procedure justifies the conclusion that the duties of an assistant are even less substantial than those of an arbitral secretary. Therefore, the assistant *a fortiori* may not partly or wholly take over the mandate of the arbitrator, nor may he function as a fourth arbitrator, or even participate in the deliberations leading to the arbitral award, nor may he write any drafts of the award. In addition to the prohibition against the arbitrators delegating their personal tasks, the justification for these restrictions on the position of an assistant is that there is no disclosure obligation for an assistant and an assistant cannot be challenged under the code.

(e) The Assistant Here Played A Decisive Role In The Arbitrations

486. In the present case, the Tribunal engaged a person who it introduced to the parties as "assistant" of the Tribunal, but then apparently allowed him to undertake substantial responsibilities that are part of the personal mandate of each arbitrator, so that he in effect acted as a fourth arbitrator, as is set out below.

487. The Chairman of the Tribunal informed the parties at the first organizational hearing on October 31, 2005 that Mr Martin Valasek had been appointed as assistant of the Tribunal.[657] This was effectively presented as a "*fait accompli*." Mr Valasek did not make any statement regarding his impartiality and independence of the parties.[658]

488. The Chairman informed the parties at the hearing on October 31, 2005 that Mr Valasek would provide solely administrative and logistical assistance:

> "I would like to bring to the attention of the parties that I have asked one of my colleagues in my office in Montreal <u>to assist</u> me in the conduct of this case. Because, like all of us, I travel a lot, if at any time I am unreachable, you could always contact him…It may come to pass that you wish to find out something with respect to the tribunal that Brooks Daly [tribunal secretary, of the PCA] might not be aware of. Martin [Valasek] at my office in Montreal could be reached and hopefully will have the answer for you."[659]

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657 Transcript of the procedural hearing held on October 31, 2005, 92:19-25.

658 The Chairman of the Tribunal declared to the parties in an e-mail dated November 2, 2005 that "Martin [Valasek] is impartial and independent of the Parties." Email from Chairman to Parties dated November 2, 2005.

659 Transcript of the procedural hearing held on October 31, 2005, 92:19-93:6 [emphasis added].

489. The Tribunal separately appointed Mr Brooks Daly of the PCA as administrative secretary (not to be confused with Mr Valasek, who acted as assistant).[660] This appointment was made pursuant to Article 7(c) of the Terms of Appointment agreed between the parties and the arbitrators on October 31, 2005, which forms the basis for the appointment and describes the duties of the secretary:

> "The Tribunal may appoint a member of the Registry [the PCA] to act as Administrative Secretary. The Administrative Secretary and other members of the International Bureau [of the PCA] shall carry out administrative tasks on behalf of the Tribunal."[661]

490. The secretary therefore was to perform "*administrative tasks*." Neither the Terms of Appointment nor any other document forms a basis for the appointment of an assistant of the Tribunal. The Tribunal requested and obtained the explicit permission of the parties prior to the appointment of Mr Brooks Daly as administrative secretary, while the parties were simply informed of the appointment of assistant Mr Valasek by the Chairman during the hearing of October 31, 2005.[662] The Tribunal did not suggest that the assistant would perform anything but administrative or liaison duties.

491. It has emerged from the Final Awards, however, that the Tribunal must have delegated far more substantive responsibilities to the assistant. Set out in paragraphs 1860 to 1866 of the Final Awards is an overview of the costs of the arbitrators, secretariat and assistant:

> "1860. The fees of Mr Daniel Price, the arbitrator initially appointed by Claimants, amount to EUR 103,537.50. Mr Price's expenses amount to EUR 3,678.99. The fees of Dr. Charles Poncet, the arbitrator appointed by Claimants following the resignation of Mr Price, amount to EUR 1,513,880. Dr. Poncet's expenses amount to EUR 85,549.64.
>
> 1861. The fees of Judge Stephen M. Schwebel, the arbitrator appointed by Respondent, amount to EUR 2,011,092.66. His expenses amount to EUR 51,927.29.
>
> 1862. The fees of The Hon. L. Yves Fortier, PC CC OQ QC, the Chairman, amount to EUR 1,732,937.50. The Chairman's expenses amount to EUR 51,782.24.
>
> 1863. The fees of Mr Martin J. Valasek, the Assistant to the Tribunal, amount to EUR 970,562.50. Mr Valasek's expenses amount to EUR 51,718.96.

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660 Transcript of the procedural hearing held on October 31, 2005, 9:23-10:5 [emphasis added].

661 Terms of Appointment dated October 31, 2005, Article 7(c).

662 Transcript of the procedural hearing held on October 31, 2005, 9:16-10:7 and 92:19-92:22.

> 1864. Pursuant to the Terms of Appointment and the agreement of the Parties, the PCA Secretary-General served as the Appointing Authority, and the International Bureau of the PCA was designated to act as Registry in these arbitrations. The PCA's fees for its services amount to EUR 866,552.60.
>
> 1865. Other tribunal costs, including court reporters, interpreters, hearing rooms, meeting facilities, travel and all other expenses relating to the arbitration proceedings, amount to EUR 996,780.12.
>
> 1866. Accordingly, the costs of the arbitration, including all items set out in paragraphs (a), (b), (c), (d) and (f) of Article 38 of the UNCITRAL Rules, amount to EUR 8,440,000 for the jurisdiction and merit phases."

492. Based on this overview and from the hourly charges of the participants (EUR 250-325/hour for the assistant and 750-850/hour for each arbitrator),[663] it has become clear to the Russian Federation that Mr Valasek spent far more time on the case than did any arbitrator. Thus, he must be presumed to have done much more than assist the Tribunal with administrative functions, as his position had been presented to the parties by the Chairman, because he spent many more hours on the arbitrations than did any member of the Tribunal.

493. The fact that the assistant spent far more time on the arbitrations than did any of the arbitrators was confirmed by information provided by the PCA, which served as registry and secretary for the Tribunal. Counsel for the Russian Federation requested the secretariat of the PCA (the "**Secretariat**") on September 9, 2014 for a specification of the time,[664] expenses and activities of the Tribunal and Mr Valasek, in order to obtain more insight into their activities. In its response to that request, on October 6, 2014 the Secretariat sent a Statement of Account to the parties which shows the number of hours charged by each member of the Tribunal, by Mr Valasek, and by the PCA, together with their fees and expenses incurred.[665]

494. The Secretariat disclosed that Mr Valasek charged for having worked 3,006.2 hours on the Arbitrations from beginning to end, for which he was paid EUR 970,562.50.[666] The

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663 Terms of Appointment dated October 31, 2005, Article 5(a); Letter from Secretariat to Parties dated November 17, 2008; Letter from Secretariat to Parties dated January 26, 2012; Letter from Claimants to Secretariat dated January 30, 2012; Letter from Respondent to Secretariat dated February 7, 2012.

664 Letter from Respondent to Secretariat dated September 9, 2014.

665 Letter from Secretariat to Parties enclosing Statement of Account dated October 6, 2014.

666 Final Awards, ¶ 1863.

Secretariat previously disclosed that Mr Valasek charged 381 hours for his work from the beginning of the arbitrations through the end of 2008 (i.e., through the hearings on jurisdiction and admissibility), for which he was paid EUR 95,250.[667] This means that Mr Valasek spent 2,625 hours (for a fee of EUR 875,312.50) in the period from January 1, 2009 until the date of the Yukos Awards, i.e. the period of the merits hearing and the drafting of the Yukos Awards.

495. To compare, the fee of the Tribunal's Chairman, Mr Fortier, amounted to EUR 1,732,937 for the entire arbitration, representing 1,732.5 hours plus 35 days.[668] Under the terms of reference, the arbitrators were allowed to charge for 10 hours for a hearing day,[669] which means that Mr Fortier charged for 2,082.5 hours (1,732.5 + (10 x 35) = 2,082.5). Of this total amount, Mr Fortier charged for 390.5 hours plus 10 days (i.e., a total of 490.5 hours) and a fee of EUR 379,525 for the period up to and including the hearing on jurisdiction and admissibility (to be exact up to and including December 31, 2008). This means that Mr Fortier spent 1,592 hours on the substantive hearing of the disputes and the drawing up of the Yukos Awards. By similarly comparing the interim and final accounts, it can be seen that the other arbitrators, Mr Poncet and Mr Schwebel, spent 1,540 hours and 1,852.6 hours, respectively, on this decisive phase of the arbitrations.[670]

496. The hours the three arbitrators and the assistant of the Tribunal spent on the substantive hearing of the disputes and drawing up of the Yukos Awards (therefore from January 1, 2009) is shown schematically below:

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667 Statement of Account dated February 4, 2009 for the period through 31 December 2008.

668 Final Awards, ¶ 1862.

669 Terms of Appointment dated October 31, 2005, Article 5(a).

670 According to the final statement of account, Mr Poncet charged 1559 hours plus 33 days (a total of 1,889 hours) and Mr Schwebel charged 2,077.2 hours plus 34 days (a total of 2,417.2 hours), whereas for the period through December 31, 2008 Mr Poncet charged 249 hours plus 10 days (a total of 349 hours) and Mr Schwebel charged 464.6 hours plus 10 days (a total of 564.6). This means that in the phase after the hearing on jurisdiction and admissibility Mr Poncet charged 1,540 hours (1,889 - 349), and Mr Schwebel charged 1,852.6 hours (2,417.2 – 564.6).

"Assistant" Valasek	2,625 hours
Chairman Fortier	1,592 hours
Mr Poncet	1,540 hours
Mr Schwebel	1,852.6 hours

497. This means that the "assistant's" hours were about 65% greater than the number of hours spent by the Chairman, Mr Fortier, and more than 70% and 40% greater than the hours spent by co-arbitrators Messrs Poncet and Schwebel, respectively, on the substantive hearing of the disputes and drawing up the Yukos Awards.

498. Mr Valasek's full participation in all aspects of the Arbitrations also becomes clear from the fact that his claimed expenses are virtually identical to those of the Chairman (EUR 51,718.96 for the assistant and EUR 51,782.24 for the Chairman).[671]

499. The very much larger number of hours Mr Valasek spent on the Arbitrations compared to the members of the Tribunal cannot be justified or explained on the basis that he was required to perform administrative functions, as might have been anticipated based on the role the Chairman represented the assistant would play, because he did not have any significant administrative responsibilities. Rather, the Secretariat fully handled the administrative organisation of the Arbitrations. As noted, the Tribunal appointed Mr Brooks Daly and Ms Judith Levine as administrative secretary and assistant administrative secretary, respectively, and a number of other employees of the Secretariat assisted them in these administrative duties and attended hearings. The Secretariat charged a total of 5,232.1 hours for these services, for which it was paid EUR 866,552.60. In addition, the Secretariat was paid EUR 996,780 for other costs, including the fees for stenographers, translators, costs for meeting rooms and travel expenses.[672] This means that Mr Valasek did not have to occupy himself with administrative activities.

500. The Tribunal, through the Secretariat, effectively confirmed that Mr Valasek participated in the substantive work and deliberations of the Tribunal, which the Tribunal members were

[671] Final Awards, ¶¶ 1862-1863.

[672] Final Awards, ¶¶ 1864-1865.

obligated to perform personally. In particular, when the Secretariat refused a request from counsel for the Russian Federation for further details regarding the hours worked by the assistant, it did so on the basis that disclosing any further details would invade the confidentiality of the Tribunal's deliberations:

> "The PCA has consulted the Tribunal regarding the Respondent's request of 9 September 2014. In the view of the Tribunal, the attached Statement of Account provides the Parties with the appropriate level of detail while assuring the confidentiality of the Tribunal's deliberations." [673]

501. By invoking the confidentiality of deliberations as the basis for refusing to provide further information about the assistant's role, the Tribunal effectively confirmed, or at least has prevented anyone from denying, what the time analysis and the invocation of the confidentiality of deliberations imply. The necessary implication of this reliance on "*the confidentiality of the Tribunal's deliberations*" [674] is that a third party, Mr Valasek, participated in the Tribunal's deliberations concerning the parties' evidence and submissions and participated in the drafting of the Final Awards. Such participation is in violation of the Tribunal's mandate to perform these functions personally, to the exclusion of any other persons.

502. There was no notice before receipt of the Final Awards, that Mr Valasek may have been performing duties that are reserved to the arbitrators. In the prior statement of account, which covered the period through the hearing on jurisdiction and admissibility, Mr Valasek charged for considerably fewer hours than the arbitrators did, as one would anticipate would be the case for an assistant performing administrative duties. For example, while Mr Valasek recorded 381 hours during that period, the Chairman recorded 490.5 hours and the others recorded 564.6 hours and 487 hours.[675]

503. Apparently, the Tribunal's own perception of Mr Valasek's role changed following the initial accounting, but without the Tribunal advising the parties. In fact, a comparison of the cover page of the Interim Awards with the cover page of the Final Awards shows a subtle change that suggests the Tribunal had silently elevated his status above that of the secretary and assistant secretary by the time of its deliberations on the Final Awards. Here

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673 Letter Secretariat to Parties, dated October 6, 2014, p. 2 [emphasis added].

674 Letter Secretariat to Parties, dated October 6, 2014.

675 This consists of 390.5 hours plus 10 days for the Chairman; 464.6 hours plus 10 days for Mr Schwebel; and 138.05 hours for Mr Price plus 249 hours plus 10 days for Mr Poncet, who is the arbitrator who replaced Mr Price. *See* Statement of Account dated February 4, 2009.

is the relevant extract of the cover page of the Interim Awards on Jurisdiction and Admissibility:

INTERIM AWARD ON JURISDICTION AND ADMISSIBILITY

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30 November 2009

Tribunal
L. Yves Fortier, CC, QC, Chairman
Dr. Charles Poncet
Judge Stephen M. Schwebel

Mr. Brooks W. Daly, Secretary to the Tribunal
Ms. Judith Levine, Assistant Secretary to the Tribunal
Mr. Martin J. Valasek, Assistant to the Tribunal

504. And here is the same part of the cover page of the Final Awards, showing Mr Valasek's elevated status:

FINAL AWARD

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18 July 2014

Tribunal
The Hon. L. Yves Fortier PC CC OQ QC, Chairman
Dr. Charles Poncet
Judge Stephen M. Schwebel

Mr. Martin J. Valasek, Assistant to the Tribunal
Mr. Brooks W. Daly, Secretary to the Tribunal
Ms. Judith Levine, Assistant Secretary to the Tribunal

505. Whatever the reason for the undisclosed elevation of the assistant's status – which coincided with his professional advancement at the Chairman's law firm – the delegation of the arbitrators' duties to the assistant is improper. At the moment he was appointed as assistant to the Tribunal, Mr Valasek was still an associate at the same law firm as the

Tribunal's Chairman. This law firm, after several mergers, is now part of Norton Rose Fulbright. Mr Valasek became a partner at Norton Rose during the Arbitrations and, according to its website, now regularly acts as an arbitrator and regularly speaks at international arbitration conferences.[676] Mr Valasek has also in the meantime been recognised as an international arbitration specialist in *Chambers Global: The World's Leading Lawyers for Business, 2012-2014*.[677] These developments in professional experience could not justify delegating the arbitrators' duties to the assistant or making him the fourth arbitrator. The opposite is the case, as is illustrated on the basis of the following statement by the former secretary of the International Court of Arbitration of the ICC (which in fact relates to an arbitral secretary, but also applies to an assistant):

> "in at least one case, the [ICC] Court required a tribunal to replace a secretary when the person originally appointed was a well-known arbitrator and arbitration authority in his own right."[678]

506. In sum, the foregoing leads to the conclusion that the assistant of the Tribunal played a too substantive and therefore unacceptable role in the proceedings. By acting this way, Mr Valasek assumed a significant portion of the personal mandate of one or more of the arbitrators or functioned as a fourth arbitrator. The Tribunal therefore failed to comply with its mandate within the meaning of article 1065(1)(c) DCCP.

507. The Russian Federation expressly offers to provide evidence to substantiate the facts set out above through the examination of witnesses, including Mr Valasek (the assistant).

508. Should your District Court nevertheless find that the position Mr Valasek held qualifies as "secretary" instead of assistant, then the above applies accordingly to the activities carried

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676 Http://www.nortonrosefulbright.com/people/42426/martin-j-valasek. When last visited, Mr Valasek's biography indicates that he had served as "tribunal secretary" in the Arbitrations. It provided in relevant part as follows [emphasis added]:

> "Martin Valasek is a leading practitioner in the area of international arbitration, with extensive experience in both investor-State and commercial contract disputes. He regularly acts as counsel, and also sits as an arbitrator.
>
> His experience covers a wide range of legal systems and industries, including aerospace, banking, construction, mining, energy, environmental remediation, pharmaceuticals and manufacturing. He has provided winning guidance to clients, in both transactions and disputes, under all of the leading rules, including the ICC, LCIA, ICSID and UNCITRAL Rules, and other institutional and ad hoc regimes. He has acted as arbitrator, and as tribunal secretary, in several important arbitrations, including the multibillion dollar Yukos Energy Charter Treaty arbitration. Mr Valasek is a frequent speaker, lecturer and contributor to various publications in his areas of expertise."

Mr Fortier left Norton Rose in 2011.

677 Http://www.chambersandpartners.com/person/297891/2.

678 Partasides, 2002, p. 150 (Exhibit RF-88)(quoting E. Schwartz, "The Rights and Duties of ICC Arbitrators" in (1995) ICC International Court of Arbitration Bulletin, Special Supplement "The Status of the Arbitrator," p. 86.

out by him as secretary of the Tribunal. In order to avoid unnecessary repetition, the Russian Federation suffices here with a reference to the aforementioned facts and grounds.

(f) Conclusion

509. The Tribunal has failed to comply with its mandate due to the fact that Mr Valasek as assistant or, alternatively, as secretary of the Tribunal, must be presumed to have participated in an unacceptable manner in the deliberations that led to the Final Awards and to the drawing up of parts, if not more, of the Final Awards. The Yukos Awards therefore should be set aside pursuant to Article 1065(1)(c) DCCP.

F. Conclusion

510. Based on the foregoing, the Yukos Awards should be set aside because the Tribunal failed to comply with its mandate, in violation of Article 1065(1)(c) DCCP.

VI. GROUND FOR SETTING ASIDE 3: THE COMPOSITION OF THE TRIBUNAL (ARTICLE 1065(1) (B) DCCP)

A. Introduction

511. If the arbitral tribunal was irregularly composed, an award can be set aside on the basis of Article 1065(1)(b) DCCP. In the present case, the assistant of the Tribunal must be presumed to have actively participated in the decision-making process, resulting in the Tribunal having been *de facto* composed irregularly. This irregular composition of the Tribunal (Article 1065(1)(b)) arises from the fact that:

(a) Mr Valasek must be presumed to have been actively involved in the decision-making process, resulting in the Tribunal effectively consisting of four persons; and

(b) Mr Valasek was appointed in an irregular manner.

B. Legal Framework

512. If the arbitral tribunal was irregularly composed, the award can be annulled on the basis of Article 1065(1)(b) DCCP.[679] The rules applicable to the composition of the arbitral tribunal

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[679] *See* Snijders 2011, article 1065 annotation 3.

are the statutory provisions with respect to the composition of the arbitral tribunal and the rules of procedure that the parties have agreed upon. The statute contains various provisions that address the composition of the arbitral tribunal. Violation of the rules applicable to the composition of the arbitral tribunal lead to the conclusion that the arbitral tribunal was irregularly composed. For example, the arbitral tribunal must consist of an odd number of arbitrators (Article 1026 DCCP) and various provisions regulate the manner in which the arbitrator or arbitrators must be appointed (see, *inter alia*, Articles 1027 and 1028 DCCP). The UNCITRAL Rules also contain provisions that address, *inter alia*, the number of arbitrators and the procedure for the appointment of arbitrators (Articles 5-13 UNCITRAL Rules).

513. In a prior instance in which an arbitral tribunal was irregularly composed, the District Court of Utrecht rendered a judgment dated August 8, 2007 in which it set aside an arbitral award that had been rendered by an arbitral tribunal consisting of two arbitrators: one president and one secretary.[680] The District Court of Utrecht ruled that an arbitral tribunal consisting of an even number of arbitrators violates Article 1026 DCCP and for that and other reasons it set aside the arbitral award.

C. Cross References

514. The Tribunal did not comply with its mandate because the assistant to the Tribunal, Mr Valasek, appears to have actively participated in the decision making process, and thus the Tribunal effectively consisted of four arbitrators. The fourth arbitrator was not appointed in accordance with the applicable rules and an even number of arbitrators violates Article 1026 DCCP. Therefore, the Yukos Awards must also be set aside.

D. Conclusion

515. Based on the foregoing, the Yukos Awards should be set aside on the basis of Article 1065(1)(b) DCCP.

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[680] District Court of Utrecht August 8, 2007, *NJF* 2007, 501, *LJN* BB1410.

VII. GROUND FOR SETTING ASIDE 4: THE AWARD DOES NOT CONTAIN REASONS (ARTICLE 1065(1) (D) DCCP)

A. Introduction

516. The Tribunal did not provide reasons for several of its rulings. This constitutes a further defect in the Final Awards that warrants setting them aside pursuant to Article 1065(1)(d) DCCP.

B. Legal Framework

517. The requirement to give reasons for decisions is a fundamental principle in our legal system (compare Article 6 ECHR, Article 121 Dutch Constitution and Article 30 DCCP). A judgment rendered by a court must therefore explain how and by which reasons the court came to a particular decision. If that is not the case, the judgment will be subject to annulment in appeal or in cassation before the Supreme Court:

> "(...) that each judgment by a court must contain reasons that provide sufficient insight in the line of reasoning that underlies the decision so that it can be verifiable and be acceptable for both the parties to the proceedings and for third parties, including, with respect to a case that may be subject to appeal, the court of appeal (Dutch Supreme Court, 4 June 1993, NJ 1993, 659). The requirement to give reasons for its decisions can be found in article 121 Dutch Constitution (Ct), article 20 Law on the Organisation of Courts, article 59 and 429k DCCP; the extent of this requirement depends on the particular circumstances of the matter."[681]

518. This principle also applies to arbitral awards. Pursuant to Article 1057(4)(e) DCCP, an arbitral award must contain "the reasons for the decision rendered in the award." If the award does not give reasons in accordance with Article 1057, the award should be set aside on the basis of Article 1065(1)(d) DCCP.[682]

519. Articles 1057 and 1065 DCCP contain the words 'reasons' and 'grounds," which implies that the arbitral tribunal in its arbitral award must set out, in unambiguous terms, how and for which reasons it arrived at a particular decision. The Supreme Court answered the question as to what exactly is meant by 'reasons' and 'grounds' in the *Nannini/ SFT Bank* and *Kers/Rijpma* judgments.

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681 Supreme Court, June 4, 1993, *NJ* 1993, 659.

682 Snijders 2011, Article 1057 DCCP, annotation 5.b.

520. In *Nannini/SFT Bank*, the Supreme Court ruled that a failure to give reasons for its decisions must be deemed equivalent to a case in which reasons were given, but no well-founded explanation for the relevant decision can be found.[683] The Joint Court of Justice of the Dutch Antilles and Aruba had set aside an arbitral award because it did not contain adequate reasons, among other things, because the arbitral tribunal made an incorrect factual assumption (with respect to the question whether a causal connection had already been established) and as a result (a) the decision, which followed from that incorrect assumption, lacked the reasoning required by law, or in any event (b) if the arbitral tribunal's reasoning could have passed the test of providing adequate reasoning, the arbitral tribunal should have rendered a decision on the causality defences that was put forward in the arbitration proceedings, or in any event (c) even if it should be understood from the arbitral award that the arbitrators implicitly addressed the causality defences, the defences that had been put forward were of such importance that the arbitral tribunal should have explicitly rendered a decision in respect of them in the arbitral award.[684] In the appeal in cassation, the Supreme Court upheld the setting aside of the arbitral award.

521. In *Kers/Rijpma*, the Supreme Court elaborated on the principle established in *Nannini/SFT Bank*, deciding as follows:

> "The court does not have the discretion to review an arbitral award for its content on the basis of this ground for annulment. The Supreme Court provided further details for that ruling in its judgment of 9 January 2004, no. R 02/066, NJ 2005, 190, holding that a failure to provide a reasoning must be deemed equivalent to the case in which reasons were given, but no well-founded explanation for the relevant decision can be found therein."[685]

522. According to A-G Huydecoper, the regular court should annul an arbitral award for a failure to give reasons if the reasoning included in the judgment contains a "manifest error."[686] A-G Wesseling-van Gent in her advisory conclusion for the Supreme Court's decision of December 22, 2006, is to the same effect:

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683 Supreme Court 9 January 2004, Dutch law reports 2005/190, ground 3.5.2

684 Grounds 9.5-9.7 of the ruling of the Joint Court of Justice of the Netherlands Antilles and Aruba in Supreme Court January 9, 2004, NJ 2005, 190 (*Nannini/SFT Bank*).

685 Supreme Court December 22, 2006, *NJ* 2008, 4 (*Kers/Rijpma*), ground 3.3.

686 A-G Huydecoper in his advisory conclusion for Supreme Court 9 January 2004, NJ 2005, 190 (*Nannini/SFT Bank*), par. 11 sub h and par. 15.

> "The conviction that the arbitral tribunal has made use of an incorrect assumption must according to Huydecoper be based on more than solely a "difference of appreciation"; it must concern a "manifest error". He believes that a reasoning cannot be upheld if "it cannot logically be defended or is otherwise evidently incomplete or insufficient."[687]

523. It is shown below that the Tribunal did not provide any explanation for several key aspects of its decisions in the Final Awards, and that the Final Awards must therefore be set aside under Article 1065(1)(d) DCCP.

C. Reasoning Ground 1 – The Determination Of The Damages Award Lacks Comprehensible Reasoning

524. The first respect in which the Final Awards lack comprehensible reasoning is in the calculation of the award of damages to Claimants. As shown above in paragraphs 386 to 467, the Tribunal exceeded its mandate and violated public policy by awarding Claimants more than USD 50 billion in damages, based on a valuation date and non-standard methodology that departed significantly from the parties' submissions and fell outside the parties' debate. As also shown, if the Tribunal had allowed an opportunity for the Russian Federation to be heard on the methodology the Tribunal developed on its own, the Russian Federation would have demonstrated that this methodology effectively double-counted a significant portion of Claimants' purported losses, and failed to take consistent account of the adjustments made by the Tribunal in the data presented by the parties.

525. The Tribunal's calculation of damages determined pursuant to its own non-standard and fundamentally flawed methodology without affording the parties an opportunity to be heard not only constitutes a violation of the Tribunal's mandate and public policy, but also warrants setting aside the Final Awards under Article 1065(1)(d) DCCP. Indeed, the Tribunal failed to provide any – or at least any comprehensible – reasoning for the nature and scope of the significant adjustments it made to the methodologies proposed by Mr Kaczmarek and to the figures discussed by both Mr Kaczmarek and Professor Dow. Consequently, this Court should set aside the Yukos Awards due to the Tribunal's failure to provide any comprehensible explanation for its calculation of Claimants' damages in the Final Awards.

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687 *NJ* 2008, 4 (*Kers/Rijpma*), ¶ 2.35

D. Reasoning Ground 2 – The Tribunal Ignored The Voluminous Evidence Showing That Yukos' Mordovian Trading Companies Were Shams; The Final Awards Accordingly Lack Comprehensible Reasoning

526. As shown above in paragraphs 316 to 324, the Tribunal found that the Russian Federation did not establish a basis for what the Tribunal found to be more than 75% of Yukos' corporate profit tax assessments. According to the Tribunal, the Russian Federation did not submit *any* evidence that Yukos' Mordovian trading companies were empty shams.[688] As also shown above, this finding is completely unsupported, and implies that the Tribunal *either:* (a) completely overlooked the voluminous evidence that the Russian Federation *did* submit showing this to be the case; *or* (b) without any comprehensible reasoning, deemed that evidence to be devoid of any relevance at all.

527. The evidence submitted by the Russian Federation, however, unambiguously and incontestably demonstrates that Yukos' trading companies in Mordovia, like those registered in Evenkia, Kalmykia and Baikonur, and like the Lesnoy and Trekhgorniy trading shells, were *all* empty shams created by Yukos solely to evade taxes. In any event, it is impossible to conclude that all of this evidence is irrelevant to the question of whether Yukos' Mordovian trading companies were shams. Indeed, this evidence includes numerous statements and documents showing in respect of the low-tax regions, including Mordovia:

(a) that Yukos used straw-men to act as the nominal directors of the trading shells in all these regions;

(b) that the trading shells in all these regions had no (or virtually no) assets or employees;

(c) that all of the business and affairs of the trading shells in all these regions were managed by Yukos itself from Moscow; and

(d) that there was an enormous disproportion between the tax benefits obtained by the trading shells in all these regions and the local investments they made (the latter,

[688] Final Awards, ¶ 639.

according to the Tribunal, being a factor that could warrant application of Russia's anti-avoidance tax rules).689

528. The Tribunal's conclusion that the Russian Federation did not justify most of Yukos' corporate profit tax assessments is based principally on the Tribunal's incorrect finding that that there was no evidence *at all* showing that the Mordovian trading companies were mere sham shells. In making this finding, the Tribunal *either* completely overlooked the powerful and voluminous evidence on this subject submitted by the Russian Federation with respect to Yukos' Mordovian sham trading shells *or* rejected this evidence without any discernible reasoning. Consequently, the Tribunal did not provide any comprehensible reasoning for its finding on this important point in accordance with the minimum requirements of Article 1065(1)(d) DCCP.

E. Reasoning Ground 3 – Speculation Does Not Amount To Permissible Reasoning

529. As the Russian Federation demonstrates below in paragraphs 536 to 578, the Court should set aside the Final Awards pursuant to Article 1065(1)(e) DCCP on the ground that they violate public policy and good morals, including the Russian Federation's right to due process. This is the case, in part, because the Tribunal based many of its rulings on what it openly and explicitly described as its own speculation as to what the Russian Federation *might have* done to destroy Yukos and thus deprive Claimants of their investments in Yukos, rather than what the record showed the Russian Federation to have *actually* done. The Tribunal repeatedly resorted to this concluding-by-speculation approach with respect to matters essential to its key holdings, when the record was insufficient to condemn the Russian Federation's actual conduct. The Tribunal's substitution of its own speculation in place of proven facts also supports the setting aside of the Final Awards pursuant to Article 1065(1)(d), because this type of ruling-by-speculation does not satisfy the minimum level of comprehensible reasoning required to justify the Tribunal's conclusions.

530. The Tribunal openly relied on its own impermissible speculation in at least the four following respects:

(a) The Tribunal ruled that Yukos' VAT assessments were improper in part because, even if Yukos had made itself the VAT filings required by Russian law to qualify for

689 Final Awards, ¶ 647.

a zero VAT rate, the Russian Federation would nonetheless have assessed Yukos for VAT because, in the Tribunal's view, the Russian Federation "was determined to impose the VAT liability on Yukos, and would have done whatever was necessary to ensure that the VAT liability was imposed on Yukos,"[690] indeed "no matter what Yukos did."[691] Not surprisingly, no factual support for the Tribunal's speculative conclusion is provided, as there is none in the record.

(b) In condemning the fines imposed on Yukos – 90% of which Yukos could have avoided if, in the first quarter of 2004, it had paid under protest the corporate profit tax and VAT it had evaded – the Tribunal again engaged in impermissible speculation, stating that even if Yukos had made this payment, "the Russian Federation would still have found a way or a reason to impose the fines on Yukos."[692] Again not surprisingly, no factual support for the Tribunal's speculative conclusion is provided, as there is none in the record.

(c) In response to the Russian Federation's showing that Yukos itself (and not the Russian Federation) was responsible for the commencement of Yukos' involuntary bankruptcy proceeding (because Yukos defaulted on its "A Loan" from a syndicate of banks led by Société Générale),[693] the Tribunal concluded – in line with the Russian Federation's argument – that "Yukos was in a position to pay off the balance of the A Loan and […] its willful failure to do so contributed to the circumstances of its bankruptcy by leading [its lenders] to petition for it."[694] The Tribunal nonetheless again engaged in impermissible speculation as to what might have occurred rather than what did occur, stating that "[i]n view of the larger circumstances, it is difficult to conclude that, even if the A Loan had been paid, another ground for pushing Yukos into bankruptcy would not have been found."[695] Not surprisingly, here too no factual support for the Tribunal's speculative conclusion is provided, as there is none in the record.

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690 Final Awards, ¶ 694.

691 Final Awards, ¶ 694.

692 Final Awards, ¶ 750.

693 Resp. C-Mem. on the Merits, ¶¶ 257-585; Resp. Rej. on the Merits, ¶¶ 1059-1064.

694 Final Awards, ¶ 1630.

695 Final Awards, ¶ 1631.

(d) Finally in this regard, the Tribunal ruled that the Russian Federation was responsible for (i) the agreement between Yukos' bank creditors and Rosneft (a Russian oil company then wholly-owned by the Russian Federation), providing for Rosneft to pay Yukos' debts to those banks, and (ii) Rosneft's conduct in bidding for Yukos' assets in Yukos' public bankruptcy auctions.[696] In so ruling, the Tribunal once again engaged in impermissible speculation, but this time openly acknowledged that "proof of specific State direction is lacking," [697] and openly speculated that "it may well be that in taking these actions, Rosneft did so at the sub rosa direction of the Russian State." [698] Based solely on this speculation, the Tribunal leapt to its definitive finding that "[i]n the view of the Tribunal, that Rosneft was so directed."[699] Once again, no factual support for the Tribunal's speculative conclusion is provided, and here not only is there is none in the record, but the Tribunal itself acknowledged this to be the case.

531. None of these speculative conclusions has any support in the evidentiary record. Indeed, in none of these four instances did the Tribunal even purport to cite any evidence that – in accordance with the minimum standard required by Article 1065(1)(d) DCCP – supports and explains its rulings. Because the Tribunal openly based these conclusions solely on its own speculation, none of these conclusions is supported by reasoning that is comprehensible and makes sense. Consequently, the Court should set also aside the Yukos Awards under Article 1065(1)(d) on this ground as well.

F. Reasoning Ground 4 – The Tribunal's Internally Inconsistent Findings Concerning The YNG Auction

532. The Tribunal's internally inconsistent findings concerning the YNG auction constitute a further reason why the Court should set aside the Final Awards pursuant to Article 1065(1)(d) DCCP, as well as pursuant to Article 1065(1)(e) DCCP on the ground that they are a violation of public policy and good morals (as shown below in paragraphs 569 to 573).

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696 Final Awards, ¶ 1474.

697 Final Awards, ¶ 1474.

698 Final Awards, ¶ 1474. [emphasis added]

699 Final Awards, ¶ 1474. [emphasis added]

533. According to the Tribunal, the sale at auction of 76.79% of YNG's shares in December 2004 was *"rigged,"*[700] and this sale, together with Yukos' VAT assessments, were the two "fatal blows" that inevitably led to Yukos' demise. In finding the YNG auction to have been *"rigged,"* the Tribunal relied heavily on its erroneous conclusion that the USD 9.35 billion price paid for this 76.79% of the YNG shares *"was far below the fair market value of those shares."*[701] This conclusion is contradicted by the Tribunal's own finding as to the value of Yukos and the share of this value that was then represented by YNG, as determined by Claimants' damages expert, Mr. Kaczmarek, and accepted by the Tribunal. On this basis, the price for the YNG shares achieved at auction actually *exceeded* their fair market value. This is particularly striking, because (a) property sold at a debtor's auction is almost invariably sold at a discount to its fair market value,[702] (b) Yukos had threatened all prospective purchasers and their financiers with a *"lifetime of litigation"* if they participated in the auction, and (c) all of the expected bidders and their financiers were subsequently legally enjoined from participating in the auction by a temporary restraining order obtained by Yukos from a U.S. bankruptcy court.

534. In light of these contradictory findings, the Tribunal's ruling that the YNG auction was "*rigged"* is not supported by the minimally required comprehensible reasoning. Consequently, the Court should set aside the Yukos Awards also on the ground of Article 1065(1)(d) DCCP.

G. Conclusion

535. Based on the foregoing, the Court should set aside the Final Awards pursuant to Article 1065(1)(d) DCCP.

VIII. GROUND FOR SETTING ASIDE 5: THE YUKOS AWARDS ARE CONTRARY TO PUBLIC POLICY (ARTICLE 1065(1) (E) DCCP)

A. Introduction

536. The final ground which the Russian Federation invokes for the setting aside of the Yukos Awards is the violation of public policy, as the Tribunal's reasoning, its composition and

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700 Final Awards, ¶¶ 986, 1036, 1043.

701 Final Awards, ¶ 1020.

702 *See* Second Dow Report, ¶¶ 546-549; Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law* 224 (British Institute of International and Comparative Law 2008) (Exhibit RF-86).

the manner in which the Tribunal formulated its own method of calculating damages – without hearing the parties – are in fact violations of public policy.

B. Legal Framework

537. Pursuant to Article 1065 (1)(e) DCCP, an arbitral award can be set aside because it violates public policy. Both the contents of the arbitral award and the manner in which it was produced can violate public policy. The term "public policy" indicates that a standard or principle is attributed particular importance.[703] Public policy has many elements and the exact meaning given to this standard depends on the context.[704] There can be a violation of this undefined standard in case of a violation of (a) a fundamental rule or fundamental principle of procedural law,[705] or (b) an essential principle or an essential rule of substantive law that is so fundamental that it causes a disruption in society.[706]

(a) The Right Of Both Parties To Be Heard

538. The right of both parties to be heard and the right to equality of arms are, for arbitration proceedings, set out in Article 1039(1) DCCP:[707]

> "The parties shall be treated equally. The arbitral tribunal gives each party the opportunity to claim its rights and to present its arguments."

539. The right of both parties to be heard means not only that both parties have the right to present their arguments, but also that the arbitral tribunal must actually reflect upon those arguments in its decision-making process. The right of both parties to be heard includes the right of the parties to express their views on the statements made by the opposing party. Insofar as the arbitral tribunal fails to do so, the arbitral award can be annulled.

540. The right of both parties to be heard also requires that the arbitral tribunal may not render any surprise decisions. A surprise decision exists if the parties, considering the discourse of the procedural debate, were surprised by a decision of the arbitral tribunal that is based

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703 Asser/Scholten General part* 1974/7.

704 H.J. Snijders, 'Openbare orde, rechtspersonen en mensenrechten', *NJB* 2014/1174.

705 In Supreme Court March 21, 1997, *NJ* 1998, 207 (*Eco Swiss/Benetton*), ground 4.2, the Supreme Court held that there is a violation of public policy if the drafting, contents or execution of an arbitral award constitutes a violation of mandatory law of a fundamental nature.

706 Cf. H.J. Snijders, 'Openbare orde, rechtspersonen en mensenrechten', *NJB* 2014/1174. Parliamentary Papers II 1983/84, 18 464, no. 3, pp. 29-30 (Explanatory Memorandum).

707 Also compare Article 15 UNCITRAL Rules that is discussed below.

on grounds that parties did not comment on or were not given the opportunity to comment on.[708] An arbitral award that includes a surprise decision can therefore be set aside as being contrary to public policy.

541. The Supreme Court held in its judgment dated May 25, 2007 (*Spaanderman/Anova)* that the fundamental right to be heard in arbitral proceedings is of such importance that a restrictive review of this right in annulment proceedings would be inappropriate.

> "However, a restrictive application of this provision [Article 1065 (1)(e) DCCP] is inappropriate if it must be determined if the arbitral tribunal in deciding the matter violated the fundamental right to be heard." That right is of at least the same importance for arbitration proceedings as it is for proceedings before a regular court."[709]

542. Consequently, the court must apply a full review in deciding if the right of both parties to be heard has been violated. If such a violation exists, the arbitral award must be set aside.

(b) Equality Of Arms

543. Article 1039(1) DCCP not only provides for the right of parties to be heard, but also the closely related right to equal treatment (*equality of arms*). The right to equality of arms is also laid down in Article 15 of the UNCITRAL Rules:

> "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

544. The ECtHR described in *Dombo Beheer/Nederland* the right to equality of arms in similar terms:

> "'equality of arms' implies each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."[710]

545. In the *IMS/Modsaf* ruling, the Supreme Court held that it is "*established case law*" that a violation of the right to equality of arms that is safeguarded by Article 1039(1) DCCP could lead to the setting aside of the award for a violation of public policy or good

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[708] Supreme Court, January 31, 2014, NJ 2014/89 (*Koolman/Arubags*).

[709] Supreme Court May 25, 2007, NJ 2007, 294 (*Spaanderman/Anova*), ground 3.5.

[710] ECtHR October 27, 1993, NJ 1994, 534 (*Dombo Beheer/Nederland*).

morals.[711] As the *Spaanderman/Anova* ruling quoted above is applicable by analogy, it must be assumed that in setting aside proceedings a restrictive review of the question whether parties were treated equally is inappropriate. It can be understood from the *X/Slotervaartziekenhuis* ruling that the right to equality of arms could, for example, have been violated if an arbitral tribunal bases its decision, among other things, on the findings of a committee of experts that is unilaterally formed by the arbitral tribunal.[712]

546. Mr Asser is of the view that it is not a given that the principle of equality of arms is observed. He states that the arbitrator may on the basis of first impressions make presumptions as to the outcome of the case and no longer afford the party "that will lose" the opportunity to alter that opinion by submitting evidence:

> "Therefore, both parties must equally be afforded the opportunity to set out their positions and to submit evidence. That sounds self-evident, but unfortunately that is not the case, if one considers that bias on the part of the court or arbitrator resulting from the anticipated outcome of the case, entails the anything but imaginary risk that the party 'that will lose' will no longer be afforded the opportunity to alter that opinion, for example by submitting evidence."[713]

547. It can be concluded from the above that a full judicial review is required in order to assess whether the principle of equality of arms has been violated. If such a violation exists, the arbitral award must be set aside.

(c) Impartiality And Independence

548. Arbitrators must be independent and impartial. This requirement arises, *inter alia*, from the (UNCITRAL and statutory) rules regarding the appointing[714] and challenging of arbitrators,[715] and includes, for example, Article 1033(1) DCCP, which provides:

> "An arbitrator can be challenged if there is justifiable doubts as to his impartiality or independence"

549. Article 10(1) of the applicable UNCITRAL Rules is to similar effect:

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711 Supreme Court April 24, 2009, *NJ* 2010, 171 (*IMS/Modsaf*), ground 4.3.1.

712 Supreme Court July 12, 2013, *RvdW* 2013, 884, *JBPr* 2013, 45 (*X/Slotervaartziekenhuis*).

713 Asser 2013, no. 3.

714 Article 6 UNCITRAL Rules (Exhibit RF-39); Article 1028 DCCP et seq.

715 Articles 9-12 UNCITRAL Rules (Exhibit RF-39); Article 1033 DCCP et seq.

> "Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrators impartiality or independence."

550. If an arbitrator is not impartial or independent, the award can be subject to annulment because the manner in which the award was produced violates public policy (Article 1065(1)(e) DCCP). The Supreme Court held in *Nordström/Van Nievelt*[716] that the arbitral award can be set aside for this reason when facts and circumstances have come to light showing that:

(a) when rendering the arbitral award an arbitrator was not impartial or independent, or

(b) there are such serious doubts as to his impartiality and independence that, considering the other relevant facts and circumstances, it would be unjustifiable to require the party that lost the case to accept the award.

551. The authoritative *IBA Guidelines on Conflicts of Interest in International Arbitration* set out certain general standards with respect to, among other things, the impartiality and independence of arbitrators. For instance, General Standard 1 of these guidelines provides:

> "Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated."[717]

C. The Yukos Awards Were Made In Violation Of Public Policy And Good Morals

552. The Yukos Awards evidence in at least three important respects a breach of the right to be heard, a failure to provide equality of arms and the Tribunal's partiality and prejudice, which caused the Yukos Awards to violate public policy and good morals:

(a) the Tribunal based many of its rulings on what it openly described as its own speculation as to what the Russian Federation *might have* done to deprive Claimants of their investments in Yukos, rather than what the record showed the Russian Federation to have *actually* done;

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716 Supreme Court February 18, 1994, *NJ* 1994, 765 (*Nordström/Van Nievelt*). This judgment has been confirmed by the ECtHR in a judgment of November 27, 1996, NJ 1997, 505 (*Nordström/Nederland*).

717 *See* www.ibanet.org.

(b) in holding that Yukos' VAT assessments were improper, the Tribunal expressly relied on its own views as to what Russian tax law *should have been*, rather than what it indisputably *was*; and

(c) in finding that the auction of YNG's shares was *"rigged,"* the Tribunal relied on its own *"suspicion"* as to what happened, and contradicted its own findings showing that the price achieved at auction for YNG's shares actually exceeded their fair market value, as found by the Tribunal itself.[718]

553. These rulings could not be more material to the Tribunal's ultimate conclusion that the Russian Federation expropriated Claimants' investments in Yukos in violation of Article 13(1) ECT. That is because, according to the Tribunal, Yukos' VAT assessments and the sale of YNG constituted the two "*but for*" causes that lead to Yukos' demise:

> "1579 […] Among the many incidents in this train of mistreatment that are within the remit of this Tribunal, two stand out: finding Yukos liable for the payment of more than 13 billion dollars in VAT in respect of oil that had been exported by the trading companies and should have been free of VAT and free of fines in respect of VAT; and the auction of YNG at a price that was far less than its value. But for these actions, for which the Russian Federation for reasons set out above and in preceding chapters was responsible, Yukos would have been able to pay the tax claims of the Russian Federation justified or not; it would not have been bankrupted and liquidated […]"[719]

554. As a result, the Tribunal can only be reasonably understood to have breached the Russian Federation's right to be heard, failed to provide equality of arms and to have assessed the factual record and to have made its findings with a degree of partiality and prejudice against the Russian Federation that violates public policy and good morals, including the Russian Federation's right to due process. These issues are so fundamental to the Tribunal's decision-making process and to the outcome of the Arbitrations that the Court should set aside the Yukos Awards under Article 1065(1)(e) DCCP.

(a) Public Policy Ground 1 - The Tribunal's Decision-Making By Speculation

555. In at least four instances, the Tribunal relied for its findings on what it openly described as its own speculation about what the Russian Federation *might have* done, rather than what

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[718] Final Awards, ¶¶ 1036-1037.

[719] Final Awards, ¶ 1579.

the Russian Federation actually *had* done. This decision-making by speculation is inconsistent with public policy and good morals, including fundamental due process rights. The Tribunal followed this impermissible line of "reasoning" where on essential issues the record contains insufficient evidence to condemn the Russian Federation.

556. First, the Tribunal, in holding Yukos' VAT assessments to have been improper, based its rulings not only on its unsupportable determination that Russia's generally applicable VAT filing requirements should not have been applied to Yukos, but also on the Tribunal's speculation that, even if Yukos *had* made the required filings, the Russian Federation would nonetheless have assessed Yukos for VAT because it purportedly "*was determined to impose the VAT liability on Yukos, and would have done whatever was necessary to ensure that the VAT liability was imposed on Yukos,*"[720] indeed "*no matter what Yukos did*."[721] There is no basis in the record for this speculative conclusion, and the Tribunal accordingly could not, and did not, cite one.

557. Second, the Tribunal based its condemnation of the fines imposed on Yukos on similar speculation. As noted above, the Russian Federation established that Yukos could have avoided 90% of these fines if, in the first quarter of 2004, Yukos had paid under protest the corporate profit tax and VAT that it evaded. Rather than addressing this evidence and explaining its reasoning, the Tribunal again engaged in impermissible speculation, stating that even if Yukos had made this payment "*the Russian Federation would still have found a way or a reason to impose the fines on Yukos*."[722] This finding again has no basis in the evidentiary record, and the Tribunal therefore again could not, and did not, cite one.

558. Third, the Tribunal engaged in speculation when it addressed Claimants' contention that the Russian Federation was responsible for the commencement of the involuntary bankruptcy proceedings against Yukos. The Russian Federation demonstrated that Yukos itself was responsible for the commencement of those proceedings, in part by defaulting on its "A Loan" from a syndicate of banks led by Société Générale.[723] The Tribunal agreed with the Russian Federation that "*Yukos was in a position to pay off the balance of the A Loan and … its willful failure to do so contributed to the circumstances of its bankruptcy*

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720 Final Awards, ¶ 694 [*English quote in Dutch text omitted*].

721 Final Awards, ¶ 694 [*English quote in Dutch text omitted*].

722 Final Awards, ¶ 750 [*English quote in Dutch text omitted*].

723 Resp. C-Mem. on the Merits, ¶¶ 541-585; Resp. Rej. on the Merits, ¶¶ 1059-1064.

by leading [its lenders] *to petition for it*."[724] The Tribunal nonetheless held the Russian Federation responsible for the commencement of Yukos' bankruptcy proceedings, based on its own speculation as to what *might have* occurred rather than what *did* occur, stating that "[i]*n view of the larger circumstances, it is difficult to conclude that, even if the A Loan had been paid, another ground for pushing Yukos into bankruptcy would not have been found*."[725]

559. Fourth, the Tribunal relied on speculation when it ruled that the agreement between Rosneft, a Russian oil company then wholly-owned by the Russian Federation, and Yukos' bank creditors, providing for Rosneft to pay Yukos' debt to those banks should be attributed to the Russian Federation, along with Rosneft's conduct in bidding for Yukos assets in Yukos' public bankruptcy auctions.[726] The Tribunal on this occasion explicitly acknowledged that "*proof of specific State direction is lacking*,"[727] and openly speculated that "[y]*et it may well be that in taking these actions, Rosneft did so at the sub rosa direction of the Russian State*."[728] This inconclusive speculation would clearly not have provided a basis for the Tribunal to have attributed Rosneft's conduct to the Russian Federation. The Tribunal nonetheless leapt directly from its own inconclusive speculation (without citing *any* evidence in support of its chain of thought) to definitively finding that *"[i]n the view of the Tribunal, it may reasonably be concluded that Rosneft was so directed.*"[729] Once again, the Tribunal's finding has no support in the evidentiary record, and the Tribunal accordingly could not, and did not, cite one.

560. This example of the Tribunal's decision-by-speculation is particularly egregious because it is also inconsistent with the standard for attributing a company's conduct to the State adopted by the Tribunal itself some two pages earlier in the Final Awards. According to the Tribunal, "*[t]he conduct of a person or group of persons shall be considered an act of State… if the person or group of persons is in fact acting on the instructions of, or under*

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724 Final Awards, ¶ 1630 [*English quote in Dutch text omitted*].

725 Final Awards, ¶ 1631 [*English quote in Dutch text omitted*].

726 Final Awards, ¶ 1480.

727 Final Awards, ¶ 1474 [*English quote in Dutch text omitted*].

728 Final Awards, ¶ 1480 [*English quote in Dutch text omitted*].

729 Final Awards, ¶ 1474 [*English quote in Dutch text omitted*] [emphasis added].

the direction and control of, that State in carrying out the conduct."[730] The Tribunal acknowledged that the mere fact that a company is controlled by the State "*is not a sufficient basis for the attribution to the state of the subsequent conduct of that entity… unless* [it is] *exercising elements of governmental authority… [and] the instructions, directions or control* [of the State] *relate to the conduct which is said to have amounted to an internationally wrongful act*."[731]

561. The Tribunal, however, *never* ruled that Rosneft was "*exercising elements of government authority*" or that it was "*in fact acting on the instruction of, or under the direction and control of the Russian Federation"* when it agreed with Yukos' bank creditors to pay Yukos' loans or when it bid in Yukos' bankruptcy auctions. To the contrary, the Tribunal merely inconclusively speculated "*it may well be*" that Rosneft acted "*at the sub rosa direction of the Russian State*.[732]

562. The Tribunal then offered an alternative – and even less justifiable ground – for its conclusion, holding that even if Rosneft was not "*in fact*" acting on the instructions of the Russian Federation, Rosneft "*did not need to be"* because *"it was such a creature of President Putin's entourage that it reflexively implemented his policies*." [733] This conclusion is manifestly inconsistent with the Tribunal's own attribution standard – that a company's actions cannot be attributed to the State unless it "*is <u>in</u> <u>fact</u> acting on the instructions of, or under the direction and control of, that State in carrying out the conduct*."[734]

563. In the one instance where the Tribunal did cite some evidence in support of its attribution of Rosneft's conduct to the Russian Federation, that evidence does not in fact support the Tribunal's conclusion. The Tribunal attributed to the Russian Federation Rosneft's acquisition of the YNG shares that were previously sold at auction based solely on a statement made by President Putin at a press conference on December 23, 2004. During

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730 Final Awards, ¶ 1466, quoting Articles on Responsibility of States for Internationally Wrongful Acts with commentaries (Text adopted by the International Law Commission at its fifty-third session, in 2001), Article 8, p. 47 (Annex (Merits) C-1042)[emphasis added] [*English quote in Dutch text omitted*].

731 Final Awards, ¶ 1466, quoting Articles on Responsibility of States for Internationally Wrongful Acts with commentaries (Text adopted by the International Law Commission at its fifty-third session, in 2001), Article 8, p. 48 (Annex (Merits) C-1042) [*English quote in Dutch text omitted*].

732 Final Awards, ¶ 1474 [*English quote in Dutch text omitted*].

733 Final Awards, ¶ 1474 [*English quote in Dutch text omitted*].

734 Final Awards, ¶ 1466 [*English quote in Dutch text omitted*] [emphasis added].

that press conference, President Putin contrasted the sale of YNG's shares at public auction with the illegal privatization of state-owned assets during the 1990s. As discussed above at paragraphs 30 to 36, in the 1990s state property worth billions of rubles (including Yukos itself) was sold at less than fair value in auctions illegally manipulated by Russian oligarchs who were entrusted with protecting the state's interest, but in fact pursued only their own self-interest. It was in this context, and referring to the manner in which YNG's shares were sold – and not to the identity of the purchaser of those shares – that President Putin stated that times had changed and that "*the state, resorting to absolutely legal market mechanisms, is looking after its own interests*."[735]

564. The Tribunal concluded that this statement "*constitutes President Putin's public acceptance and assertion that Rosneft's purchase of the YNG shares from* [the winning bidder] *was an action in the State's interest, <u>the inference being</u> that the State, then 100 percent shareholder of Rosneft, the most senior officers of which were members of President Putin's entourage, directed that purchase in the interest of the State*."[736] The Tribunal based this finding not on fact but instead on *"inference,"* misinterpreting President Putin's statement by divorcing it from its context. Specifically, nothing in the words on which the Tribunal relied for its inference indicates that President Putin was referring to Rosneft's purchase of YNG's shares, let alone that the Russian Federation had directed Rosneft to purchase those shares. To the contrary, when the words relied on by the Tribunal are considered in the context of President Putin's preceding sentence, in which he referred to the illegal privatizations of the 1990s, his subsequent sentence is properly understood as referring to the *sale* of YNG's shares at public auction, and not to Rosneft's purchase of those shares. President Putin was thus here explaining that, by selling YNG's shares in a public auction open to all bidders with a view to maximizing the auction

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[735] Final Awards, ¶ 1472. The full quotation is:

> "Now regarding the acquisition by Rosneft of the well-known asset of the company – I do not remember its exact name – is it Baikal Investment Company? Essentially, Rosneft, a 100% state owned company, has bought the well-known asset Yuganskneftegaz. That is the story. In my view, everything was done according to the best market rules. As I have said, I think it was at a press conference in Germany, a state-owned company or, rather companies with 100% state capital, just as any other market players, have the right to do so and, as it emerged, exercised it.
>
> Now what would I like to say in this context? <u>You all know only too well how the privatisation drive was carried out in this country in the early 90s and, how, using all sorts of stratagems, some of them in breach even of the then current legislation, many market players received state property worth many billions. Today, the state, resorting to absolutely legal market mechanisms, is looking after its own interests. I consider this to be quite logical</u>." (Exhibit Annex (Merits) C 422) [emphasis added].

[736] Final Awards, ¶ 1472 [*English quote in Dutch text omitted*] [emphasis added].

proceeds, the Russian Federation was acting in accordance with "legal market mechanisms."[737]

565. One consequence of the Tribunal's resort to decision-by-speculation was to relieve Claimants of their obligation to prove their claims, as was their burden under Article 24(1) of the UNCITRAL Arbitration Rules.[738] The Tribunal held that, even if the Russian Federation's treatment of Yukos was justified, the Russian Federation should nonetheless be held to have expropriated Claimants' investments, because even if the Russian Federation did not cause Yukos' demise by the means Claimants alleged, the Russian Federation would have seized upon some other means (not found in the record) to achieve the same end. No person or State should be required to defend himself or itself against this type of accusation based on speculation. Moreover, this type of decision-making is plainly inconsistent with Claimants' obligation to prove their claims under Article 24(1) of the UNCITRAL Arbitration Rules, as well as public policy and good morals, including the Russian Federation's fundamental right to due process that Article 1065(1)(e) DCCP requires the Court to uphold. It should therefore lead to the Yukos Awards being set aside.

(b) Public Policy Ground 2 - The Tribunal Relied On Its Own View As To What Russian Law Should Be

566. The Tribunal's holding that Yukos should not have been required to file its VAT returns on the same forms as were legally required to be used by all other similarly situated taxpayers was based on the Tribunal's own views as to what Russian law *should have been,* and not on what Russian law *actually was* at the time.

567. In finding Yukos' VAT assessments to have been improper, the Tribunal agreed with Mr Konnov, the only Russian tax expert to have provided evidence in the Arbitrations, that Russian law required all taxpayers to file a monthly or quarterly return in its own name in order to qualify for a zero VAT rating, and acknowledged that its ruling was inconsistent with Russia's tax law. The Tribunal nonetheless held that this requirement should not have been applied to Yukos because the Tribunal found it "*difficult to understand*"[739] why

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[737] There would not in any event have been anything inappropriate had Rosneft acted in the interest of its 100% shareholder, as companies around the world routinely do. An issue would have arisen only if the Russian Federation had, in addition, directed or instructed Rosneft to purchase YNG's shares, and even the Tribunal acknowledges that there was no evidence of that.

[738] UNCITRAL Rules, Article 24(1)("*Each party shall have the burden of proving the facts relied on to support his claim or defence*.") (Exhibit RF-39).

[739] Final Awards, ¶ 686.

Russia's law did not make an exception for taxpayers who were seeking a zero VAT rating in respect of exports that had previously been vetted by the tax authorities. In so holding, the Tribunal acted like a super-legislature, effectively overruling a duly enacted Russian law of general application in the absence of *any* showing that this law had been applied to Yukos in a discriminatory manner. Indeed, the Tribunal expressly stated that it did not make any finding in respect of Claimants' claim that they had been the subject of discriminatory treatment.[740] As also shown above, many States, including the Netherlands, strictly apply their own VAT filing requirements, and Yukos indisputably could have filed the proper VAT returns required by Russian law, but chose for its own reasons not to do so.

568. The Tribunal's decision-making based on its own views as to what Russian law should have been, and not on what Russian law actually was at the time, violates public policy and good morals, and evidences the Tribunal's partiality and prejudice.

(c) Public Policy Ground 3 - The Tribunal's Ruling Concerning The Sale Of YNG Contradicts Its Other Findings And Is Based On Mere "Suspicion"

569. According to the Tribunal, the sale at auction of 76.79% of YNG's shares in December 2004 was *"rigged,"*[741] and this sale, together with Yukos' VAT assessments, was one of the two "fatal blows" that inevitably led to Yukos' demise. In finding the auction to have been *"rigged,"* the Tribunal placed substantial weight on its "*suspicion*" that the winner of the auction, an entity known as Baikalfinancegroup ("BFG"), "*was created by instruments of Respondent in order to facilitate the acquisition of YNG by State-owned Rosneft*."[742] It was obviously improper for the Tribunal to base its ruling on "*suspicion*" rather than competent proof.

570. The Tribunal's finding was also based in large part on its erroneous conclusion that the USD 9.35 billion price paid for YNG's shares *"was far below the fair market value of those shares."*[743] This conclusion is demonstrably incorrect, based on the Tribunal's own finding as to the fair market value of Yukos and the share of Yukos' value that was then represented by YNG, as determined by Claimants' damages expert, Mr Kaczmarek, and

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740 Final Awards, ¶ 1582.

741 Final Awards, ¶¶ 986, 1036, 1043.

742 Final Awards, ¶ 1037 [*English quote in Dutch text omitted*].

743 Final Awards, ¶ 1020.

accepted by the Tribunal. On this basis, the price for the YNG shares achieved at auction actually *exceeded* their fair market value. This is all the more remarkable because (a) property sold at a debtor's auction is almost invariably sold at a discount to its fair market value;[744] (b) Yukos took out a full page advertisement in the *Financial Times*, threatening prospective purchasers with a *"lifetime of litigation"* if they participated in the auction; and (c) all of the expected bidders and their financiers were subsequently legally enjoined from participating in the auction by a temporary restraining order obtained by Yukos from a U.S. bankruptcy court. While the Tribunal acknowledged that the threat of a "lifetime of litigation" and the temporary restraining order "*may have resulted in a low winning bid,*"[745] it is difficult to imagine that these actions did not actually have a significant effect on the YNG auction price.

571. In any event, the Tribunal's own findings demonstrate that the price achieved at auction was actually above, not "*far below*," fair market value. On the date of the auction, the Tribunal found that Yukos' equity value was USD 21.176 billion.[746] According to Mr Kaczmarek, 55.6% of that amount represented YNG's equity value.[747] On that basis, 100% of YNG's own equity value then amounted to USD 11.774 billion (USD 21.176 billion x .556 = USD 11.774 billion). However, at the auction, only 76.79% of YNG's shares were sold.[748] If YNG's equity value is adjusted for the portion of its shares that were auctioned, the fair value of those shares, based on the Tribunal's own valuation, was approximately USD 9.04 billion (USD 11.774 billion x .7679 = USD 9.04 billion). The USD 9.35 billion auction price achieved for those shares was thus roughly USD 310 million *greater* than their fair value based on the Tribunal's own valuation (USD 9.35 billion – USD 9.04 billion = USD 310 million). As the Russian Federation showed in the

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744 *See* Second Dow Report, ¶¶ 546-549; Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law*, p. 224 (British Institute of International and Comparative Law 2008) (Exhibit RF-86).

745 Final Awards, ¶ 1023 [*English quote in Dutch text omitted*] [emphasis added].

746 Final Awards, ¶ 1815.

747 The share of Yukos' equity value then represented by YNG is based on the ratio of the two companies' enterprise values, as determined by Mr Kaczmarek. *See* Second Expert Report of Brent C. Kaczmarek, CFA, ¶ 99, March 15, 2012. This ratio is also equal to the ratio of the two companies' equity values, because Mr Kaczmarek assumed that each company's equity value would always represent 90% of its enterprise value. While the Tribunal rejected Mr Kaczmarek's valuation of Yukos, the Tribunal did not challenge his determination of the *relative share* of Yukos then represented by YNG.

748 Final Awards, ¶ 1020.

Arbitrations, this price of USD 9.35 billion was also consistent with other contemporaneous valuations of YNG.[749]

572. The Tribunal's conclusion that the sale of YNG was a "*fatal blow*" from which Yukos could not recover[750] is likewise contradicted by the Tribunal's own finding that Yukos' creditors improperly rejected the company's proposed rehabilitation plan (submitted in Yukos' bankruptcy proceeding some 18 months later).[751] This could only have been the case if Yukos' assets then exceeded its liabilities. The sale of YNG obviously could not have been a *"fatal blow"* from which the company could not have recovered if, a year and a half later, its assets still exceeded its liabilities.

573. Finally, the Tribunal here again held the Russian Federation responsible not for what it actually did, but for what the Tribunal speculated would have been the case. Even though the Tribunal acknowledged that a higher auction price might have been achieved if Yukos had not threatened potential participants with a "*lifetime of litigation*" and then obtained a restraining order legally enjoining them from participating, the Tribunal nonetheless found that a higher price would have "*had no relevant impact on the bankruptcy of Yukos*,"[752] and that while Yukos' "*demise may have been postponed, or the path to its demise altered in some minor way, […] it would not have been avoided*."[753] In making this finding, the Tribunal was necessarily speculating – because there was no basis in the record for its statement – that the Russian Federation would have found some other way to put Yukos into bankruptcy.

(d) Conclusion

574. The Yukos Awards show that the arbitrators breached the Russian Federation's right to be heard and its right to equality of arms and were neither impartial nor independent, or at least that there are such serious doubts as to the Tribunal's impartiality and independence

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749 *See* Resp. C-Mem. on the Merits, ¶¶ 517-520; Resp. Rej. on the Merits, ¶¶ 993-994; *see also* DKW Report, p. 13 (Annex(Merits) C-274); Morgan Stanley's equity research report "YNG Sale: A Shock and Awe Negotiating Tactic?" (July 22, 2004) (RME-632); Merrill Lynch's Comment (Nov. 23, 2004) (RME-851).

750 Final Awards, ¶ 1043.

751 Final Awards, ¶ 1180.

752 Final Awards ¶ 1023 [*English quote in Dutch text omitted*].

753 Final Awards ¶ 1625 [*English quote in Dutch text omitted*].

that, considering all the other relevant facts and circumstances, the Yukos Awards should be set aside.

First, key rulings in the Yukos Awards relating to (a) Yukos' VAT assessments; (b) Yukos' fines; (c) the commencement of Yukos' bankruptcy proceedings; and (d) the attribution of Rosneft's conduct to the Russian Federation, are all based on the Tribunal's own speculation as to what the Russian Federation *might have done,* and not on the basis of what the record showed the Russian Federation to have *actually done.*

Second, in ruling on Yukos' VAT assessments, the Tribunal applied its own views as to what Russian law *should have been,* and not on what Russian law *actually was* at the time.

Third, in finding that the auction of YNG's shares was *"rigged",* the Tribunal relied on its own "*suspicion*" and drew factual conclusions that were inconsistent with the Tribunal's own findings.

575. The "decision by speculation" approach adopted by the Tribunal resulted in an award that is based on speculation and suspicion rather than what *actually happened*, what the Russian Federation *actually did* and what Russian law *actually was.* The Tribunal can only be reasonably understood to have assessed the factual record and to have made findings in ways that violate:

(a) Articles 1033(1) DCCP and Article 10(1) UNCITRAL Rules, which require that arbitrators should be impartial and independent; and

(b) Article 1039(1) DCCP and Article 15(1) UNCITRAL Rules, which require a tribunal not to rule on the basis of speculation or suspicion, but rather on facts and allegations that are in the record and that the parties have been equally able to address.

576. The Yukos Awards should accordingly be set aside because they violate public policy and good morals under Article 1065(1)(e) DCCP.

577. The Tribunal's "decision by speculation" approach also moves beyond the limits of the parties' dispute, and violated Article 24(1) of the UNCITRAL Arbitration Rules. For this reason, the Yukos Awards should accordingly also be set aside because they violate the Tribunal's mandate under Article 1065(1)(c) DCCP.

578. The Russian Federation notes here that it has also raised grounds for annulment based on Article 1065(1)(e) DCCP with respect to the award of damages, as explained in paragraphs 386 to 467. To avoid unnecessary repetition the Russian Federation suffices here with a reference to the aforementioned facts and grounds.

IX. PROCEDURE AND CONCLUSION

A. Exhibits And Offer To Produce Evidence

579. In support of its arguments, the Russian Federation will enter the exhibits mentioned in this summons into the proceedings on the cause list date. To the extent required by law, the Russian Federation offers to produce evidence of its arguments, still to be disputed by the Defendants, in particular by examining witnesses. For grounds for setting aside under Article 1065 (1)(b) and (c) DCCP regarding Mr Valasek's role, the Russian Federation wishes to examine Mr Valasek.

580. Given that the Defendants' defences against the claim for setting aside are unknown, the Russian Federation will not be able to specify any exhibits or witnesses it has at its disposal to substantiate the grounds of the claim disputed by the Defendants. The Russian Federation does refer to the exhibits entered into the arbitration proceedings (see Exhibit RF-3).

B. Defences And Grounds For Setting Aside Of Defendant

581. Thus far, the Defendants have not put forward a substantive defence against the claim for setting aside, so that the Russian Federation cannot make any mention of that. Insofar as it concerns the Russian Federation's objections as to the existence and validity of the purported arbitration agreement, the Russian Federation refers to the Defendants' position set out in the Interim Awards.

C. Joinder

582. The present claims for setting aside formally only concern the awards rendered between each individual (original) Claimant and the Russian Federation of November 30, 2009 and of July 18, 2014. However, the Russian Federation simultaneously institutes three actions to set aside the near identical Interim Awards and the completely identical Final Awards, entered in the proceedings lodged by each of the three (original) Claimants, which have

been dealt with simultaneously and in which the decisions have been given at the same time. Procedurally, and formally, there are three separate proceedings to set aside the Yukos Awards. Although the three (original) Claimants in these three setting aside proceedings are different, they are related and have jointly taken their previous procedural steps, represented by the same counsel and before the same Tribunal. Moreover, the current claimant (the Russian Federation) and the subjects and grounds for setting aside are the same. Given the large degree of relatedness between the three setting aside proceedings, the Russian Federation claims the joinder of these three setting aside proceedings pursuant to article 222 DCCP.

583. The requirements for joinder of the three proceedings have been fulfilled. All three setting aside proceedings are brought before the same court (Your Honour's Court) and there is a close connection among them. There is a close connection within the meaning of Article 222 DCCP when the factual or legal points in dispute in one case are identical to the facts or legal points in the other case, or correspond with said facts or legal points to such a degree that consistency of the judgments is desirable. This is clearly the case, which follows among other things from the nearly identical Interim Awards and completely identical Final Awards, the similar subjects and the grounds for setting aside and the joint handling in the arbitration proceedings of which the present proceedings are a continuation. Paragraph 2 of every Final Award states that the "*three arbitrations were heard in parallel with the full participation of the Parties at all relevant stages of the proceedings*." Also, since the handling of the cases on the merits, the (original) Claimants and the Russian Federation have in the arbitration proceedings chosen to each time submit one joint document. Finally, joinder in this case is compatible with the objective of the arrangements for joinder: to prevent contradictory decisions and the serving of the judicial efficiency (preventing "*unnecessary double proceedings and the objections related thereto such as unnecessary double work*"[754]).

584. Insofar as the Russian Federation is concerned, no decision needs to be made first and in advance in respect of the formal application for consolidation of the proceedings (Article 209 DCCP). In case of the simultaneous filing of the three writs of summons, the Russian Federation will already request to (temporarily) merge the three proceedings on the cause list administratively. Said informal cause-list joinder limits the need for a quick decision in

[754] G. Snijders, *GS Burgerlijke Rechtsvordering*, annotation 2 to paragraph 2.10.4.

the formal procedural issue regarding joinder of proceedings. In case the current defendant agrees to the joinder, it can be realized immediately with a simple entry on the cause-list (article 232 paragraph 2 sub b DCCP).

585. If the other party objects to the formal joinder, it can also include its objection in the statement of defence in the principal proceedings so that Your Honour's Court can render a decision in that respect after the fixed period of consideration (Article 2.11 District Courts Rules of Procedure).

D. Conclusion

586. For the reasons set out above, and in light of their relatedness, the Russian Federation requests that the Yukos Awards dated November 30, 2009 and July 18, 2014, respectively, be set aside – on each ground separately and on all grounds jointly – on the basis of Article 1065(1)(a) DCCP and/or Article 1065(1)(b) DCCP and/or Article 1065(1)(c) DCCP and/or Article 1065(1)(d) DCCP and/or Article 1065(1)(e) DCCP.

FOR WHICH REASONS:

it may please the court by judgment:

In the motion:

to join these proceedings on the basis of article 222 DCCP with the other two proceedings which the Russian Federation initiated against Veteran Petroleum Limited and against Yukos Universal Limited, in which at the same date of 28 January 2015 are summoned;

In the main proceedings:

to set aside the Yukos Awards (dated November 30, 2009 and July 18, 2014), respectively, between the Russian Federation, as respondent in the Arbitrations and the Defendant, as claimant in the Arbitrations,

ordering the Defendant to pay the costs of these proceedings plus legal interest, accrued as of fourteen days after the date of the judgment.

all, in as far as permitted by law, provisionally enforceable.

Bailiff

X. ANNEXES AND EXHIBITS

RF	***Annexes***
A.	List of Defined Terms
B.	List of Authorities
C.	Summary of the Yukos Awards
	Exhibits
	General
1.	Interim Awards On Jurisdiction And Admissibility, November 30, 2009 in (i) PCA Case No. 226 *Hulley Enterprises Limited v. The Russian Federation* (ii) PCA Case No. 227 *Yukos Universal Limited v. The Russian Federation* (iii) PCA Case No. 228 *Veteran Petroleum Limited v. The Russian Federation*
2.	Final Awards, July 18, 2014 in (i) PCA Case No. 226 *Hulley Enterprises Limited v. The Russian Federation* (ii) PCA Case No. 227 *Yukos Universal Limited v. The Russian Federation* (iii) PCA Case No. 228 *Veteran Petroleum Limited v. The Russian Federation*
3.	Case file of (i) PCA Case No. 226 *Hulley Enterprises Limited v. The Russian Federation* (ii) PCA Case No. 227 *Yukos Universal Limited v. The Russian Federation* (iii) PCA Case No. 228 *Veteran Petroleum Limited v. The Russian Federation*
4.	*Khodorkovskiy and Lebedev v. Russia*, ECtHR, Appls. Nos. 11082/06 and 13772/05, Judgment (July 25, 2013)
5.	Communication from the EC Commission on European Energy Charter, COM(91) 36 (Feb. 14, 1991)
6.	*Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award of October 5, 2012
	Article 45 ECT
7.	Electronic Registration Card for draft Law No. 96043844-2 on Ratification of the Energy Charter Treaty and the Protocol to the Energy Charter on Energy Efficiency and Related Environmental Aspects
8.	J. Doré, *The Negotiating History of the European Energy Charter Treaty*, *in* ENERGY CHARTER TREATY: SELECTED TOPICS (T.W. Wälde and K.M. Christie, eds. 1995)
9.	United Nations, General Assembly, Statement by the Hellenic Republic during meeting of the Sixth Committee (Nov. 4, 2013)
10.	United Nations, General Assembly, Statement by the United Kingdom of Great Britain and Northern Ireland during meeting of the Sixth Committee (Nov. 6,

	2012)
11.	United Nations, General Assembly, Statement by New Zealand during meeting of the Sixth Committee (Nov. 4, 2013)
12.	United Nations, General Assembly, Statement by the Federal Republic of Germany during meeting of the Sixth Committee (Nov. 5, 2012)
13.	United Nations, General Assembly, Written Statement by the Kingdom of the Netherlands during meeting of the Sixth Committee (Nov. 5, 2012)
14.	1995 Food Aid Convention, Art. XIX
15.	1962 Protocol Relating to the Provisional Application of the Protocol Concerning the Establishment of European Schools, Sole Article
16.	1949 General Agreement on Privileges and Immunities of the Council of Europe
17.	1964 Convention on the Elaboration of a European Pharmacopoeia
18.	1954 Agreement Concerning the International Institute of Refrigeration Replacing the Convention of 21st June 1920 as modified on 31st May 1937
19.	1921 Agreement Between the Government of the French Republic and the Government of the Republic of Czechoslovakia on the Settlement of Questions of Properties, Rights And Interests of Their Nationals in Their Respective Countries
20.	2008 Economic Partnership Agreement between CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part
21.	M.H. Arsanjani and W.M. Reisman, *Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION (2011)
22.	United Nations, General Assembly, Statement by China during meeting of the Sixth Committee (Nov 5, 2013)
23.	United Nations, General Assembly, Statement by Austria during meeting of the Sixth Committee (Nov. 4, 2013)
24.	United Nations, General Assembly, Statement by the Kingdom of Belgium during meeting of the Sixth Committee (Nov. 5, 2013)
25.	United Nations, General Assembly, Statement by Chile during meeting of the Sixth Committee (Nov. 4, 2013)
26.	United Nations, General Assembly, Statement by South Africa during meeting of the Sixth Committee (Nov. 5, 2012)
27.	R. Lefeber, *The Provisional Application Of Treaties*, *in* ESSAYS ON THE LAW OF TREATIES: A COLLECTION OF ESSAYS IN HONOUR OF BERT VIERDAG (J. Klabbers & R. Lefeber, eds. 1998

28.	H. Krieger, *Article 25: Provisional Application*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (O. Dörr & K. Schmalenbach, eds. 2012)
29.	AUSWÄRTIGES AMT, Richtlinien für die Behandlung völkerrechtlicher Verträge – Entwurf 2014 (German Federal Foreign Office, Guidelines on the Treatment of International Treaties – Draft 2014)
30.	AUSWÄRTIGES AMT, Richtlinien für die Behandlung völkerrechtlicher Verträge – Neufassung 2004 (German Federal Foreign Office, Guidelines on the Treatment of International Treaties – New Version 2004)
31.	Finnish Government Proposal to the Parliament regarding the ratification of the ECT
32.	Finnish Ministry of Foreign Affairs Memorandum (Nov. 22, 1994)
33.	European Commission, Communication from the Commission to the Council and the European Parliament on the signing and provisional application by the European Communities of the European Energy Charter Treaty (Sept. 21, 1994), Annex
34.	Council Decision of July 13, 1998 approving the text of the amendment to the trade-related provisions of the Energy Charter Treaty and its provisional application agreed by the Energy Charter Conference and the International Conference of the Signatories of the Energy Charter Treaty, 98/537/EC, L 252/21
35.	P. EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION – LEGAL AND CONSTITUTIONAL FOUNDATIONS (2004)
36.	ECJ, Ruling 1/78 delivered pursuant to the third paragraph of Article 103 of the EAEC Treaty (Nov. 14, 1978)
37.	*Hermes International v. FHT Marketing*, ECJ Case C-53/96, Opinion of Advocate General Tesauro, [1998] ECR I-3603
38.	C. S. Bamberger, Epilogue: The Energy Charter Treaty as a Work in Progress, *reprinted in* The Energy Charter Treaty – An East-West Gateway for Investment and Trade (T. Wälde, ed., 1996)
39.	1976 Arbitration Rules of the United Nations Commission on International Trade Law
40.	Rules of Procedure of the Provisional Energy Charter Conference of February 28, 1996 (CC 53 Corr. 2) *as cited in* Decision of the Energy Charter Conference of November 22-23, 1995 (CCDEC 1995 30 GEN)
41.	Energy Charter Secretariat, Staff Regulations and Rules, Rule 8.1 *as cited in* Decision of the Energy Charter Conference of June 29, 2000 (CCDEC 2000 2 GEN)
42.	Energy Charter Treaty Website, "Members and Observers"

43.	Decision of the Energy Charter Conference of December 6, 2013 (CCDEC 2013 24 APP)
44.	L.A. OKUNKOV (ed.), COMMENTARY TO CONSTITUTION OF THE RUSSIAN FEDERATION (ARTICLE-BY-ARTICLE) (1996)
45.	Y.A. DMITRIEV, THE CONSTITUTION OF THE RUSSIAN FEDERATION. DOCTRINAL COMMENTARY (ed. 2013)
46.	E.Y. BARKHATOVA, COMMENTARY TO THE CONSTITUTION OF THE RUSSIAN FEDERATION (2010)
47.	1995 Law On International Treaties (July 15, 1995)
48.	Federal laws on ratification of BITs by the State Duma
49.	Resolution No. 8-P of the Constitutional Court (Mar. 27, 2012)
50.	Expert Report of Professor Anton V. Asoskov (with Annexes), dated October 30, 2014
51.	1990 Agreement Between the Government of the People's Republic of China and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments
52.	1989 Agreement Between the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments
53.	1989 Agreement Between the Government of Finland and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments
54.	1989 Agreement Between the Government of the Republic of Italy and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments
55.	1990 Agreement Between the Government of the Kingdom of Spain and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments
56.	1990 Agreement Between the Government of the Republic of Austria and the Government of the Union of Soviet Socialist Republics Regarding the Promotion and Reciprocal Protection of Investments
57.	1989 Agreement Between the Federal Republic of Germany and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments
58.	1990 Agreement Between the Swiss Federal Council and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments
59.	1990 Agreement Between the Government of the Republic of Turkey and the Government of the Union of Soviet Socialist Republics Concerning the

	Promotion and Reciprocal Protection of Investments
60.	1990 Agreement Between the Government of the Republic of Korea and the Government of the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocald Protection of Investments
61.	S. Ripinsky, Chapter 14: Russia, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (C. Brown, ed. 2013)
62.	Explanatory Note Regarding the Draft Federal Law "On Ratification of the Agreement between the Government of the Russian Federation and the Government of the Republic of Macedonia on Encouragement and Reciprocal Protection of Investments" (May 30, 1998)
63.	Explanatory Note on the Issue of Ratification of the Agreement between the Government of the Russian Federation and the Government of the Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments (Apr. 8, 2000)
64.	Explanatory Note on the Issue of Ratification of the Agreement between the Government of the Russian Federation and the Government of Japan for the Promotion and Protection of Investments (Feb. 29, 2000)
65.	Explanatory Note Regarding the Draft Federal Law "On Ratification of the Bilateral Investment Treaty between the Government of the Russian Federation and the Government of the Syrian Arab Republic" (June 30, 2007)
66.	Certified Translation of Explanatory Note to the Draft Law On Ratification of the Energy Charter Treaty originally submitted as C-143
	Article 1(6)-(7) ECT
67.	Radio Free Europe, *Former Yukos Official Satisfied With Court Award*, (July 29, 2014)
68.	Financial Times, *Leonid Nevzlin is biggest winner from Yukos ruling at The Hague*, (July 28, 2014)
69.	Reuters, *Nevzlin 'very pleased' with Hague court ruling on Yukos*, (July 28, 2014)
70.	I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (7th ed. 2008)
71.	*Nasser Esphahanian* v. *Bank Tejarat*, Award No. 31-157-2 of March 29, 1983, 2 IUSCTR 157
72.	*ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction of July 18, 2013
73.	*National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7/, Award of April 3, 2014
74.	*TSA Spectrum De Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award of December 19, 2008

	Article 21(1)-(5) ECT
75.	*Competence of Assembly regarding admission to the United Nations*, Advisory Opinion of March 3rd 1950, 1950 I.C.J. Rep., 4
76.	Judgment of the Svea Court of Appeal, *The Russian Federation v. RosInvestCo UK Ltd.*, Case No. T 10060-10 (Sept. 5, 2013)
77.	OECD, Action Plan on Base Erosion and Profit Shifting (July 19, 2013)
	Article 21(5) ECT
78.	*Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent of July 3, 2013
79.	*Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction of December 19, 2012
80.	*ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction of February 10, 2012
81.	*Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award of August 22, 2012
82.	*Ambiente Ufficio S.P.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility of February 8, 2013
83.	1992 Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Argentine Republic
84.	Report of the International Law Commission (2006), Suppl. No. 10 (A/61/10)
	Damages
85.	Expert Report Of Professor James Dow, dated November 8, 2014
86.	Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law*, (British Institute of International and Comparative Law 2008)
87.	J. Waincymer, *Procedure And Evidence In International Arbitration* (2012)
	Arbitral Assistant
88.	C. Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 2002, Kluwer Law International, number 2, p. 147-163.
89.	IBA Rules of Ethics for International Arbitrators
90.	G. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, KLUWER LAW INTERNATIONAL, 2014
91.	UNCITRAL Notes on Organizing Arbitral Proceedings 1996, ¶¶ 26-27
92.	Note from the Secretariat of the ICC Court Concerning the Appointment of Administrative Secretaries by Arbitral Tribunals 1995; ICC Note on the

	Appointment, Duties and Remuneration of Administrative Secretaries 2012
93.	Young ICCA Guide on Arbitral Secretaries
94.	White & Case, International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, 2012
95.	REDFERN, HUNTER E.A., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, OXFORD UNIVERSITY PRESS, 2009

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