E. ATTEMPTS TO SETTLE

1. Introduction

891. In the second half of 2004, Yukos made several proposals to the Russian authorities for the settlement of its tax debts. None of these proposals was accepted by the Russian Federation, which moved to auction off YNG in December 2004 in spite of Yukos' protests.

892. This chapter examines the context of Yukos' settlement offers, their content and the Russian Federation's reaction to them, with a view to determining whether the conduct of the Russian Federation was more consistent with the goal of collecting taxes or, as Claimants argue, with the aim of leading Yukos to bankruptcy and appropriating its most valuable assets.

893. Claimants submit that, through its settlement offers, Yukos sought to initiate a dialogue with the Russian Federation that could lead to Yukos paying its tax debts while "preserv[ing] the company as a going concern."[1040] However, the settlement offers were met with a "complete lack of responsiveness" and utter inflexibility from the Russian Federation.[1041] For Claimants, this reaction is "one of the strongest testaments" to the fact that Respondent was not interested in tax collection, but only the destruction of Yukos.[1042] As put by Claimants' counsel at the Hearing:

> the bottom line is: if the Russian Federation was interested in collecting taxes, it would have responded to Yukos; it would have worked with Yukos to try and find a way for the company to pay its alleged tax debt. . . . And we say that this is consistent and supports the Claimants' conclusion that this was not about paying taxes but was about the expropriation of the company.[1043]

894. Claimants add that the Russian Federation's real intent with respect to Yukos is also revealed by the fact that it did settle the tax debts of other oil companies, such as Rosneft, Sibneft and TNK-BP.[1044]

895. Claimants also submit that, in addition to rejecting Yukos' settlement offers, the Russian authorities actively prevented Yukos from discharging its tax liabilities by freezing and seizing

---

1040 Theede WS ¶ 9; *see also* Transcript, Day 17 at 126.

1041 Reply ¶ 321.

1042 Transcript, Day 20 at 216 (Claimants' closing); *see also* Rieger WS ¶ 24.

1043 Transcript, Day 17 at 105 (Claimants' closing).

1044 Claimants' Skeleton Argument, 1 October 2012 ¶ 26 (hereinafter "Claimants' Skeleton").

Yukos' assets (through the April 2004 injunction of the Moscow Arbitrazh Court and the bailiffs' resolutions of June and July 2004).[1045] As a result, Yukos could only pay its tax debts from the proceeds of the business operations of its subsidiaries, which did not suffice to meet Yukos' liabilities in the short time allowed by the Russian authorities.[1046]

896. For its part, Respondent submits that the Russian authorities responded to each of Yukos' offers[1047] and, moreover, were entitled to reject these offers because none of them amounted to a serious proposal.[1048] From Respondent's perspective, Yukos' settlement offers were a mere posturing exercise intended to give "an appearance of cooperation, while fostering the image—embellished by their public relations machines—that Yukos was a victim of the authorities' conduct."[1049] Yukos' offers were "invariably unacceptable, either because they were contrary to Russian law, or because they involved impaired assets, or because they were otherwise inadequate."[1050]

897. Respondent further submits that, by the second half of 2004, "Yukos' management faced a serious credibility problem, among other things because it had made manifestly false claims that it was unable to pay any of its tax bills."[1051] Given Yukos' bad faith, the Russian authorities' refusal to negotiate was reasonable.[1052] Respondent concludes that Yukos caused its own demise by failing to pay its tax debts in full in the first quarter of 2004 (instead making disingenuous and inadequate settlement proposals), thereby attracting mounting interest and fines.[1053]

898. The Tribunal recalls that the *Quasar* tribunal found that the Russian Federation's failure "even to respond" to the offers made by Yukos, "the largest private taxpayer in Russia" and a major

---

1045 Memorial ¶ 351.

1046 *Ibid*. ¶¶ 351, 353.

1047 Respondent's Closing Slides, p. 895; *see also* Rejoinder ¶ 893.

1048 Counter-Memorial ¶ 419.

1049 Rejoinder ¶ 897.

1050 Counter-Memorial ¶ 419; *see also* Rejoinder ¶ 893.

1051 Counter-Memorial ¶ 418.

1052 Respondent's Closing Slides, pp. 804–806.

1053 Respondent's Post-Hearing Brief ¶¶ 220–21.

force of the national economy, raised "significant doubts as to whether the Respondent acted in good faith in attempting to resolve its tax dispute with Yukos."[1054]

2. Yukos' Settlement Offers (and the Russian Federation's Replies)

899. To place the settlement offers in context, it is helpful to recall the dates of some key events.[1055]

900. The 2000 Audit Report, the first audit report to assess tax arrears against Yukos, was issued on 29 December 2003.[1056] The 2000 Decision holding Yukos fiscally liable for a tax offense and concluding that an amount of approximately USD 3.48 billion was due within two days, was issued on 14 April 2004.[1057]

901. On 15 April 2004, the Moscow Arbitrazh Court, upon application by the Tax Ministry, issued the 2004 Injunction prohibiting Yukos "from alienation and encumbrance in any way of its assets, including shares (including prohibition from the transfer of securities to a nominee holder and in trust management), interests in the charter capital of other legal entities, securities, excluding main types of products manufactured by [it]."[1058]

902. In a decision dated 23 June 2004 and published on 30 June 2004, the Appeal Panel of the Moscow Arbitrazh Court reversed a 19 May 2004 ruling that had provisionally suspended the effect of the 2000 Decision.[1059]

903. On 29 June 2004, an appeal resolution of the Moscow Arbitrazh Court upheld a first instance decision allowing the Tax Ministry to collect "tax arrears, interest, and fines" from Yukos in an amount of USD 3.42 billion.[1060] On 30 June 2004, the Moscow Arbitrazh Court issued an enforcement writ for this amount.[1061]

1054 *Quasar* ¶ 102, Exh. R-3383.

1055 For a complete narrative, *see* Chapter VIII.B of this Award.

1056 2000 Audit Report, Exh. C-103.

1057 2000 Decision, Exh. C-104.

1058 April 2004 Injunction, Exh. C-108.

1059 Decision of Judge Cheburashkina to Suspend the Effect of Decision No. 14-3-05/1609-1 of 14 April 2004, Exh. C-112; Moscow Arbitrazh Court, Appeal Resolution in the name of the Russian Federation, 23 June 2004, Exh. C-120.

1060 Decision of the Moscow Arbitrazh Court, 26 May 2004, Exh. C-116; Moscow Arbitrazh Court, Appeal Resolution, 29 June 2004, Exh. C-121.

1061 Enforcement Writ No. 383729, 30 June 2004, Exh. C-122.

904. On the same day, Bailiff Solovyova issued a resolution to initiate an enforcement proceeding. The resolution granted Yukos a 5-day period for voluntary payment of the full amount due, failing which the Bailiff would consider imposing a 7 percent enforcement fee.[1062] The Bailiff then issued several more resolutions, freezing cash in 16 Yukos bank accounts.[1063]

905. The 2001 Tax Audit, assessing USD 4.1 billion in taxes, interest and fines against Yukos, was released on 30 June 2004.[1064]

906. During July 2004, Bailiffs Solovyova and Borisov issued further resolutions restricting Yukos' access to its assets and imposing the collection of a 7 percent enforcement fee. [1065]

907. On 9 July 2004, the Chukotka Arbitrazh Court issued interim measure orders in proceedings between former shareholders of Sibneft and Yukos, attaching 72 percent of Sibneft's share capital and thus shrinking Yukos' alienable stake in Sibneft to 20 percent minus one share (the "**Chukotka Injunctions**").[1066]

908. On 6 July 2004, Yukos began making cash payments against its tax debts from the proceeds of the business operations of its subsidiaries.[1067] By 16 November 2004, Yukos had paid USD 3.47 billion—a little more than the amount of its tax liability for the year 2000.[1068]

909. However, Yukos' tax liabilities increased with the 2001 Decision, the 2002 Decision and the 2003 Decision, which were issued on 2 September, 16 November and 6 December 2004, respectively, and required payment by Yukos of tax arrears, fines and interest in the amounts of USD 4.1, 6.7 and 6 billion.[1069]

910. YNG was auctioned on 19 December 2004.[1070]

1062 Resolution of the bailiff to initiate enforcement proceeding 10249/21/04, 30 June 2004, Exh. C-123.

1063 Resolutions of the bailiffs to seize monies, 30 June 2004, Exh. C-124.

1064 Repeat Field Tax Audit Report No. 30-3-14/1 (2001), 30 June 2004, Exh. R-345.

1065 Resolution to restrict the rights of the securities owner, 1 July 2004, Exh. C-125; Resolution No. 10249/21/04 to Collect an Enforcement Fee, 9 July 2004, Exh. C-132.

1066 Rulings of the Arbitrazh Court of the Chukotka Autonomous District, Case No. A80- 141/2004, 9 July 2004, Exh. R-553.

1067 Reply ¶ 320, referring to Exhs. C-212 to C-238.

1068 Memorial ¶ 358, referring to Exh. C-234.

1069 2001 Decision, Exh. C-155; 2002 Decision, Exh. C-175; 2003 Decision, Exh. C-190.

1070 Protocol of the results of the auction to sell shares in OAO Yuganskneftegaz, 19 December 2004, Exh. C-290.

911. Between 29–30 June 2004—when one appeals decision lifted the provisional suspension of the effect of the 2000 Decision and another confirmed the Tax Ministry's USD 3.42 billion claim against Yukos—and December 2004—when the YNG auction took place—Yukos made several proposals to the Russian authorities to settle its tax debts. These proposals may be classified in four categories: (a) proposals made to the bailiffs, requesting enforcement against specific assets; (b) proposals for a global settlement conveyed by the Right Honourable Jean Chrétien, PC, OM, CC, QC, former Prime Minister of Canada; (c) requests for a deferral or payment in instalments; and (d) other proposals (which are not in the documentary record in this arbitration). The Rehabilitation Plan, proposed by Yukos' management in the bankruptcy proceedings and discussed in greater detail in Chapter VIII.G of this Award, can be seen as Yukos' final attempt to discharge its tax liabilities while continuing as a going concern.

(a) Proposals Made to the Bailiffs

912. On 2 July 2004, Mr. Gololobov, Yukos' legal counsel, wrote to Bailiff Solovyeva, explaining that the April 2004 Injunction and the Bailiff's 30 June 2004 seizure of 16 Yukos bank accounts prevented Yukos from voluntarily complying with the 30 June 2004 enforcement resolution and requesting that Bailiff Solovyeva accept, by way of voluntary enforcement, the transfer of a 34.5 percent stake in Sibneft, corresponding to the 20 percent minus one share stake obtained by Yukos under the Share Purchase Agreement plus the 14.5 percent stake obtained by Yukos as the second tranche under the Share Exchange Agreement.[1071] Mr. Gololobov's letter stated that the value of the 34.5 percent stake in Sibneft was approximately USD 4 billion.

913. On 9 July 2004, Mr. Gololobov again requested Bailiff Solovyeva to accept Yukos' 34.5 percent stake in Sibneft in payment of Yukos' tax debts.[1072] Respondent has described this request dated 13 July 2004 as being "in clear violation of the Chukotka [I]njunctions."[1073] However, Claimants correctly point out that, while 13 July 2004 may have been the date when the letter was received by the Bailiff, the letter itself is dated 9 July 2004.[1074]

[1071] Petition for voluntary enforcement of the Resolution of 30 June 2004 to initiate enforcement proceedings and the Demand of 30 June 2004, 2 July 2004, Exh. C-126.

[1072] Application on the procedure of performance of the Resolution on commencement of enforcement proceedings dated 30 June 2004 and the Demand dated 3 June 2004, 9 July 2004, Exh. R-554.

[1073] Counter-Memorial ¶ 425.

[1074] Reply ¶ 328 n.630.

914. On 14 July 2004, Mr. Gololobov amended Yukos' previous requests and lowered the offer to a 20 percent minus one share stake in Sibneft ostensibly to take account of the Chukotka Injunctions dated 9 July 2004.[1075] Mr. Gololobov indicated that the 20 percent minus one share stake in Sibneft was worth between USD 2.3 and 2.5 billion.[1076]

915. On 6 August 2004, Mr. Gololobov wrote to Chief Bailiff Melnikov, requesting that the 20 percent minus one share stake in Sibneft, as well as Yukos' holdings in 15 other companies with a purported value of approximately USD 1.1 billion, be used for enforcement purposes as a matter of priority.[1077] The letter incorrectly stated that the 20 percent stake comprised 1,637,633,048 shares (a number that in fact corresponds to a 34.5 percent stake), prompting Respondent to argue that Yukos sought to conceal from the bailiffs that at least a 14.5 percent stake in Sibneft was encumbered pursuant to the Chukotka Injunctions.[1078] The letter also stated that the total value of the assets offered in payment was USD 3.4 billion.[1079] But, the annex to the letter valued the shareholdings in Sibneft at USD 2.351 billion, which corresponds to the value of a 20 percent minus one share stake (as stated in Yukos' letter of 14 July 2004), and all the assets offered at USD 3.4 billion.[1080] It is obvious that the letter contained some errors, which could have been corrected by the bailiffs by comparing it to its annex and the letter of 14 July 2004.

916. On 16 September, 24 November and 16 December 2004, Yukos wrote further letters to the bailiffs (in response to the issuance of the 2001, 2002 and 2003 Decisions),[1081] again proposing that enforcement be made as a matter of priority against its stake in Sibneft and 15 other entities.[1082] These proposals did not specify the number or percentage of Sibneft shares that Yukos was offering, but the total value of the assets offered in each case was said to be USD 3.407 billion. This figure is identical to the total amount of assets referred to in the annex

---

1075 Addendum to petition regarding the process of enforcement of the Resolution of June 30, 2004 to initiate enforcement proceedings and the Demand of June 30, 2004, 14 July 2004, Exh. C-137.

1076 *Ibid*.

1077 Letter from Mr. Gololobov to Chief Bailiff A.T. Melnikov, 6 August 2004, Exh. C-140.

1078 Counter-Memorial ¶ 427, n.636.

1079 Letter from Mr. Gololobov to Chief Bailiff A.T. Melnikov, 6 August 2004, Exh. C-140.

1080 *Ibid*.

1081 Memorial ¶¶ 354, 356.

1082 Petition for voluntary enforcement of Resolution of 09.09.2004 to initiate an enforcement proceeding and Demand of 30.06.2004, 16 September 2004, Exh. C-163; Petition for voluntary enforcement of Resolution 19 November 2004 to initiate an enforcement proceeding, 24 November 2004, Exh. C-180; Petition for voluntary enforcement of the Resolution of 09.12.2004 to initiate an enforcement proceeding, 16 December 2004, Exh. C-195.

to the 6 August 2004 letter, and it appears to have been calculated on the basis of a 20 percent minus one share stake in Sibneft.[1083]

917. The bailiffs did not respond to the proposals made by Mr. Gololobov in July 2004. Yukos challenged the bailiffs' silence before the Moscow Arbitrazh Court, which found, in a decision dated 17 August 2004, that the bailiffs had acted lawfully because both the 14.5 percent stake in Sibneft, which was attached pursuant to the Chukotka Injunctions, and the remaining 20 percent minus one share stake in Sibneft, were disputed by Sibneft's former shareholders.[1084]

918. The Department of Bailiffs within the Russian Ministry of Justice responded to Yukos' 6 August 2004 letter on 9 September 2004, referring in particular to the decision of the Moscow Arbitrazh Court of 17 August 2004 and concluding that the Russian judiciary had "affirmed the right of the bailiff to make the final decision regarding the sequence for seizures."[1085]

919. The bailiffs did not respond to Yukos' letters of 16 September, 24 November and 16 December 2004. Respondent submits that the bailiffs did not need to respond as, by then, Yukos had already been put on notice by the 17 July 2004 decision of the Moscow Arbitrazh Court that its offers of Sibneft shares were unacceptable.[1086] The Tribunal notes, however, that the bailiffs also failed to react to Yukos' offer of shares in companies other than Sibneft, in respect of which the Moscow Arbitrazh Court had not commented.

(b) Proposals for a Global Settlement Conveyed by Mr. Chrétien

920. Mr. Chrétien wrote to Prime Minister Fradkov on behalf of Yukos for the first time on 6 July 2004, offering a "global settlement" of USD 8 billion for the taxes assessed against Yukos in 2000–2003, with 2 billion to be paid in cash in July 2004 and two more tranches to be paid in

---

1083 With respect to the Sibneft shares, in addition to the proposals listed here, Yukos also applied on 22 April 2004 to the Moscow Arbitrazh Court for a replacement of the April 2004 Injunction with a new injunction that would instead freeze Yukos' 57.5 percent stake in Sibneft (*see* Exhs. R-476 and R-477). Yukos' application was rejected the following day (Exh. R-452). Respondent discussed this application in the context of Yukos' settlement offers (Counter-Memorial ¶ 420). However, since the purpose of the application was the unfreezing of Yukos' assets in the context of interim measures ordered against it, rather than a final settlement of the tax claims, the Tribunal considers that this application cannot properly be characterized as a settlement proposal.

1084 Decision of the Moscow Arbitrazh Court, 17 August 2004, Exh. C-143.

1085 Letter from Mr. Sazanov, Deputy Head of the Bailiffs Department to Mr. Gololobov, 9 September 2004, Exh. C-146. *See also* Memorial ¶ 350.

1086 Rejoinder ¶ 893(c).

July 2005 and July 2006.[1087] As security for the payment of the July 2005 tranche, Yukos offered its 35 percent stake in Sibneft.[1088]

921. Having received no reply, Mr. Chrétien reiterated the global settlement proposal in another letter to Prime Minister Fradkov dated 15 July 2004 and in letters addressed to President Putin dated 30 July, 10 September and 17 November 2004.[1089]

922. Noting that Mr. Chrétien's letter of 30 July 2004 offered an "uncontested" 35 percent stake in Sibneft as collateral, Respondent again argues that Yukos sought to conceal from Respondent that at that time at least a 14.5 percent stake in Sibneft was encumbered pursuant to the Chukotka Injunctions. However, as Mr. Chrétien's letter in this respect contradicted Mr. Gololobov's letter to the bailiffs of 14 July 2004, the Tribunal views the reference to the uncontested stake in Sibneft as a mistake rather than a deliberate attempt by Yukos to mislead the Russian authorities.

923. Referring to Mr. Chrétien's letters of 30 July 2004 and 17 November 2004, Respondent submits that, while Prime Minister Fradkov and President Putin did not respond to Mr. Chrétien in writing, they did discuss with him the tax claims against Yukos.[1090]

924. In his letter of 30 July 2004, Mr. Chrétien refers to a discussion with President Putin during a "meeting in July."[1091] In his letter of 17 November 2004, he describes a meeting with President Putin as follows:

> [w]hen we last met in Moscow, you told me that I could take the mandate to represent the interests of Group Menatep, and possibly other minority shareholders of Yukos, to find a solution to the tax problems confronting them. . . . When you and I last spoke after our meeting, you asked for a letter outlining our proposal to settle this matter and you assured me that a response from the Minister responsible for this file would be forthcoming. I sent you the letter at the end of July, but have received no communications from your government as yet.[1092]

1087 Letters from Jean Chrétien to Prime Minister Fradkov of 6 and 15 July 2004, and to President Putin of 30 July 2004, 10 September 2004 and 17 November 2004, Exh. C-129 (hereinafter "Chrétien letters").

1088 *Ibid*.

1089 *Ibid*.

1090 Respondent's Closing Slides, pp. 302, 324.

1091 Chrétien letters, Exh. C-129.

1092 *Ibid*.

925. From these excerpts, it appears that President Putin initially encouraged the overture of a dialogue regarding Yukos' tax liability, but that neither he nor any other Russian authority ever responded to the concrete proposal made by Mr. Chrétien on Yukos' behalf.

926. Under cross-examination at the Hearing, Mr. Theede expressed Yukos' frustration with the lack of response from the Russian Federation:

> By this time it was really becoming obvious that Mr. Chrétien's, you know, admirable efforts just weren't going to get us where we needed to go, because he had been made—a lot of promises had been made to him about 'All I want Yukos to do is pay taxes, you know? That's all I want out of them: I just want them to pay taxes. And if you can get them to do that, then send me a proposal and it will work.'
>
> And he did all that, and never got a response. And it's now several months after the original proposal. I suppose—I suppose, you know, no question in my mind—the authorities probably already by July had in mind the amount of money that they were going to rack up against us in tax liabilities. They probably knew that they were going for something in the order of $30 billion, and so to them the $8 billion was low. And of course, they couldn't come back and say, 'Look, our plan is to tax you $30 billion, and so you guys are well off the mark.' They couldn't say that, because it would have blown their cover.
>
> But we were trying, and thought Mr Chrétien was a very credible way to open the dialogue I've been talking about all afternoon. But by this time, I don't—I had pretty much lost hope, and was, I guess, impressed that Mr Chrétien was continuing to try, but to no avail.[1093]

(c) Requests for a Deferral or Payment in Instalments

927. On 16 July 2004, Mr. Steven Theede sent a letter signed by Mr. Bruce Misamore to the Minister of Finance, Mr. Kudrin, then Minister of Finance, requesting a six-month deferral or payment in instalments of the tax arrears and interest for the year 2000.[1094] The letter referred to the "unprecedented nature" of the sum subject to collection and the potentially negative consequences of rapid enforcement on Yukos' production operations and the Russian budget.[1095] During the Hearing, Mr. Theede acknowledged that the letter was not perfect (the proposals were not detailed) but he described the letter as an attempt to "create a dialogue" between Yukos and the Russian Federation.[1096] The Ministry of Finance rejected Mr. Theede's request by letter dated 30 August 2004, relying on Art. 62(1)(2) of the Russian Tax Code,

---

1093 Transcript, Day 10 at 100–101.

1094 Petition for deferral or payment in instalments, 16 July 2004, Exh. C-138.

1095 *Ibid*.

1096 Transcript, Day 10 at 54.

which provides that the term for the payment of tax cannot be changed if the entity applying for such a change is the subject of proceedings for a tax offence.[1097]

928. On 12 August 2004, Yukos petitioned the Moscow Arbitrazh Court for the right to pay its tax debt for the year 2000 in 15 monthly instalments of USD 143.96 million. Judge Grechishkin denied the petition, stating that while he had discretion under the law to order payment in instalments, in this case the circumstances did not justify such an order.[1098]

(d) Other Proposals

929. Claimants submit that the settlement offers described above are "just a sample" of the "roughly 80 proposals and attempts to communicate with various authorities" made by Yukos.[1099] They say that other settlement proposals were made, but did not leave a paper trail.

930. For example, Mr. Rieger recounts in his witness statement that, in the summer of 2004, he and Mr. Gololobov had a meeting with Chief Bailiff Belyakov during which they "explained that Yukos could start selling off its assets within a month in order to pay off its alleged tax debts" and "left a two-page letter for the Russian authorities setting out Yukos' settlement proposal." Mr. Rieger adds that the authorities did not respond to this proposal.[1100] Noting that Mr. Rieger could not recall the exact terms of the proposal, Respondent suggests that, in the light of the timing, there is no reason to believe that the proposal differed from that made in Mr. Golobolov's 6 August 2004 letter (described in paragraph 915 above).[1101]

931. In their respective witness statements, Messrs. Theede and Misamore also recount that, in October 2004, "the company put everything it could into a last settlement effort" and presented to the Russian authorities a USD 21 billion settlement proposal that included Yukos shares, Sibneft shares, non-core assets and "a concession to re-elect a new board of directors that would include a number of people selected by the Government."[1102] While Yukos was initially

---

1097 Letter from the Tax Ministry to Yukos, 30 August 2004, Exh. C-145, referring to Russian Tax Code, Article 62, Exh. R-557.

1098 Ruling of the Moscow Arbitrazh Court, 12 August 2004, Exh. C-142.

1099 Transcript, Day 17 at 105 (Claimants' closing), referring to Theede WS ¶ 9.

1100 Rieger WS ¶¶ 21–23.

1101 Respondent's Closing Slides, p. 319, referring to Transcript, Day 6 at 130 (cross-examination of Mr. Rieger).

1102 Misamore WS ¶ 47; Theede WS ¶ 21.

"cautiously optimistic", the negotiations ended abruptly when Mr. Temerko, Yukos' chief negotiator in the process, was threatened with arrest and fled Russia.[1103]

932. Respondent emphasizes that there is no written record of this proposal and no witness statement by Mr. Temerko. Respondent also contends that "[i]f there were such a proposal in any amount, there is no rational basis for believing it totalled US $21 billion, because after it was allegedly made in October 2004, Yukos continued to make proposals it valued at US$ 3.4 billion, and Mr. Chrétien kept reiterating his 'global settlement' proposal of US$ 8 billion."[1104]

933. When asked in cross-examination whether there was a record of this offer, Mr. Theede replied "[y]ou have no record, but you do have my word. And I believe certainly Bruce Misamore and I have exactly the same recollection."[1105] Mr. Misamore was not cross-examined regarding this settlement proposal.

3. Parties' Arguments and Tribunal's Observations

(a) Did Yukos Contribute to its Own Demise by Failing to Discharge Tax Debt in the Amount of USD 9 Billion in the First Quarter of 2004?

934. As discussed in paragraphs 679–80 and 745–48 above, Respondent submits that Yukos could have avoided some of the taxes, fines and interest eventually assessed against it, in the first quarter of 2004, by filing amended VAT returns in its own name, amended tax returns for 2000–2002 and a tax return for 2003 recognizing all of Yukos' income without assigning it to its trading entities. According to Respondent, had Yukos taken these steps, it would have faced only USD 9 billion in unavoidable tax debt, comprising the full amount assessed against it for the year 2000 and the amounts assessed against it for 2001–2003 minus VAT, willful and repeat offender fines and a part of the default interest accrued on the taxes for those years.[1106]

935. Respondent also contends that Yukos could have paid this amount—USD 9 billion—in the first quarter of 2004. At that time, Respondent argues, Yukos had both the ability to calculate its tax liabilities for 2001–2003 based on the amounts assessed against it for the year 2000 and

[1103] Theede WS ¶¶ 22–23; Misamore WS ¶ 48.

[1104] Respondent's Post-Hearing Brief ¶ 102(iii).

[1105] Transcript, Day 10 at 75.

[1106] Respondent's Closing Slides, p. 228.

sufficient funds.[1107] Specifically, Respondent submits that Yukos had "unrestricted access" to: (a) over USD 6.8 billion in cash, constituting revenue from Yukos' trading entities paid out in dividends to Brittany Ltd., a British Virgin Islands indirect subsidiary of Yukos;[1108] (b) USD 3 billion in cash, which Yukos was entitled to receive in the context of the unwinding of the Sibneft merger for the 20 percent minus one share stake it had acquired under the Share Purchase Agreement;[1109] (c) over USD 1.1 billion in cash generated by Yukos' continuing operations;[1110] (d) the USD 2 billion "giga-dividend" Yukos paid out to its shareholders in December 2003 and January 2004;[1111] and (e) at least USD 1.55 billion in offshore non-monetary assets.[1112] Respondent also points out that, until the April 2004 Injunction, all of Yukos' assets in Russia were available to it to pay its tax debts.[1113]

936. Respondent submits that, by re-filing its VAT and tax returns and paying USD 9 billion in the first quarter of 2004, Yukos could have avoided the 7 percent enforcement fee imposed by the bailiffs and "all of the enforcement measures about which Claimants complain, including the April 14, 2004 injunction, the June 30, 2003 cash freeze orders, the seizures of shares, and the YNG auction."[1114] Yukos would thus "have survived as a going concern and still could have pursued a claim for a refund of any amounts the courts found it did not need to pay."[1115]

937. Respondent insists that, as Mr Konnov stated in his second expert report, "[t]he filing of tax returns and the payment of the tax would not have prejudiced Yukos' appeal rights."[1116] According to Respondent, Mr Konnov's opinion is confirmed by Yukos' counsel Mr Pepeliaev who, in a commentary published in 2002, wrote:

1107 Respondent's Closing Slides, p. 247, referring to Exh. C-1756.

1108 Respondent's Post-Hearing Brief ¶ 79, n.199; Rejoinder ¶¶ 838–41. For a description of Brittany's place in the Yukos corporate structure and revenue flow structure see Supplemental Expert Report of Thomas Z. Lys, 15 August 2012, ¶¶ 105, 114, 130–37 and Appendix I.

1109 Respondent's Post-Hearing Brief ¶ 79, n.199; Rejoinder ¶ 842.

1110 *Ibid*.; Rejoinder ¶¶ 843–44.

1111 *Ibid*.; Rejoinder ¶ 845.

1112 *Ibid*.; Counter-Memorial ¶ 372, n.500.

1113 Respondent's Closing Slides, p. 267.

1114 Rejoinder ¶ 834. Respondent adds that even if Yukos had waited until after the 2000 Decision was issued in April 2004, it could have avoided all enforcement measures by paying only USD 10.8 billion (Respondent's Post-Hearing Brief ¶ 84).

1115 Respondent's Post-Hearing Brief ¶ 250.

1116 Respondent's Closing Slides, p. 248, referring to Second Konnov Report ¶ 104.

> We often recommend for the sake of a client's safety to pay tax for a short period (a month) in a maximum amount which can possibly be inferred from interpretation of the relevant provision. And immediately thereafter we file an application to the tax inspectorate requesting a refund or offset of an overpaid amount. It basically reads, 'Hey! We used to interpret this norm this way but our consultants tell us that we overpaid tax, so please refund it.' Of course, the inspectorate refuses to refund implying that we paid correctly – the more the better. Then a court claim is filed and it is up to court to decide. As a result a precedent is established.[1117]

938. However, Respondent submits, despite this possibility to discharge the totality of its tax debt at an early stage for a fraction of the amounts eventually assessed against it, Yukos "failed to use the time and its resources to pay its tax debt," its managers choosing to "ignore that payment was due as provided in the assessment, not months later."[1118] Instead, Yukos only started making payments and considering a payment plan in July 2004.[1119]

939. Respondent submits that, in the light of Yukos' conduct, the Russian authorities were entitled to view Yukos' settlement offers with "caution and scepticism".[1120] In addition, by the time of the first settlement offers, Yukos' untrustworthiness had become manifest in other ways, particularly when Yukos: (a) accused the Russian authorities of running a "tax racket"; (b) denied affiliation with, or the ability to get information about, its trading entities; (c) asked that the April 2004 Injunction be substituted with an injunction against already-encumbered Sibneft shares; and (d) engaged in serial corporate dissolution to frustrate tax collection.[1121]

940. Respondent concludes that the destruction of Yukos is therefore "the consequence of the contributory fault and failure to mitigate of Yukos, under the control of Claimants."[1122]

941. Claimants reject the argument that they could have avoided enforcement of the tax assessments by the Russian Federation and the bankruptcy of Yukos by paying USD 9 billion in the first quarter of 2004, asserting that, to be convinced by this argument, "the Tribunal would need to ignore the most salient facts—the Respondent's breaches—and assume . . . that the very same Russian authorities who committed those breaches would have acted differently if only Yukos had taken the actions specified by the Respondent."[1123] Claimants argue that there is no "duty

---

1117 Rejoinder ¶ 849, referring to S.G. Pepeliaev, *Tax Law Should Be Understandable*, Raschet, No. 4, 2002, Exh. R-3287.

1118 Respondent's Closing Slides, p. 292.

1119 *Ibid*., pp. 264–65, referring to Transcript, Day 10 at 21 (cross-examination of Mr. Theede).

1120 Transcript, Day 18 at 265.

1121 Transcript, Day 18 at 265.

1122 Respondent's Post-Hearing Brief ¶ 250.

1123 Claimants' Post-Hearing Brief ¶ 276.

to appease" and that "a victim of extortion is not to blame if the threats against it are carried out after it refuses to pay."[1124]

942. In addition, Claimants are of the view that taking the steps suggested by Respondent would have prejudiced Yukos' position for subsequent litigation.[1125] As Mr. Theede stated at the Hearing, "you don't run a business by talking about paying taxes until they become an official tax."[1126]

943. Moreover, Claimants submit that, as a matter of fact, Yukos "did everything it could to pay off the tax assessments as soon as they became due."[1127] The obligation to pay arose on 16 April 2004,[1128] and Yukos made its first payment shortly thereafter on 6 July 2004. However, contrary to Respondent's contention, Yukos did not have enough cash available to settle an alleged tax debt of USD 9 billion in the first quarter of 2004. Mr. Theede explained at the Hearing that the USD 6.8 billion on the balance sheet of Brittany Ltd. "were basically loans of cash that had already been repatriated into Russia to fund our capital programs and operating expenses and so forth" and thus represented a "zero-sum" game.[1129] The offer by the former Sibneft shareholders to buy back the 20 percent minus one share stake in Sibneft that Yukos had acquired pursuant to the Share Purchase Agreement for USD 3 billion was only made in October 2004 (and was rejected because it significantly undervalued the shares).[1130] The 2 billion dividend could not be reversed and the sale of Yukos' offshore assets would have taken longer than three months to realize.[1131] As for Yukos' assets in Russia, Yukos was prevented from using them by the April 2004 Injunction, which was "grossly disproportionate" to the debt it was intended to secure, and subsequent seizures.[1132]

944. Thus, according to Claimants, by adding the "wide-ranging freeze and seizures" of the company's non-cash assets to the "massive payment demands" and "impossibly short

---

1124 *Ibid*. ¶ 275.

1125 *Ibid*. ¶¶ 280–281.

1126 Transcript, Day 10 at 21.

1127 Claimants' Post-Hearing Brief ¶ 83.

1128 Transcript, Day 20 at 112–13.

1129 Transcript, Day 11 at 41–42.

1130 Claimants' Post-Hearing Brief ¶ 291.

1131 *Ibid*.

1132 *Ibid*. ¶¶ 85–86, 91.

deadlines," the Russian Federation itself "engineer[ed] the circumstances of non-payment."[1133] In the circumstances, "it was evident that Yukos would not be able [to] settle its alleged tax debts or discharge them in full without the cooperation of the Russian authorities."[1134]

945. In the Tribunal's view, Yukos cannot be held responsible (even in part) for the rejection of its settlement offers and the enforcement measures subsequently taken by the Russian Federation merely because it did not pay USD 9 billion in the first quarter of 2004. Although the 2000 Audit Report was issued at the end of 2003, Yukos' obligation to pay its tax debt for the year 2000 did not arise until the 2000 Decision was issued in April 2004. Similarly, Yukos' obligation to pay its tax debts for 2001–2003 arose only with the issuance of the 2001, 2002 and 2003 Decisions in September–December 2004. Although some of the amounts that became due under these decisions could have been estimated based on the findings set out in the 2000 Audit Report, the Tribunal does not see why Yukos, at a time when it considered the tax assessments to be ill-founded, should have made any payments before a legal obligation to pay the tax arose. The Tribunal notes that Yukos began making payments toward its tax debts on 6 July 2004, less than a week after the issuance of the appeals decisions in its challenge proceedings against the 2000 Decision and the enforcement proceedings initiated by the Russian Federation. In the circumstances, the Tribunal does not consider it unreasonable for Yukos to have delayed payment of its tax debts until these decisions were issued.

(b) Did Yukos' Settlement Offers Constitute Real Alternatives to Enforcement?

946. Respondent invokes several reasons why Yukos' settlement offers could not be accepted by the Russian Federation, all of which are disputed by Claimants. Principally, the Parties disagree as to whether (i) all the Sibneft shares were either encumbered or disputed; (ii) Yukos sought to enter into negotiations that are not permissible under Russian law; and (iii) Russian law permits payment in kind of tax arrears.

947. For Respondent, because of the flaws in Yukos' offers, the Russian authorities were justified in doubting the sincerity of Yukos' intention to pay. This justified distrust explains why the Russian authorities did not respond to each one of Yukos' offers (although, according to Respondent, they did respond to all the sound offers).

1133 *Ibid.* ¶ 88.

1134 *Ibid.* ¶ 84.

948. Disputing that Yukos' offers suffered from any insurmountable defects, Claimants repeat that it was Yukos' genuine intention to commence a dialogue with the Russian Federation aimed at finding a workable solution to pay off its tax debts.

949. In this section, the Tribunal first addresses the specific areas of disagreement between the Parties and then makes some general observations regarding Yukos' settlement offers and the Russian Federation's responses.

i. Whether all the Sibneft Shares were Either Encumbered or Disputed

950. Respondent submits that the Sibneft shares could not be accepted in payment of Yukos' tax debts because Yukos' ownership of these shares was disputed by Sibneft's former shareholders.[1135] This defect, says Respondent, affected all the offers made to the bailiffs, all the offers conveyed by Mr. Chrétien to Prime Minister Fradkov and President Putin, as well as the USD 21 billion settlement proposal allegedly made by Yukos in October 2004.

951. Claimants recognize that Yukos' ownership of the 14.5 percent stake in Sibneft corresponding to the second tranche under the Share Exchange Agreement was challenged by Nimegan Trading Limited before the Chukotka Arbitrazh Court in proceedings initiated on 6 July 2004 and that those shares were attached by the Chukotka Injunctions of 9 July 2004, pending resolution of the merits of the dispute. Claimants assert, however, that the 20 percent minus one share stake in Sibneft acquired by Yukos under the Share Purchase Agreement was never encumbered or challenged in any legal proceeding.[1136]

952. As explained in paragraphs 2–915 and 922 above, the Tribunal considers that, although Yukos initially offered a 34.5 percent stake in Sibneft in payment of its tax debts to the bailiffs, after the Chukotka Injunctions it sought only to offer in payment the 20 percent minus one share stake in Sibneft that was not the object of the Injunctions.

953. As for this 20 percent stake, the Tribunal notes that a number of Sibneft's original shareholders wrote to the Russian authorities in July and August 2004, opposing Yukos' proposals to use Sibneft shares to settle its tax debts, since the shares' ownership was disputed between them

---

[1135] Counter-Memorial ¶¶ 420–30; Respondent's Skeleton ¶ 47.

[1136] Memorial ¶ 229; Claimants' Post-Hearing Brief ¶ 92, referring to Transcript, Day 6 at 95–97, 112, 116 (Mr. Rieger); Transcript, Day 9 at 242–43 (Mr. Misamore); Transcript, Day 9 at 36–39, 44–45, 48–49, 71, 74, 92–93 (Mr. Theede); Day 17 at 106–12 (Claimants' closing).

and Yukos. Thus, on 6 July 2004, these former shareholders wrote to the bailiffs, claiming that "rights to the shares of OAO Sibneft held by OAO NK YUKOS are the subject of the dispute and OAO NK YUKOS is unable to exercise its ownership rights to such shares."[1137] On 13 July 2004, the same former shareholders wrote to the Deputy Minister for Taxes, stating that "OAO NK YUKOS is not entitled to use the whole block of shares in OAO Sibneft held by it for settlements with its creditors, including with respect to tax liabilities."[1138] In a further letter dated 16 August 2004, the former shareholders specifically asserted that the Share Purchase Agreement and the Share Exchange Agreement constituted "a single transaction" and that "all 92 percent of shares in [Sibneft] that were transferred to [Yukos] under both agreements are in dispute."[1139]

954. Despite these allegations, it is clear to the Tribunal that the Share Purchase Agreement was never formally challenged. The 6 July 2004 letter refers to an LCIA proceeding; yet, the only LCIA proceeding related to Sibneft shares that is in the record in this arbitration is LCIA Arbitration No. 4589, in the context of which Yukos sought damages arising out of the purported termination of the Share Exchange Agreement, but made no claim in relation to the Share Purchase Agreement.[1140]

955. In light of these findings, the Tribunal considers the bailiffs' failure to respond in July 2004 to Yukos' settlement offers to be inexcusable. On 2 July 2004, when Yukos first wrote to the bailiffs to request enforcement against its 34.5 percent shareholding in Sibneft, its ownership of these shares had not yet been challenged. The Chukotka court proceedings (challenging the transfer of the 14.5 percent stake) were commenced four days later, on 6 July 2004. This was also the date on which the former Sibneft shareholders, for the first time, wrote to the bailiffs claiming that Yukos was "unable to exercise its ownership rights" to the Sibneft shares. For four days, therefore, the bailiffs had no reason to believe that ownership of these shares by

---

1137 Application of White Pearl Investments Limited, Kindselia Holdings Limited, Heflinham Holdings Limited, Marthacello Co. Limited and N.P. Gemini Holdings Limited to the Chief Bailiff of the First Interdistrict Department of the Bailiff Service for the Central Administrative District of Moscow, 6 July 2004, Exh. R-552.

1138 Letter from White Pearl Investments Limited, Kindselia Holdings Limited, Heflinham Holdings Limited, Marthacello Co. Limited and N.P. Gemini Holdings Limited to the Deputy Minister of Taxes and Levies of the Russian Federation, 13July 2004, Exh. R-555.

1139 Letter from N.P. Gemini Holdings Limited, Heflinham Holdings Limited, White Pearl Investments Limited, Kindselia Holdings Limited and Marthacello Co. Limited to the Deputy Minister of Taxes and Levies of the Russian Federation, 16 August 2004, Exh. R-559.

1140 LCIA Arbitration No. 4589: *Yukos Oil Company v. Kravin Investments and others*, Statement of Case ¶ 94, Exh. R-3645.

Yukos was disputed. Yet the bailiffs did not respond to Yukos' offer during that period or at any time thereafter.

956. In addition, after Yukos, on 14 July 2004, reduced its offer to the 20 percent minus one share holding in Sibneft, the only basis for Respondent's assertion that "the bailiffs had reason to believe that Yukos' title to even this block of proffered shares was in dispute"[1141] were the "warnings" received from the former Sibneft shareholders. The Tribunal is not persuaded that mere letters to the bailiffs from a third party asserting a claim to an asset held by the debtor (without asserting this claim vis-à-vis the debtor itself) can constitute a sufficient reason for the bailiffs to disregard the debtor's request to use this asset for enforcement purposes.

ii. Whether Yukos Sought to Enter into Negotiations that are Not Permissible under Russian Law

957. According to Respondent, Yukos management believed erroneously that tax assessments provided an opportunity for a "business negotiation" that could end in a "compromise".[1142] Such negotiations, says Respondent, seeking a reduction, deferral or payment in instalments of tax arrears, are not permitted under Russian law.[1143] Specifically, Respondent contends that, once "a resolution of the highest tax authority or a court judgment has entered into force, the tax authorities and bailiffs cannot reduce the amount of the tax that's due."[1144] Nor, avers Respondent, can the tax authorities agree to a delay for payment of more than 6 months, or change the term for payment when the entity applying for such a change is the subject of proceedings for a tax offence.[1145] Moreover, adds Respondent, the Moscow Arbitrazh Court was justified in rejecting Yukos' request for payment in instalments of its tax arrears due to the absence of exceptional circumstances.[1146]

958. Respondent maintains that a major problem with Yukos' settlement proposals was that the amounts offered were insufficient to cover the tax arrears, fines and interest assessed against

---

1141 Counter-Memorial ¶ 426.

1142 Respondent's Post-Hearing Brief ¶ 101, referring to Transcript, Day 10 at 7 (cross-examination of Mr. Theede); Transcript, Day 6 at 110–11 (cross-examination of Mr. Rieger).

1143 Respondent's Post-Hearing Brief ¶ 101.

1144 Transcript, Day 18 at 270; *see also* Respondent's Closing Slides, p. 299.

1145 Transcript, Day 18 at 270–71; Respondent's Closing Slides, p. 315.

1146 Respondent's Closing Slides, pp. 316–18, referring to Decision of the Moscow Arbitrazh Court, 12 August 2004, Exh. C-142.

Yukos at that time and thus demonstrated that Yukos never intended to pay its tax debts in full.[1147]

959. Respondent contends that, even if it accepted that Yukos' 20 percent minus one shareholding in Sibneft was formally unencumbered, its value was nevertheless uncertain, since Yukos was unable to offer a controlling block of shares and the public controversy with respect to the shares could affect their market value.[1148] The fact that Yukos did not itself sell the Sibneft shares is also proof of their illiquidity.[1149] Respondent notes that Yukos' Board, when authorising the sale of the shares in August 2004, expressly acknowledged that "certain terms of the sale of these stakes may differ from the existing market terms because of the need to sell the assets as soon as possible in order to discharge the Company's tax liabilities."[1150] When the 20 percent minus one shareholding in Sibneft was tendered on 14 July 2004, it was valued by Yukos at USD 2.3 billion, which was insufficient to cover Yukos' liabilities for the year 2000. The value of the Sibneft shares plus the shares in the other 15 companies offered by Yukos in its letters of 16 September, 24 November and 16 December was also insufficient having regard to Yukos' tax debt assessed in the 2001, 2002 and 2003 Decisions.[1151]

960. As for Mr. Chrétien's offer of USD 8 billion to settle the claims for the years 2000–2003, asserts Respondent, it would have covered only about half the amount then assessed against Yukos.[1152] The USD 21 billion settlement offer allegedly made by Yukos in October 2004 was also insufficient, submits Respondent, since Yukos' tax liabilities for the years 2000–2004 totalled USD 24.2 billion.[1153]

961. Claimants deny that Yukos was asking the authorities for a reduction in the amount of the tax arrears that were due.[1154] As Mr. Theede testified at the Hearing, Yukos "never tried to make any kind of proposal that was less than the tax that was due . . . we didn't try to negotiate the

---

1147 Respondent's Closing Slides, p. 292.

1148 Counter-Memorial ¶ 423.

1149 Respondent's Closing Slides, pp. 216, 313.

1150 Respondent's Closing Slides, p. 295, referring to Minutes No.120–18 of Meeting of Yukos' Board of Directors, 19 August 2004, Exh. C-210.

1151 Respondent's Closing Slides, pp. 308–309.

1152 Respondent's Closing Slides, p. 296.

1153 Rejoinder ¶ 896, n.1425.

1154 Transcript, Day 20 at 215; Claimants' Post-Hearing Brief ¶ 93.

amount; we were willing to pay all the taxes back."[1155] Mr. Theede further observed that Yukos "could never in a million years have anticipated the level of taxes that would ultimately be presented to the company; and fines and VAT."[1156] Claimants submit that the Russian authorities could have ascertained the sincerity of Yukos' intention if only they had bothered to discuss the settlement offers.[1157]

962. A dialogue, say Claimants, was necessary given the enormous amounts assessed against Yukos. During the Hearing, when asked by a member of the Tribunal: "when a State assesses taxes and the taxpayer has exhausted administrative and judicial recourse in respect of the assessments, is it normal for the State to enter into a dialogue to negotiate a settlement of the assessments with the taxpayer?," Mr. Theede replied that while he was not "sure what is normal . . . , there was no way that we would have been able to pay the taxes without being able to talk to the authorities and come to some agreement. We felt like our feet were nailed to the floor and we were being asked to jump. It was very frustrating."[1158]

963. Concerning the value of the Sibneft shares, Claimants assert that they were Yukos' most liquid asset.[1159] Yukos' assessment of the value of its 20 percent minus one shareholding at USD 2.3 billion in its letters to the bailiffs was not exaggerated since, as stated above, in the bankruptcy proceedings in 2006, Gazprom acquired these shares for USD 4.1 billion.[1160] Under cross-examination at the Hearing, Mr. Theede acknowledged that Yukos did not try to sell the Sibneft shares itself.[1161] He explained that Yukos did not know what the Russian authorities wanted. He testified that if the bailiffs had said to Yukos "'[w]e don't want the shares, but we will take the $3 billion. You can sell the Sibneft stock without any interference,' [Yukos] would have done that in a second."[1162]

964. Claimants also note that the settlement offers conveyed by Mr. Chrétien in July 2004 were well in excess of the tax debt that had been assessed at that time—USD 3.42 billion for the year

---

1155 Transcript, Day 10 at 8–12.

1156 *Ibid.* at 9.

1157 Claimants' Post-Hearing Brief ¶ 93.

1158 Transcript, Day 10 at 40.

1159 Claimants' Post-Hearing Brief ¶ 92.

1160 *Ibid*.

1161 Transcript, Day 11 at 49–50.

1162 *Ibid.* at 48.

2000.[1163] At the Hearing, Mr. Theede explained that the USD 8 billion figure was arrived at by considering the 2000 tax assessment of USD 3.4 billion and scaling it back for subsequent years to account for the shorter period over which interest would be calculated.[1164] In terms of Yukos' ability to honor the proposal, Mr. Theede confirmed that Yukos would have been in a position to pay the first installment of USD 2 billion in July 2004, and states that, despite the absence of a response from the Tax Ministry, Yukos "did take immediate action to start accumulating the offshore cash … within a day or two of this letter."[1165] When asked to explain why the settlement offer remained at the level of USD 8 billion in the proposal of 10 September 2004, when the amount of taxes assessed against Yukos (for 2000 and 2001) had reached USD 7.5 billion, Mr. Theede stated as follows:

> [W]hat [the 10 September proposal] is saying is: with what we've already paid, plus the [VAT] that you haven't refunded us, we've nearly paid our 2000 tax arrears. I think it's important to maybe explain . . . this [VAT], because by the end of the attack that . . . unrefunded [VAT] amounted to nearly [USD] 5 billion of the total assessment against the company. And what it was is: when you sell oil in Russia, you pay a [VAT] on it; and then, if you export it, you automatically get that [VAT] back.[1166]

965. And Mr. Theede testified that in October 2004 Yukos made a USD 21 billion offer. Mr. Theede's evidence on this alleged offer was confirmed by Mr. Misamore. However, the Tribunal notes that there is no documentary evidence of this offer in the record.

966. As for Respondent's argument that the amounts and payment modalities of tax arrears cannot be negotiated under Russian law, Claimants submit that it is disingenuous, since the Russian Federation has entered into negotiations and agreed settlements of tax assessments with other Russian and international oil companies such as Sibneft, TNK-BP and Rosneft.[1167]

967. The Tribunal observes that according to press reports submitted by Claimants Sibneft was able to settle a 1 billion tax arrears claim by paying only 300 million,[1168] while the one billion tax arrears claim against TNK-BP was reduced by "hundreds of million of dollars," after a meeting

---

1163 Claimants' Post-Hearing Brief ¶ 92.

1164 Transcript, Day 10 at 82–85.

1165 *Ibid.* at 89.

1166 *Ibid.* at 96.

1167 Claimants' Post-Hearing Brief ¶ 93.

1168 *Sibneft Pays Off Tax Claim*, The Moscow Times, 19 April 2005, Exh. C-1418; "Sibneft 'settles its tax demand'," BBC News, 18 April 2005, Exh. C-752.

took place between Lord Browne, BP's chief executive, and President Putin.[1169] As for Rosneft, the Tribunal notes that its financial statements reveal that, after Rosneft purchased YNG, the Russian authorities approved a restructuring plan allowing it to pay the tax arrears that had been assessed against YNG in February and October 2004 in quarterly payments over a period of 5 years starting in March 2008.[1170]

968. Claimants also affirm that Rosneft received a concession from Respondent in the guise of an 83 percent reduction in the amount of YNG's tax arrears and a corresponding 89 percent reduction in fines.[1171]

969. Respondent answers that Yukos' case is "totally different" from those of Sibneft or TNK-BP, because there is no evidence that these companies, contrary to Yukos, engaged in "knowing and longstanding tax evasion" and lied to the courts and tax authorities. From the limited record available in this arbitration in this respect, it does appear as if these companies cooperated with the tax authorities in order to settle the amount due. Moreover, there is no evidence that the authorities compromised after having reached a final assessment of liability.[1172] For Respondent, "considering the flagrancy of Yukos' violation, the not[o]riety of its failure to accept responsibility and indeed its efforts to undermine tax enforcement, common sense and straightforward deterrent interest would dictate different results."[1173]

970. Regarding Rosneft, Respondent explains that, unlike Yukos, it was eligible for a "tax restructuring process" because it had, also unlike Yukos, been designated as a "strategic company" by the Russian Government. According to Mr. Konnov's first expert report, Article 191 of the *Federal Law on Insolvency* "contemplates a possibility to restructure federal tax debt of certain 'strategic' companies in order to prevent their bankruptcy."[1174] A list of

---

1169 *TNK-BP Tax Bill Slashed by Moscow*, Financial Times, 11 August 2005, Exh. C-762.

1170 Rosneft Consolidated Financial Statements as of December 31, 2007 and 2006 and for the years ended 31 December 2007, 2006 and 2005, p. 50, Exh. C-377; Management's Discussion and Analysis of Financial Condition and Results of Operations for the three and nine months ended 30 September 2007 and 2006, p. 38, Exh. C-378.

1171 Memorial ¶ 278.

1172 Respondent's Closing Slides, p. 326.

1173 *Ibid.*, p. 327.

1174 First Konnov Report ¶ 91.

"strategic" companies was approved in early 2004, and Rosneft (contrary to Yukos) was eligible for inclusion on the list given its status as a state-owned company.[1175]

971. At the Hearing, counsel for Respondent provided the following explanation as to the requirements for a "strategic" company:

> It was necessary to be State-owned. It was necessary that one of the ministries request that the company qualify to be a strategic company and to undertake responsibilities of a strategic company, and ultimately to be approved by the relevant federal agency, which involved the defence services; and in the case of Rosneft involved committing to supply petroleum products to the Ministry of Defence of the Russian Federation. So these were all things that were not open to Yukos.[1176]

972. While Claimants appeared to suggest at the Hearing that, since "it's the Government that decides which company is strategic," it would have been "fairly easy" for Respondent to accept Yukos as a strategic company. The Tribunal notes that no specific requirements for purposes of designating a strategic company were proffered by either side.[1177]

iii. Whether Russian Law Permits Payment in Kind of Tax Arrears

973. Respondent submits that the Russian Federation could not accept Yukos' shares in Sibneft and other companies as payment because Russian law does not allow a taxpayer to settle its liabilities in kind.[1178] Specifically, Article 45(3) of the Russian Tax Code stipulates that "[t]he obligation to pay taxes/duties shall be executed in the currency of the Russian Federation."[1179] This defect affected all of Yukos' settlement offers with the exception of those conveyed by Mr. Chrétien.

974. Claimants reply that Respondent misrepresents "both the legal context and the substance of Yukos' settlement proposals."[1180] While Article 45(3) of the Russian Tax Code requires the payment of taxes in Russian rubles, Article 45(1) expressly provides that in case of late or incomplete payments, outstanding taxes may be collected through a forced sale of the taxpayer's assets other than cash, as provided for in Articles 47 and 48 of the Russian Tax Code

---

1175 *Ibid*.

1176 Transcript, Day 19 at 30.

1177 Transcript, Day 17 at 253.

1178 Counter-Memorial ¶ 423.

1179 Russian Tax Code, Article 45, Exh. R-550.

1180 Reply ¶ 326.

and Article 46 of the *Federal Law "On Enforcement Proceedings"*.[1181] Respondent itself relies on the latter provision for the proposition that, for the purposes of the settlement of Yukos' alleged tax liabilities, the company's assets seized by the bailiffs were subject to a coercive sale.

iv. Concluding Observations

975. Having reviewed the totality of the evidence and the Parties' representations, the Tribunal is of the view that Yukos' settlement offers represented a good faith attempt by the company to initiate a dialogue with the Russian Federation regarding the payment of Yukos' tax arrears. While it is true that these offers were for less than the total amount of taxes, fines and arrears assessed against Yukos, the Tribunal observes that, at the time when each offer was made, it either would have been sufficient to cover the amounts for which decisions had been issued by the Tax Ministry at the time, or was close enough to those amounts to allow the Russian Federation to assume that Yukos did indeed intend to discharge its tax liabilities. As for Yukos' offer of its 20 percent minus one share holding of Sibneft shares, in the opinion of the Tribunal, since this shareholding was never formally disputed, it should have convinced the Russian Tax authorities that Yukos was serious in wishing to settle its tax liabilities.

976. Respondent's argument that the Russian Federation does not negotiate tax liabilities is belied by the fact that it agreed to tax settlements with other companies. Given the paucity of evidence before this Tribunal regarding the settlements actually reached by Sibneft and TNK-BP, the Tribunal cannot judge the extent to which their situations were similar to that of Yukos. However, the simple fact that these companies were able to negotiate the reduction of tax arrears initially claimed by the tax authorities suggests to the Tribunal that such negotiations can in fact take place under Russian law and practice.

977. Thus, even if Yukos' settlement offers may not have resolved definitively all of its tax liabilities, the Tribunal sees no valid reason why the Russian Federation, if it sought only to collect taxes (and, presumably, to allow its largest taxpayer to continue in business) would not have reacted more positively to Yukos' settlement offers at the very least to the extent of engaging constructively in discussion.

[1181] *Ibid.*, referring to Federal Law No. 119-FZ of 21 July 1997 "On Enforcement Proceedings" (as amended), Article 46, Exh. C-1274.

978. The Russian Federation never showed any interest in Yukos' offers. With the exception of the letter of 9 September 2004, the bailiffs never replied to Yukos, never even troubling to explain why they considered its offers inadequate. The Tribunal finds this silence very revealing, particularly in circumstances where the bailiffs' views as to the unacceptability of the offers were based in part on correspondence they had received from a third party (the former Sibneft shareholders), which had not even been copied to Yukos. The settlement offers conveyed by Mr. Chrétien, at the end of the day, were also met with silence.

979. When the Russian authorities did provide responses to Yukos' proposals, these were in the nature of blanket rejections. It is manifest that the authorities never seriously considered any one of Yukos' proposals. The only letter from the bailiffs to Yukos (dated 9 September 2004) relies on the decision of the Moscow Arbitrazh Court of 17 July 2004, which merely addressed the issue of the Sibneft shares, but fails to explain why the shares in the other 15 companies offered by Yukos could not be accepted in payment. The Tribunal notes that the letter has a ring of finality to it, emphasizing as it does "the right of the bailiff to make the final decision."[1182] In the entire period from July to December 2004, the Russian authorities did not make a single counter-proposal to Yukos or even state that they were prepared to engage with the taxpayer. Mr. Rieger testified at the Hearing that "it was like a one way road: making proposals, talking, offering, and . . . no substantial feedback . . . no sitting down and willing to discuss."[1183] This statement aptly describes the impression that the Tribunal garners from the record.

980. In conclusion, Respondent's total failure to engage with any of Yukos' settlement proposals raises significant doubts in the Tribunal's mind as to whether Respondent's true and sole concern in its dealings with Yukos after the tax assesments were issued was the collection of taxes.

F. THE AUCTION OF YNG

1. Introduction

981. After having reviewed these futile attempts by Yukos to settle its tax debts to the State, the Tribunal comes to one of the most striking episodes in the saga of Yukos' demise, the

[1182] Letter from Mr. Sazanov, Deputy Head of the Bailiffs Department to Mr. Gololobov, 9 September 2004, Exh. C-146.

[1183] Transcript, Day 6 at 40.

December 2004 auction of its core asset, the oil production company Yuganskneftegaz ("**YNG**") and the subsequent acquisition of YNG by State-owned Rosneft.

982. Claimants argue that the auction was a sham, "carefully orchestrated to achieve the transfer of Yukos' crown jewel to the State at the lowest price that could be achieved while maintaining a façade of legality."[1184] Claimants accuse Respondent of having depressed the value of YNG by fabricating USD 4.6 billion in tax claims against the company. They argue that Respondent set a low starting price which ignored both a valuation by Dresdner and Dresdner's advice on how to conduct the auction in order to maximize the sale price. Claimants deny that their own actions contributed to the low price achieved at the auction. They maintain that the sole bidder at the auction, a previously unknown entity called Baikal Finance Group ("**Baikal**"), was a dummy that was used to mask the Russian State's interest and involvement in the process.[1185]

983. Respondent answers that the decision to sell YNG to satisfy Yukos' massive debt was a direct consequence of Yukos' misconduct and the only realistic way to collect Yukos' unpaid taxes in circumstances where Yukos had fiercely obstructed audits, resisted payment and attempted to make itself judgment proof.[1186] Although YNG was sold during a 10-minute auction attended by two bidders on a Sunday afternoon in the outskirts of Moscow, Respondent observes that it was done in compliance with Russian law. Respondent avers that the price realized—USD 9.35 billion—was consistent with the formal appraisal conducted by Dresdner and other market estimates, and notes that this price reflected YNG's own tax liabilities.[1187] If the price was lower than it might otherwise have been, says Respondent, the fault lies solely with Claimants and Yukos, who sabotaged the auction through a sham bankruptcy proceeding in Texas and published threats of "a lifetime of litigation" which kept potential bidders away. Respondent rejects Claimants' theory that Baikal was a veneer for the Russian Government. Rather, Respondent submits that it was a special purpose vehicle associated with Surgutneftegaz. When Baikal suddenly found itself unable to finance its purchase (due to the Temporary Restraining Order ("**TRO**") obtained by Yukos in Texas), Rosneft simply seized a

---

1184 Claimants' Post-Hearing Brief ¶ 97; *see* Press Conference with Russian and Foreign Media, 23 December 2004, Russian President Official Website, Exh. C-422; *see also* Memorial ¶¶ 334, 409; Reply ¶ 293; Claimants' Skeleton ¶ 45.

1185 Claimants' Post-Hearing Brief ¶¶ 110–14; Memorial ¶¶ 386–95; Reply ¶¶ 370–76; Claimants' Skeleton ¶¶ 40–43.

1186 Respondent's Post-Hearing Brief ¶¶ 87–121; Counter-Memorial ¶¶ 450–527; Rejoinder ¶¶ 951–1008; Respondent's Skeleton ¶¶ 36–54.

1187 *See, e.g.*, Deutsche Bank, Project Chekov, December 2004, Slide 6, Exh. C-284.

commercial opportunity that presented itself as a result of Claimants' misconduct.[1188]

984. At the outset of its analysis, the Tribunal will recall that during the February 2003 meeting with the Union of Industrialists and Entrepreneurs Industrialists attended by Michael Khordokovsky and referred to earlier in this Award, President Putin made this seemingly prescient observation:

> [C]ertain things are obviously clear. [Rosneft] is a State-owned company. It has insufficient reserves and should increase them. Some other oil companies, such as Yukos, have a surplus of reserves.[1189]

985. As will be seen, after having reviewed the totality of the circumstances leading to the YNG auction and the auction itself, the Tribunal concludes that this episode provides yet more compelling evidence that the Russian Federation was not engaged in a true, good faith tax collection exercise but rather was intent on confiscating the most valuable asset of Yukos and effectively transferring it to the Russian State.

986. The Tribunal notes that its findings are consistent with those of the *RosInvestCo* and *Quasar* tribunals, which found "many aspects of the YNG auction more than suspect"[1190] and concluded that "the auction of YNG was rigged."[1191]

2. Chronology

987. As is evident from the chronology of events recounted in Chapter VIII.B, and as observed by the ECtHR, the Russian authorities "were unyieldingly inflexible as to the pace of the enforcement proceedings, acting very swiftly."[1192] This chronology reviews the key events as of the date when the sale of YNG was announced to the auction itself on 19 December 2004, and the transfer of the YNG shares to the Russian State-owned Rosneft three days later on 22 December.

1188 *See* Respondent's Skeleton ¶¶ 46–52; Respondent's Closing Slides, pp. 327–70.

1189 Video recording and transcript of meeting of the members of the Union of Industrialists and Entrepreneurs with President V. Putin held in the Ekaterininsky Hall, Kremlin, 19 February 2003, Exh. C-1396.

1190 *Quasar* ¶ 116, Exh. R-3383.

1191 *RosInvestCo* ¶ 620(d), Exh. C-1049.

1192 ECtHR Yukos Judgment ¶ 656, Exh. R-3328; Chapter VIII.B.

(a) Yukos' Shares in YNG are Seized and the Government Announces they will be Sold; Yukos Brings Unsuccessful Court Challenges

988. On 20 July 2004, the Ministry of Justice announced its plan to sell YNG in order to satisfy Yukos' tax debt for the year 2000.[1193] Mr. Misamore testified that at the time of this announcement the only tax levied against Yukos and confirmed by the courts was for the year 2000, in the amount of approximately USD 3.42 billion, which Yukos had already started to pay.[1194] In the circumstances, he viewed the seizure of YNG as disproportionate and unjustified.

989. Industry analysts interpreted the bailiff's plans to sell "Yukos's most valuable asset" as "a clear sign the authorities are going in for the kill," observing that the move "leaves little doubt the authorities' final goal is for Yukos to cease to exist in its current form, materially erasing most, if not all, shareholder value in the process." [1195]

990. On 23 July 2004, GML director Tim Osborne declared that any purchaser of YNG would be "buying a whole heap of trouble."[1196]

991. Yukos applied to the Russian courts to prevent the sale from proceeding, but to no avail.[1197] In a letter to the Chief Bailiff of the Russian Federation dated 6 August 2004, Yukos requested that any sale of YNG be conducted by public auction. This request was granted.[1198]

(b) YNG is Valued for Auction while its Tax Liabilities Rapidly Escalate

992. On 12 August 2004, the bailiffs appointed Dresdner to carry out the valuation of YNG.[1199]

1193 *Moscow set to seize huge Yukos oil division—Investors may lose everything in tax fight, analysts warn*, International Herald Tribune, 21 July 2004, Exh. C-698.

1194 Misamore WS ¶ 52.

1195 *Moscow set to seize huge Yukos oil division—Investors may lose everything in tax fight, analysts warn*, International Herald Tribune, 21 July 2004, Exh. C-698 (quoting Mr. Steven Dashevsky).

1196 *Yukos Says Asset Sale Could Prove Fatal Blow*, NY Times, 23 July 2004, Exh. R-648.

1197 Ruling of Moscow Arbitrazh Court, 29 November 2004, Exh. C-283.

1198 Letter from Yukos' counsel D.V. Gololobov to the Chief Bailiff of the Russian Federation A.T. Melnikov, 6 August 2004, Exh. C-140; *Moscow set to seize huge Yukos oil division—Investors may lose everything in tax fight, analysts warn*, International Herald Tribune, 21 July 2004, Exh. C-698. Respondent points out that the sale of the YNG shares could, instead, have been negotiated with a designated purchaser. Rejoinder ¶¶ 978, 984; Transcript, Day 3 at 115 (Respondent's opening).

1199 Resolution of Moscow Court Bailiff D.A. Borisov, 12 August 2004, Exh. C-270.

993. Dresdner issued its valuation report on 6 October 2004; it valued YNG as a stand-alone enterprise at USD 18.6 to 21.1 billion.[1200] Dresdner noted in the summary of its Report that this amount could be reduced by tax and other liabilities, which would lower the value to USD 14.7 to 17.3 billion.[1201] In its report, Dresdner observed that "[t]he sales process usually has a significant impact on the revenue from the sale" and that "[a] quick auction will most likely prevent the achievement of a full price."[1202] Dresdner added that "[i]f access to full information is not provided to potential purchasers, this will lead to a significant reduction in the number of parties interested in YNG and also in their ability to offer the full price."[1203]

994. A few days after Dresdner delivered its report, on 11 October 2004, the bailiffs recommended a minimum sale price for the YNG shares that reflected a 60 percent discount of the value determined by Dresdner.[1204] The bailiffs' declaration caused Yukos shares to fall "so far so fast . . . that trading had to be halted twice on MICEX."[1205]

995. On 13 October 2004, GML's Tim Osborne reiterated his earlier threat, and said that "[w]hoever buys [YNG] is going to be buying themselves a lifetime of litigation."[1206]

996. On 29 October 2004, following an audit that began on 23 September 2004, YNG received a tax reassessment for transfer pricing violations, in the amount of USD 2.35 billion for the year 2001.[1207] On the same day, following an audit that began on 1 October 2004, the tax authorities issued a decision finding YNG liable for a tax offense for the year 2002 in the amount of

---

1200 Dresdner Valuation Report, Exh. C-274, ZAO Dresdner Bank Summary Valuation Opinion Letter, 6 October 2004, Exh. C-273 (hereinafter "Dresdner Summary Letter").

1201 Dresdner Summary Letter, 6 October 2004, p. 6, Exh. C-273.

1202 Dresdner Valuation Report ¶ 11.2.

1203 *Ibid*. ¶ 12.8.

1204 Resolution of Moscow Court Bailiff D.A. Borisov, 11 October 2004, Exh. C-1160; *see Basic Yukos asset valued merely at $10.4 billion*, RIA Novosti, 12 October 2004, Exh. C-710; *Russia to press on with Yukos sell-off*, The Financial Times, 13 October 2004, Exh. C-711; *Low valuation for Yukos unit sale*, NY Times, 14 October 2004, Exh. C-712.

1205 *Yukos Unit Up for Sale at Discount Price*, Moscow Times, 13 October 2004, Exh. R-625. Dresdner, on 14 October 2004, released, "in the interests of transparency" and "with the permission of the Ministry of Justice," a summary of the valuation report on its own website, including the USD 14.7 to 17.3 billion range Dresdner had estimated for YNG post-liabilities. Summary valuation opinion letter on Yuganskneftegaz, Dresdner Bank Corporate Website, 14 October 2004, Exh. C-275, with link to Dresdner Summary Letter. Claimants characterize Dresdner's decision to do so as an extraordinary reaction taken to correct the public record. Memorial ¶ 370; Counter-Memorial ¶ 458 & n.686.)

1206 *Yukos Unit Up for Sale at Discount Price*, Moscow Times, 13 October 2004, Exh. R-625.

1207 Repeat Field Tax Audit Report No. 30–03–14/2, 29 October 2004, Exh. C-251; Memorial ¶ 271; Counter-Memorial ¶ 482; Reply ¶¶ 360–61; Rejoinder ¶¶ 959–60. As explained in the First Konnov Report, "under the transfer pricing rules, the tax authorities were permitted to substitute the contract price with the market price," but they "could do this . . . only if the market price deviated from the contract price by more than 20%." First Konnov Report ¶ 87.

USD 1.03 billion.[1208] A further tax audit on YNG was commenced on 12 October 2004, resulting in a tax assessment on 3 December 2004 of USD 1.22 billion for the year 2003.[1209] According to Claimants, these three successive tax assessments over a period of less than five weeks on the eve of the YNG auction amounted to double-taxation and were part of the Russian Federation's strategy to depress the auction price of YNG and destroy Yukos.[1210]

997. By mid-November, Yukos' settlement proposals were continuing to fall on deaf ears.[1211] On 18 November 2004, the bailiffs announced that YNG would be auctioned and the Ministry of Justice appointed the Russian Federal Property Fund to handle the auction.[1212] The Russian Federal Property Fund issued the formal auction notice the next day and fixed the auction date for 19 December 2004.[1213] This was a Sunday, and the earliest possible date to hold the auction under the relevant regulations.[1214] The opening price for 100 percent of the ordinary shares (or 76.79 percent of YNG's total share capital) was set at USD 8.65 billion.

998. Yukos applied to the Moscow Arbitrazh Court for a declaration that this decision was unlawful and sought interim measures. Both applications were swiftly denied.[1215]

(c) Yukos Tries to Prevent the Auction; Preparations Proceed; an Entity Named Baikal is Created to Purchase YNG

999. On 6 December 2004, Baikal was incorporated in the town of Tver by a sole founder, Ms. Valentina Davletgareeva, with capital of USD 359.[1216] A few days later, Ms. Davletgareeva sold her stake in Baikal to a company called Makoil.[1217]

1208 Memorial ¶ 271; Decision of Moscow Arbitrazh Court, 25 April 2006, p. 2, Exh. C-255.

1209 Field Tax Audit Report No. 52/975, 3 December 2004, Exh. C-252; *but see* Decision of the Moscow Arbitrazh Court, 21 April 2006, Exh. C-256.

1210 Claimants' Post-Hearing Brief ¶¶ 84, 98–100.

1211 *See* Chapter VIII.E.

1212 Resolution of Bailiff I.V. Kochergin to appoint a seller, 18 November 2004, Exh. C-279; Agreement No. 4-UYu/2–1/1772–1 between Ministry of Justice and Russian Federal Property Fund, 18 November 2004, Exh. R-623.

1213 Notice of auction published by the Russian Federal Property Fund, 19 November 2004, Exh. C-280.

1214 *See* YNG Auction Regulation (RP11197–221), 18 November 2004, Exh. R-3764.

1215 Memorial ¶ 382; Ruling of the Moscow Arbitrazh Court, 29 November 2004, Exh. C-283; Resolution of the Federal Arbitrazh Court for the Moscow District, 3 May 2005, Exh. C-292; Resolution of Bailiff D.A. Borisov, 31 December 2004, Exh. C-291.

1216 Baikalfinancegroup Limited Liability Company, Charter, 2 December 2004, Exh. R-672; Certificate of registration of OOO Baikalfinancegroup as a legal entity, 6 December 2004, Exh. C-286.

1217 Baikalfinancegroup Limited Liability Company, Charter (amended version), 9 December 2004, Exh. R-674.

1000. On 10 December 2004, the Federal Antimonopoly Service reported that three entities—Gazpromneft, ZAO Intercom and OOO First Venture Company—had filed for clearance to participate in the auction. While Gazpromneft did eventually register for the auction, the other two companies did not.[1218]

1001. Having failed to convince the Russian courts to prevent the auction from proceeding, Yukos, in its own words, sought "to obtain justice"[1219] elsewhere. On 13 December 2004, GML posted a full-page advertisement entitled "Buyer Beware" in the Financial Times.[1220] The next day, Yukos filed for Chapter 11 bankruptcy protection in Texas.[1221] On 16 December 2004, the U.S. court granted Yukos' request for a TRO enjoining registered and prospective bidders from participating in the YNG auction.[1222]

1002. Meanwhile, on 14 December 2004, Baikal applied for antimonopoly clearance in order to participate in the auction.[1223] Two days later it registered for the auction and made a deposit of USD 1.77 billion.[1224] The only other company to register for the auction was State-owned Gazpromneft on 16 December 2004.[1225] Gazpromneft challenged the TRO on an emergency basis on 18 December 2004, but its appeal was denied that night, about ten hours before the auction was scheduled to commence in Moscow.[1226]

1218 *FAS of Russia Received Three Applications to Participate in the Auction for the Sale of Yuganskneftegaz*, Press Release, 10 December 2004, Exh. R-684.

1219 Memorial ¶ 383.

1220 *Buyer Beware*, Advertisement, Financial Times, 13 December 2004, Exh. R-649.

1221 *In re Yukos Oil Co.*, U.S. Bankruptcy Court for the Southern District of Texas, Case No. 04–47742–H3–11, Yukos' Original Complaint for Injunctive Relief, 14 December 2004, Exh. R-656 (hereinafter "U.S. Bankruptcy Complaint"); *In re Yukos Oil Co.*, U.S. Bankruptcy Court for the Southern District of Texas, Case No. 04–47742–H3–11, Yukos' Verified Emergency Motion for Temporary Restraining Order and Preliminary Injunction, 14 December 2004, Exh. R-629; *In re Yukos Oil Co.*, U.S. Bankruptcy Court for the Southern District of Texas, Case No. 04–47742–H3–11, Yukos' Voluntary Petition, 14 December 2004, Exh. R-658; Yukos-Moscow Limited, Resolution No. 1 of Management Board, 10 December 2004, Exh. R-657.

1222 *In re Yukos Oil Co.*, U.S. Bankruptcy Court for the Southern District of Texas, Case No. 04–47742–H3–11, Temporary Restraining Order, 16 December 2004, Exh. C-287.

1223 Application to Federal Antimonopoly Service regarding approval of acquisition by Baikal Finance (hererinafter "Baikal") of 76.79 percent interest in YNG, 14 December 2004, Exh. R-3793.

1224 Application to Participate in the Auction for the Sale of Seized Shares in OAO Yuganskneftegaz filed by Baikal Finance, 16 December 2004, Exh. R-3805.

1225 Protocol of the Results of an Auction to Sell Shares in OAO Yuganzkneftegaz, 19 December 2004, Exh. C-290.

1226 *Yukos Oil Co. v. OOO Gazpromneft*, U.S. District Court for the Southern District of Texas, Case No. 04cv4756, Hearing Minutes and Orders, 18 December 2004, Exh. R-697.

(d) After a 10-Minute Auction, the Successful Bidder Baikal is Sold to State-Owned Rosneft; a "Monumental Bargain"; the "State, Looking After its Own Interests"

1003. The auction of YNG took place on 19 December 2004 at 4:00 p.m. Baikal opened the bidding at USD 9.35 billion. Gazpromneft's representative then asked for a recess and left the room to make a call. Upon his return, Baikal was declared the winner with its opening bid. The bidding process was over within ten minutes.[1227]

1004. One press article reported that the Baikal bidders worked for Surgutneftegaz and had "hastily departed for vacations abroad as soon as the auction ended."[1228] At a press conference on 21 December 2004, President Putin was invited to comment on the perception that "a state company is in fact behind the organisation Baikal Finance Group" and responded as follows:

> As is well known, the shareholders of this company are all private individuals, but they are individuals who have been involved in business in the energy sphere for many years. They intend, as far as I am informed, to establish relations with other energy companies in Russia which have an interest in their company. And within the framework of current legislation, the participants of this process have the right to work with this company after the auction is held. For us, it is only important that all these actions, as I already said, are within strict accordance with the current legislation of Russia. I hope that this is the way it will be. As for the ability of state company to buy these assets, they of course have this right, just like other market participants.[1229]

1005. What was not public knowledge at the time President Putin gave his press conference was the fact that, the previous day, the State-owned company Rosneft had sought and obtained antimonopoly clearance to acquire Baikal.[1230]

1006. On 22 December 2004, Rosneft purchased Baikal, before it had paid the balance of the purchase price for the YNG shares.[1231] Rosneft's purchase was announced publicly the

---

1227 *See* Protocol of the Results of an Auction to Sell Shares in OAO Yuganzkneftegaz, 19 December 2004, Exh. C-290.

1228 *Yugansk Was Purchased by Surgutneftegaz Employees*, OilCapital.ru, 21 December 2004, Exh. R-3789.

1229 Press Statement and Answers to Questions Following Russian–German Bilateral Consultations, Russian President Official Website, 21 December 2004, p. 2, Exh. C-421.

1230 Rosneft's request to Federal Antimonopoly Service to approve acquisition of a 100 percent interest in Baikal, 20 December 2004, Exh. C-1162; Federal Antimonopoly Service's approval of Rosneft's acquisition, 20 December 2004, Exh. C-1163.

1231 *See* Rosneft IPO Prospectus, 14 July 2006, pp. 75–76, Exh. C-380.

following day.[1232] During another press conference, on 23 December 2004, President Putin said:

> 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? 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.[1233]
>
> [emphasis added]

(e) Once it is State-Owned, YNG's Fate Improves, with Reductions in Tax Liabilities and a Dramatic Increase in Value

1007. The Tribunal notes that, as at 31 December 2004, ten days after Baikal purchased YNG for USD 9.35 billion, Rosneft stated in its consolidated financial statements that "negative goodwill" in the amount of USD 7.052 billion arose in the context of its acquisition of YNG "as a result of excess of the net assets measured at fair value, over the purchase price."[1234] Rosneft's total revenues increased from USD 5.28 billion in 2004 to USD 23.95 billion in 2005, while its net income increased from USD 0.84 billion to USD 4.16 billion over the same period.[1235] At the time of its IPO in mid-2006, Rosneft's share capital was USD 79.8 billion;[1236] YNG alone was then valued at USD 55.78 billion.[1237] Rosneft itself described the YNG acquisition as "the most monumental bargain in Russia's modern history."[1238]

1008. Subsequent to the YNG auction, Yukos continued its efforts to have the sale invalidated in the

---

1232 *OJSC 'OC 'Rosneft' Buys 100% Share of 'Baykalfinancegroup' LLC And Becomes the Owner of Its Assets—76.6% Yuganskneftegas Shares*, Rosneft Press Release, 23 December 2004, Exh. C-741.

1233 Press Conference with Russian and Foreign Media, Russian President Official Website, 23 December 2004, p. 4, Exh. C-422.

1234 Rosneft's Consolidated Financial Statements as of 31 December 2003 and 2004, p. 24, NAV-213.

1235 Rosneft IPO Prospectus, 14 July 2006, p. 16, Exh. C-380.

1236 Rosneft Website, p. 16, Exh. C-381.

1237 Rosneft IPO Prospectus, 14 July 2006, Table 40, Exh. C-380.

1238 Place in economy of Russia, Rosneft: About company, Rosneft Website, p. 14, Exh. C-381.

Russian courts, but all its claims were dismissed.[1239]

1009. The Tribunal notes with interest that very soon after it was acquired by Rosneft, a significant portion of the tax assessments levied against YNG were set aside or vastly reduced by Russian courts.[1240] According to Mr. Konnov, after YNG contested the assessments, "the court-appointed experts who calculated the market prices" found in a number of cases "that the price deviation was within the 20% 'safe harbour' [for transfer pricing]."[1241] As a consequence, "large parts of the assessments against YNG were overturned by the courts."[1242] Claimants, while not explicitly disputing the "supposed technicality" of the provisions on transfer pricing,[1243] insist that, given the "scale of the reduction . . . the purported tax reassessments against Yuganskneftegaz lacked any credibility in the first place."[1244]

1010. As for YNG's remaining debts, Rosneft, according to Mr. Konnov, as a "strategic company" owned by the State and supplying the State with petroleum, was able to "restructure[e]" them through a series of negotiations.[1245]

3. Parties' Arguments and Tribunal's Observations

1011. The Tribunal now returns to the Parties' central arguments in respect of the YNG auction which it summarized at the outset of this Chapter and will seek to determine whether the events which

---

1239 *See* Memorial ¶ 382 n.578; Resolution of the Federal Arbitrazh Court for the Moscow District, 12 October 2007, Exh. C-294.

1240 On 16 February 2005, the Federal Arbitrazh Court granted YNG's cassation complaint and referred for re-examination YNG's challenge of the 1999 tax reassessment. Resolution of the Federal Arbitrazh Court for the Moscow District, 16 February 2005, Exh. C-253; *Yugansk's New Victory*, Vedomosti, 11 October 2005, Exh. C-784; *but see* First Konnov Report ¶¶ 86–92. On 10 October 2005, the Moscow Arbitrazh Court found that the 1999 reassessment against YNG violated the three-year limitation period under Article 87 of the Russian Tax Code. Decision of the Moscow Arbitrazh Court, 12 October 2005, Exh. C-254; *Yugansk's New Victory*, Vedomosti, 11 October 2005, Exh. C-784. On 16 April 2006, the Moscow Arbitrazh Court reduced YNG's alleged tax arrears for 2002 by 83 percent and the corresponding fines by 89 percent (to USD 760 million). Decision of the Moscow Arbitrazh Court, 25 April 2006, Exh. C-255; Rosneft 2005 U.S. GAAP Consolidated Financial Statements, p.59, Exh. C-374. In December 2007, having agreed in May–June 2007 that Rosneft was eligible for a tax restructuring process and that the total amounts of its tax debts (including that of YNG) could be restructured, the State approved the restructuring of Rosneft's tax debt, allowing for quarterly repayment of outstanding tax over five years, starting in March 2008. Memorial ¶ 283; Rosneft 2007 U.S. GAAP Consolidated Financial Statements, p. 50, Exh. C-377; Rosneft Management's Discussion and Analysis of Financial Condition and Results of Operations for 2007 and 2006, p. 38, Exh. C-378.

1241 First Konnov Report ¶ 88.

1242 *Ibid*. Mr. Konnov refers to a total of 16 decisions of various courts in this regard, First Konnov Report ¶¶ 88–89 nn.161–69.

1243 Reply ¶ 360.

1244 *Ibid.* ¶ 361.

1245 First Konnov Report ¶ 91; Transcript, Day 19 at 30–31.

it has traversed are consistent with a genuine attempt by the Russian Federation to collect taxes, or whether they disclose that the auction was rigged so as to enable YNG to fall into the hands of the State through the veneer of a legitimate process. The Tribunal will review, in turn, (a) the fairness of the price achieved at the auction, (b) the role of Baikal and its acquisition by Rosneft, and (c) the impact of the YNG auction on the future of Yukos.

(a) Did the Auction Price Reflect the True Value of YNG; If not, was Either Party Responsible for the Price Reduction?

1012. The Parties have different views as to whether the sale price of USD 9.35 billion reflected the fair value of YNG. Claimants argue that if the purpose of the auction had been to collect revenues in order to pay legitimate tax debts, the Russian Federation would have been expected to make every effort to maximize the proceeds. Instead, Claimants allege that Russia took steps to reduce the price so that it could, via Rosneft, acquire YNG for a derisory amount, and still be able to enforce the remaining tax liabilities against other Yukos assets.[1246] Respondent maintains that the price for which YNG was acquired was not a "knock down" price but, to the extent it was, only Yukos was to blame.[1247]

1013. Claimants complain that the auction price paid by Baikal represented less than half of the enterprise value of YNG, which the Dresdner Valuation Report had assessed to be in the range of USD 18.6–21.1 billion. Respondent answers that other contemporaneous valuations, including Morgan Stanley's, estimated a much lower value (USD 8.9 billion).[1248] Respondent also recalls that it was necessary to adjust the value of the enterprise to account for the fact that only the 76.79 percent stake of Yukos in YNG was being auctioned. Respondent put these issues to Dr. Illarionov, when challenging his claim that the price achieved was "well below even the most conservative estimates prepared by experts."[1249] Dr. Illarionov admitted that his figure of USD 14.7–17.3 billion was based on a full enterprise value that did not take into account the tax liabilities.[1250] At the end of his cross-examination, however, Dr. Illarionov maintained that he did not think "this discount rate of 60% that has been applied by the Russian

1246 Claimants' Post-Hearing Brief ¶ 101.

1247 Respondent's Closing Sides, pp. 354–65.

1248 *See* Dresdner Valuation Report; *see also YNG Sale: A Shock and Awe Negotiating Tactic?,* Morgan Stanley Equity Research Report on Yukos, 22 July 2004, Exh. R-632.

1249 Illarionov WS ¶ 44; *see* Transcript, Day 7 at 85–86 (cross-examination of Dr. Illarionov).

1250 Transcript, Day 7 at 53–56, 77, 80–81 (cross-examination of Dr. Illarionov); *but see* Transcript, Day 17 at 255–56 (Claimants' closing, arguing that the demonstrative charts put to Dr. Illarionov during the cross-examination were not entirely accurate).

authorities produces a number that [he] would consider . . . a legitimate valuation."[1251]

1014. Respondent points out that Dresdner's valuation did not take into account outstanding tax liabilities in the amount of USD 4.6 billion, and that "[i]f this were to be judicially upheld, the estimate of net debt and other liabilities would increase by a corresponding amount."[1252] Claimants reply that these tax liabilities were fabricated by the Russian authorities in the period from October to December 2004 in order to depress the price of YNG. The tax liabilities, say Claimants, related to transfer pricing and were applied to oil trading revenue that had already been re-attributed to Yukos, thus resulting in double taxation.[1253] Respondent argues that YNG's transfer pricing issues had arisen over many years and that the allegation of double taxation was misconceived. Respondent says the assessments were made in accordance with Russian law, since Yukos had forced YNG to sell oil to the trading companies at very low prices which exposed it to liability.[1254]

1015. Claimants also argue that the sale price was affected by the nature and speed of the process adopted by the Russian authorities. While it is common ground that the time frame for the auction was within the minimum statutory requirements, Claimants recall that the Government ignored Dresdner's recommendation for a two-stage auction process to allow for proper due diligence, and its warning that failure to provide access to full information could lead to a reduction in the number of potential purchasers and the price they would be willing to pay.[1255] No due diligence was provided beyond a "data room" that consisted of the report itself, auction rules and 89 pages of additional documents. Respondent answers that Russian law requires no due diligence, that Gazpromneft was still able to undertake a thorough assessment, and that any due diligence issue was due to Yukos' lack of cooperation with Dresdner.[1256]

1016. The bare minimum time frame meant that the auction was conducted on a Sunday, which Dr. Illarionov described as "highly unusual . . . since the Russian Government agencies are closed on Saturdays and Sundays."[1257] Respondent's suggestion at the Hearing that Sunday

---

1251 Transcript, Day 7 at 87.

1252 Dresdner Summary Letter, p. 6.

1253 Memorial ¶¶ 269–75; Reply ¶ 266.

1254 Rejoinder ¶¶ 958–60; First Konnov Report ¶¶ 86–92.

1255 Dresdner Valuation Report ¶¶ 11.2, 12.8.

1256 Rejoinder ¶¶ 978–81.

1257 Illarionov WS ¶ 43.

was chosen to reduce the impact of Moscow's traffic was scoffed at by Claimants as "absurd."[1258]

1017. Claimants conclude that by any measure "the auction process was perfunctory and did not involve genuine competition."[1259] Although the auction process complied with the letter of Russian legislation,[1260] Claimants insist that it is not a defence to an expropriation claim under international law that the State complied with its own domestic law.

1018. Respondent accuses Yukos of turning YNG into a "wasting asset"[1261] by foisting upon it "upstream guarantees"[1262] for its loan in favour of Moravel and forcing YNG to borrow USD 485 million from affiliate Yukos Capital. Respondent adds that Yukos caused YNG to default on at least USD 586 million of mineral extraction tax, imperilling its oil licenses. Yukos' press service issued a statement on 11 October 2004 attributing the non-payment of mineral extraction tax to YNG's accounts having been frozen.[1263]

1019. Respondent alleges that the low turn-out at the auction was attributable to Claimants' own acts of sabotage, namely their "intimidation campaign"[1264] and Yukos' "spurious bankruptcy filing in the United States"[1265] the purpose of which was to block the YNG auction by targeting both the companies that had expressed an interest in bidding as well as their banks.[1266] According to Respondent, the TRO led banks to withdraw their financing, drove two of the companies that had applied for antimonopoly clearance not to register for the auction and resulted in Gazpromneft not submitting a bid. Dr. Illarionov was cross-examined about Claimants' media campaigns aimed at warding off prospective bidders from the auction.[1267] When he was asked

---

1258 Claimants' Post-Hearing Brief ¶ 104; *see* Transcript, Day 7 at 137–40.

1259 *Ibid*. ¶109.

1260 A point also noted in the ECtHR Yukos Judgment. *See* ECtHR Yukos Judgment ¶ 647, Exh. R-3328.

1261 Rejoinder ¶ 955.

1262 *Ibid*. ¶ 966.

1263 *Yuganskneftegaz may lose licenses in three months*, RIA Novosti, 11 October 2004, Exh. C-709.

1264 Rejoinder ¶ 982; *see Yukos Says Asset Sale Could Prove Fatal Blow*, NY Times, 23 July 2004, Exh. R-648; *Buyer Beware*, Advertisement, Financial Times, 13 December 2004, Exh. R-649.

1265 Rejoinder ¶ 982.

1266 *See* Yukos-Moscow Limited, Resolution No. 1 of Management Board, 10 December 2004, Exh. R-657. In the circumstances, the Tribunal wonders why Gazpromneft attended the auction at all, except that two participants were required for the auction to proceed.

1267 Transcript, Day 7 at 90–91; *Yukos Says Asset Sale Could Prove Fatal Blow*, NY Times, 23 July 2004, p. 3, Exh. R-648 (quoting Mr. Tim Osborne stating that "[a]nyone that buys those assets [referring to the YNG auction] is buying a whole heap of trouble"); Transcript, Day 7 at 98–99; *Buyer Beware*, Advertisement, Financial Times, 13 December

whether these statements likely encouraged or discouraged bidders from participating in the auction, he answered that Gazpromneft and Baikal probably "felt very well protected, maybe by the Russian Government."[1268]

1020. Having considered all of the factors that it has reviewed, the Tribunal concludes that the price of USD 9.35 billion which Baikal paid at the auction for the 76.79 percent stake of Yukos in YNG was far below the fair value of those shares.

1021. In the opinion of the Tribunal, the imposition during the few weeks prior to the auction of massive tax liabilities on YNG (which were cancelled in the months after the acquisition of YNG by Rosneft) appear designed specifically to depress the value of YNG. The amount of the tax liabilities imposed which were subtracted from the Dresdner valuation cannot be justified. In addition, in the view of the Tribunal, the failure by YNG to pay its mineral extraction tax was inextricably linked to the asset freeze of Yukos' cash.

1022. The Tribunal also finds that the Russian authorities deliberately ignored the advice of Dresdner that haste in carrying out the auction could decrease the price. The Tribunal notes that the *Quasar* tribunal criticized Respondent's decision to hold the auction only one month after its announcement, and found that "the auction procedure was highly irregular in a number of ways that all relate to the extraordinary speed with which it was conducted."[1269]

1023. While the Tribunal accepts, as did the *RosInvestCo* and *Quasar* tribunals,[1270] that the actions of Claimants in warding off prospective buyers through a media campaign and the TRO may have deterred some potential buyers and may have resulted in a low winning bid,[1271] these actions, at

---

2004, Exh. R-649; Transcript, Day 7 at 114; *Mystery Russian Company Wins Bid on Yukos Unit— Offer of $9.37 Billion Seals Fate of Beleaguered Firm, But Many Questions Linger*, The Wall Street Journal (Europe), 20 December 2004, p. 3, Exh. C-738 ("Menatep intends to take every action available in order to protect its interest in Yukos").

1268 Transcript, Day 7 at 100–01.

1269 *Quasar* ¶ 117, Exh. R-3383.

1270 *RosInvestCo* ¶ 522, Exh. C-1049 (accepting that "had Claimant not discouraged international bidders and without the bankruptcy proceedings in the United States, more bidders might have participated, and that the process seems to have been conducted within the limits of discretion awarded by Russian law"); *Quasar* ¶115, Exh. R-3383 (the tribunal was "receptive to the Respondent's argument that some of the blame associated with the poor turnout and low winning bid at the YNG auction should be attributed to the Claimants for their media campaign . . . and for initiating bankruptcy proceedings . . . that led to the TRO" and to the "argument that Yukos' actions reasonably could have deterred potential bidders from participating in the YNG auction") Both tribunals contrasted these findings with their serious doubts about the bona fide nature of the auction, stemming largely from the dubious identity of Baikal and the circumstances of its acquisition by Rosneft.

1271 On the other hand, the Tribunal notes that the Russian Justice Minister on 14 October 2004, in a commentary on the auction price, is reported to have said that this value "takes into account the 'high risk to a potential buyer' of the

the end of the day, had no relevant impact on the bankruptcy of Yukos.[1272] The circumstances surrounding the appearance and disappearance of Baikal make the auction process seem all the more questionable to the Tribunal. The Tribunal now turns to these events.

(b) Who was Behind Baikal and were They a Front for the Russian State?

1024. In the view of the Tribunal, one of the most opaque facets of the YNG auction is the identity of Baikal, the sole and successful bidder at the auction which was acquired by State-owned Rosneft three days after its successful bid. Baikal did not exist until less than two weeks before the YNG auction. It was obviously a vehicle created solely for the purpose of bidding for YNG at the auction. As noted earlier, it was incorporated with capital of USD 359.

1025. During the closing oral arguments, the Chairman told Respondent's counsel: "you still have to convince us that Baikalfinance . . . was not a sham company. That's your challenge."[1273]

1026. Respondent sought to explain that Baikal was a special purpose vehicle established strictly for bidding at the auction. Respondent added that "it was well known that those lying behind Baikal was [sic] Surgutneftegaz."[1274] Respondent stated that Baikal was represented at the auction by two managers of Surgutneftegaz, Mr. Igor Minibayev and Ms. Valentina Komarova. Ms. Valentina Davletgareeva, the person who incorporated Baikal, was also connected to companies affiliated with Surgutneftegaz. According to Counsel for Respondent, she sold 100 percent of her interest in Baikal to Makoil, a company owned in part by a secretary to the Board of Surgutneftegaz.[1275] Accordingly, Respondent submits that "all of those who had a connection to the company in a formal manner or who were identified with it can be identified as having significant positions or relationships with respect to Surgutneftegaz."[1276] Baikal's Tver office was close to a subsidiary of Surgutneftegaz, which in turn was located directly across the river from YNG.[1277] In addition, there had been reports in the media since

---

Yukos asset." *In the Yukos Saga, Yet Another Gloomy Chapter*, The Wall Street Journal (Europe), 14 October 2004, Exh. C-713.

1272 *See* Chapter X.E at paragraph 1625.

1273 Transcript, Day 19 at 33.

1274 Transcript, Day 21 at 151; Rejoinder ¶¶ 36, 1002, 1007.

1275 Rejoinder ¶ 1002 nn.1690–91.

1276 Transcript, Day 21 at 151; Respondent's Closing Slides, pp. 772–80.

1277 *See* Transcript, Day 21 at 151, Respondent's Closing Sides, pp. 782, 790.

September 2004 that Surgutneftegaz was interested in the auction.[1278]

1027. Claimants insist that, even accepting Respondent's theory that Baikal was a front for Surgutneftegaz, the "facts in the record . . . compel the conclusion that Baikal served the interests of the State, and any involvement of Surgut, a company known to be 'friendly with the Kremlin', was solely to mask the State's involvement."[1279]

1028. The fact that Baikal was incorporated only a few weeks before the auction and had the minimum-required capital is, according to Respondent, irrelevant. The other three entities who had antimonopoly clearance for the auction were also relatively new companies with little capital. Respondent alleged that Baikal paid the USD 1.77 billion deposit itself after having received the financing from a third party.[1280] Respondent submitted that Surgutneftegaz had sufficient resources to enable Baikal Finance to pay the deposit, but not the full purchase price without recourse to international capital markets.[1281] Respondent's theory is that such financing was foreclosed on the day of the auction by the TRO, leaving Baikal (and Surgutneftegaz) with a stark choice of defaulting on the obligation to pay the balance, and lose the USD 1.77 billion deposit, or find someone else to buy the asset.[1282] On the other hand, Respondent's counsel agreed that the transaction "turned out to be very productive for Rosneft; there's no question about it."[1283]

1029. Claimants contend that the nature and speed of events that followed the auction cannot be reconciled with Respondent's suggestion that Rosneft's acquisition of Baikal was entirely fortuitous and unplanned. On 20 December 2004, the day after the auction, they point out that Rosneft sought and obtained, in less than a day, antimonopoly clearance to acquire Baikal.[1284] Respondent's attempts to explain these events by pointing out that Rosneft and the authorities

---

1278 *Surgut drops first hint of interest in Yukos assets*, AFP, 28 September 2004, Exh. C-704 (stating that "President Vladimir Putin and his entourage of secret service agents and Soviet era officials would be delighted with the transaction").

1279 Claimants' Post-Hearing Brief ¶ 110 (footnote omitted).

1280 Transcript, Day 19 at 34.

1281 Transcript, Day 19 at 34–35.

1282 Transcript, Day 19 at 34–35, 43.

1283 Transcript, Day 19 at 35.

1284 Rosneft's request to Federal Antimonopoly Service to approve acquisition of a 100 percent interest in Baikal, 20 December 2004, Exh. C-1162; Federal Antimonopoly Service's approval of Rosneft's acquisition of a 100 percent interest in Baikal, 20 December 2004, Exh. C-1163; Federal Antimonopoly Service's instructions with respect to Rosneft's acquisition of a 100 percent interest in Baikal, 20 December 2004, Exh. C-1164.

were familiar with such filings confirm, according to Claimants, that the authorities did not perform even a perfunctory review of the 13-page application and its 98 pages of attachments.[1285]

1030. Claimants also refer to the fact that Rosneft filed for antimonopoly clearance on a Monday, the day after the auction. Thus, Respondent's allegation that Surgutneftegaz was obliged to sell "the bid" because the TRO prevented it from accessing financing rings hollow since Surgutneftegaz would have needed to seek and be denied financing by every commercial bank on the Sunday of the auction. Claimants ask whether Baikal would have risked a deposit of USD 1.77 billion by making a bid without first having financing in place.[1286]

1031. Respondent claims Rosneft had no ownership interest in Baikal prior to the auction, and that Rosneft put together a finance package for the purchase of Baikal after the auction, on an emergency basis, and, in so doing, even breached covenants related to its prior borrowings.

1032. When Rosneft completed the acquisition of YNG on 22 December 2004, using funds borrowed from State-owned banks, the transaction was described in the Russian Press as "the State budget via a State bank help[ing] a State company acquire from the State a very profitable asset."[1287] Claimants urge the Tribunal to reach the "inescapable conclusion"[1288] that it was determined in advance that Rosneft would acquire YNG, and that the elaborate sham involving Baikal was set up to mask the State's involvement and thus reduce legal risks.

1033. Claimants also submit that the events *after* the auction speak for themselves. YNG's tax debts were reduced from USD 4 billion to less than a billion. In addition, after having filed claims by YNG of almost USD 10 billion in Yukos' bankruptcy, the net cost to Rosneft for the purchase of Yukos' jewel was, according to Claimants, less than USD 3 billion. Thus, bearing in mind that in 2006 Rosneft's IPO valued YNG at USD 55.78 billion, Rosneft's description of the

---

1285 Rejoinder ¶ 1004 & n.1698; *see* Approval of the Federal Antimonopoly Service regarding the acquisition by Baikal Finance of a 76.79 percent interest in YNG, 15 December 2004, Exh. R-3813; Order of the Federal Antimonopoly Service regarding the acquisition by Baikal Finance of 76.79 percent interest in YNG, 15 December 2004, Exh. R-3814.

1286 Claimants' Post-Hearing Brief ¶ 112.

1287 *From the Editors: The State Whirligig*, Vedomosti, 15 August 2005, Exh. C-764.

1288 Claimants' Post-Hearing Brief ¶ 113.

transaction as "the most monumental bargain in Russia's modern history" was, conclude Claimants, an understatement.[1289]

1034. The Tribunal notes that the *RosInvestCo* tribunal in reaching its conclusion that the auction was rigged observed that "the winning bidder was a completely unknown company just created before the auction and disappearing right after the auction and assigning its interests to Ru[ss]ian state-owned Rosneft."[1290] To the *RosInvestCo* tribunal, "[t]he circumstances that this bidder was further found to have no real offices and nevertheless was able to raise the deposit in the range of US$ 1.7 billion and then the purchase price with the apparent help of Rosneft further contribute to the impression that the scheme was set up under the control of respondent to bring Yukos' assets under Respondent's control."[1291]

1035. The identity of Baikal was also of "[p]aramount"[1292] concern for the *Quasar* tribunal, which described its unease with the circumstances of Baikal's purchase as follows:

> an unknown entity, placed a $9.3 billion, uncontested winning bid for YNG, the largest oil production company in Russia, and was then acquired a mere three days later by state-owned Rosneft, even before payment of the purchase price was due. . . . The Respondent's argument . . . to the effect that [the] YNG auction was of a public nature, and that [Baikal] bid $500 million above the starting price, are insufficient to remove the suspicion of collusion, particularly when [Baikal] was quickly taken over by Rosneft before payment of the purchase price was due.[1293]

1036. Having assessed the evidence with respect to the identity and role of Baikal, and the timing and nature of Rosneft's acquisition of that company, this Tribunal agrees with the conclusions of the *RosInvestCo* and *Quasar* tribunals that the YNG auction was rigged.

1037. The additional evidence placed before this Tribunal connecting Baikal to Surgutneftegez does not erase the suspicion that Baikal was created by instruments of Respondent in order to facilitate the acquisition of YNG by State-owned Rosneft. The statement by Rosneft that the purchase was a "monumental bargain", the remarks by President Putin acknowledging that the

---

1289 *Ibid*. ¶ 114; *see* "Place in economy of Russia, Rosneft: About company," Rosneft Website, p. 14, Exh. C-381.

1290 *RosInvestCo* ¶ 523, Exh. C-1049.

1291 *Ibid*.

1292 *Quasar* ¶ 118, Exh. R-3383.

1293 *Ibid*.

State had looked after the State's interest [1294] by increasing its reserves, and the good fortunes of YNG once it was in the hands of a State-owned company all support the Tribunal's conclusion that the auction of YNG was not driven by motives of tax collection but by the desire of the State to acquire Yukos' most valuable asset and bankrupt Yukos. In short, it was in effect a devious and calculated expropriation by Respondent of YNG.

(c) What were Yukos' Prospects for Survival Once it Lost its Core Asset?

1038. While the legal implications of the YNG auction will be discussed in Part X of the Award, the Tribunal will set out briefly Claimants' factual allegations that the sale of YNG dealt a "fatal blow" to the survival prospects of Yukos.[1295] Was the sale of YNG the point of no return for the survival of Yukos? On the basis of the totality of the evidence and, in particular, the testimony of Messrs. Misamore and Theede and Dr. Illarionov, the Tribunal answers that question in the affirmative.

1039. Mr. Misamore testified that with the auction of YNG, "Yukos lost over 60% of its total production capacity." This "meant a massive downsizing of the company's activities." Mr. Misamore hoped it "was not the end of the company," and Yukos started 2005 on the basis that it would carry on operations on a smaller scale with the remaining production assets and refineries. However, "it soon became evident there was little that Yukos' management could do to protect the company's Russian assets. Despite our best efforts to challenge the tax reassessments, the Russian courts were biased against us. Bankruptcy proceedings in Russia were increasingly likely and the Yuganskneftegaz auction had highlighted the real risk that company assets would be transferred to State-owned entities at substantial undervalue."[1296]

1040. Mr. Theede considered the announcement of the auction as the point in time when "the die was finally cast" for Yukos. The auction put an end to settlement discussions with the Russian Government. He considered the sale of YNG at a "grossly undervalued price through a sham

---

[1294] Press Statement and Answers to Questions Following Russian–German Bilateral Consultations, Russian President Official Website, 21 December 2004, p. 2, Exh. C-421; Press Conference with Russian and Foreign Media, Russian President Official Website, 23 December 2004, p. 4, Exh. C-422.

[1295] ECtHR Yukos Judgment ¶ 653; *Yukos Says Asset Sale Could Prove Fatal Blow*, NY Times, 23 July 2004, Exh. R-648; *Moscow set to seize huge Yukos oil division—Investors may lose everything in tax fight, analysts warn*, International Herald Tribune, 21 July 2004, Exh. C-698.

[1296] Misamore WS ¶¶ 58–59.

auction" to be a "clear theft by the Russian State," which became all the more obvious in the context of the IPO by Rosneft in July 2006.[1297]

1041. Dr. Illarionov described the confiscation of YNG as the "culminating point of th[e] attack" on Yukos, following which the Russian authorities took no further steps to satisfy Yukos' alleged tax debts. Such conduct was inconsistent with a genuine attempt to collect taxes.[1298]

1042. At the time, Claimant YUL and its subsidiaries (including Hulley), as majority shareholders of Yukos, acknowledged that they had "lost the power to govern the financial and operating policies of Yukos so as to obtain benefits from its activities."[1299] It was noted in the 2004 Annual Report for YUL that Yukos had become "incapable of operating as a business as evidenced by the forced sale of [YNG]."[1300]

1043. The effect of the auction on Yukos' prospects did not escape the attention of the ECtHR, which acknowledged that YNG had been Yukos' "only hope of survival."[1301] It was "rather obvious" to the ECtHR that the choice of YNG as the first Yukos asset to be auctioned to satisfy Yukos' tax debts was "capable of dealing a fatal blow to its ability to survive the tax claims and to continue its existence."[1302] This Tribunal agrees. This Tribunal also agrees with the *Quasar* tribunal's characterization of the seizure of YNG as an extreme measure capable of "drastic" consequences for Yukos.[1303]

1044. Those "drastic" consequences will be important for the Tribunal's determination of an appropriate valuation date for purposes of calculating damages. The dim prospects of resuscitation of Yukos after the "fatal blow" of the YNG auction are discussed in the next chapter on Bankruptcy.

1297 Theede WS ¶ 25–27 (evoking the Rosneft IPO as a moment "where Rosneft was valued at approximately US $ 80 billion, with YNG accounting for 70% of its crude oil production").

1298 Illarionov WS ¶¶ 42–43.

1299 YUL (and its subsidiaries), Annual Report and Consolidated Financial Statements for the Year Ended 31 December 2004, p. 2, Exh. R-4229. Deloitte, auditors of YUL, in their report on the financial statements, after referring to the auction of YNG, wrote: "These events indicate a material uncertainty which may cast significant doubt on Yukos's ability to continue as a going concern and therefore it may be unable to realize its assets and discharge its liabilities in the normal course of business." *Ibid*. at 3.

1300 *Ibid*. at 2.

1301 ECtHR Yukos Judgment ¶ 654.

1302 *Ibid*. ¶ 653.

1303 *Quasar* ¶ 116, Exh. R-3383.

G. THE BANKRUPTCY OF YUKOS

1. Introduction

1045. Claimants' case is that Yukos' bankruptcy, announced by the Moscow Arbitrazh Court on 4 August 2006 and followed by the removal of Yukos from the companies' register on 21 November 2007, was the "final act of the destruction of the Company by the Russian Federation and the expropriation of its assets for the sole benefit of the Russian State and State-owned companies Rosneft and Gazprom."[1304] Claimants allege that Respondent "instigated" a syndicate of western banks led by Société Générale (the "**Western Banks**")[1305] to commence bankruptcy proceedings against Yukos based on Yukos' default under a loan agreement concluded between Yukos and the Western Banks for the purposes of funding the Sibneft merger.[1306] Claimants contend that Respondent ensured, through the initiation of bankruptcy proceedings and discriminatory treatment of bankruptcy claims, that the Russian State and Rosneft would hold over 97 percent of the alleged claims against Yukos in the bankruptcy.[1307] Having made certain that Yukos' proposed Rehabilitation Plan would be rejected at the general creditors' meeting, the Russian Federation completed its expropriation scheme by auctioning Yukos' remaining assets. Through the bankruptcy and liquidation of Yukos, the Russian State directly received more than 60.5 percent of the bankruptcy proceeds and, indirectly, through Rosneft, received more than 39.21 percent of the bankruptcy proceeds and all of Yukos' main production assets.

1046. Respondent denies all allegations of impropriety or bias in relation to the bankruptcy proceedings. Moreover, Respondent argues that the bankruptcy proceedings are irrelevant to the Tribunal's determination because the conduct that directly caused Yukos' liquidation—the initiation of Yukos' bankruptcy and the vote to liquidate Yukos—is either not attributable to Respondent or not an exercise of its sovereign power. Respondent's case is that "the insolvency of the Yukos holding company was the consequence of the Oligarchs' and Yukos' management's disastrous strategy of tax evasion, resistance to and obstruction of the collection

---

1304 Memorial ¶¶ 411–13.

1305 The Western Banks included BNP Paribas S.A., Citibank N.A., Commerzbank Akziengesellschaft, Calyon S.A., Deutsche Bank A.G., Hillside Apex Fund Limited, ING Bank N.V., KBC Bank N.V., Société Générale S.A., Stark Trading, Shepherd Investments International Limited, Thames River Traditional Funds PLC (High Income Fund), UFJ (Holland) N.V., and V.R. Global Partners L.P.

1306 Presumably for the $3 billion Share Purchase of 20 percent of Sibneft shares. *See* Yukos, *YukosSibneft, Greater Opportunities to Build Value*, Presentation of 8 October 2003, Exh. C-42.

1307 Claimant's Post-Hearing Brief ¶ 126; Memorial ¶ 439; Reply ¶ 412.

of overdue taxes, self imposition of massive non-tax and intercompany liabilities on the company, and failure to draw on Yukos' ample offshore assets."[1308]

2. Chronology

(a) The Initiation of the Bankruptcy

1047. The initiation of bankruptcy proceedings against Yukos is inextricably tied up in the history of two loans connected with the Sibneft merger, one from the Western Banks ("**A Loan**") and the other from Société Générale ("**B Loan**"). It is therefore important to review the key facts relating to each of those loans.

1048. For purposes of funding the Sibneft merger, Yukos entered into two loan agreements. The A Loan consisted of USD 1 billion borrowed by Yukos from the Western Banks, which was secured by certain of Yukos' oil export contracts and by YNG. This loan was entered into on 24 September 2003.[1309]

1049. The B Loan consisted of USD 1.6 billion borrowed by Yukos from Société Générale, which was fully collateralized in cash by GML, Yukos' ultimate parent company. This loan was entered into on 30 September 2003.[1310]

1050. On 3 October 2003, Société Générale drew on the collateral under the B Loan, making GML the lender. GML's rights were then assigned to Moravel, which was GML's wholly-owned indirect subsidiary in Cyprus.[1311]

1051. On 30 June 2004, an appeal panel of the Moscow Arbitrazh Court issued an enforcement writ against Yukos for payment of the taxes assessed for the year 2000. Following this development, the Western Banks notified Yukos that they would not demand immediate

---

[1308] Counter-Memorial ¶ 445.

[1309] Memorial ¶ 374, Guarantee between YNG and Société Générale, 24 May 2004, Exh. R-581.

[1310] B Loan Agreement, 30 September 2003, Exh. R-468.

[1311] *Yukos Oil Company Arranges 1.6 Billion Loan*, Yukos Press Release, 6 October 2003, Exh. C-653; Respondent's Closing Slides, p. 381; Memorial ¶¶ 441–44; Counter-Memorial ¶¶ 548, 578, 1531–33; Rejoinder ¶¶ 1054–56, 1136–37.

payment, but would instead rely on the security supporting the A Loan, namely payments through the proceeds of export sales of crude oil.[1312]

1052. Soon after, however, as described in the previous chapter, the tax authorities seized and auctioned YNG, depriving Yukos of its primary oil producing asset. Claimants contend that when YNG was taken from Yukos in December 2004, YNG stopped shipping oil under the export contracts and "[i]t was thus the actions of the Russian Federation, not Yukos, which obstructed the payment of [the A Loan]."[1313]

1053. Since Yukos ceased making payments under the A Loan, the Western Banks brought a claim against Yukos for approximately USD 472.8 million, plus interest under the A Loan. The claim was recognized by the High Court of England and Wales on 24 June 2005 ("**English Judgment**").[1314] Respondent contends that, by this time, Yukos had already paid Moravel over USD 1 billion under the B Loan, and thus had more than enough cash to have repaid the Western Banks in full under the A Loan.

1054. During this same time period, Yukos management implemented two restructurings that transferred Yukos' non-Russian assets, previously held through Yukos' wholly-owned Dutch and Armenian subsidiaries Yukos Finance and Yukos CIS into two "stichting administratiekantoor".

1055. A stichting is a Dutch "foundation."[1315] It does not have members or shareholders. All management powers are vested in a board of directors, subject only to the stichting's articles of association and Dutch law.[1316] In the case of a stichting administratiekantoor or "foundation trust," the stichting issues depository receipts for shares in exchange for shares transferred to it.[1317] This trust-like structure separates legal ownership and beneficial ownership: the

---

1312 Appeal Resolution of the Moscow Arbitrazh Court, 29 June 2004, Exh. C-121; Enforcement Writ No. 383729 of 30 June 2004, Exh. C-122; Claimant's Post-Hearing Brief ¶ 118.

1313 Claimant's Post-Hearing Brief ¶ 118.

1314 *BNP Paribas v. Yukos Oil Company*, High Court of England and Wales, Judgment, 24 June 2005, Exh. R-455 (hereinafter "English Judgment").

1315 Dutch Civil Code (Burgerlijk Wetboek) art. 285(2), Exh. R-709; Counter-Memorial ¶ 528.

1316 C. Asser, *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht* (W.E.J. Tjeenk Willink, 1997) ¶ 475, Exh. R-723; ¶¶ 480, 484, Exh. R-724.

1317 C. Asser, *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht* (Kluwer, 2009) ¶ 658, Exh. R-725.

stichting is the legal owner of the shares and the holder of the depositary receipts for shares is the beneficial owner of the shares.[1318]

1056. The first restructuring took place in April 2005 and consisted in the transfer of all of the assets of Yukos Finance to Yukos International U.K. B.V. ("**Yukos International**"), a wholly-owned Dutch subsidiary of Yukos Finance, and the subsequent transfer of Yukos Finance's shares in Yukos International to Stichting 1in exchange for depositary receipts for those shares.[1319]

1057. The second restructuring took place in September 2005 and consisted in the transfer of all the shares owned by Yukos CIS in Yukos Hydrocarbons Investments Limited ("**YHIL**") to Wincanton, a Dutch company; and the subsequent transfer of all of Wincanton's shares in YHIL to Small World Telecommunication Holding B.V. ("**Small World**"),[1320] another Dutch company wholly-owned by Wincanton. Finally, Wincanton's shares in Small World were transferred to Stichting 2[1321] in exchange for depositary receipts for those shares.[1322]

1058. The members of the Stichtings' boards are former managers of Yukos and individuals close to Yukos.[1323] The Stichtings hold "substantial value"[1324] and remain in place today.

1059. Articles 2.2 and 2.3 of the original Articles of Association of the Stichtings provide:

> 2. The Foundation will exercise the rights attached to the shares in such a way as to guarantee to the best of its ability, whether or not by conducting court proceedings, the interests of the Company and the other, direct or indirect, subsidiaries of Yukos Oil Company (the "Parent Company"), which jointly constitute the group of which the Company forms a part (the "Group"), the management, executive staff and employees of the Group, the Group's legitimate creditors (including creditors with undisputed claims) and all other acknowledged stakeholders of the Group.

1318 *Ibid.*

1319 Counter-Memorial ¶ 529; Articles of Association of Stichting Administratiekantoor Yukos International (hereinafter "Stichting 1"), 14 April 2005, Exh. C-1181.

1320 Small World Telecommunication Holding B.V. later changed its name to Financial Performance Holdings B.V. Counter-Memorial ¶ 530; *see also* Article 2.1 of the Articles of Association, Stichting Administratiekantoor Small World Telecommunications Holdings B.V. (hereinafter "Stichting 2"), 20 June 2006, Exh. R-712.

1321 Stichting 2 later changed its name to Stichting Administratiekantoor Financial Performance Holdings. *See* Counter-Memorial ¶ 530.

1322 Counter-Memorial ¶ 530; Articles of Association of Stichting 2, 26 September 2005, Exh. C-1182.

1323 Counter-Memorial ¶ 532; Minutes of the Yukos Board of Directors Executive Committee, 26 October 2005, Exh. R-716; Transcript, Day 9 at 232 (cross-examination of Mr. Misamore).

1324 Respondent's Post-Hearing Brief ¶ 120; Transcript, Day 9 at 233–34 (cross-examination of Mr. Misamore) (asserting that the maximum value held by Stichting 1 was USD 1.8 billion in 2006, and the maximum value held by Stichting 2 was around USD 500 million as of the date of the Hearing); Counter-Memorial ¶ 536.

> 3. Excluded from the Foundation's objects are the exercising of rights attached to the shares as a result of or in the implementation of an unlawful claim, judgment or transaction, including but not limited to those resulting from or related to the tax assessments imposed on Yukos Oil Company and members of the Group in the Russian Federation on or after the fourteenth of April two thousand and four, specifically including, but without prejudice to the above, any claim against, transfer of, sale of, revendication of, attachment judgment in respect of, allocation of or other applicability to, or expropriation of the shares, assets or other property of, or other imposition of charges on Yukos Oil Company and any part of the Group.[1325]

1060. Respondent asserts that the Stichtings were used to insulate assets from the reach of the Western Banks. Respondent puts particular emphasis on proceedings in Dutch courts, where the Western Banks attempted to enforce the English Judgment.[1326] On 15 July 2005, the Western Banks petitioned the District Court of Amsterdam to enforce the English Judgment, and to issue a judgment permitting the sale and transfer of Yukos' share interest in Yukos Finance.[1327] The Western Banks informed the court that the creation of the Stichtings had rendered Yukos' shares in Yukos Finance, over which the Western Banks had obtained a prejudgment attachment, "worthless" and "more or less unsellable."[1328] Respondent asserts that the Western Banks' failure to enforce the English Judgment in the Netherlands was "the death knell of Yukos' pretense of cooperation in its negotiations with the syndicate."[1329]

1061. Back in Russia, on 22 September 2005, the bailiff adopted a resolution to seize all of Yukos' assets.[1330]

1062. The Western Banks proceeded to seek to enforce the English Judgment against Yukos in Russia. The Western Banks succeeded in the first instance, before the Moscow Arbitrazh Court, but the Court's favourable ruling (issued on 28 September 2005) was reversed on "procedural" grounds by the Federal Arbitrazh Court for the Moscow District on 5 December 2005.

1325 Articles of Association of Stichting 1, 14 April 2005, Exh. C-1181; Articles of Association of Stichting 2, 26 September 2005, Exh. C-1182.

1326 Rejoinder ¶¶ 1073–75; English Judgment, Exh. R-455.

1327 Rejoinder ¶ 1076; *BNP Paribas S.A. et al. v. OAO Yukos Oil Company et al.*, Decision of the District Court of Amsterdam, 29 September 2005 ¶ 2.1, Exh R-756.

1328 *BNP Paribas S.A. et al. v. OAO Yukos Oil Company et al.*, Decision of the District Court. of Amsterdam, 29 September 2005 ¶ 2.3, Exh R-756.

1329 Rejoinder ¶ 1083.

1330 Resolution of Bailiff A.V. Reydik, 22 September 2005, Exh. C-301.

1063. Following the unfavourable decision by the Federal Arbitrazh Court for the Moscow District, the Western Banks entered into a confidential sale agreement with Rosneft ("**Confidential Sale Agreement**").[1331]

1064. Pursuant to this Confidential Sale Agreement, Rosneft agreed to satisfy the outstanding debt owed by Yukos to the Western Banks (the outstanding principal being at the time USD 455,124,215.03), in exchange for the assignment of the banks' rights of claim against Yukos under the A Loan to Rosneft.[1332]

1065. Significantly, the payment of the purchase price by Rosneft was predicated upon the Western Banks agreeing to take the steps described in Schedule 8 of the Confidential Sale Agreement, entitled "Application For Bankruptcy." Schedule 8 sets out the Western Banks' obligations under three steps: "1. Proceedings on recognition and enforcement of the English Judgment in Russia (the 'Enforcement Case')"; "2. Execution proceedings against the Borrower [*i.e.*, Yukos] (based on the Enforcement Case) (the 'Execution Proceedings')"; and "3. Bankruptcy proceedings against the Borrower.[1333]

1066. Following the conclusion of the Confidential Sale Agreement between the Western Banks and Rosneft, the enforcement of the A Loan was back before the Russian courts. On 21 December 2005, the Moscow Arbitrazh Court formally recognized the English Judgment against Yukos in favour of the Western Banks and issued a writ of enforcement with respect to the judgment.

1067. On 29 December 2005, the Western Banks submitted the enforcement writ to the bailiffs, who then initiated enforcement proceedings to recover from Yukos the amounts ordered under the English Judgment, namely USD 455,124,214.99 in principal and USD 9,459,143.18 in interest. These enforcement proceedings failed. Claimants assert that they were bound to fail due to the seizure of Yukos' assets, which had been imposed since July 2004.

1068. The order of the Moscow Arbitrazh Court that recognized the English Judgment was challenged by Yukos, and upheld by the Federal Arbitrazh Court of the Moscow District. In its decision of 2 March 2006, the Federal Arbitrazh Court reasoned as follows:

[1331] Sale Agreement Relating To Certain Rights And Benefits Arising Under A Credit Agreement dated 24 September 2003 Between, Amongst Others, "Yukos Oil Company" and Société Générale SA, 13 December 2005, Exh. C-300 (hereinafter "Confidential Sale Agreement").

[1332] *Ibid*, p. 4.

[1333] *Ibid*., pp. 37–38.

> When re-examining the case, the Court did comply with the directions given by the cassation Resolution of December 5, 2005. The Court fully and comprehensively reviewed the circumstances of the case. Its conclusions on the application of legal rules are consistent with the established circumstances and evidence in the case.[1334]

1069. On 6 March 2006, the Western Banks petitioned the Moscow Arbitrazh Court to declare Yukos bankrupt.[1335]

1070. In an undated letter, Mr. Theede wrote in mid-March to the bailiffs requesting that the authorities "immediately release Company property from the freezing order in an amount sufficient to satisfy" the debt owed to the A Loan lenders, and thus avert the commencement of the bankruptcy proceedings.[1336]

1071. On 14 March 2006, consistent with the terms of the Confidential Sale Agreement, Rosneft paid the Western Banks the full outstanding amount of the A Loan; in exchange, the Western Banks assigned their rights of claim to Rosneft.[1337]

1072. On 24 March 2006, YNG—by then a subsidiary of Rosneft—filed a separate and parallel petition against Yukos before the Moscow Arbitrazh Court to declare Yukos bankrupt.[1338]

1073. According to Respondent, the YNG petition was based on a judgment in respect of transportation services provided while Yukos owned YNG in January through March 2004, under a January 2003 contract.[1339]

1074. The YNG petition was formally granted on 27 March 2006.[1340] Since Russian law does not allow separate bankruptcy proceedings against one company, YNG's claim was joined to the bankruptcy proceedings initiated by the Western Banks.[1341]

1334 Resolution of the Federal Arbitrazh Court for the Moscow District, 2 March 2006, p. 4, Exh. C-302.

1335 Banks' Petition to Declare Yukos Bankrupt Filed with the Moscow Arbitrazh Court, 6 March 2006, Exh. R-3885; *Creditors Petition Russian Court to Declare Yukos Bankrupt*, World Markets Analysis, 13 March 2006, Exh. R-3882.

1336 Letter from Yukos' President S. Theede to the Head of the Interdistrict Department for Special Enforcement Proceedings of the Chief Directorate of the Federal Bailiffs Service for Moscow V.A. Savostov (undated), p. 3, Exh. C-1180; Claimant's Post-Hearing Brief ¶ 125.

1337 Ruling of the Moscow Arbitrazh Court, 28 March 2006, p. 3, Exh. C-307; Memorial ¶ 425; Claimants' Skeleton ¶ 47.

1338 Memorial ¶ 427; Counter-Memorial ¶ 561; Ruling of the Moscow Arbitrazh Court, 27 March 2006, p. 1, Exh. C-305.

1339 Rejoinder ¶ 1098.

1340 Ruling of the Moscow Arbitrazh Court, 27 March 2006, p.1, Exh. C-305.

1341 Register of Yukos Creditors' Claims, 30 October 2007 (Claim No. 2), p. 34, and (Claim No. 3), p. 109, Exh. C-353.

1075. On 28 March 2006, the Moscow Arbitrazh Court ordered the commencement of bankruptcy proceedings, placed Yukos under supervision, appointed Mr. Rebgun as interim administrator, and formally substituted Rosneft for the Western Banks as creditor.[1342]

1076. The Tribunal recalls that around that time Mr. Theede appointed Mr. Aleksanyan to represent Yukos in connection with the bankruptcy proceedings, but that within days of his appointment, Mr. Aleksanyan was arrested on 6 April 2006 at his house by masked and armed men on charges of money laundering and embezzlement allegedly committed when he was head of Yukos' legal department.[1343]

(b) The Treatment of Bankruptcy Claims; the Creditors' Meeting; the Declaration of Yukos' Bankruptcy

1077. In accordance with Russian bankruptcy law, it was for Mr. Rebgun, as interim administrator of Yukos, to convene a first meeting of Yukos' creditors. At that meeting, Yukos' creditors would, under the options available under Russian Bankruptcy Law, vote either in favour of a Rehabilitation Plan proposed by Yukos or for the alternative of a liquidation of Yukos.

1078. In anticipation of these steps, on 1 June 2006, Yukos convened an extraordinary general shareholders' meeting and approved, by majority vote, the Rehabilitation Plan proposed by Yukos' management.[1344] Also, the shareholders appointed Mr. Osborne as their representative in the bankruptcy proceedings.

1079. Claimants' Rehabilitation Plan was based on, *inter alia*:[1345]

i) The remaining assets valued at USD 31 billion exceeding the USD 29.5 billion in tax claims filed with Mr. Rebgun;

ii) a two year program to pay off the claims in bankruptcy;

1342 Rulings of the Moscow Arbitrazh Court, 28 March 2006, Exh. C-306 and Exh. C-307.

1343 *Top Yukos official Aleksanyan detained in Moscow*, RIA Novosti, 6 April 2006, Exh. C-796; *Arrest of Yukos Oil Company Executive Vice-President is a Brutal and Unjust Attack on the Company's Attempts to Secure a Fair Bankruptcy Process*, Yukos Press Release, 7 April 2006, Yukos Website, Exh. C-797; *Ioukos, un deuxième président en prison*, Libération, 8 April 2006, Exh. C-798; *Le Kremlin s'acharne contre le groupe pétrolier Youkos*, Le Figaro, 13 April 2006, Exh. C-799; Theede WS ¶ 30.

1344 Minutes of Extraordinary General Meeting of Yukos' Shareholders held on 1 June 2006, Exh. C-311.

1345 Memorial ¶ 458; Letter from Fulbright & Jaworski LLP to Chadbourne & Parke LLP, 1 June 2006, enclosing Yukos' Outline of Proposed Financial Rehabilitation Plan, Exh. C-312 (hereinafter "Rehabilitation Plan").

iii) the creation of a "Cash Pool separate from the Company," funded by constant cash flows generated by Yukos' production, refining and marketing subsidiaries (approximately USD 3–3.5 billion of annual Earnings Before Interest, Taxes, Depreciation and Amortification ("**EBITDA**");

iv) the sale of non-core assets: approximately USD 8.9 billion from the sale of Russian assets (20 percent stock of Sibneft ordinary shares, approximately USD 4.2 billion; 23.7 percent of YNG's outstanding share capital in the form of preferred shares (estimated at USD 3.6 billion); 100 percent of shares in Arctic Gas, approximately USD 1.1 billion) and approximately USD 1.5 billion from foreign assets (from the sale of its 53.7 percent stake in Lithuanian oil company Mazeikiu Nafta and 49 percent stock in Slovakian oil transport major Transpetrol); and

v) supplementing the Cash Pool with amounts awarded in pending international arbitrations and Russian litigation where Yukos was seeking approximately USD 18 billion.

1080. On the same day that the shareholders approved the Rehabilitation Plan (*i.e.*, on 1 June 2006), Yukos' counsel transmitted an "Outline of the Proposed Financial Rehabilitation Plan" to Mr. Rebgun's counsel in the U.S. (Chadbourne & Parke LLP), requesting that the Rehabilitation Plan be placed on the agenda of the first meeting of Yukos' creditors, and circulated to all of Yukos' registered creditors.

1081. On 2 June 2006, Mr. Rebgun sent to Yukos' registered creditors and to Yukos' CEO, Mr. Theede, a notice informing them that the first creditors' meeting would be held on 16 June 2006 and inviting them to consult the materials that would be discussed at the meeting in his office from 9 to 15 June 2006.[1346]

1082. In the event, the first meeting of Yukos' creditors did not take place as scheduled on 16 June 2006. On 8 June 2006, the first meeting of Yukos' creditors was adjourned by the Moscow Arbitrazh Court pending a 14 June 2006 hearing on the admission into bankruptcy proceedings of outstanding tax claims by the Federal Taxation Service for 2000 to 2004. Mr. Rebgun, in turn, requested a postponement of the Court's hearing on Yukos' bankruptcy.[1347]

[1346] Notice of the First Yukos Creditors' Meeting to be held on 16 June 2006, 2 June 2006, Exh. C-314.

[1347] Memorial ¶¶ 432–34, 454.

1083. At the hearing of 14 June 2006, a bankruptcy judge (not a tax judge) of the Moscow Arbitrazh Court ruled in favour of the Federal Taxation Service "after taking just 15 minutes to consider 127,000 pages of information submitted by Russian tax officials," admitting in their entirety as valid bankruptcy claims the tax authorities' claims based on years 2000–2003, plus 2004. In so doing, the judge confirmed the Federal Taxation Service as Yukos' largest creditor, with registered claims of USD 13.06 billion (amounting to 60.5 percent of all registered bankruptcy claims).[1348]

1084. Some two weeks later, the Court's hearing on Yukos' bankruptcy was postponed to 1 August 2006. The Court granted the postponement, noting that the "first meeting of creditors did not take place because not all of the creditors' claims submitted before the established deadline have been reviewed by the Court."[1349]

1085. On 28 June 2006, Mr. Rebgun sent a revised notice of the first creditors' meeting to be held on 20 July 2006 and invited registered creditors to consult the bankruptcy materials from 14 to 19 July 2006.[1350] Claimants assert that Mr. Rebgun did not circulate the Rehabilitation Plan that had been proposed by Yukos with his original notice of 2 June 2006.[1351] Indeed, the existence of the Rehabilitation Plan appears to have been notified to the creditors by Mr. Rebgun only in his revised notice of 28 June 2006, and made available for review between 14 and 19 July.

1086. On 17 July 2006, the Moscow Arbitrazh Court admitted into the bankruptcy proceedings four claims by YNG (now Rosneft's subsidiary) based on the sale of oil produced by YNG and sold to Yukos' trading companies in 2004. The Court decided that Yukos, not the trading companies, was liable to pay for the purchased oil. Thus, YNG's registered claims (Rosneft's) were USD 4.42 billion (including penalties) or 22.16 percent of the claims admitted into the bankruptcy proceedings at the time.[1352]

1348 *Judge sets speed-reading record…*, Reuters, 16 June 2006, Exh. C-809; Claimants' Summary Chart of Registered Creditors' claims, Exh. C-594 (hereinafter "Summary Chart of Creditors").

1349 Ruling of the Moscow Arbitrazh Court, 27 June 2006, Exh. C-315.

1350 Notice of the First Yukos Creditors' Meeting to be held on 20 July 2006, 28 June 2006, Exh. C-316.

1351 Memorial ¶ 453.

1352 Resolutions of the Ninth Arbitrazh Court of Appeal, 31 August 2006 and 7 September 2006, Exh. C-339 and Exh. C-340. On 20 July 2006, a further 29 claims were admitted on behalf of YNG (by now Rosneft's subsidiary). Summary Chart of Creditors, Exh. C-594; Claimants' Skeleton ¶ 52; Memorial ¶¶ 435–36; Reply ¶ 399.

1087. In accordance with Mr. Rebgun's revised notice of 28 June 2006, the first meeting of Yukos' creditors was held on 20 July 2006. Creditors were offered two alternative scenarios: (1) the Rehabilitation Plan proposed by Yukos' management; and (2) the Analysis of Yukos' Financial Situation proposed by Mr. Rebgun. At the request of Federal Taxation Service, the meeting was adjourned to 25 July 2006 to allow Mr. Rebgun to complete his Analysis with a separate exhibit analyzing the possibility of Yukos' breakeven activities.[1353]

1088. Mr. Rebgun's Analysis did not contemplate the restoration of Yukos' financial situation. Instead, Mr. Rebgun concluded that Yukos' remaining assets, totalling approximately USD 17.75 billion after a deduction of a 24 percent profit tax, were not sufficient to cover the USD 18.3 billion of registered bankruptcy claims. On this basis, Mr. Rebgun recommended that Yukos be declared bankrupt and that receivership proceedings against Yukos be initiated.[1354]

1089. On 25 July 2006, when the creditors' meeting that had been adjourned resumed, the creditors voted against the Rehabilitation Plan and recommended that Yukos be declared bankrupt. Twenty-four creditors were admitted as voting participants to the creditors' meeting. The Tribunal notes that Respondent, through the Federal Taxation Service, and indirectly through Rosneft (which had acquired the Western Banks' claim under the A Loan) and YNG (now Rosneft's subsidiary), had 93.87% of the votes.[1355]

1090. On 4 August 2006, Yukos was declared bankrupt by the Moscow Arbitrazh Court and placed under receivership, which was to be completed within one year.[1356]

(c) The Liquidation of Yukos' Remaining Assets

1091. On 9 October 2006, the Moscow Arbitrazh Court admitted further claims by YNG into the bankruptcy proceedings. These claims, worth USD 5.5 billion, were for alleged "lost profits"

1353 Analysis of Yukos' Financial Situation, 2006, Exh. C-317; Summary Analysis of the Debtor's Financial Situation submitted by Mr. Rebgun to the U.S. Bankruptcy Court for the Southern District of New York in the Chapter 15 Case as Exhibit B to his Status Report of 7 August 2006, Exh. C-318; Summary Chart of Creditors, Exh. C-594; Memorial ¶¶ 458–61; Counter-Memorial ¶¶ 620–32.

1354 Summary Analysis of the Debtor's Financial Situation submitted by Mr. Rebgun to the U.S. Bankruptcy Court for the Southern District of New York in the Chapter 15 Case as Exhibit B to his Status Report of 7 August 2006, pp. 7–8, Exh. C-318.

1355 Protocol of the First Meeting of Yukos' Creditors held on 20 July 2006, 25 July 2006, Exh. C-319; Memorial ¶ 464.

1356 Decision of the Moscow Arbitrazh Court, 1 August 2006, Exh. C-324.

during 2000 to 2003. Thus, from July to October 2006, the Russian courts admitted over USD 9.9 billion of claims by YNG into Yukos' bankruptcy.[1357]

1092. YNG was fully consolidated into Rosneft as of 1 October 2006.[1358] As a result of this consolidation, on 9 November 2006, the Moscow Arbitrazh Court ordered that YNG be replaced by Rosneft as a bankruptcy creditor, thereby attributing to Rosneft all of the claims registered to that time in the name of YNG. Eventually, adding a few minor claims, Rosneft held USD 10.69 billion or 37.17% of all registered bankruptcy claims.[1359]

1093. Under Russian bankruptcy law, Mr. Rebgun needed to select an appraiser in connection with the liquidation of Yukos' assets. On 23 October 2006, Mr. Rebgun selected a consortium of five appraisers headed by ZAO ROSECO ("**ROSECO**").[1360]

1094. On 15 January 2007, ROSECO issued an appraisal report on Yukos' assets, including the preliminary results of an appraisal of its subsidiaries and dependent companies.[1361] There is some uncertainty, however, over what exactly the appraisers determined in respect of the value of Yukos' remaining assets.

1095. On 19 January 2007, Mr. Rebgun reportedly declared that his appraisers had valued Yukos' assets at USD 22 billion.[1362] It was also reported that Mr. Rebgun later revised his valuation of Yukos' assets to USD 25.6 and 26.8 billion and indicated that "the liquidation discount during the sale would not exceed 30 percent."[1363] Another article reported that the consortium of appraisers had valued Yukos' remaining assets at USD 33 billion.[1364]

1096. Between March and August 2007, 17 bankruptcy auctions took place. The Tribunal observes that Respondent held (directly or through Rosneft) 97.67 percent of all claims against Yukos

---

1357 Ruling of the Moscow Arbitrazh Court, 9 October 2006, Exh. C-343; Claimants' Skeleton ¶ 52.

1358 Rosneft 2007 U.S. GAAP Consolidated Financial Statements, p. 8, Exh. C-377; Memorial ¶ 437.

1359 Ruling of the Moscow Arbitrazh Court, 9 November 2006, Exh. C-344 and Summary Chart of Creditors, Exh. C-594; Memorial ¶ 438.

1360 Receiver's Report on His Activities and the Results of the Receivership for the Period from 4 August 2006 through 1 November 2007, 1 November 2007, p. 3, Exh. C-361 (hereinafter "Receiver's Report").

1361 Ruling of the Moscow Arbitrazh Court, 12 November 2007, p. 7, Exh. C-362.

1362 *Yukos assets valued at $22 bln – bankruptcy receiver spokesman*, RIA Novosti, 19 January 2007, Exh. C-828; Claimant's Post-Hearing Brief ¶ 129.

1363 *21 Yukos Assets Bundled for Auction*, The Moscow Times, 5 March 2007, Exh. C-831.

1364 *Appraisers say Yukos worth over $33 bln*, RIA Novosti, 22 January 2007, Exh. C-829; Claimant's Post-Hearing Brief ¶ 129; Memorial ¶ 469.

and received (directly or through Rosneft) approximately 99.71 percent of the bankruptcy proceeds.[1365] The most important assets were auctioned off as follows:[1366]

- Lot 1 (27 March 2007): remainder of Yukos' stake (9.44 percent) in YNG sold to Rosneft, acting through its indirect subsidiary OOO RN-Razvitiye, for USD 7.59 billion;

- Lot 2 (4 April 2007): 20 percent minus 1 share in Gazpromneft (ex-Sibneft), Urengoil and Arctic Gas sold to OOO EniNeftegaz (the Russian subsidiary of Italian companies Eni (60 percent) and Enel (40 percent)) for USD 5.83 billion; transferred to Gazprom in 2009; immediately announced that EniNeftegaz would cede control of the assets to Gazprom under option agreements signed prior to the auction.

- Lot 5 (18 April 2007): Manoil sold to Rosneft.

- Lot 10 (3 May 2007): Tomskneft, Achinsk, Angarsk, East Siberian and Strezhevskoy sold to Rosneft (via Neft-Aktiv) for $6.82 billion.

- Lot 11 (10 May 2007): Samaraneftegaz, Syzran, Novokuybyshevsk and Kuybyshev sold to Rosneft for USD 6.4 billion.

1097. Between August and October 2007, the Federal Taxation Service successfully applied for "late" claims, consisting chiefly of claims for 24 percent profit taxes on the proceeds arising from the bankruptcy auctions.[1367] These claims amounted to USD 8.82 billion.[1368]

1098. On 31 October 2007, upon liquidation, Yukos still had some USD 9 billion in unsatisfied liabilities. One third of these were tax claims.[1369]

1365 Receiver's Report, pp. 30–43, Exh. C-361.

1366 Claimants' Rebuttal Slides, p. 32.

1367 Memorial ¶¶ 490–91; Counter-Memorial ¶¶ 665–69; Reply ¶¶ 418–20; Rejoinder ¶¶ 1182–83.

1368 Respondent explains at Counter-Memorial ¶ 665 n.1100:

> Pursuant to Art. 142(4) of the Russian Bankruptcy Law, any claim submitted after closure of the register of claims (in the case of Yukos, on Oct. 12, 2006), as well as any claim for mandatory payments arising after the commencement of receivership (irrespective of when it was filed against the debtor), is validly filed as a "late" claim and recorded on a separate list. "Late" claims are satisfied after full satisfaction of timely claims included in the register of bankruptcy claims. *See* Art. 142(4) of the 2002 Russian Bankruptcy Law [Exh. R-776]."

1099. On 15 November 2007, the Moscow Arbitrazh Court formally endorsed all of Mr. Rebgun's activities as receiver, closed Yukos' receivership, and ordered that Yukos be struck off the register of legal entities.[1370] Yukos was struck off the register of companies and its shares were legally extinguished on 21 November 2007.[1371]

3. Parties' Arguments and Tribunal's Observations

1100. In broad terms, Claimants allege that the Russian Federation decided to "push Yukos into bankruptcy in order to redistribute its remaining assets." In their Memorial, Claimants set out what they characterized as Russia's orchestrated plan to bankrupt and liquidate Yukos:

> The Russian Federation ensured, through the initiation of bankruptcy proceedings at the behest of Rosneft and using the cover of a consortium of Western banks (1), and through the biased and discriminatory conduct of the proceedings by its courts, that the Russian State and Rosneft would hold over 97% of the alleged claims against Yukos in the bankruptcy (2). Having also made certain that Yukos' rehabilitation plan would be rejected (3), the Russian Federation completed its expropriation scheme by auctioning the Company's remaining assets. As a result of the bankruptcy and liquidation of Yukos, the Russian State received directly more than 60.5% of the bankruptcy proceeds and, through Rosneft, more than 39.21% of the bankruptcy proceeds and all of Yukos' main production assets (4).[1372]

1101. Respondent rejects this suggestion, and argues instead that it was Yukos' management that forced the company into bankruptcy:

> [T]he bankruptcy and ultimately the liquidation of Yukos was not the aim or the result of a massive, global plot orchestrated by the Russian Government, but rather the inevitable consequence of the consistent and repeated lawless and reckless misconduct of the Oligarchs and the Yukos management they installed to conduct their—including Claimants'—investment.[1373]

1102. According to Respondent, "Claimants have failed to establish their primary contentions regarding Yukos' bankruptcy proceedings: that the bankruptcy was instigated 'by the Russian Federation through State-owned Rosneft,' that 'the only logic behind the decision to liquidate

---

1369 Yukos Liquidation Balance Sheets, 31 October 2007, Exh. R-753 and Analysis of Financial Condition of Yukos Oil Company OJSC Conclusions and Actions (undated), p. 36, R-748.

1370 Ruling of the Moscow Arbitrazh Court, 12 November 2007, Exh. C-362.

1371 Certificate Recording an Entry in the Unified Register of Legal Entities, 21 November 2007, Exh. C-363.

1372 Memorial ¶ 412.

1373 Counter-Memorial ¶ 540.

Yukos was to expropriate the company,' and that the proceedings were conducted improperly so that the Russian Federation could 'take its assets.'[1374]

1103. The Parties' arguments are related to and can be organized under the following two headings: (a) why was the bankruptcy initiated and who was truly behind it? And (b) were the bankruptcy proceedings conducted properly and fairly?

1104. The Parties' arguments and the Tribunal's observations on each of these are presented below.

(a) Why was the Bankruptcy Initiated and Who was Truly Behind It?

1105. It is not contested that the non-payment of the A Loan was an important factor leading to the bankruptcy of Yukos, since it was the creditor under the A Loan, the Western Banks, who initiated the bankruptcy (consistent with terms agreed with Rosneft in the Confidential Sale Agreement). There is disagreement, however, over the following two issues related to the non-payment of the A Loan:

i) Who was responsible for the non-payment of the A Loan – was Yukos prevented from paying by Respondent's conduct, or did Yukos have some control over the matter?

ii) Was the Confidential Sale Agreement a reasonable commercial arrangement between the Western Banks, as creditor, and Rosneft, as parent of YNG, the guarantor of the A Loan, or was it imposed on the Western Banks as part of Respondent's deliberate plan (executed through or with the assistance of Rosneft) to expropriate the remaining assets of Yukos?

1106. Each of these issues is analyzed in the respective subsections below, followed by the Tribunal's observations on why the bankruptcy was initiated and who was truly behind it.

(i) Non-Payment of the A Loan

1107. The Parties present opposing views on the reasons for which the A Loan had not been paid off by Yukos by the end of 2005.

[1374] Respondent's Post-Hearing Brief ¶ 122 (internal footnotes omitted).

1108. Respondent argues that the Western Banks were not paid simply because "Yukos adamantly refused to pay."[1375] In other words, according to Respondent, "Yukos' dilatory and obstructionist treatment of its commercial creditors paralleled closely its treatment of its tax creditors."[1376] Respondent advances four arguments, as summarized at paragraphs 125 to 129 of its Post-Hearing Brief.

1109. Firstly, starting in January 2004, Yukos refused the syndicate's requests for full prepayment of the loan and denied the syndicate's requests to subordinate the B Loan to the A Loan. Secondly, Yukos "re-routed" its exports and chose to leave the banks with an unsecured non-performing loan. Thirdly, Yukos failed to satisfy the English Judgment even though it had the available resources to pay it, frustrating collection efforts in the United States and in the Netherlands. Fourthly, Yukos engaged in "bad-faith negotiations" with the syndicate, which eventually led the syndicate to contact Rosneft and come to an agreement with it.

1110. Claimants generally argue that "Yukos worked closely with [the syndicate] to ensure payment of the debt" but that "at each step, the Russian Federation's actions impeded the Company's efforts."[1377] Claimants submit that "[h]ad the A Lenders not received an offer from Rosneft in the interim, they too would have been paid out of the proceeds of the sale of the Dutch assets, along with Moravel."[1378]

1111. Each of Respondent's specific arguments in relation to the non-payment of the A Loan is addressed in the respective subsections below.

(a) Yukos' Refusal to Fully Prepay the A Loan or to Subordinate the B Loan

1112. Respondent argues that "[t]rouble arose almost immediately after the A Loan was funded."[1379] It claims that the syndicate "first raised the possibility of Yukos' bankruptcy" in early 2004.[1380]

1375 Respondent's Post-Hearing Brief ¶ 124.

1376 Rejoinder ¶ 1052.

1377 Claimants' Post-Hearing Brief ¶ 117 (footnote omitted).

1378 Claimants' Post-Hearing Brief ¶119. The debt of Moravel Investment Limited (hereinafter "Moravel") was paid in 2008 through the proceeds from the sale of Yukos' stake in the Lithuanian oil company Mazeikiu Nafta. Reply ¶ 391; Transcript, Day 20 at 229 (Claimant's rebuttal): "Indeed, Moravel would eventually be paid out from the proceeds of the sale of Mazeikiu Nafta, and pursuant to a court order, and the banks would have similarly been paid out from the proceeds of the sale of that asset had they not in the meantime received an offer that was difficult to refuse."

1379 Rejoinder ¶ 1057.

1380 *Ibid.*

In January 2004, the following options were discussed: full prepayment of the A Loan; partial acceleration of the A Loan; additional security; and subordination of the B Loan to the A Loan.[1381] Respondent, relying on a news article, claims that the syndicate was "especially concerned" with the so-called "giga-dividend."[1382]

1113. After the syndicate served notice on Yukos of a potential event of default in April 2004,[1383] Respondent asserts that Yukos "compelled" its production subsidiaries YNG, Samaraneftegaz, and Tomskneft to provide guarantees[1384] and agreed to make pre-payments.[1385] Respondent notes that Yukos insisted that the A Loan and the B Loan be treated *pari passu*.[1386]

1114. Respondent emphasizes that if Yukos had subordinated the B Loan, the syndicate would have been paid in full.[1387] In response to Claimants' argument that the loans were *pari passu*,[1388] Respondent underlines that the B Loan "was nothing more and nothing less than a shareholder loan."[1389] Therefore, according to Respondent, there is nothing that prevented Yukos (or Claimants) from agreeing to subordination.[1390]

1115. While Claimants defend the 2003 interim "giga dividend," and assert that they never favored the B Loan over the A Loan (treating the two loans *pari passu*),[1391] they do not address Respondent's argument that the B Loan was a shareholder loan and that they could have agreed to subordinate it to the A Loan.

1381 *Ibid*. ¶ 1057; Société Générale Meeting Agenda, Paris, 22 January 2004, Exh. R-3823.

1382 Rejoinder ¶ 1057.

1383 Letter from Société Générale to Yukos Oil Company re: US$ 1.6 billion Loan Agreement dated 30 September 2003 with "Yukos Oil Company," 30 April 2004, Exh. R-3827.

1384 Rejoinder ¶ 1058; Financial and Performance Guarantee between Yuganskneftegaz and Société Générale S.A., 24 May 2004, Exh. R-581; Financial and Performance Guarantee between Yuganskneftegaz and Société Générale S.A., 25 May 2004, Exh. R-582.

1385 Rejoinder ¶ 1058; Yukos Oil Company Notice of Prepayment, 25 May 2004, Exh. R-3832; Yukos Oil Company Notice of Prepayment, 22 June 2004, Exh. R-3833.

1386 Rejoinder ¶ 1058.

1387 Counter-Memorial ¶ 557; Transcript, Day 19 at 60–63 (Respondent's closing).

1388 Transcript, Day 20 at 227–28 (Claimants' rebuttal).

1389 Rejoinder ¶ 1056; Transcript, Day 19 at 60 (Respondent's closing): "Although Yukos nominally borrowed $1.6 billion from SocGen, it was fully collateralised in cash by Group Menatep. SocGen drew on the collateral before making the loan through an intermediary bank. And as a result, ultimately GML's rights in the loan were assigned to Moravel, which was its wholly owned subsidiary. So there is no doubt that this was a shareholder loan from the outset, not a commercial loan."

1390 Transcript, Day 21 at 157 (Respondent's rebuttal).

1391 Reply ¶¶ 384–85; Transcript, Day 20 at 227–28 (Claimants' rebuttal).

(b) The Export Contracts as Security for the A Loan

1116. On 2 July 2004, the syndicate declared an Event of Default, following the bailiff's cash freeze orders.[1392] Respondent explains that, as Yukos claimed that it was unable to pay the relevant amounts, the syndicate did not call the loan "but instead relied on the default as the basis to access funds under the export trade guarantees."[1393]

1117. The syndicate received payment through this security mechanism[1394] until the end of 2004 and recovered around half of Yukos' USD 1 billion obligation.[1395] Respondent notes that on 27 December 2004, following the sale of YNG, Yukos notified the syndicate that it would cease payment under the A Loan.[1396] Respondent asserts that Yukos "continued to export oil produced by its other oil production subsidiaries Samaraneftegaz and Tomskneft" but that it "simply manipulated the export stream so that the oil was not exported pursuant to the specific export agreements used to secure the A Loan."[1397]

1118. At the Hearing, Mr. Theede asserted that there was "no cash from exported oil to be used to pay the banks" because of a sweep by the tax authorities.[1398] Respondent responds that this is "simply false,"[1399] and seeks to demonstrate that none of the funds under the export guarantee came from Yukos accounts, whether in Russia or elsewhere.[1400]

1119. Claimants argue that "with the sham auction of [YNG] in December 2004, [YNG] stopped shipping oil under the export contracts" and that therefore it was Respondent who "obstructed payment of the A Loan."[1401]

1392 Rejoinder ¶ 1059; Letter From Société Générale S.A. To Yukos Oil Company, re: Event of Default, 2 July 2004, Exh. R-3835.

1393 Rejoinder ¶ 1060.

1394 Respondent provides a detailed explanation of this mechanism at note 1771 of its Rejoinder.

1395 Rejoinder ¶ 1062.

1396 Rejoinder ¶ 1063.

1397 *Ibid*.; Transcript, Day 19 at 63-66 (Respondent's closing).

1398 Transcript, Day 10 at 103-04 (cross-examination of Mr. Theede).

1399 Respondent's Post-Hearing Brief ¶ 127.

1400 *Ibid.*, referring to Banks' Petition to Declare Yukos Bankrupt Filed with the Moscow Arbitrazh Court, 6 March 2006, Exh. R-3885.

1401 Claimants' Post-Hearing Brief ¶ 118; *see* Transcript, Day 20 at 228 (Claimants' rebuttal).

(c) The English Judgment and the Syndicate's Unsuccessful Collection Efforts

1120. Respondent asserts that, as a result of Yukos' re-routing of its export streams, the syndicate was left with "what had become, effectively, an unsecured loan."[1402] The syndicate therefore reduced its claim to judgment, obtaining the English Judgment in June 2005.[1403]

1121. Respondent faults Yukos for seeking to frustrate the syndicate's efforts to collect on the English Judgment, in the United States, the Netherlands, and Russia.[1404] Respondent puts particular emphasis on the Dutch Stichtings.[1405] Respondent argues that Yukos must be faulted for its use of the Stichtings to put its foreign assets out of reach of not just Rosneft or the tax authorities, but also of the Western Banks. Respondent contends that that the creation of the Stichtings "constitutes a blatant violation of Russian bankruptcy and criminal law."[1406] Respondent also submitted with its Rejoinder an expert report by Professor Dr. Albert Jan van den Berg (the "**Van den Berg Report**"), arguing that the creation of the Stichtings was illegal under Dutch law.[1407]

1122. Professor Van den Berg concludes that the creation of the Stichtings was:

> illegal, as it goes against the Dutch law principle, discussed in length above, that does not permit a company, or its directors, to transfer its assets for the purpose of making it more difficult for a creditor to satisfy its claims against the company and its assets, or for the new ultimate parent company to exercise control, even when the company reacts to what it believes to be illegitimate acts.
>
> In this connection, the establishment of the Stichting-structure (including the issuance of depositary receipts) as a protective device was not valid either, as it qualifies as a permanent protective device and, in any event, was established to make it more difficult for creditors to collect on debts.[1408]

1402 Rejoinder ¶ 1064.

1403 Rejoinder ¶¶ 1073–75; English Judgment, Exh. R-455.

1404 Respondent's Post-Hearing Brief ¶ 127; Rejoinder ¶¶ 1076–92.

1405 Rejoinder ¶ 1076; Transcript, Day 19 at 66–67 (Respondent's closing); Transcript, Day 21 at 165 (Respondent's rebuttal).

1406 Counter-Memorial ¶¶ 537–38; *Criminal Code of the Russian Federation No. 63-FZ*, 13 June 1996, Article 195, Exh. R-720.

1407 Rejoinder ¶ 86; Van den Berg Report.

1408 Van den Berg Report ¶¶ 94–95.

1123. Claimants chose not to cross-examine Professor Van den Berg at the Hearing;[1409] his conclusions stand unrebutted.

1124. In response to Respondent's claim that the Stichtings were created to frustrate the syndicate's collection efforts, Claimants state that Respondent "misrepresents the purpose" of the Stichtings.[1410] Claimants argue that the Stichtings "sought to protect certain [assets] from further attack by the Respondent and in the best interests of the Yukos group, its management, employees, shareholders and legitimate creditors."[1411] At the Hearing, Mr. Theede asserted that the Stichtings were created to remove certain assets from the reach of Respondent:[1412]

> after [the YNG auction] happened, it became very obvious that we were not going to be able to do anything to protect our Russian assets; they were going to take them away from us, one way or another. And of course it was going to be through taxes: that was the decided approach.
>
> But we were presented with a way to add some additional security to our international assets.[1413]

1125. Claimants emphasize "the big picture": Yukos was facing tax claims in Russia and its assets were frozen.[1414] Claimants assert that Yukos repatriated almost all of the cash it had offshore.[1415] Claimants contend that Yukos was actively trying to sell the Dutch assets to satisfy the English Judgment, and that, had the syndicate not accepted an offer it could not refuse from Rosneft in the meanwhile, the proceeds of the sale of Mazeikiu Nafta would have been applied to the English Judgment.[1416] Claimants claim that Respondent was actively preventing Yukos from successfully selling the Dutch assets.[1417]

1409 Letter from Claimants to the Arbitral Tribunal, 20 September 2012 (confirming Claimants' decision not to cross-examine Professor Van den Berg at the hearing).

1410 Reply ¶ 389.

1411 Reply ¶ 390.

1412 Transcript, Day 10 at 106–10 (cross-examination of Mr. Theede).

1413 Transcript, Day 10 at 108 (cross-examination of Mr. Theede).

1414 Transcript, Day 17 at 125–26 (Claimants' closing).

1415 Transcript, Day 17 at 120–24 (Claimants' closing, excerpting relevant portions of Mr. Theede's and Mr. Misamore's testimonies).

1416 Transcript, Day 10 at 117–18 (cross-examination of Mr. Theede); Transcript, Day 20 at 228–29 (Claimants' rebuttal); Claimants' Post-Hearing Brief ¶¶ 119, 124.

1417 Transcript, Day 10 at 105–106 (cross-examination of Mr. Theede).

1126. Respondent criticizes Claimant's assertion that Yukos was unable to satisfy the English Judgment because of the asset freeze.[1418] Respondent emphasizes that counsel for Yukos in the English proceedings stated that the

> evidence would show that Yukos had assets outside Russia free from the Russian court's freezing order which could have been, and which still could be, exploited to raise money with which to make payments under the Loan Agreement as they became due.[1419]

1127. Respondent also notes that Mr. Misamore conceded at the Hearing that when Stichting 2 was formed in September 2005, it held approximately USD 500 million in cash, more than enough to satisfy the debt to the syndicate.[1420]

1128. In response to Claimants' argument that Yukos was trying to sell the Dutch assets to satisfy the judgment,[1421] Respondent claims that the proceeds were used to pay bonuses and to pay Moravel.[1422]

(d) Yukos' Negotiations with the Syndicate

1129. Respondent submits that Yukos engaged in bad faith negotiations with the syndicate.[1423] It notes that Yukos offered the syndicate a "poisoned chalice": seats on the board of a stichting in lieu of actual payment.[1424] Respondent claims that once Yukos had successfully obstructed collection efforts in the Netherlands, it withdrew its settlement offer to the syndicate.[1425]

1130. Claimants assert that, had the syndicate not been paid by Rosneft, it would have eventually been paid by Yukos.[1426]

1131. Claimants also rely on an undated letter sent by Mr. Theede to the bailiff, probably between 10 and 14 March 2006.[1427] In that letter, Mr. Theede asserts that Yukos finds itself in a

---

1418 Respondent's Post-Hearing Brief ¶ 129.

1419 English Judgment ¶ 15, Exh. R-455.

1420 Respondent's Post-Hearing Brief ¶ 127; Transcript, Day 9 at 223–24 (cross-examination of Mr. Misamore).

1421 Transcript, Day 20 at 228–29 (Claimants' rebuttal); Transcript, Day 10 at 112 (cross-examination of Mr. Theede).

1422 Transcript, Day 19 at 45–46 (Respondent's closing).

1423 Respondent's Post-Hearing Brief ¶ 128.

1424 Rejoinder ¶¶ 1081, 1083.

1425 Rejoinder ¶ 1083; Respondent's Post-Hearing Brief ¶ 128.

1426 Claimants' Post-Hearing Brief ¶ 119.

"straightjacket" and asks the bailiff to lift the freeze to enable Yukos to pay the syndicate.[1428] Respondent criticizes Claimants' reliance on this letter noting that the letter was sent *after* the bankruptcy petition was filed.[1429]

(ii) The Confidential Sale Agreement Between the Western Banks and Rosneft

1132. Claimants argue that, while it was the Western Banks that formally initiated the bankruptcy of Yukos, it was the Russian Federation, acting through Rosneft, that orchestrated the commencement of the bankruptcy. In particular, Claimants place great emphasis on the Confidential Sale Agreement that was entered into between the Western Banks and Rosneft on 13 December 2005. Pursuant to that Agreement, Rosneft agreed to satisfy the outstanding debt owed by Yukos to the Western Banks (over USD 455 million plus interest) in exchange for the Western Banks agreeing to take the steps described in Schedule 8 of the Confidential Sale Agreement, entitled "Application for Bankruptcy."

1133. Claimants assert that each of Rosneft, on the one hand, and the Western Banks, on the other, fulfilled their respective roles under the Confidential Sale Agreement meticulously. Thus, on 6 March 2006, having completed the other steps contemplated under the Confidential Sale Agreement, the Western Banks filed a petition with the Moscow Arbitrazh Court to declare Yukos bankrupt.[1430] On 14 March 2006, the Moscow Arbitrazh Court formally substituted Rosneft in the place of the Western Banks for the purposes of the bankruptcy proceedings.[1431]

1134. Respondent explains that the Confidential Sale Agreement was concluded between Rosneft and the Western Banks because of the "convergence of their commercial interests":

> The SocGen syndicate simultaneously also sought payment of the same debt from Rosneft pursuant to the 2004 loan guarantee that Yukos had foisted on YNG, which Rosneft then owned. Although Rosneft disputed the validity of the guarantee, Rosneft required forbearance from the same banks on covenant breaches arising from the YNG acquisition, and Rosneft needed the bank's cooperation for its planned IPO. The convergence of the syndicate's and Rosneft's commercial interests resulted in their agreeing that Rosneft

---

1427 Letter from Mr. Theede to Mr. Savostov (undated), Exh. C-1180; Transcript, Day 20 at 230–33 (Claimants' rebuttal); Theede WS ¶ 29.

1428 Letter from Mr. Theede to Mr. Savostov (undated), Exh. C-1180.

1429 Transcript, Day 21 at 159 (Respondent's rebuttal); Respondent's Post-Hearing Brief ¶ 128 (the letter is "typical of Yukos' consistent strategy of doing too little, too late, and then blaming others.")

1430 Banks' Petition to Declare Yukos Bankrupt Filed with the Moscow Arbitrazh Court, 6 March 2006, Exh. C-303.

1431 Ruling of the Moscow Arbitrazh Court, 28 March 2006, Exh. C-307.

> would pay the syndicate in full, but only after the syndicate had pursued all legal avenues to obtain payment from Yukos, the primary obligor. If Rosneft instead paid, the syndicate's rights under the A Loan agreement were to be assigned to Rosneft.[1432]

1135. Respondent disagrees with Claimants that the confidentiality clause in the Confidential Sale Agreement evidences a "conspiracy on the part of the SocGen syndicate to act secretly on behalf of Rosneft, which Claimants improperly equate with Respondent." Instead, Respondent contends that the confidentiality clause was a standard commercial term "necessary to preserve the possibility that Yukos would pay the SocGen syndicate before Rosneft became unconditionally obligated to do so, and remained in effect only for so long as Yukos' payment would have discharged Rosneft's own obligations to pay the syndicate."[1433]

1136. Respondent argues that the syndicate "ha[d] been nothing if not patient during this whole process"[1434] and that, in its frustrated effort to satisfy the English Judgment, the syndicate in last resort turned to Rosneft for payment under the YNG guarantee.[1435] After "a little bit of a dance going on between them," the syndicate and Rosneft concluded a mutually advantageous deal.[1436]

1137. Respondent asserts that the syndicate originally pressed Rosneft for payment under the YNG guarantee[1437] but eventually came to a commercially sound arrangement with it.[1438] Respondent claims that these propositions stand unrebutted.[1439]

1138. Claimants contend that Yukos "work[ed] closely" with the syndicate until the syndicate received from Rosneft an offer it could not refuse.[1440] In the words of Mr. Theede, "banks being banks, that was an easy, low-risk way out of this for them, and so that's what happened and that's what they did."[1441] Having said this, Claimants note that "there is no commercial

---

1432 Respondent's Skeleton ¶ 58.

1433 Respondent's Skeleton ¶ 59.

1434 Respondent's Post-Hearing Brief ¶ 129, quoting *Creditors Petition Russian Court to Declare Yukos Bankrupt*, World Markets Research Centre, 13 March 2006, Exh. R-3882.

1435 Respondent's Post-Hearing Brief ¶ 129; Counter-Memorial ¶¶ 577–80; Rejoinder ¶¶ 1065–71; Transcript, Day 19 at 69–72 (Respondent's closing).

1436 Transcript, Day 19 at 69–72 (Respondent's closing); *see* Confidential Sale Agreement, Exh. C-300.

1437 Counter-Memorial ¶¶ 577–80; Rejoinder ¶¶ 1065–71.

1438 Post-Hearing Brief ¶ 129; Counter-Memorial ¶¶ 575–83; Rejoinder ¶¶ 1086–88.

1439 Post-Hearing Brief ¶ 129; Transcript, Day 10 at 113–14 (cross-examination of Mr. Theede).

1440 Claimants' Post-Hearing Brief ¶ 119; Transcript, Day 20 at 228–29 (Claimants' rebuttal).

1441 Transcript, Day 10 at 113 (cross-examination of Mr. Theede).

rationale for why Rosneft would insist upon the further and highly unusual step that the A Lenders initiate bankruptcy proceedings against Yukos, save for the sake of appearances."[1442]

1139. The Parties also disagree when it comes to the significance of the separate and parallel bankruptcy petition filed by YNG (then a subsidiary of Rosneft) on 24 March 2006. According to Respondent, the YNG petition "alone disposes of Claimants' contention that the bankruptcy filing by the SocGen syndicate had been orchestrated by the Russian Federation so as to allow Rosneft not to 'appear as the instigator of Yukos' bankruptcy.'"[1443]

1140. According to Claimants, Rosneft had decided to "hedge its bets" by filing a separate bankruptcy petition through YNG in the event the court would reject the petition filed by the banks.[1444] Claimants further contend that having the syndicate file its petition prior to YNG was "evidently important to Rosneft and the Kremlin's public relations efforts."[1445] Finally, Claimants argue that the YNG petition refutes Respondent's argument that Yukos itself caused the bankruptcy by failing to pay the syndicate: "Respondent offers no explanation as to how the Claimants suffered additional damages because it was the Société Générale syndicate who initiated the bankruptcy rather than Rosneft."[1446]

(iii) Tribunal's Observations

1141. Having considered the extensive record and the maze of documents as well as the Parties' arguments, the Tribunal concludes that while it is undisputed that the Western Banks formally initiated the bankruptcy proceedings, and that Yukos is partly to blame for giving the Banks the incentive to enter into the Confidential Sale Agreement with Rosneft, the role of Rosneft and of Respondent in creating the conditions for Yukos' bankruptcy cannot be ignored.

1142. Turning firstly to the fault that Yukos bears in this matter, the Tribunal largely accepts Respondent's arguments that Yukos could have paid the A Loan in full prior to the end of 2005, whether by subordinating the B Loan to the A Loan, allowing the export contracts to continue to operate as security for the Western Banks, or indeed using assets that were placed into the

---

1442 Claimants' Post-Hearing Brief ¶ 121 (underlining in original).

1443 Counter-Memorial ¶ 572 (quoting Memorial ¶ 427); *see* Rejoinder ¶ 1090.

1444 Memorial ¶ 427; *Yuganskneftegaz demands Yukos' bankruptcy over $1 million debt*, Vedomosti, 3 April 2006, Exh. C-795.

1445 Claimant's Post-Hearing Brief ¶ 300.

1446 *Ibid.*

Stichtings. It can therefore be said that Yukos is not without fault in connection with the initiation of the bankruptcy, since it contributed to creating conditions that gave the Western Banks every incentive to enter into the Confidential Sale Agreement with Rosneft, and it was pursuant to that Confidential Sale Agreement that the Banks initiated bankruptcy proceedings against Yukos in exchange for payment from Rosneft under the A Loan. As Mr. Theede testified, banks being banks, the solution presented by the Confidential Sale Agreement was "an easy, low-risk way out of this for them."[1447]

1143. However, to focus only on these narrow reasons for non-payment of the A Loan, and on the commercial considerations that drove the Western Banks to enter into the Confidential Sale Agreement, is to miss the bigger picture. The Tribunal observes that Yukos was current in its payments to the Western Banks until December 2004, when YNG was auctioned to Rosneft. Had YNG not been seized, therefore, it is reasonable to assume that Yukos would not have had problems repaying the A Loan. By the same token, given the circumstances under which YNG was seized (discussed in Chapter VIII.F of this Award), it stands to reason that Yukos felt justified in forcing Respondent, through Rosneft, to pay the Western Banks under the YNG guarantee, rather than paying the debt itself.

1144. The Tribunal therefore cannot accept Respondent's argument that because Yukos, even after the seizure of YNG, *could have* paid the Western Banks under the A Loan but did not do so, there is no link to be made between Rosneft (and, indeed, Respondent) and the bankruptcy. The big picture established by the record, including in respect of the tax assessments and the auction of YNG, suggests otherwise.

1145. The Tribunal's conclusion is also supported by two particular facts more closely related to the enforcement of the A Loan in Russia.

1146. Firstly, the Tribunal notes that the Western Banks entered into the Confidential Sale Agreement with Rosneft very soon after the Federal Arbitrazh Court for the Moscow District reversed an earlier decision that had authorized the enforcement of the English Judgment, and that the same Court ultimately allowed the Western Banks to proceed with its enforcement after it had entered into the Confidential Sale Agreement. This suggests to the Tribunal, at best, a very happy coincidence as between the decision of the Court and the interests served by the terms presented to the Western Banks in the Confidential Sale Agreement. It is also consistent with

[1447] Transcript, Day 10 at 113 (cross-examination of Mr. Theede).

Claimants' argument that the decisions of the Court and the conduct of Rosneft were being coordinated as part of a deliberate strategy to drive Yukos into bankruptcy.

1147. Secondly, if Rosneft itself (or the State, as its owner) were not interested in orchestrating the initiation of the bankruptcy proceedings against Yukos, why was the requirement to initiate bankruptcy included in the Confidential Sale Agreement? In other words, while the Tribunal can accept both that the Western Banks had a commercial interest in getting paid by Rosneft (especially after the 5 December 2005 decision of the Federal Arbitrazh Court that reversed the enforcement of the English Judgment) and that Rosneft had a commercial interest in having the Western Banks' claim against Yukos assigned to it in exchange for such payment, the Tribunal does not see any evident commercial rationale for the inclusion in the Confidential Sale Agreement of the requirement that the Banks initiate bankruptcy in order to be paid.

1148. It thus appears to the Tribunal that the Western Banks, since Yukos was not reimbursing the loan, were actively "encouraged" to enter into the Confidential Sale Agreement in order to accomplish their objective of being paid. While, as the Tribunal said earlier, Yukos must shoulder some of the blame for not paying the Western Banks and thereby increasing its exposure to the risk that it could be petitioned into bankrupcy, it appears undeniable to the Tribunal that initiating bankruptcy was not a goal of the Western Banks, but rather the objective of Rosneft, in the interests of its owner, the Russian Federation. The Tribunal concludes that in the end the bankruptcy was initiated by the Russian Federation. The separate and parallel bankruptcy petition filed by Rosneft-controlled YNG on 24 March 2006 reinforces this conclusion.

1149. The Tribunal, in light of the evidence reviewed above, finds the following passage from Claimants' Post-Hearing Brief compelling and adopts it as its own:

> The only rational explanation for the highly unusual manner in which the bankruptcy proceedings against Yukos were initiated was to act as a cover for the Russian Federation's involvement, allowing the Russian government to keep its word—in the context of ongoing legal proceedings, including these arbitrations—that it was not interested in the bankruptcy of Yukos (and thus maintaining the appearance that it was commercial parties—not the State—that sought Yukos' bankruptcy), while achieving its desired end.[1448]

[1448] Claimants' Post-Hearing Brief ¶ 123.

(b) Were the Bankruptcy Proceedings Conducted Properly and Fairly?

1150. Claimants paint the bankruptcy as "the final act of the destruction" of Yukos.[1449] Claimants argue that Respondent (or entities whose conduct is attributable to Respondent)[1450] not only initiated the bankruptcy, but also (i) ensured that it monopolized the bankruptcy process by discriminatory rejection and allowance of bankruptcy claims; [1451] (ii) ensured the rejection of Yukos' proposed Rehabilitation Plan;[1452] and (iii) confiscated the residual assets of Yukos through sham auctions and Yukos' eventual liquidation.[1453]

1151. Claimants claim that Respondent monopolized the bankruptcy and, directly or indirectly, obtained 97.67 percent of all bankruptcy claims, obtained approximately 93.87 percent of the votes in the creditors' meeting, claimed USD 6 billion in profit tax on the auction proceedings, acquired over 95 percent of Yukos' remaining assets in the bankruptcy, and received as creditor approximately 99.71 percent of the bankruptcy proceeds.[1454]

(i) The Courts' Treatment of Bankruptcy Claims

1152. Claimants argue that the Russian courts never had the interests of Yukos or its rehabilitation in mind when conducting the bankruptcy proceedings. Firstly, the Russian courts ensured that the Russian State would become Yukos' main creditor in the bankruptcy proceedings by postponing the date of the first meeting of Yukos' creditors to give the State "more time to prove new tax claims" against Yukos.[1455] These tax claims comprised Yukos' outstanding alleged tax liabilities for the years 2000 to 2003. As noted above, at the hearing of the Moscow Arbitrazh Court on 14 June 2006, the bankruptcy judge ruled in favour of the Federal Taxation Service, setting "a new speed reading record" after taking just 15 minutes to consider 127,000 pages of information submitted by Russian tax officials.[1456] As a result of that judgment, the

---

1449 Memorial ¶ 411.

1450 For the Tribunal's discussion of attribution, see Chapter X.A of this Award.

1451 *Ibid*. ¶¶ 431–51.

1452 *Ibid*. ¶¶ 452–67.

1453 *Ibid*. ¶¶ 468–94.

1454 Claimants' Post-Hearing Brief ¶¶ 126–33.

1455 *Yukos creditors' meeting delayed by Moscow court*, Reuters, 8 June 2006, Exh. C-808.

1456 *Judge sets speed-reading record…*, Reuters, 16 June 2006, Exh. C-809.

Federal Taxation Service became Yukos' single largest creditor with registered claims amounting to approximately USD 13.06 billion.[1457]

1153. Secondly, Claimants contend that the Russian courts ensured that State-controlled Rosneft—of which the Russian State has been the majority shareholder since the company's privatization in the nineties—would become Yukos' second largest creditor in the bankruptcy. On 17 July 2006, the Moscow Arbitrazh Court admitted into the bankruptcy proceedings four claims by YNG, which by that that time had already become a subsidiary of Rosneft:

> The claims were based on the sale of oil produced by Yuganskneftegaz and sold to Yukos' trading companies in 2004: the Court decided that Yukos, and not the trading companies—notwithstanding that those companies were Yuganskneftegaz's counterparties under the relevant oil sale contracts—was liable to pay for the oil sold.[1458]

1154. Thirdly, in Claimants' view, the Russian courts ensured that creditor claims belonging to Yukos-related entities or to Yukos' shareholders would not be recognized in the bankruptcy proceedings. For example, in its Memorial on the Merits, Claimants explain the Russian courts' treatment of Moravel Investment Limited, a GML affiliate:

> This was the case, for example, for the claim filed by Moravel Investment Limited ("Moravel"), a GML affiliate, on the basis of an LCIA award of September 16, 2005, rendered by an arbitral tribunal comprised of Peter Leaver QC, Jonathan Hirst QC and J. William Rowley QC, Chairman. The award ordered Yukos to pay to Moravel US$ 655,725,238.60 in principal plus corresponding interest, which was outstanding under the B Loan Agreement concluded between Yukos and Société Générale in September 2003 for the purposes of Yukos' merger with Sibneft. This loan was identical, in all material aspects, to the A Loan which had been assigned to Rosneft by the Western Banks headed by Société Générale and on the basis of which Rosneft had been admitted into the bankruptcy proceedings. However, unlike Rosneft's claim, for which the Russian courts had recognized the English Judgment rendered in favor of the Western banks (later assigned to Rosneft), the courts refused the enforcement of the awards in favor of Moravel.[1459]

1155. Russian courts accorded similar treatment to the remaining Yukos affiliates with outstanding claims against Yukos, such as Yukos Capital SARL, Glendale Group Limited, OOO Yu-Mordovia, OOO Yukos Vostok Trade, ZAO Yukos-M, OOO Siberian Internet Company, OOO Trading House Yukos-M, ZAO Krasnoyarskgeofizika, ZAO Lipetsknefteprodukt, and

---

[1457] Resolution of the Ninth Arbitrazh Court of Appeal, 11 August 2006, Exh. C-336; Decision of the Moscow Arbitrazh Court, 2 October 2006, Exh. C-201; Register of Yukos Creditors' Claims, 30 October 2007, Exh. C-353; Summary Chart of Creditors, Exh. C-594.

[1458] Memorial ¶ 435.

[1459] Memorial ¶ 441 (internal footnotes omitted).

OOO Alta-Trade. As Claimants contend, "the common ground for denying the claims of these companies was the alleged lack of evidence of the existence of the claims."[1460]

(ii) The Rejection of Yukos' Rehabilitation Plan

1156. On 1 June 2006, Yukos' general shareholders' meeting approved Yukos' Financial Rehabilitation Plan and appointed Mr. Osborne as the shareholders' representative in the bankruptcy proceedings.[1461] Claimants point out that according to Yukos' Rehabilitation Plan, Yukos was in a position to pay off its alleged liabilities fully within two years.[1462] Mr. Rebgun, the appointed administrator, was required to circulate Yukos' Rehabilitation Plan to all Yukos' registered creditors. According to Claimants, Mr. Rebgun did not do so, although Respondent alleges that Mr. Rebgun made the Rehabilitation Plan available for the creditors' review before the creditors' meeting.

1157. Mr. Rebgun's own proposal to the creditors was to sell all Yukos' assets to satisfy the creditors' claims and then liquidate the company. At the creditors' meeting of 25 July 2006, at which the Federal Taxation Service and Rosneft held 93.87 percent of votes, Yukos' Rehabilitation Plan was rejected, and the creditors decided to liquidate Yukos, "which had the added bonus of creating an additional claim for the tax authorities of 24% profit tax on the auction proceedings, a claim on which it would collect US$ 6 billion."[1463]

1158. In their Post-Hearing Brief, Claimants further contend that:

> During the hearing, the Respondent made a limited number of unfounded attacks on Yukos' Financial Rehabilitation Plan. For example, the Respondent alleged that Yukos' Financial Rehabilitation Plan was "highly speculative" as the "cash pool" was to be funded from "uncertain revenues" including US$ 18 billion from "litigation claims." However, as even the most cursory review of the Plan reveals, "litigation claims" were not ascribed a value in determining the aggregate value of Yukos' assets available to pay claims and were merely intended to supplement the "cash pool", if and when anything was received.[1464]

1159. Yukos' creditors gathered for their first meeting on 20 July 2006. Yukos' management proposed a Rehabilitation Plan[1465] and Mr. Rebgun proposed its Analysis of Yukos' Financial

---

1460 Memorial ¶ 448.

1461 Minutes of Extraordinary General Meeting of Yukos' Shareholders held on 1 June 2006, Exh. C-311.

1462 Claimants' Skeleton ¶ 55.

1463 Claimants' Post-Hearing Brief ¶ 127.

1464 *Ibid.* ¶ 128.

1465 Rehabilitation Plan, Exh. C-312.

Situation.[1466] After the meeting was adjourned and resumed on 25 July 2006, the Federal Taxation Service, representing together with Rosneft 93.87 percent of the votes, voted against the Rehabilitation Plan and in favor of the liquidation of Yukos.[1467]

1160. Claimants argue that the decision to liquidate was "preposterou[s], even from an economic standpoint"[1468] and that "[t]he absurdity of Yukos' fate was only the flip side of the coin of the Russian Federation's and Rosneft's fortune."[1469] Claimants allege that there was an "obvious conflict of interest" in the vote as the sales of Yukos' assets were subject to a 24 percent profit tax, "which meant that liquidation would bring an enormous windfall to the Federal Taxation Service".[1470]

1161. Respondent denies all allegations of impropriety in relation to Mr. Rebgun's conduct of the creditors' meeting and the rejection of Yukos' Rehabilitation Plan:

> All registered creditors and the representatives of the debtor had an opportunity to review the Rehabilitation Plan and the analysis of Yukos' financial situation (along with relevant enclosures) prepared by Mr. Rebgun at his offices during the week preceding the meeting (and for five full days, from July 20, 2006 until July 25, 2006).[1471]

1162. Respondent contends that the Rehabilitation Plan was rejected because it was flawed and overly optimistic:

> Yukos' management, actively supported by the Claimants, had the opportunity to present a rehabilitation claim to the meeting of creditors. The rough outline management submitted was, however, legally defective and did not provide any basis for creditors to prefer rehabilitation to liquidation. It was not properly presented to or approved by Yukos shareholders, did not meet the legal requirements that the company's tax claims be satisfied within six months, and did not ensure full, let alone timely, payment of Yukos' creditors' claims.[1472]

1163. Respondent argues that the Rehabilitation Plan was "a blatant and untenable attempt on the part of the Oligarchs to secure their own interests over those of the creditors" and that "the

---

[1466] Analysis of Yukos' Financial Situation 2006, Exh. C-317; see Summary Analysis of the Debtor's Financial Situation submitted by Mr. Rebgun to the U.S. Bankruptcy Court for the Southern District of New York in the Chapter 15 Proceeding as Exhibit B to his Status Report of 7 August 2006, Exh. C-318.

[1467] Protocol of the First Meeting of Yukos' Creditors held on 20–25 July 2006, Exh. C-319.

[1468] Memorial ¶ 466.

[1469] Memorial ¶ 467.

[1470] Reply ¶ 418.

[1471] Counter-Memorial ¶ 607.

[1472] Respondent's Skeleton ¶ 62*; see also* Respondent's Post-Hearing Brief ¶ 123.

creditors' decision to reject the plan was reasonable and taken in accordance with Russian law, which vests full discretion with the creditors, consistently with international practice."[1473]

1164. Respondent underlines that in Russia, "the vote for the liquidation or rehabilitation of the debtor is within the full discretion of the creditors."[1474]

1165. On the question of the late claims, Respondent does not contest that the Federal Taxation Service claimed USD 8.82 billion in profit taxes out of the proceeds of the bankruptcy and eventually received USD 6.02 billion; it submits however, that "[t]hese are standard '*late*' claims that arise in connection with any sale generating profits, including in the context of rehabilitation proceedings"[1475] and that there is therefore nothing improper about them.

(iii) The Declaration of Yukos' Bankruptcy

1166. On 1 August 2006, the Moscow Arbitrazh Court stated that it had "established that the debtor showed the signs of bankruptcy as defined in Article 3 of the Federal Law 'On Insolvency (Bankruptcy)'" and that Yukos had "not fulfilled its monetary obligations towards its creditors for three months from the time when these obligations should have been fulfilled," without making any reference to the difference between Yukos' liabilities and its assets.[1476]

1167. The Claimants assert that on 1 August 2006, when Yukos was declared bankrupt, "Yukos' assets exceeded its alleged liabilities, and . . . the Company was clearly solvent."[1477] The Claimants further suggest that "there was nothing inevitable about the bankruptcy of Yukos" and that "Yukos could have avoided bankruptcy if allowed to pay off its fabricated tax debts."[1478] To support this claim, Claimants refer to the Rehabilitation Plan proposed by Yukos' management, which proposed "to leave intact Yukos' 'core assets' as a viable ongoing company, while addressing and paying in full all valid creditors' claims."[1479]

1473 Counter-Memorial ¶ 611.

1474 Counter-Memorial ¶ 632. This is consistent with international practice, *see* Counter-Memorial ¶ 1501.

1475 Rejoinder ¶ 1182.

1476 Decision of the Moscow Arbitrazh Court, 1 August 2006, Exh. C-324.

1477 Memorial ¶ 822.

1478 Memorial ¶ 825.

1479 Claimants' Post-Hearing Brief ¶128; *see also* Rehabilitation Plan, Exh. C-312.

1168. By contrast, Respondent points out that the insolvency test applicable to the initiation of bankruptcy proceedings against Yukos was an "illiquidity test," based on the debtor's inability to discharge a certain debt "within three months of its due date."[1480] According to Respondent, this "illiquidity test" was satisfied when the Western Banks filed a petition for Yukos' bankruptcy.[1481] Further, the question of whether the bankruptcy proceedings will result in the adoption of a financial rehabilitation plan and the company's survival or in the company's liquidation depends on whether the financial rehabilitation plan provides for the discharge of all the creditors' claims within certain applicable time limits.[1482] Respondent points out that the debt repayment schedule in the Rehabilitation Plan did not do so.[1483]

1169. Respondent denies all allegations of impropriety or bias relating to the way the Russian courts conducted the bankruptcy proceedings:

> As confirmed by the Moscow Arbitrazh Court, the syndicate's petition satisfied the insolvency test under Russian bankruptcy law applicable at the time, which was based on the debtor's inability to discharge a debt exceeding US$ 3,500 within three months of its due date.
>
> Nothing in Russian law in this regard concerning the initiation of bankruptcy proceedings is at odds with international practice. In a number of other jurisdictions, the so-called "illiquidity test: (*i.e.*, the debtor's inability to pay its debts as they become due) is sufficient to initiate bankruptcy proceedings.[1484]

1170. In any event, Respondent claims that Yukos' liabilities did exceed its assets, a position Respondent seeks to support by stressing that, after the sale of Yukos' assets, liabilities of Yukos in an amount of USD 9.2 billion remained unsatisfied.[1485]

(iv) The Liquidation of Yukos' Remaining Assets

1171. According to Claimants, the last stage in the "confiscation of Yukos"[1486] was the bankruptcy auctions of Yukos' remaining assets.[1487]

1480 Counter-Memorial ¶¶ 584, 1491; Article 3(2) of the Russian *Federal Law on Insolvency (Bankruptcy)*, Exh. R-776.

1481 Counter-Memorial ¶ 1491.

1482 Article 84(3) of the Russian Federal Law on Insolvency (Bankruptcy), Exh. R-776; Protocol of the First Meeting of Yukos' Creditors held on 20–25 July 2006, p. 11, Exh. C-319; Summary Analysis of the Debtor's Financial Situation submitted by Mr. Rebgun to the U.S. Bankruptcy Court for the Southern District of New York in the Chapter 15 Proceeding as Exhibit B to his Status Report of 7 August 200, p. 86, Exh. C-318.

1483 Counter-Memorial ¶ 623.

1484 Counter-Memorial ¶ 584–85; *see also* Respondent's Post-Hearing Brief ¶¶ 130–34.

1485 Counter-Memorial ¶ 669; Rejoinder ¶ 1161, Respondent's Post-Hearing Brief ¶ 134; Respondent's Opening Slides, p. 452.

1172. Claimants' argument regarding the auctions does not point to specific acts. While Claimants fault Rosneft for the initiation of the bankruptcy, the courts for the discriminatory rejection and allowance of claims, the Federal Taxation Service and Rosneft for the rejection of the Rehabilitation Plan, they fault "the Russian Federation" for the auctions.[1488] Claimants state "[t]he results of the auctions speak for themselves."[1489] Claimants argue that the small number of bidders, the speed of the auctions, the below-market-value resulting prices, and the overall benefits to Respondent leave no doubt about Respondent's "monopolization" of the auctions.[1490]

1173. Claimants note that Respondent as creditor in the bankruptcy was involved in the auctions in four ways. Firstly, it approved the procedure for the auctions[1491] and Mr. Rebgun's allotment of Yukos' assets into twenty lots.[1492] Secondly, it selected the Russian Federal Property Fund to organize and conduct the auctions.[1493] Thirdly, it set the starting price for the auctioned assets.[1494] Fourthly, it "actively communicated with [Mr. Rebgun] on other issues as well."[1495]

1174. Respondent underlines that this involvement was in accordance with Russian law and emphasizes that Respondent as creditor in the bankruptcy did not have the power to control the identity of the bidders, and that in each instance the starting price for the auctioned assets was at least equal to the appraised market value.[1496]

1175. Claimants assert that "[a]s creditor, the Russian Federation received, either directly or through Rosneft, approximately 99.71% of the bankruptcy proceeds."[1497] This occurred through

---

1486 Memorial ¶ 468.

1487 Memorial ¶¶ 468–94.

1488 Reply ¶ 438.

1489 Reply ¶¶ 421, 432.

1490 Reply ¶ 425.

1491 Counter-Memorial ¶ 633; Finalization Order, Exh. R-752; *see also* Receiver's Report, pp. 28–29, Exh. R-751.

1492 Memorial ¶ 470.

1493 Memorial ¶ 470; *see also* Ruling of the Moscow Arbitrazh Court, 12 November 2007, p. 8, Exh. C-362.

1494 Reply ¶ 425.

1495 Reply ¶ 425, citing Ruling of the Moscow Arbitrazh Court, 12 November 2007, pp. 8–9, 21, Exh. C-362.

1496 Rejoinder ¶ 1162; Counter-Memorial ¶¶ 633–38; *see also* Procedure for the Conduct of Public Auctions in Respect of the Assets of OAO NK Yukos during the Receivership Proceedings, Clauses 2.1–2.3, 20 February 2007, Exh. R-3943 and Minutes No. 5 of the Meeting of the Creditors' Committee of OAO NK Yukos, 21 February 2007, Exh. R-3944; Russian Bankruptcy Law 2002, Articles 110(5) and 111(3), Exh. R-3892.

1497 Claimants' Post-Hearing Brief ¶ 132.

"Rosneft [having] won 11 out of the 17 bankruptcy auctions, including acquiring Samaraneftegaz (Lot No. 11) and Tomskeneft (Lot No. 10)."[1498]

1176. In their Skeleton Argument, Claimants summarize the eleven auctions that completed the bankruptcy proceedings as follows:

> Yukos' remaining assets were transferred to the Russian State at well below their fair market value through a series of 17 auctions held between March 2006 and August 2007. Rosneft thereby directly or indirectly acquired Yukos' key remaining assets, including Samaraneftegaz (Lot No. 11) and Tomskneft (Lot No. 10), which were sold at a gross discount of approximately 37% and 33%, respectively, of their fair market value. For its part, Gazprom acquired through Eni/Enel the 20% minus 1 share stake in Sibneft that the Russian Federation had persistently refused to let Yukos sell to pay off alleged tax debts. As with the sham auction of Yuganskneftegaz, there was no genuine competition in the bankruptcy auctions and, in many instances, including those for Samaraneftegaz and Tomskneft, the only participants were Rosneft and a previously unknown entity whose sole role was to satisfy the formal requirement that there be a minimum of 2 bidders.
>
> Finally, when, by the end of July 2007, it became clear that despite the low auction prices, the bankruptcy might still generate some surplus, further claims were admitted in the bankruptcy proceedings on behalf of the Russian State, through the Federal Taxation Service and Rosneft. This ensured the completeness of Yukos' destruction and the transfer of its value and assets to the Russian State. Thus, the Russian Federation received, either directly or through State-owned Rosneft or Gazprom, approximately 99.71% of the bankruptcy proceeds and over 95% of Yukos' remaining assets, including all of Yukos' main production assets.
>
> On November 12, 2007, the Moscow Arbitrazh Court formally endorsed all the activities of Yukos' receiver Mr. Rebgun, closed the Company's receivership and ordered that Yukos be struck off the register of legal entities. The latter happened on November 21, 2007.[1499]

1177. Respondent contends that Yukos' bankruptcy auctions were held in full compliance with Russian law, and that Mr. Rebgun had secured appraisals for the fair value of the assets:

> Once Yukos' liquidation was properly approved, the company's assets were sold at auction in accordance with Russian law and international practice. Yukos' receiver obtained appraisals for the fair value of the assets, and used those appraisals to set minimum bids in the auctions, all of which were exceeded, some by very large margins. The auctions were open to domestic and foreign bidders, adequately noticed and advertised, and competitive. To the extent that any bidders may have been discouraged from participating, this was again the result of Claimants and Yukos having threatened potential bidders with legal action. While the aggregate results exceeded Yukos' own (and other) contemporaneous fair market value estimates, more than US$ 9 billion in creditor claims nonetheless remained unsatisfied.[1500]

[1498] Claimants' Post-Hearing Brief ¶ 131.

[1499] Claimants' Skeleton ¶¶ 58–60 (internal footnotes omitted).

[1500] Respondent's Skeleton ¶ 63; *see also* Respondent's Post-Hearing Brief ¶¶ 133–34.

(v) Tribunal's Observations

1178. The Tribunal notes Respondent's insistence that all aspects of the bankruptcy were conducted in accordance with Russian bankruptcy law. However, the Tribunal's inquiry is not limited to a mere review of the formalities of the bankruptcy. It must address and review all the substantial features of the proceedings.

1179. Thus, the Tribunal views as improper and unfair that, for example:

- All claims filed by Rosneft and the Federal Taxation Service, valued in the billions, were peremptorily accepted by the Court, while the many claims filed by Yukos' affiliated companies were rejected by the Court in a very summary way; and

- Yukos was saddled with a claim of some USD 6 billion that related only to the profit tax to be collected by the Federal Taxation Service as a result of the liquidation of Yukos' assets in the bankruptcy.[1501]

- The Tribunal is also troubled by the fact that Rosneft's acquisition of YNG (discussed in Chapter VIII.F of this Award) generated a claim of almost USD 10 billion against Yukos in the bankruptcy, including a claim based on the attribution to Yukos of debts owed to YNG by Yukos' trading companies. Since the Tribunal has already found that Rosneft's acquisition of YNG was, to say the least, questionable, in its view, this claim is equally questionable.

1180. In light of the above conclusions, the Tribunal cannot accept that it was in any sense proper or fair for the creditors' committee to reject the Rehabilitation Plan, for the court to declare Yukos bankrupt, or for Yukos to have been deprived of all of its remaining assets through a hasty and questionable liquidation process. On the contrary, it is evident to the Tribunal that the totality of the bankruptcy proceedings reviewed in this chapter were not part of a process for the collection of taxes but rather, as submitted by Claimants, indeed the "final act of the destruction of the Company by the Russian Federation and the expropriation of its assets for the sole benefit of the Russian State and State-owned companies Rosneft and Gazprom."

[1501] The Tribunal notes that this claim or liability was considered in determining whether Yukos should be liquidated or rehabilitated, and indeed declared bankrupt, and the Federal Taxation Service itself—which stood to benefit from that claim—had a majority vote at the creditors' meeting.

1181. The Tribunal notes that its conclusions are consistent with those of the *RosInvestCo* tribunal and the *Quasar* tribunal.

1182. With respect to the bankruptcy proceedings, the *RosInvestCo* tribunal concluded as follows:

> Though the Tribunal did not find the bankruptcy auctions to be conducted contrary to Russian law, this does not change the general impression from the evidence on file for the Tribunal, since the application for bankruptcy by the SocGen Group was also conducted by association with the State-controlled company, Rosneft, and that they fitted into the obvious general pattern and obvious intention of the totality of the scheme to deprive Yukos of its assets.[1502]

1183. The *Quasar* tribunal concluded:

> 141. The Tribunal has carefully considered each of the Respondent's defences, but is ultimately unpersuaded by them. The issue here is not one of the legality of the bankruptcy proceedings, nor their conformity with Russian bankruptcy regulations. Rather, it is whether the steps that were taken can properly and fairly be characterised as part of an ordinary process of collecting taxes. In the Tribunal's view, they cannot fairly be so characterised, particularly when viewed against the broader chronology of which they form part (as summarised later in this section). This conclusion is not overcome by the Respondent's various technical analyses of the consortium agreement.
>
> . . .
>
> 157. But the Tribunal also notes that, as a result of these auctions, "at the end of the day" . . . the Russian Federation has ended up with 93% of Yukos Oil Company." . . .
>
> 158. As summarised below, the overall chronology of which the liquidation auctions form part, casts them and their outcome in a particular light. After careful consideration of the entire record, the Tribunal concludes that, as with the preceding events, the liquidation auctions were part of the same overall scheme of confiscation. In this regard, the Tribunal's findings are consistent with those of the *RosInvest* Tribunal. . . . The ECHR's finding to the contrary—*i.e.*, that Yukos failed to prove that the Russian Federation "had misused those [enforcement] proceedings with a view to destroying the company and taking control of its assets"—must be understood as based on a heightened requirement of "incontrovertible and direct proof," given the "wide margin of appreciation" a State enjoys under Protocol No. 1 to the European Convention on Human Rights. . . .[1503]

H. THE WITHDRAWAL OF PWC'S AUDIT OPINIONS

1. Introduction

1184. As noted earlier in this Award,[1504] Yukos' auditor, PwC, withdrew its audit reports for Yukos in June 2007. This withdrawal was often mentioned, mostly by Respondent's counsel, during

---

1502 *RosInvestCo* ¶ 620, Exh. C-1049.

1503 *Quasar*, Exh. 3383.

1504 *See* paragraph 104 above.

these proceedings. Although neither Party called as a witness anyone from PwC, the Tribunal has formed the view that it is essential for it to review PwC's role in the present Awards.

1185. PwC was Yukos' auditor from 1997 to 2004. It also played an advisory role to Yukos, consulting on the company's domestic and international structures. On 15 June 2007, PwC formally withdrew all its prior audit reports for Yukos for the period from 31 December 1995 until 31 December 2004, stating that "new information" had led it to conclude that such reports could no longer be relied upon as trustworthy.[1505]

1186. Claimants say that the Russian Government exerted pressure on PwC to withdraw the audits in order to bolster the legitimacy of the destruction of Yukos. The harassment of PwC, say Claimants, took the form of searches, seizures, interrogations, criminal charges, two tax lawsuits, and the potential loss of clients and its license to do business in Russia. Rather than risk its business and employees for the sake of a client that was "no longer a going concern," PwC chose the "only viable option," namely to cooperate with the Russian authorities by finding pretexts to withdraw its Yukos audits.[1506]

1187. In contrast, Respondent says that PwC and Yukos had had a troubled relationship for a long time, noting that PwC refused to audit the company after 2004. During interrogations of PwC auditor Douglas Miller in May and June 2007, PwC received credible "new" information showing that Yukos' senior management had repeatedly lied to its auditors, confirming PwC's prior suspicions on four particular issues, and causing PwC to lose confidence in the content of its audit reports. At the time, Yukos was in bankruptcy and former executives and company records were no longer accessible. PwC thus could not conduct satisfactory inquiries to determine how the new information affected the audited financial statements. In the circumstances, the "only viable option" for PwC was to withdraw the audits, a move endorsed and approved by Respondent's audit expert, Mr. Ellison.[1507]

1188. No witnesses from PwC were presented by the Parties.[1508] PwC is not on trial before this Tribunal. The Tribunal draws no conclusions in this Award on PwC's professional conduct.

1505 PwC's Withdrawal Letter, Exh. C-611.

1506 Transcript, Day 2 at 50 (Claimants' opening), quoting U.S. State Department Cable No. 07MOSCOW2159, 10 May 2007, WikiLeaks Website, Exh. C-1358.

1507 Respondent's Opening Slides, p. 205; Respondent's Skeleton ¶¶ 45–50; Respondent's Closing Slides, pp. 188–89; Ellison Report.

1508 For the names of specific individuals from PwC who potentially could have testified, see paragraph 251 above.

Nevertheless, the events surrounding PwC's withdrawal of the Yukos audits help to inform the Tribunal's view as to whether Yukos was the object of a series of politically-motivated attacks, or is now simply "blaming the Russian Federation for the consequences of its own misconduct."[1509]

2. Chronology

1189. Absent direct testimony from PwC, the Tribunal must draw its conclusions from the testimony of Claimants' witnesses; correspondence amongst Yukos, PwC, external advisors and the Russian authorities; and the testimony of PwC personnel before other fora. There are also contemporaneous U.S. State Department cables, which emerged via "Wikileaks" and reveal the "candid"[1510] and "unguarded"[1511] views of PwC's senior management.

(a) PwC Serves as Both Auditor and Consultant to Yukos

1190. From 1997, Yukos was one of PwC's major clients in Russia. At the Hearing, Claimants' witnesses described a "perfectly normal", "cordial and close" business relationship in which PwC was a "permanent partner of Yukos and its subsidiaries for a long time."[1512] PwC conducted Yukos' external audits and assisted with training Yukos' in-house accountants. PwC played an "integral role"[1513] in developing Yukos' financial reporting system, and, according to Mr. Theede, "PwC's consulting arm was actually the architect of [the trading company] structures."[1514]

1191. Mr. Kosciusko-Morizet testified that "from 1997 to 2004, PwC was given access to the entire documentation of the whole of the Yukos group without restriction and had a very detailed and global view of the financial situation and the procedures of Yukos and its subsidiaries."[1515] It was a consistent theme among Claimants' witnesses that PwC enjoyed full access to Yukos'

1509 *See* Respondent's Skeleton ¶ 22.

1510 Reply ¶ 507.

1511 Transcript, Day 3 at 41 (Respondent's opening).

1512 Transcript, Day 11 at 50 (cross-examination of Mr. Theede); Kosciusko-Morizet WS ¶ 15; Transcript, Day 6 at 28 (cross-examination of Mr. Rieger).

1513 Misamore WS ¶ 25.

1514 Transcript, Day 11 at 50. *See also* the reference to PwC's consulting contract in Letter from Michael Kubena to Bruce Misamore, 15 January 2004, Exh. C-609; Rieger WS ¶¶ 15–19.

1515 Kosciusko-Morizet WS ¶ 17.

accounts, employees and information, "including related-party transactions, shareholders, costs [and] taxation."[1516] PwC also maintained a permanent staff presence within Yukos and performed site visits to Yukos entities.[1517]

1192. Claimants' witnesses pointed out that PwC never voiced complaints about access to the company or any of its staff. Mr. Kosciusko-Morizet affirmed that PwC was "perfectly able to check for themselves any documentation, ask for any documentation anywhere in the group at any level."[1518] Mr. Misamore observed that if PwC "did not have sufficient information, they should have asked for more."[1519] It is interesting to note that in 1998 PwC initially refused to sign the Yukos financials, as it was unable to resolve which trading companies should be consolidated as "controlled by Yukos and used for tax optimization." However, the next year, PwC did sign, as by then it had apparently been shown information sufficient to enable it to understand the control relationships.[1520]

1193. Similarly, as detailed in the next section, PwC occasionally requested additional information about certain aspects of Yukos' activities, and was provided each time with sufficient answers to enable it to certify the financial statements according to U.S. GAAP standards.

(b) PwC Responds to the Massive Tax Reassessments against Yukos

1194. When Mr. Lebedev was arrested in 2003 on tax-related charges, Yukos turned to PwC. Mr. Michael Kubena, a PwC partner, assured the specially-formed *ad hoc* Yukos Board committee chaired by Mr. Kosciusko-Morizet that Yukos had always complied with Russian law, including in the operation of its tax optimization structure, and that PwC did not believe that there was any possibility that the Russian authorities would attack Yukos on these issues.[1521]

1195. In December 2003, after Yukos received the 2000 Audit Report, Yukos again asked PwC for its

---

1516 *See e.g.*, Transcript, Day 6 at 28 (cross-examination of Mr. Rieger).

1517 Rieger WS ¶ 16.

1518 Transcript, Day 4 at 29. Mr. Kosciusko-Morizet added that PwC "had every possibility to check whatever they wanted to check. And if they agreed on the consolidated perimeter, that was enough for us . . . . The U.S. GAAP consolidating statements were done according to the rules . . . . The accounts were approved by an eminent firm." Transcript, Day 4 at 52.

1519 Transcript, Day 9 at 249.

1520 Russian Federation Prosecutor General's Office, Record of Interrogation of Douglas Miller, 4 May 2007, Exh. R-137.

1521 Kosciusko-Morizet WS ¶ 24.

comments. In a letter dated 15 January 2004, Mr. Kubena advised that, under the relevant Russian tax legislation, Yukos was not required to discharge the tax obligations of other taxpayers, regardless of whether they were affiliated parties.[1522]

1196. PwC's advice to Yukos was to set up a Board committee with independent legal counsel to carry out an investigation.[1523] Mr. Kosciusko-Morizet thus resurrected the special *ad hoc* Board committee and Yukos engaged the law firm Akin Gump to examine the tax reassessments. PwC explained in a letter to Yukos of 29 January 2004 that an independent investigation of the pending charges and allegations against key Yukos personnel would enable PwC to obtain an understanding of possible illegal acts for purposes of its own auditing standards.[1524] Mr. Kosciusko-Morizet said that "to understand this letter, you have to remember the events . . . if you know that the problem was political, as everybody did . . . . The answer is you get cold feet and you start hedging, and this letter in technical language is about hedging."[1525] PwC's persistence about the investigation led Mr. Kosciusko-Morizet to suggest at the time that PwC was "trying to evade its responsibilities."[1526] At the Hearing, he explained what he meant by this comment:

> You're an auditor, you're in Russia, you know it's political; you get cold feet. What do you do? You don't want to be involved in the matter, so you find reasons to technically withdraw from the issue. What happened here is that we made every effort to satisfy the PwC requirements. The effort continued. Akin Gump was hired. A couple of memos, interviews and so on. And in the midst of April . . . assets of Yukos . . . were frozen. So that was that. At that point, any realistic hope of having PwC approving the 2003 GAAP accounts disappeared, for it was practically impossible. Even though we had satisfied all their requirements, they would not have approved the accounts because they knew—they thought, "It's a political struggle. What about our office?" And they were right, because two years later they got into a problem that we all know about . . . . They know it's political; they don't want to be in the middle of the battle, they don't want to be touched. So they will keep raising arguments, technical arguments, in order not to be dragged into the fight.[1527]

1197. In April 2004, PwC decided they would no longer audit Yukos. Mr. Doug Miller, a PwC Moscow partner, explained several years later, in an interrogation before the Prosecutor

---

[1522] Letter from Michael Kubena to Bruce Misamore, 15 January 2004, Exh. C-609. An earlier draft of this letter also concluded that Yukos should not be liable for the trading shells' taxes, but did not exclude the possibility that there would be tax consequences for Yukos if the authorities and courts re-qualified its transactions and the nature of its business. Exh. C-1064, CP12026–27.

[1523] Letter from Donn Kingsley to Simon Kukes, 29 January 2004, Exh. C-1064, CP11726.

[1524] Transcript, Day 4 at 154–55.

[1525] *Ibid*., pp. 153–54.

[1526] E-mail from Jacques Kosciusko-Morizet to Bruce Misamore, 16 February 2004, Exh. C-1064, CP11807.

[1527] Transcript, Day 4 at 165–66.

General of the Russian Federation, that the results of the Yukos/Akin Gump investigation "were not final for us, they did not help us, i.e. we did not obtain the confirmation or comfort that would satisfy us as auditors. This was one of the factors which led to our refusal to audit the company in the future."[1528]

1198. The timing of PwC's April 2004 decision to cease auditing Yukos coincides with the period when, according to Mr. Rieger, harassment of PwC at the hands of the Russian authorities commenced. PwC employees involved in Yukos' Russian accounts were interrogated.[1529] In the spring of 2005, Mr. Miller told Mr. Rieger that he could not even meet with Yukos employees or management anymore, which Mr. Rieger understood to be a "direct result of the permanent pressure put by the Russian authorities on PwC."[1530]

(c) PwC Faces Mounting Pressure from the Russian Federation around the Same Time as Mr. Khodorkovsky's Second Trial Starts

1199. Pressure on PwC from the Russian authorities was sustained. In March 2006, a court case was brought against PwC for tax violations relating to expatriate salaries. There was speculation that the lawsuit was indirectly connected with investigations against Yukos.[1531]

1200. In December 2006, a second court case was filed against PwC by the Tax Inspectorate. The Tax Inspectorate accused PwC of colluding with Yukos on tax evasion. PwC categorically rejected the claims that the Yukos audit reports were defective in any professional, legal or regulatory way.[1532] While PwC acknowledged that it had raised certain matters with Yukos, it insisted that these matters did not materially affect the company's financial statements or alter PwC's opinion in respect of the financial statements.[1533]

1201. In March 2007, PwC's Moscow offices were raided by 50 officers from the Prosecutor General's Office and the Interior Ministry. Documents were seized and PwC was eventually

---

1528 Russian Federation General Prosecutor's Office, Record of Interrogation of Douglas Miller of PwC Russia, 4 May 2007, Exh. R-137 at 17.

1529 Rieger WS ¶ 18.

1530 *Ibid*.

1531 U.S. State Department Cable No. 07MOSCOW466, "Update on PWC's Russian tax issues," 2 February 2007, WikiLeaks Website, Exh. C-1352.

1532 "Official Position of PricewaterhouseCoopers," PwC Press Release, 25 December 2006, Exh. C-826; "Official Position of PricewaterhouseCoopers Regarding the Claims of Tax Inspectorate 5," PwC Press Release, 17 January 2007, Exh. C-827.

1533 *Ibid*.

fined.[1534] A press report observed:

> [w]hat is clear is that the firm's association with Yukos and the fact that the oil company was paralysed and eventually bankrupted after being slapped with more than US$30 billion in back-tax claims despite financial reports approved by PwC has made the auditor a clear target for Russian tax authorities.[1535]

1202. PwC published an official statement in which it "strongly object[ed] to the seizure of such information . . . [and] strongly denie[d] any wrongdoing in either the 2002 tax case or in relation to its audits," and stated that it continued "to work to resolve both matters."[1536] Mr. Kubena told the U.S. Embassy that the treatment of PwC employees during the March 2007 raids was "shocking" and a "disgrace."[1537] Nevertheless, he was reported as saying that he wished to limit the public profile of the case and urged restraint in discussing it until the facts were clear. He said that, in the meantime, PwC "better not . . . raise the public profile of the case in ways that could come back to hurt the prospects for a reasonable solution."[1538]

1203. On 20 March 2007, the Moscow Arbitrazh Court found against PwC in the Yukos audit case and imposed a fine.[1539] PwC employees, including Mr. Kubena, also faced criminal charges.[1540] Mr. Kubena expressed disappointment about the outcome to the U.S. Embassy, but again urged restraint when discussing the case in public.[1541] PwC was anxious about the renewal of its license. Having met with PwC representatives, the U.S. Ambassador sought reassurance from Finance Minister Kudrin, who advised the Ambassador that there was no basis for the license to be revoked.[1542] The press still speculated, however, that PwC might risk losing the license.[1543]

1534 *Russia, With Yukos Still in Sights, Raids PwC*, Wall Street Journal, 10 March 2007, Exh. C-832.

1535 *PwC Offices Searched in Yukos-Related Tax Evasion Investigation in Russia*, Global Insight, 12 March 2007, Exh. C-835; U.S. State Department Cable No. 07MOSCOW1028, "GOR Agencies visit PwC Moscow Office March 9," 12 March 2007, Wikileaks Website, Exh. C-1353.

1536 "PricewaterhouseCoopers' Official Statement," PwC Press Release, 12 March 2007, Exh. C-834.

1537 U.S. State Department Cable No. 07MOSCOW1028, "GOR Agencies visit PwC Moscow Office March 9," 12 March 2007, Wikileaks Website, Exh. C-1353.

1538 *Ibid*.

1539 *PwC Puts On a Brave Face After Losing Case*, Moscow Times, 22 March 2007, Exh. C-838; *see also* PwC Press Release, 20 March 2007, Exh. C-836.

1540 Letter from the Russian Federation Prosecutor General's Office to Michael Kubena, 26 June 2007 and Resolution On Denial to Initiate Prosecution against ZAO PricewaterhouseCoopers Audit, 25 June 2007, Exh. C-1243.

1541 U.S. State Department Cable No. 07MOSCOW1210, "Russia: PWC fined in Yukos tax audit case," 21 March 2007, Wikileaks Website, Exh. C-1354.

1542 U.S. State Department Cable No. 07MOSCOW1354, "Ambassador's 3/27 meeting with Finance Minister Kudrin," 28 March 2007, Wikileaks Website, Exh. C-1355.

1543 *Court Blasts PricewaterhouseCoopers*, Kommersant, 2 April 2007, Exh. C-845.

In fact, the license was renewed in April 2007 but PwC continued to fear that it would be revoked long after.[1544] Press reports in April also noted that PwC had started losing clients, including State-owned companies Transneft and Sakhalin II.[1545]

1204. While these events were unfolding, in early 2007, prosecutors filed new charges against Mr. Khodorkovsky, causing PwC to start an internal review. According to the declaration of a PwC in-house counsel in a separate forum, PwC was at that time already considering and drafting a possible withdrawal of the audits.[1546]

1205. In April 2007, the Russian tax authorities asked the Finance Ministry to initiate a "review" of PwC's auditing practices.[1547] On 18 April 2007, PwC received a summons from prosecutors in the second Khodorkovsky trial. The prosecutors wanted to interrogate Mr. Miller while reprimanding PwC for failing to cooperate with earlier requests.[1548] On 19 April 2007, PwC urgently recalled Mr. Miller from his new post in London. They informed him that PwC was now cooperating with investigators. Mr. Miller was instructed to attend the Prosecutor General's Office, where he was interrogated on six occasions in May and June.[1549] During these sessions he was presented with "new" evidence obtained in connection with the Khodorkovsky prosecution.[1550] Other PwC personnel were also interrogated in the first half of 2007. During his last interrogation session, on 4 June 2007, Mr. Miller told the prosecutor that, in his opinion, the audit opinions issued in respect of Yukos' financial statements "starting from at least 1999 should be withdrawn."[1551]

1206. The Tribunal notes that, on 14 June 2007, the Prosecutor General's Office wrote to Mr. Kubena that, in connection with criminal investigations of Messrs. Khodorkovsky and Lebedev, "the

---

1544 Order of the Ministry of Finance of the Russian Federation No. 348, 19 April 2007, Exh. R-885; U.S. State Department Cable No. 07MOSCOW5403, "PWC's travails in Russia worsen," 15 November 2007, Exh. C-1360.

1545 *PwC loses Russia's Sakhalin-2 audit contract*, Reuters, 13 April 2007, Exh. C-855; *Russia's Transneft drops PwC as auditor, picks KPMG*, Reuters, 25 April 2007, Exh. C-858.

1546 In the Matter of an Application of Michael Khodorkovsky and Platon Lebedev for an Order Seeking Discovery Under 28 U.S.C. § 1782, Declaration of Laurie Endsley, 31 January 2011 ¶ 9, Exh. R-881.

1547 U.S. State Department Cable No. 07MOSCOW3343, "Russia: PricewaterhouseCoopers Withdraws Audits of Yukos," 9 July 2007, Exh. C-1358.

1548 Letter from Russian Federation Prosecutor General's Office to PwC, 18 April 2007, Exh. C-1241.

1549 Letter from ZAO PwC Audit to Doug Miller, 23 April 2007, Exh. C-1242.

1550 Russian Federation Prosecutor General's Office, Records of Interrogations of Douglas Miller of PwC Russia, 4 May 2007, Exh. R-137; 8 May 2007, Exh. R-17; 10 May 2007, Exh. R-18; 4 June 2007, Exh. R-871.

1551 Russian Federation Prosecutor General's Office, Records of Interrogations of Douglas Miller of PwC Russia, 4 June 2007, Exh. R-871.

investigation has at its disposal data that certain persons at the present time are relying" on PwC's audit reports for Yukos.[1552] PwC was asked to consider whether its Yukos audit reports "ought to be relied upon" and whether PwC could confirm the reliability of the financial reports for 1995–2004 in light of "information, that had earlier been inaccessible to the auditors."[1553] The Tribunal also notes that the following day PwC withdrew its Yukos audit reports.

(d) PwC's "Volte-Face" in Withdrawing the Yukos Audits; Improved Treatment and Continued Pressures in the Russian Federation

1207. On 15 June 2007, in a letter from Mr. Kubena to Yukos' receiver, Mr. Rebgun, PwC withdrew all of its audit reports for Yukos for the years 1995 to 2004 on the basis of "new information" it had received that had caused it to lose confidence in Yukos' management.[1554] Four categories of "new" information were highlighted by PwC, concerning:

- control over Behles Petroleum S.A., Baltic Petroleum Trading Limited and South Petroleum Limited (the "**BBS Companies**");
- Yukos' control over the trading companies and consequential avoidance of profit tax;
- Yukos' purchases of Bank Menatep's liabilities; and
- compensation to certain individuals who had led Yukos at the time of its privatization.[1555]

1208. Senior PwC manager Pete Gerendasi reportedly explained to the U.S. Embassy that the "new" information had been carefully reviewed and deemed credible; that PwC's U.S. headquarters had been closely consulted; and that PwC had concluded after a thorough review that, "since Yukos was no longer a going concern, the only viable option was to withdraw its audits."[1556] The Embassy observed that Mr. Gerendasi was uncomfortable discussing the sources of the "new" information but that he was "unequivocal" that the withdrawal was "a difficult call."[1557]

1552 Letter from the Russian Federation Prosecutor General's Office to PwC, 14 June 2007, Exh. C-610.

1553 Letter from the Russian Federation Prosecutor General's Office to PwC, 14 June 2007, Exh. C-610; *see also* In the Matter of the Application of Michael Khodorkovsky and Platon Lebedev for an Order Seeking Discovery Under 28 U.S.C. 1782, Deposition of Douglas Miller, 18 December 2009, p. 257, Exh. R-4309 (hereinafter "Miller Deposition").

1554 PwC's Withdrawal Letter, Exh. C-611.

1555 *Ibid*.

1556 U.S. State Department Cable, 07MOSCOW3343, "Russia: PricewaterhouseCoopers Withdraws Audits of Yukos," 9 July 2007, Wikileaks Website ¶ 3, Exh. C-1358.

1557 *Ibid*. ¶ 7.

As described in the Wikileaks cable, at the time, PwC was still facing: (a) a review by the Finance Ministry of its auditing practices; (b) an appeal regarding the expatriate tax case; and (c) an appeal regarding the Yukos collusion case.[1558] While Mr. Gerendasi noted that PwC's legal counsel "was uncertain what effect PwC's decision to withdraw its Yukos audits would have on the outcome" of the Yukos collusion case, he stated that "the withdrawal would not have an adverse effect on the Finance Ministry's review of PwC's auditing practices."[1559]

1209. PwC made a public announcement of its withdrawal decision on 24 June 2007.[1560] The *Financial Times* reported:

> PwC's sudden about face comes after a government pressure campaign that included police raids in March on its Moscow office and an ongoing criminal investigation into alleged underpayment of taxes by Yukos. The audit firm has also risked losing its license . . . . The move will strengthen the Kremlin's case against Mikhail Khodorkovsky.[1561]

1210. The Tribunal notes that just one day after the public announcement, the criminal charges against Mr. Kubena and other PwC personnel were dropped.[1562] In dropping the charges, the prosecutor noted that "the unjustified nature of the [audit opinions] . . . was the result of misrepresentation by [Yukos'] major shareholders and the persons acting on their instructions."[1563]

1211. In July 2009, the *Financial Times* reported that the prosecutors had cleared PwC with respect to its Yukos audits, having found no wrongdoing by the firm. PwC was "pleased . . . the general prosecutor ha[d] decided not to take any action against PwC Russia, its partners or employees."[1564]

1212. PwC has always denied that there was a tit-for-tat deal whereby the Russian authorities would drop their cases against PwC in return for PwC withdrawing its audits. PwC told the *Financial Times* that "the audit firm's apparent reversal of fortune had nothing to do with its withdrawal

---

1558 *Ibid*. ¶¶ 4–6.

1559 *Ibid*. ¶ 6–7.

1560 "Withdrawal of Yukos Audit Reports," PwC Press Release, 24 June 2007, Exh. C-864.

1561 *PwC withdraws Yukos audits*, Financial Times, 25 June 2007, Exh. C-865.

1562 Letter from Russian Federation Prosecutor General's Office to PwC, 26 June 2007, enclosing Resolution on Denial to Initiate Prosecution against ZAO PriceWaterhouseCoopers Audit, 25 June 2007, Exh. C-1237.

1563 *Ibid*.

1564 *Moscow clears PwC over Yukos audits*, Financial Times, 19 July 2007, Exh. C-874.

of the audits . . . and nothing to do with any attempt to reduce the legal pressure."[1565] A few years later, in a 2009 deposition conducted in the U.S. by Mr. Khodorkovsky's criminal lawyers, Mr. Miller categorically denied any connection between PwC's decision to withdraw its audits and the legal pressure against PwC:

> Q. Mr. Miller, how much did the—did the criminal investigation into PwC in 2007 impact PwC's decision to withdraw the audits?
>
> . . .
>
> THE WITNESS: I believe that the decision to withdraw was based firmly [on] the information that was shown to us . . . during the investigation.
>
> Q. And is it the same answer as to the tax claims filed against PwC?
>
> A. Yes.
>
> . . .
>
> Q. And did you receive any assurances from the investigators, including Mr. Karimov, that if PwC withdrew the audits, that the criminal investigation against PwC would be terminated?
>
> A. No.
>
> Q. Have you received any other assurances from the investigators as to treatment of PwC if you were—if PwC were to withdraw the audit letters?
>
> A. No.
>
> . . .
>
> Q. How about any of the investigators from the Russian authorities, did anybody ask you to develop reasons to withdraw the Yukos audits?
>
> A. No.
>
> Q. Are you aware of anyone from the . . . [Prosecutor General's Office] asking PwC to develop reasons to withdraw the audits?
>
> A. No, I'm not aware of that.[1566]

1213. At the same time, the Tribunal notes that an October 2007 Wikileaks cable reveals that Messrs. Kubena and Gerendasi of PwC conveyed to the U.S. Embassy "that the Yukos and expatriate salary tax cases against the auditor were politically motivated."[1567] Mr. Kubena speculated that the case against PwC for colluding with Yukos might have been "an effort by the [Government of Russia] to prove ex post facto that its actions against Yukos had a legitimate basis."[1568] Mr. Gerendasi drew a direct connection between the expatriate tax case

---

1565 *Ibid.*

1566 Miller Deposition, pp. 256–7, 264, Exh. R-4309.

1567 U.S. State Department Cable No. 07MOSCOW5083, "Update on PWC's Yukos, Russian tax cases," 19 October 2007 ¶ 1, Exh. C-1359.

1568 *Ibid.*

against PwC and the prosecution against Yukos' former management, saying that "tax and law enforcement authorities may be trying to cast PwC as reckless in an attempt to underscore that the [Government of Russia] rightfully prosecuted Yukos senior management."[1569] Following this meeting, the Ambassador commented that "PwC is under serious duress in Russia."[1570]

1214. The following month, PwC told the Embassy it was worried that the criminal charges laid in the context of the expatriate tax case had "devolved into a pressure tactic against the firm."[1571] As for the Yukos tax case, which was on appeal, Mr. Gerendasi noted that "[a]lthough the potential financial penalties in this case were only on the order of USD 500,000 . . . the real threat remained to the firm's auditing license."[1572] The Ambassador noted that "Russia matters to PwC," and that "[d]espite the rather stark picture Gerendasi painted, he said that PwC remained bullish on Russia and intended to maintain its operations in-country . . . . He added that in the interest of facilitating a resolution to the firm's short-term difficulties, PwC's international leadership would try to meet with senior [Russian governmental] officials in the near future."[1573]

1215. Mr. Miller and other PwC employees then cooperated as prosecution witnesses in the second Khodorkovsky trial. The record discloses that they consulted with the prosecutors prior to their testimony, as demonstrated by an e-mail dated 28 March 2009 from the Prosecutor General's Office, in which the prosecutors answered questions posed by Mr. Miller as follows:

> *2. For every witness, exactly on what issues and/or arguments should they dwell in their witness testimony?*
>
> - The testimony of each witness from among your company's employees should be unified, that is testify to the same thing, in the same sense and featuring the same style (offensive and aggressive with regard to the Defense) . . .
>
> *3. Can we obtain a list of approximate expected questions by the Prosecutor for each witness?*
>
> - Carefully analyze your testimony (records of interrogations) and recall our recent conversation: you will understand the general meaning of such questions. You and I should phrase specific questions ourselves once you have personally got to the bottom of the situation.[1574]

1569 *Ibid*. ¶ 5.

1570 *Ibid*. ¶ 6.

1571 U.S. State Department Cable No. 07MOSCOW5403, "PWC's travails in Russia worsen," 15 November 2007 ¶ 4, Exh. C-1360.

1572 Ibid. ¶ 5.

1573 *Ibid*. ¶ 8.

1574 E-mail from Sergei Mikhailov to Doug Miller, 28 March 2009, Exh. C-1244.

1216. In December 2009, the U.S. Embassy commented on the role that PwC played in the Khodorkovsky trial and related Yukos lawsuits. It observed as follows:

> . . . if the audits were properly withdrawn, this will be a "black mark" for the [Yukos/Khodorkovsky] defense; if not, it could help the defense, but would greatly tarnish PWC's international reputation . . . . [The Khodorkovsky trial is] applying a superficial rule-of-law gloss to a cynical system where political enemies are eliminated with impunity . . . . There is a widespread understanding that Khodorkovskiy violated the tacit rules of the game: if you keep out of politics, you can line your pockets as much as you desire. Most Russians believe the Khodorkovskiy trial is politically motivated . . .[1575]

1217. Eventually the two court cases against PwC were resolved in PwC's favor and PwC's fines were refunded.[1576] Meanwhile, Mr. Miller's evidence, and that of other cooperative PwC witnesses, was accepted and relied upon by the trial judge who found Mr. Khodorkovsky guilty at the conclusion of his second criminal trial.[1577]

3. Parties' Arguments and Tribunal's Observations

1218. The main question the Tribunal will address is whether PwC's withdrawal of its Yukos audits was a decision brought about by pressure from the Russian Federation, as Claimants argue, or whether PwC decided to withdraw the audit opinions out of the genuine concern that they were tainted by newly-discovered misrepresentations, as Respondent argues. There is a third possibility as well, namely, that PwC's withdrawal of its audits was a tactical response to pressure of the Russian authorities but that nevertheless PwC did have some valid grounds to believe that Yukos had made important misrepresentations to it.

(a) Did PwC Withdraw its Audits because it was under Pressure from the Russian Government?

1219. Claimants' witnesses were unequivocal. In their view, PwC gave in to pressure from the Russian authorities when it withdrew the audits. Mr. Rieger had noticed that after the attacks on Yukos began in 2003, "PwC grew much more distant from Yukos . . . . I understood this to be the direct result of the permanent pressure put by the Russian authorities on PwC."[1578]

1575 U.S. State Department Cable No. 09MOSCOW3144, "Rule of Law Lipstick on a Political Pig: Khodorkovskiy case plods along," 30 December 2009 ¶¶ 3, 8, Exh. C-1361.

1576 *Tax Authorities Performed Their Duty to Yukos' Auditor*, Kommersant, 19 June 2009, Exh. R-4310.

1577 Verdict of the Khamovnichesky Court of Moscow in the second criminal case against Michael Khodorkovsky and Platon Lebedev, 27 December 2010, pp. 448–49, Exh. C-1057.

1578 Rieger WS ¶ 18.

Mr. Misamore stated at the Hearing his belief that "PwC withdrew its audit reports as a result of tremendous pressure from the Russian Government . . . ."[1579] Mr. Kosciusko-Morizet agreed. He testified:

> Well, knowing Russia, knowing that this whole Yukos affair is basically political, with a financial dimension for some people of course, there is a complete logic here in the harassment that PwC was submitted to from December 2006; the raid on their offices, the usual methods of armed masked men with machine guns, in March; their denial again of any wrongdoing in April; and finally this letter, I would not say written but signed by Doug Miller; and then I believe that all the criminal prosecutions disappeared in a matter of days . . . . I saw this letter. I considered that this letter was extorted from them by force. I know and they know what happened to the Yukos personnel, Vasily Aleksanyan, . . . Svetlana Bakhmina and others; there is a long list. And they had to face a decision between, of course, protecting their business and protecting their people, especially their Russian personnel, from dire consequences and/or insisting on no wrongdoing; that is, keeping the ethical line . . . . But PwC, as everybody else, was familiar with the kind of treatment you could expect if you resist in that context, and they made a decision—I don't blame them for that decision—protecting their staff. It's just unethical but realistic. And now they have a thriving business in Moscow.[1580]

1220. Respondent did not deny that the raids, seizures and lawsuits occurred, but explained they were part of regular law enforcement activities. Respondent pointed out, for example, that many companies (including Ernst & Young) faced lawsuits about expatriation tax issues. It argued that auditor collusion lawsuits are standard in other countries.[1581]

1221. The record before the Tribunal is abundantly clear. PwC's treatment improved significantly once it started to cooperate with the authorities and then withdrew its audits. Almost overnight, charges were dropped against PwC personnel. PwC's own legal problems started to be resolved. At the same time, some cases took longer to resolve, and concerns by PwC over loss of its license were real. It is clear that cooperation from PwC, once given, was expected to be enduring. This is easily understood. Mr. Khodorkovsky's second trial was still ongoing.

1222. Respondent relies heavily on Mr. Miller's deposition to contradict Claimants' account of the events.[1582] That deposition was taken under oath in the U.S., at the request of Mr. Khodorkovsky's own lawyers, and, according to Respondent, it is "hard to imagine a

---

[1579] Transcript, Day 9 at 182.

[1580] Transcript, Day 4 at 203–04. For Mr. Kosciusko-Morizet's testimony at the second Khodorkovsky trial, *see also* Verdict of the Khamovnichesky Court of Moscow, 27 December 2010, pp. 468ff, Exh. C-1057.

[1581] Rejoinder ¶ 1283.

[1582] *Ibid*. ¶¶ 1273–74.

clearer or more credible denial of Claimants' 'harassment' theory."[1583]

1223. Although Mr. Miller was not offered as a witness, the Tribunal does not accept his denial in another forum of any link between PwC's decision to withdraw the audits and the pressure against PwC mounted by the Russian authorities. Mr. Miller was then subjected to six sessions of interrogation. When he was recalled from London his superiors instructed him to cooperate with the Russian authorities. The March 2009 e-mail exchange with the prosecutor's office, suggests that he was prepared to cooperate when he testified in Mr. Khodorkovsky's second trial. Moreover, the candid views expressed by PwC officials in the U.S. Embassy's cables published by Wikileaks confirm that PwC was under pressure. The cables demonstrate that PwC was concerned not to aggravate its difficulties with the Government ("better not raise the public profile of the case in ways that could come back to hurt the prospects for a reasonable solution");[1584] that PwC was anxious not to lose its license or its business in Russia;[1585] that it considered the Yukos cases to be politically motivated and saw some connections between the withdrawal of the audit opinions and PwC's treatment by the Russia Government;[1586] and that it felt that criminal charges in the expatriate tax case were being used as a "pressure tactic."[1587] The Embassy considered PwC to be under duress and concluded that "the political and legal concerns that are driving the heightened scrutiny of PWC's accounting practices appear to have taken on a life of their own."[1588]

(b) Were the Grounds Provided by PwC in its Withdrawal Letter Contrived or Credible?

1224. As noted earlier, Claimants assert that PwC played a role in establishing and auditing Yukos' domestic and international structures, and that, at all times, PwC had access to all the

---

1583 *Ibid*. ¶¶ 1274–75.

1584 U.S. State Department Cable No. 07MOSCOW1028, "GOR Agencies visit PwC Moscow Office March 9," 12 March 2007, Wikileaks Website, Exh. C-1353.

1585 U.S. State Department Cable No. 07MOSCOW5403, "PWC's travails in Russia worsen," 15 November 2007 ¶ 5, Exh. C-1360.

1586 U.S. State Department Cable No. 07MOSCOW5083, "Update on PWC's Yukos, Russian tax cases," 19 October 2007 ¶¶ 1, 5, Exh. C-1359.

1587 U.S. State Department Cable No. 07MOSCOW5403, "PWC's travails in Russia worsen," 15 November 2007 ¶ 4, Exh. C-1360.

1588 *Ibid*. ¶ 9.

information it required.[1589]

1225. Respondent on the other hand points to "a long and troubled relationship" between Yukos and PwC, recalling that PwC had refused to continue to audit the company's U.S. GAAP statements after 2003.[1590] Respondent asserts that in 2007 PwC withdrew its opinions in good faith, upon learning "new information" via Mr. Miller's interrogations in May and June 2007.[1591] Respondent emphasizes "that the Tribunal is not a trier of fact as to the reliability of the information learned by PwC. In order to rebut Claimants' unsupported harassment theory, it is sufficient that PwC had a good-faith belief in the credibility of that information. . . ."[1592] According to Respondent, it is for Claimants to prove that Yukos never lied to PwC and that PwC's four reasons for withdrawal of the audits were a mere pretext. Although the Tribunal agrees with Respondent that it is not a trier of facts as to the soundness of this "new information," it finds it appropriate to examine those four reasons.

i. Did Yukos' Management Lie to PwC about the BBS Companies Being "Related"?

1226. The first category of alleged misinformation identified in PwC's Withdrawal Letter was the following:

> Whilst we were auditing the Company, its management many times declared to us that the Company and companies to which substantial volumes of crude oil and oil products were exported, namely Behles Petroleum S.A., Baltic Petroleum Trading Limited and South Petroleum Limited (hereinafter together referred to as "BBS"), were not affiliated parties. In the course of the Investigation, we were provided with information showing that BBS had been controlled by the shareholders of Group Menatep Limited (hereinafter "Group Menatep") and had been used to their advantage. At the material time, Group Menatep held a controlling block of shares in the Company.[1593]

1227. It appears as if Yukos' management had repeatedly assured PwC that Yukos was not "related" to the BBS Companies (in the sense of sharing the same beneficial owners within the meaning

---

[1589] At the Hearing, Mr. Misamore stated that he did not "agree that anything was misrepresented to PwC." In his view, "PwC had access to all the information they wanted; and if they didn't have sufficient information, they should have asked for more." Transcript, Day 9 at 249. Mr. Theede also testified that up until the Russian Federation's attack on PwC began, "there was never any indication of any concerns or problems or anything to me." Transcript, Day 11 at 50. *See also* Misamore WS ¶ 29; Rieger WS ¶ 18; Kosciusko-Morizet WS ¶ 17.

[1590] Respondent's Opening Slides, p. 205; Respondent's Post-Hearing Brief ¶ 61.

[1591] Respondent's Post-Hearing Brief ¶ 61.

[1592] *Ibid*.

[1593] PwC's Withdrawal Letter, Exh. C-611.

of GAAP standards).[1594] PwC had looked at the issue itself and expressed doubts, but concluded that even if they were related, the transactions with the BBS Companies were done under fair market conditions, and were so immaterial that they could have no impact on the financial statements and thus did not need to be disclosed.[1595] Then, in 2007, while being interrogated, Mr. Miller found out "new information," in the form of the record of an interrogation of a Mr. Anilionis, who described how the BBS Companies were set up in a structure that would enable Messrs. Khodorkovsky and Lebedev to "keep [them] under control but on the surface the structure should not belong to 'Yukos.'"[1596] A trade office was set up in Geneva, prices were coordinated with Mr. Lebedev, and Yukos' employees were responsible for oil trading activities. The discovery of this "lie", even though relating to an immaterial matter from a financial reporting standpoint, is said to have shattered PwC's confidence in the statements of Yukos' management and thus caused PwC to withdraw its audit opinions.[1597] Claimants say it is simply not credible for PwC to have invoked the BBS Companies issue as an excuse to withdraw its audit opinions.[1598] They also question the reliability of the source of "new information," the interrogation of Mr. Anilionis.[1599]

1228. When Mr. Kosciusko-Morizet was shown documents indicating that PwC had raised concerns in the past about Yukos' relationship with the BBS Companies, he emphasized that PwC had approved Yukos' G.A.A.P. accounts and thus " any problem they might have had was solved."[1600] Mr. Misamore also confirmed the view that the BBS Companies were not related parties vis-à-vis Yukos, that the issue had been on PwC's radar, and that PwC could have caused Yukos to identify the BBS Companies as related if it were essential, but did not.[1601]

1229. Mr. Misamore denied that PwC had repeatedly recommended that Yukos disclose the ownership structure of the BBS Companies and that Yukos had refused such disclosure. He explained that PwC had conducted a study in 2002 and that it had not been able to "reach a

---

1594 Mr. Misamore confirmed on cross-examination that he still believed that they were unrelated. Transcript, Day 9 at 171.

1595 PwC Memorandum "Matters for Partner Attention – Summary of Significant Issues," 31 December 2000, item 8, Exh. C-1232; *see also* Record of Interview of Bruce Misamore, 9 March 2009, pp. 49–50, Exh. R-3347.

1596 Interrogation Protocol of G.P. Anilionis, 18 January 2007, p. 15, Exh. R-3581.

1597 Miller Deposition, pp. 176–77, Exh. R-4309.

1598 Reply ¶ 457.

1599 Transcript, Day 20 at 203 (Claimants' closing).

1600 Transcript, Day 4 at 124; *see also* Transcript, Day 4 at133.

1601 Transcript, Day 9 at 176–77.

conclusion as to whether or not [information about Yukos' relationship with the BBS Companies] should be disclosed."[1602] Further, he noted that PwC signed Yukos' audited financial statements without that information. Upon being shown an internal PwC document, "Matters for Partner Attention", for year 2000, wherein PwC stated that "[t]he absence of disclosure, while not desirable, does not constitute a material omission,"[1603] Mr. Misamore said that this document too supports his view that disclosure was not so desirable as to warrant PwC insisting on its inclusion in Yukos' F-1 document.[1604]

1230. Nevertheless, the Tribunal is unconvinced by the claims that the BBS Companies, apparently the, or certainly, a, principal exporter of the oil produced by Yukos, were not controlled by or related to Yukos. PwC's contention that it was misled in this regard may have been true.

ii. Did Yukos Management Lie to PwC about Yukos' Control over the Trading Companies?

1231. The second category of alleged misinformation identified in PwC's Withdrawal Letter was the following:

> Now we have information demonstrating that the management of certain Russian legal entities affiliated with the Company did not control the activities of these entities, rather these legal entities were fully controlled directly by the Company's management. Since the management of these affiliated entities were not in control of these entities' activities, the court found that these activities were fictitious. Consecutively, the courts found that the profit earned by these legal entities affiliated with the Company was a profit of the Company, and therefore the Company should have accrued and paid taxes on this profit. Nevertheless, in the course of the audits, the Company's management told us that key issues of the activities of these affiliated legal entities were under supervision and control of their own management.[1605]

1232. This is an issue that was traversed at length in Chapters VIII.A and B of the present Award.

1233. Claimants argued that PwC was fully aware of the structures of the trading companies, and that in the context of the preparation of Yukos' U.S. GAAP financial statements, PwC had given specific and detailed advice to Yukos on how to demonstrate control over affiliated companies

---

1602 *Ibid*. at 64.

1603 PwC Memorandum "Matters for Partner Attention—Summary of Significant Issues," 31 December 2000, p. 6, Exh. C-1232.

1604 Transcript, Day 9 at 178.

1605 PwC's Withdrawal Letter, Exh. C-611.

so that they could be included within the consolidation umbrella.[1606] Respondent accuses Claimants of conflating concepts of accounting (control relationships amongst various Yukos entities for consolidation purposes under the U.S. GAAP), which PwC *did* understand, with questions of tax (how much *actual* control Yukos exerted at an operational level over the trading shells from Moscow while maintaining the fiction of management in the low-tax region to avoid tax under Russian tax law), which PwC certainly did *not* appreciate, because it never audited the trading companies.[1607] Respondent does not actually refer to any "new" information PwC learned which would have caused them concern about this in June 2007; it simply points to a series of negatives (PwC did *not* design the trading company scheme, PwC did *not* audit the trading companies).

1234. At the hearing, Respondent referred to the August 2007 interrogation of Mr. Kubena's predecessor as PwC tax advisor in Russia, Mr. Klubnichkin, to show PwC never audited the trading companies.[1608] While PwC was fully aware of Yukos' use of the tax optimization scheme, Mr. Klubnichkin said, it was *not* aware of any abusive elements. Mr. Klubnichkin said that as Yukos' auditor, PwC had "never been aware of the fictitious nature of these 'operational' companies . . . . The deceit lies in the fact that a corporation creates false appearance of normal activity, of a serious business, with respect to a fictitious business . . . . We could only learn about such nature of these companies in case of a full audit of these companies themselves, which would include our visits to their operational premises."[1609] The Tribunal notes that Mr. Klubnichkin's interrogation took place in August 2007, *after* the PwC withdrawal.

1235. Respondent submits that PwC did not know about the Lesnoy assessments. Respondent thus disputes that PwC was ever aware that the trading companies were sham entities directly controlled by Yukos from Moscow, and disputes that Yukos' tax scheme was adopted on PwC's advice or recommendation.[1610]

1236. Claimants' response is two-fold. Firstly, they refer to oral and documentary evidence in the

---

[1606] *See* Reply ¶¶ 469–70, referring to PwC Memorandum "Audit Summary Points and Matters For Partner Attention—31 December 1999 and 1998," Exh. C-1230; and for 2001, Exh. C-1233.

[1607] Respondent's Post-Hearing Brief ¶ 64.

[1608] Respondent's Closing Slides, pp. 205, citing Interrogation of K.M. Klubnichkin, 1 August 2007, Exh. RHB-S-72 (in English)/C-1065, RP 9988-9997 (in Russian).

[1609] Interrogation of K.M. Klubnichkin, 1 August 2007, Exh. RHB-S-72 (in English)/C-1065, RP 9988-9997 (in Russian).

[1610] Respondent's Post-Hearing Brief ¶¶ 65–67.

record confirming PwC's participation in the Yukos tax scheme in the regions.[1611] They point to a contemporaneous internal memo from PwC Cyprus to PwC Moscow, which discloses that PwC was familiar with the details of the group structure and the relationships of the trading companies.[1612] In addition, Claimants underline the closeness of Yukos' relationship with PwC as shown by PwC's attendance at an "international symposium" held by Yukos in early 2002, at which tax issues, group structure, international accounting standards and related party disclosure requirements were discussed.[1613]

1237. Finally, Claimants point to a timing problem that in their view undermines the credibility of PwC's statement that it obtained "new information" only in May 2007. The Tribunal finds much force in Claimants' submission that PwC was on notice of the Russian Federation's alleged concerns about Yukos' tax optimization structure at least as early as January 2004, when it issued its opinion on the 2000 Audit Report. As Yukos' auditor since 1997, PwC obviously had a strong incentive in ensuring that its previous audit reports were accurate, and if there was anything new or worrying in what it had seen, it would have raised it at the time. PwC did not withdraw the audits in 2004, 2005, or 2006 when the issues were being aired through the Russian courts and in the public domain. Rather it waited three and a half years, and then suddenly decided that there was "new information" on the basis of which the audits should be withdrawn.

iii. Did Yukos' Management Lie to PwC about Transactions with Bank Menatep?

1238. The third category of alleged misinformation identified in PwC's Withdrawal Letter was the following:

> In the course of the Investigation, we were shown documents demonstrating that the Company had made significant payments to meet liabilities of the companies effectively

---

[1611] Claimants' Post-Hearing Brief ¶¶ 135–42, citing Transcript, Day 6 at 27 (cross-examination of Mr. Rieger); Transcript, Day 4 at 27 (cross-examination of Mr. Kosciusko-Morizet). Mr. Misamore recalled that it was PwC's recommendation to use indirect control for purposes of consolidation. Transcript, Day 9 at 34. Mr. Theede recalled that PwC had been the "architect" of the domestic trading companies' structure. Transcript, Day 11 at 50. Mr. Kosciusko-Morizet specified that Yukos, as in the case of other Russian companies, had "made use of means of tax optimization that were provided for by Russian law" and that "these means had been recommended and put in place by PwC's experts." Morizet WS ¶ 24. *See also* Letter from Enrique Munoz to Michel Soublin, 13 October 2000, Exh. C-1064, CP1408.

[1612] Transcript, Day 16 at 157, citing to Letter from Chris Santis (PwC Cyprus) to Kelly Allin (PwC Moscow), 10 April 2003, Exh. R-349.

[1613] Claimants' Post-Hearing Brief ¶ 146, citing to Minutes of Yukos Moscow International Symposium, 29–31 January 2002, Exh. C-1064, CP4146.

> owned and controlled by Group Menatep before AKB Menatep Bank. Complete information about the nature of these transactions and relations was not disclosed to us in the course of the audits.[1614]

1239. This "new information" concerned transactions going back to the late 1990s, when Yukos purchased what Respondent calls "worthless claims" against Bank Menatep, which was in bankruptcy at the time.[1615] The principal shareholders of Bank Menatep were the same as the principal shareholders of Yukos. PwC was concerned that the purchase of claims against a bankrupt bank was undertaken to further the interests of the companies' common shareholders, using Yukos' funds and at the expense of Yukos' minority shareholders. By May 2000, Yukos had accumulated USD 500 million in claims against Bank Menatep, but had at most USD 220 million in guarantees.

1240. During one of the 2007 interrogations, Mr. Miller was shown minutes of a May 2000 meeting, in which Yukos' managers stated that "it would be not be desirable to disclose this information since those shares were bought out from the borrowers."[1616] The minutes then state that "[i]t is necessary to immediately demonstrate to the Company's auditors the intention to sell the excess of the purchased assets—with a book profit—to unrelated third parties. . . ." Although Mr. Miller could not in fact remember if he worked on this issue or if the information was disclosed to PwC, he was outraged what he described as the "unacceptable manipulation of information" revealed by the minutes and by Yukos' plan to lie to the auditors about its worthless claims against Bank Menatep.[1617]

1241. Claimants assert that PwC was always fully aware of the substance of the transactions concerning the assumption of Bank Menatep's debt, and that the transactions were accounted for in Yukos' financial statements and draft F-1 forms.[1618]

[1614] PwC's Withdrawal Letter, Exh. C-611.

[1615] White & Case, Memorandum, 25 July 2001, Exh. R-3585.

[1616] Minutes of Meeting, 31 May 2000, Exh. C-1231.

[1617] Reply ¶ 481, citing to Russian Federation General Prosecutor's Office, Record of Interrogation of Douglas Miller, 4 June 2007, Exh. R-871.

[1618] Yukos U.S. GAAP Consolidated Financial Statements, 31 December 1999, Exh. C-1066; for 2000, Exh. C-27; for 2001, Exh. C-28; Draft Yukos F-1 Form and Registration Statement Under the Securities Act of 1933, 19 March 2003, Exh. C-1067.

iv. Did Yukos' Management Lie to PwC about its Compensation Payments to Certain VPL Managers?

1242. The fourth category of alleged misinformation identified in PwC's Withdrawal Letter was the following:

> The Company failed to timely disclose to us information about certain payments made by the shareholders of Group Menatep in favor of certain individuals, who were leading executives of the Company at the time of its privatization. In the course of the Investigation, some information disclosed to us ran counter to the explanations given to us by the management and shareholders of the Company in the course of our audits with regard to the exact nature of those payments.[1619]

1243. This allegation concerned the extraordinarily generous compensation plan that had been put in place for certain persons who had been managers of Yukos at the time of its privatization. PwC suspected that the immense sums paid to those persons could not have been for services rendered to Yukos itself. Respondent alleges that Yukos had misrepresented to PwC the purpose of the compensation plan. PwC's long-held suspicion about the nature of the payments was only confirmed when the Prosecutor General showed Mr. Miller statements signed by the beneficiaries of the payments to the effect that they had been made to them "not for services provided to Yukos but were . . . connected to Group Menatep's acquisition of Yukos."[1620] Mr. Miller expressed "indignation" at the "lie" and alleged that Mr. Khodorkovsky had told him he would go to jail if forced to disclose the real reason for the payments.[1621] This category of so-called "lies" was seen as important to PwC not in terms of material effect on the audited reports, but insofar as they undermined the credibility of Yukos' management's statements.[1622]

1244. Claimants affirm that Mr. Miller had always been familiar with the payment arrangements. How the payments are identified in the accounts is only an accounting issue (as opined by Clifford Chance and Cleary Gottlieb at the time).[1623] When PwC signed off on the Yukos financial statements, they were aware of the issue. Even Mr. Miller acknowledged that the

---

[1619] PwC's Withdrawal Letter, Exh. C-611.

[1620] Counter-Memorial ¶¶ 724, 728, citing to Minutes of Audit Committee of the Yukos Board of Directors, 26 February 2003, Exh. R-3583.

[1621] Russian Federation Prosecutor General's Office, Record of Interrogation of Douglas Miller, 10 May 2007, p. 8, Exh. R-18.

[1622] Miller Deposition, pp. 176–77, Exh. R-4309.

[1623] Reply ¶ 461, citing to E-mail from Doug Miller to Bruce Misamore, 14 August 2002, attaching PwC Memorandum "Veteran Managers' Plan and Agreement: Determination of Accounting for Plan," Exh. C-1235.

"reliability of the financial statements is not affected."[1624] Claimants were prepared to disclose the existence and purpose of the compensation fund to the public for the ADR listing.[1625]

(c) Concluding Observations

1245. The Tribunal observes that there are some notable timing problems concerning the date of PwC's withdrawal following the revelation of "new" information. For example, the fact that PwC did not audit the trading shells would have been known to Mr. Miller before June 2007. PwC would have known about alleged "sham" or "abusive" elements of the Yukos tax optimization scheme at least as early as January 2004 when it was shown the 2000 Audit Report. It is not understandable that PwC would wait until June 2007 before determining that its audits were unreliable. Respondent itself notes that "[a] question can be raised as to whether PwC waited too long to withdraw its audit opinions."[1626]

1246. In addition, PwC said that its withdrawal letter was drafted on the basis of "new" information that Mr. Miller learned in the course of his interrogations in May 2007. However, it appears that a draft withdrawal letter was prepared as early as March of that year.[1627]

1247. PwC was clearly pressed by the Russian authorities to find grounds for withdrawing its audits of Yukos. Bearing in mind the complexity of the Yukos structure, the business environment at the time it was set up, and the grey areas of Russian tax law at the time, it is not surprising that PwC could identify elements of evidence with respect to some aspects of Yukos' business practice that it affirms gave rise to credibility issues. As far as the Tribunal can judge, Yukos may not have been candid in its representations to PwC about control of the BBS Companies and about the reasons for the immense payments Yukos undertook to make, and did make, to individuals who were involved in its privatization.

1248. However, the Tribunal cannot accept that the four issues identified in PwC's Withdrawal Letter were in fact "new" for PwC. In addition, even if the information was new, it was not unequivocal, and could have been tested with Yukos when it was still operational. In this

---

1624 *Ibid*. ¶ 464, citing to Russian Federation General Prosecutor's Office, Record of Interrogation of Douglas Miller, 4 June 2007, Exh. R-871.

1625 *Ibid*. ¶ 466, citing to Group Menatep Limited, "Information for the Management of OAO NK 'Yukos,'" Exh. C-597.

1626 Counter-Memorial ¶ 708.

1627 In the Matter of an Application of Michael Khodorkovsky and Platon Lebedev for an Order Seeking Discovery Under 28 U.S.C. § 1782, Declaration of Laurie Endsley, 31 January 2011 ¶ 9, Exh. R-881.

regard, the Tribunal notes that PwC did not give former Yukos senior officials an opportunity to comment on the new information before signing the withdrawal letter. At the Hearing, Mr. Misamore testified that he stood by the following statement he made in 2009 in relation to the PwC withdrawal:

> PWC never said anything to me or, as far as I know, anyone else at Yukos, to my knowledge, about a lack of information or the refusal to provide information, other than the instance concerning the ownership interests in [the] BBS [Companies]. If PWC had asked me to intervene—and I did intervene with the BBS inquiry—I would have gone to Group Menatep shareholders or their lawyers, and would have urged the release of the requested information.[1628]

1249. According to Respondent's accounting expert, Mr. Ellison, who was not cross-examined, the U.S. Statement of Auditing Standards No. 1 sets the following standard for the "Subsequent Discovery of Facts Existing at the Date of the Auditor's Report":

> When the auditor becomes aware of information which relates to financial statements previously reported on by him, but which was not known to him at the date of his report, and which is of such a nature and from such a source that he would have investigated it had it come to his attention during the course of his audit, he should, as soon as practicable, undertake to determine whether the information is reliable and whether the facts existed at the date of his report. In this connection, the auditor should discuss the matter with his client at whatever management levels he deems appropriate, including the board of directors, and request cooperation in whatever investigation may be necessary.[1629]
>
> [emphasis added]

1250. Similar steps are expected to be taken under international and Russian auditing standards.[1630] Mr. Ellison notes that PwC's Withdrawal Letter stated that "due to the company undergoing bankruptcy and the former company executives no longer working for the company, PwC was unable to access the information required that could lead to revision of the financial statements and was also unable to discuss the matter with management, as recommended by [the audit standards]." Mr. Ellison concludes that under those circumstances "PwC had no option but to withdraw its audit reports."[1631]

1251. Mr. Ellison observes that when a reputable international firm withdraws an audit opinion it is an "unusual and serious" event.[1632] In light of the seriousness of the decision to withdraw the

---

1628 Record of Interview of Bruce Misamore, 9 March 2009, p. 51, Exh. R-3347.

1629 U.S. Statement of Auditing Standards No. 1, Section 561(4), attached as Exh. 4 to Ellison Report.

1630 Mr. Ellison refers to a similar obligation to "discuss the matter with management" under the International Auditing Standards ISA 560 and Russian Federal Auditing Rule No. 10. Ellison Report ¶¶ 3.5.5, 3.5.11, 3.6.1.

1631 *Ibid*. ¶ 3.4.28.

1632 *Ibid*. ¶ 2.3.1.

audit opinions, and the industry standard of consulting with the audited company before taking any action, it is noteworthy that PwC made no effort to reach out to Yukos' management or ex-management to discuss the "new" information.

1252. PwC's senior executives confided to the U.S. Embassy that the withdrawal decision was a "difficult" call.[1633] At stake for PwC on the one hand was its reputation and loyalty to a "dead" client, and on the other hand its continued viability in the Russian market. As the cables reveal, Russia mattered to PwC.[1634] PwC's senior executives met with the Russian Government to resolve PwC's problems. And, as noted earlier, after PwC made its decision, criminal charges were dropped, and PwC prevailed in two lawsuits, received a refund of its fines, maintained its license and retained important Russian clients such as Gazprom. As observed by Mr. Kosciusko-Morizet, "PwC undoubtedly opted in the end for the most pragmatic approach so as to maintain its office in Russia and protect its employees from being sued."[1635]

1253. As the Tribunal stated at the outset of this chapter, PwC is not on trial before this Tribunal, which draws no conclusion in the present Award about PwC's professional conduct. However, the pressure mounted by the Russian authorities against Yukos' auditors, which led to PwC's eventual withdrawal of its audits and even to a PwC auditor testifying against Messrs. Khodorkovsky and Lebedev at their second trial, informs the Tribunal's view that Yukos was the object of a series of politically-motivated attacks by the Russian authorities that eventually led to its destruction, as alleged by Claimants.

IX. PRELIMINARY OBJECTIONS

1254. Before turning to the central question of Respondent's liability under the ECT on the basis of the extensive factual record canvassed in the preceding Part VIII, the Tribunal addresses in this Part IX three preliminary objections made by Respondent, including two that were not finally resolved in the Tribunal's Interim Awards.

1255. The Tribunal considers, in this order, Respondent's preliminary objections related to: (a) the ECT's "fork-in-the-road" provision—Article 26(3)(b)(i); (b) Claimants' allegedly "unclean

---

[1633] U.S. State Department Cable No. 07MOSCOW3343, "Russia: PricewaterhouseCoopers Withdraws Audits of Yukos," 9 July 2007 ¶ 7, Exh. C-1358.

[1634] U.S. State Department Cable No. 07MOSCOW5403, "PWC's travails in Russia worsen," 15 November 2007 ¶ 8, Exh. C-1360.

[1635] Kosciusko-Morizet WS ¶ 25.

hands"; and (c) the relevance of Article 21 of the ECT.

A. ARE ALL OR SOME OF THE CLAIMS BARRED BY THE "FORK-IN-THE-ROAD" PROVISION OF THE ECT?

1. Introduction

1256. Article 26(3)(b)(i) of the ECT contains the ECT's "fork-in-the-road" provision. It must be read together with the preceding paragraphs of Article 26:

> *Article 26*
> SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY
>
> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
>
> (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
>
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
>
> (c) in accordance with the following paragraphs of this Article.
>
> (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
>
> (b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b);
>
> (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.
>
> [. . .]

1257. Before turning to the Parties' submissions, the Tribunal recalls its dismissal in the Interim Awards of Respondent's identical Article 26(3)(b)(i) objection to jurisdiction and/or admissibility:

> The Tribunal finds that Respondent's arguments are unconvincing. Indeed, in its written submissions, Respondent did appear to concede that, as a general matter, there is ample

> authority for the application of a "triple identity" test [identity of parties, cause of action and object of the dispute] in the context of a "fork-in-the-road" provision. To that extent, there is no question that the various Russian court proceedings and applications to the European Court of Human Rights cited by Respondent fail to trigger the "fork-in-the-road provision" of the ECT.[1636]

2. Parties' Positions

1258. In its Counter-Memorial, Respondent renews its objection that the Tribunal lacks jurisdiction pursuant to Article 26(3)(b)(i) of the ECT. In its view, developments subsequent to the Interim Awards show that Claimants, as Yukos shareholders, are seeking before the ECtHR damages for the same alleged loss arising from Yukos' demise. Accordingly, Respondent submits that the ECT arbitrations expose it to double recovery.[1637]

1259. Respondent relies on the Application for Just Satisfaction made by Yukos' former representative, Mr. Gardner, before the ECtHR, requesting damages "and, for the first time … compensation for the 'ultimate stakeholders' in Yukos through a Stichting created under Dutch law."[1638] Respondent argues that these circumstances deprive the Tribunal of jurisdiction under Articles 26(3)(b)(i) and 26(2)(b), and Annex ID of the ECT.[1639]

1260. Respondent submits that the European Convention on Human Rights ("**ECHR**") and ECT claims share the same fundamental basis, and, accordingly, the ECT claims should be dismissed. As previously submitted in its First Memorial on Jurisdiction and Admissibility, Respondent emphasizes that its consent to submit a dispute to international arbitration is expressly conditioned on Claimants not having already submitted the dispute to a "previously agreed dispute resolution procedure," pursuant to Article 26(3)(b)(i) read in conjunction with Article 26(2)(a) and Annex ID of the ECT.[1640]

1261. Respondent argues that the Tribunal's dismissal of this objection was premised on the "incorrect assumption" that the parties in the proceedings before the ECtHR and the present

---

[1636] Interim Awards ¶¶ 598–600 (YUL); 609–11 (VPL); 597–99 (Hulley).

[1637] Respondent's Counter Memorial ¶ 837.

[1638] Rejoinder ¶ 369; Counter-Memorial ¶ 827.

[1639] Counter-Memorial ¶ 828. Annex ID lists the Contracting Parties that have conditioned their consent to the submission of a dispute under the Treaty to international arbitration on the condition that the Investor has not previously submitted the dispute to the courts or administrative tribunals of the Contracting Party to the dispute. The Russian Federation is listed in Annex ID. (Interim Awards ¶¶ 588–89 (YUL); ¶¶ 599–600 (VPL); ¶¶ 587–88 (Hulley).

[1640] Counter-Memorial ¶ 829.

proceedings are different.[1641] Respondent further submits that the Tribunal erred in "fail[ing] to mention the requirements of the 'triple identity test' and state which requirement was not fulfilled."[1642] In satisfaction of the identity threshold, Respondent submits as follows:

- the Application for Just Satisfaction before the ECtHR establishes that the "'ultimate stakeholders', including Claimants, are the only Yukos interests that are represented in the EC[t]HR proceedings";[1643]
- the monetary relief requested in both proceedings for Yukos' alleged expropriation is identical;[1644] and
- the ECHR and ECT claims both aim to obtain compensation for the purported expropriation of Yukos and "have the same normative source," as Article 13(1) of the ECT and Article 1 of Protocol No. 1 ECHR do not lay down independent standards by which Respondent's conduct is to be judged.[1645]

1262. Claimants maintain their rejection of this objection, emphasizing in their Reply that "it is entirely inappropriate and an abuse of process for the Respondent now to seek to reopen this issue."[1646]

1263. Firstly, Claimants emphasize that the merits phase of these arbitrations is not an instance of appeal and, further, that the principles of *res judicata* and *ne bis in idem* are absolute bars to Respondent renewing this objection.[1647]

1264. Secondly, Claimants submit that Respondent's contention that the parties in the ECtHR proceedings and these arbitrations are the same is incorrect. Mr. Gardner[1648] does not act on behalf of Claimants, nor did Claimants make any submissions in those proceedings. Contrary to Respondent's characterization, Mr. Gardner was not seeking compensation "on behalf of Claimants." Rather, Claimants say Mr. Gardner he was simply arguing that the destruction of

1641 *Ibid.* ¶ 830.

1642 *Ibid*.

1643 *Ibid.* ¶ 831.

1644 *Ibid.* ¶ 832.

1645 *Ibid.* ¶ 833.

1646 Reply ¶ 967.

1647 *Ibid.* ¶ 969.

1648 Yukos' counsel before the ECtHR.

the Company need not pose an obstacle to an award of just satisfaction, "because the Dutch Foundation was able to receive such an award and dispose of it in accordance with its statutes."[1649] Claimants also highlight that Mr. Gardner's submission is dated 4 May 2009, thus preceding the Interim Awards in these arbitrations by several months.

1265. Thirdly, Claimants submit that Respondent advanced essentially the same argument previously before the ECtHR. Claimants submit that Respondent's position in that regard was rejected by the ECtHR because the parties in the ECT arbitrations were different, and thus the matters were not substantially the same.[1650]

1266. Finally, Claimants submit that no issue of double recovery arises in these arbitrations. They repeat the disclaimer they provided to the Tribunal on 1 April 2010, that "should any pecuniary damages be awarded to Yukos in the ECtHR proceedings, and should the Claimants receive any payments, such payments would be deducted from the amounts claimed in these arbitrations."[1651]

1267. In its Rejoinder, Respondent draws the Tribunal's attention to the 2012 decision in *Chevron v. Ecuador*,[1652] which, according to Respondent, confirms "a narrow interpretation of 'fork-in-the-road' provisions that focuses strictly on the legal bases of the claims would deprive such a clause of effective scope."[1653]

1268. Respondent also objects to Claimants' *res judicata* argument. Respondent submits that the ECtHR proceedings, which were "formally instituted by Yukos, under Claimants' direction and control" and involve "the very same economic interests that are represented in these arbitrations, constitute a special circumstance that justifies a new examination of Respondent's Article 26(3)(b)(i) ECT objection."[1654]

1269. Respondent also alleges that Claimants admit there is privity of interest between the two proceedings. In support of this assertion, Respondent refers to:

1649 Reply ¶ 971.

1650 *Ibid.* ¶ 972, citing ECtHR Yukos Judgment ¶¶ 524–26.

1651 Reply ¶ 963, citing Letter from the Claimants to the Arbitral Tribunal of 1 April 2010.

1652 *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009–23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012 (hereinafter "*Chevron v. Ecuador*").

1653 Rejoinder ¶ 370, citing *Chevron v. Ecuador* ¶ 4.76.

1654 Rejoinder ¶ 374.

- the passage of the Reply (mentioned at paragraph 1266 above) where Claimants state that they will deduct any payments they receive in the ECtHR proceedings from the amounts claimed in these arbitrations; and
- the Application for Just Satisfaction (mentioned at paragraph 1261 above), where Mr. Gardner characterized Claimants in these arbitrations as the "ultimate stakeholders" in Yukos.[1655]

1270. Finally, Respondent submits that Claimants' reliance on positions that the ECtHR has already finally rejected – namely that Respondent's taxation measures against Yukos were *mala fides*, briefed extensively in its Rejoinder,[1656] "creates a risk of conflicting determinations, one of the ills that Article 26(3)(b)(i) ECT is designed to avoid."[1657]

3. Tribunal's Decision

1271. Having considered the Parties' submissions and reviewed the reasons for its dismissal in the Interim Awards of Respondent's identical objection to jurisdiction pursuant to Article 26(3)(b)(i) of the ECT, the Tribunal sees no reason to reopen this issue and change its decision.

1272. Accordingly, Respondent's objection that the Tribunal lacks jurisdiction pursuant to Article 26(3)(b)(i) of the ECT is dismissed.

B. "UNCLEAN HANDS" (DID CLAIMANTS ACT ILLEGALLY SO AS TO DEPRIVE THEM OF PROTECTION UNDER THE ECT?)

1. Introduction

1273. As its second preliminary objection, Respondent submits that Claimants have come to this Tribunal with "unclean hands," with one or many of the following consequences: (a) the Tribunal does not have jurisdiction over Claimants' claims; (b) Claimants' claims are inadmissible; and/or (c) Claimants should be deprived of the substantive protections of the ECT. The Tribunal addresses this argument in the present chapter.

1274. Should the Tribunal reject the "unclean hands" argument as a preliminary objection,

---

1655 *Ibid.* ¶ 369.

1656 *Ibid.* ¶¶ 99–193.

1657 *Ibid.* ¶ 374.

Respondent also submits that some instances of Claimants' unclean hands should be treated as contributory fault and/or a failure to mitigate on the part of Claimants, and that any damages awarded to Claimants should be discounted on the basis of their unclean hands. These arguments are addressed in Chapters X.E and XII.C.

1275. Respondent initially made its "unclean hands" argument in the jurisdictional phase of these arbitrations. In Paragraph 3 of its Procedural Order No. 3 dated 31 October 2006, the Tribunal decided that it would be "appropriate to defer consideration of the Parties' contentions concerning 'unclean hands' [and] Respondent's 'criminal enterprise' contention . . . to the merits phase, if any."

1276. In its Interim Awards, the Tribunal stated:

> The Tribunal is well aware of Respondent's argument that Claimant in this arbitration has "unclean hands" and that Claimant's corporate personality should be disregarded because it is an instrumentality of a "criminal enterprise." The Tribunal recalls that it addressed these issues in its Procedural Orders Nos. 2 and 3 on 8 September and 31 October 2006. Specifically, the Tribunal then decided to defer consideration of Respondent's arguments concerning the "unclean hands" of Claimant or Claimant being an instrumentality of a "criminal enterprise" to any merits phase of this arbitration. Accordingly, by finding, as it does, that Claimant qualifies as an Investor owning and controlling an Investment for the purposes of Articles 1(7) and (6) of the ECT, the Tribunal does not dispose of the issues argued by Respondent concerning the "unclean hands" of Claimant and Claimant being an instrumentality of a "criminal enterprise," which it will address during any merits phase of this arbitration.[1658]

1277. As anticipated in the Interim Awards, now with the benefit of a full presentation of the facts by the Parties on all aspects of the Yukos affair, the Tribunal addresses Respondent's "unclean hands" argument in this final Award.

1278. The Tribunal notes that, in their First Submission on Costs, Claimants argue that Respondent, after insisting on its "unclean hands" allegations and the assertion that Claimants are an instrumentality of a "criminal enterprise" in the jurisdictional phase of this arbitration and dedicating nearly two hundred pages of its Counter-Memorial and Rejoinder to the first of these two arguments, ultimately abandoned these arguments at the Hearing, pursuing only the allegations related to alleged abuse by Claimants of the Cyprus-Russia DTA.[1659] In its Reply Submission on Costs, Respondent confirmed that it had not abandoned its unclean hands defense. To the contrary, Respondent argued that Claimants had explicitly refused to join issue

[1658] Interim Awards ¶ 435 (Hulley); ¶ 436; (YUL); ¶ 492 (VPL).

[1659] Exh. C-916.

and submit rebuttal and Respondent had accordingly relied on its arguments as undisputed and accepted. According to Respondent, this alleviated the need to devote substantial hearing time to these points.[1660]

1279. Claimants correctly observe that at the merits hearing (and in their Post-Hearing Brief) Respondent expanded only on the Cyprus-Russia DTA abuses part of its "unclean hands" argument, making only passing reference to other aspects of this argument.[1661] However, in the Tribunal's view, this circumstance speaks only to Respondent's freedom to present its case as it chooses, and represents Respondent's strategic decision to focus on certain arguments instead of others in the limited time available to it at the Hearing and within the page limit for post-hearing submissions imposed by the Tribunal. The fact that Respondent did not repeat in full all of the arguments made in previous pleadings at the Hearing and in its Post-Hearing Brief does not mean that these arguments were abandoned.

1280. Below, the Tribunal first summarizes the factual allegations constituting the foundation of Respondent's "unclean hands" argument and then the Parties' arguments regarding the impact of the alleged facts on the Tribunal's jurisdiction, the admissibility of claims and the availability of the substantive protections of the ECT to Claimants. In the last section of this chapter, the Tribunal sets out its decision with respect to "unclean hands" as a preliminary objection.

2. Claimants' Alleged "Unclean Hands"

1281. Respondent lists 28 instances of alleged "illegal and bad faith conduct" by Claimants or "attributable to" Claimants involving a variety of actors and spanning over ten years, from the privatization of Yukos in the mid-1990s to its liquidation in November 2007. Claimants dispute that any of their conduct (or any conduct attributable to them) was illegal or in bad faith.

1282. Given the number and diversity of Respondent's allegations, the Tribunal presents them below in groups intended to facilitate its subsequent analysis. Where facts related to Respondent's "unclean hands" allegations fall outside the scope of the analysis of the factual background set out in Part VIII above, they are briefly summarized here.

1660 Respondent's Reply Submission on Costs ¶¶ 16–18

1661 *See e.g.* Transcript, Day 19 at 169–74, 179; Respondent's Post-Hearing Brief ¶¶ 146, 148.

(a) Conduct Related to the Acquisition of Yukos and the Subsequent Consolidation of Control over Yukos and its Subsidiaries

1283. The first eleven items of Respondent's list of "illegal and bad faith conduct" are dedicated to conduct related to the acquisition of Yukos by Bank Menatep; and the so-called "Oligarchs" and their subsequent consolidation of control and ownership over Yukos and its subsidiaries:

i. Violating the legal requirements governing the loans-for-shares program that allowed Menatep to gain its controlling interest in Yukos.

ii. Using shell company proxies to feign competition in the loans-for-shares auction and a simultaneous investment tender for Yukos shares.

iii. Precluding actual competitors from bidding on Yukos shares in the loans-for-shares auction and investment tender, including through the abuse of Menatep's role as auction organizer to disqualify Russian competitors.

iv. Rigging a subsequent auction for the Yukos shares that were being held as collateral following the initial loans-for-shares auction, which deprived the Russian Government of substantial revenue.

v. Conspiring with Yukos' pre-existing managers to facilitate the unlawful acquisition of Yukos by the Oligarchs, including by entering into an agreement whereby "Yukos Universal" committed to pay them compensation consisting of 15% of Menatep's beneficial interest in Yukos, ultimately worth billions of dollars, for "services rendered to 'Yukos'".

vi. Colluding with others to predetermine the post-privatization ownership of Yukos.

vii. Skimming profits from Yukos and its production subsidiaries for their own self-enrichment.

viii. Abusing Russian corporate law and principles of corporate governance by squeezing out minority shareholders in Yukos' production subsidiaries through ruthless and self-enriching share dilutions, asset stripping, and transfer pricing.

ix. Siphoning off huge sums for the benefit of the Oligarchs from Yukos' proceeds from the sale of oil and oil products, while concealing related-party transactions from Yukos' own auditor.

x. Further mistreatment of minority shareholders by manipulating shareholder meetings, pressuring the Russian Federal Securities Commission not to pursue its challenges against illegal misconduct, relying on fraudulently determined stock and asset values and deceiving those minority shareholders, the government, and domestic and foreign courts about the nature and control of offshore companies that were created to benefit Claimants and their cohorts.

xi. Manipulating Yukos' stock value to devalue and reacquire the interests of creditors to which Yukos stock had been pledged.[1662]

1284. As context to Respondent's allegations, it is useful to recall some of Yukos' early history. The Russian Federation created the company in 1993 as part of a large-scale reorganization of the Soviet oil production and processing industry into vertically integrated oil companies. Yukos remained largely state-run until 1995.[1663]

1285. Respondent recounts, based on a report by Professor Reinier Kraakman that, in March 1995, a consortium of Russian commercial banks, including Bank Menatep (the Chairman of which was Mr. Khodorkovsky), proposed to the Russian government that they would lend it money in exchange for the right to hold as collateral and manage shares of major state-owned companies such as Yukos.[1664] A presidential decree of August 1995 provided for the auctioning of the right to hold and manage shares of individual companies.[1665] Once the terms of the proposed management agreement expired, the government would have a choice between paying back the loan and reclaiming its shares, and allowing the lender to sell the shares, with the government keeping 70 percent of the difference between the sale price and the original amount of the loan.[1666] This mechanism became known as the "loans-for-shares program."

1286. In December 1995, the Russian Government retained Bank Menatep to organize the auction for the shares in Yukos.[1667]

1287. Respondent alleges that Bank Menatep "completely rigged the auction" by preventing potential competitors from participating, while using two front companies, Laguna and Regent, to formally comply with the requirements for bids.[1668] Respondent recounts that Laguna won the right to hold as collateral and manage a 45 percent stake in Yukos for a USD 159 million loan to the Russian government and an additional investment obligation of USD 200 million. According to Respondent, Laguna acquired an additional 33 percent stake in Yukos by pledging just over USD 150 million in investments at a simultaneously held "investment

1662 Rejoinder ¶¶ 1435–36.

1663 Counter-Memorial ¶ 19.

1664 *Ibid*.¶ 20.

1665 Decree of the President of the Russian Federation No. 889 On the Procedure for Putting the Federally Owned Shares in Pledge, 31 August 1995, Exh. R-7.

1666 Counter-Memorial ¶ 21.

1667 *Ibid*. ¶ 23.

1668 *Ibid*. ¶¶ 27–28.

tender."[1669] Bank Menatep acquired Laguna's rights to hold and manage Yukos shares immediately thereafter.[1670] Respondent further alleges that Bank Menatep then used "another rigged auction and another shell affiliate, named Monblan," to obtain full ownership of the stake in Yukos.[1671] Respondent also suggests that Bank Menatep was "an insider among insiders" and used Yukos' own funds to pay for its takeover of Yukos.[1672]

1288. Respondent makes additional allegations regarding Bank Menatep's and the Oligarchs' treatment of foreign and Russian investors holding minority shares in Yukos' main production subsidiaries—YNG, Samaraneftegaz and Tomskneft—in the aftermath of the privatization.[1673] Respondent alleges that from 1996 to 1999 Bank Menatep and the Oligarchs engaged in significant profit skimming and, in 1999 and 2000, abused Russian corporate law and principles of corporate governance to "squeeze out the minority shareholders through massive share dilutions, transfer pricing, and asset stripping,"[1674] until "the minority shareholders sold or swapped their shares on the Oligarchs' terms."[1675]

1289. Claimants do not engage with the detail of Respondent's allegations. They contend that these allegations "amount to little more than innuendo based upon a handful of sensationalized journalistic accounts."[1676] In particular, Claimants point out that Respondent is "unable to make out any failure by Bank Menatep to comply with the terms of the loans-for-shares program"[1677] and underline that it was the Russian government itself that had the authority to preclude foreign companies and individuals from bidding and to disallow bids.[1678] Claimants add that Respondent's "vague insinuations" as to the source of funds used to privatize Yukos do not prove that anything unlawful took place.[1679] Claimants suggest that Respondent's argument "amounts to nothing more than an attempt to shift blame for the actions of the

---

1669 *Ibid*. ¶ 28.

1670 Kraakman Report ¶ 20.

1671 Counter-Memorial ¶ 29.

1672 *Ibid*. ¶ 33.

1673 *Ibid*. ¶ 45.

1674 *Ibid*. ¶¶ 915, 946–49; *see* Kraakman Report ¶¶ 28–42.

1675 Counter-Memorial ¶¶ 916, 951–61, 75; *see* Kraakman Report ¶¶ 44–62.

1676 Reply ¶ 1142.

1677 *Ibid*. ¶ 1143.

1678 *Ibid*. ¶¶ 1144–45.

1679 *Ibid*. ¶ 1146.

Russian Government itself onto Bank Menatep."[1680]

1290. As regards the manner of the consolidation of Bank Menatep's ownership over Yukos, Claimants reply that Respondent's allegations are vague and "not only irrelevant, but also moot."[1681] Claimants point out that Respondent relies on share issuances and transfers that were ultimately cancelled and on an alleged dispute with a minority shareholder that was eventually settled.[1682]

(b) Conduct Related to the Cyprus-Russia DTA

1291. Next, Respondent complains of Claimants' use of the Cyprus-Russia DTA, listing the following "bad faith and illegal conduct":

> xii. Submitting fraudulent claims under, or otherwise abusing, the Russia-Cyprus Tax Treaty to evade hundreds of millions of dollars in Russian taxes payable on dividends involving Yukos shares, thereby also violating Russian and Cypriot criminal laws.
>
> xiii. Entering into hundreds of sham transactions involving the sale and repurchase of Yukos shares between Claimants and their affiliates, the sole purpose of which was to fraudulently suggest that Claimants beneficially owned dividends declared on Yukos shares, and thereby to further Claimants' fraudulent claims for favorable tax treatment under the Russia-Cyprus Tax Treaty.
>
> xiv. Evading hundreds of millions of dollars in Russian taxes on profits from transactions in and profits from sales of Yukos shares.
>
> [. . .]
>
> xvi. Diverting the proceeds of the Yukos tax evasion scheme into highly opaque Cypriot and British Virgin Islands entities and trusts to conceal the unlawful provenance of those proceeds, including through dividend distributions to undisclosed Cypriot parent companies of trading shells, thereby further abusing the Russia-Cyprus Tax Treaty.[1683]

1292. The Russia–Cyprus DTA, as stated in its preamble, serves the "avoidance of double taxation with respect to taxes on income and capital" and the promotion of "economic cooperation between the two countries." Article 10 of the DTA provides:

1680 *Ibid*. ¶ 1147.

1681 *Ibid*. ¶¶ 1149, 1151–53.

1682 *Ibid*. ¶¶ 1149–50.

1683 Rejoinder ¶¶ 1435–36.

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other State, the tax so charged shall not exceed:

5% of the gross amount of the dividends…."

1293. The Parties agree that Claimants Hulley and VPL obtained monetary benefits running in excess of USD 230 million under this provision by claiming the reduced withholding tax rate of 5 percent instead of the standard 15 percent rate of the Russian Federation.

1294. Respondent argues that, in so doing, Hulley and VPL fraudulently relied on the Russia–Cyprus DTA to evade Russian taxes, because they: (a) were not the "beneficial owners" of the dividend income but mere "conduits" for the Oligarchs, and (b) had a "permanent establishment" in Russia to which the dividend income was attributable.[1684] According to Respondent, Claimants' reliance on the DTA was a "complete perversion of the Treaty's purpose," and, as stated by Professor Rosenbloom, a "blatant example of tax treaty abuse."[1685] Respondent alleges that Claimants contrived a series of artificial sales and repurchases of Yukos shares by Hulley from YUL, and VPL parked shares in a UBS Moscow account at suspicious times, solely to benefit from the DTA. According to Respondent, Claimants offer no justification for this practice, aside from their expert, Mr. Baker, mischaracterizing it as a "standard arrangement."[1686]

1295. Respondent submits that the beneficial ownership requirement "should be construed in light of the object and purposes of the [DTA], including avoiding double taxation and the prevention of fiscal evasion and avoidance."[1687] According to Respondent, Hulley and VPL never had the full right to use or enjoy Yukos' dividends. In support, Respondent refers to the following documents:

- Hulley's and VPL's bank statements from 1 January 2000 to 31 December 2004, as well as GML's statement for 2004, which purportedly establish that the

[1684] Counter-Memorial ¶¶ 922–23; Rejoinder ¶ 1448.

[1685] Counter-Memorial ¶ 165; Rosenbloom Report ¶ 77.

[1686] Rejoinder ¶¶ 1488–90; Baker Report, ¶70.

[1687] *Ibid.* ¶ 1449, relying on the 2011 OECD Discussion Draft for the Model Tax Convention, Exh. R-1959.

dividends paid to Hulley and VPL by Yukos only stayed in their accounts for one or two days prior to going to YUL;[1688]

- Hulley's Articles of Association, which according to Respondent reserved to the "Oligarchs" any decision concerning the disposal of Hulley's assets;[1689] and
- the Deed of Appointment of Chiltern as a custodian trustee for VPL, which, according to Respondent, provides that all dividend income from VPL's Yukos shares "shall be paid" to YUL so long as Chiltern owns VPL.

1296. Respondent also argues that Claimants have contradicted their own arguments in the jurisdictional phase of these proceedings by acknowledging an "obligation to pass all future dividends" to YUL; this, argues Respondent, falls within even Claimants' narrow interpretation of the beneficial ownership limitation.[1690]

1297. Respondent further asserts that Hulley and VPL each had a "Russian permanent establishment."[1691] Respondent interprets Claimants' admission that Hulley and VPL were holding companies to mean that any activity necessary to conduct the business of holding Yukos shares had to be carried out in Russia through a "deemed permanent establishment" (Article 5(5) of the Cyprus-Russia DTA) or a "fixed place of business" (Article 5(2) of the Cyprus-Russia DTA).[1692] Respondent contends that Messrs. Lebedev and Kakorin, both Russian citizens and residents, carried out all the activities relating to Hulley's and VPL's Yukos shares from Russia.[1693]

1298. Respondent further submits that Claimants' alleged abuses violate both Russian and Cypriot criminal laws, as shown in the expert report of Mr. Polyviou.[1694]

1299. Finally, Respondent argues that Claimants' expert, Mr. Baker, fails to differentiate the "tolerated" practice of "treaty shopping" from the "universally condemned" practice of "round

---

1688 *Ibid.* ¶¶ 1457–65, referring to Exhs. R-334 to R-4154.

1689 *Ibid.* ¶¶ 1466–87, referring to Exh. R-236.

1690 *Ibid.* ¶¶ 1478–79.

1691 *Ibid.* ¶¶ 1491–501.

1692 *Ibid.* ¶ 1491.

1693 *Ibid.* ¶ 1500.

1694 Counter-Memorial¶ 927.

tripping," which Respondent alleges is what Claimants did.[1695] Accordingly, Respondent submits that, "at best," Hulley and VPL "perverted" the purposes of the Cyprus-Russia DTA, even if they satisfied its "literal requirements."[1696]

1300. Claimants protest that Respondent's allegations are unsubstantiated in fact and in law.

1301. Firstly, Claimants argue that the beneficial ownership limitation set forth in Article 10(2)(a) of the Cyprus-Russia DTA is a "narrow one targeted at nominees, agents and other conduits under an obligation to pass on the amount received as a dividend to another party."[1697] Hulley and VPL in the present case had the full right to use and enjoy the dividends they received from Yukos and were under no obligation to pass them on to another entity, as is evident from Clause 117 and Article 1 of their respective Articles of Association, which provide that the power to propose the declaration and payment of dividends lies solely with the directors of the respective companies.[1698]

1302. Claimants assert that shares "transferred to a company shortly before the dividend dates and transferred back after the dividend has been paid are lawful and a common feature in stock-lending, and also in the sale and repurchase of shares ('repos')."[1699]

1303. Secondly, Claimants assert that Hulley and VPL were holding companies, and that their business as such was not carried on in Russia. [1700] None of the cumulative conditions in Article10(4) of the DTA were made out to show that Hulley or VPL had a permanent establishment in Russia, as demonstrated by Mr. Baker's report.[1701]

1304. Thirdly, Claimants reject the fraudulent abuse analysis made by Respondent's expert Professor Rosenbloom, noting that there is no anti-abuse principle in the DTA.[1702] Claimants emphasize

---

1695 Rejoinder ¶ 1508.

1696 *Ibid.* ¶ 1509.

1697 Reply ¶ 1157.

1698 *Ibid.* ¶ 1158.

1699 *Ibid.* ¶ 1161.

1700 *Ibid.* ¶ 1163.

1701 *Ibid.* ¶¶ 1164–74.

1702 *Ibid.* ¶ 1176.

that 'treaty shopping' to minimize tax is permissible.[1703]

1305. Finally, Claimants submit that Hulley's and VPL's claims under the Cyprus-Russia DTA were consistent with the purpose of the DTA. Claimants recall that one purpose of double-taxation treaties is to promote the flow of investment, and argue that both countries have derived significant benefits from the DTA.[1704]

1306. In any event, Claimants submit that the claiming of benefits under a double-taxation treaty is a technical matter, for which specific mechanisms of redress are available under the treaty itself and domestic law. Accordingly, this Tribunal is not the proper forum to hear and decide such disputes.[1705]

(c) Conduct Related to the Tax Optimization Scheme

1307. Three items on Respondent's list of Claimants' "illegal and bad faith" conduct relate to Claimants' use of the low-tax regions of the Russian Federation to mitigate tax burdens:

> xv. Engineering through management installed and controlled by Claimants the massive Yukos tax evasion scheme to avoid paying hundreds of billions of rubles in Russian taxes.
>
> [. . .]
>
> xvii. Engaging in abusive corporate restructurings to conceal Yukos' affiliation with its trading shells, thereby preventing Russian authorities from identifying and addressing Yukos' tax abuses.
>
> xviii. Concealing Yukos' continued control of its trading shells by resorting to call options or other artifices and by fabricating corporate and other transactional documents.[1706]

1308. A detailed discussion of these allegations is found in Chapter VIII.A of this Award.

(d) Actions Taken in Hindrance of the Enforcement of Russia's Tax Claims

1309. The remaining ten items on Respondent's list of Claimants' "bad faith and illegal conduct" refer to actions allegedly taken to obstruct enforcement of Russia's tax claims against Yukos:

1703 *Ibid.* ¶ 1175, citing *MIL (Investments) S.A. v. Canada* [2006] 5 CTC 2552 (Tax Court of Canada), affirmed by Federal Court of Appeal of Canada.

1704 *Ibid.* ¶ 1177.

1705 *Ibid.* ¶ 1189.

1706 Rejoinder ¶¶ 1435–36.

xix. Repeatedly obstructing the conduct of the tax authorities' audits of Yukos by refusing to provide documents and information which would show the extent of Yukos' abuses, and by causing Yukos' producing subsidiaries and other related entities to be similarly obstructive.

xx. Failing to pay Yukos' tax liabilities for tax year 2000 and following years, despite having received ample notice that Yukos would be required to pay these amounts and despite the fact that Yukos had abundant resources to do so.

xxi. Dissipating assets to frustrate the Russian authorities' collection of the tax assessments, including by way of paying dividends of unprecedented amounts, making spontaneously accelerated loan "*prepayments*" to Oligarch-owned Moravel, and foisting upon YNG an upstream guarantee up to US$ 3 billion for the repayment of Yukos' alleged "*debts*" to Moravel.

xxii. Offering to the Russian authorities assets which Yukos knew to be tainted to settle its tax liabilities.

xxiii. Concealing the share registers of Yukos' subsidiaries to obstruct the bailiffs' enforcement of Yukos' tax obligations.

xxiv. Sabotaging the YNG auction through litigation threats and a spurious bankruptcy filing in the United States that effectively prevented all but one bidder from placing a bid at the auction and artificially depressed the amount of the auction proceeds.

xxv. Implementing asset-stripping measures by diverting Yukos' valuable assets to the *stichtings* managed by former Yukos officers and representatives of Claimants in anticipation of Yukos' bankruptcy.

xxvi. Failing to repay Yukos' debt to the SocGen syndicate and frustrating the banks' attempts to collect against Yukos' Dutch assets.

xxvii. In the process of all of the foregoing, lying to Yukos' auditors PwC about core aspects of their misconduct and, through PwC's certification of Yukos' financial statements based on this deception of Yukos' auditors, to Yukos' creditors and other members of the investing public who relied upon those financial statements and PwC's certification of them.

xxviii. Yukos management's shielding of Yukos' very substantial foreign assets behind the veil of two Dutch *stichtings*, to place those assets beyond the reach of Russian tax authorities, violated Dutch law.[1707]

1310. In sum, Respondent alleges that Yukos neither paid its tax debts in full immediately after these debts were assessed, nor made reasonable settlement offers; dissipated the assets it had on hand; lied to its auditors; obstructed the work of the bailiffs; and sabotaged the YNG auction. Each of these allegations is discussed by the Tribunal in Part VIII of this Award.

[1707] *Ibid.* ¶¶ 1435–36.

3. Parties' Positions Regarding the Impact of Claimants' Allegedly "Unclean Hands" on this Arbitration

1311. The Parties disagree as to whether any of the instances of alleged illegal or bad faith conduct enumerated above could serve as a complete bar to Claimants' claims under the ECT (whether as a matter of jurisdiction, admissibility or otherwise) by virtue of the application of some rule or principle of law.

1312. Between them, the Parties have dedicated to this controversy several hundreds of pages of pleadings in the merits phase alone, citing in the process dozens of arbitral awards and decisions rendered by the Permanent Court of International Justice (the "**PCIJ**"), the International Court of Justice ("**ICJ**") and mixed-claims commissions. Below, the Tribunal does not attempt to do justice to the full breadth of the Parties' arguments, but focuses instead on their most salient points.

(a) Respondent's Position

1313. Respondent submits that Claimants' "unclean hands" deprive the Tribunal of jurisdiction, render Claimants' claims inadmissible and/or deprive Claimants of the substantive protections of the ECT. This submission is based on two main principles.

1314. First, Respondent argues that "the ECT protects only *bona fide* and lawful investments and Respondent's consent to arbitrate only extends to such investments."[1708] Respondent emphasizes that, as provided by Article 31(1) of the VCLT, a treaty must be interpreted in good faith and in accordance with its object and purpose. According to Respondent, the object and purpose of the ECT does not include the promotion and protection of illegal investments.[1709] Rather, as stated in the Treaty's introductory note, "[t]he fundamental aim of the [ECT] is to strengthen the rule of law on energy issues." Respondent argues that several arbitral awards, including *Phoenix Action, Ltd. v. Czech Republic* ("***Phoenix***"), *SAUR International S.A. v. The Argentine Republic* and *Plama Consortium Limited v. Bulgaria* ("***Plama***") support the proposition that, even in the absence of an express legality requirement clause in an investment treaty, illegal investments will not be protected.[1710] With respect to *Plama*, in particular,

[1708] Respondent's Post-Hearing Brief ¶ 147.

[1709] Counter-Memorial ¶ 898.

[1710] Rejoinder ¶¶ 1551–52, 1527, 1563, 1566, referring to *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, Exh. C-994 (hereinafter "*Plama*"); *Phoenix Action Ltd. v. Czech Republic*,

Respondent notes that the tribunal dismissed the claimants' ECT claims in the merits phase on the grounds that: (a) the investment violated Bulgarian law and applicable principles of international law; (b) the claimant's conduct was not in good faith; and (c) to grant ECT protection would therefore have been contrary to the clean hands requirement.[1711]

1315. Second, Respondent argues that a claimant who is guilty of illegal conduct is deprived of the necessary *ius standi* to complain of corresponding illegalities by the State.[1712] This requirement of "clean hands," argues Respondent, is a "general principle of law" within the meaning of Article 38(1)(c) of the ICJ Statute.[1713] Respondent cites the ICJ's decision in the *Case Concerning the Gabčíkovo-Nagymaros Project* and various dissenting opinions by ICJ judges, as well as a number of decisions of mixed claims commissions rendered in cases of diplomatic protection.[1714] Regarding the latter set of cases, Respondent submits that the "unclean hands

---

ICSID Case No. ARB/06/5, Award, 15 April 2009, Exh. R-1078 (hereinafter "*Phoenix*"); *SAUR International S.A. v. Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, Exh. R-4186 (hereinafter "*SAUR*").

1711 *Ibid.* ¶ 1552.

1712 Counter-Memorial ¶ 892.

1713 *Ibid.* ¶ 893.

1714 Counter-Memorial ¶¶ 894–95, referring to *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, p. 7 ¶ 133, Exh. C-948 (hereinafter "*Gabčíkovo-Nagymaros*"); *Samuel Brannan v. Mexico*, U.S.-Mexico Mixed Claims Commission, Opinion of the Umpire, 1868, *in* HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY, Vol. 3 (John Bassett Moore, ed. 1898), p. 2757, 2758, Exh. R-1056; *The "Lawrence" Case*, U.S.-Great Britain Mixed Claims Commission, Judgment of the Umpire, 4 January 1855, Hornby's Report 397, 1856, p. 398, Exh. R-1057; *William Whitty v. The United States*, U.S.-British Claims Commission, Decision of the Commissioners, *in* HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY, Vol. 3 (John Bassett Moore, ed. 1898), p. 2820, 2823, Exh. R-1058; *Frederick G. Fitch v. Mexico*, U.S.-Mexico Mixed Claims Commission, Opinion of the Umpire, 21 June 1876, *in* HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY, Vol. 4 (John Bassett Moore, ed. 1898), p. 3476, 3477, Exh. R-1059; *Jarvis Case*, U.S.-Venezuela Mixed Claims Commission, Opinion of the Commissioner, UNRIAA, 1903–1905, Vol. 9, p. 208, 212, Exh. R-1060; *Cucullu's case*, U.S.-Mexico Mixed Claims Commission, Opinion of Mr. Palacio, 1868, *in* HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY, Vol. 4 (John Bassett Moore, ed. 1898), p. 3477, 3480, Exh. R-1061; *Case of the Brig "Mary Lowell"*, U.S.-Spain Claims Commission, Opinion of the Umpire, 9 December 1879, Spain-U.S. Claims Commission, *in* HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY, Vol. 3 (John Bassett Moore, ed. 1898), p. 2772, 2775, 2777, Exh. R-1062; *Robert Eakin v. United States*, No. 118, U.S.-Great Britain Claims Commission, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, Vol. 3 (Washington Government Printing Office, 1874), p. 15, Exh. R-1063; *Clark Case ("The Medea and The Good Return")*, U.S.-Ecuador Claims Commission, 1862, Opinion of Mr. Hassaurek, *in* HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY, Vol. 3 (John Bassett Moore, ed. 1898), p. 2729, 2738–39, Exh. R-1064; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, Dissenting Opinion of Judge Schwebel, ICJ Reports 1986, p. 259 ¶¶ 268, 272, Exh. R-1071; *Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, Dissenting Opinion of Judge van den Wyngaert, ICJ Reports 2002, p. 137 ¶ 84, Exh. R-1072; *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment, 5 April 1933, Dissenting Opinion of Judge Anzilotti, PCIJ Series A/B No. 53, p. 76, 95, Exh. R-1073; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Second Phase, Advisory Opinion, 18 July 1950, Dissenting Opinion of Judge Read, ICJ Reports 1950, p. 231, 244, Exh. R-1074. *See also* Rejoinder ¶¶ 1529–40, citing *Case Concerning the*

principle has [an even] greater role with respect to claims brought directly by private parties, including in investor-State arbitration, than in the context of diplomatic protection."[1715] Respondent also relies on *Barcelona Traction* for the proposition that in international law the corporate "veil is lifted" to "prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance . . . or to prevent the evasion of legal requirements or of obligations."[1716] Finally, Respondent argues that if the "unclean hands" doctrine was not included in the ILC Articles on State Responsibility and Articles on Diplomatic Protection of the International Law Commission, it is only "because it corresponded to the doctrine of inadmissibility" and did not fall within the projected scope of both sets of ILC Articles.[1717]

1316. With respect to Claimants' contention that the instances of "unclean hands" referred to by Respondent can have no impact on this arbitration because they are collateral illegalities unrelated to either the making of Claimants' investments or their claims in these arbitrations,[1718] Respondent argues that it is "unsupported both by the investment treaty awards on which [Claimants rely], and by common sense and good faith."[1719]

1317. With respect to post-investment conduct, Respondent submits that the awards in *Gustav FW Hamester GmbH & Co KG v. Ghana* ("***Hamester***") and *AG Frankfurt Airport Services Worldwide v. Philippines* ("***Fraport***") recognize the relevance of such misconduct to the merits of an investment treaty claim.[1720]

1318. As regards illegalities pre-dating the acquisition of the investment, Respondent relies on the award in *Anderson v. Costa Rica* ("***Anderson***").[1721] Respondent submits that the tribunal in that

---

Barcelona Traction Light and Power Company Limited (Belgium v. Spain) (New Application: 1962), Second Phase, Judgment, 5 February 1970, ICJ Reports 1970, p. 3, Exh. C-930; *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment, 30 August 1924, PCIJ Series A No. 2, p. 6, 13, Exh. R-1043; ILC, Provisional Summary Record of the 2844th Meeting held 25 May 2005, A/CN.4/SR.2844, Agenda Item 2, 6 June 2005, p. 4, 7, Exh. R-4191.

[1715] Rejoinder ¶ 1538.

[1716] *Case Concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain) (New Application: 1962)*, Second Phase, Judgment, 5 February 1970, ICJ Reports 1970, p. 3 ¶ 56, Exh. C-930.

[1717] Rejoinder ¶¶ 1543, 1545–47.

[1718] Reply ¶¶ 1134–38.

[1719] Rejoinder ¶ 1568.

[1720] *Ibid.* ¶¶ 1569–70, referring to *Gustav F W Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, Exh. R-1079 (hereinafter "*Hamester*"); *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, Exh. R- 1006 (hereinafter "*Fraport*").

[1721] Resondent's Rejoinder ¶ 1571, referring to *Anderson v. Costa Rica*, ICSID ARB(AF)/07/3, Award, 19 May 2010, Exh. R-4204 (hereinafter "*Anderson*").

case dismissed claims brought by Canadian individuals who had invested in a "Ponzi scheme" for lack of jurisdiction *ratione materiae*. Respondent highlights that tribunal's finding that the entire underlying transaction was illegal and, by that fact, "it follows that the acquisition by each [c]laimant of the asset resulting from that transaction was also not in accordance with the law of Costa Rica."[1722] Respondent submits that the finding of the *Anderson* tribunal applies in the present case, highlighting that:

> where an investment is simply transferred by the same ultimate owner from one investment vehicle to another, the concept of the unity of the investment requires that the process of the making and operation of the investment by the ultimate owner and the owner's investment vehicle be considered as a whole for purposes of determining the legality of the investment, even if the acquisition of the investment by the claimant, standing alone, is not illegal.[1723]

1319. To hold otherwise, argues Respondent, would extend investment treaty protection to claimants who shift investments through several layers of ownership and control in order to launder their illegal investments into legal ones qualifying for treaty protection.[1724]

1320. In response to Claimants' assertion that 'in accordance with the law' requirements should be limited to domestic laws regulating the admission of foreign investment, Respondent submits a number of counter-arguments, including the following:

- Claimants' reliance on the "isolated 2010 dictum" in *Mr. Saba Fakes v. the Republic of Turkey* ("***Saba Fakes***") to limit the substantive scope of the 'in accordance with the law' requirement is "unpersuasive and contrary to a consistent line of arbitral awards that have applied 'in accordance with the law' clauses to domestic legislation other than laws governing the admission of investments."[1725]
- the illegalities "infecting" Claimants' investments are "quintessential breaches of 'fundamental principles'" and were "central to the profitability of and dividend flow from Claimants' investments."[1726]

1722 *Ibid.*, quoting *Anderson* ¶ 55.

1723 *Ibid.* ¶ 1572.

1724 *Ibid*.

1725 *Ibid.* ¶ 1577, referring to *Mr Saba Fakes v. The Republic of Turkey*, ICSID ARB/07/20, Award, 17 July 2010, Exh. C-1537 (hereinafter "*Saba Fakes*").

1726 *Ibid.* ¶ 1582.

- Claimants' attempt to exclude minor violations from the scope of 'in accordance with the law' clauses is unavailing, as none of the illegalities of which Respondent complains are minor.[1727]

1321. In response to Claimants' contention that they were not the relevant actors in the context of Respondent's allegations regarding Yukos' tax optimization scheme and the obstruction of the enforcement of tax claims against Yukos by the Russian Federation, Respondent submits that Claimants are "essential instrumentalities of illegal acts, through Claimants' control of Yukos and its management,"[1728] noting that during the relevant period, "Claimants owned a majority of Yukos shares and appointed the totality of the members of its board of directors, including . . . Mikhail Khodorkovsky."[1729]

1322. Respondent also states that it is not estopped from invoking Claimants' unclean hands in this arbitration by any failure to take prompt action.[1730] Respondent submits that Claimants have failed to satisfy the legal standard for estoppel.[1731] This standard, argues Respondent, was confirmed by the ICJ in the *North Sea Continental Shelf Cases*:

> [I]t appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention, -- that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of part conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever in the present case.[1732]

1727 *Ibid.* ¶ 1580.

1728 Counter-Memorial ¶ 909.

1729 *Ibid.* ¶ 933.

1730 Rejoinder ¶ 1597.

1731 *Ibid.* ¶¶ 1588–98.

1732 *Ibid*. ¶ 1589, quoting *North Sea Continental Shelf (Federal Republic of Germany/Denmark and Federal Republic of Germany/Netherlands*), Judgment, 20 February 1969, ICJ Reports 1969, p. 3 ¶ 30, Exh. R-4208; *see also* ¶¶ 1590–92, citing *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/U.S.)*, Judgment, 12 October 1984, ICJ Reports 1984, p. 246 ¶ 145, Exh. R-4209; *Case of the Land and Maritime Boundary (Cameroon/Nigeria)*, Preliminary Objections, Judgment, 11 June 1998, ICJ Reports 1998, p. 275 ¶ 57, Exh. R-4210; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application by Nigeria for Permission to Intervene, Judgment, 13 September 1990, ICJ Reports 1990, p. 92 ¶ 63, Exh. R-4211; *Aerial Incident of 10 August 1999 (Pakistan v. India*), Jurisdiction of the Court, Judgment, 21 June 2000, ICJ Reports 2000, p. 12 ¶ 45, Exh. R-4212; *Legality of Use of Force (Serbia and Montenegro v. Canada)*, Preliminary Objections, Judgment, 15 December 2004, ICJ Reports 2004, p. 429 ¶ 42, Exh. R-4213; WTO, Guatemala—Definitive Anti-Dumping Measures On Grey Portland Cement From Mexico, Report of the Panel, 24 October 2000 ¶¶ 8.23–8.24, Exh. R-4214; WTO, Argentina—Definitive Anti-Dumping Duties On Poultry From Brazil, Report of the Panel, 22 April 2003 ¶ 7.39, Exh. R-4215; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000 ¶ 111, Exh. C-953.

1323. Respondent submits that Claimants have failed to identify an unequivocal representation by Respondent. In that regard, Respondent argues that Claimants' reliance on Respondent's alleged failure to challenge illegalities earlier does not amount to an unequivocal representation. Respondent also submits that Claimants have failed to establish that they changed their conduct to their detriment in reliance on said representation. Particularly regarding the alleged abuses of the Cyprus-Russia DTA, Respondent contends it raised its objection to Hulley's and VPL's alleged violations in these arbitrations as early as October 2006, and thus, argues Respondent, "Claimants' further suggestion that Respondent might be estopped because it did not also raise these abuses 'in an appropriate forum' is absurd."[1733]

1324. Respondent adds that informal or *contra legem* acceptance of an investment by the host State's authorities that is illegal under the host State's domestic law, or based on covert arrangements unknown to the host State, cannot provide a basis for estoppel. In support, Respondent relies on the *Fraport* award.[1734]

1325. Finally, Respondent rejects Claimants proportionality argument, stating that it is based on "rules governing countermeasures by an injured State in inter-State relations."[1735] In the words of Respondent: "the legality requirement excludes illegal investments from the scope of ECT protection. As a result it is not that a host State is not justified in breaching obligations with respect to illegal investments, but instead that it has no treaty obligations in the first instance."[1736]

(b) Claimants' Position

1326. Claimants object that their "unclean hands," even if proven by Respondent, could have no impact on their claims in these arbitrations because: (a) the ECT does not contain any principle of "unclean hands"; (b) no principle of "unclean hands" has been recognized as a general principle of law; and (c) the instances of "unclean hands" alleged by Respondent are "collateral illegalities" that do not fall within the parameters of any "unclean hands" doctrine.

1327. Claimants assert that it is "impossible to find any textual basis in the [ECT] for the

---

1733 *Ibid*. ¶¶ 1593–95.

1734 *Ibid.* ¶ 1596, referring to *Fraport* ¶ 347.

1735 *Ibid.* ¶¶ 1584–7.

1736 *Ibid.* ¶ 1586.

Respondent's contention."[1737] They add that the introductory note to the ECT—a note which Claimants contend is not an official document or interpretation of the ECT—confers an obligation to strengthen the rule of law on States parties, rather than on the investor.[1738] Claimants highlight that Respondent chose not to quote the remainder of the note, which goes on to state that the ECT's aim of strengthening the rule of law on energy issues is to be accomplished "by creating a level playing field of rules to be observed by all participating governments, thus minimising the risks associated with energy-related investments and trade."[1739] In this regard, Claimants contend that denying a claimant access to a forum for resolving its claims altogether would violate, rather than support, the rule of law.[1740]

1328. Claimants seek to distinguish the *Phoenix* and *Hamester* ICSID awards relied upon by Respondent. Claimants highlight that the statement relied on by Respondent to infer that a jurisdictional requirement of compliance with host State laws is implicit, even when not stated, is *obiter dictum* on account of the BIT provisions being applied by those tribunals.[1741] Similarly, Claimants submit that any reliance on the *Plama* award to insert a jurisdictional requirement of "clean hands" into the relevant treaty is incorrect. Claimants submit that in the *Plama* decision on jurisdiction, the tribunal considered and rejected an argument that the illegality of the investment could affect its capacity to hear the dispute.[1742]

1329. Further, Claimants emphasize that the bar for recognition of general principles of international law is set "extremely high".[1743] Claimants assert that Respondent's "unclean hands" theory fails to meet this high threshold.

1330. Claimants allege that neither the PCIJ nor the ICJ have ever endorsed "unclean hands" as a general principle of law.[1744] They also argue that the inter-state cases relied on by Respondent are inapposite to this arbitration as they concern "situations in which two sovereign States have

---

1737 Reply ¶ 1029.

1738 *Ibid.* ¶ 1100.

1739 *Ibid.* ¶ 1101.

1740 *Ibid.* ¶ 1102.

1741 *Ibid.* ¶ 1098, referring to *Phoenix* ¶ 101, Exh. R-1078; *Hamester* ¶ 123–24, Exh. R-1079.

1742 *Ibid.* ¶ 1099, referring to *Plama*, Exh. C-994.

1743 *Ibid.* ¶ 1039.

1744 *Ibid.* ¶¶ 1040–55.

assumed an identical or reciprocal obligation."[1745] Claimants further argue that the awards of mixed claims commissions are of little guidance, as they deal mostly with diplomatic protection and are of "ancient vintage." In support, Claimants cite the *Saba Fakes v. Turkey* ICSID award, in which the tribunal held that the "rules of customary international law applicable in the context of diplomatic protection do not apply as such to investor-State arbitration."[1746]

1331. Claimants note that the ILC Articles on State Responsibility and Articles on Diplomatic Protection do not contain a principle of "unclean hands."[1747] They also argue that most scholars reject the existence of an "unclean hands" general principle altogether, while its proponents argue that it should be subject to certain well-defined limits.[1748]

1332. Claimants also submit that the investment tribunal awards relied on by Respondent in support of a general principle of "unclean hands" were decided on other grounds and that Respondent's analysis of these awards is incomplete and misleading.[1749] According to Claimants, in each of the ICSID awards cited by Respondent—*Plama*, *Phoenix*, *Hamester* and *Inceysa Vallisoletana, S.L. v. Republic of El Salvador* ("***Inceysa***")—the tribunal's decision rested on a clause in the relevant BIT conditioning jurisdiction on compliance by the investor with the laws of the host State.[1750]

1333. Furthermore, Claimants argue that even if Respondent can make the case for a general principle of "unclean hands" or a legality requirement under the ECT, Respondent's theory as applied to this case rests on allegations of collateral illegalities unrelated to either the making of

---

1745 *Ibid.* ¶¶ 1040, 1055.

1746 *Ibid.* ¶¶ 1056–67, referring to *Saba Fakes* ¶ 69, Exh. C-1537.

1747 *Ibid.* ¶¶ 1068–71.

1748 *Ibid.* ¶¶ 1072–77. For scholars rejecting the principle, Claimants cite to: Jean Salmon, ed., DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC, 2001, pp. 677–78, Exh. C-1613 ; Luis Garcia-Arias, *La doctrine des «Clean Hands» en droit international public*, 1960, 30 *Annuaire des anciens auditeurs de l'académie de droit* 14, p. 18, Exh. R-1075; ILC, Sixth report on diplomatic protection by John Dugard, Special Rapporteur, 57th Session, 2 May – 5 August 2005, U.N. Doc. A/CN.4/546 ¶ 15, Exh. C-1678; Charles Rousseau, DROIT INTERNATIONAL PUBLIC, TOME V, LES RAPPORTS CONFLICTUELS ¶ 170, Exh. C-1612. For proponents of the principle, with limits, Claimants cite to: Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, pp. 157–58, Exh. R-1054; Sir Gerald Fitzmaurice, *The General Principles of International Law Considered From the Standpoint of the Rule of Law*, 1957, 92 Collected Courses of the Hague Academy of International Law 1, p. 119, Exh. R-1053.

1749 *Ibid.* ¶ 1094.

1750 *Ibid.* ¶ 1094–1105, referring to *Plama*, Exh. C-994; *Inceysa Vallisoletana, S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, Exh. R-1083 (hereinafter "*Inceysa*"); *Phoenix*, Exh. R-1078; *Hamester*, Exh. R-1079.

Claimants' investments or their claims in these arbitrations.[1751]

1334. Claimants submit that even when interpreting treaty provisions expressly requiring compliance with host State laws as a condition of jurisdiction, investment tribunals have strictly construed such provisions.[1752] Claimants submit that investment tribunals have only subjected the initial making of the investment to a legality test. They also assert that the limited temporal scope employed by investment tribunals renders alleged pre-investment conduct irrelevant,[1753] and limits its substantive scope, *e.g.*, by extending only to host State laws "governing the admission of foreign investments in its territory."[1754] Claimants emphasize that misconduct unrelated to the making of an investment, or which concerns minor violations, has been disregarded by investment tribunals.[1755]

1335. Claimants also submit that Anglo-American jurisprudence confirms that alleged illegalities must have an "immediate" and "necessary" relation to a claimant's cause of action.[1756]

1336. It follows, argue Claimants, that none of Respondent's allegations are covered by any principle of "unclean hands". The actions complained of by Respondent with respect to the acquisition of Yukos pre-date Claimants' investments, depriving the Tribunal of jurisdiction *ratione temporis* over those actions.[1757] The alleged abuses of the Cyprus-Russia DTA do not, according to Claimants, have the required "immediate" or "necessary" relation to Claimants' claims.[1758] Claimants argue that to bar Hulley and VPL permanently from bringing claims under the ECT for having claiming benefits under the Cyprus-Russia DTA to which they were not entitled rests on an "impossibly broad interpretation" of the "unclean hands" concept.[1759]

1337. Claimants also point out that only the allegations of DTA abuses concern the conduct of Claimants themselves, while the other 24 allegations concern the conduct of persons other than Claimants. Claimants contend that Respondent provides no basis on which the conduct of these

---

1751 *Ibid.* ¶¶ 1134–38.

1752 *Ibid.* ¶ 1105.

1753 *Ibid.* ¶¶ 1106–12.

1754 *Ibid.* ¶¶ 1118–19.

1755 *Ibid.* ¶ 1120.

1756 *Ibid.* ¶¶ 1105, 1078, 1134.

1757 *Ibid.* ¶ 1135.

1758 *Ibid.* ¶ 1137.

1759 *Ibid.*

third parties could render Claimants' hands "unclean".[1760]

1338. Claimants further assert that, even if any principle of "unclean hands" is potentially applicable in the situation at hand, Respondent is estopped from raising matters in these arbitrations of which it has long been aware, but has never challenged.[1761] Claimants argue that acquiescence, or the silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection, may "in and of itself" result in estoppel, where the other elements of estoppel are not made out.[1762]

1339. In particular, Claimants reject Respondent's allegations with respect to the creation and original acquisition of Yukos in 1995. Claimants submit that it was Respondent that "planned, organized, conducted and completed the privatization of the Russian Federation's property through the loans-for-shares program, including the privatization of Yukos."[1763] Similarly, Claimants highlight that Respondent did not take legal action against Claimants for any of the alleged violations of the Cyprus-Russia DTA by Hulley and VPL. Claimants underline that Respondent must have had knowledge of many, if not all, of the alleged violations "as early as October 2003, through the searches and seizures of documents at the Moscow premises of GML MS, or at least as early as October 6, 2006 when the Respondent first raised the matter in these arbitrations."[1764]

1340. Claimants also submit that, even if an "unclean hands" general principle existed, it would not confer upon States the right to violate investors' rights.[1765] Drawing an analogy to counter-measures, Claimants refer to Articles 49 and 54 of the ILC Articles on State Responsibility and to the ILC Commentary on the provisions, which states that such measures "are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible State."[1766]

1341. The ILC Commentary further emphasizes that proportionality is a stand-alone requirement, such that even where a counter-measure is carried out for a permissible purpose, it must still be

---

1760 *Ibid.* ¶ 1136.

1761 *Ibid.* ¶ 1181.

1762 *Ibid.* ¶ 1183.

1763 *Ibid.* ¶ 1188.

1764 *Ibid.* ¶ 1189.

1765 *Ibid.* ¶ 1191.

1766 *Ibid.* ¶ 1194.

proportionate to the original breach.[1767]

1342. Claimants submit that the need to weigh the proportionality of Respondent's response to the illegalities it alleges against Claimants provides further reason for rejecting Respondent's "unclean hands" objection to jurisdiction/admissibility. In Claimants' own words: "it is for the tribunal to assess such allegations . . . in its consideration of the merits of the investor's claims, bearing in mind that any response by the host State to any alleged illegality must comport with its international obligations."[1768]

4. Tribunal's Decision

1343. Article 26(6) of the ECT provides that "[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

1344. Article 31 of the VCLT, which is widely recognized as reflecting customary international law, provides in its first paragraph that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

1345. Looking first at the text of the ECT, the Tribunal observes that it does not contain any express reference to a principle of "clean hands." Nor, unlike some other investment treaties, does the ECT contain an express requirement that investments be made in accordance with the laws of the host country.[1769] These points are not disputed by the Parties.

1346. In the absence of any specific textual hook, the Tribunal must consider whether, given the need to interpret treaties in good faith and take account of their object and purpose, the ECT as a whole may be understood as conditioning the protection of investments on their legality, or on the good faith of the investor. The Tribunal addresses this question in subsection (a) below.

1767 *Ibid.* ¶ 1195.

1768 *Ibid.* ¶ 1197.

1769 *See e.g.* the bilateral investment treaties applied in *Fraport*, Exh. R-1006 (Germany–Philippines BIT: "[t]he term investment shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State"); *Inceysa*, Exh. R-1083 (Spain–El Salvador BIT: "[e]ach Contracting Party shall protect in its territory investments made, in accordance with its legislation"; "[the BIT shall] apply to investments made . . . in accordance with the laws"); *Phoenix*, Exh. RE-1078 (Israel–Czech Republic BIT: "[t]he term 'investment' shall comprise any kinds of asset invested . . . in accordance with the respective laws and regulations."

1347. In addition to any potential limitation on the protection of investments inherent in the ECT, a principle of "clean hands" could be relevant to this arbitration pursuant to Article 26(6) of the ECT if it were an "applicable rule[. . .] or principle[. . .] of international law." The Parties dispute whether "clean hands" exists as a "general principle of international law recognized by civilized nations" in the meaning of Article 38(1)(c) of the Statute of the ICJ. The Tribunal addresses this question in subsection (b) below.

1348. Finally, in subsection (c) below, the Tribunal considers whether any of the 28 instances of "bad faith and illegal conduct" of which Respondent accuses Claimants fall within the scope of any "unclean hands" or similar principle applicable in the ECT context.

(a) Can a Clean Hands Principle or Legality Requirement be Read into the ECT?

1349. The Tribunal notes that there is support in the decisions of tribunals in investment treaty arbitrations for the notion that, even where the applicable investment treaty does not contain an express requirement of compliance with host State laws (as is the case with the ECT), an investment that is made in breach of the laws of the host State may either: (a) not qualify as an investment, thus depriving the tribunal of jurisdiction; or (b) be refused the benefit of the substantive protections of the investment treaty.

1350. The *Plama* tribunal, deciding a case under the ECT, thus stated that the "substantive protections of the ECT cannot apply to investments made contrary to law."[1770] It acknowledged that the ECT "does not contain a provision requiring the conformity of the Investment with a particular law," but stated that "[t]his does not mean . . . that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic and international law."[1771] The tribunal explained that, in that case, granting the claimant protection would have "be[en] contrary to the principle *nemo auditor propriam turpitudinem allegans*" and "the basic notion of international public policy—that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal."[1772]

1351. Other arbitral tribunals have stated in *obiter dicta* that the principle that an investment "will not be protected if it has been created in violation of national or international principles of good

[1770] *Plama*, Exh. C-994 ¶ 139.

[1771] *Ibid.* ¶ 138.

[1772] *Ibid.* ¶ 143.

faith" or "of the host State's law" is a "general principle[. . .] that exist[s] independently of specific language" in an investment treaty.[1773]

1352. The Tribunal agrees with this proposition. In imposing obligations on States to treat investors in a fair and transparent fashion, investment treaties seek to encourage legal and *bona fide* investments. An investor who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host state, has brought itself within the scope of application of the ECT through wrongful acts. Such an investor should not be allowed to benefit from the Treaty.

1353. For reasons that will become apparent further in this chapter, the Tribunal does not need to decide here whether the legality requirement it reads into the ECT operates as a bar to jurisdiction or, as suggested in *Plama*, to deprive claimants of the substantive protections of the ECT.

1354. However, the Tribunal does need to address Respondent's contention that the right to invoke the ECT must be denied to an investor not only in the case of illegality in the *making* of the investment but also in its *performance*. The Tribunal finds Respondent's contention unpersuasive.

1355. There is no compelling reason to deny altogether the right to invoke the ECT to any investor who has breached the law of the host State in the course of its investment. If the investor acts illegally, the host state can request it to correct its behavior and impose upon it sanctions available under domestic law, as the Russian Federation indeed purports to have done by reassessing taxes and imposing fines. However, if the investor believes these sanctions to be unjustified (as Claimants do in the present case), it must have the possibility of challenging their validity in accordance with the applicable investment treaty. It would undermine the purpose and object of the ECT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.

[1773] *Hamester* ¶¶ 123–24, Exh. R-1079. *See also Phoenix* ¶ 101, Exh. R-1078 ("it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT"); *SAUR* ¶ 308, Exh. R-4186 ("[the tribunal] is aware that the finality of the investment arbitration system is to protect only lawful and bona fide investments. Whether or not the BIT between France and Argentina mentions the requirement that the investor act in conformity with domestic legislation does not constitute a relevant factor. The condition of not committing a serious violation of the legal order is a tacit condition, inherent to any BIT as, in any event, it is incomprehensible that a State offer the benefit of protection through arbitration if the investor, in order to obtain such protection, has acted contrary to the law.")

1356. Respondent has not been able to cite any apposite authority in support of its contention. The statements of investment tribunals it relies on were all made *obiter* and are too vague to allow any certain conclusions to be drawn as to their intended meaning. For example, the statement in *Fraport* that illegal acts in the course of an investment "might be a defense to claimed substantive violations" appears to suggest that, in some cases, the State's actions will have been justified as an appropriate response to the investor's violations of national law.[1774] As is clear from the decision, the statement by the *Fraport* tribunal does not imply the unavailability of the substantive protections of the treaty, but rather concludes that the respondent State has not incurred any liability under the treaty.

(b) Does the "Clean Hands" Doctrine Constitute a "General Principle of Law Recognized by Civilized Nations"?

1357. Since the Tribunal will not read into the ECT any legality requirement with respect to the conduct of the investment, it must consider Respondent's more general proposition that a claimant who comes before an international tribunal with "unclean hands" is barred from claiming on the basis of a "general principle of law."

1358. The Tribunal is not persuaded that there exists a "general principle of law recognized by civilized nations" within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called "unclean hands."

1359. General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an "unclean hands" principle in international law.

1360. Respondent has demonstrated that certain principles associated with the "clean hands" doctrine, such as *exceptio non adimpleti contractus* and *ex iniuria ius non oritur* have been endorsed by the PCIJ and the ICJ.[1775] However, the Tribunal notes that Judge Simma in his separate opinion

---

[1774] *Fraport*, Exh. R-1006 ¶¶ 395, 345. The Tribunal notes that the Chairman, Mr. Fortier, was the Chairman of the Fraport tribunal.

[1775] *See The Diversion of Water from the Meuse (Netherlands v. Belgium)*, Judgment, 28 June 1937, Individual Opinion of Judge Hudson, PCIJ Series A/B No. 70, p. 73, 77, Exh. C-1502 ("[i]t would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party"); *Gabčíkovo-Nagymaros*, ¶ 133 Exh. C-948 ("[t]he Court, however, cannot

in the *Application of the Interim Accord of 13 December 1995* raises doubt as to the continuing existence of the *exceptio non adimpleti contractus* principle.[1776]

1361. With regard to the "unclean hands" doctrine proper, Respondent has referred to the dissenting opinion of Judge Schwebel (a member of this Tribunal) in the *Military and Paramilitary Activities in and against Nicaragua* ICJ case, where he concluded that Nicaragua's claims against the United States should fail because Nicaragua had "not come to Court with clean hands."[1777] Respondent also referred to other dissenting ICJ and PCIJ opinions where the principle of "unclean hands" was invoked (albeit often without referring to it by name).[1778]

1362. However, as Claimants point out, despite what appears to have been an extensive review of jurisprudence, Respondent has been unable to cite a single majority decision where an international court or arbitral tribunal has applied the principle of "unclean hands" in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim.

1363. The Tribunal therefore concludes that "unclean hands" does not exist as a general principle of international law which would bar a claim by an investor, such as Claimants in this case.

---

disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation . . . when deciding on the legal requirements for the future conduct of the Parties. This does not mean that facts—in this case, facts which flow from wrongful conduct—determine the law. The principle *ex injuria jus non oritur* is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct.")

[1776] *Application of the Interim Accord of 13 December 1995 (the Former Yugoslav Republic of Macedonia v. Greece)*, Judgment, 5 December 2011, Separate Opinion of Judge Simma, ICJ Reports 2011, p. 695 ¶¶ 19–20, Exh. C-1545.

[1777] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, Dissenting Opinion of Judge Schwebel, ICJ Reports 1986, p. 259 ¶ 268, Exh. R-1071.

[1778] *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment, 5 April 1933, Dissenting Opinion of Judge Anzilotti, PCIJ Series A/B No. 53, p. 76, 95, Exh. R-1073; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Second Phase), Advisory Opinion, 18 July 1950, Dissenting Opinion of Judge Read, ICJ Reports 1950, p. 231, 244, Exh. R-1074; *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, 24 May 1980, Dissenting Opinion of Judge Morozov, ICJ Reports 1980, p. 51 ¶ 3, Exh. R-1087; *Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, Dissenting Opinion of Judge van den Wyngaert, ICJ Reports 2002, p. 137 ¶ 84, Exh. R-1072 ("The Congo did not come to the Court with clean hands").

(c) Would any Instances of Claimants' Alleged "Bad Faith and Illegal" Conduct be Caught by a Legality Requirement Read into the ECT?

1364. To summarize, the Tribunal accepts that a claimant may be barred from seeking relief under the ECT if its investment was made in bad faith or in violation of the laws of the host state.

1365. It follows that the alleged instances of "unclean hands" listed in Subsections IX.B.2(b), (c) and (d) above—specifically, the instances related to the alleged abuse of the Russia–Cyprus DTA, the tax optimization scheme and the obstruction of Russia's enforcement of tax claims against Yukos, all of which relate to actions that were taken after the making of Claimants' investment, cannot have any impact on the availability of ECT protection for Claimants.

1366. This leaves for the Tribunal's consideration Respondent's allegations of bad faith and illegal conduct in the acquisition of Yukos and the subsequent consolidation of control and ownership over Yukos and its subsidiaries, set out in Subsection IX.B.2(a) above.

1367. It is common ground between the Parties that these actions were taken before Claimants became shareholders of Yukos in 1999, 2000 and 2001 and, consequently, were not taken by Claimants themselves, but by other actors, such as Bank Menatep and the Oligarchs.[1779] Claimants submit that these actions are thus irrelevant to these arbitrations, as the conduct complained of was not that of Claimants' themselves and, in any event, pre-dates Claimants' investment.[1780]

1368. Respondent replies that, on the contrary, the process of the acquisition of the Yukos shares by Claimants should not be seen in isolation but as an integral part of the "making of the investment" by Claimants. Respondent's argument was most convincingly put by Dr. Claudia Annacker during the Hearing. Dr. Annacker argued as follows:

> Contrary to Claimants' position, the serious illegalities that infect the entire process of the acquisition of the Yukos shares by Claimants cannot simply be ignored because the transfer of the shares to the Claimants . . . viewed in isolation, is asserted to be legal. These illegalities cannot somehow be cured through multiple transfers within this network of the oligarchs' offshore companies from one shell company to another.
>
> Indeed, the making of an investment is often a process rather than an instantaneous act, and often comprises a number of diverse transactions. These transactions must be treated as an

[1779] *See* Counter-Memorial ¶¶ 910–13, explaining the alleged illegal conduct of Bank Menatep and the Oligarchs in the acquisition of Yukos shares by the Oligarchs in 1995 and 1996.

[1780] *See* Reply ¶¶ 1135–36.

> integrated whole. The transactions may have a separate legal existence, but they have a common economic aim . . .
>
> Indeed, it would be incompatible with economic reality and undermine the integrity of the legal process if serious irregularities – illegalities – infecting the process of the making of the investment would not affect the availability of investment treaty protection, whether or not a specific transaction, part of the process, if viewed in isolation, might be legal.
>
> Now, this conclusion applies a fortiori where a claimant is not unrelated to the persons or entities that committed these illegalities, but is an investment vehicle owned and controlled by the same persons who committed the illegalities . . . Otherwise, investment treaty protection could be achieved simply by shifting investments through layers of ownership and control to launder illegal investments . . .
>
> While Claimants' acquisition of their shares may be a separate legal transaction, there is a common economic aim pursued by the same oligarchs . . .[1781]

1369. The Tribunal agrees with Respondent that an examination of the legality of an investment should not be limited to verifying whether the last in a series of transactions leading up to the investment was in conformity with the law. The making of the investment will often consist of several consecutive acts and all of these must be legal and *bona fide.*

1370. In the present case, however, Respondent has failed to demonstrate that the alleged illegalities to which it refers are sufficiently connected with the final transaction by which the investment was made by Claimants. The transactions by which each Claimant acquired its investment were their purchases of Yukos shares. As established in the Interim Award, these purchases were legal and occurred starting in 1999.[1782] On the other hand, the alleged illegalities connected to the acquisition of Yukos through the loans-for-shares program occurred in 1995 and 1996, at the time of Yukos' privatization. They involved Bank Menatep and the Oligarchs, an entity and persons separate from Claimants, one of which—Veteran—had not even come into existence.[1783] With respect to Respondent's other allegations, regarding profit skimming and the oppression of minority shareholders, it is also clear to the Tribunal that they are not part of the transaction or transactions by which each Claimant acquired their interest in Yukos.

1371. Respondent relies on *Anderson* for the proposition that "illegalities infecting an investment that pre-date a claimant's acquisition of the investment are not irrelevant or outside the tribunal's jurisdiction *ratione temporis*."[1784] However, the tribunal in that case examined and found to be

---

[1781] Transcript, Day 19 at 171–174 (Respondent's closing).

[1782] Interim Awards ¶¶ 431 (YUL); 430 (Hulley); 474 (VPL).

[1783] VPL was incorporated in 2001 (Interim Award ¶ 44 (VPL).

[1784] Rejoinder ¶ 1571, referring to Anderson, Exh. R-4204.

illegal the very transaction through which the claimants obtained their investment, not any prior transactions made by other persons.[1785]

1372. While it is true that the claimants in *Anderson* were not blamed for the illegality that tainted their investment, nevertheless it is the very transaction by which their respective investments were obtained that was considered illegal by the tribunal, and led it to decline jurisdiction.

(d) Conclusion

1373. The Tribunal concludes that Respondent's "unclean hands" argument fails as a preliminary objection. It does not operate to deprive the Tribunal of its jurisdiction in this arbitration, render inadmissible any of the Claimants' claims or otherwise bar Claimants' from invoking the substantive protections of the ECT.

1374. However, as will be seen in Chapter X.E and Part XII, some of the instances of Claimants' "illegal and bad faith" conduct complained of by Respondent in the context of this preliminary objection, could have an impact on the Tribunal's assessment of liability and damages.

C. RESPONDENT'S OBJECTIONS UNDER ARTICLE 21 OF THE ECT

1. Introduction

1375. Another important threshold issue in this arbitration arises from Respondent's objection under Article 21 of the ECT. Respondent argues that, pursuant to this complex provision (containing a "carve out" *from* the ECT for "Taxation Measures" at Article 21(1) and a "claw back" *for* Article 13 of the ECT in relation to "taxes" at Article 21(5)), the Tribunal lacks jurisdiction over claims with respect to "Taxation Measures" other than those based on expropriatory "taxes".[1786] Claimants argue that the objection is without merit since, *inter alia*, Article 21 does not apply to actions—including expropriations—carried out "under the guise of taxation."[1787]

1785 *Ibid*.

1786 *See e.g.*, Respondent's Post-Hearing Brief ¶¶ 162–72.

1787 *See e.g.*, Claimants' Post-Hearing Brief ¶¶ 203–30.

1376. The relevant provisions of Article 21 of the ECT for present purposes are paragraphs 1 (the "carve-out"), 5 (the "claw-back") and 7 (definitions), which in the English version[1788] read as follows:

> (1) Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.
>
> . . .
>
> (5) (a) Article 13 shall apply to taxes.
>
> (b) Whenever an issue arises under Article 13, to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply:
>
> (i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) shall make a referral to the relevant Competent Tax Authorities;
>
> (ii) The Competent Tax Authorities shall, within a period of six months of such referral, strive to resolve the issues so referred. Where nondiscrimination issues are concerned, the Competent Tax Authorities shall apply the non-discrimination provisions of the relevant tax convention or, if there is no non-discrimination provision in the relevant tax convention applicable to the tax or no such tax convention is in force between the Contracting Parties concerned, they shall apply the non-discrimination principles under the Model Tax Convention on Income and Capital of the Organisation for Economic Co-operation and Development;
>
> (iii) Bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) may take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the tax is an expropriation. Such bodies shall take into account any conclusions arrived at within the six-month period prescribed in subparagraph (b)(ii) by the Competent Tax Authorities regarding whether the tax is discriminatory. Such bodies may also take into account any conclusions arrived at by the Competent Tax Authorities after the expiry of the six-month period;
>
> (iv) Under no circumstances shall involvement of the Competent Tax Authorities, beyond the end of the six-month period referred to in subparagraph (b)(ii), lead to a delay of proceedings under Articles 26 and 27.
>
> . . .

[1788] The Tribunal has taken note of Claimants' highlighting of the differences in the wording of paragraphs 5 and 7 of Article 21 in some of the other official languages of the ECT. As will be seen from the Tribunal's findings in this chapter, the Tribunal does not need to address the relevance, if any, of these differences.

(7) For the purposes of this Article:

(a) The term "Taxation Measure" includes:

(i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein;

and

(ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound.

(b) There shall be regarded as taxes on income or on capital all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

(c) A "Competent Tax Authority" means 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.

(d) For the avoidance of doubt, the terms "tax provisions" and "taxes" do not include customs duties.

1377. Respondent's objection under Article 21 of the ECT was originally addressed by the Parties during the jurisdictional phase of the arbitration. In its Interim Awards, the Tribunal observed that some of the arguments raised by the Parties under Article 21 went to the heart of the merits of the dispute, in that they related to the background to and motivation behind Respondent's tax assessments, enforcement measures and other conduct, and that the Tribunal would not rule on these issues in a vacuum.[1789] As a consequence, the Tribunal decided "to defer its definitive interpretation of Article 21, and its characterization of [Claimants'] claims for purposes of Article 21, to the next phase of the arbitration."[1790]

1378. As a consequence, the Parties had a further opportunity to develop their positions under Article 21 of the ECT during the merits phase of the present proceedings. Claimants' and Respondent's arguments are now summarized in turn.

2. Claimants' Position

1379. Claimants argue that Article 21 of the ECT does not apply to the case at hand since Respondent's actions were "actions under the guise of taxation" rather than "*bona fide* taxation

[1789] Interim Awards ¶¶ 583–84 (Hulley), ¶¶ 584–85 (YUL), ¶¶ 595–96 (VPL).

[1790] Interim Awards ¶ 584 (Hulley), ¶ 585 (YUL), ¶ 596 (VPL).

actions"[1791] and merely a tool "to achieve a purpose that had nothing to do with taxation: the elimination of a potential opponent and the appropriation of Yukos' assets."[1792] According to Claimants, "[i]t is no answer for a state to say that its courts have used the [word] 'taxation' . . . in describing judgments by which they effect the dispossession of foreign investors. If that were enough, investment protection through international law would likely become an illusion, as states would quickly learn to avoid responsibility by dressing up all adverse measures, perhaps expropriation first of all, as taxation."[1793] Claimants refer in particular to the decisions of the *Quasar* and *RosInvestCo* tribunals to support their view that in a case such as this one a carve-out with regard to taxation measures cannot apply.[1794]

1380. In addition, Claimants suggest that the carve-out under Article 21 of the ECT is narrower than that in other treaties in that it only applies to the enactment of "provisions" relating to taxes, but not to the application of these provisions and the "collection and enforcement" of taxes.[1795] Claimants refer to the ECT's *travaux préparatoires* in this regard.[1796] In particular, they point out that during the negotiations of the ECT, the French delegation, in response to a memorandum of the Legal Sub-Group noting that "taxation measures" were identified in an illustrative manner, took the view that Article 21(7) of the ECT would constitute a definition and that, therefore, "includes" in that provision would have to be replaced by "means".[1797]

1381. Claimants say that they "have no issue with the right of the Russian Federation to enact tax provisions or with the content of Russian tax law," but only with "the manner in which Russian tax law was grossly distorted, misapplied and abused to effect the destruction of Yukos."[1798]

1791 Transcript, Day 2 at 4 (Claimants' opening); Transcript, Day 17 at 156 (Claimants' closing); Claimants' Post-Hearing Brief ¶ 204.

1792 Transcript, Day 17 at 170 (Claimants' closing); Claimants' Post-Hearing Brief ¶ 206.

1793 Transcript, Day 17 at 171 (Claimants' closing) (quoting *Quasar* ¶ 179, Exh. R-3383).

1794 Transcript, Day 2 at 4–8 (Claimants' opening); Transcript, Day 17 at 168–69 (Claimants' closing); Claimants' Opening Slides, pp. 219–20; Claimants' Post-Hearing Brief ¶ 207 (discussing *RosInvestCo* ¶ 628, Exh. C-1049; *Renta4 S.V.S.A. v. Russian Federation*, SCC Arbitration V024/2007, Award on Preliminary Objections, 20 March 2009 ¶ 74, Exh. C-1048).

1795 Transcript, Day 2 at 10 (Claimants' opening); Transcript, Day 17 at 174 (Claimants' closing); Claimants' Opening Slides, pp. 226–30; Claimants' Post-Hearing Brief ¶¶ 204, 208.

1796 Claimants' Post-Hearing Brief ¶ 211.

1797 Memorial ¶ 1034 n.1418.

1798 Claimants' Post-Hearing Brief ¶ 209.

Accordingly, Claimants take the view that for this reason alone Article 21 of the ECT cannot apply.[1799]

1382. Claimants also take the view that, in any event, the ECT's protection would still apply with regard to the expropriation standard under Article 13 of the ECT, due to the claw-back provision in Article 21(5) of the ECT, which they say must have the same scope as Article 21(1) of the ECT.[1800] Claimants suggest that Respondent's interpretation (according to which the claw-back provision would be narrower in scope than the taxation carve-out) would lead to "a gaping hole in the ECT where investors would stand completely unprotected from expropriatory taxation," thus "defeat[ing] the object and purpose of the 'claw-back' and of the ECT itself."[1801] Claimants also dispute Respondent's argument that Russian law should determine the meaning of "tax" under Article 21(5) of the ECT, since "for the interpretation of a treaty, you do not look at domestic law of one of the States parties to a treaty."[1802]

1383. In any event, Claimants argue that many of Respondent's actions that they complain of have nothing to do with taxation and thus fall outside of the scope of Article 21 of the ECT.[1803] In this regard, Claimants state that "the attacks on Yukos and related persons involved all of the following organs and entities: the Presidential Administration, the Russian courts, Ministry of Justice, Federal Bailiff Service, Penitentiary Service, Ministry of Natural Resources, Internal Affairs, FSB, Prosecutor General's Office, Federal Property Fund, Rosneft" and included "freezes, searches and seizures," the auctioning of YNG and the forcing of Yukos into bankruptcy, all of which would "have nothing to do with taxation."[1804]

1384. Finally, Claimants assert that referring any questions with regard to taxation measures to the Russian Federation's tax authorities as envisaged under the claw-back provision of Article 21(5) of the ECT would be an exercise in futility, as the relevant Russian authorities would already have looked at the issues, the Parties' submissions would be too voluminous to be considered by any of the relevant authorities and the Tribunal would, in any event, not be

---

1799 Claimants' Post-Hearing Brief ¶ 209.

1800 Transcript, Day 2 at 10 (Claimants' opening); Transcript, Day 17 at 192 (Claimants' closing); Claimants' Post-Hearing Brief ¶¶ 204, 214–21.

1801 Claimants' Post-Hearing Brief ¶ 220 (emphasis in the original); Transcript, Day 17 at 190–91 (Claimants' closing).

1802 Transcript, Day 17 at 195 (Claimants' closing).

1803 Transcript, Day 2 at 11 (Claimants' opening); Transcript, Day 17 at 207 (Claimants' closing); Claimants' Post-Hearing Brief ¶¶ 204, 222–24.

1804 Transcript, Day 17 at 208 (Claimants' closing).

bound by any comments of these authorities.[1805] As a consequence, Claimants argue that, even if the Tribunal were to find that Article 21(5) of the ECT applies, it should still proceed with its examination of the case without any referral to the Russian authorities.

3. Respondent's Position

1385. Respondent argues that most of the actions complained of by Claimants are outside the scope of the Tribunal's scrutiny due to the taxation carve-out provision in Article 21(1) of the ECT.

1386. Respondent points out that taxation carve-outs have a number of functions, which include preserving States' sovereignty in fiscal matters, the coordination of obligations under investment treaties and double taxation treaties, and assuring that complex tax issues are addressed with the necessary expertise.[1806] To achieve these functions, taxation carve-outs would typically be "broad, covering all aspects of the tax regime."[1807] Respondent refers to a number of instances where investment treaty tribunals gave effect to taxation carve-outs in international investment treaties, namely the decisions in *Duke Energy v. Ecuador*, *EnCana v. Ecuador*, *El Paso International Company v. The Argentine Republic* ("***El Paso***"), *Burlington v. Ecuador* and *Nations Energy v. Panama*.[1808]

1387. With regard to the wording of Article 21(1) of the ECT, Respondent argues that the term "measures" is given a broad meaning throughout the ECT, in contradistinction to the narrower term of "laws and regulations".[1809] As a consequence, says Respondent, an interpretation of Article 21(1) of the ECT in accordance with recognized principles of treaty interpretation shows that the provision "covers all measures taken by the legislative, executive, and judiciary in the field of taxation, whether of general or individual application."[1810] Respondent refers to the ICJ's judgment in *Fisheries Jurisdiction (Spain v. Canada)* to support its view that

---

1805 Transcript, Day 17 at 200 (Claimants' closing); Claimants' Post-Hearing Brief ¶ 229.

1806 Transcript, Day 3 at 156–59 (Respondent's opening); Respondent's Opening Slides, pp. 454–58.

1807 Transcript, Day 3 at 159 (Respondent's opening).

1808 Transcript, Day 3 at 161–62 (Respondent's opening) (discussing *Duke Energy v. Ecuador*, ICSID ARB/04/19, Award, 18 August 2008 ¶ 188, Exh. C-993; *EnCana v. Ecuador*, LCIA UN3481, UNCITRAL, Award, 3 February 2006 ¶ 168, Exh. C-976; *El Paso Energy International Company v. The Argentine Republic*, ICSID ARB/03/15, Award, 31 October 2011 ¶ 449, Exh. C-1544/R-4190 (hereinafter "*El Paso*"); *Burlington Resources v. Ecuador*, ICSID Case ARB/08/5, Decision on Jurisdiction, 2 June 2010 ¶ 249, Exh. R-992; *Nations Energy v. Panama*, ICSID ARB/06/19, Award, 24 November 2010 ¶ 483, Exh. R-1032); Respondent's Opening Slides, pp. 458–60.

1809 Transcript, Day 3 at 162 (Respondent's opening); Respondent's Opening Slides, pp. 461–62; Respondent's Post-Hearing Brief ¶ 164.

1810 Respondent's Post-Hearing Brief ¶ 162.

"measures" has a broad ordinary meaning and that, contrary to Claimants' suggestion that "Taxation Measures" only refer to legislative "provisions", legislation and implementing measures cannot be dissociated.[1811] According to Respondent, such a dissociation would be absurd, since "[e]very time a contracting State enforces tax legislation that is carved out, but would be inconsistent with the treatment standards in Part III, the State would incur international responsibility for breach of Part III of the Energy Charter Treaty."[1812]

1388. Respondent disputes Claimants' argument that Article 21(7) of the ECT, properly interpreted, applies only to the enactment of "provisions" relating to taxes. Respondent points out that the word "includes" used in Article 21(7) of the ECT stands in contrast to the word "means" used elsewhere, thus suggesting that the enumeration in that provision is not exhaustive.[1813] Respondent also argues that, if the term "Taxation Measure" were limited to provisions relating to taxes, the use of the word "includes" would not make sense, since Article 21(7) of the ECT specifically refers to both "any provision relating to taxes" in "the domestic law of the Contracting Party" and "any provision relating to taxes" in an "international agreement . . . by which the Contracting Party is bound."[1814] Since "all provisions relating to taxes are either contained in domestic law or in international treaties," Respondent claims that there would be nothing left to add.[1815]

1389. Respondent rather suggests that "[t]he term 'Taxation Measure' has a meaning in itself" and that "it provides a benchmark to determine which measures or categories of measures, in addition to those expressly listed, constitute 'Taxation Measures' for purposes of Article 21 of the ECT."[1816] Respondent refers to the ECT's *travaux préparatoires* to support its view that the list in Article 21(7) of the ECT is "illustrative" and "not a definition".[1817] In particular, Respondent points out that, during the negotiations of the ECT, the Canadian delegation, in

---

[1811] Transcript, Day 3 at 163–64, 170 (Respondent's opening) (discussing *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, 4 December 1998, ICJ Reports 1998, p. 460 ¶¶ 66–67, Exh. R-1028); Respondent's Opening Slides, pp. 462–63.

[1812] Transcript, Day 3 at 170 (Respondent's opening); Transcript, Day 21 at 173 (Respondent's rebuttal).

[1813] Transcript, Day 21 at 171 (Respondent's rebuttal); Respondent's Opening Slides, p. 465; Respondent's Post-Hearing Brief ¶ 163.

[1814] Transcript, Day 21 at 176 (Respondent's rebuttal).

[1815] Transcript, Day 21 at 178 (Respondent's rebuttal).

[1816] Transcript, Day 21 at 171–72 (Respondent's rebuttal).

[1817] Transcript, Day 3 at 167–68 (Respondent's opening) (discussing Memorandum from the Chairman of the Legal Sub-Group to the Chairman of Working Group II, Document No. LEG-14, 5 March 1993, p. 2, Exh. R-1020); Respondent's Opening Slides, pp. 466–67.

response to a memorandum of the Legal Sub-Group noting that "taxation measures" were identified in an illustrative manner, remarked that this was intentional and that "it would be counterproductive to come up with anything more precise."[1818] It also suggests that, while the French delegation expressed a preference for an exhaustive definition and for the word "includes" to be replaced by "means", by not proceeding with the suggested replacement, the "negotiating States chose to maintain an illustrative list."[1819]

1390. In addition, Respondent refers to Article 21(2)(b) and (3)(b) of the ECT as implying that the term "Taxation Measure" includes the generic term "measure" "as consistently used throughout the Energy Charter Treaty."[1820] According to Respondent, "Claimants would have this Tribunal rewrite Article 21(7)(a) to read: 'The term 'Taxation Measure' only includes provisions relating to taxes.'"[1821] In reality, according to Respondent, "[t]he purpose of Article 21, paragraph 7(a) ECT is not to replace the term 'measures' with the term 'provisions', but to clarify that the carve-out extends to both domestic and international taxation measures."[1822] This would be in line with general treaty practice, which would show that "there is not a single taxation carve-out that is limited in scope to tax legislation."[1823]

1391. The result of this interpretation, according to Respondent, is that "the core allegations on which Claimants base their claims are squarely within the taxation carve-out of Article 21(1)" of the ECT.[1824]

1392. With regard to Claimants' argument that Article 21(1) of the ECT should be inapplicable to the present case, since the measures adopted by Respondent were taken, according to the Claimants, under the guise of taxation (rather than constituting "real" taxation measures),

---

[1818] Transcript, Day 3 at 167 (Respondent's opening) (discussing Canada Department of Finance, Tax Policy Branch: Fax from A. Castonguay to F. Mullen et al., 19 March 1993, p. 4, Exh. R-1010).

[1819] Transcript, Day 3 at 168 (Respondent's opening) (discussing Memorandum from the Ministère du Budget of France to the ECT Secretariat, 19 March 1993, p. 3, Exh. C-1045).

[1820] Transcript, Day 21 at 173 (Respondent's rebuttal).

[1821] Transcript, Day 3 at 170–71 (Respondent's opening).

[1822] Transcript, Day 3 at 169 (Respondent's opening).

[1823] Transcript, Day 21 at 173 (Respondent's rebuttal).

[1824] Transcript, Day 3 at 164 (Respondent's opening).

Respondent refers to the ECtHR Yukos Judgment to support its claim that the tax assessments against Yukos pursued a legitimate aim and were not politically motivated.[1825]

1393. In any event, Respondent claims, referring to the ICJ's *Fisheries Jurisdiction (Spain v. Canada)* judgment, that the question of legality can have no impact on the qualification of an act as a "taxation measure",[1826] and it suggests that measures "in apparent reliance" on taxation legislation, even if abusive, must be covered by a taxation carve-out.[1827] Respondent also refers to a number of decisions of investment treaty tribunals to support this view. In particular, Respondent quotes from the decision in *EnCana v. Ecuador*, according to which "provided a matter 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), its legality is a matter for the courts of the host State."[1828] Similarly, Respondent quotes from the decision in *Burlington v. Ecuador* as having taken the view that the claim that a State "used its tax power in bad faith . . . challenges [that State's] tax power, and therefore raises 'matters of taxation'."[1829]

1394. In addition, Respondent avers that an exception to a substantive standard (such as the carve-out of Article 21(1)) cannot logically refer to the substantive standard (such as the expropriation standard of Article 13) to determine whether or not the exception applies.[1830] Therefore, according to Respondent, "neither the standards under Article 13 . . . nor the standards under Article 10, paragraph 1 of the ECT can be used to determine the scope or the applicability of the taxation carve-out."[1831] Accordingly, Respondent claims that the question of the legality of any taxation measures, including their *bona fide* nature, falls under Article 21(1) of the ECT and can be determined by an arbitral tribunal "only to the extent clawed back" pursuant to

---

1825 Transcript, Day 3 at 171–72 (Respondent's opening); Transcript, Day 21 at 178 (Respondent's rebuttal); Respondent's Opening Slides, pp. 468–69; ECtHR Yukos Judgment ¶¶ 8, 606, 647.

1826 Respondent's Opening Slides, p. 469 (quoting *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, 4 December 1998, ICJ Reports 1998, p. 460 ¶ 68, Exh. R-1028).

1827 Transcript, Day 3 at 172–73 (Respondent's opening); Respondent's Opening Slides, pp. 470–71.

1828 Transcript, Day 3 at 174 (Respondent's opening); Transcript, Day 21 at 179, 183 (Respondent's rebuttal) (discussing *EnCana v. Ecuador*, LCIA UN3481, UNCITRAL, Award, 3 February 2006 ¶ 142, Exh. C-976).

1829 Transcript, Day 3 at 174 (Respondent's opening); Transcript, Day 21 at 182–83 (Respondent's rebuttal) (discussing *Burlington Resources v. Ecuador*, ICSID Case ARB/08/5, Decision on Jurisdiction, 2 June 2010 ¶ 207, Exh. R-992).

1830 Transcript, Day 21 at 180 (Respondent's rebuttal).

1831 Transcript, Day 21 at 182 (Respondent's rebuttal).

Article 21(5) of the ECT.[1832] This would mean in particular that "[t]he Tribunal . . . lacks jurisdiction over Claimants' Article 10 claims, and Article 10(1) ECT is inapplicable."[1833]

1395. With regard to the claw-back provision in Article 21(5) of the ECT, Respondent argues that the reference to "taxes" rather than "taxation measures" is deliberate and implies that only "compulsory contributions to the Government" can be examined under that provision, but not "fines, interest, enforcement fees" or "other tax collection and enforcement measures."[1834] The basis for this would be that, in its ordinary meaning, "a tax" would be "a charge or a contribution imposed by the State for public purposes," but not "tax enforcement and collection measures."[1835]

1396. To support its reading of the claw-back provision, Respondent refers to the *travaux préparatoires*, claiming that, while the claw-back provision originally referred to "Taxation Measures", in June 1993 a new version of the draft of the provision was circulated, in which these references were replaced with references to "taxes".[1836] According to Respondent, this change "was certainly not incidental or unintentional."[1837] Respondent also dismisses the idea that the different wording of Article 21(5) of the ECT in some of the other official languages of the ECT should be accorded any relevance, since the negotiations of the Treaty would have been conducted solely in English and translations into other languages would only have been prepared after the conclusion of the negotiations without input from the negotiating teams.[1838] This must, according to Respondent, be taken into account as part of the circumstances surrounding the conclusion of the ECT in accordance with Article 32 of the VCLT.[1839]

1397. With regard to the meaning of "taxes", Respondent submits that, since this term "is not defined in the Energy Charter Treaty, and . . . has no autonomous meaning in international law,"[1840] it

---

1832 Transcript, Day 3 at 173 (Respondent's opening); Respondent's Post-Hearing Brief ¶ 168.

1833 Transcript, Day 3 at 176 (Respondent's opening).

1834 Transcript, Day 3 at 182 (Respondent's opening); Respondent's Opening Slides, pp. 472–79; Respondent's Post-Hearing Brief ¶ 172.

1835 Transcript, Day 3 at 179 (Respondent's opening).

1836 Transcript, Day 3 at 177 (Respondent's opening) (discussing European Energy Charter, Conference Secretariat, Room Document 3, Plenary Session 28 June1993–2 July 1993, 28 June 1993, pp. 3–4, Exh. R-1035).

1837 Transcript, Day 3 at 177 (Respondent's opening).

1838 Transcript, Day 21 at 185 (Respondent's rebuttal); Respondent's Rebuttal Slides, pp. 470–73.

1839 Transcript, Day 21 at 186 (Respondent's rebuttal).

1840 Transcript, Day 3 at 179 (Respondent's opening).

needs to be determined pursuant to Russian law. This would be in line with the practice under tax treaties, which generally leaves the term of "taxes" undefined, adopting the meaning of the term under the domestic law of the State that imposed the tax.[1841] Respondent refers in this regard for instance to Article 3(2) of the OECD Model Tax Convention on Income and Capital and the Cyprus-Russia DTA, pointing out that both instruments are referenced in the claw-back provision of Article 21(5) of the ECT.[1842]

1398. More generally, Respondent argues that "in the absence of autonomous rules or concepts of international law, international law must turn for guidance to domestic law . . . as developed within the State's domestic jurisdiction."[1843] Under Russian law, a "tax" would be defined in Article 8 of the Russian Tax Code as a "mandatory . . . payment" collected "to provide financial support to the government" for public purposes.[1844] This would exclude "tax enforcement, [and] collection measures," including "interest, fines, [and] enforcement fees."[1845]

1399. Respondent argues that a limited claw-back would also be "very much in line with treaty practice," which would be "diverse" and variable "with respect to the type of measures that are clawed back."[1846] In particular, Respondent refers to the Russia-Sweden BIT, which contains a carve-out with regard to "taxation matters", whilst also providing that some of its provisions shall apply to "taxes".[1847] For Respondent, this provision constitutes proof that "States are . . . free to claw back only a subcategory of the measures they decided to exclude from the scope of the Treaty" and that "they do so".[1848] The "deliberate choice of the ECT Contracting Parties to limit the expropriation claw-back to taxes" would in fact "represen[t] a middle ground of varying practices of the ECT Contracting Parties."[1849]

1841 Transcript, Day 3 at 180 (Respondent's opening).

1842 Transcript, Day 3 at 180–81 (Respondent's opening); Transcript, Day 21 at 188 (Respondent's rebuttal); 2010 OECD Model Tax Convention, Article 3(2), Exh. R-1017; 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, Article 3(2), Exh. C-916.

1843 Transcript, Day 3 at 181 (Respondent's opening).

1844 Transcript, Day 3 at 182 (Respondent's opening); Russian Tax Code, Article 8, Exh. R-551.

1845 Transcript, Day 3 at 182 (Respondent's opening).

1846 Transcript, Day 3 at 178 (Respondent's opening).

1847 Transcript, Day 21 at 184 (Respondent's rebuttal); Agreement between the Government of the Kingdom of Sweden and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments, 19 April 1995, Article 11(2), Exh. R-3451.

1848 Transcript, Day 21 at 184 (Respondent's rebuttal).

1849 Transcript, Day 3 at 179 (Respondent's opening).

1400. Finally, Respondent argues that, if the Tribunal were to find that both the carve-out and the claw-back provisions apply, the Tribunal would be required to make a referral to the "Competent Tax Authorities".[1850] This would include "the Russian Ministry of Finance, the Cypriot Ministry of Finance, and the UK Inland Revenue"[1851]; and this is so "because the referral procedure replicates the dispute settlement procedures under double taxation agreements."[1852] According to Respondent, "[t]he referral mechanism . . . forms part of the ECT Contracting Parties' consent to submit themselves to international arbitration pursuant to Article 26 ECT, and it precludes any ruling by the Tribunal whether a tax constitutes an expropriation . . . without having made referral to the tax authorities."[1853]

4. Tribunal's Decision

(a) Introduction

1401. As mentioned earlier, the Tribunal deferred its decision on Article 21 because the Parties' arguments in relation to this provision during the jurisdictional phase raised issues that went to the heart of the merits of the dispute and the Tribunal decided that it could not rule on these issues in a vacuum.

1402. Now, at the conclusion of the merits phase of the present proceedings, the Tribunal has the necessary context within which to evaluate the Parties' arguments, analyze and interpret Article 21, and characterize Claimants' claims for purposes of Article 21.

1403. Before turning to Article 21 itself, the Tribunal considers it helpful to recall its principal findings on those core issues relating to the merits that are particularly relevant for Article 21.

1404. In Chapter VIII.B, the Tribunal concluded, on the totality of the evidence, that the tax authorities used the "re-attribution" formula not only so as to be able to collect the revenue-based taxes against Yukos, but also so as to establish a basis for imposing on Yukos the massive VAT liability and excessive fines that followed. In the Tribunal's view, while Yukos was vulnerable on some aspects of its tax optimization scheme, principally because of the sham-like nature of certain elements of its operations in at least some of the low-tax regions,

[1850] Transcript, Day 21 at 189–90 (Respondent's rebuttal).

[1851] Transcript, Day 21 at 191 (Respondent's rebuttal).

[1852] Transcript, Day 21 at 191 (Respondent's rebuttal).

[1853] Transcript, Day 21 at 192 (Respondent's rebuttal).

and could have faced some legitimate claims relating to revenue-based taxes had the Russian Federation limited itself to *bona fide* taxation measures, the State apparatus decided to take advantage of that vulnerability; it did so by launching a full assault on Yukos and its beneficial owners in order to bankrupt Yukos and appropriate its assets while, at the same time, removing Mr. Khodorkovsky from the political arena. The Tribunal has come to these conclusions based on its review of the entire record, as detailed in the other chapters of Part VIII, above.

1405. The Tribunal now has to decide, in these circumstances, if and how Article 21 applies, and whether it deprives the Tribunal of its jurisdiction, as argued by Respondent, to consider Claimants' claims under Article 10 of the ECT (in the event the carve-out applies), and perhaps even under Article 13 of the ECT (if the carve-out applies and the claw-back does not apply).

1406. Both Parties made extensive submissions on Article 21, both in writing and orally. Having considered the Parties' arguments, the Tribunal concludes that it has jurisdiction to rule on Claimants' claims under Article 13 of the ECT for two independent reasons, each of which in and of itself suffices to justify the jurisdiction of the Tribunal. Firstly, the Tribunal finds that, irrespective of its findings regarding the applicability of Article 21 of the ECT to the present case, it would have "indirect" jurisdiction over claims under Article 13 of the ECT because any measures excluded by the carve-out under Article 21(1) of the ECT would be brought back within the Tribunal's jurisdiction by the claw-back of Article 21(5) of the ECT and any referral to the Competent Taxation Authorities within the meaning of this latter provision would clearly have been futile.

1407. Secondly, the Tribunal finds that, in any event, the carve-out of Article 21(1) can apply only to *bona fide* taxation actions, *i.e.*, actions that are motivated by the purpose of raising general revenue for the State. By contrast, actions that are taken only under the guise of taxation, but in reality aim to achieve an entirely unrelated purpose (such as the destruction of a company or the elimination of a political opponent) cannot qualify for exemption from the protection standards of the ECT under the taxation carve-out in Article 21(1). As a consequence, the Tribunal finds that it does indeed have "direct" jurisdiction over claims under Article 13 (as well as Article 10) in the extraordinary circumstances of this case.

1408. The Tribunal will now develop each of these reasons.

(b) First Reason: Assuming the Carve-Out Applies, So Does the Claw-Back, and Any Referral to the Competent Tax Authorities Would Clearly have been Futile

1409. Firstly, the Tribunal concludes that it has jurisdiction under Article 13 of the ECT, even assuming that the carve-out in Article 21(1) of the ECT applies. This determination is based on both the scope of the expropriation claw-back in Article 21(5) of the ECT relative to the scope of the taxation carve-out in Article 21(1) of the ECT, and the futility of any referral to the Competent Tax Authorities under Article 21(5) of the ECT. The Tribunal will expand upon each of these points in turn.

i. The Scope of the Claw-Back in Article 21(5)

1410. Respondent argues that the term "Taxation Measures", used in the carve-out, should be given a broad meaning, including collection and enforcement measures, while the term "taxes", used in the claw-back, should be given a narrow meaning, which would exclude collection and enforcement measures. The Tribunal cannot accept Respondent's arguments for the following reasons.

1411. Firstly, the Tribunal observes that the term "Taxation Measures", used in Article 21(1), is defined in Article 21(7)(a) to mean "provisions" of domestic tax law and tax treaties, while the term "taxes", used in Article 21(5), is not defined in the Treaty.

1412. Pursuant to Article 31 of the 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."

1413. In the view of the Tribunal, the ordinary meaning of "tax" used in Article 21(5) cannot be narrower than the meaning of "Taxation Measure" used in Article 21(1). Respondent's interpretation of "Taxation Measures" and "taxes" would, as Claimants submit, result in a wide carve-out and a narrow claw-back, "reinstating protection from expropriation [under Article 13 of the ECT] only in relation to 'charges and payments', but not collection and enforcement measures or interests and fines."[1854] The Tribunal agrees with Claimants that such an interpretation would lead to "a gaping hole in the ECT where investors would stand completely

[1854] Claimants' Post-Hearing Brief ¶ 220.

unprotected from expropriatory taxation."[1855] Such an interpretation would defeat the object and purpose of the claw-back and of the ECT itself.

1414. Respondent refers the Tribunal to a number of treaties that contain a taxation carve-out, but that either do not contain any claw-back provision or limit the claw-back to certain substantive protection standards, and argues that its proposed interpretation of Article 21 of the ECT corresponds to a "middle ground of varying practices." The Tribunal, having reviewed those treaties, finds those provisions of no assistance to its interpretation of Article 21 of the ECT.

1415. In any event, the Tribunal, having found that the interpretation of Article 21 of the ECT according to the general rule of interpretation under Article 31 of the VCLT results in a meaning that is neither ambiguous nor obscure and does not lead to a result which is manifestly absurd or unreasonable, does not need to call in aid any other rule of interpretation. Finally, the Tribunal does not find much helpful guidance in the *travaux préparatoires* of the ECT. Respondent claims that the replacement of "Taxation Measures" with "taxes" in a draft of Article 21(5) of the ECT circulated in June 1993 could not have been incidental. However, if this replacement had been motivated by the intention of the negotiators to limit the scope of the claw-back provision in Article 21(5) of the ECT compared to the scope of the carve-out in Article 21(1) of ECT, the Tribunal would expect such a motivation to have found some additional expression in the record.

1416. The Tribunal therefore holds that any measures falling under the taxation carve-out of Article 21(1) of the ECT are also covered by the scope of the expropriation claw-back in Article 21(5) of the ECT.

ii. The Referral to Competent Tax Authorities

1417. The Tribunal recalls Article 21(5)(b), which sets out the following referral mechanism:

> (b) Whenever an issue arises under Article 13, to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply:
>
> (i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle

[1855] Claimants' Post-Hearing Brief ¶ 220 (emphasis in the original).

disputes pursuant to Article 26(2)(c) or 27(2) shall make a referral to the relevant Competent Tax Authorities;

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

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

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

1418. According to Respondent, "[t]he referral mechanism . . . precludes any ruling by the Tribunal whether a tax constitutes an expropriation . . . without having made referral to the tax authorities."[1856] Specifically, Respondent argues that Article 21(5)(b)(i) requires the Tribunal to make a referral to "the Russian Ministry of Finance, the Cypriot Ministry of Finance, and the UK Inland Revenue."[1857]

1419. Claimants, on the other hand, take the view that a referral is not warranted, for two reasons. Firstly, Claimants argue that the requirement is triggered only if there is an allegation that "a tax constitutes an expropriation," whereas in the present case, according to Claimants, their investments were not expropriated by "a tax", but "by a combination of many types of actions of which taxation—as labeled by the Russian Federation—was only one."[1858] Secondly, Claimants argue that any referral made to the Russian Ministry of Finance, or the tax authorities of the United Kingdom and Cyprus for that matter, would be an exercise in futility.[1859] According to Claimants, the Russian Ministry of Finance would effectively be asked to "be a judge in its own cause," and asking the tax authorities to review the entire file—written

[1856] Transcript, Day 21 at 192 (Respondent's rebuttal).

[1857] Transcript, Day 21 at 191 (Respondent's rebuttal).

[1858] Claimants' Post-Hearing Brief ¶ 229.

[1859] Claimants' Post-Hearing Brief ¶ 229.

submissions, relevant correspondence, expert reports, witness statements, hearing transcripts and over 8,000 exhibits—and to comment on it, would amount to a "useless exercise".[1860]

1420. The Tribunal does not accept Claimants' first argument, since it ignores the logic by which the Tribunal would have come to this point in its reasoning. If the Tribunal were considering Respondent's measures under the claw-back of Article 21(5), it would be because the Tribunal would have found previously that there was no meaningful distinction between the scope of "Taxation Measures" and "taxes" for purposes of Article 21, or indeed because it would have found that even if measures "under the guise" of taxation were covered by the carve-out, then they must also be covered by the claw-back. The referral mechanism therefore cannot be avoided on the basis of a narrow interpretation of the term "tax" in Article 21(5)(b)(i).

1421. Claimants' futility argument, however, is persuasive. In this particular case, the Tribunal is convinced that a referral to the tax authorities of the Russian Federation, the United Kingdom and/or Cyprus would be (and, at any earlier stage of the proceedings, would have been) an exercise in futility.

1422. The record before the Tribunal is enormous. The arguments and allegations of the Parties relating to various taxes and the reasons for which they should or should not be considered expropriatory have filled briefs adding up to thousands of pages, have relied on some 8,800 exhibits and were presented to the Tribunal in oral hearings scheduled over a six-week period. It is inconceivable that the gist of this case, for either side, could have been reduced to a meaningful submission of a size and scope that might have been digested by the relevant tax authorities in a way that would have given them an opportunity to provide timely and pertinent guidance to the Tribunal.

1423. Thus, while the Tribunal acknowledges that the referral mechanism in the claw-back provision of Article 21(5) was designed to assist tribunals "to distinguish normal and abusive taxes," as noted by Professor Park in his "Tax Arbitration and Investor Protection" article cited by Respondent,[1861] this is simply not a case in which the Tribunal could have been assisted by referring the matter to the tax authorities. As the Tribunal has noted at various stages in the present Award, its conclusions ultimately rest on a consideration of the totality of the evidence

---

[1860] Claimants' Post-Hearing Brief ¶ 229.

[1861] Respondent's Closing Sides, p. 849; William Park, Tax Arbitration and Investor Protection, in INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY (Graham Coop & Clarisse Ribeiro eds., 2008), p. 115, p. 131, Exh. R-3410.

presented to it. The tax authorities, on the other hand, would necessarily need to focus on discrete taxes or discrete issues related to taxes.

1424. The requirement for an investor to make a referral under Article 21(5)(b)(i), first sentence (and, *a fortiori*, the requirement for the Tribunal to make a referral under Article 21(5)(b)(i), second sentence) cannot, in the Tribunal's view, apply in cases where such a referral would obviously be futile. Like any provision in an international treaty, Article 21(5)(b)(i) of the ECT must be interpreted in good faith. A good faith interpretation of the provision leads to the conclusion that a referral cannot be required if following the referral procedure would clearly be futile under the circumstances of a specific case.

1425. It has long been recognized, with regard to the exhaustion of local remedies requirement in the context of the principles on diplomatic protection,[1862] that following a prescribed procedure may be dispensed with under circumstances where doing so clearly would not produce the result that the procedure seeks to achieve. The relevant principle is set out in Article 15(a) of the 2006 ILC Draft Articles on Diplomatic Protection, providing that "[l]ocal remedies do not need to be exhausted where . . . there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress."[1863] Tribunals adjudicating claims of investors under international investment treaties have made similar findings with regard to the obligation of investors to observe so-called cooling-off periods[1864] or the requirement to submit a dispute to litigation in the host State's domestic courts for a certain period of time.[1865]

1426. The Tribunal is of the view that a referral must be regarded as clearly futile if there is no possibility that the relevant authorities would in fact be able to come to some timely and meaningful conclusion about the dispute or make any timely determinations that could

---

1862 *See e.g.*, *Certain Norwegian Loans (France v. Norway)*, Judgment, 6 July 1957, ICJ Reports 1957, p. 9, Separate Opinion of Judge Lauterpacht, p. 34, at p. 39; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase)*, Judgment, 5 February 1970, ICJ Reports 1970, p. 3, Separate Opinion of Judge Tanaka, p. 114, at pp. 144–45.

1863 Draft Articles on Diplomatic Protection, adopted by the International Law Commission at its 58th session, 2006, Article 15(a).

1864 *See e.g.*, *Occidental Petroleum Corporation & Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/111, Decision on Jurisdiction, 9 September 2008 ¶ 94.

1865 *See e.g.*, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Award, 24 December 2007 ¶ 147, Exh. R-3576; *Ambiente Ufficio S.P.A. v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013 ¶ 607.

potentially serve to assist the Tribunal's decision-making. The Tribunal finds, for the reasons stated above, that no such possibility exists or existed in this case.

1427. Furthermore, the Tribunal notes that neither Party disputes that, in the event of a referral, any determinations of the Competent Tax Authorities regarding whatever discrete issues they might have been able to focus on relating to whether any tax was an expropriation would not have been binding on the Tribunal. The wording of Article 21(5)(b)(iii) of the ECT is very clear: bodies such as the present Tribunal *may* take into account any conclusion arrived at by the Competent Tax Authorities regarding which the tax is an expropriation.[1866]

1428. In conclusion, the Tribunal holds that a referral of the dispute to the "Competent Tax Authorities" within the meaning of Article 21(5)(b)(i) of the ECT would clearly have been futile at the outset of this arbitration and was therefore not required. It remains futile today.

iii. Conclusion

1429. As a consequence, assuming (for the sake of argument) that some of Respondent's measures fell within the scope of the carve-out in Article 21(1), the Tribunal would nevertheless be in a position to proceed to determine whether the relevant measures constituted a violation of Article 13 of the ECT under the claw-back. It could do so even though it has not referred the issue of whether any tax is an expropriation to any of the Competent Tax Authorities because to do so would clearly be an exercise in futility.

(c) Second Reason: The Carve-Out Does Not Apply

1430. Secondly, and independently from the above reasoning, the Tribunal concludes that it has jurisdiction to rule on Claimants' claims under Article 13 of the ECT due to the fact that the Article 21 carve-out does not apply to the Russian Federation's measures because they are not, as the Tribunal has concluded above, on the whole, a *bona fide* exercise of the Russian Federation's tax powers.

1431. This accords with Claimants' view that Article 21 of the ECT can apply only to *bona fide* taxation actions, *i.e.*, actions that are motivated for the purpose of raising general revenue for the State. By contrast, actions that are taken only "under the guise" of taxation, but in reality

[1866] Claimants' Post-Hearing Brief ¶ 229; Transcript, Day 21 at 194 (Respondent's rebuttal).

aim to achieve an entirely unrelated purpose (such as the destruction of a company or the elimination of a political opponent), argue Claimants, cannot qualify for exemption from the protection standards of the ECT under the taxation carve-out in Article 21(1).

1432. The Tribunal essentially accepts the latter interpretation of Article 21.

1433. To find otherwise would mean that the mere labelling of a measure as "taxation" would be sufficient to bring such measure within the ambit of Article 21(1) of the ECT, and produce a loophole in the protective scope of the ECT. Since the claw-back in Article 21(5) of the ECT relates only to expropriations under Article 13 of the ECT, a State could, simply by labelling a measure as "taxation", effectively avoid the control of that measure under the ECT's other protection standards. It would seem difficult to reconcile such an interpretation with the purpose of Part III of the ECT.

1434. The Tribunal cannot agree with Respondent that, by finding that Article 21(1) of the ECT applies only to *bona fide* taxation, the Tribunal would be conflating the requirements for the application of the taxation carve-out (representing an exception to the protection standards under the ECT) and the requirements for the application of the protection standards themselves. For example, Article 13 of the ECT could be violated through a *bona fide* taxation measure that was aimed at the raising of State revenue, but whose effect was expropriatory. By contrast, the characterization of an incriminated action by a respondent State as a Taxation Measure for purposes of Article 21(1) of the ECT would be independent of the effects of that action, but rather depend on the motivation underlying it.

1435. The Tribunal also sees no reason to assume that it would be better for the question of the motivation underlying a particular measure to first be addressed through the "Competent Tax Authorities" (pursuant to the referral mechanism under Article 21(5) of the ECT), as the particular expertise of these authorities does not extend to the question of whether an act that on its face appears to be a taxation measure is in reality implemented for improper reasons. To the contrary, where the tax authorities of a State have participated in measures against an investor whose true purpose is unrelated to taxation, submitting these issues to the preliminary examination of the same authorities would add little value for an arbitral tribunal.

1436. The Tribunal further observes that, by making this finding, it is in good company, and that the two eminent arbitral tribunals which have previously considered, on an admittedly more limited record, essential elements of the dispute now before it, have adopted the same view.

1437. Thus, the *RosInvestCo* tribunal concluded that:

> [I]t is generally accepted that the mere fact that measures by a host state are taken in the form of application and enforcement of its tax law, does not prevent a tribunal from examining whether this conduct of the host state must be considered, under the applicable BIT or other international treaties on investment protection, as an abuse of tax law to in fact enact an expropriation.[1867]

1438. Similarly, the *Quasar* tribunal opined that:

> It is no answer for a state to say that its courts have used the word "taxation" . . . in describing judgments by which they effect the dispossession of foreign investors. If that were enough, investment protection through international law would likely become an illusion, as states would quickly learn to avoid responsibility by dressing up all adverse measures, perhaps expropriation first of all, as taxation. When agreeing to the jurisdiction of international tribunals, states perforce accept that those jurisdictions will exercise their judgment, and not be stumped by the use of labels.[1868]

1439. By contrast, neither the *EnCana v. Ecuador* decision[1869] nor the *Burlington v. Ecuador* award[1870] to which Respondent refers in support of its view that any measure "adopted in apparent [reliance on] tax legislation" should fall under the taxation carve-out,[1871] in fact appears to endorse such a position.

1440. Thus, while the tribunal in *EnCana* stated that, for a measure to fall under the taxation carve-out in the treaty before it, it would have to be "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),"[1872] the emphasis in this formulation appears to have been on the "sufficiently clea[r]" connection to an existing legal provision or practice, rather than the "apparent reliance" of the authorities on the existence of a legal basis for their actions. This is supported by another statement of the *EnCana* tribunal in the same paragraph, according to which "an arbitrary demand unsupported by any provision of the law of the host State would not qualify" for an exemption under the taxation carve-out.[1873]

1867 *RosInvestCo* ¶ 628, Exh. C-1049.

1868 *Quasar* ¶ 179, Exh. R-3383.

1869 Transcript, Day 3 at 174 (Respondent's opening); Transcript, Day 21 at 179, 183 (Respondent's rebuttal) (discussing *EnCana v. Ecuador*, LCIA UN3481, UNCITRAL, Award, 3 February 2006 ¶ 142, Exh. C-976).

1870 Transcript, Day 3 at 174 (Respondent's opening); Transcript, Day 21 at 182–83 (Respondent's rebuttal) (discussing *Burlington Resources v. Ecuador*, ICSID Case ARB/08/5, Decision on Jurisdiction, 2 June 2010 ¶ 207, Exh. R-992).

1871 Transcript, Day 3 at 174 (Respondent's opening).

1872 *EnCana v. Ecuador*, LCIA UN3481, UNCITRAL, Award, 3 February 2006 ¶ 142(1), Exh. C-976.

1873 *EnCana v. Ecuador*, LCIA UN3481, UNCITRAL, Award, 3 February 2006 ¶ 142(1), Exh. C-976.

1441. The context of the statement also makes it clear that the tribunal was only addressing minimum requirements for the application of the taxation carve-out before it, rather than expressing any views about situations in which the carve-out provision would not apply. Thus the tribunal emphasized that, for a measure to come under the treaty's carve-out, it would have to be "sufficiently clearly connected to" or supported by some taxation law, regulation or actual practice (the latter of which would in turn have to be based on a taxation law or regulation). It did, however, neither say nor imply that any measure which the authorities based on a taxation law or regulation would by definition be regarded as a taxation measure and therefore justify the application of the carve-out.

1442. It makes sense to regard a tax demand that is effectively motivated not by the aim of raising public revenue but by a purpose extraneous to taxation as an "arbitrary demand" that, in the words of the *EnCana* tribunal, cannot qualify for an exemption under a taxation carve-out.[1874] Such an interpretation is also supported by the statement of Claimants' expert Professor Crawford, who was the presiding arbitrator in the *EnCana* arbitration and according to whom the decision was not meant to imply "that anything labelled as a taxation measure is excluded" by a taxation carve-out.[1875]

1443. Neither does the *Burlington* decision referred to by Respondent support the view that a taxation carve-out would have to apply to any measure adopted by tax authorities in apparent reliance on tax legislation. In *Burlington*, the tribunal notes that "bad faith" of the respondent mentioned by the claimant rested on its allegation that Ecuador had forced the claimant to give up certain contractual rights by the use of its taxation legislation.[1876] There was no suggestion in that case that Ecuador had taken any measures against the investor for motives that were entirely unrelated to the raising of public revenue. As a consequence, the tribunal in *Burlington*, when it said that the claimant's suggestion "that Respondent used its tax power in bad faith in order to force Claimant to surrender its rights" under the contracts raised "matters of taxation",[1877] was referring to the specific situation in that case that cannot in any way be compared to the one at issue in the present proceedings.

1874 *EnCana v. Ecuador*, LCIA UN3481, UNCITRAL, Award, 3 February 2006 ¶ 142(1), Exh. C-976.

1875 Transcript, Day 17 at 161 (Claimants' closing); Further Opinion on Jurisdictional Issues by James Crawford, 3 May 2007 ¶ 5, Exh. C-613.

1876 *Burlington Resources v. Ecuador*, ICSID Case ARB/08/5, Decision on Jurisdiction, 2 June 2010 ¶ 175, Exh. R-992.

1877 *Burlington Resources v. Ecuador*, ICSID Case ARB/08/5, Decision on Jurisdiction, 2 June 2010 ¶ 207, Exh. R-992.

1444. It follows that Article 21(1) of the ECT, which applies only to *bona fide* taxation measures, does not find any application in this arbitration. The tax assessments levied against Yukos by the Russian Federation, which the Tribunal has found were designed mainly to impose massive liabilities based on VAT and related fines, and were essentially aimed at paralyzing Yukos rather than collecting taxes, are not exempt from scrutiny under the ECT, as they are not captured by the carve-out of Article 21(1).

1445. Similarly, and *a fortiori*, subsequent steps in the enforcement of the tax assessments are not captured by the carve-out, because the Tribunal has found that they too were exigently pursued by means that indicate that Yukos was not just being chased to pay taxes, but was being driven into bankruptcy.

(d) Conclusion

1446. Based on the analysis set out in this chapter of the Award and for the two independent reasons set out above, the Tribunal has jurisdiction to consider whether the Russian Federation is liable to Claimants under Article 13 of the ECT for the measures which it has adopted and which have resulted in the evisceration of their investments and the destruction of Yukos.

1447. While the Tribunal's finding that the carve-out in Article 21(1) does not apply would in principle allow the Tribunal to consider the measures under both Articles 10 and 13 of the ECT, in the circumstances, as will be seen, it will not be necessary for the Tribunal to consider whether the expropriatory measures of Respondent are also in breach of Article 10 of the ECT.

X. LIABILITY

1448. Having dismissed Respondent's preliminary objections to the Tribunal's jurisdiction, the admissibility of Claimants' claims and the applicability of the ECT in the present case, the Tribunal now turns to the question of the Russian Federation's liability under the Treaty. In Part VIII, the Tribunal canvassed the evidentiary record put before it by the Parties. In this Part X, the Tribunal draws the legal consequences of its factual conclusions, beginning by addressing questions of attribution.

1449. As has already been mentioned, the Tribunal's eventual conclusions regarding the alleged breaches by Respondent of Article 13 (Expropriation) of the ECT will make it unnecessary for the Tribunal to consider the application of Article 10 (Promotion, Protection and Treatment of

Investments). Nevertheless, for the sake of completeness, the Tribunal will set out the Parties' arguments with regard to Article 10. The Tribunal will then set out the Parties' arguments in respect of Article 13. Finally, the Tribunal will set out its decision regarding Respondent's liability and Claimants' contributory fault.

A. ATTRIBUTION

1450. The Parties are divided on the question of whether some of the actions of which Claimants complain are attributable to the Russian Federation. Below, the Tribunal sets out the Parties' submissions and its own views on this question.

1. Claimants' Position

1451. Claimants summarize their position with regard to the attribution of acts said to constitute breaches of the ECT to Respondent in their Memorial as follows:

> [T]he Russian Federation has acted through almost all of its organs, be it Executive or Judiciary, at all levels, including the highest, in seeking the destruction of Yukos. These include the President of the Russian Federation, the Presidential Administration, the Tax Ministry (later to become the Federal Taxation Service, a federal body of executive authority within the Ministry of Finance), the Ministry of Justice (under whose authority federal bodies of executive authority such the Federal Bailiff Service or the Federal Penitentiary Service are acting), the Prosecutor General's Office (a federal body entrusted with the task of execution of the laws in the name of the Russian Federation), the Ministry of Internal Affairs (responsible for the police forces), the Federal Security Service (also a federal body of executive authority, acting under the authority of the President). When not acting through these Executive organs or through the Russian courts, the Russian Federation was acting through State-owned entities, first and foremost State-owned company Rosneft . . .[1878]
>
> [emphasis added]

1452. Claimants put forward a similar view at the Hearing:

> [W]e complain of acts of the executive organs. That's the President; the Prime Minister; ministries, including Tax, Justice and Interior Ministries; and their constituent bodies, the Federal Bailiffs Service and the Federal Penitentiary Service under Justice.
>
> We complain of the actions of executive bodies or agencies: that would be the Prosecutor General's Office, the Federal Property Fund and the Federal Security Services. We also complain of the actions of the courts . . . . These are actions of the Russian Federation State organs, and they are, by definition, actions of the State.[1879]
>
> [emphasis added]

[1878] Memorial ¶ 551.

[1879] Transcript, Day 20 at 252.

1453. In particular, with regard to the bankruptcy proceedings against Yukos, Claimants assert that:

> The Russian Federation initiated the bankruptcy proceedings through Rosneft, whilst the Russian courts ensured that the Russian State directly and through Rosneft would be the main creditor in the proceedings, systematically rejecting the claims of creditors related to Yukos or Yukos' shareholders. Thus placed in the driving seat in these bankruptcy proceedings, the Russian State, acting through the Federal Taxation Service and Rosneft, rejected the Rehabilitation Plan proposed by Yukos' management and paved the way for itself, through bankruptcy receiver (Mr. Rebgun) and the Russian Federal Property Fund to distribute the rest of Yukos' assets by auctioning them at bargain prices. The vast majority of the proceeds went to the Russian State, with Rosneft acquiring Yukos' two other main production assets, Samaraneftegaz and Tomskneft, at a substantial discount."[1880]
>
> [emphasis added]

1454. Claimants seek to attribute the following actions of Rosneft (some of them through Rosneft-controlled YNG) to Respondent:

> Rosneft's action in acquiring Yugansk through Baikal, a special vehicle used to conceal Rosneft's involvement in the Yuganskneftegaz auction.
>
> Rosneft's entering into an agreement with the consortium of banks in order to initiate the bankruptcy and precipitate the liquidation of Yukos.
>
> . . .
>
> [T]he decisions made at the creditors' meeting hand in hand with the Russian Tax Ministry, namely: to vote against the rehabilitation plan; to vote against the admission of any Yukos-related creditor; and to vote for the liquidation of Yukos.[1881]

1455. Claimants take the view that "the actions of Rosneft are attributable to the Russian State"[1882] due to the latter's ownership of and control over the former, which would be "established by the fact that members of Rosneft's Board of Directors hold parallel positions in the Executive branch of the Russian Federation and that Rosneft's President is appointed by the Russian Executive."[1883] Claimants refer to a statement made by Rosneft in the context of its IPO in July 2006, acknowledging that "the Russian Government . . . controls Rosneft and may cause Rosneft to engage in business practices that do not maximize shareholder value."[1884] Claimants also cite a statement made by President Putin at a press conference in December 2004 and a decision rendered by the Amsterdam Court of Appeal in proceedings between Yukos Capital

---

[1880] Reply ¶ 718; *see also* Transcript, Day 20 at 252.

[1881] Transcript, Day 20 at 253–54.

[1882] Reply ¶ 721.

[1883] Memorial ¶ 551. *See also* Transcript, Day 20 at 254–55.

[1884] Transcript, Day 20 at 257.

and Rosneft in April 2009 as further support for the control of Rosneft's actions by Respondent.[1885]

1456. Finally, Claimants submit that Respondent's argument that, for a breach of a host State's ECT obligations to have occurred, challenged actions must have been taken by the host State in the exercise of *puissance publique* is a "nice invention."[1886] All that matters, argue Claimants, is whether the acting entity is an organ of the State, not the capacity in which it is acting.[1887] Claimants quote the commentary to Article 4 of the ILC Articles on State Responsibility: "[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or acta iure gestionis . . . the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act."[1888]

2. Respondent's Position

1457. Respondent denies that the actions of any of the following entities can be attributed to it, as none of these entities would have exercised governmental authority or acted under the instructions of, or under the direction or control of, Respondent: Sibneft, Gemini Holdings, Nimegan Trading, Rosneft, YNG.[1889] Respondent also denies that the actions of Mr. Rebgun, Yukos' interim manager and receiver, or the actions of "the meeting and the committee of Yukos' bankruptcy creditors," can be attributed to Respondent, for the same reasons.[1890]

1458. Concerning the attribution of Mr. Rebgun's actions to the Russian Federation, Respondent points out that "[i]n most European legal systems a liquidator or bankruptcy receiver is not a State organ"[1891] and that bankruptcy managers and receivers do not "generally exercise elements of governmental authority or act under the instructions, direction or control of the

---

1885 Transcript, Day 20 at 257, referring to *Press Conference with Russian and Foreign Media*, President of Russia Official Web Portal, 23 December 2004, Exh. C-422; *Yukos Capital SARL v. OAO Rosneft*, Amsterdam Court of Appeal, Decision, 28 April 2009, Exh. C-484.

1886 Transcript, Day 1 at 157–58 (Claimants' opening).

1887 Transcript, Day 20 at 249 (Claimants' rebuttal).

1888 Transcript, Day 1 at 148 (Claimants' opening).

1889 Counter-Memorial ¶¶ 1442; 1472–1475; Rejoinder ¶¶ 77, 381, 1044; Respondent's Opening Slides, Vol. 6, slide 3.

1890 Rejoinder ¶¶ 77, 381; *see also* ¶ 1044; Respondent's Opening Slides, Vol. 6, slide 3.

1891 Rejoinder ¶ 389.

State."[1892] Respondent cites several decisions of investment treaty tribunals as well as the decision of the Grand Chamber of the ECtHR in *Kotov v. Russia* to support this view.[1893]

1459. Regarding Rosneft, Respondent does not deny that it held 75.16 percent of the shares in this company, that members of the company's Board of Directors held parallel positions in the Russian Government, or that the company's President was appointed by the Russian Government. However, Respondent insists that this is not enough to satisfy the standard of attribution under Article 8 of the ILC Articles on State Responsibility, and that Claimants must prove a link between any relevant actions of Rosneft or YNG and specific instructions given by the Russian State.[1894] As explained by Respondent at the Hearing:

> [W]hat Claimants must establish to attribute the conduct of Rosneft under Article 8 to Respondent—but which they clearly have not proven—is that in acquiring YNG from Baikalfinance, entering into the agreement with SocGen and voting for Yukos' liquidation at the creditors' meeting, Rosneft was acting pursuant to specific instructions of a Russian State organ.[1895]
>
> [emphasis added]

1460. Similarly, with respect to the initiation of bankruptcy proceedings, Respondent asserts that "what Claimants must establish, but what they clearly have not proven, is that in filing the bankruptcy petitions . . . YNG were acting under the instructions or directions or control of Russian State organs."[1896]

1461. With regard to the standard applicable under Article 8 of the ILC Articles on State Responsibility, Respondent explains that:

> The commentary to Article 8 of the ILC Articles on State Responsibility notes that "it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act." As regards "direction or control," the commentary states that "[s]uch conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation."[1897]

1892 Rejoinder ¶ 391.

1893 Rejoinder ¶¶ 389–390, referring to *Plama* ¶ 253; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 ¶ 155, Exh. R-2940 (hereinafter "*Jan Oostergetel*"); *Case of Kotov v. Russia*, ECtHR [GC], Appl. No. 54522/00, Judgment, 3 April 2012, Exh. R-3531 (hereinafter "*Kotov v. Russia*").

1894 Rejoinder ¶ 387.

1895 Transcript, Day 21 at 196. *See also* Transcript, Day 19 at 116.

1896 Transcript, Day 19 at 115–16.

1897 Counter-Memorial ¶ 1444, referring to Commentary to ILC Articles on State Responsibility, Article 8 ¶¶ 3 and 7, Exh. C-1042. *See also* Rejoinder ¶ 382; Transcript, Day 21 at 196.

1462. Respondent also quotes the following passage from the commentary on the ILC Articles on State Responsibility, which notes that the fact a State initially establishes a corporate entity is not a sufficient basis for the attribution to the State of the conduct of that entity, unless the entity exercises elements of governmental authority.[1898]

1463. Respondent refers to several decisions of investment treaty tribunals (in particular *Jan de Nul v. Egypt*, *White Industries v. India* and *Hamester*) as well as to the decision of the Iran–U.S. Claims Tribunal in *Flexi-Van Leasing v. Iran* to support these statements.[1899]

1464. Finally, although Respondent does not deny that the Russian Tax Ministry is a State organ, the actions of which can in principle be attributed to the State under Article 4 of the ILC Articles on State Responsibility, Respondent submits that it cannot be held liable for the actions taken by the Tax Ministry in the context of Yukos' bankruptcy because such actions were not taken in the exercise of *puissance publique.* In particular, Respondent submits that it cannot be held liable for the Tax Ministry's vote to liquidate Yukos at the creditors' meeting.[1900]

3. Tribunal's Decision on Attribution

1465. The Parties' differences in respect of attribution are centered on whether there can be attributed to Respondent actions of Rosneft in the acquisition of YNG, and in precipitating and participating in the bankruptcy proceedings. Their differences also include whether the course of the bankruptcy proceedings and the actions in respect of them by the bankruptcy administrator, Mr. Rebgun, are, in whole or in part, attributable to the Russian Federation.

1466. The ILC Articles on State Responsibility are in point. They and their commentary are conveniently republished in a book edited by Professor James Crawford, then the Commission's special rapporteur on the topic.[1901] Chapter II, "Attribution of Conduct to a State," in its introductory commentary, observes that, "the general rule is that the only conduct

---

1898 Counter-Memorial ¶ 1473; Rejoinder ¶ 385, referring to Commentary to ILC Articles on State Responsibility, Article 8, ¶ 6 Exh. C-1042. *See also* Respondent's Rebuttal Slides, Vol. 7, slide 50.

1899 Transcript, Day 21 at 197, referring to *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID ARB/04/13, Award, 6 November 2008 ¶ 173, Exh. C-997; *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Award, 30 November 2011 ¶¶ 8.1.10 and 8.1.18, Exh. R-3545; *Hamester* ¶ 179; Counter-Memorial ¶ 1474, referring to *Flexi-Van Leasing, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Case No. 36, (1988) 12 Iran-U.S.C.T.R. 335, Award, 11 October 1986 p. 349, Exh. R-1154.

1900 Respondent's Post-Hearing Brief ¶ 177; Transcript, Day 19 at 119, 161–62 (Respondent's closing).

1901 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), Articles 1–11 and 28–39, Exh. C-1042.

attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State."[1902] Article 8, "Conduct directed or controlled by a State," provides that "[t]he conduct of a person or group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction and control of, that State in carrying out the conduct."[1903] The commentary to Article 8 observes that:

> Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled . . . . The fact that the State initially establishes a corporate entity . . . is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity . . . . Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority . . . [and] the instructions, direction or control [of the State] must relate to the conduct which is said to have amounted to an internationally wrongful act.[1904]

1467. The Parties agree that the actions of organs of the Russian State, whether executive, judicial or administrative, are attributable to Russia. As noted, disagreement is essentially confined to the actions of Rosneft (and Rosneft-controlled YNG) and the actions of the bankruptcy administrator.

1468. The Russian State owned all, or, subsequently, over 70 percent of the shares of Rosneft. Rosneft's officers were and are appointed by the State and many of the members of Rosneft's Board of Directors concurrently occupied and occupy senior executive positions in Government, some close to President Putin.[1905] All this however does not suffice to attribute to the Russian State the actions of which Claimants especially complain: (a) Rosneft's collaboration with Baikal in the sale of YNG at auction and its immediate repurchase by Rosneft; (b) Rosneft's agreement with the SocGen bank creditors syndicate of Yukos to pay the debt of Yukos to those banks, the banks at the same time undertaking to petition Russian courts

---

[1902] *Ibid.*p. 54.

[1903] *Ibid.* p. 47.

[1904] *Ibid.* p. 48.

[1905] For example, Mr. Igor Sechin, the Chairman of Rosneft's Board of Directors from 2004 to 2012, was also from 2004 to 2008 Deputy Head of the Administration of the President of the Russian Federation and aide to the President, and, from 2008 to 2012, Deputy Prime Minister of the Russian Federation. In 2011, he became President of Rosneft. Mr. Sergei Naryshkin, now the Chairman of the State Duma, was member of the Rosneft Board of Directors from 2004 to 2009, while also holding the post, from 2004 to 2011, of Head of the Executive Office of the President of the Russian Federation (*see* Rosneft Annual Reports 2004, 2005, 2006, 2007, 2009, Exh. C-379; Rosneft Annual Report 2010, Exh. C-1265; *see also* Rosneft Annual Report 2012 (available on Rosneft's web-site).

for the bankruptcy of Yukos; and (c) Rosneft's successful bids at the bankruptcy auction for much of what was left of Yukos.

1469. That is because it would be difficult, if not impossible, to prove that Rosneft in so acting, did so at the instructions or direction, or under the control of the Russian State—but for one remarkable fortuity that bears on the auction of the shares of YNG and their acquisition by Rosneft.

1470. President Putin conducted a press conference with Russian and foreign media on 23 December 2004.[1906] He was asked by V. Terekhov (Interfax), "in the wake of serious events that occurred tonight, when Nefteyugansk passed into the ownership of a state company. Will you comment . . . ?" President Putin replied:

> 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 Yuganskneftgaz. That is the story. In my view, everything was done according to the best market rules . . . 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? You all know only too well how the privatization 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.

1471. Towards the end of this lengthy press conference, K. Eggert (BBC), noting that there had been a lot of criticism in Western press and official circles of the sale of YNG, asked for the reaction of President Putin to "this criticism and does it concern you at all?" President Putin responded by sharply criticizing the Texas bankruptcy proceedings brought by Yukos and the responsive court ruling as "unacceptable from an international legal point of view . . . a breach of international politeness" and a manifestation of U.S. "imperium". He concluded: "As for the deal that took place, I think that it was carried out in strict conformity with the Russian legislation and in accordance with the norms of international law and the international commitments that Russia has taken on as part of the agreements that we have signed with our partners on the international stage. So I do not see any real problems here."

1472. In this latter comment about agreements that Russia had signed, President Putin may have had the ECT in mind. What at any rate is critical is his statement at the opening of the press

[1906] President of Russia Official Web Portal, Press Conference with Russian and Foreign Media, 23 December 2004, Exh. C-422.

conference that, with regard to Rosneft's purchase of the YNG shares from Baikal, "the state, resorting to absolutely legal market mechanisms, is looking after its own interests." He did not say that Rosneft was looking after its own interests, but that the purchase signified that the Russian State was looking after "its own interests". In the view of the Tribunal, that statement constitutes President Putin's public acceptance and assertion that Rosneft's purchase of the YNG shares from Baikal was an action in the State's interest, the inference being 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. It follows that that act, as well as the auction of YNG shares that underlay it, is attributable to the Russian State.

1473. Claimants have invoked as well Rosneft's press release of 27 June 2005, in which Rosneft declared that, given that it is wholly owned by the State, "Rosneft acts on its behalf."[1907] They also noted a statement made by Rosneft in the context of its IPO in July 2006, acknowledging that "the Russian Government . . . controls Rosneft . . . ."[1908]

1474. It does not necessarily follow from the foregoing that the actions of Rosneft in contracting with the SocGen bank creditors of Yukos, and in bidding at the bankruptcy auction of Yukos itself, are attributable to Russia. Yet it may well be that in taking those actions, Rosneft did so at the *sub rosa* direction of the Russian State, at the direction of senior officers of President Putin's entourage who concurrently ran Rosneft. In the view of the Tribunal, it may reasonably be concluded that Rosneft was so directed. Or, if not, that it was not because it did not need to be; Rosneft was such a creature of President Putin's entourage that it reflexively implemented his policies. But proving that admittedly is elusive, in the absence of an inculpatory admission on behalf of the Russian State such as that of President Putin in respect of the acquisition of YNG.

1475. Are the actions of the bankruptcy administrator, Mr. Rebgun, attributable to the Russian Federation?

1476. Respondent observed in its Rejoinder that "[i]n most European legal systems a liquidator or bankruptcy receiver is not a State organ" and that bankruptcy managers and receivers do not "generally exercise elements of governmental authority or act under the instructions, direction

---

1907 *Rosneft Shareholders' AGM Held*, Rosneft Press Release, 27 June 2005, Rosneft Website, Exh. C-1419.

1908 Rosneft IPO Prospectus, 14 July 2006, Exh. C-380.

or control of the State".[1909] Respondent cited pertinent awards of investment treaty tribunals, including *Plama*[1910] and *Oostergeel v. Slovak Republic*[1911] as well as the decision of the Grand Chamber of the ECtHR in *Kotov v. Russia*[1912] in support of this conclusion. Those decisions are indeed supportive.

1477. Claimants did not address these arguments at the Hearing, where they appeared to limit their complaints in the context of the bankruptcy proceedings to "the actions of the Russian courts, who appointed the interim receiver and confirmed all his actions, as well as the actions of the admitted creditors, namely the Tax Ministry and Rosneft."[1913]

1478. Respondent has maintained that the actions of the Tax Ministry—incontestably an organ of the Russian State—in asserting and realizing its predominant claims to the assets of Yukos in the bankruptcy proceedings, nevertheless are not in breach of the ECT because the Tax Ministry there acted as a mere commercial creditor and did not exercise governmental authority. "The votes of the Russian tax authorities are attributable to Respondent, but are not an exercise of *puissance publique.* The tax authorities voted at the Creditors' Meeting, and, more generally, participated in Yukos' bankruptcy proceedings in their capacity as a Yukos creditor alongside other creditors, enjoyed no special prerogatives or privileges, and were subject to the same rules as private creditors, the 2002 Bankruptcy Law."[1914] Moreover, Respondent contends that the Moscow Arbitrazh Court's "acceptance of the bankruptcy petitions and ratification of the creditors' decision to liquidate Yukos does not change this conclusion . . . [It] enforced legislation governing private-law relations, specifically, bankruptcy legislation, which imposes limitations inherent in private property. Loss resulting from a court's enforcement of legal limitations inherent in private property is not compensable under Article 13 or 10(1) ECT, irrespective of whether the court proceedings were instituted by a State organ."[1915]

1479. The foregoing line of argument runs up however against the ILC Articles on State Responsibility. Article 4 provides that "[t]he conduct of any State organ shall be considered an

---

1909 Rejoinder ¶¶ 389–390.

1910 *Plama* ¶¶ 252–53.

1911 *Jan Oostergetel* ¶¶ 151–58.

1912 *Kotov v. Russia* ¶¶ 99–107.

1913 Transcript, Day 20 at 252.

1914 Respondent's Post-Hearing Brief ¶ 177.

1915 *Ibid.* ¶ 178.

act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State . . . ." The commentary to this article specifies that "[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as '*acta iure gestionis*'."[1916]

1480. In respect of attribution, the Tribunal concludes that the Russian Federation is responsible for its organs, executive, judicial and administrative, in the actions that they took against and in relation to Yukos and its stockholders; that, for the reasons stated above, the Russian Federation, speaking through its President, accepted responsibility for Rosneft's acquisition of YNG and for the auction that underlay it; and that, in respect of other actions of Rosneft that bear on the destruction of Yukos, while proof of specific State direction is lacking, it may reasonably be held that the highest officers of Rosneft who at the same time served as officials of the Russian Federation in close association with President Putin acted in implementation of the policy of the Russian Federation. The actions of Mr. Rebgun as bankruptcy administrator are not attributable to Respondent.[1917]

B. ARTICLE 10 OF THE ECT

1. Introduction

1481. Article 10(1) provides, in relevant part:

> *Article 10*
> PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS
>
> (1) 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. . . .

[1916] ILC Aricles on State Responsibility, Articles 1–11 and 28–39, p. 40, Exh. C-1042.

[1917] It is of interest to note that, in an interview with the Vedomosti paper in October 2006, Mr. Rebgun is alleged to have acknowledged his ties to the Russian security establishment known as the "siloviki." *Yukos liquidator says process will be legal*, AFP World News, 10 August 2006, Exh. C-822.

1482. The Tribunal will first summarize the Parties' arguments regarding applicable legal standards under Article 10(1) of the ECT, and then turn to the Parties' arguments regarding whether Claimants have made out a breach of these standards by Respondent.

2. Applicable Legal Standards under Article 10(1) of the ECT

(a) Claimants' Position

1483. In respect of the obligations imposed by Article 10(1) on host States, Claimants refer, as being particularly relevant to the present case, to Respondent's obligation to accord Claimants' investments "fair and equitable treatment" and its obligation not to impair Claimants' investments by discriminatory measures.[1918]

1484. With regard to fair and equitable treatment, Claimants submit that, as a general matter, it is "a broad and widely accepted standard"[1919] encompassing such fundamental standards as "good faith, due process, non-discrimination and proportionality",[1920] "procedural propriety",[1921] "the right to be heard and to present evidence",[1922] "proper notice of administrative actions to be taken by the State"[1923] and "transparency, protection of legitimate expectations . . . and freedom from coercion and harassment".[1924]

1485. Claimants submit that fair and equitable treatment in Article 10(1) of the ECT is a "non-contingent, autonomous" standard that is broader than both the historical customary international law standard for the treatment of aliens elaborated in *Neer* (which requires "a showing of outrage, bad faith, willful neglect of duty, or 'insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily

---

1918 Memorial ¶ 556.

1919 *Ibid.* ¶ 558, quoting Judge Schwebel in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/–1/07, Award, 25 May 2004 ¶ 109, Exh. C-969 (hereinafter "*MTD v. Chile*").

1920 *Ibid.* quoting Judge Schwebel in *MTD v. Chile*, Exh. C-969 and *Saluka Investments BV v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006 ¶ 303, Exh. C-977 (hereinafter "*Saluka*"); Reply ¶ 581.

1921 Memorial ¶ 564.

1922 *Ibid.* ¶ 566.

1923 *Ibid.* ¶ 567.

1924 *Ibid.* ¶ 558.

recognize its insufficiency'")[1925] and the current customary international law minimum standard of treatment for investments.[1926]

1486. Claimants emphasize that fair and equitable treatment is an "objective standard that does not require bad faith by the [host] State."[1927]

1487. Claimants further submit that denial of justice can constitute a breach of the fair and equitable treatment standard and refer to several awards that define the legal standard for establishing a denial of justice: *Azinian v. Mexico*, *Rumeli v. Kazakhstan*, *Chattin*, *Mondev v. United States*, *Brown v. Great Britain*, and *Petrobart v. Kyrgyz Republic*.[1928] Claimants submit that "[i]nternational law has long accepted the responsibility of States for the actions of their courts, especially where those actions involve judicial impropriety and malfunctions in the administration of justice."[1929] Claimants submit that a substantive denial of justice may be found in instances of gross misapplication of the law,[1930] but that most often denial of justice will be related to procedural inadequacies.[1931] Accordingly, say Claimants, the concepts of due process and denial of justice are "closely linked", such that "a failure to allow a party due process will often result in a denial of justice."[1932]

1488. However, Claimants contend that Respondent, by arguing that the threshold for Article 10(1) is "demanding" or "high", conflates the standard for breaches of due process with the historical standard for denial of justice.[1933] In support of their criticism, Claimants refer to the awards in *Vivendi II* and *Rumeli v. Kazakhstan* and to a recent commentary by Judge Schwebel, a member of this Tribunal, where he wrote that:

1925 Reply ¶ 584, quoting Counter-Memorial ¶ 1564.

1926 Reply ¶ 584–606, citing *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 ¶¶ 360–61, 372, Exh. C-979 (hereinafter "*Azurix*").

1927 Transcript, Day 1 at 154, quoting *National Grid P.L.C. v. Argentine Republic* (UNCITRAL) Award, 3 November 2008 ¶ 173, Exh. C-996; *see also* Memorial ¶ 559.

1928 Memorial ¶¶ 618–28.

1929 *Ibid.* ¶ 619.

1930 *Ibid.* ¶ 621.

1931 *Ibid.* ¶ 622.

1932 *Ibid.*¶ 623, quoting *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 ¶ 452, Exh. C-998.

1933 *Ibid.* ¶¶ 607–16.

> [w]hat in another case may or may not be fair and equitable treatment by a State of foreign investment may involve procedural matters, or matters of substance, or both, far removed from the confines and criteria of a denial of justice.[1934]

1489. It follows, submit Claimants, that while investment tribunals have considered the fair and equitable treatment standard to include the manner in which an investor and its investment are treated by the host State's courts "mainly through the prism of denial of justice . . . this is by no means exhaustive of the standard."[1935] In sum, Claimants' position is that, while denial of justice forms part of the fair and equitable treatment standard, the latter standard is not limited to the former.[1936]

1490. Claimants also submit that freedom from arbitrariness and discrimination forms part of the fair and equitable treatment standard.[1937] In support of their submission, Claimants refer to the award in *Saluka Investments BV v. The Czech Republic* ("***Saluka***")—quoted verbatim by the *Biwater Gauff v. United Republic of Tanzania* ("***Biwater***") and *Rumeli v. Kazakhstan* tribunals—which established the proposition that the standard of reasonableness has no different meaning in this context than in that of the fair and equitable treatment standard with which it is associated.[1938]

1491. Claimants submit that the *Plama v. Bulgaria* award confirms that "unreasonable" conduct is synonymous with "arbitrary" conduct.[1939] Claimants also contend that many tribunals, such as those in *Lemire v. Ukraine* and *Siemens A.G. v. The Argentine Republic* ("***Siemens***"), have ruled that various State actions, not "based on reason", and comparable to those alleged against Respondent were "arbitrary".[1940]

1934 *Ibid.* ¶ 608, referring to Judge Stephen M. Schwebel, "Is *Neer* Far from Fair and Equitable?" (2011) 27 Arb. Int'l 555 p. 559, Exh. C-1647.

1935 *Ibid.* ¶ 611.

1936 *Ibid.* ¶ 615

1937 *Ibid.* ¶ 645, citing *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (hereinafter "*CMS v. Argentina*").

1938 Memorial ¶ 645, citing *Saluka*, ¶ 460, Exh. C-977; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 and Concurring and Dissenting Opinion by Gary Born ¶ 692, Exh. C-991 (hereinafter "*Biwater*"); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 ¶ 679, Exh. C-992.

1939 Memorial ¶ 646, *Plama*, Exh. C-994.

1940 *Ibid.* ¶¶ 651–52.

1492. Claimants further submit that the principle of proportionality is an element of the fair and equitable treatment standard, as confirmed in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* ("***MTD v. Chile***")and *Vivendi v. Argentina*.[1941]

1493. Many arbitral tribunals, say Claimants, have also held that a stable legal and business environment is an essential element of fair and equitable treatment.[1942] They refer to the concepts of consistency, transparency and treatment that does not frustrate the legitimate expectations of the investor as being essential to ensure such an environment[1943] Claimants cite the *PSEG Global v. Turkey* award, where the tribunal stated that "the 'roller-coaster' effect of the continuing legislative changes" seriously breached the fair and equitable treatment obligation.[1944]

1494. Claimants also contend that Article 10(1) of the ECT includes a stand-alone prohibition against discrimination that is breached if the management, maintenance, use, enjoyment or disposal of the investor's investment is impaired. The test for identifying discriminatory measures, submit Claimants, is described in *Plama* as entailing "like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds."[1945]

1495. Further, Claimants argue that the non-discrimination standard in Article 10(1) of the ECT is not limited to measures taken because of the foreign nationality of the investor. Claimants emphasize that nothing in the wording of Article 10(1) of the ECT suggests such a limit to the standard. This is particularly obvious when Article 10(1) is contrasted with Article 10(7) of the ECT, which contains the most-favored-nation treatment and national treatment standards. It follows, argue Claimants, that "when the ECT's drafters intended to restrict a non-discrimination provision to nationality-based discrimination, they expressly did so."[1946] Claimants contend that the former U.S. BIT negotiator, Mr. Vandevelde supported this interpretation:

> Nothing in the language [of the ECT] suggests that it is limited to discrimination based on nationality . . . . Although the most common competitive disadvantages imposed on

---

1941 *Ibid.* ¶ 679.

1942 *Ibid.* ¶ 697.

1943 *Ibid.* ¶ 698.

1944 *Ibid.* ¶ 703.

1945 *Ibid.* ¶ 737.

1946 Reply ¶ 641.

> foreign investments may be nationality-based, a competitive disadvantage imposed on some other basis may be just as detrimental to the investment.[1947]

1496. Claimants also rely on the awards in *Plama, Al-Bahloul v. Tajikistan*[1948] and *National Grid*[1949] for the proposition that arbitral tribunals interpreting the ECT and other investment protection treaties with identical or similar provisions have concluded that the non-discrimination standard is not restricted to a protection against nationality-based discrimination.[1950]

1497. Claimants contend that the authorities relied upon by Respondent for the contrary proposition either contradict Respondent's position or are inapposite.[1951] Claimants characterize Respondent's "selective quoting" from the *LG&E Energy Corp. et al. v. The Argentine Republic* award as "unfortunate." They say that, in fact, in the paragraph immediately following the one cited by Respondent, the Tribunal said the exact opposite. They point out that the tribunal found that "while there was no intent to discriminate against the investments on account of the investors' nationality, there was differential treatment of similar companies."[1952] Claimants also highlight that Respondent's reliance on declarations from the U.S. and Canada is of no assistance, as they are non-signatories to the ECT.[1953]

(b) Respondent's Position

1498. Respondent submits that, in determining whether the host State's conduct is fair and equitable, an investor's legitimate and reasonable expectations are the "dominant" element. Respondent also submits that the assessment of the reasonableness and legitimacy of an investor's expectations of fair and equitable treatment must be based on the state of the law of the host State, its political and historical conditions, and any particular conditions of treatment the State

---

1947 *Ibid.* ¶ 642, referring to Kenneth Vandevelde, *Bilateral Investment Treaties, History, Policy and Interpretation* (OUP 2010) pp. 213–14, Exh. C-1018.

1948 *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan* (SCC Case No. V064/2008), Partial Award on Jurisdiction and Liability of 2 September 2009 ¶ 248, Exh. C-1531.

1949 *National Grid P.L.C. v. Argentine Republic* (UNCITRAL), Award, 3 November 2008 ¶ 198, Exh. C-996.

1950 *Ibid.* ¶¶ 644–46.

1951 *Ibid.* ¶¶ 647–51.

1952 *Ibid.* ¶ 650, referring to Counter-Memorial p. 748, n.2479; *LG&E Energy Corp et al. v. The Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 ¶¶ 147–48, Exh. C-981 (hereinafter "*LG&E*").

1953 *Ibid.* ¶¶ 652–53.

offered the investor at the time it made its investment.[1954] In support of these propositions, Respondent cites *Saluka* and *Duke Energy v. Ecuador*.[1955]

1499. Respondent also refers to the award in *M.C.I. v. Ecuador* to support the proposition that the obligation to provide an investor with stable, equitable, favorable and transparent conditions cannot be construed as an obligation to refrain from enforcing existing law.[1956] Respondent relies on Professor Dolzer's view that "[t]he pre-investment legal order forms the framework for the positive reach of the expectation which will be protected and also the scope of considerations upon which the host state is entitled to rely when it defends [itself]."[1957]

1500. Respondent refers to the awards in *Lauder v. Czech Republic* and *Genin v. Estonia* in support of its contention that conduct cannot be in breach of the fair and equitable treatment standard if authorities are only taking the actions necessary to enforce the their laws.[1958] Respondent also relies on the *Genin v. Estonia* award for the proposition that where a State's actions are the justified exercise of its power to enforce its laws, the procedural irregularities complained of by investors must be very severe to amount to a violation of the relevant investment treaty.[1959]

1501. Moreover, Respondent contends that the fair and equitable treatment standard in Article 10(1) of the ECT—specifically with respect to establishing a denial of justice, or conduct that is otherwise manifestly unfair or unreasonable—corresponds to an international law minimum standard of treatment of foreign investment.[1960] This minimum standard, submits Respondent, incorporates the customary international law minimum standard of treatment for alien property, as well as treaty obligations of the host State, but excludes decisions by international organizations, such as the ECtHR.[1961]

1954 Counter-Memorial ¶¶ 1549–50.

1955 *Ibid*. citing *Saluka* ¶¶ 301–302; *Duke Energy Eletroquil Partners S.A. v. Republic of Ecuador*, ICSID ARB/04/19, Award, 18 August 2008 ¶ 340, Exh. C-993.

1956 Counter-Memorial ¶ 1551.

1957 *Ibid.* ¶ 1552.

1958 *Ibid.* ¶ 1553, referring to *Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001 ¶¶ 296–97, Counter-Memorial ¶¶ 1566–67, referring to *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID ARB/99/2, Award, 25 June 2001, 17 ICSID Rev. 395 (2002) ¶ 367, Exh. R-1095.

1959 *Ibid.* ¶ 1567.

1960 *Ibid.* ¶ 1559.

1961 *Ibid.* ¶ 1561.

1502. According to Respondent, Claimants' burden for showing a violation of the minimum standard is "demanding".[1962] Thus, some tribunals have equated the fair and equitable treatment standard with the *Neer* standard, which for allegations of due process violations by a host State's courts would require a showing of outrage, bad faith, willful neglect of duty, or "insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".[1963]

1503. Thus, due process violations in one or more proceedings "do not by themselves establish a treaty violation if the procedures are only part of the judicial process available to the parties."[1964] Citing *AMTO v. Ukraine*, Respondent argues that the assessment of the conduct of national courts must include the availability of remedies in the host State's legal system and whether or not such remedies were exercised; and if they were exercised, whether they were exercised fully and wisely.[1965] In addition, in order to prove their claim for denial of justice, Claimants must show a "clear and malicious misapplication of the law" based on the content of judicial opinions themselves.[1966]

1504. With respect to the standard of non-discrimination, Respondent submits that Article 10(1) of the ECT "only prohibits discrimination based on nationality."[1967] Accordingly, it argues that discriminatory measures must have been "taken because of the foreign nationality of the shareholders."[1968]

1505. Part VII of the Table of Contents in Respondent's Rejoinder provides a short list of the conditions that, according to Respondent, Claimants' claims must meet in order to show a breach of Article 10(1) (in addition to showing that the conduct alleged to be in breach of Article 10(1) is attributable to Respondent and is an exercise of *puissance publique*, as discussed above in Chapter X.A):

1962 *Ibid.* ¶ 1562, referring to *AES Summit Generation Ltd. and AES-Tisza Eromu Kft v. Hungary*, ICSID ARB/07/22, Award, 23 September 2010 ¶ 9.3.40, Exh. R-1103; *see also* Counter-Memorial ¶ 1568.

1963 Counter-Memorial ¶ 1564, *see esp.* p. 738, n.2456; *ibid.* ¶ 1568, referring to *B.E.Chattin (U.S.) v. United Mexican States*, U.S.–Mexico General Claims Commission, Opinion of 23 July 1927, 4 U.N.R.I.A.A. 282, 295, ¶ 29, Exh. C-924.

1964 Counter-Memorial ¶ 1571.

1965 *Ibid.* citing *Limited Liability Company AMTO v. Ukraine*, SCC 080/2005, Final Award, 26 March 2008 ¶ 76, Exh. C-989.

1966 Counter-Memorial ¶ 1572.

1967 *Ibid.* ¶ 1580.

1968 *Ibid.* ¶¶ 1581–84.

> 1. Regardless of the standard of review under Article 10(1), Claimants must establish that the Russian Federation's actions interfered with Claimants' legitimate and reasonable expectations based on a full disclosure of the facts relevant to Claimants' investments and based on operation of the investments in accordance with Russian law
>
> > a) . . . Claimants must establish . . . specific, legal commitments by Respondent based on a full disclosure of the facts relevant to their investments
> >
> > b) Claimants also must establish that the Russian Federation's actions interfered with their expectations that are based on an operation of their investments in accordance with Russian law
>
> 2. Claimants must establish a systemic judicial failure, or, at a minimum, that the conduct they attack is otherwise manifestly unfair or unreasonable
>
> > a) Claimants must establish that the Russian court decisions they attack constitute a denial of justice or are otherwise manifestly unfair or unreasonable
> >
> > b) Specifically with respect to the taxation measures Claimants challenge, Claimants must establish a systemic judicial failure or, at a minimum, that the measures are manifestly unfair or unreasonable, and contrary to internationally recognized tax policies and practices
> >
> > c) Specifically with respect to Yukos' bankruptcy proceedings, Claimants must demonstrate a systemic failure of the Russian judicial system, or, at a minimum, that the bankruptcy proceedings were manifestly unfair or unreasonable
>
> 3. To establish "unreasonable or discriminatory measures" that impaired the management, maintenance, use or enjoyment of their investments, Claimants must prove a systemic judicial failure, or, at a minimum, that the taxation measures complained of are contrary to international tax practices or treated similar cases differently on the basis of nationality, without reasonable justification.[1969]

1506. Finally, Respondent submits that in order to substantiate their claim, Claimants must prove a direct causal link between the loss of their shares and measures in breach of Article 10(1) ECT.[1970]

3. Did Respondent Accord Claimants' Investments the Standard of Treatment Required by Article 10(1) of the ECT?

(a) Claimants' Position

1507. Claimants submit that Respondent violated its obligations under Article 10(1) of the ECT by failing to accord Claimants' investments fair and equitable treatment and by impairing Claimants' investments by discriminatory measures.

1508. In terms of fair and equitable treatment, Claimants contend that Respondent's actions, both individually and collectively, constitute breaches of the most basic requirements of procedural

[1969] Rejoinder, Table of Contents, pp. v–vi.

[1970] Respondent's Post-Hearing Brief ¶ 173.

propriety and due process, as well as a denial of justice.[1971] Claimants emphasize that their case is not limited to one of "systematic denial of justice", as Respondent maintains.[1972]

1509. Claimants also emphasize that, in considering whether Respondent violated the fair and equitable treatment standard under Article 10(1) of the ECT, the Tribunal should not view each fact in isolation, but rather look at the totality of Respondent's actions.[1973] Thus, Claimants state that, while some of Respondent's actions could and do, in and of themselves, constitute breaches of Articles 10(1), their position is that "the totality of the Russian Federation's actions and their cumulative effect" constitute a violation of the fair and equitable treatment standard.[1974]

1510. Claimants offer a list of specific actions taken by Respondent, or attributable to it, which, they say, demonstrate that Respondent breached the fair and equitable treatment standard.

1511. Firstly, Claimants contend that Respondent breached the fair and equitable treatment standard by the conduct of "over 150 raids . . . in brutal conditions from July 4, 2003 to November 18, 2004, and the innumerable searches and seizures conducted by armed and masked officers at Yukos' headquarters, the premises of affiliates or entities related to Yukos, or the offices of lawyers acting in Yukos-related cases, leaving neither a copy nor a simple list of the documents and items seized, in breach of even the most basic requirements of Russian law."[1975] Claimants allege that these searches and seizures were part of the Russian Federation's campaign to destroy Yukos and had a major disruptive effect on the operations of Yukos, reducing the company's chances of survival in the face of the Russian Federation's attacks (and, in

---

1971 Memorial ¶¶ 568, 618.

1972 Transcript, Day 17 at 134 (Claimants' closing); *Ibid.* at 145.

1973 Transcript, Day 1 at 155–57 (Claimants' opening), referring to *RosInvestCo* ¶ 621, Exh. C-1049; *Quasar* ¶ 44, Exh. R-3383; Transcript, Day 17 at 149–154, referring to *Vivendi* ¶ 7.5.31 ("It is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached. The ad hoc Committee recognized this when it noted that '[i]t was open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the BIT"); *Walter Bau AG v The Kingdom of Thailand*, UNCITRAL, Award, 1 july 2009 ¶ 12.43 (hereinafter "*Walter Bau*") ("The Respondent's argument that 'creeping expropriation' only, and not breaches of FET, can be defined by a series of acts is not correct. The Tribunal sees no reason why a breach of a FET obligation cannot be a series of cumulative acts and omissions. One of these may not on its own be enough, but taken together, they can constitute a breach of FET obligations."); *see also* Claimants' Post-Hearing Brief ¶¶ 182–84.

1974 Claimants' Post-Hearing Brief, ¶ 182.

1975 *Ibid*. ¶ 161, referring to Memorial ¶¶ 152–66; Reply ¶¶ 74–94; Rieger WS ¶ 28; Misamore WS ¶¶ 31–32; Schmidt WS ¶ 16; *see also* Memorial ¶¶ 569–79.

particular, "the accelerated pace in which tax debts were fabricated").[1976] As for the "campaign of harassment" on PwC, and subsequent raid, Claimants allege that it precipitated PwC's withdrawal of its certification of Yukos' audits.[1977]

1512. Secondly, Claimants contend that Respondent did not provide proper notice of administrative actions to be taken by the State.[1978] In that regard, Claimants submit that the Tax Ministry, the Russian courts and the bailiffs repeatedly failed to afford Yukos reasonable timeframes in which to pay or challenge the alleged tax reassessments: just two days to voluntarily pay after issuance of the 2000 Decision, and a single day to pay after issuance of each of the 2002 and 2003 Decisions. In addition, Claimants allege that Respondent did not wait for these short time limits to expire before filing a petition for collection with the Moscow Arbitrazh Court, which Claimants allege were swiftly "rubber-stamped" in favor of Respondent.[1979]

1513. Thirdly, Claimants submit that Respondent did not afford them the opportunity to be heard by an impartial tribunal. Claimants contend that Respondent instead ensured that government-friendly judges sanctioned the tax reassessments and that the three judges who failed to rule against Yukos were removed, and their rulings later overturned. Yukos' requests for interim relief to suspend the effect of the tax reassessment decisions pending appeal on the merits were also systematically rejected. Claimants further submit that hearings on these matters were set, and appeals ruled upon, almost immediately, and that Yukos was not given real access to case materials.[1980]

1514. Fourthly, Claimants assert that the sale of YNG was a sham auction, orchestrated by Respondent under the pretext of satisfying Yukos' alleged tax liability for the 2000 Decision; an alleged liability that Claimants submit was fully paid prior to the auction date.[1981] With only State-owned Gazprom and Baikal in attendance,[1982] Claimants contend that Baikal acquired YNG for a "bargain" price. Claimant also notes that Baikal was purchased by State-owned

---

1976 Claimants' Post-Hearing Brief ¶¶ 159, 161–62, 165.

1977 Memorial ¶ 578.

1978 *Ibid.* ¶¶ 567, 586.

1979 *Ibid.* ¶¶ 582–90.

1980 *Ibid*. ¶¶ 581–86.

1981 *Ibid.* ¶ 594.

1982 *Ibid.* ¶¶ 595.

Rosneft shortly following the auction, and that President Putin himself admitted Baikal was used as a front company to shield the future owner – Rosneft – from legal claims.[1983]

1515. Fifthly, Claimants assert that the initiation of bankruptcy proceedings against Yukos at the behest of Rosneft, the biased conduct of those proceedings by Russian courts, and the sale of Yukos' remaining assets also violated due process requirements.[1984]

1516. Claimants submit that the following actions taken by Respondent in breach of due process amount to a denial of justice:

- the administration of justice by Russian courts with respect to all Yukos related matters did not meet generally accepted international law standards of due process, impartiality and legitimacy;[1985]

- Russian courts were unduly hasty in their decision-making, refusing to provide Yukos with sufficient time or adequate opportunity to review the evidence on which the tax reassessment payment demands were based which eventually lead to its bankruptcy;[1986] and

- the systematic removal of judges who ruled in Yukos' favor and dismissal of Yukos' challenges against judges who had previously ruled against it in tax proceedings.[1987]

1517. In their discussion of denial of justice, Claimants invited the Tribunal to note the fact that Yukos lost nearly all of its cases in 2000 against the tax authorities and the statistic put forward by Mr. Konnov that the taxpayer in Russia wins in 75 percent of the cases.[1988]

1518. Moreover, Claimants argue that even if it purported to discuss denial of justice claims, Respondent has actually failed to defend its conduct, limiting itself to misstating the standard applicable to a claim of denial of justice.[1989] According to Claimants, Respondent has "concentrated its energies on urging the Arbitral Tribunal to impose a higher burden on

---

1983 *Ibid.* ¶¶ 599.

1984 *Ibid.* ¶¶ 601–17.

1985 *Ibid.* ¶ 643.

1986 *Ibid.* ¶ 626.

1987 *Ibid.* ¶ 629.

1988 Transcript, Day 17 at 135 (Claimants' closing).

1989 Reply ¶ 612.

Claimants, for the facts of the Russian Federation's conduct are devastating."[1990] Claimants assert that Respondent's attempts to elevate the applicable threshold fail because Respondent's conduct was indefensible under any plausible interpretation of the standards contained in Article 10(1) of the ECT.[1991]

1519. Claimants also contend that Respondent's actions were arbitrary, unreasonable, disproportionate, and abusive,[1992] in their reference to the following actions of Respondent:

- Respondent's unrelenting campaign of coercion, harassment, and intimidation against Yukos and related persons and entities;[1993]
- the imposition of arbitrarily and disproportionately large payment demands by Respondent under the guise of tax reassessments, enforced within short time periods and accompanied by arbitrary freezing of assets orders;[1994] and
- Respondent's unreasonable and arbitrary rejection of Yukos' proposals to settle or resolve the alleged tax claims.[1995]

1520. Claimants submit that Respondent failed to ensure a predictable and stable legal and business framework for the Claimants' investments.[1996] They refer as examples to:

- Respondent's reversal of its previous acceptance of Yukos' tax optimization structure as legal;
- Respondent's reversal of its approval of the Sibneft merger; and
- a general lack of transparency on the part of Respondent.[1997]

1990 *Ibid.* ¶ 631.

1991 *Ibid*.

1992 Memorial ¶¶ 644–95. Claimants submit that while Article 10(1) of the ECT only expressly prohibits "unreasonable or discriminatory measures", jurisprudence confirms that "unreasonable" measures have the same meaning as "arbitrary" conduct, and similarly violate the fair and equitable treatment standard (*Ibid.* ¶¶ 665–67, citing *EDF (Services) Limited v. The Republic of Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 ¶ 303, Exh. C-1001; *Plama* ¶ 184; *Saluka* ¶ 460; *CMS v. Argentina* ¶ 290).

1993 Memorial ¶¶ 654–77.

1994 *Ibid.* ¶¶ 678–95.

1995 *Ibid.* ¶¶ 689–701.

1996 *Ibid.* ¶¶ 702–21.

1521. In support of their contention that Respondent discriminated against Claimants' investments, Claimants rely on the following facts:

- Respondent treated Yukos in a significantly different way from other comparable Russian oil companies;
- Respondent treated YNG differently before and after its acquisition by Rosneft; and
- Respondent ensured differential treatment between creditors related to Yukos or Yukos' shareholders, and State or State-related creditors in the Yukos bankruptcy proceedings.

1522. In their Reply, Claimants assert that in its Counter-Memorial Respondent does not address Claimants' claims of discrimination under Article 10(1) of the ECT, except in its assertion that Claimants' allegations with respect to the Yukos–Sibneft demerger do not involve discrimination based on nationality.[1998] Claimants also argue that Respondent improperly invokes its domestic law in defense of its breaches of international law.[1999]

1523. Also in their Reply, Claimants argue that Respondent's only defense against the bulk of Claimants' claims under Article 10(1) is to invoke Article 21(1) ECT. According to Claimants, in providing no other defense, Respondent has conceded that its conduct breached Article 10(1). Claimants view Respondent's defense as resting

> squarely on the theory that Article 21(1) . . . operates as a license to ECT signatories to freely violate their treaty obligations under Article 10(1) . . . so long as they create the appearance that their actions have some connection, however remote and indirect, to taxation.[2000]

(b) Respondent's Position

1524. Respondent's main position is that Claimants have failed to establish any violation of Article 10(1) of the ECT.

1525. In particular, Respondent submits that (a) Claimants have failed to establish that conduct, which is attributable to Respondent and an exercise of its sovereign power, proximately caused

---

1997 *Ibid.* ¶¶ 722–33.

1998 Reply ¶¶ 654–90.

1999 *Ibid.* ¶ 619.

2000 *Ibid.* ¶ 577.

the loss of Claimants' investment;[2001] (b) Claimants have failed to establish that the measures they challenge interfered with Claimants' legitimate expectations;[2002] and (c) the measures relating to the imposition and enforcement of taxes were well within the range of a State's generally accepted regulatory powers.[2003]

1526. Respondent also argues that Claimants have failed to show that the challenged measures constitute a denial of justice or are otherwise manifestly unfair or unreasonable.[2004] In particular, Respondent argues that Claimants have failed to establish that the Moscow and Chukotka courts "clearly and maliciously" misapplied Russian law when granting the claims of Gemini Holdings and Nimegian Trading in the context of the Yukos–Sibneft merger.[2005]

1527. Respondent also asserts that the challenged measures were not discriminatory.[2006]

C. ARTICLE 13 OF THE ECT

1. Introduction

1528. Article 13(1) of the ECT provides, in relevant part:

> *Article 13*
> EXPROPRIATION
>
> (1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:
>
> (a) for a purpose which is in the public interest;
>
> (b) not discriminatory;
>
> (c) carried out under due process of law; and
>
> (d) accompanied by the payment of prompt, adequate and effective compensation.
>
> Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending

2001 Post-Hearing Brief ¶¶ 174–80.

2002 *Ibid*. ¶¶ 184–90; Counter-Memorial ¶¶ 1545, 1555–58.

2003 Respondent's Post-Hearing Brief ¶¶ 191–99. Particulars of Respondent's submission are summarized in the next chapter, which deals with Article 13 of the ECT.

2004 Counter-Memorial ¶ 1545.

2005 *Ibid*. ¶ 1573.

2006 *See* following chapter on Article 13 ECT.

> Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").
>
> Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

1529. The Parties analyze Article 13 in two steps, first by addressing what constitutes expropriation or "measures having effect equivalent to nationalization or expropriation," and then by discussing what constitutes a legal expropriation, *i.e.*, an expropriation conducted in accordance with the four conditions set out in Article 13(1): that the expropriation be (a) in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation. The Tribunal will summarize first the Parties' principal arguments regarding the legal standards of Article 13 and will then review the facts of the present case in the light of these standards.

2. Applicable Legal Standards under Article 13 of the ECT

(a) Claimants' Position

1530. Claimants note that Article 13(1) of the ECT deals with nationalization and expropriation, as well as other equivalent measures. Claimants submit that such equivalent measures include "covert or incidental interference with the use of property which has the effect of depriving the owner . . . of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[2007]

1531. Claimants submit that the standard for expropriation is objective and that while the showing of intent to expropriate may evidence a measure to be expropriatory, it is not a requirement of expropriation.[2008]

1532. Claimants emphasize that, in considering whether Respondent expropriated Claimants' investment within the meaning of Article 13(1), the Tribunal should look at the totality of

---

[2007] Memorial ¶ 855, quoting *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 ¶ 103, Exh. C-954.

[2008] Memorial. ¶ 856, referring to *Compañía de aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 ¶ 7.5.20, Exh. C-986 (hereinafter "*Vivendi v. Argentina*"); *Tecmed* ¶ 116; *Waste Management, Inc. v. United Mexican States*, ICSID ARB(AF)/00/3, Award, 30 April 2004 ¶ 79, Exh. C-968; *see also* Transcript, Day 1 at 154.

Respondent's actions and not at each fact in isolation.[2009] The question is not, Claimants submit, whether each of Respondent's individual actions was lawful under Russian law, or was no different than the practice in other jurisdictions, but whether the totality of Respondent's conduct was lawful under international law.[2010]

1533. Claimants argue that, contrary to Respondent's assertion, the standard for expropriation is not limited to the investor's legitimate expectations.[2011] Respondent's reference in this regard to the treaty practice of various States is unavailing, as whether or not other treaties refer to legitimate expectations as a criterion to establish expropriation is irrelevant to the interpretation of the ECT.[2012]

1534. With regard to the requirement that expropriation be in the public interest, Claimants submit that international tribunals have emphasized that expropriation must have occurred for a "*bona fide* public purpose"[2013] and not for "purely extraneous political reasons,"[2014] "amusement and private profit"[2015] or "reprisal."[2016] Claimants submit that a State's broad discretion to determine what constitutes "public interest" is not unfettered.[2017]

2009 Transcript, Day 1 at 153–56 (Claimants' opening), referring to *RosInvestCo* ¶ 621, Exh. C-1049; *Quasar* ¶ 44, Exh. R-3383; Transcript, Day 17, 149–154 (Claimants' closing), referring to *Compañía de Desarollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID ARB/96/1, Final Award, 17 February 2000 ¶ 76, Exh. C-952 (hereinafter "*Santa Elena*")("[i]t is clear . . . that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title"; *Tradex Hellas v. Albania*, ICSID ARB/94/2, Award, 29 April 1999 ¶ 191, Exh. R-1114; *Azurix* ¶ 308; *Biwater* ¶ 455 ("[i]n terms of what might qualify as 'expropriation', the Arbitral Tribunal accepts BGT's submission that it must consider the Republic's conduct both in terms of the effect of individual, isolated, acts complained of, as well as in terms of the cumulative effect of a series of individual and connected acts, in so far as such a cumulative effect might be to deprive the investor in whole or in material part of the use or economic benefit of its assets"; OECD Draft Convention on the Protection of Foreign Property ¶ 4(b), Exh. C-1040; *Pope & Talbot v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001 ¶ 181, Exh. C-1518; *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID ARB/05/18 and ARB/07/15, Award, 3 March 2010 ¶ 404, Exh. C-1533 (hereinafter "*Kardassopoulos*"); Michael Reisman & Robert Sloane, "Indirect Expropriation and its Valuation in the BIT Generation," (2003) 74 British Yearbook of International Law 115 p. 123, Exh. C-1643 ("[d]iscrete acts, analyzed in isolation rather than in the context of the overall flow of events . . . may not be expropriatory in themselves. Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor's property rights."); Claimants' Post-Hearing Brief ¶¶ 182–191; Reply ¶¶ 693, 699, 700.

2010 Reply ¶¶ 693.

2011 Transcript, Day 20 at 248 (Claimants' rebuttal).

2012 Transcript, Day 20 at 248–49 (Claimants' rebuttal).

2013 Memorial ¶ 867, referring to *Liberian Easter Timber Corporation (LETCO) v. The Government of the Republic of Liberia*, ICSID ARB/83/2, Award, 31 March 1986, Exh C-937, *Walter Fletcher Smith Case* (Cuba, USA), II RIAA 917–18, Award, 2 May 1929, Exh C-926.

2014 *Ibid.* ¶ 868, quoting *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*, Award (Merits), 10 October 1973, 53 Int'l L. Rep. 297, p. 329, Exh. C-931 (hereinafter "*BP Exploration*").

2015 *Ibid.* ¶ 870, referring to *Walter Fletcher Smith Case* (Cuba, USA), II RIAA 917–18, Award, 2 May 1929, Exh C-926.

1535. Claimants challenge Respondent's assertion that States should be afforded a particularly wide margin of discretion when seeking to collect taxes. According to Claimants, a State alleging that it has legitimately exercised its powers of taxation is not impervious to scrutiny under international law;[2018] "taxation, like the exercise of any other sovereign power, can be expropriatory."[2019]

1536. With regard to non-discrimination, Claimants assert that it is defined as the singling out of a person or group of people without a reasonable basis. Thus, Claimants submit, a finding of "unjustified differential treatment, whether in law or in fact," has been regarded as discriminatory.[2020] Claimants quote a commentary that the "expropriation of an investment because of animosity between the host-state officials and the investor or in retaliation for lawful, but politically unpopular, conduct of the investment would violate the non-discrimination condition."[2021] Claimants add that, as in the case of Article 10(1) of the ECT, discrimination under Article 13(1) refers not only to nationality-based discrimination, but to other types of unjustified discriminatory treatment as well.[2022]

1537. Claimants also maintain that, by stating that an expropriation must be "carried out under due process of law," the ECT, unlike some other investment treaties, requires that expropriations conform not only to local, but also international standards of due process.[2023] Claimants argue that due process "contains both substantive and procedural elements";[2024] implies that "whenever a State seizes property, the measures taken must be free from arbitrariness" and that the "administrative or judicial machinery used or available must correspond at least to the minimum standard required by international law;"[2025] and requires that the investor must be

---

2016 *Ibid.*, referring to Kenneth Vandevelde, *Bilateral Investment Treaties, History, Policy and Interpretation* (OUP 2010), p. 272, Exh. C-1018.

2017 *Ibid.*

2018 Reply ¶ 754.

2019 *Ibid.* ¶¶ 756, 761.

2020 Memorial ¶ 878, citing *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID ARB/03/16, Award, 2 October 2006, Exh. C-980 (hereinafter "*ADC*"); *BP Exploration* ¶ 329, Exh. C-931.

2021 *Ibid.* ¶ 879, citing Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (OUP, 2010), p. 273, Exh. C-1018.

2022 Reply ¶¶ 637, 733.

2023 Memorial ¶ 882.

2024 *Ibid*. ¶ 883, quoting OECD, Draft Convention on the Protection of Foreign Property, Notes and Comments, Art. 3, 7 ILM 117, p. 126, Exh. C-1040.

2025 *Ibid*.

given "reasonable advance notice, a fair hearing and an unbiased adjudicator to assess the actions in dispute."[2026]

1538. Finally, Claimants submit that the taking of property without compensation engages the international responsibility of States, regardless of the purpose of the taking.[2027]

(b) Respondent's Position

1539. Respondent submits that the standard for expropriation under Article 13 of the ECT must not be conflated with the standard for fair and equitable treatment under Article 10(1), as otherwise the taxation carve-out of Article 21, pursuant to which a tribunal may lack jurisdiction over fair and equitable treatment claims, while retaining jurisdiction over claims of expropriation, would be rendered meaningless.[2028]

1540. Respondent also contends that the absence of one or more of the four requirements of Article 13(1) (*i.e.*, public purpose, non-discrimination, due process and compensation) "is not in itself indicative of expropriation."[2029]

1541. Respondent submits that, to show expropriation or equivalent measures under Article 13(1), Claimants must (in addition to showing that the challenged actions are attributable to Respondent and constitute an exercise of *puissance publique*), demonstrate firstly that the challenged measures "proximately" caused a total or substantial deprivation of their investment;[2030] and secondly that they interfered with their legitimate expectations.[2031]

1542. The importance of the causal link between the challenged measures and the investors' investment, argues Respondent, has been confirmed by international tribunals in *Otis Elevator v. Iran*, *Elettronica*, *Link-Trading Joint Stock Company v. Moldova* and *El Paso v.*

2026 *Ibid.* ¶ 884, quoting *ADC* ¶ 435.

2027 *Ibid.* ¶ 888, citing *Santa Elena* ¶¶ 71–72.

2028 Transcript, Day 19 at 103–105 (Respondent's closing), referring to *Nations Energy Inc. and others v. Panama*, ICSID ARB/06/19, Award, 24 November 2010 ¶¶ 682–83, Exh. R-1032; *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID ARB(AF)/02/01, Award, 17 July 2006 ¶ 208, Exh. R-1141.

2029 Transcript, Day 19 at 103–105 (Respondent's closing), quoting *Corn Products International Inc. v. The United Mexican States*, ICSID ARB(AF)/04/01, Decision on Responsibility, 15 January 2008 ¶ 90, Exh. R-1108.

2030 Counter-Memorial ¶¶ 1096–1104; Rejoinder ¶¶ 403–06; Transcript, Day 19 at 108–10 (Respondent's closing); Respondent's Post-Hearing Brief ¶ 173.

2031 Rejoinder ¶¶ 407–24; Transcript, Day 19 at 123–24 (Respondent's closing).

Argentina.[2032] By applying the standard resulting from these precedents to the present case, Respondent submits that Claimants must prove that the loss of their shares was the "only possible, unavoidable consequence of conduct attributable to Respondent, conduct that is *iure imperii* and not excluded under Article 21 ECT."[2033] Therefore, Claimants cannot base a claim for expropriation on damages suffered as a result of their own conduct or the conduct of their investment.[2034]

1543. As regards investors' legitimate expectations, Respondent submits that they are a "central element of claims" under Article 13(1) of the ECT.[2035] Respondent argues that this is in accordance with the treaty practice of both ECT and non-ECT Contracting Parties, which, in turn, reflects customary international law.[2036] Respondent then submits that:

> [P]roperty rights have inherent limitations. The host State has the power to accept and define the rights acquired by an investor at the time of the making of the investment. And a foreign investor acquires rights in an investment, subject to the existing regulatory framework. So absent a specific commitment from the host State to the investor, an expropriation may occur only where the State measure does not reflect a pre-existing lawful limitation inherent in private property.[2037]

1544. Thus, argues Respondent, without a specific commitment from the host State, an investor has no right or legitimate expectation to non-enforcement or exemption from taxes and associated penalties, regardless of any earlier knowledge or tolerance of the tax authorities.[2038] Moreover, legitimate expectations cannot be based on host State commitments when the investor has provided the State with incomplete and inaccurate information. Nor can legitimate

---

2032 Transcript, Day 19 at 106–109 (Respondent's closing), referring to *Otis Elevator Company v. Iran*, Iran–United States Claims Tribunal Case No. 284, (1987) 14 I. 28, Award, 29 April 1987 ¶ 47, Exh. R-1113; *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, United States v. Italy, Judgment, 20 July 1989 ¶ 119, Exh. C-942; *Link-Trading Joint Stock Company v. Moldova*, UNCITRAL, Final Award, 18 April 2002 ¶ 91, Exh. R-3533; *El Paso* ¶ 272, Exh. C-1544/R-4190.

2033 Transcript, Day 19 at 108.

2034 Counter-Memorial ¶ 1103.

2035 Transcript, Day 19 at 123–24 (Respondent's closing), referring to *LG&E* ¶¶ 189–90.

2036 Transcript, Day 19 at 124–25 (Respondent's closing), citing 2004 and 2012 U.S. Model BITs, Annex B ¶ 1, Exhs. R-3513 and R-3514; 2004 Canada Model BIT, Annex B.13(1) ¶ b, Exh. R-3512; Canada–Romania BIT, Annex B ¶ (b), Exh. R-3494; Canada–Latvia BIT, Annex B, ¶ (2), Exh. R-3491; Canada–Czech Republic BIT, Annex A, ¶ (b), Exh. R-4646; India–Latvia BIT, Protocol *ad* Articles 5, ¶ (4)(a), Exh. R-4648; Slovak Republic–India BIT ¶ 2, Exh. R-4649.

2037 Transcript, Day 19 at 125–26 (Respondent's closing); *see also* Counter-Memorial ¶ 982.

2038 Counter-Memorial ¶ 984; Transcript, Day 19 at 129–30 (Respondent's closing); *see also* Respondent's Post-Hearing Brief ¶ 184.

expectations be premised on illegal conduct.[2039] Respondent also submits that legitimate expectations include an expectation of "the evolution of the regulatory regime, including through interpretation or application of the law, even if without precedent, and changes through legislative amendment."[2040]

1545. In addition, Respondent submits that a distinction must be made between expropriatory measures that breach a host State's obligations under the ECT and the legitimate exercise of a State's regulatory power, including for the imposition and enforcement of taxes.[2041] Factors which distinguish one from the other include the compatibility of the measures with international and comparative standards, as well as their compatibility with national law and review by domestic courts.[2042] Applying the latter criterion, Respondent submits that States cannot usually incur international responsibility through the actions of their tax authorities so long as domestic courts are available to resolve disputes between the tax authorities and taxpayers.[2043]

1546. Thus, in the present case, to establish a violation of Article 13(1) of the ECT, Claimants must demonstrate that the decisions of the Russian courts that upheld the challenged taxation measures, as well as the decisions issued in the context of Yukos' bankruptcy, are themselves "measures having effect equivalent to nationalization or expropriation."[2044] Accordingly, Respondent says, Claimants must demonstrate that these decisions were the result of a systemic failure of the Russian judicial system or, at a minimum, are manifestly improper, abusive, extraordinarily excessive or arbitrary, in manifest violation of Russian law, and in violation of international and comparative standards, so as to place them outside Russia's wide margin of discretion in taxation matters.[2045] Respondent emphasizes that this Tribunal cannot sit as an appellate court reviewing the decisions of the Russian courts.

2039 Transcript, Day 19, 126–27 (Respondent's closing), referring to *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006 ¶ 208, Exh. R-1143.

2040 Respondent's Post-Hearing Brief ¶ 185.

2041 Transcript, Day 19, 133–34 (Respondent's closing); Respondent's Post-Hearing Brief ¶ 191.

2042 Transcript, Day 19 at 136, 142 (Respondent's closing); Respondent's Post-Hearing Brief ¶¶ 192–93.

2043 Transcript, Day 19 at 136, 141–42 (Respondent's closing).

2044 Counter-Memorial ¶ 1107; Rejoinder ¶ 425.

2045 Rejoinder ¶¶ 425–69.

1547. Finally, Respondent submits that Claimants must establish a violation of the requirements in Article 13(1) of the ECT.[2046] Regarding the non-discrimination requirement, Respondent submits that Article 13(1) calls for proof that similar cases were, without reasonable justification, treated differently on the basis of nationality. Accordingly, Claimants must allege differential treatment based on foreign ownership.[2047]

3. Did Respondent's Actions Constitute Expropriation (or "Measures Having Effect Equivalent to Nationalization or Expropriation") within the Meaning of Article 13(1) of the ECT?

(a) Claimants' Position

1548. According to Claimants, Respondent completely and totally deprived Claimants of their investments in Yukos through a series of "coordinated and mutually reinforcing actions," which were motivated by a political and economic agenda and not any legitimate tax collection purpose.[2048]

1549. Claimants submit that Respondent expropriated their investments by:[2049]

(a) seizing, in October 2003, approximately 99 percent of the shares held by Hulley and YUL in Yukos, thus preventing Claimants from disposing of their shares before they lost all value;[2050]

(b) causing the unwinding of the Yukos–Sibneft merger, allowing the State-owned company Gazprom to acquire Sibneft;[2051]

(c) "fabricat[ing] massive tax debts" against Yukos, while simultaneously freezing or seizing the company's assets and interfering with its day-to-day management

---

2046 *Ibid.* ¶¶ 471–86.

2047 *Ibid.* ¶ 765.

2048 Memorial ¶¶ 801, 829–64. The measures Claimants consider to be expropriatory are discussed at length in Part VIII.

2049 *Ibid.* ¶¶ 802–28.

2050 *Ibid.* ¶¶ 803–804. The seizure of about 4.5 percent of Hulley's and YUL's shares in Yukos was subsequently revoked, but 94.5 percent remained frozen until the liquidation of Yukos in November 2007.

2051 *Ibid.* ¶¶ 805–807. For a discussion of the unwinding of the Yukos–Sibneft merger see Chapter VIII.D.

through the harassment of executive officers, employees and other related persons, "thereby engineering the circumstance of non-payment";[2052]

(d) selling YNG in a sham auction that allowed State-owned company Rosneft to acquire Yukos' "crown jewel" for an "absurdly low price";[2053] and

(e) initiating and controlling the Yukos bankruptcy so as to obtain, either directly or through State-owned Rosneft, Yukos' main production assets, as well as almost all of the bankruptcy proceeds.[2054]

1550. Claimants submit that the liquidation of Yukos on 21 November 2007 "marked the final act in the expropriation of Yukos."[2055]

1551. Finally, Claimants argue that, even viewed individually, the harassment campaign against Yukos and its associates, the sale of YNG and the bankruptcy of Yukos each constitute an act of expropriation.[2056]

(b) Respondent's Position

1552. Respondent submits that Claimants have failed to establish that any of the challenged measures constitute expropriation or "measures having effect equivalent to nationalization or expropriation" within the meaning of Article 13(1) of the ECT.

1553. Firstly, Respondent maintains that Claimants have failed to establish that conduct that is attributable to Respondent and an exercise of its sovereign power proximately caused Claimants' total or substantial deprivation of their investment.[2057] Respondent argues that the actions that directly caused Yukos' liquidation and the ensuing loss of Claimants' Yukos shares—the bankruptcy petition and the decision to liquidate Yukos—are either not attributable to Respondent, or not an exercise of its sovereign power.[2058] The Moscow Arbitrazh Court's

---

2052 *Ibid.* ¶¶ 808–12. For a discussion of the legitimacy of the Russian Federation's tax assessments against Yukos see Chapter VIII.B. For a discussion of the "harassment campaign" against Yukos and related persons see Chapter VIII.C.

2053 *Ibid.* ¶¶ 813–19. For a discussion of the YNG auction see Chapter VIII.F.

2054 *Ibid.* ¶¶ 820–25. For a discussion of the Yukos bankruptcy see Chapter VIII.G.

2055 *Ibid.* ¶¶ 826–27.

2056 *Ibid.* ¶ 858.

2057 *Ibid.* ¶¶ 1096–1104.

2058 Respondent's Post-Hearing Brief ¶ 174.

acceptance of the bankruptcy petitions and ratification of the creditors' decision to liquidate Yukos does not change this conclusion, as loss resulting from a court's enforcement of legal limitations inherent in private property is not compensable under Article 13 of the ECT, irrespective of whether the court proceedings were instituted by a State organ.[2059]

1554. According to Respondent, it is therefore not responsible for the loss of Claimants' investment unless "Claimants can prove that Respondent is responsible for Yukos' financial situation that led to its liquidation."[2060] Yet, argues Respondent, Yukos' financial situation was actually "the result of Claimants' and their owners' decision to siphon off billions of dollars from Yukos and its subsidiaries to further their own financial interests, at the expense of Yukos' creditors and minority shareholders."[2061]

1555. Respondent emphasizes that Claimants could have avoided Yukos' insolvency, which, in Respondent's view, led to Yukos' bankruptcy and eventual liquidation, by paying the taxes assessed against it for years 2000–2003 in the first quarter of 2004; filing amended VAT and other tax returns; and petitioning for a refund of any amounts paid that it believed not to be legally due.[2062]

1556. As for the criminal proceedings against Messrs. Khodorkovsky and Lebedev and certain Yukos officials, as well as the searches, seizures and arrests carried out in support of those proceedings, Respondent submits that these events did not cause Yukos' liquidation. According to Respondent, the evidence establishes that these measures did not impair Yukos' operations.[2063]

1557. Respondent further contends that Claimants have failed to establish that the measures they challenge interfered with Claimants' legitimate expectations.[2064]

1558. With regard to the tax assessments, Respondent argues that Claimants had no "legitimate expectation that the tax authorities would not apply the substance-over-form, proportionality, and bad-faith taxpayer doctrines to attribute the income nominally earned by Yukos' sham

---

2059 *Ibid*. ¶ 178.

2060 *Ibid*. ¶ 179.

2061 *Ibid*. ¶ 179; *see also* Rejoinder ¶ 746.

2062 Rejoinder ¶ 745. For a detailed discussion, see paragraphs 679–97, 745–50, and 934–45 above.

2063 Respondent's Post-Hearing Brief ¶ 182.

2064 Counter-Memorial ¶¶ 978–1095.

trading shells to Yukos," because Respondent had never made any specific representation, based upon full disclosure, that Respondent would allow Yukos to operate its tax schemes with impunity.[2065] Nor had Claimants ever sought or obtained a formal tax ruling on the legality of Yukos' tax scheme.[2066] In fact, prior to the 2000 Tax Audit Report, according to Respondent, Yukos sought, but was unable to obtain, a legal opinion supporting the legality of its tax scheme.[2067]

1559. In addition, Respondent submits that Claimants had no legitimate expectation that Yukos would not be held liable for the taxes assessed. According to Respondent, the attribution for tax purposes of revenues nominally earned by sham entities to a company that sought to evade taxes was a proper application of legal doctrines that were well-settled in Russia, and are employed by many other States.[2068] Yukos itself, argues Respondent, was well aware that its tax schemes, if discovered or disclosed, would result in substantial tax liabilities.[2069]

1560. Respondent also argues that the Russian legislation on which the enforcement measures (including the asset freezes, fines, default interest, enforcement fees and the forced sales of Yukos' assets) were based was already extant in the 1990s. These enforcement measures were thus foreseeable consequences of Yukos' failure to pay.[2070]

1561. Respondent then submits that the measures taken for the imposition and enforcement of taxes were well within the range of a State's generally accepted regulatory powers.[2071] This is shown by the fact that these measures were in conformity with Russian law and were upheld by national courts, and were in accordance with international and comparable standards and practices of other countries.[2072]

1562. According to Respondent, Claimants have failed to show that the Russian courts contributed to any "measures having effect equivalent to nationalization or expropriation" through any of the

---

2065 Respondent's Post-Hearing Brief ¶ 187–88; *see also* Counter-Memorial ¶¶ 1030–65; Rejoinder ¶¶ 748–756. For a discussion of the state of tax law in Russia at the relevant time see Chapters VIII.A and VIII.B.

2066 Respondent's Post-Hearing Brief ¶ 186.

2067 Respondent's Post-Hearing Brief ¶ 186.

2068 Respondent's Post-Hearing Brief ¶ 188 (*see* discussion in Chapters VIII.A and VIII.B).

2069 Counter-Memorial ¶¶ 1003–29; Rejoinder ¶¶ 584–645; Respondent's Post-Hearing Brief ¶ 189.

2070 Respondent's Post-Hearing Brief ¶ 189.

2071 *Ibid.* ¶ 191.

2072 *Ibid.* ¶ 192–93; *see also* Counter-Memorial ¶¶ 1106, 1120–1232.

decisions they issued in the context of the enforcement of the tax demands,[2073] the Yukos–Sibneft demerger,[2074] the criminal proceedings against Messrs. Khodorkovsky and Lebedev,[2075] or the Yukos bankruptcy proceedings.[2076]

1563. Finally, Respondent submits that the ECtHR unanimously determined that the challenged tax assessments were a legitimate exercise of Respondent's regulatory powers.[2077] According to Respondent, given that the vast majority of the ECT Contracting States (including the Russian Federation, the United Kingdom, and Cyprus) are also ECHR Contracting States and that the ECHR enshrines the common *ordre public* of the European States in terms of democracy and the rule of law, the "ECtHR's interpretation and application of the ECHR to the measures at issue, through a final and binding judgment, must be taken into account under Article 31(3)(c) VCLT in assessing whether they are within the bounds of generally recognized regulatory powers."[2078]

4. If Respondent's Actions Constitute Expropriation, Has Respondent Met the Criteria for a Lawful Expropriation under Article 13(1) of the ECT?

(a) Claimants' Position

1564. Claimants submit that Respondent did not meet any of the four requirements under Article 13(1) of the ECT for a lawful expropriation (*i.e.*, public interest, non-discrimination, due process and adequate compensation).[2079]

1565. According to Claimants, the expropriation of Claimants' investment was not in the public interest. In fact, "the facts of the case unmistakably show that the actions of the Russian Federation had nothing to do with the legitimate exercise of sovereign power, whether taxation, law enforcement or otherwise, but were rather a blatant confiscation of strategic assets and the

---

2073 Counter-Memorial ¶¶ 1337–1434.

2074 *Ibid.* ¶¶ 1435–51.

2075 *Ibid.* ¶¶ 1452–6.

2076 *Ibid.* ¶¶ 1457–1543.

2077 Respondent's Post-Hearing Brief ¶¶ 194–95, referring to ECtHR Yukos Judgment ¶ 606, Exh. R-3328 (" . . . 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.").

2078 Respondent's Post-Hearing Brief ¶ 195; *see also* Transcript, Day 19 at 143–49.

2079 Memorial ¶¶ 865–90.

elimination of a potential political opponent."[2080] Claimants invoke the finding of the *RosInvestCo* tribunal that the Russian Federation's actions were "linked to the strategic objective to return assets to the control of the Russian State and to an effort to suppress a political opponent."[2081] According to Claimants, Respondent's justification that it only sought to enforce its laws is without any basis.[2082]

1566. Claimants also submit that the expropriation of their investments was discriminatory and was not carried out under due process of law.[2083] Nor was the expropriation accompanied by compensation, let alone "prompt, adequate and effective compensation."[2084]

1567. Claimants conclude that the Russian Federation's actions are in breach of Article 13(1) and constitute an internationally wrongful act for which Respondent is responsible.[2085]

(b) Respondent's Position

1568. Even if Claimants could establish expropriation, which Respondent contends they cannot, Respondent maintains that the requirements in Article 13(1) of the ECT have not been breached.

1569. Respondent submits that no lack of public interest has been established.[2086] Respondent states that its actions were legitimate, as "the purposes justifying imposition and enforcement of taxes, including severe penalties, fines and other sanctions in case of non-compliance of taxpayers with their obligations to pay taxes, are firmly recognized in international law."[2087] Respondent asserts that Claimants have not addressed the ECtHR's rejection of Yukos' "political motivation" charge.[2088]

2080 Claimants' Post-Hearing Brief ¶ 167; *see also* Memorial ¶¶ 1010–12; Reply ¶¶ 511–13.

2081 Reply ¶ 726.

2082 *Ibid.* ¶¶ 745–838.

2083 *Ibid.* ¶¶ 881, 885–87.

2084 *Ibid.* ¶ 889.

2085 *Ibid.* ¶ 890.

2086 Counter-Memorial ¶¶ 1318–36.

2087 *Ibid.* ¶ 1324.

2088 Rejoinder ¶ 764.

1570. Respondent also contends that Claimants have failed to establish discrimination under Article 13(1)(b) of the ECT because Claimants do not allege any discrimination based on foreign ownership or residence, which Respondent contends is the intended scope of the term "discriminatory" in this provision.[2089] Respondent submits that selective tax enforcement is not discriminatory within the meaning of Article 13(1)(b) of the ECT.

1571. According to Respondent, Yukos "was a visible and logical candidate for tax assessments, penalties, and enforcement actions" as its abuses of the low-tax region policy were particularly egregious and the amounts of taxes it evaded unprecedented.[2090] Other Russian oil companies, argues Respondent, cannot be compared. Some companies, such as Rosneft, Tatneft and Surgutneftegaz did not resort to tax minimization schemes involving the use of low-tax regions.[2091] While some other companies, such as Lukoil, did use such schemes, they abandoned them much earlier than Yukos.[2092] Other companies, which continued to rely on the low-tax regions program, for example Sibneft, satisfied the "proportionality of investments" requirement of the Russian anti-avoidance rules.[2093] Finally, tax arrears, default interest and fines were in fact assessed against some companies, including TNK-BP, Sibneft and Lukoil.[2094]

1572. Respondent also submits that Claimants have failed to establish due process violations cognizable under Article 13(1)(c) of the ECT. For this assertion, Respondent relies on its own articulation of the requisite legal standard, namely that "administrative authorities cannot be faulted for conduct upheld by their own courts unless the court system is disavowed at the international level," which Respondent argues is not the case here.[2095]

1573. Respondent contends that in the present case most of the due process violations raised by Claimants have been reviewed by Russian courts and dismissed on the merits, while the due process arguments raised by Claimants for the first time in this arbitration are "specious."[2096]

2089 Counter-Memorial ¶¶ 1238–51.

2090 *Ibid.* ¶¶ 1255, 1268.

2091 *Ibid.* ¶ 1260.

2092 *Ibid.* ¶¶ 1261, 1269.

2093 *Ibid.* ¶ 1262.

2094 *Ibid.* ¶ 1264.

2095 *Ibid.* ¶ 1280.

2096 *Ibid.* ¶ 1290.

1574. Respondent specifically submits that the pace of the court proceedings that led to decisions upholding the Tax Ministry's tax demands against Yukos was in conformity with Russian procedural law and practice. Respondent notes that, pursuant to Article 215(1) of the Arbitrazh Procedure Code, first instance judgments in tax disputes must be rendered no later than two months after institution of the court proceedings.[2097] Respondent denies that Yukos was not provided with sufficient time to review documents during the collection proceedings pertaining to the 2000 Decision conducted by Judge Grechishkin.[2098] Respondent also argues that the removal of Judge Cheburashkina and the recusal of Judge Mikhailova were proper, as there was cause to doubt the impartiality of these two judges.[2099] Finally, Respondent argues that Yukos' challenges to Judges Korotenko and Dzuba (who were charged with reviewing Yukos' challenges to the 2001 Decision and 2002 Decision, respectively) on the ground that they had previously been involved in other proceedings for the collection of taxes against Yukos, were soundly rejected, as Yukos was not able to point to any rule of Russian law that would prevent a judge from hearing similar or related cases.[2100]

D. TRIBUNAL'S DECISION ON BREACH OF THE ECT

1575. As set out in Section X.C.2 above, the Parties are in sharp disagreement about the place and content of the legitimate expectations that Yukos had or could have had in devising and implementing its tax avoidance arrangements. Claimants maintain, as Mr. Dubov testified, that the most senior officials of the Russian Federation were informed of and approved Yukos' plans in respect of low-tax jurisdictions. Claimants point to the legislation of those jurisdictions which, while requiring a specified level of local investment by a trading company, for the most part did not refer to or require the presence of trading company personnel in the low-tax jurisdiction or specify that the activities of the trading company take place in that jurisdiction. Respondent stresses that virtually all the significant work of the trading companies was done not in the low-tax jurisdictions by a small number of low-level and uninformed functionaries but in and by Yukos' Moscow offices, facts that led two panels of the ECtHR to conclude that the trading companies were a "sham". Respondent emphasizes that Yukos never

---

2097 Counter-Memorial ¶¶ 1291–92, referring to *Arbitrazh Procedure Code*, Art. 215, Exh. R-1566.

2098 *Ibid.* ¶¶ 1293–99.

2099 *Ibid.* ¶¶ 1300–1301. For a description of the removal of Judge Cheburashkina and the recusal of Judge Mikhailova, see paragraphs 527–28, 539 above.

2100 *Ibid.* ¶¶ 1302–51. For a description of the challenges to Judges Korotenko and Dzuba, see paragraphs 553, 563 above.

secured and apparently was unable to secure a legal opinion upholding the lawfulness of its tax planning arrangements and operations.

1576. The Tribunal accepts that federal legislation and the legislation of the low-tax jurisdictions did not provide, or at any rate, uniformly provide, that the trading companies actually conduct their trading operations in the territory of the low-tax jurisdictions. Such a provision in any event would have been increasingly deprived of its force in view of the advent of electronic communications. Nevertheless there are indications in the record that Yukos itself had doubts, or at least apprehensions, about the legality of aspects of its *modus operandi.* Internal Yukos communications noted above at paragraph 491 so suggest, as may the unwillingness of Mr. Khodorkovsky to sign papers required for SEC registration. Yukos was able to advance no convincing explanation for the "Lesnoy shuffle", which may well have been carried out to frustrate investigation of perceived tax improprieties. While both PwC (Yukos' tax consultants) and Mr. Pepeliaev (Yukos' tax lawyer) opined in early January 2004, after the initial tax assessment was issued, that the tax assessment against Yukos itself was not well-founded,[2101] the absence of a prior legal opinion supporting the propriety of Yukos' arrangements in the low-tax jurisdictions is striking and may be suggestive. So also is the inability of Yukos to explain immense payments to former Yukos employees and its inability to sustain the claim that certain of its primary trading companies (the BBS companies) were not controlled by it. There is also the issue of the questionable use by Claimants of the Cyprus-Russia DTA, which the Tribunal addresses in Chapter X.E on contributory fault.

1577. The Tribunal has not overlooked or discounted the foregoing and other weaknesses in the contentions of Claimants. But are they sufficient to support what the Tribunal understands to be a central contention of Respondent, namely, that Claimants should have expected that the Russian Federation would react as it did to what it claims were violations of Russian tax law and practice as its courts had interpreted that law and practice to be?

1578. In the view of the Tribunal, the expectations of Claimants may have been, and certainly should have been, that Yukos' tax avoidance operations risked adverse reaction from Russian authorities. It is common ground between the Parties that Yukos and its competitors viewed

[2101] *See* Letter from Michael Kubena to Bruce Misamore, 15 January 2004, Exh. C-609; Sergey Pepeliaev, Summary of the Tax Inspection of OAO NK Yukos, 5 January 2004, Exh. C-1128; Sergey Pepeliaev et al., Opinion Regarding Compliance with Legislation of Inspection Report No. 08-1/1 of 29 December 2003 issued by the Tax Ministry of Russia, 15 January 2004, Exh. C-1129 (all referring to the 2000 Audit Report, Exh. C-103). *See also* paragraphs 705, 706 and 1195 above.

positions taken by the tax authorities on issues of tax liability to be exigent, erratic and unpredictable. The Tribunal however is unable to accept that the expectations of Yukos should have included the extremity of the actions which in the event were imposed upon it. Not only did Mikhail Khodorkovsky not appear to expect to be arrested even after the arrest of Platon Lebedev, he and his colleagues surely could not have been expected to anticipate the rationale and immensity of the tax assessments and fines. They could not have been expected to anticipate that their legal counsel would labor under the disabilities imposed upon them. They could not have been expected to anticipate the sale of YNG for so low a price under such questionable circumstances. They could not have been expected to anticipate that more than thirteen billion dollars in unpaid taxes and fines would be imposed on Yukos for unpaid VAT on oil exports when that oil had in fact been exported. They could not have been expected to anticipate that they risked the evisceration of their investments and the destruction of Yukos.

1579. The Tribunal has earlier concluded that "the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets."[2102] For the reasons that emerge in Part VIII, if the true objective were no more than tax collection, Yukos, its officers and employees, and its properties and facilities, would not have been treated, and mistreated, as in fact they were. 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 (unless the Russian Federation were intent on its liquidation and found still additional grounds for achieving that end, as the second criminal trial of Messrs. Khodorkovsky and Lebedev indeed suggests).

1580. Respondent has not explicitly expropriated Yukos or the holdings of its shareholders, but the measures that Respondent has taken in respect of Yukos, set forth in detail in Part VIII, in the view of the Tribunal have had an effect "equivalent to nationalization or expropriation". The four conditions specified in Article 13 (1) of the ECT do not qualify that conclusion.

[2102] *See* paragraph 756 above.

1581. As to condition (a), whether the destruction of Russia's leading oil company and largest taxpayer was in the public interest is profoundly questionable. It was in the interest of the largest State-owned oil company, Rosneft, which took over the principal assets of Yukos virtually cost-free, but that is not the same as saying that it was in the public interest of the economy, polity and population of the Russian Federation.

1582. As to condition (b), the treatment of Yukos and the appropriation of its assets by Rosneft (and to a much lesser extent, another State-owned corporation, Gazprom), when compared to the treatment of other Russian oil companies that also took advantage of investments in low-tax jurisdictions, may well have been discriminatory, a question that was inconclusively argued between the Parties and need not be and has not been decided by this Tribunal.

1583. As to condition (c), Yukos was subjected to processes of law, but the Tribunal does not accept that the effective expropriation of Yukos was "carried out under due process of law" for multiple reasons set out above, notably in Section VIII.C.3. The harsh treatment accorded to Messrs. Khodorkovsky and Lebedev remotely jailed and caged in court, the mistreatment of counsel of Yukos and the difficulties counsel encountered in reading the record and conferring with Messrs. Khodorkovsky and Lebedev, the very pace of the legal proceedings, do not comport with the due process of law. Rather the Russian court proceedings, and most egregiously, the second trial and second sentencing of Messrs. Khodorkovsky and Lebedev on the creative legal theory of their theft of Yukos' oil production, indicate that Russian courts bent to the will of Russian executive authorities to bankrupt Yukos, assign its assets to a State-controlled company, and incarcerate a man who gave signs of becoming a political competitor.

1584. As to condition (d), what in any event is incontestable is Respondent's failure to meet its prescription, because the effective expropriation of Yukos was not "accompanied by the payment of prompt, adequate and effective compensation", or, in point of fact, any compensation whatsoever. In order for the Russian Federation to be found in breach of its treaty obligations under Article 13 of the ECT, the foregoing violations of the conditions of Article 13 more than suffice.

1585. It follows that Respondent stands in breach of its treaty obligations under Article 13 of the ECT. Accordingly Respondent's liability under international law for breach of treaty is established. The Tribunal reaches this conclusion based on its consideration of the totality of the extensive evidence before it. Having found Respondent liable under international law for

breach of Article 13 of the ECT, the Tribunal does not need to consider whether Respondent's actions are also in breach of Article 10 of the Treaty.

1586. The establishment of liability under international law is at the heart of its doctrine and jurisprudence. The Statute of the PCIJ, in Article 36(2), referred to "(c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation". The identical provision is found in Article 36(2) of the Statute of the ICJ.

1587. The PCIJ held in the *Factory at Chorzów* case that:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.[2103]

1588. In a subsequent phase of the *Factory at Chorzów* case, the Court specified the content of the obligation of reparation in the following oft-quoted terms:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for the loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[2104]

1589. The ILC Articles on State Responsibility provide, in Article 31, an article entitled "Reparation", that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." In support of this conclusion the Articles quote the foregoing holdings in the *Factory at Chorzów* case.[2105]

1590. Article 36 of the Articles, entitled "Compensation", provides that:

[2103] *Case concerning the Factory at Chorzów* (Germany v. Poland), Jurisdiction, Judgment, 26 July 1927, P.C.I.J., Series A, No. 9, p. 21, Exh. C-1501.

[2104] *Case concerning the Factory at Chorzów* (Germany v. Poland), Merits, Judgment, 13 September 1928, P.C.I.J., Series A, No. 17, p. 47, Exh. C-925.

[2105] 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), Articles 1–11 and 28–39, p. 91, Exh. C-1042.

> 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby . . . .

The commentary to the Articles states that:

> the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. Compensation corresponds to the financially assessable damage suffered . . . it is not concerned to punish . . . nor does compensation have an expressive or exemplary character."[2106]

1591. Article 13 of the ECT specifies, in the event of expropriation, that "compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation . . . the Valuation Date."

1592. Article 39 of the ILC Articles on State Responsibility, entitled "Contribution to the injury," provides that "[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured . . . entity in relation to whom reparation is sought." The ILC's commentary to the Articles refers to notions of "contributory negligence" and "comparative fault".[2107]

1593. The Tribunal will assess damages in the light of the foregoing accepted principles of international law.

E. CONTRIBUTORY FAULT

1. Introduction

1594. The Tribunal now has to determine whether the damages caused to Claimants by the wrongful acts of Respondent should be reduced because, as Respondent argues, "Claimants may not recover from the Russian Federation the fruits of their own wrongdoing."[2108]

1595. In support of its submission, Respondent invokes mainly the legal principle of contributory fault. In its Closing Statement, Respondent argued that Claimants failed to establish that their loss was caused by the Russian Federation's actions in violation of its obligations under the ECT, notably by failing to account for the effects of Claimants' own actions and of Yukos'

2106 *Ibid.*, p. 99.

2107 *Ibid*., pp. 109–10.

2108 Respondent's Opening Statement, Vol. 10, Slide 4.

actions.[2109] It argued[2110] that Claimants ignored Article 39 of the ILC Articles on State Responsibility, which provides:[2111]

> Article 39. Contribution to the injury
>
> In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

1596. Extracts of the ILC's Commentary to Article 39 are pertinent, including the following:[2112]

> Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with Articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially contributed to the damage by some willful or negligent act or omission.
>
> [emphasis added]

1597. The Tribunal also refers to Article 31 of the ILC Articles on State Responsibility , which states:

> Article 31. Reparation
>
> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

1598. The following extract from the ILC's Commentary to Article 31 is also noted:[2113]

> It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct.
>
> [emphasis added]

1599. The Tribunal must therefore decide, on the basis of the totality of the evidence before it, whether there is a sufficient causal link between any willful or negligent act or omission of the Claimants (or of Yukos, which they controlled) and the loss Claimants ultimately suffered at the hands of the Russian Federation through the destruction of Yukos.

2109 Respondent's Closing Statement, Vol. 12, Slide 4.

2110 Respondent's Closing Statement, Vol. 12, Slide 5.

2111 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), Articles 1–11 and 28–39, p. 109 Exh. C-1042.

2112 *Ibid.*

2113 *Ibid.*, p. 93.

1600. The Tribunal notes that it is not any contribution by the injured party to the damage which it has suffered which will trigger a finding of contributory fault. The contribution must be material and significant. In this regard, the Tribunal has a wide margin of discretion in apportioning fault.

2. Contributory Fault as Applied in Other Cases

1601. Before it proceeds with its analysis of the potential contributory fault of Claimants (and Yukos) in the present case which may have contributed to the injury caused to them by the internationally wrongful act of the Russian Federation, the Tribunal has reviewed decisions of investor-state tribunals which have addressed the principle of contributory fault.

1602. This review leads the Tribunal to three conclusions which will inform its analysis.

1603. Firstly, the legal concept of contributory fault must not be confused with the investor's duty to mitigate its losses. There are cases where the claimant's damages were reduced because the tribunal found that it failed to take some reasonable steps to minimize its losses. In such cases, "the injured party must be held responsible for its own contribution to the loss."[2114]

1604. Secondly, there are cases where the contributory fault of the investor, while it may have increased the loss which it sustained, was unrelated to the wrongdoing of the State.[2115] The fault of the investor in those cases contributed to the losses which flowed from the wrongful act of the State.

1605. Finally, the Tribunal identified certain decisions where the tribunals found that the victim contributed to the State's wrongful conduct.[2116] The contributory fault of the investor in those cases provoked the wrongful conduct of the State.

1606. While there is no doctrine of precedent *stricto sensu* in international arbitration, the Tribunal has found these decisions of assistance in its analysis.

[2114] *EDF International S.A. and Ors v. Argentine Republic*, ICSID, ARB/03/23, Award, 11 June 2012 ¶ 1301. *See also Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID, ARB/99/6, Award, 12 April 2002, Exh. C-962 and *AIG Capital Partners, Inc and Anor v. Republic of Kazakhstan*, ICSID, ARB/01/6, Award, 7 October 2003, Exh. R-1110.

[2115] *MTD. v. Chile*, Exh. C-969 and *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC Rules, Award, 22 September 2005, Exh. R-1179.

[2116] *Antoine Goetz & Consorts et S.A. Affinage des Metaux v. Republique du Burundi*, ICSID, ARB/01/2, Award, 21 June 2012 and *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID, ARB/06/111, Award, 5 October 2012 (a case also chaired by Mr. Fortier).

3. Tribunal's Analysis

1607. In Chapter IX.A above, the Tribunal reviewed some 28 instances of alleged "illegal and bad faith conduct" by Claimants or "attributable to the Claimants", which Respondent argues have contributed to Yukos' demise or should, in any event, prevent Claimants from recovering damages from the Russian Federation. For the reasons set out in that chapter, the Tribunal has already concluded that most of these "actions or omissions" cannot be considered as having materially contributed to Yukos' demise.

1608. There are, however, four remaining instances of alleged willful or negligent conduct by Claimants and/or Yukos which, the Tribunal agrees, must be considered as potentially constituting fault that may have contributed to the destruction of Yukos, for which the Tribunal has found Respondent responsible. These four instances are:

i) Yukos' conduct in some of the low-tax regions;

ii) Yukos' use of the Cyprus-Russia DTA;

iii) Yukos' conduct in connection with the YNG auction, notably the procuring of a Temporary Restraining Order by a Texas court and the published threat of a "lifetime of litigation"; and

iv) Yukos' conduct in connection with its bankruptcy, notably the non-payment of the A Loan.

1609. The Tribunal will now review these four instances and seek to determine whether any one of them qualifies as contributory fault as that legal principle has been interpreted in the decisions which it has reviewed earlier.

(a) Conduct of Yukos in Some of the Low-Tax Regions

1610. At the outset of its review, the Tribunal needs to recall that the central, indeed the only, focus of its remit with respect to the tax optimization schemes in the ZATOs and other low tax regions of Russia was the series of arrangements implemented by one Russian oil company, Yukos. These arrangements have been documented by hundreds of exhibits which the Tribunal has considered and analyzed in Chapters VIII.A and VIII.B of the present Award.

1611. While there is ample evidence in the record that nearly all Russian oil companies also availed themselves of such tax optimization arrangements which were permitted by law, [2117] there is no evidence that the operations of those other oil companies, in any respect, breached the legislation and abused the low tax regimes as the Tribunal has found Yukos did through the sham-like nature of some elements of its operations in at least some of the low-tax regions notably in the ZATOs of Lesnoy and Trekhgorny.

1612. The Tribunal also recalls its further findings, in Chapters VIII.A and VIII.B above, that this abuse by Yukos in some of the low-tax regions occurred prior to the confrontation between President Putin and Mr. Khodorkovsky in February 2003. At the February 2003 meeting, President Putin said to Mr. Khodorkovsky that, henceforth, he would no longer receive any protection from the Kremlin. Specifically, President Putin said to Mr. Khodorkovsky: "We have already discussed it with you recently, that your company, for example, has had problems with the payment of taxes."[2118]

1613. This specific reference by President Putin to Yukos' tax issues at the February 2003 meeting is significant.

1614. While the Tribunal has concluded, on the basis of the totality of the evidence, that Respondent's tax assessments and tax collection efforts against Yukos were not aimed primarily at the collection of taxes, but rather at bankrupting Yukos and facilitating the transfer of its assets to the State, it cannot ignore that Yukos' tax avoidance arrangements in some of the low-tax regions made it possible for Respondent to invoke and rely on that conduct as a justification of its actions against Mr. Khodorkovsky and Yukos.

1615. Accordingly, even though the Tribunal has found that President Putin and his administration used Yukos' tax problems as a pretextual justification for setting in motion a plan to bankrupt Yukos, as opposed to just collecting the taxes that might have been legitimately assessed

---

2117 Transcript of Testimony of Mikhail Kasyanov before the Khamovnichesky Court of Moscow of May 24, 2010, p. 3, Exh. C-440; Statement of Prime Minister Mikhail Mikhailovich Kasyanov of 8 July 2009 in *Khodorkovsky v. Russia 1*, ¶ 40, Exh. C-446; TNK-BP's use of low tax regions was disclosed in *TNK International Limited Interim Consolidated Financial Statements*, as of 30 June 2003, p. 8, Exh. C-391; and *TNK-BP Limited Consolidated Financial Statements*, as of 31 December 2003, Exh. C-392; Lukoil's use of low tax regions was noted in *Board of the Audit Chamber of the Russian Federation, Audit Chamber Report on Yukos, Lukoil and Sibneft for 2003 and January–March 2004*, Exh. R-266, *OAO Lukoil, Securities filing, Offering Circular*, 26 November 2002, Exh. R-322, and *OAO Lukoil, Annual Report for 2001*, Exh. R-321.

2118 Video recording and transcript of the meeting of the members of the Union of Industrialists and Entrepreneurs with President V. Putin held in the Ekaterininsky Hall, Kremlin, on 19 February 2003, Exh. C-1396.

against the trading companies on the basis of the "bad faith taxpayer" doctrine, the Tribunal concludes that there is a sufficient causal link between Yukos' abuse of the system in some of the low-tax regions and its demise which triggers a finding of contributory fault on the part of Yukos.

(b) Conduct of Yukos under the Cyprus-Russia DTA

1616. As detailed in the Expert Reports of Thomas Z. Lys, Yukos' "tax optimization" plan included use of the trading companies in the low-tax regions to receive proceeds from the sale of Yukos' oil and oil products, and the transfer of those proceeds to other Yukos-controlled trading and holding companies in the Russian Federation and in off-shore jurisdictions such as Cyprus and the British Virgin Islands.[2119]

1617. Respondent, relying on the expert reports of Professor H. David Rosenbloom,[2120] Professor Dr. Stef van Weeghel and Mr. Polyvios G. Polyviou, has argued that Yukos' use of the Cyprus-Russia DTA was abusive. Claimants, relying on the Expert Report of Mr. Philip Baker QC, counter Respondent's argument and assert that the use by Yukos of the DTA was not abusive. It is noteworthy that the Parties did not call as witnesses one another's respective experts on that issue.

1618. Claimants note that, to this day, the Russian authorities "have done absolutely nothing" in respect of the alleged improper invocation of DTA benefits by Claimants, including under the specific mechanisms of review that exist under the treaty itself and/or under the domestic laws of the contracting parties.[2121] They also submit that the first time Respondent raised any issue regarding the tax arrangements subject to the Cyprus-Russia DTA was on 6 October 2006 in the present arbitration and that Respondent "concocted [this issue] specifically for the purposes of these arbitrations."[2122]

1619. The Tribunal accepts Claimants' argument that it is incongruous for the Russian Federation to complain in these proceedings about Yukos' use of the treaty while never having invoked the

---

2119 Second Lys Report, , pp. 39 ff.

2120 Respondent's Post-Hearing Brief, ¶¶ 150–61.

2121 Claimants' Post-Hearing Brief, ¶¶ 192–202.

2122 *Ibid.* ¶¶ 198–200, referring to Respondent's Comments on Issues Raised by Procedural Order No. 2 of 8 September 2006.

mechanisms available to it to trigger the review of such use by, for example, invoking the information-sharing provisions of the treaty.[2123]

1620. At the same time, it seems clear to the Tribunal, on the facts, that Yukos' operations under the DTA were wholly conducted by Mr. Lebedev from Yukos' established offices in Moscow, that his "place of management" where he habitually concluded contracts relating to operations under the Treaty was in Moscow, which of itself demonstrates that Yukos' avoidance of hundreds of millions of dollars in Russian taxes through the Cyprus-Russia DTA, was questionable. Hulley appears to the Tribunal to have falsely declared on Cypriot withholding tax forms that "income"—dividends from Yukos—"was not connected with activities carried on in the Russian Federation" despite Mr. Lebedev's activities in Moscow.[2124]

1621. In any event, even if there was an abuse by Yukos of that treaty, as in the Tribunal's *prima facie* view there was, such conduct would be subsumed into and enlarge the abuse by some of Yukos' trading companies in some of the low tax regions, which the Tribunal has already found amounted to contributory fault on the part of Yukos.

(c) Conduct of Yukos in Connection with YNG Auction

1622. The Tribunal reiterates that the abusive use of some of the low-tax regions by Yukos including its questionable use of the Cyprus-Russia DTA occurred prior to the February 2003 encounter between President Putin and Mr. Khodorkovsky and thus prior to the plan formed by the Russian Federation not simply to collect taxes from Yukos but to bankrupt the company and transfer its assets to the State.

1623. The YNG auction took place in December 2004 well after Respondent had put in motion its plan to expropriate Yukos. It was preceded by Yukos' resort to bankruptcy proceedings in Texas, the issuance of a Temporary Restraining Order by the Texas court, and Yukos' public threats, most strikingly a full page advertisement in the *Financial Times*, warning prospective purchasers of YNG against participating in the auction.

[2123] Transcript, Day 20 at 146.

[2124] Counter-Memorial, ¶ 164, referring to Hulley Enterprises Limited, Claims for an Exemption of Passive Incomes Sourced in Russia before the Payment is Made (Form 1013DT) for 2000, 2001, Exh. R-193; Veteran Petroleum Limited, Claims for an Exemption of Passive Incomes Sourced in Russia before the Payment is Made (Form 1013DT) for 2001, 2002, Exh. R-194; Hulley Enterprises Limited, Annual Report and Financial Statements for the year ended Dec. 31, 2003, 7 April 2004, Exh. R-190; Veteran Petroleum Limited, Annual Report and Financial Statements for the year ended Dec. 31, 2003, 15 December 2006 Exh. R-192.

1624. Respondent submits that these actions discouraged prospective purchasers of YNG from taking part in the auction and depreciated the price realized at the auction.

1625. The Tribunal agrees that, but for these actions of Yukos, it is reasonable to surmise that the auction of YNG on 19 December 2004, the unlawful measure of Respondent that dealt as "fatal blow" to the survival prospects of Yukos, could have resulted in a higher bid price than the auction actually did. However, in the view of the Tribunal, Yukos' ultimate fate would have been no different if it had not threatened a lifetime of litigation or obtained a Temporary Restraining Order from a Texas Court. Its demise may have been postponed, or the path to its demise altered in some minor way, but it would not have been avoided.

1626. The Tribunal observes with interest that the *RosinvestCo* tribunal found that "Yukos did in some respects contribute to its own demise" and that it referred in that context to the Houston bankruptcy proceedings.[2125]

1627. In addition, before concluding its analysis of this facet of Claimants' conduct, the Tribunal needs to contrast these actions of Yukos with a series of actions of Respondent before the YNG auction which must have depreciated the auction price very significantly and thus served the Russian Federation objective of acquiring the Yukos assets at a bargain price.

1628. Those actions of Respondent include:

- The threat by Russia's Ministry of Natural Resources to withdraw YNG's operating licenses;[2126]
- The massive tax liabilities imposed on YNG in October and December 2004;[2127]
- The statement by the Russian Federation Ministry of Justice that the USD 10.4 billion valuation of YNG was "due to the high risk to a potential buyer";[2128]

2125 *RosInvestCo* ¶ 634, Exh. C-1049.

2126 *Russian Government May Revoke YUKOS Unit's Licenses*, FWN Select, 10 September 2004, Exh. C-701.

2127 *Repeat Field Tax Audit Report No. 30-03-14/2*, 29 October 2004, Exh. C-251; *see* Decision of the Moscow Arbitrazh Court, 25 April 2006, p. 2, Exh. C-255; Memorial ¶ 271.

2128 *In the Yukos Saga, Yet Another Gloomy Chapter*,Wall Street Journal, 14 October 2004, Exh. C-713.

- The decision by Respondent to fix the date of the auction exactly one month after the auction was announced, being the minimum length of the notice required under Russian law;[2129]

- The alleged pressure of Respondent on would be bidders from India and China not to participate in the auction.[2130]

1629. In conclusion, the Tribunal finds that the actions of Yukos which may have depreciated the auction price, do not constitute contributory fault as they did not contribute in a material way to its demise.

(d) Conduct of Yukos in Connection with its Bankruptcy (Non-Payment of the A Loan)

1630. With respect to the non payment by Yukos of the A Loan and Respondent's submission that such non-payment rendered Yukos responsible for its own bankruptcy, the Tribunal accepts Respondent's contention that Yukos was in a position to pay off the balance of the A Loan and that its willful failure to do so contributed to the circumstances of its bankruptcy by leading SocGen to petition for it. At the same time, the loan provisions contemplated that YNG oil production and sale would fuel payment of the loan, and it was understandable that, once YNG was taken over by Rosneft, Claimants should have felt that responsibility for repayment of the A Loan was not theirs or theirs alone.

1631. Moreover, in the view of the Tribunal, even if Yukos had paid off the A Loan, it represented only a fraction of the claims against Yukos which could have been used to petition the company into bankruptcy. In 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.

1632. Consequently, the Tribunal concludes that, while Yukos may have been at fault in refusing to pay off the A Loan, its behavior does not rise to the level of contributory fault.

[2129] In its report of 6 October 2004, Dresdner wrote that "[a] quick auction will most likely prevent the achievement of a full price since purchasers will only be able to conduct a limited audit of the financial and economic performance and accordingly will discount their valuation of the target asset." [emphasis added]. Dresdner Valuation Rpeort, Section 11.2, Exh. C-274.

[2130] *Russia's Latest Auction Farce Eerily Familiar*, The Moscow Times, 21 December 2004, p. 1, Exh. C-739.

4. Tribunal's Decision on Contributory Fault

1633. Paraphrasing the words of Article 39 of the ILC Articles on State Responsibility and its commentary, the Tribunal must now determine whether Claimants' and Yukos' tax avoidance arrangements in some of the low-tax regions, including their questionable use of the Cyprus-Russia DTA summarized above, contributed to their injury in a material and significant way, or were these minor contributory factors which, based on subsequent events such as the decision of the Russian authorities to destroy Yukos, cannot be considered, legally, as a link in the causative chain. As the Tribunal noted earlier in this chapter, an award of damages may be reduced if the victim of the wrongful act of the respondent State also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility.[2131]

1634. In the view of the Tribunal, Claimants should pay a price for Yukos' abuse of the low-tax regions by some of its trading entities, including its questionable use of the Cyprus-Russia DTA, which contributed in a material way to the prejudice which they subsequently suffered at the hands of the Russian Federation.

1635. In considering the extent of the contribution of Claimants' faults to their injury, the Tribunal notes that the subsequent conduct of the Russian Federation, as the Tribunal has found, was disproportionate and tantamount to expropriation of Claimants' investment in Yukos. Claimants' damages were caused by the series of events starting with the arrest of Messrs. Khodorkovsky and Lebedev, and the tax assessments, and culminating in the YNG auction, which led to the bankruptcy and liquidation of Yukos. The Tribunal must now determine to what extent and in what proportion Claimants' and Yukos' conduct prior to 2003, including their questionable use of the Cyprus-Russia DTA, contributed so as to lessen the responsibility of Respondent.

1636. The Tribunal agrees with the ICSID Annulment Committee in the *MTD v. Chile* case that "the role of the two parties contributing to the loss [is] [. . .] only with difficulty commensurable

---

2131 *See* ruling in *MTD v. Chile* ¶¶ 242–43 that "the Claimants should bear part of the damages suffered." In that case, that "part" was quantified as 50 percent of the damages. *See also Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID, ARB/06/111, Award, 5 October 2012 ¶¶ 659–687. In that case, that "part" was quantified as 25 percent of the damages.

and the Tribunal [has] a corresponding margin of estimation."[2132] However, the Tribunal, as other tribunals have done, must reach a decision and it has done so on the basis of all the evidence which it has reviewed.

1637. Having considered and weighed all the arguments which the Parties have presented to it in respect of this issue the Tribunal, in the exercise of its wide discretion, finds that, as a result of the material and significant mis-conduct by Claimants and by Yukos (which they controlled), Claimants have contributed to the extent of 25 percent to the prejudice which they suffered as a result of Respondent's destruction of Yukos. The resulting apportionment of responsibility as between Claimants and Respondent, namely 25 percent and 75 percent, is fair and reasonable in the circumstances of the present case.

XI. INTEREST

1638. As will be seen in Part XII of the Award dealing with quantification of Claimants' damages for Respondent's breach of the ECT, one of the elements factored into the Tribunal's calculation of damages will be interest.[2133] Accordingly, the Tribunal, in the present Part XI will determine the applicable rate of such interest, whether it should be simple or compound and, if compound, the period of compounding.

A. CLAIMANTS' POSITION

1639. Claimants request the Tribunal to award them pre- and post-award interest.[2134] In their Submission on Costs, Claimants also request interest on any costs awarded to them.[2135]

1640. According to Claimants, "payment of interest can be required to ensure full reparation."[2136] Claimants quote the tribunal in *Vivendi v. Argentina*, which stated that the purpose of the payment of interest is "to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he

---

2132 *MTD Equity Sdn Bhd. v. The Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007 ¶ 101. *See also Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID, ARB/06/111, Award, 5 October 2012 ¶¶ 659–87.

2133 In particular see paragraphs 1822–23 below on pre-award interest on the dividend streams that Claimants would have obtained in the absence of Respondent's breach.

2134 Memorial ¶¶ 969–70; Reply ¶¶ 859, 1199; Claimants' Post-Hearing Brief ¶ 302.

2135 Claimants' Submission on Costs ¶ 64.

2136 Memorial ¶ 959, citing to ILC Articles on State Responsibility, Art. 38, Exh. C-1042.

was supposed to receive."[2137] Claimants submit that the Tribunal has "full discretion to determine the most appropriate rate of interest to achieve full reparation"[2138] and quote the award in *Compañía del Desarollo de Santa Elena, S.A. v. Republic of Costa Rica* ("***Santa Elena***"):

> [T]he determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal.[2139]

1641. Claimants further contend that the Tribunal may award compound interest[2140] and that compound interest has become "the norm in investment arbitration as regards full reparation."[2141] Putting emphasis on the awards in *Santa Elena* and *Wena Hotels Limited v. Arab Republic of Egypt* ("***Wena***"), Claimants explain that compound interest should be awarded in order for the amount of compensation to reflect the additional sum that the claimant would have earned if the money had been reinvested each year at generally prevailing rates of interest.[2142]

1642. Claimants' valuation expert, Mr. Kaczmarek, analyzed three possible rates of interest: the LIBOR plus two or four percent; the yield on Russian sovereign bonds issued in USD; and the U.S. Prime rate of interest plus two percent.[2143]

1643. According to Claimants:

> Navigant observed that the Russian Federation's breaches "have effectively turned Claimants into unwilling lenders to Russia." The yield on Russian sovereign bonds issued

---

2137 *Ibid*., citing to *Vivendi v. The Argentine Republic* ¶ 9.2.3, Exh. C-986.

2138 *Ibid*. ¶ 961.

2139 *Santa Elena* ¶ 103, Exh. C-952.

2140 Memorial ¶ 963, citing to *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 ¶ 128, Exh. C-954; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 ¶ 129, Exh. C-956 (hereinafter "*Wena*"); *Santa Elena* ¶ 104, Exh. C-952; *MTD v. Chile* ¶ 251, Exh. C-969; *Azurix* ¶ 440, Exh. C-979; *Siemens* ¶¶ 399–401, Exh. C-983 (hereinafter "*Siemens*"); *ADC* ¶ 522, Exh. C-980; *Vivendi* ¶¶ 9.2.5–9.2.6, Exh. C-986; *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 ¶ 595, Exh. C-998; F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 U.C. Davis L. Rev. 577 (1987–1988), Exh. C-1025; Stephen M. Schwebel, *Compound Interest in International Law*, 2(5) Transnational Dispute Management (2005), Exh. C-1029; John Yukio Gotanda, *Compounding Interest in Interest: The Global Economy, Deflation, and Interest, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION. THE FORDHAM PAPERS (2009–2010), pp. 261–87, Exh. C-1024; *see also* Reply ¶ 845 n.1472, citing to *Kardassopoulos* ¶¶ 650–78, Exh. C-1533; *Gemplus S.A., SLP S.A., Gemplus et al. v. Mexico, Talsud S.A6. v. The United Mexico States*, ICSID Cases Nos. ARB (AF)/04/3 & ARB (AF)/04/4, Award, 16 June 2010 ¶¶ 16–26, Exh. C-1536 (hereinafter "*Gemplus*").

2141 Memorial ¶ 965.

2142 *Ibid*. ¶¶ 963–64, citing to *Wena* ¶ 129, Exh. C-956; *Santa Elena* ¶ 104, Exh. C-952.

2143 Memorial ¶ 966; First Kaczmarek Report ¶¶ 375–81; Reply ¶ 859 n.1491; Second Kaczmarek Report ¶¶ 64–65.

> in U.S. dollars corresponds to the rate that the Russian Federation offers to its willing lenders. Therefore, in order to be fully compensated for the Russian Federation's breaches, the Claimants should be awarded interest at a commercial rate higher than this latter rate. LIBOR +4% would represent such an appropriate commercial rate, which is the rate used by Navigant in its expert report.[2144]
>
> [emphasis in the original]

1644. Claimants have requested that interest of LIBOR plus 4 percent, compounded annually, be applied pre- and post- award, including on costs.[2145]

1645. At the Hearing, Claimants presented the following table to summarize their submission on interest rates:[2146]

Interest Rate	Description	Justification
Russian Cost of Debt	Cost of raising money for the Russian Government	The actions have effectively turned the Claimants into unwilling lenders to Russia.
U.S. Prime Rate	Rate that US banks charge their most creditworthy customers	The U.S prime rate is not widely available in the market. A 2% premium reflects a rate that would be more broadly available.
LIBOR	Rate of interest that banks charge one another for loans in the money market	Historically, LIBOR + 2% has closely tracked the U.S. Prime rate of interest. As such, LIBOR + 4% would be a commercial rate of interest on par with the U.S. Prime rate + 2%

1646. Claimants noted that the Russian cost of debt is "a natural candidate" for interest rate.[2147] In response to a question by the Chairman whether Claimants "still rely on LIBOR", counsel for Claimants noted that he had "avoided making any comment on the reliability of LIBOR."[2148]

B. RESPONDENT'S POSITION

1647. Respondent submits that Claimants' request for pre- and post-award interest is "manifestly unfounded and disproportionate, and should be rejected."[2149] Respondent refers to the

---

2144 Memorial ¶ 967.

2145 Memorial ¶ 970; Reply ¶¶ 859, 1199; Claimants' Post-Hearing Brief ¶ 309; Claimants' Submission on Costs ¶ 64.

2146 Transcript, Day 17 at 259 (Claimants' closing), showing Exh. C-1787.

2147 *Ibid*.

2148 *Ibid*. at 260 (Claimants' closing).

Commentary on Article 38 of the ILC Articles on State Responsibility for the proposition that there is "no automatic entitlement to the payment of interest."[2150]

1648. Respondent emphasizes that compound interest is not awarded automatically by tribunals.[2151] Respondent observes that the *RosInvestCo* tribunal used LIBOR alone, calculated annually, without any compounding.[2152]

1649. Respondent criticizes Claimants and their expert for failing to provide a justification for their preferred rate of LIBOR plus four percent.[2153] According to Respondent, awarding Claimants interest at LIBOR plus four percent compounded annually would "unduly punish" Respondent while granting Claimants a "windfall."[2154]

C. THE LEGAL FRAMEWORK

1. Energy Charter Treaty

1650. Article 26(8) of the ECT provides that "awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute" [emphasis added]. In the case of a lawful expropriation, Article 13(1) of the ECT directs that compensation "shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment" [emphasis added].[2155]

2149 Rejoinder ¶ 1743.

2150 *Ibid*., quoting Commentary on ILC Articles on State Responsibility, Article 38 ¶ 7, Exh. R-4235.

2151 *Ibid*. Respondent explains that, as noted by the tribunal in *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID ARB/04/19, Award, 18 August 2008 ¶ 473, Exh. C-993, "the award of compound interest is not a principle of international law." As explained by BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION (2011), p. 152, Exh. R-4234, "compound interest, in international investment law, may be awarded if the aggrieved party can prove that it 'could have received compound interest . . . by placing its money in a readily available and commonly used investment vehicle . . .'." In *RosInvestCo* ¶¶ 688–90, Exh. C-1049, the tribunal notes that the practice of awarding compound interest is "by no means unanimous" and that awarding interest at "a normal commercial rate" does not imply that the tribunal "is bound to award compound interest." Rejoinder ¶ 1743 n.2952.

2152 Rejoinder ¶ 1746; *RosInvestCo* ¶¶ 684–90, Exh. C-1049.

2153 Rejoinder ¶ 1746.

2154 *Ibid*. ¶ 1747, quoting John Yukio Gotanda, *Awarding Interest in International Arbitration*, 90 Am. J. of Int'l Law 40 (1996) pp. 59–60, Exh. R-4236.

2155 See Subsection XII.C.1(b) below for discussion on the applicability of the Article 13 standard in lawful and unlawful expropriations.

1651. The Tribunal observes that arbitral tribunals hearing disputes under the ECT have awarded pre- and post-award interest at various rates.[2156]

2. ILC Articles on State Responsibility

1652. Article 38 of the ILC Articles on State Responsibility reads as follows:

> 1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
>
> 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.[2157]

1653. The Commentary on Article 38 provides that "[t]he awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation."[2158]

3. *RosInvestCo* and *Quasar*

1654. The *RosInvestCo* tribunal awarded pre- and post-award interest using LIBOR alone, calculated annually, without any compounding,[2159] while the *Quasar* tribunal awarded pre- and post-award interest at a rate of 6.434 percent (corresponding to the relevant average yield of medium-term Russian sovereign bonds dealt in USD) compounded annually.[2160]

4. Treatises

1655. Two books on the issue of damages in international investment cases have recently been published. The Tribunal has found the chapters of these books dealing with interest very informative.[2161]

2156 *See e.g. Nykomb Synergetics Technology Holding AB (Sweden) v. Latvia*, SCC, Award, 16 December 2003, p. 40 (pre-award and post-award interest at six percent, corresponding to the prevailing interest rate in Latvia), Exh. C-967; *Kardassopoulos* ¶¶ 658–68, 677–78 (pre-award and post-award interest at LIBOR plus four percent compounded semi-annually), Exh. C-1533.

2157 Exh. C-1042.

2158 ¶ 7, Exh. C-1042.

2159 *RosInvestCo* ¶¶ 684–92, Exh. C-1049.

2160 *Quasar* ¶ 226, Exh. R-3383.

2161 SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), pp. 363–91 (other extracts of which constitute Exh. C-1610) (hereinafter "Ripinsky and Williams"); IRMGARD MARBOE, CALCULATION

1656. The following paragraphs summarize these authors' respective analyses and conclusions on various aspects of the issue of interest in international investment cases.

(a) General Issues

1657. Dr. Irmgard Marboe explains that, on the one hand, interest should compensate the temporary withholding of money: interest should address the claimant's financial disadvantage of not being able to dispose of money, which materializes either in loss of profit from alternative investments or in costs for a loan.[2162] On the other hand, the awarding of interest should prevent the debtor's unjust enrichment since the debtor gains a financial profit through the withholding of the money.[2163] Additionally, post-award interest, writes Dr. Marboe, serves the purpose of creating an effective incentive for the respondent to comply with an arbitral award without delay.[2164]

1658. Dr. Sergey Ripinsky and Mr. Kevin Williams stress the well-established mantra that tribunals enjoy a wide margin of discretion in awarding interest.[2165]

(b) Rate

1659. Dr. Ripinsky and Mr. Williams write that choosing the rate is "perhaps the issue where one sees the greatest variety in approaches of arbitration tribunals."[2166] They consider four different approaches.

1660. The first is the "investment alternatives" approach, adopted by the majority opinion in the Iran–U.S. Claims Tribunal case *Sylvania Technical Systems v. Iran* ("***Sylvania***") and explained in the following terms:

> [T]he Tribunal will derive a rate of interest based approximately on the amount that the successful claimant would have been in a position to have earned if it had been paid in time

---

OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2009), pp. 317–92 (other extracts of which constitute Exh. C-1607) (hereinafter "Marboe").

2162 Marboe ¶ 6.05.

2163 *Ibid*. ¶ 6.06; *see also Santa Elena* ¶ 101, Exh. C-952 ("[the claimant] is entitled to the full present value of the compensation that it should have received at the time of the taking. Conversely, the taking state is not entitled unjustly to enrich itself by reason of the fact that the payment of compensation has been long delayed.").

2164 Marboe ¶ 6.38, citing to John Yukio Gotanda, SUPPLEMENTAL DAMAGES IN PRIVATE INTERNATIONAL LAW, 1997, p. 58.

2165 Ripinsky and Williams, pp. 365–66.

2166 *Ibid*., p. 366. Dr. Marboe calls it "one of the most difficult decisions." Marboe ¶ 6.40.

> and thus had the funds available to invest in a form of commercial investment in common use in its own country.[2167]

1661. According to Dr. Ripinsky and Mr. Williams, this approach was followed in subsequent awards of the Iran–U.S. Claims Tribunal as well as by the *Santa Elena* tribunal.[2168]

1662. The second approach is the "borrowing rate" approach, which is based on borrowing rates from banks in the claimant's country.[2169] Investment tribunals have often used the LIBOR, an inter-bank borrowing rate of interest. Some tribunals have also added a certain percentage to the LIBOR rate to arrive at the approximate rate that international investors would have had to pay if they had been obliged to borrow the money. According to Ripinsky and Williams, tribunals have "normally" added two percent to LIBOR.[2170]

1663. Dr. Marboe notes that Judge Holtzmann had argued in favor of a borrowing rate approach in his separately recorded view on interest in the *Sylvania* decision, because it "is reasonable to assume that most businesses habitually borrow while fewer regularly invest in certificates of deposit."[2171] Dr. Marboe writes that the borrowing rate approach can lead to different results, such as the selection of the prime rate, the borrowing rate of the investor, the cost of capital of the investor, the borrowing rate of the State (the "coerced loan theory") or the average borrowing rate.[2172]

1664. In respect of the prime rate, Dr. Marboe writes:

> The "prime" or "base" rate plays an important role in negotiations about company loan conditions in Anglo-American countries. As such, it seems to be an appropriate basis for the assessment of the damages incurred by a delayed payment. However, it must be taken into account that not all enterprises can borrow money from the banks at the prime rate. Therefore, an increase by a few percentage points might be necessary as has been the practice in the cases mentioned above. The question then arises, of course, how many percentage points are appropriate. It appears, therefore, that the prime rate does not really offer a viable means of ensuring adequate and consistent decisions on interest.[2173]

1665. In respect of the "coerced loan theory", she opines:

2167 Ripinsky and Williams, p. 368, quoting *Sylvania Technical Systems v. Iran,* Award, 27 June 1985, 8 Iran–U.S. Claims Tribunal Reports, 298, 320 (footnote omitted) (hereinafter "*Sylvania*").

2168 *Ibid*., p. 368; *see* Marboe ¶¶ 6.107–6.120.

2169 Ripinsky and Williams, p. 369.

2170 *Ibid*., p. 370.

2171 Marboe ¶ 6.82, quoting *Sylvania*, p.321 n.13.

2172 *Ibid*. ¶¶ 6.85–6.106.

2173 *Ibid*. ¶ 6.93.

> According to this approach, the amount of interest has nothing to do with the claimant's actual loss, but rather depends on the respondent's risk characteristics.
>
> This approach measures the financial effect of the delay from the perspective of the respondent. It has to be borne in mind, however, that pre-award interest in international investment cases should fulfil the function of compensation or damages. Therefore, the perspective of the claimant is decisive.
>
> The perspective of the respondent, however, is important when it comes to the prevention of enrichment as an additional function of the interest claim. While this is only of secondary importance concerning pre-award interest, it becomes relevant with regard to post-award interest. This means that the "coerced loan theory" would better fit with the determination of post-award interest.[2174]

1666. The third approach to interest is to rely on the interest rate applicable under the host State's domestic law provisions concerned. Dr. Ripinsky and Mr. Williams observe that investment tribunals have done so,[2175] while Dr. Marboe asserts that, in international investment disputes, "national legal interest rates are not applicable and not adequate."[2176]

1667. Finally, in a number of disputes, write Dr. Ripinsky and Mr. Williams, tribunals have adopted a specific rate ranging from 5 to 10 percent, calling it "reasonable", "fair" or "appropriate".[2177] Dr. Marboe writes that "fair" rates have ranged from 5 to 17.5 percent.[2178]

1668. The Tribunal notes that, overall, Dr. Ripinsky and Mr. Williams favor the "investment alternatives" approach, with the caveat that, in situations where the debtor's actions force the claimant to borrow funds, it would be appropriate to award interest at the claimant's actual borrowing rate,[2179] whereas Dr. Marboe appears to prefer the use of inter-bank interest rates.[2180]

(c) *Dies a quo*

1669. The authors of both treatises affirm that, in cases of expropriation, "interest has invariably been calculated from the date of the taking."[2181]

2174 *Ibid*. ¶¶ 6.101–6.103 (footnote omitted).

2175 Ripinsky and Williams, pp. 370–72.

2176 Marboe ¶¶ 6.70.

2177 Ripinsky and Williams, p. 372.

2178 Marboe ¶ 6.149; *see also* ¶¶ 6.150–6.161.

2179 Ripinsky and Williams, p. 373.

2180 *See* Marboe ¶ 6.147.

2181 Ripinsky and Williams, p. 375; *see ibid*. ¶ 6.163.

(d) Simple or Compound

1670. With respect to the important issue of whether interest awarded should be simple or compound, Dr. Ripinsky and Mr. Williams opine that "there is a trend away from only awarding simple interest to generally awarding compound interest,"[2182] while Dr. Marboe states that "compound interest as opposed to simple interest appears to be predominantly accepted as appropriate in recent international investment arbitration" because it is "regarded as better reflecting actual economic realities both for the purpose of remedying the loss actually incurred by the injured party and for the prevention of unjustified enrichment of the respondent State."[2183] Dr. Ripinsky and Mr. Williams refer to the *Santa Elena* award, issued in 2000, as "a turning point in jurisprudence."[2184]

1671. Dr. Ripinsky and Mr. Williams observe that the period of compounding has ranged from one year to one month and that annual compounding has been "predominant."[2185]

(e) Post-Award Interest

1672. After an extensive review of arbitral decisions, Dr. Ripinsky and Mr. Williams conclude that in the majority of cases, tribunals have not considered post-award interest separately from pre-award interest and have simply granted interest until the date of full payment of the award. This "automatically turns pre-award interest into post-award."[2186]

1673. They note that when post-award interest has been granted separately, tribunals have been more severe towards the respondent, compared to the pre-award interest granted.[2187]

1674. According to Dr. Ripinsky and Mr. Williams, "[t]hese changes can be explained by the desire of some tribunals to ensure prompt compliance with the award by adding a punitive element to

---

2182 Ripinsky and Williams, p. 379.

2183 Marboe ¶ 6.236; but see Marboe's list of exceptions ¶¶ 6.237–6.261.

2184 Ripinsky and Williams, p. 385.

2185 *Ibid*., p. 387.

2186 *Ibid*.; *see also* Marboe ¶¶ 6.243–6.261.

2187 Ripinsky and Williams, p. 389.

interest and thereby turning the post-award interest from a purely compensatory instrument into a sanction."[2188]

1675. Dr. Ripinsky and Mr. Williams also note that some tribunals have provided for a grace period following the date of the award, during which interest does not accrue.[2189]

D. TRIBUNAL'S DECISION

1676. The Tribunal, having considered the Parties' submissions, the treatises of the learned authors quoted extensively above, the many decisions of tribunals which have traversed the issue of interest and, of course, the totality of the evidence in the case at hand that it considers pertinent to its determination of this facet of the present arbitrations, will now proceed with its analysis and exercise its judgment.

1677. As we saw earlier, the ECT, the relevant legal instrument, envisages an award of interest in an arbitral award. In addition, the Treaty decrees mandatory payment of interest "at a commercial rate established on a market basis" in the case of a lawful arbitration. In the view of the Tribunal, there can be no doubt that, *a fortiori*, in the case of an unlawful expropriation, as in the present case, Claimants are entitled to interest from Respondent in order to ensure full reparation for the injury they suffered as a result of those of Respondent's measures that the Tribunal has found to be internationally wrongful.

1678. Neither the Treaty nor the ILC Articles on State Responsibility provide specific rules regarding how interest should be determined. In addition, as the Tribunal has found, the practice of past tribunals is varied and inconsistent and does not provide clear guidance. Thus, as is well established, the Tribunal has a wide margin of discretion to determine the rate of interest applicable and whether it should be simple or compound.

1679. Of the three rates proposed by Claimants, the LIBOR plus two or four percent, the yield on Russian sovereign bonds issued in USD and the U.S. Prime rate plus two percent, the Tribunal has rejected outright the first two for the following brief reasons. LIBOR, as Claimants' counsel implicitly recognized during the Hearing, has been discredited, while the yield on

---

[2188] *Ibid*., p. 389; *see* Marboe ¶ 6.245.

[2189] Ripinsky and Williams, p. 390; *see also* Marboe ¶¶ 6.262–6.268.

Russian sovereign bonds issued in USD would lead, in the Tribunal's opinion, to excessive compensation for Claimants.

1680. As for the U.S. Prime rate plus two percent, the Tribunal initially saw merit in this rate which is a version of the borrowing rate approach reviewed earlier. The Tribunal notes that this method was put forward by Judge Holtzmann in his separately recorded view on interest in the *Sylvania* Iran–U.S. Claims Tribunal case.[2190]

1681. The Tribunal has concluded however that this method should also be rejected. It is not an appropriate basis for the assessment of the damages in this case. There is no evidence that Claimants had to borrow money because they were not compensated at the time of the expropriation.

1682. On the other hand, the Tribunal finds apposite the following statement of the *Siemens v. Argentina* tribunal:

> The Tribunal considers that the rate of interest to be taken into account is not the rate associated with corporate borrowing but the interest rate the amount of compensation would have earned had it been paid after the expropriation.[2191]

1683. The Tribunal recalls that a rate of interest based on return of investment during the relevant period was adopted by the *Santa Elena* tribunal:

> [W]here an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest.[2192]

1684. The Tribunal observes that many investor-state tribunals have adopted this "investment alternatives approach,"[2193] using rates of U.S. debt instruments even when the claimant was not a U.S. investor.[2194]

2190 *Sylvania*, p. 321 n.13.

2191 *Siemens* ¶ 396, Exh. C-983.

2192 *Santa Elena* ¶ 104, Exh. C-952. The Chairman of the Tribunal was also the Chairman of the ICSID tribunal in *Santa Elena*.

2193 Ripinsky and Williams, pp. 368–69; Marboe ¶¶ 6.107–6.119; *Sylvania*, pp. 320–21; *Santa Elena* ¶ 104, Exh. C-952; *Siemens* ¶ 396, Exh. C-983.

2194 Ripinsky and Williams, p. 369 & n.42; *see e.g.*, *Alpha Projektholding GmbH (Austria) v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010 ¶ 514 & n.666; *EDF International S.A., SAUR International S.A. Leon*

1685. The Tribunal, in the exercise of its discretion, has concluded that it would be appropriate to award to Claimants interest on a rate based on ten-year U.S. Treasury bond rates.

1686. As will be seen in Part XII on damages, the Tribunal has ruled that Claimants' shares in Yukos should be valued as of the date of the Award. Accordingly, there will be no pre-award interest granted to Claimants in respect of the damages representing the value of their shares.[2195]

1687. However, in order that they may be made whole, the Tribunal will grant pre-award interest to Claimants for the damages which represent the value of the dividend streams for which, as will be seen,[2196] the Tribunal has decided Claimants should be compensated. In order to compute the pre-award interest awarded to Claimants at the rate based on ten-year U.S. Treasury bond rates, the Tribunal will use the average yield of ten-year U.S. Treasury bonds over the period from 1 January 2005 to 30 May 2014 as the applicable rate of interest, which the Tribunal has determined to be 3.389 percent.[2197]

1688. As will also be seen in Part XII on damages, the Tribunal has decided to award Claimants post-award interest on the damages of USD 50,020,867,798 for which the Tribunal has found Respondent liable.

1689. As to whether the interest awarded should be simple or compound, while the Tribunal recognizes that the awarding of compound interest under international law now represents a form of "jurisprudence constante" in investor-state expropriation cases,[2198] the Tribunal has concluded that, in the circumstances of this case, it would be just and reasonable to award Claimants simple pre-award interest and post-award interest compounded annually if Respondent fails to pay in full to Claimants the damages for which it has been held liable before the expiry of the grace period hereinafter granted.

Participationes Argentinas S.A. v. The Argentine Republic, ICSID Case No. ARB/03/23, Award, 11 June 2012 ¶ 1325ff, Exh. R-4186; *Gemplus*, Exh. C-1536.

2195 Pre-award interest on the value of the Claimants' shares has, however, been applied in the context of calculating the amount of damages that would have to be awarded on the basis of a valuation date corresponding to the date of the expropriation of Claimants' investment. *See* paragraph 1847 below.

2196 *See* Subsection XII.C.4.

2197 *See* Table T9 appended to this Award.

2198 *Oko Pankki Oyj (formerly called OKO Osuuspankkien Keskuspankki OYJ), VTB Bank (Deutschland) AG (formerly called Ost-West Handelsbank AG) and Sampo Bank PLC v. The Republic of Estonia*, ICSID Case No. ARB/04/6), Award, 19 November 2007 ¶ 349, Exh. C-1530.

1690. The Tribunal notes that Claimants claim interest on the costs that may be awarded to them by the Tribunal at the same rate as the interest awarded to them on the damages.[2199] In the event that Respondent fails to pay in full to Claimants the costs awarded to them in Part XIII of the present Award before the expiry of the grace period, post-award interest will accrue on any outstanding amount, compounded annually.

1691. In the circumstances of the present case, in view of the significant amount of damages which Respondent owes Claimants as a result of this Final Award, the Tribunal considers it reasonable to grant to Respondent a grace period of 180 days following the date of the Award before interest will accrue if not paid in full to Claimants by then.

1692. In order to compute any post-award interest awarded to Claimants on their damages and their costs, the Tribunal orders that the interest rate be determined as the yield on ten-year U.S. Treasury bonds as of 15 January 2015 and then the dates of compounding yearly thereafter.

XII. THE QUANTIFICATION OF CLAIMANTS' DAMAGES

1693. The Tribunal will now determine the damages caused to Claimants by Respondent's breach of Article 13 of the ECT. The Parties' positions in this regard can be summarized as follows.

A. CLAIMANTS' POSITION

1694. Claimants assert that they are entitled to full reparation for Respondent's breach of its obligations under the ECT "through financial compensation measured at the date of expropriation or at the date of the award, whichever is the greatest"[2200] and seek damages in "an amount to be determined by the Arbitral Tribunal," but estimated at "no less than US$ 114.174 billion."[2201] Claimants maintain that, while Article 13(1) of the ECT provides a specific rule of compensation, this rule applies only to legal expropriations (*i.e.*, expropriations satisfying the conditions contained in Article 13(1)), and that, where one or more of the conditions of Article 13(1) have not been met, the rules of customary international law apply to the issue of

[2199] Claimants' Submission on Costs ¶ 64.

[2200] Claimants' Post-Hearing Brief ¶ 232.

[2201] Reply ¶ 1199. *See also* Claimants' Post-Hearing Brief ¶ 302.

reparation.[2202] According to Claimants, in order to achieve full reparation in the event of an unlawful expropriation, an investor must be able to choose between a valuation of the damages it has suffered as at the date of the breach and a valuation as at the date of the award.[2203]

1. Valuation Date

1695. Claimants submit that there are two potentially relevant dates with regard to the assessment of damages, namely the moment when a treaty breach occurs and the moment when an award is rendered. Claimants take the view that "an investor should be compensated in the highest amount between the valuation of the damages it has suffered as at the date of the breach and that at the date of the award."[2204] The reason for this alternative valuation, according to Claimants, is that "to the extent the assets expropriated have increased in value during the arbitration process, this increase must accrue for the benefit of the Claimants, not to the Russian Federation."[2205] Claimants refer to a number of legal authorities to support the conclusion that, in cases of unlawful expropriations, investors are entitled to choose between a valuation as at the date of the breach and a valuation as at the date of the award.[2206]

1696. Claimants assert that the date of the expropriation of their investment in this case was 21 November 2007, the date on which Yukos was struck off the Russian register of legal entities. The justification for choosing this date, according to Claimants, is that "[i]n cases involving expropriations through a series of coordinated interferences by the State, the date of expropriation corresponds to the date on which the governmental interference ripened into an irreversible deprivation of the investor's property,"[2207] and that striking Yukos from the register of legal entities constituted "a point of no return."[2208]

2202 Memorial ¶¶ 897–99; Transcript, Day 17 at 219–18.

2203 Memorial ¶ 917.

2204 *Ibid*. *See also* ¶ 913; Claimants' Post-Hearing Brief ¶¶ 232–33.

2205 Memorial ¶ 913.

2206 Memorial ¶¶ 915–17; Reply ¶ 845. Claimants refer in particular to *ADC*, ¶¶ 496–97, Exh. C-980; *Siemens* ¶ 352, Exh. C-983; *Kardassopoulos* ¶ 514, Exh. C-1533; *Amoco International Finance Corporation v. Iran*, Partial Award, 14 July 1987, 15 Iran–U.S. Claims Tribunal Reports, 189, pp. 300–01, Exh. C-939 (hereinafter "*Amco*").

2207 Memorial ¶ 912, n.1314. *See also* Reply ¶ 940.

2208 Reply ¶ 943.

2. Causation

1697. With regard to causation, Claimants assert that they do not need to establish a link between individual actions of Respondent and the damages suffered, but that it suffices for them to show that the sum of Respondent's actions caused those damages. Claimants argue that:

> [T]he Russian Federation sought and achieved the dismantlement and destruction of Yukos, and the Claimants' investments therein, through a series of cumulative actions. . . . The breach, and the Respondent's responsibility, arises from the Russian Federation's actions taken as a whole and not from each and every one of these actions. It is the cumulative effect of these acts that is criticized by the Claimants.[2209]

1698. Claimants also argue that:

> [A] causal link needs only be established between the actions of the Russian Federation taken as a whole and the Claimants' damages, namely the destruction of their investments. This causal link is obvious . . . .[2210]

1699. According to Claimants, there is ample authority to support their position that the Tribunal need only consider "the totality of the Russian Federation's actions and their result: the inexcusable treatment of the Claimants' investments and, ultimately, their outright expropriation."[2211]

3. Calculations Performed by Claimants and Mr. Kaczmarek

1700. Claimants have submitted two expert reports on damages authored by Mr. Brent Kaczmarek of Navigant Consulting, dated 15 September 2010 and 15 March 2012, together with their Memorial and their Reply, respectively. The calculations contained in these reports and referred to in Claimants' pleadings can be summarized as follows.

(a) The "Scenarios" Presented by Claimants

1701. Claimants perform calculations based on three different "scenarios." Within each of these scenarios, Claimants also differentiate between a number of sub-scenarios.

1702. The first scenario developed by Claimants is based on two fundamental assumptions, namely (a) that the tax assessments against Yukos constituted a breach of the ECT, and (b) that this

---

2209 *Ibid.* ¶ 904.

2210 *Ibid.* ¶ 911.

2211 Claimants' Post-Hearing Brief ¶ 191, citing to *e.g.*, *Walter Bau* ¶ 12.43, Exh. C-1000; *Pope & Talbot v. Canada*, UNCITRAL, Award on the Merits of Phase 2 ¶ 181, Exh. C-1518; *Kardassopoulos* ¶ 451, Exh. C-1533; *El Paso* ¶ 519, Exh. C-1544/R-4190.

breach caused the merger between Yukos and Sibneft to be cancelled. In addition, Claimants call in aid an optional assumption in the context of this scenario, namely (c) that Yukos would have had a 70 percent chance of obtaining a listing on the NYSE, which would have further increased its value.[2212] Claimants' first scenario can thus be subdivided into two sub-scenarios: sub-scenario 1a, which is based only on assumptions (a) and (b); and sub-scenario 1b, which is based on all three assumptions (a), (b), and (c).

1703. Claimants' second scenario is based on assumption (a) described above, namely that the tax assessments against Yukos constituted a breach of the ECT, whilst excluding assumption (b) (thus not seeking damages for the demerger between Yukos and Sibneft). Here again two sub-scenarios can be distinguished: sub-scenario 2a is based solely on assumption (a), whereas sub-scenario 2b is based on both assumptions (a) and (c).

1704. Claimants' third scenario assumes that the tax assessments against Yukos did not constitute a breach of the ECT, but that the subsequent enforcement of the tax claims did. Accordingly, Claimants calculate the "damages arising out of the 2004 and 2007 auctions, regardless of the merits of the alleged tax claims imposed on Yukos."[2213] Within this third scenario, Claimants distinguish five sub-scenarios (subsequently referred to as 3a, 3b, 3c, 3d and 3e),[2214] all of which assume that Yukos should have been allowed to settle its alleged tax debts one way or another (thus avoiding the liquidation of the company), but propose different modalities as to how this could have been done.[2215]

1705. Sub-scenario 3a assumes that Yukos would have been allowed a grace period of five years and would then have "been able to pay off the entire amount of its alleged tax liabilities out of its operating cash-flows only by 2009."[2216]

1706. Sub-scenario 3b assumes that Yukos would have been granted a grace period of three years and would then have been able to pay off its alleged tax liabilities with a combination of its free cash flows and the sale of non-core assets during that period.[2217]

2212 First Kaczmarek Report ¶ 20.

2213 Memorial ¶ 977.

2214 Sub-scenarios 3b and 3d were first presented in Reply ¶ 873.

2215 Memorial ¶ 979.

2216 *Ibid*. ¶ 983. *See also* Second Kaczmarek Report ¶ 33.

2217 Second Kaczmarek Report ¶ 36.

1707. Sub-scenario 3c assumes that Yukos would have been granted a grace period of one year and would then have been able to pay off its alleged tax liabilities with a combination of its free cash flows, the sale of non-core assets and debt financing during that period.[2218]

1708. Sub-scenario 3d also assumes that Yukos would have been granted a grace period of only one year, but then assumes (in contradistinction to sub-scenario 3c) that Yukos would have paid off its alleged tax liabilities with a combination of free cash flows, the sale of certain core assets and (limited) debt financing.[2219]

1709. Finally, sub-scenario 3e assumes that, while Yukos would have had to sell YNG to settle its alleged tax obligations, the auction "would have been conducted in a manner ensuring a fair, rather than grossly undervalued, price," generating proceeds of USD 19.703 billion,[2220] with the result that Yukos would have paid off its alleged tax liabilities with these proceeds as well as its cash flows in 2004 and 2005, while remaining a going concern.[2221]

1710. In accordance with Claimants' submissions regarding the relevant valuation dates, Claimants base their damages calculations in the first place on a valuation date of 21 November 2007. Accordingly, Claimants provide calculations for all three scenarios based on this date. In addition, Claimants also carry out a number of calculations based on the date of 1 January 2012, as a proxy for the date of the award, "for comparison purposes."[2222] Claimants provide calculations based on this date for scenarios 1 and 2, but not for scenario 3.

(b) Methodology Used for Calculations Based on Scenarios 1 and 2

1711. Claimants' calculations for scenarios 1 and 2 as of November 2007 are in principle based on the following methodology: the total of the damages claimed corresponds to the sum of Claimants' share in a hypothetical Yukos entity as of the valuation date plus the hypothetical cash flows that Claimants would have received in the form of dividends based on Claimants' shareholding in Yukos from 2004 to November 2007. In addition, in scenarios 1b and 2b, Claimants also

---

2218 *Ibid*. ¶ 34.

2219 *Ibid*. ¶ 38.

2220 Memorial ¶¶ 989–90.

2221 *Ibid*. ¶ 993. *See also* Second Kaczmarek Report ¶ 30.

2222 Second Kaczmarek Report ¶ 155; Reply ¶ 946.

include the value they attribute to the "lost chance" of listing Yukos' shares on the NYSE.[2223] The total amount thus obtained is then "brought forward" to a date close to the date of Mr. Kaczmarek's report by adding pre-award interest.[2224] Each one of these steps is set out in more detail below.

i. Value of Shares

1712. With regard to the valuation date of 21 November 2007, Claimants calculate the value of their shares in Yukos as follows:

(a) Valuation of Yukos

1713. As a first step, Claimants calculate the value of the relevant Yukos entity, as defined by the assets that Claimants assume Yukos would have owned in November 2007 in the absence of Respondent's alleged breaches.[2225] The assets taken into account depend on the scenario. For the purposes of scenario 1, both Yukos' and Sibneft's original assets are taken into account,[2226] whereas for scenario 2 the calculations are based only on Yukos' assets.[2227] Claimants use three different methods for valuating Yukos, namely the DCF method, the comparable companies method and the comparable transactions method.[2228]

1714. With regard to the DCF method, Claimants describe their approach as an attempt to reconstruct the "pro-forma financial statements" that the relevant Yukos entity would have presented in November 2007, based on the financial and operational data published by Rosneft and Gazprom Neft, which held the majority of Yukos' assets at that point in time.[2229] Where no such data is available, Claimants rely on "historical financial statements and operating information published by Yukos and Sibneft . . . as well as a benchmark of indicators from

---

2223 The total loss T under Claimants' scenario 1b based on a valuation date of November 2007 can thus be described as T = Value of Shares in November 2007 (V) + Dividends received from 2004 to 2007 (D) + Value of "lost chance" to list shares on NYSE (LC). Memorial ¶ 920. *See also* Claimants' Opening Slides, p. 204.

2224 Memorial ¶¶ 925, 969, 976. *See also* Claimants' Opening Slides, p. 204.

2225 Memorial ¶ 931.

2226 *Ibid*.

2227 *Ibid*. ¶ 972.

2228 *Ibid*. ¶¶ 927, 972.

2229 *Ibid*. ¶ 931. For scenario 2, Mr. Kaczmarek uses the Dicounted Cash Flow (hereinafter "DCF") model developed for scenario 1 with a number of adjustments. First Kaczmarek Report ¶ 417.

Yukos' and Sibneft's industry peers in Russia."[2230] Based on this data, Claimants estimate cash flows between 2007 and 2015 as well as a "terminal value" of the entity in 2015.[2231] Claimants then bring the above estimates to their November 2007 value by applying a discount rate based on Yukos' cost of capital.[2232] This operation leads them to Yukos' enterprise value as of November 2007.[2233]

1715. Claimants also use a comparable companies approach, based on data available for a pool of Russian (Rosneft, Gazprom Neft, Lukoil, TNK-BP and Surgutneftegaz) and international (BP, Chevron, Conoco-Philips, Exxon-Mobil, Royal Dutch Shell and Total SA) oil companies.[2234] This approach identifies companies with characteristics similar to Yukos (notably in terms of production, reserves, profitability, revenue growth and financing structure), establishes the ratios between the enterprise value of these companies and relevant operating or financial metrics (EBITDA, reserves and production), and then applies these ratios to the relevant metrics of Yukos in order to estimate the latter's enterprise value.[2235] The net income, EBITDA, reserves and production of Yukos are derived from the "pro-forma financial statements" established in the context of the DCF method.[2236]

1716. Finally, Claimants use a comparable transactions approach based on public purchase transactions of comparable companies.[2237] In this regard, Claimants apply a "sum of the parts valuation," in which they select transactions that are meant to match the upstream and downstream business of Yukos separately.[2238] Here again, the operating and financial metrics of Yukos as determined in the context of the DCF method are used to calculate the value of the company.[2239]

1717. Claimants then calculate a synthesized enterprise value of Yukos based on the results of the three approaches, weighing the DCF approach at 50 percent, the comparable companies

---

2230 Memorial ¶ 931.

2231 *Ibid*. ¶ 932.

2232 *Ibid*. ¶¶ 933–34. *See also* First Kaczmarek Report ¶¶ 84, 87.

2233 Memorial ¶ 935.

2234 *Ibid*. ¶ 938.

2235 *Ibid*.

2236 First Kaczmarek Report ¶ 429.

2237 Memorial ¶ 940.

2238 *Ibid*. ¶ 941.

2239 *Ibid*.

approach at 40 percent and the comparable transactions approach at 10 percent.[2240] By then subtracting Yukos' assumed debt, they arrive at Yukos' synthesized equity value.[2241]

(b) Calculation of the Value of Claimants' Shareholding

1718. In a final step, for each of the scenarios considered, Claimants calculate the value of Claimants' shareholding in Yukos by multiplying the company's equity value by Claimants' share in the company—53 percent (corresponding to the dilution of Claimants' shareholding associated with the creation of YukosSibneft) for scenario 1 and 70.5 percent (corresponding to Claimants' original shareholding in Yukos) for scenario 2.[2242]

ii. Additional Indicators Relied on by Claimants to Confirm the Value of Yukos Shares

1719. With regard to scenario 1, Mr. Kaczmarek avers that he confirmed his valuation with a number of additional indicators. Claimants calculate Yukos' enterprise value based on the market capitalization of Rosneft in November 2007, with a number of adjustments made in order to take into account the differences between Rosneft's assets and Yukos' (fictitious) assets as of that date. The result of this calculation is an enterprise value that is about USD 4.5 billion lower than the enterprise value calculated on the basis of the above-described methodology.[2243]

1720. Mr. Kaczmarek also confirms his valuation of Yukos' enterprise value as of November 2007 based on the increase of three benchmarks (Urals blend prices, the RTS Oil and Gas index and Lukoil's market capitalization) between October 2003 and November 2007.[2244] These calculations lead to an enterprise value of Yukos that is approximately halfway between USD 14.4 billion lower (RTS Oil and Gas) and USD 46.5 billion higher (Lukoil market capitalization) than the enterprise value of Yukos calculated on the basis of Claimants' basic methodology.[2245]

2240 *Ibid*. ¶¶ 944–45. Claimants note that they assign a low weight to the results of their comparable transactions approach, due to the "absence of a transaction involving a company similar to YukosSibneft in the years preceding the date of valuation." *Ibid.* ¶ 945.

2241 *Ibid*. ¶ 945.

2242 *Ibid*. ¶¶ 949, 972.

2243 Claimants' Post-Hearing Brief ¶ 263. *See also* Memorial ¶ 946.

2244 Claimants' Post-Hearing Brief ¶ 260. *See also* Exh. C-1783.

2245 Claimants' Post-Hearing Brief ¶ 261. *See also* Exh. C-1783.

1721. Finally, Claimants calculate Yukos' enterprise value on the basis of a share swap involving YNG shares that would have taken place between Rosneft and Yukos in October 2006, which Claimants say implies a valuation of YNG's equity at USD 46.2 billion at that point in time.[2246] On that basis, Claimants calculate an enterprise value of Yukos as of 21 November 2007 that is approximately USD 12.8 billion lower than the value calculated on the basis of their basic methodology.[2247]

iii. Hypothetical Cash Flows from Dividends

1722. The second component of Claimants' damages calculation is the cash flows from dividends that Claimants argue would have been paid to them in the first and second scenarios but for Respondent's treaty breaches. Claimants assume that, without the alleged breaches of the ECT by Respondent, Yukos would have paid dividends to its shareholders between 30 September 2003 and 21 November 2007.[2248] Accordingly, Claimants say that they would have received a pro rata share of these dividends, calculated on the basis of their shareholding in the company.[2249]

iv. Loss of Chance

1723. The third component of Claimants' damages calculation is based on Claimants' valuation of what they refer to as the loss of a chance to obtain a listing of Yukos on the NYSE. Claimants submit that, without the breaches of Respondent, Yukos would likely have been listed on the NYSE, and that this listing would have decreased the company's costs of capital and thus increased Yukos' share value.[2250] Claimants quantify the value of the loss of this chance by multiplying the assumed increase in share value with the probability of a successful listing, which they assume to be 70 percent.[2251] This loss for Claimants is the amount thus obtained, multiplied by Claimants' shareholding in Yukos.[2252]

2246 Claimants' Post-Hearing Brief ¶ 262. *See also* Exh. C-1773.

2247 Claimants' Post-Hearing Brief ¶ 262. *See also* Exh. C-1784.

2248 Memorial ¶ 952.

2249 *Ibid*. ¶ 953.

2250 *Ibid*. ¶¶ 954–56.

2251 *Ibid*. ¶ 958.

2252 *Ibid*. ¶¶ 956, 958.

v. Pre-Award Interest

1724. In a final step for purposes of their calculations with regard to scenarios 1 and 2, Claimants bring forward the total amount thus obtained to a date close to the date of their last submissions,[2253] and add pre-award interest of LIBOR plus four percent on a compound basis.[2254]

(c) Methodology Used for Calculations Based on Scenario 3

1725. Claimants' calculations for scenarios 3a to 3d are based on their calculations for the second scenario, but are adjusted to take into account the settlement of Yukos' tax liabilities through Yukos' cash flow, the sale of certain assets and/or debt financing.[2255] These scenarios do not assume any payment of dividends to Yukos' shareholders or the loss of a chance of obtaining a listing of Yukos on the NYSE.[2256] Rather, Claimants determine Yukos' equity value as of November 2007 and derive the value of their ownership interest in Yukos from that figure. They then bring forward the amount thus obtained to a date close to the date of their last submissions again by adding compound pre-award interest at a rate of LIBOR plus four percent.[2257]

1726. Claimants' calculations for scenario 3e (which assumes the sale of YNG at a price higher than that achieved in the 2004 auction) are somewhat more complex. In this scenario, Claimants estimate the enterprise value of YNG as of November 2007, and then subtract this amount from their estimate of the enterprise value of Yukos as of the same date. This leaves Claimants with a figure for the enterprise value of Yukos' assets without YNG.[2258] Claimants then subtract the assumed debt of this smaller Yukos entity and thus arrive at the equity value of Yukos (without YNG) in November 2007.[2259] Claimants calculate their losses as a pro rata share (based on their 70.5 percent shareholding in Yukos) of the sum of this equity value, their estimate of free cash flows that a diminished Yukos (without YNG) would have achieved between January

---

2253 The date used for purposes of Mr. Kaczmarek's second report is 15 March 2012. Second Kaczmarek Report ¶ 15.

2254 Memorial ¶ 969. For Claimants' arguments on interest see Section XI.A.1 above.

2255 First Kaczmarek Report ¶¶ 555, 567.

2256 *Ibid*. ¶¶ 556, 568.

2257 *Ibid*.

2258 *Ibid*. ¶ 545.

2259 *Ibid*. ¶ 546.

2005 and November 2007, and pre-award interest brought forward to a date close to the date of their last submissions.[2260]

(d) Methodology Used for Calculations Based on 2012 Valuation Date

1727. The position of Claimants is that, because of the unlawful taking by Respondent of Yukos, they are entitled to select the evaluation of the damages either at the date of Respondent's breach or at the date of the award, whichever is the highest.[2261] Thus, Claimants, in their Reply, also quantify their damages in scenarios 1 and 2 based on a valuation date of 1 January 2012. Claimants state they chose this date for practical purposes since it is close to the date of submission of Mr. Kaczmarek's second expert report and that, if need be, calculations "can subsequently be updated at a date closer to the award."[2262]

1728. While Mr. Kaczmarek does not set out the methodology used in this regard in any great detail,[2263] it can be inferred from some of the appendices to his second report.[2264] In these appendices, Mr. Kaczmarek estimates Yukos' cash flows for the years 2004 to 2011 as well as the terminal value of Yukos as of 1 January 2012 for scenarios 1 and 2 and then applies pre-award interest of LIBOR plus four percent to bring these figures to the present (*i.e.*, 15 March 2012)[2265] value and thus obtain Yukos' total damages.[2266] For scenarios 1b and 2b, Claimants also add the incremental value of the chance of obtaining a listing on the NYSE.[2267] Claimants then calculate their damages as a percentage of Yukos' damages, based on their shareholding in the relevant entity.[2268]

2260 *Ibid*. ¶ 547.

2261 Memorial ¶ 917.

2262 Claimants' Post-Hearing Brief ¶ 233 n.499.

2263 *See* Second Kaczmarek Report ¶ 155.

2264 Second Kaczmarek Report, Appendices AG to AK.

2265 *Ibid*.

2266 Second Kaczmarek Report, Appendices AG.1 and AK.1. Claimants provide alternative computations based on pre-award interest at Russian Sovereign Cost of Debt, Prime +2 percent and LIBOR +2 percent. Second Kaczmarek Report, Appendices AG.3 to AG.8 and AK.2 to AK.4.

2267 Second Kaczmarek Report, Appendices AH and AI.

2268 *Ibid.*, Appendices AG.1 and AI.

(e) Summary of Results of Claimants' Calculations

1729. The valuation by Mr. Kaczmarek of each of the scenarios described above (including pre-award interest through 15 March 2012) is summarized in the following table (amounts in USD billion):

Valuation date	Scenario								
	1a	1b	2a	2b	3a	3b	3c	3d	3e
21 November 2007	106.815[2269]	114.174[2270]	102.015[2271]	107.966[2272]	67.236[2273]	68.593[2274]	62.763[2275]	69.583[2276]	33.317[2277]
1 January 2012	91.922[2278]	94.931[2279]	88.737[2280]	91.217[2281]	n.a.	n.a.	n.a.	n.a.	n.a.

4. Failure of Claimants to Mitigate

1730. In response to Respondent's contention that Claimants should promptly have paid the original taxes assessed against Yukos (as well as those Yukos should have anticipated would be imposed for succeeding years on the same grounds) to avoid massive damages, Claimants aver that there is no "duty to appease" and that "a victim of extortion is not to blame if the threats against it are carried out after it refuses to pay."[2282]

1731. Claimants also argue that Yukos had no reason to concede the validity of the Russian authorities' position with regard to the initial tax assessments "in circumstances where its objections to the December 29, 2003 Audit Report were still under consideration" and where it

2269 *Ibid.* ¶ 15.

2270 Reply ¶ 859.

2271 Second Kaczmarek Report ¶ 18.

2272 Reply ¶ 861.

2273 *Ibid.* ¶ 875.

2274 *Ibid.*

2275 *Ibid.*

2276 *Ibid.*

2277 *Ibid.* ¶ 864.

2278 Second Kaczmarek Report ¶ 155.

2279 Second Kaczmarek Report, Appendix AH.

2280 Second Kaczmarek Report ¶ 155 and Appendix AK.

2281 Second Kaczmarek Report, Appendix AI.

2282 Claimants' Post-Hearing Brief ¶ 275.

had received advice from its lawyers that the Audit Report was "totally inconsistent with the Russian tax law."[2283] In any event, Claimants say that Yukos did not have enough cash to settle an alleged tax debt of USD 9 billion in the first quarter of 2004.[2284]

1732. In addition, Claimants assert that, to apply Respondent's argument, "the Tribunal would need to ignore the most salient facts—the Respondent's breaches—and assume . . . that the very same Russian authorities who committed those breaches would have acted differently if only Yukos had taken the actions specified by the Respondent."[2285] In particular, with regard to Respondent's argument that Yukos could have significantly reduced its tax burden by filing corrected VAT returns during the first quarter of 2004, Claimants contend that the actual conduct of the Russian authorities demonstrates that any amended returns that Yukos might have submitted would, in any event, have been either ignored or rejected.[2286]

5. Windfall and Double-Recovery

1733. Finally, Claimants also reject Respondent's arguments that any award of damages should avoid presenting Claimants with a windfall and take into account the risk of double-recovery. According to Claimants, these arguments of Respondent merely seek to "repackage its so-called 'unclean hands' theory in the context of damages" and Respondent, they say, "has failed to articulate any basis on which alleged collateral illegalities could . . . be relevant to an assessment of damages."[2287] In any event, conclude Claimants, any benefits they may have received through their investments prior to Respondent's breaches of the ECT are irrelevant for the calculation of the damages in the present arbitration and, furthermore, any assets located outside Russia have been excluded from Mr. Kaczmarek's valuations.[2288]

2283 *Ibid.* ¶ 281, quoting Sergey Pepeliaev, Summary of the tax inspection of OAO NK Yukos, 5 January 2004, pp. 1, 3, Exh. C-1128.

2284 *Ibid.* ¶ 292.

2285 *Ibid.* ¶ 276.

2286 *Ibid.* ¶ 287.

2287 Reply ¶¶ 883–85.

2288 Reply ¶ 963.

B. RESPONDENT'S POSITION

1734. Respondent argues that, even if it were held to be liable for a breach of the ECT, Claimants should not be awarded any damages in this case.[2289] Respondent has submitted two expert reports on damages by Professor James Dow, one dated 1 April 2011 and the other 15 August 2012, with their Counter-Memorial and their Rejoinder, respectively. These reports and Respondent's arguments with regard to Claimants' damages calculations can be summarized as follows.

1. Valuation Date

1735. Respondent disagrees with both valuation dates proposed by Claimants.

1736. With regard to Claimants' valuation as of the date of expropriation, Respondent invokes the principle that "the valuation date should be when the purported substantial deprivation of the investor's investment has occurred."[2290] Respondent objects, however, to Claimants' assessment that in this case a substantial deprivation of their investment occurred on 21 November 2007, a date which Respondent considers "arbitrary."[2291] Respondent argues that "the hallmark of an appropriate valuation date is the loss of effective control over the investor's investment"[2292] and concludes that "Claimants have repeatedly averred that they lost control of their investment and that it lost all value long before November 21, 2007."[2293]

1737. As a result, Respondent disputes that the date of 21 November 2007 chosen by Claimants has any relevance. As Professor Dow explained at the Hearing:

> I am very clear in stating that the 2007 date has no economic relevance, in my view. And I say that because at the end of 2004 Yukos shares had lost essentially all of their value. Yukos was a penny stock. It wasn't expected to recover, the market did not expect it to recover; that was reflected in the share price. . . . So from an economic point of view, the date of delisting in 2007 is a bureaucratic event, not an event at which value was lost.[2294]

2289 Respondent's Post-Hearing Brief ¶¶ 262–63.

2290 Rejoinder ¶ 1666.

2291 Counter-Memorial ¶ 1618.

2292 Rejoinder ¶ 1666.

2293 Ibid. ¶ 1666. *See also* Respondent's Post-Hearing Brief ¶ 238.

2294 Transcript, Day 12 at 14. *See also* at 49.

1738. While Respondent does not propose any specific alternative date when Claimants lost control of their investments, Professor Dow suggested at the Hearing that such a date would, in any event, have to be before the end of 2004.[2295]

1739. Respondent also rejects Claimants' submission that the date of an award can be used as an alternative valuation date. In this regard, Respondent argues that the "standard theoretical framework economists typically use to calculate damages is an '*ex ante*' one" where damages are assessed at the moment of the relevant breaches and then brought to present value with pre-judgment interest.[2296] By contrast, an "*ex post*" approach would, according to Respondent, use information based on hindsight, provide no principled basis for choosing a date and therefore be vulnerable to error.[2297] In addition, Respondent claims that, "with each passing day after the alleged takings date, it becomes increasingly speculative to value the asset taken as of some later date."[2298]

1740. In his first report, Professor Dow writes that there is a "general preference among economists for the *ex ante* approach when evaluating damages in commercial matters" and refers, in this connection, to an article published in the 1990 Journal of Accounting, Auditing and Finance.[2299] Relying on this article, Respondent submits 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" and that, as a consequence, "[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."[2300]

2. Causation

1741. Respondent also disagrees with Claimants with respect to causation. In particular, Respondent emphasizes the need to establish "a sufficient causal link" between breach and damage, where

---

2295 *Ibid*. at 175.

2296 Counter-Memorial ¶ 1617.

2297 *Ibid*. ¶ 1618.

2298 Respondent's Post-Hearing Brief ¶ 239.

2299 First Dow Report ¶ 13, citing to Franklin M. Fisher and R. Craig Romaine, *Janis Joplin's Yearbook and the Theory of Damages*, Journal of Accounting, Auditing and Finance (1990), p. 153, Exh. R-1980.

2300 Respondent's Post-Hearing Brief ¶ 239.

the latter is the "proximate result" of the former.[2301] Respondent advocates the following methodology:

> [I]f the damages are caused by a series of harmful actions . . . each violation can be treated as a new action and the corresponding incremental change can be estimated at the time of the action, . . . [t]he incremental damage figures for each violation can then be added together to obtain a total damage figure.[2302]

1742. According to Respondent, Claimants' approach to damages fails "to connect any of the alleged treaty violations to a specific amount of damages" and provides "no mechanism for determining the incremental damages allegedly caused by any specific alleged violation."[2303] As a consequence, Respondent alleges that Claimants' valuations "do not accommodate the situation where the Tribunal finds that fewer than all of the scores of alleged 'bad acts' were violations."[2304]

3. Specific Aspects of the Calculations Performed by Claimants Criticized by Respondent

1743. Principally, Respondent criticizes Claimants' damages claims as being "based on inherently incorrect or speculative assumptions."[2305] According to Professor Dow, Mr. Kaczmarek's various calculations are "riddled with errors" and the obvious result of "reverse engineering to a desired result."[2306] Respondent and its expert raise numerous arguments in support of their criticism, the most important of which are summarized below.

(a) Credibility of Claimants' DCF Analysis

1744. One of Respondent's main criticisms with regard to Claimants' valuation is directed at Mr. Kaczmarek's DCF analysis. In particular, in his first expert report, Professor Dow identifies what Respondent claims are "three obvious and significant errors" regarding the valuation of YNG.[2307] Respondent points out that, while Mr. Kaczmarek admitted to two of

---

2301 Counter-Memorial ¶ 1606, quoting U.S. and Germany Mixed Claims Commission, Administrative Decision No. II, 1 November 1923, 23, p. 29, Exh. R-1188.

2302 *Ibid*. ¶ 1617.

2303 *Ibid*. ¶ 1619. *See also* ¶ 1627.

2304 *Ibid*. ¶ 1619. *See also* ¶ 1628.

2305 *Ibid*. ¶ 1637.

2306 Second Dow Report ¶ 422.

2307 Counter-Memorial ¶ 1630.

these errors in his second expert report, the valuation of YNG remained virtually unchanged.[2308] As a consequence, Respondent claims that Mr. Kaczmarek's "main task" in his second report must have been to "find a way to make up for gaping holes in his initial valuation that he concedes were the result of readily identifiable errors that he realized had to be corrected, after Professor Dow had identified them."[2309] Respondent points out that, while the necessary corrections identified by Professor Dow caused Claimants' expert to make adjustments of over USD 10 billion to his valuation of YNG, Mr. Kaczmarek still ended up with virtually the same figure as in his first report as a consequence of a series of simultaneous "discretionary" upward adjustments.[2310]

1745. Respondent also claims that Claimants' expert "did the same thing in his other two DCF models, correcting mistakes that reduce his valuation of Yukos and YukosSibneft by USD 40 billion and USD 90 billion, respectively, and then adjusting other elements to bring his conclusions back up to where he started."[2311] According to Respondent, "Mr. Kaczmarek confirmed . . . that his DCF model is simply a device for justifying an *a priori* conclusion, conceding repeatedly that his focus was not on critically analyzing the inputs to his model, but rather on whether the output met pre-conceived notions that were never disclosed in his reports."[2312] As a result, Respondent concludes that Claimants' results have been "reverse engineered"[2313] and are "made-up numbers around which models were built."[2314]

(b) Claimants' Selection of Comparable Companies for Purposes of the Comparable Companies Analysis

1746. With regard to Claimants' use of the comparable companies method, Respondent criticizes Claimants' valuation as being based on an "unsupportable decision to weigh Rosneft as 70% of the analysis, when Rosneft's market metrics never resembled Yukos' or those of other private

---

2308 Second Dow Report ¶ 8. *See also* Second Kaczmarek Report ¶¶ 82–97.

2309 Rejoinder ¶ 1606.

2310 *Ibid*. ¶ 1612.

2311 *Ibid*. ¶ 1613. Respondent identifies a number of errors which it says were made by Mr. Kaczmarek in his first report before being corrected in his second report. In addition, Respondent identifies a number of errors which it says were made by Mr. Kaczmarek in his second report. Rejoinder ¶¶ 1620–36.

2312 Respondent's Post-Hearing Brief ¶ 240, citing to Trancript, Day 11 at 112, 116–17, 143–44, 153–54.

2313 Rejoinder ¶ 1618, quoting Second Dow Report ¶ 390.

2314 *Ibid*. ¶ 1619.

Russian oil companies."[2315] Professor Dow, provides a "corrected" comparable companies analysis that excludes the data with regard to Rosneft, Gazprom Neft and the international major oil companies from the analysis,[2316] and leads to an enterprise value for Yukos in 2007 that is approximately USD 32 billion lower than the enterprise value calculated by Mr. Kaczmarek based on the comparable companies method.[2317]

(c) Claimants' Reliance on Comparable Transactions

1747. With regard to Claimants' calculations based on comparable transactions, Respondent asserts that Claimants' expert, Mr. Kaczmarek, admits that no truly comparable transactions exist.[2318] In addition, Professor Dow criticizes Mr. Kaczmarek's selection criteria for identifying comparable upstream and downstream transactions as "indefensible from an economic perspective."[2319]

(d) Claimants' Calculations of Hypothetical Cash Flows from Dividends

1748. Respondent does not explicitly address Claimants' calculations of hypothetical dividends that would have been paid by Yukos to its shareholders if there had been no breach of the ECT as alleged by Claimants. However, when criticizing Mr. Kaczmarek's calculations with regard to scenario 3, Professor Dow does comment on the free cash flows of Yukos that, according to Claimants, would have been the basis for the payment of dividends. Thus, according to Professor Dow, the free cash flows identified by Mr. Kaczmarek in this context are "inflated because they are based on his . . . grossly erroneous[] Yukos DCF model that overstates Yukos cash flows."[2320] Professor Dow provides an alternative set of figures that he refers to as the "corrected" cash flows from Mr. Kaczmarek's model.[2321]

2315 Respondent's Post-Hearing Brief ¶ 242.

2316 Second Dow Report ¶ 417.

2317 Second Dow Report, p. 195, Figure 73.

2318 Respondent's Post-Hearing Brief ¶ 242. *See also* Second Dow Report ¶ 420.

2319 Second Dow Report ¶ 423.

2320 *Ibid.* ¶ 492.

2321 *Ibid.* ¶ 492 and Figure 81.

(e) Claimants' Calculations Based on the Loss of a Chance to Obtain a Listing on the New York Stock Exchange

1749. Professor Dow also criticizes Claimants' assumption that Yukos would have benefited from a listing on the NYSE as "thrice wrong because it assumes an event that did not happen, that was entirely within Yukos' control, and overstates the economic benefit that would be expected were the event to have come to pass."[2322] In addition, Professor Dow states that there is no basis for the assumption that, without Respondent's actions, Yukos would have had a 70 percent chance of being listed on the NYSE.[2323]

(f) Claimants' Calculations Based on the Assumption of a Completed Yukos–Sibneft Merger

1750. Professor Dow criticizes Claimants' calculations based on a completed Yukos–Sibneft merger arguing that such a merger was never completed and that the valuation of a combined YukosSibneft entity is therefore utterly speculative.[2324] In particular, Professor Dow claims that Mr. Kaczmarek's calculations largely ignore "the effects of the merger on operational costs, any impact on costs as a result of changed regulatory requirements, and the combined entity's creditworthiness and cost of borrowing."[2325]

(g) Claimants' Scenarios 3a to 3d

1751. With regard to Claimants' scenarios 3a to 3d, which assume payment of Yukos' tax liabilities over a period of one, three or five years, Respondent asserts that Russian law did not allow the Tax Ministry to enter into any such arrangements as postulated by Claimants[2326] and that it was, in any event, not obligated to do so.[2327] In addition, Respondent claims that, based on the knowledge available regarding the development of oil prices in 2004, Claimants' calculations in relation to expected cash flows are not realistic.[2328] Respondent also disputes that Claimants

---

2322 *Ibid*. ¶ 204.

2323 *Ibid*. ¶ 215.

2324 *Ibid*. ¶ 204.

2325 *Ibid*. ¶ 208.

2326 Counter-Memorial ¶ 1631.

2327 Rejoinder ¶ 1662 and n.2559.

2328 Counter-Memorial ¶ 1631. *See also* Second Dow Report ¶ 492.

would have been able to negotiate a loan of USD 16 billion, as assumed in Claimants' scenario 3c.[2329]

(h) Claimants' Scenario 3e and the Valuation of YNG

1752. With regard to Claimants' scenario 3e (which assumes that the auctioning of YNG was necessary, but should have been realized at a fair price) and the valuation of YNG in Mr. Kaczmarek's first expert report, Respondent claims that Mr. Kaczmarek made three "obvious and significant errors" relating to the application of the inflation rate, the export duty rate and the mineral extraction tax rate.[2330] Adjusting for these errors, the valuation of YNG would have been USD 12.5 billion,[2331] with the consequence that Yukos would not have been able to pay its taxes by the end of 2005, even if YNG had been sold at a higher price.[2332]

(i) Claimants' Calculation of Pre-Award Interest

1753. As described in Part XI above, Respondent submits that Claimants are not entitled to claim pre-award interest.

4. Failure of Claimants to Mitigate

1754. Respondent asserts that Claimants had "repeated opportunities to mitigate the damage caused,"[2333] and that, in particular, by paying its taxes in early 2004, Yukos could have "halved the total amount to be paid"[2334] rather than "subject[ing] itself to . . . US$ 12 billion in additional 2000–2003 Avoidable Taxes and Fees."[2335] If Yukos had paid its taxes and filed appropriate returns during the first quarter of 2004, Respondent says it "would have survived as a going concern and still could have pursued a claim for a refund of any amounts the courts found it did not need to pay."[2336] Accordingly, the "loss of all value of Yukos" would be "the

---

2329 Counter-Memorial ¶ 1632; Rejoinder ¶¶ 1655–57.

2330 Counter-Memorial ¶ 1630. *See also* Respondent's Post-Hearing Brief ¶ 246; Second Dow Report ¶ 452.

2331 Counter-Memorial ¶ 1630; Rejoinder ¶ 1647.

2332 Counter-Memorial ¶ 1630.

2333 *Ibid*. ¶ 1602.

2334 Rejoinder ¶ 1729.

2335 *Ibid*. ¶ 1730. *See also* Respondent's Post-Hearing Brief ¶ 220.

2336 Respondent's Post-Hearing Brief ¶¶ 220–22, 250.

consequence of the contributory fault and the failure to mitigate of Yukos, under the control of Claimants."[2337]

1755. Respondent claims that, as a consequence, "Claimants' maximum damage claim is for their proportion of the harm (if any) Yukos would have suffered if the assessment and payment of the 2000–2003 Unavoidable Taxes were deemed to constitute a violation of the ECT."[2338] Respondent calculates this "maximum damage" as amounting to USD 6.27 billion.[2339]

5. Windfall and Double-Recovery

1756. In addition, Respondent claims that any calculation of damages should take into account any previous benefits obtained by Claimants from their investments in Russia, so as to prevent any "double-recovery."[2340] Respondent contends that granting Claimants the damages sought "would be a massive windfall to Claimants, who have already received far more from their investment in Yukos than they would have received had they invested in a comparable Russian oil company during the same period."[2341] Respondent also suggests that, had the market known of "Yukos' lack of transparency, its disregard of minority interests, and its failures of corporate governance, not to mention its internal documents acknowledging the civil and criminal exposure it faced from its massive tax fraud, Yukos would not have experienced the share appreciation . . . on which Claimants' damages claim depends."[2342] As a consequence, Respondent claims that "the market metrics . . . are not fair indicators of value and cannot be relied upon by the Tribunal."[2343]

1757. Respondent concludes that "any damages award should provide for no more than a reasonable rate of return."[2344] Since Claimants would "have already gained that return through Yukos' dividends and share repurchases, . . . hundreds of millions of dollars worth of Russian taxes

---

2337 *Ibid.* ¶ 250.

2338 Rejoinder ¶ 1732. *See also* Respondent's Post-Hearing Brief ¶¶ 220, 233, 252.

2339 Respondent's Post-Hearing Brief ¶ 252. *See also* Transcript, Day 19 at 270.

2340 Counter-Memorial ¶ 1648.

2341 Respondent's Post-Hearing Brief ¶ 232 (footnote omitted).

2342 *Ibid.* ¶ 261.

2343 *Ibid.* ¶ 261.

2344 *Ibid.* ¶ 233. *See* ¶¶ 254–62.

they evaded through abuse of the [Cyprus-Russia DTA], and all the assets that were stripped from Yukos," the "proper measure of damages in this case" would in any event be "zero."[2345]

C. TRIBUNAL'S ANALYSIS AND DECISION

1758. Having reviewed and considered the Parties' submissions and their experts' reports, the Tribunal will now determine the damages suffered by Claimants as a result of Respondent's unlawful expropriation of Yukos' assets in breach of Article 13 of the ECT.

1. Valuation Date

1759. With regard to the date of valuation, the Tribunal needs to address two issues, namely (a) the date of the expropriation of Claimants' investment by Respondent, and (b) whether Claimants are entitled to choose between a valuation based on that date of expropriation and a valuation based on the date of the award. Each of these questions is addressed in turn.

(a) The Date of the Expropriation

1760. As noted earlier, Claimants have advanced the date of 21 November 2007, the day on which Yukos was struck off the Russian register of legal entities, as the date of the expropriation of their investment, and have performed their main damages analysis based on a valuation of their shares in Yukos as of that date.

1761. The Tribunal agrees with Respondent that the date of 21 November 2007 cannot be the date of Yukos' expropriation. The Tribunal observes that both Parties are agreed that, in principle, in the event of an expropriation through a series of actions, the date of the expropriation is the date on which the incriminated actions first lead to a deprivation of the investor's property that crossed the threshold and became tantamount to an expropriation.[2346] This is the date that is relevant for the determination of the Tribunal.

1762. The Tribunal finds that the threshold to the expropriation of Claimants' investment was crossed earlier than in November 2007. On the basis of the record, it is clear to the Tribunal that a substantial and irreversible deprivation of Claimants' assets occurred on 19 December 2004,

---

[2345] *Ibid.* ¶ 262.

[2346] Memorial ¶ 912, n.1314; Reply ¶ 940; Rejoinder ¶ 1666; Respondent's Post-Hearing Brief ¶ 238.

the date of the YNG auction. YNG was Yukos' main production asset and its loss, with the conclusion of the auction on that date, marked a substantial and irreversible diminution of Claimants' investment.[2347] This conclusion of the Tribunal is confirmed by statements made by Claimants in December 2004 to the effect that they had "lost the power to govern the financial and operating policies of Yukos so as to obtain the benefits from its activities" and that Yukos had become "incapable of operating as a business."[2348] The date of the expropriation of Claimants' investment is therefore determined by the Tribunal to be 19 December 2004.

(b) The Possibility for Claimants to Choose Between a Valuation as of the Date of Expropriation and a Valuation as of the Date of the Award

1763. The Tribunal also holds that, in the case of an unlawful expropriation, as in the present case, Claimants are entitled to select either the date of expropriation or the date of the award as the date of valuation.

1764. As the Tribunal noted earlier, Respondent, relying on the opinion of its expert on damages, maintains that Claimants may not make such a choice and that there is a preference amongst economists for what he refers to as an "*ex ante*" approach to the evaluation of damages.[2349] In support of his opinion, Professor Dow relies on a single article published in an economics journal in 1990.[2350]

1765. Neither the text of Article 13 of the ECT nor its *travaux* provide a definitive answer to the question of whether damages should be assessed as of the date of expropriation or the date of the award. The text of Article 13, after specifying the four conditions that must be met to render an expropriation lawful, provides that for "such" an expropriation, that is, for a lawful expropriation, damages shall be calculated as of the date of the taking. *A contrario*, the text of Article 13 may be read to import that damages for an unlawful taking need not be calculated as of the date of taking. It follows that this Tribunal is not required by the terms of the ECT to assess damages as of the time of the expropriation. Moreover, conflating the measure of

---

2347 *See* Subsection VIII.F.3(c) above.

2348 YUL (and its subsidiaries), Annual Report and Consolidated Financial Statements for The Year Ended 31 December 2004, Exh. R-4229. *See also* Rejoinder ¶ 1673.

2349 First Dow Report ¶ 13.

2350 Franklin M. Fisher and R. Craig Romaine, *Janis Joplin's Yearbook and the Theory of Damages*, Journal of Accounting, Auditing and Finance (1990), p. 153, Exh. R-1980.

damages for a lawful taking with the measure of damages for an unlawful taking is, on its face, an unconvincing option.

1766. In the view of the Tribunal, and in exercise of the latitude that the terms of Article 13 of the ECT afford it in this regard, the question of whether an expropriated investor is entitled to choose between a valuation as of the expropriation date and the date of an award is one best answered by considering which party should bear the risk and enjoy the benefits of unanticipated events leading to a change in the value of the expropriated asset between the time of the expropriatory actions and the rendering of an award. The Tribunal finds that the principles on the reparation for injury as expressed in the ILC Articles on State Responsibility are relevant in this regard. According to Article 35 of the ILC Articles, a State responsible for an illegal expropriation is in the first place obliged to make restitution by putting the injured party into the position that it would be in if the wrongful act had not taken place. This obligation of restitution applies as of the date when a decision is rendered. Only to the extent where it is not possible to make good the damage caused by restitution is the State under an obligation to compensate pursuant to Article 36 of the ILC Articles on State Responsibility.

1767. The consequences of the application of these principles (restitution as of the date of the decision, compensation for any damage not made good by restitution) for the calculation of damages in the event of illegal expropriation are twofold. First, investors must enjoy the benefits of unanticipated events that increase the value of an expropriated asset up to the date of the decision, because they have a right to compensation in lieu of their right to restitution of the expropriated asset *as of that date*. If the value of the asset increases, this also increases the value of the right to restitution and, accordingly, the right to compensation where restitution is not possible.

1768. Second, investors do not bear the risk of unanticipated events decreasing the value of an expropriated asset over that time period. While such events decrease the value of the right to restitution (and accordingly the right to compensation in lieu of restitution), they do not affect an investor's entitlement to compensation of the damage "not made good by restitution" within the meaning of Article 36(1) of the ILC Articles on State Responsibility. If the asset could be returned to the investor on the date where a decision is rendered, but its value had decreased since the expropriation, the investor would be entitled to the difference in value, the reason being that in the absence of the expropriation the investor could have sold the asset at an earlier date at its previous higher value. The same analysis must also apply where the asset cannot be returned, allowing the investor to claim compensation in the amount of the asset's higher value.

1769. It follows for the several reasons stated above that in the event of an illegal expropriation an investor is entitled to choose between a valuation as of the expropriation date and as of the date of the award. The Tribunal finds support for this conclusion in the fact that this approach has been adopted by tribunals in a number of recent decisions dealing with illegal expropriation.[2351] One of these tribunals, in *Ioannis Kardassopoulous and Ron Fuchs v. The Republic of Georgia*, so interpreted the ECT.[2352]

2. Causation

1770. The Parties disagree with regard to the requirements for showing the causation of damages.[2353] The Tribunal finds it useful to address the Parties' views on this matter in two steps. First, the Tribunal will address the requirements for showing the causation of damages where several actions are invoked at the same time. Second, it will deal with the consequences of damage being caused by several actions, only some of which are breaches attributable to the respondent party.

(a) Causation and Reliance on Multiple Actions

1771. Claimants assert that "a causal link needs only be established between the actions of the Russian Federation taken as a whole and Claimants' damages" and that "[t]his causal link is obvious."[2354] Respondent takes the view that, by simply asserting a link between the totality of a number of "bad acts" and the damage, Claimants put themselves in a position where they have to show that "all of the scores of alleged 'bad acts' were [treaty] violations."[2355]

1772. The Tribunal holds that Claimants do, in fact, establish that a specific series of actions of Respondent, consisting of the 2000–2004 tax assessments against Yukos and the subsequent enforcement measures (including the forced auction of YNG), constituted an illegal

---

2351 *See e.g.*, *ADC* ¶¶ 496–97, Exh. C-980; *Siemens* ¶ 352, Exh. C-983; *Amoco*, pp. 300–301, Exh. C-939. *See also* Marboe ¶ 3.287, Exh. C-1607.

2352 *Kardassopoulos* ¶ 514, Exh. C-1533.

2353 Reply ¶ 911 (Claimants assert that "a causal link needs only be established between the actions of the Russian Federation taken as a whole and the Claimants' damages" and that "[t]his causal link is obvious."). *See also* Claimants' Post-Hearing Brief ¶ 191. By contrast, *see* Counter-Memorial ¶ 1619 (Respondent takes the view that, by simply asserting a link between the totality of a number of "bad acts" and a damage, Claimants put themselves in a position where they have to show that "all of the scores of alleged 'bad acts' were [treaty] violations."). *See also* Counter-Memorial ¶ 1628

2354 Reply ¶ 911. *See also* Claimants' Post-Hearing Brief ¶ 191.

2355 Counter-Memorial ¶ 1619. *See also* Counter-Memorial ¶ 1628.

expropriation of Claimants' investment, and that this expropriation caused Claimants damage. In particular, the 2000–2004 tax assessments were actions that contributed to the expropriation of Claimants' investment, and without these assessments, the damage to Claimants would not have occurred. While other actions taken by Respondent may or may not have contributed to a violation of the ECT's standards, showing that they did is not required for establishing causation with regard to the damage suffered by Claimants. All of the heads of damage subsequently identified by the Tribunal are consequences of the 2000–2004 tax assessments that led to the expropriation of Claimants' investment, and this expropriation was clearly a breach of Article 13 ECT.

(b) Multiple Causes for the Same Damage

1773. The Parties also do not agree with regard to the consequences of damage being caused by several events, where only some of those events are breaches attributable to a respondent party. Respondent appears to suggest that concurrent causation of a particular line of damage by Claimants' own conduct, the conduct of third parties and conduct of Respondent that is not wrongful should exclude Respondent's responsibility for that damage,[2356] and that Claimants bear the burden of showing that no such causation exists.[2357] The Tribunal does not agree with that argument.

1774. In this regard, the Tribunal finds it instructive to look to the ILC Articles on State Responsibility. Article 31 of the ILC Articles provides that "[t]he responsible State is under an obligation to make full reparation for the injury caused."[2358] The official commentary to this provision notes that "[o]ften two separate factors combine to cause damage," before pointing out that:

> Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault. . . . Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State . . . but of private individuals. . . . [U]nless some part of the injury can be shown to

[2356] Respondent's Post-Hearing Brief ¶ 234. *See also* Counter-Memorial ¶ 1619; Rejoinder ¶ 1719. Claimants do not specifically address this point.

[2357] Rejoinder ¶ 1719.

[2358] Exh. R-1031.

> be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct.[2359]

1775. As the commentary makes clear, the mere fact that damage was caused not only by a breach, but also by a concurrent action that is not a breach does not, as such, interrupt the relationship of causation that otherwise exists between the breach and the damage. Rather, it falls to the Respondent to establish that a particular consequence of its actions is severable in causal terms (due to the intervening actions of Claimants or a third party) or too remote to give rise to Respondent's duty to compensate. As the Tribunal considers that Respondent has not demonstrated this with regard to any of the heads of damage identified in the remainder of this Chapter, the Tribunal holds that causation exists between the damage and Respondent's expropriation of Claimants' investment.[2360]

3. Failure of Claimants to Mitigate

1776. Respondent asserts that Claimants could have significantly mitigated their damages by taking a few simple steps in the first quarter of 2004, namely by paying the taxes then assessed against Yukos, filing amended VAT returns in Yukos' name, and filing amended tax returns for the years 2000–2002 and a tax return for 2003 recognizing all of Yukos' income without assigning it to its trading entities. The Tribunal has considered each of the actions Respondent suggests Claimants should have taken (set out in paragraphs 679–80, 745–48 and 934–35 above) and has concluded that the suggested actions would not ultimately have made a difference to the enforcement measures subsequently taken by the Russian Federation. As seen in Part VIII above, the measures taken by the Russian Federation demonstrate that its primary objective was to bankrupt Yukos and appropriate its assets and that it was determined to do whatever was necessary to achieve this purpose. In light of this finding, the Tribunal cannot accept that by paying the taxes then assessed or re-filing VAT and tax returns in early 2004, Claimants could have deterred Respondent in the pursuit of its objective.

4. The Methodology Followed by the Tribunal

1777. Having made these determinations in respect of the valuation dates, causation and mitigation, the Tribunal now turns to the specific methodology of establishing the damages in this

---

[2359] *Ibid.* ¶¶ 12–13 (footnotes omitted), Exh. R-1031.

[2360] Claimants' contributory fault and the associated reduction of the damages suffered has already been addressed above in Chapter X.E.

arbitration. As an initial matter, the Tribunal observes that, since it has decided that Claimants are entitled to the higher of the damages determined as of the date of expropriation and as of the date of the award, the Tribunal must establish the total amount of damages caused by Respondent's actions on each of the two valuation dates identified, namely the date of the YNG auction and the date of this Award. For purposes of the Tribunal's calculations, the date of the Award will be deemed to be 30 June 2014. Claimants will be entitled to the higher of these two figures, subject to the deduction of 25 percent for contributory fault.[2361]

1778. On each of these valuation dates, Claimants are entitled to the following heads of damages: (1) the value of Claimants' shares in Yukos valued as of the valuation date; (2) the value of the dividends that the Tribunal determines would have been paid to Claimants by Yukos up to the valuation date but for the expropriation of Yukos; and (3) pre-award simple interest on these amounts.

1779. By contrast, the Tribunal considers that a potential listing of Yukos on the NYSE and the benefits that Claimants might have derived from such a listing are too uncertain to be taken into account for purposes of calculating Claimants' damages. This element of Claimants' damages case is therefore rejected.

1780. The Tribunal also finds that the assessment of Claimants' damages must be based on their shareholding in Yukos, without taking into account the potential effects of a completed merger between Yukos and Sibneft. The Tribunal has not been convinced, on the balance of probabilities, that in the absence of Respondent's expropriatory actions, the envisaged merger would have been completed;[2362] indeed, the Tribunal considers that assuming a completed merger in the "but for" scenario is too speculative. As a consequence, the Tribunal rejects Claimants' first damages scenario, notably the valuation of Claimants' share in YukosSibneft.

1781. Before turning to the calculation of the damages components for the two relevant valuation dates, the Tribunal explains in the following subsections the methodology it has decided to adopt for valuing Yukos on each of the given dates, and the basis on which it has determined the amount of dividends that would likely have been paid to Claimants, in the "but for" scenario, prior to each of the valuation dates.

2361 *See* Chapter X.E.

2362 *See* Chapter VIII.D.

(a) Valuation of Yukos

1782. As set out earlier in this chapter, for purposes of the damages calculation, the Tribunal has decided that the relevant valuation dates are the date of the YNG auction and the date of this Award. However, the starting point for the Tribunal's analysis must be the calculations done by Claimants as of their suggested valuation date of 21 November 2007. Claimants have put forward alternative valuations of Yukos as of that date calculated on the basis of various valuation methods. These methods and the valuations of Yukos derived from them (in USD billion) are summarized in the following table:[2363]

DCF method	88.593[2364]
Comparable companies method	92.924[2365]
Comparable transactions method	87.620[2366]
Rosneft's market capitalization on 21 November 2007, adjusted	83.07[2367]
Yukos' market capitalization on 24 October 2003 adjusted pursuant to development of Urals Blend price index	104.835[2368]
Yukos' market capitalization on 24 October 2003 adjusted pursuant to development of RTS Oil & Gas index	74.191[2369]
Yukos' market capitalization on 24 Oct 2003 adjusted pursuant to development of Lukoil's market capitalization	129.028[2370]
Implied value of YNG based on share swap between Rosneft and Yukos in October 2006 (adjusted pursuant to development of RTS Oil & Gas index) and proceeds from auctions of non-YNG assets in 2007	75.657[2371]

1783. Respondent has not put forward a methodology for valuating Yukos or any valuation figures of its own. However, Professor Dow has provided a "corrected" version of Claimants' comparable companies analysis, making adjustments for what he considered to be the principal errors

---

2363 For any of these valuations, Claimants' respective damages (under this head of damage) would correspond to their pro rata stake in the outstanding shares of Yukos, which were 56.3 percent for Hulley, 2.6 percent for YUL and 11.6 percent for VPL (a total of 70.5 percent for Claimants taken together). All figures are in USD.

2364 Second Kaczmarek Report, p. 11, Table 3; ¶ 69.

2365 Second Kaczmarek Report, p. 11, Table 3; p. 38, Table 24..

2366 Second Kaczmarek Report, p. 11, Table 3; p. 39, Table 25.

2367 Claimants' Post-Hearing Brief ¶ 263; Exh. C-1785. The equity value has been obtained from the enterprise value assumed by Claimants (USD 92.3 billion) on the basis of an assumed 90/10 equity/capital structure. *See* Exh. C-1784.

2368 Claimants' Post-Hearing Brief ¶ 261; Exh. C-1785.

2369 Claimants' Post-Hearing Brief ¶ 261; Exh. C-1785. The RTS Oil and Gas index is built up of the prices of Russian share companies in the oil and gas sector. Transcript, Day 12 at 68 (Professor Dow).

2370 Claimants' Post-Hearing Brief ¶ 261; Exh. C-1785.

2371 Claimants' Post-Hearing Brief ¶ 262; Exhs. C-1784, C-1785.

contained therein.[2372] Based on these adjustments, Respondent's expert arrives—in orally advancing what "could be" a "useful" evaluation—at a "corrected" enterprise value of Yukos, as of 21 November 2007, in the amount of USD 67.862 billion.[2373] Assuming a 90/10 equity/debt capital structure of Yukos, this corresponds to an equity value of Yukos, as of 21 November 2007, of approximately USD 61.076 billion.[2374]

1784. Having considered the extensive expert evidence presented by Mr. Kaczmarek and Professor Dow, including the written evidence in the two expert reports that each submitted (with detailed accompanying annexes and appendices), and the testimony that was elicited from them during the Hearing, the Tribunal concludes, for the reasons set out below, that the "corrected" comparable companies figure is the best available estimate for what Yukos would have been worth on 21 November 2007 but for the expropriation.

1785. The Tribunal finds that neither of the other two primary valuation methods put forward by Claimants is sufficiently reliable to ground a determination of damages for this case. On balance, 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. The Tribunal observes 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.[2375] Similarly, the Tribunal can put little stock in Claimants' calculations based on the comparable transactions method, since both Parties agree that, in fact, there were no comparable transactions,[2376] and thus no basis that would allow a useful comparison.

1786. As for the remaining valuation methods put forward by Claimants, and the valuations of Yukos generated by them, the Tribunal notes that Claimants use these secondary valuations primarily in support of their main valuation. Moreover, some of these figures 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[2377]) and could therefore not be properly addressed by

---

2372 Second Dow Report ¶ 417.

2373 *Ibid*. ¶ 444; p. 182, Figure 67; p. 195, Figure 73; Appendix 16.1. *See also* Transcript, Day 12 at 47 (Professor Dow).

2374 A 90/10 equity/capital structure corresponds to the assumption made by Claimants for purposes of their calculations. *See* Exh. C-1784.

2375 Transcript, Day 11 at 190.

2376 Memorial ¶ 945; Respondent's Post-Hearing Brief ¶ 242.

2377 Claimants' Post-Hearing Brief ¶¶ 261–63; Exh. C-1785.

Respondent. Accordingly, the Tribunal finds that none of these secondary valuation methods can serve as a suitable independent basis for determining the value of Yukos.

1787. By contrast to all of the other methods canvassed above, the Tribunal does have a measure of confidence in the comparable companies method as a means of determining Yukos' value. While Professor Dow stated at the Hearing that he had not performed an analysis sufficient to fully endorse the figure resulting from his corrections to Claimants' comparable companies approach, he agreed that it "could be a useful valuation."[2378] The Tribunal for its part finds that the comparable companies method is, in the circumstances, the most tenable approach to determine Yukos' value as of 21 November 2007, and therefore the starting point for the Tribunal's further analysis.

1788. The next step for the Tribunal consists in determining 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. Having considered the various options in this regard, the Tribunal finds that the RTS Oil and Gas index is the most appropriate index for that purpose. The RTS Oil and Gas index is based on prices of trades executed in securities admitted to trading on the Moscow Stock Exchange[2379] and presently includes preferred or common shares of nine Russian oil and gas companies, the most important of which are Gazprom, Lukoil, Novatek, Rosneft and Surgutneftegas.[2380] The methodology for establishing the index as well as its current and historical values are transparent and publicly available on the webpage of the Moscow Stock Exchange.[2381] Both Parties have referred to the RTS Oil & Gas index as a reliable indicator reflecting the changes in the value of Russian oil and gas companies[2382] and have used it in their calculations to carry forward certain valuations from one date to another.[2383]

2378 Transcript, Day 12 at 47.

2379 "Methodology of the Moscow Exchange Sector Indices calculation," March 2013 ¶ 1.1, available at http://fs.moex.com/files/4032 (last accessed 4 July 2014).

2380 Preferred or common shares in each of these companies are weighted as 15 percent of the index's total. *See* "Constituents of Sectoral Indices valid from December 17, 2013 to March 17, 2014," available at http://moex.com/s933 (last accessed 4 July 2014).

2381 http://fs.moex.com/files/4032 (last accessed 4 July 2014).

2382 Transcript, Day 12 at 67–68 (Professor Dow); Claimants' Post-Hearing Brief ¶ 260.

2383 Second Kaczmarek Report ¶ 134, n.282 (carrying forward a valuation of certain Yukos assets from November 2007 to December 2005); Second Dow Report ¶ 519 and Appendix 15.2 (carrying forward a valuation of Tomskneft and Samareneftegaz from November 2007 to May 2007); Appendix 28.3 (carrying forward a valuation of certain Yukos assets from November 2007 to December 2004).

1789. In order to determine the value of Yukos on each of the two valuation dates, the Tribunal will now adjust Yukos' value as of 21 November 2007 (USD 61.076 billion) by multiplying it by a factor that reflects the change in the RTS Oil and Gas index between 21 November 2007 and each of the two valuation dates. This adjustment factor is calculated and applied for each of the two valuation dates in subections 5(a) and 5(b) below.

1790. Having explained the Tribunal's methodology in respect of the first head of damage (the valuation of Yukos on each of the valuation dates), the Tribunal will now explain the basis on which it has determined the value of "lost" dividends, namely the dividends that would likely have been paid to Claimants, in the "but for" scenario, prior to each of the valuation dates.

(b) Valuation of Lost Dividends

1791. A second element of the damages suffered by Claimants as a result of Respondent's expropriation of their investment is the loss of dividends that would otherwise have been paid to them as Yukos shareholders. For each valuation calculated as of the two valuation dates, the Tribunal must determine the value of the lost dividends up to each date, since the value of Yukos as of that date, while it captures the expectations of future profit, does not capture any of the past profit that the company would likely have generated.

1792. The Tribunal recalls that the two valuation dates are the date of the YNG auction (19 December 2004) and the date of this Award (deemed to be 30 June 2014 for valuation purposes). For the first valuation date, the Tribunal must therefore determine the value of the lost dividends up to 19 December 2004; for the second valuation date, the Tribunal must determine the value of the lost dividends up to 30 June 2014.

1793. The starting point for the Tribunal's analysis are the "Yukos lost cash flows" (*i.e.*, free cash flow to equity) that Claimants' expert calculated with respect to his valuation of Claimants' damages. In his first report, Mr. Kaczmarek values Yukos as of 21 November 2007 only, and therefore produces a model of "lost cash flows" that does not extend beyond that date.[2384] The "lost cash flows" between 2004 and 21 November 2007 are presented as being based on actual historical information, as opposed to the cash flows included in Mr. Kaczmarek's DCF model

[2384] First Kaczmarek Report, Appendix J.1.

for the period 21 November 2007 through the end of 2015, which are based on forecasts and projections built up from information available prior to the period.[2385]

1794. In his second report, Mr. Kaczmarek updates his valuation of Yukos as of November 2007 (including his presentation of "lost cash flows" to that date),[2386] but also presents, for the first time, a valuation of Yukos as of 1 January 2012 (as a proxy for the valuation of Yukos as of the date of the Award).[2387] For purposes of the valuation as of 1 January 2012, Mr. Kaczmarek produces a model of "lost cash flows" that extends from 2004 through to the end of 2011.[2388] The "lost cash flows" between 2004 and 2011 are presented as being based on actual historical information, as opposed to the cash flows included in Mr. Kaczmarek's DCF model for the period 2012 through the end of 2019, which are based on forecasts and projections built up from information available prior to the period.[2389]

1795. The Tribunal observes that no free cash flow to equity figures are provided by Claimants' expert for the years 2012 to 2014. While Claimants offered to update their damages calculations at a date closer to the Award,[2390] the Tribunal has been able to establish the relevant figures on the basis of Mr. Kaczmarek's methodology, using data provided elsewhere in Mr. Kaczmarek's reports. The Tribunal's calculations are set out in Tables T4 to T6, attached to the Award, and explained in greater detail in the following paragraphs.

1796. To calculate Yukos' free cash flow to equity, Mr. Kaczmarek uses the following formula: Free cash flow to equity = Free cash flow to the firm – Tax-adjusted interest payments + Change in net debt + 20 percent of Sibneft dividends.[2391] Mr. Kaczmarek provides figures regarding the free cash flow to the firm and the tax-adjusted interest payments for the relevant time period in Appendix AJ.2 to his second report.[2392] In addition, in note (5) to Appendix AJ.1 to his second report, Mr. Kaczmarek defines Yukos' annual change in net debt as the annual change in

---

2385 *Ibid*., Appendix J.2.

2386 Second Kaczmarek Report, Appendix J.1–updated.

2387 *Ibid*. ¶ 155.

2388 *Ibid*., Appendix AJ.1.

2389 *Ibid*., Appendix AJ.2.

2390 Reply ¶ 946; Second Kaczmarek Report ¶ 155.

2391 Second Kaczmarek Report, Appendix AJ.1.

2392 Tables T4 and T5 attached to the Award.

Yukos' long-term debt plus its short-term debt less its cash.[2393] Mr. Kaczmarek provides these figures in Appendix AJ.4 to his second report.[2394] With regard to the Sibneft dividends, Mr. Kaczmarek provides figures for years 2004 through 2011 in Appendix AJ.1 to his second report.[2395] For the years 2012 through 2014, the Tribunal has assumed that the Sibneft dividends would have been equal to those paid in 2010, the last year for which Mr. Kaczmarek has provided an annual figure (his figure for 2011 being based on annualized third quarter figures).

1797. With these additional numbers calculated by the Tribunal, on the basis of data and formulas set out in Mr. Kaczmarek's reports, the Tribunal is able to arrive at numbers for Yukos' "lost cash flows" (*i.e.*, free cash flows to equity) for the entire period extending from 2004 through 2014. The Tribunal then, in principle, has the input it needs in order to determine the lost dividends for each of the valuation dates: for the first valuation date (the date of the YNG auction), the Tribunal can therefore arrive at a value (based on Mr. Kaczmarek's model) for the lost dividends up to 19 December 2004; and for the second valuation date (the date of the Award), the Tribunal can also arrive at a value (based on Mr. Kaczmarek's model) of the lost dividends up to 30 June 2014. The Tribunal notes that the total amount of lost dividends, based on Mr. Kaczmarek's model, for the period from 2004 to 30 June 2014, is USD 67.213 billion.[2396]

1798. As mentioned earlier, however, Claimants' calculation of Yukos' lost cash flows is merely a starting point for the Tribunal's determination of what it views as the correct estimate of the dividends that Claimants would have earned from Yukos in the "but for" scenario. As explained in the following paragraphs, several fundamental considerations lead the Tribunal to modify the calculations of Claimants' expert.

1799. Firstly, although Yukos' lost cash flows determined by Mr. Kaczmarek are based in part on actual historical information (*i.e.*, largely information about the performance of Yukos' former assets disclosed by Rosneft in its financial reports),[2397] the Tribunal is unable to dissociate them

---

2393 Table T5 attached to the Award.

2394 Table T6 attached to the Award.

2395 Second Kaczmarek Report, Appendix AJ.1.

2396 The relevant calculations with regard to both dividends and interest are set out in Table T3 attached to this Award.

2397 *See e.g.*, Second Kaczmarek Report, Appendix AJ.8, nn.6–8 (which indicate that actual tariff rates and tax expenses, as reported by Rosneft, are used for the 2004–2011 period). *See also* Second Kaczmarek Report, Appendix AJ.9, n.2 (which indicates that "[f]or the period 2004–2011, the crude sales percentages are based on actual crude sales as reported by Rosneft and Lukoil").

from Claimants' DCF model, which was convincingly criticized by Respondent's expert and its counsel.

1800. In his second report, Professor Dow identifies and explains a "series of errors" embedded in Claimants' DCF valuation of Yukos.[2398] His "corrections" of those errors result in a very substantial reduction (51 percent) in the valuation of Yukos generated by the DCF model. Although not all of those "corrections" apply to the cash flows discussed above, which are based in part on actual historical information (and thus are not plagued by some of the errors associated with forecasts and projections), some of the "corrections"—notably those related to the interpretation of the historical information—in the view of the Tribunal, do impact the cash flows.

1801. For example, the Tribunal accepts Professor Dow's opinion that Claimants have underestimated Yukos' transportation costs (by implicitly assuming that, in the "but for" scenario, "Yukos would have been able to capture the efficiencies of Rosneft's proprietary pipeline network").[2399] The Tribunal also accepts Professor Dow's opinion that Claimants' model overlooks certain operating expenses of Yukos, thus evidencing a "basic flaw" in Claimants' DCF model, namely that there is "no systematic attempt" to ensure that all of Yukos' costs have been accounted for.[2400]

1802. Although, for the reasons stated above, the Tribunal does not consider it appropriate to accept all of Professor Dow's "corrections" for purposes of the valuation of the dividends, the Tribunal notes that the spreadsheets submitted by Respondent's expert with his Second Report allow the Tribunal to calculate "corrected" free cash flow to equity figures for the relevant years.[2401] While Respondent's expert has not explicitly endorsed this "corrected" version as representing his views with regard to Yukos' free cash flow to equity, it is evident to the Tribunal that it represents a figure that is more in line with his views. According to this "corrected" methodology, Yukos' dividends in 2004 would have been USD 3.218 billion

2398 Second Dow Report ¶¶ 237–317.

2399 *Ibid*. ¶ 256.

2400 *Ibid*. ¶ 277.

2401 Second Dow Report, Appendix 1 (in Excel format). The results obtained by switching the values in the "Corrected?" column on the first sheet of Appendix 1 (Appendix 1.1) from 0 to 1 (meaning that the corrections are applied) in sheets 2 and 3 (Appendix J.1 and Appendix J.2) are reproduced in Annex A1 to this Award.

(instead of USD 3.645 billion), and the sum of Yukos' dividends over the period from 2004 through the first half of 2014 would have been USD 49.293 billion (instead of USD 67.213).[2402]

1803. The Tribunal has formed the view that Professor Dow's corrections, however, 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 to the present if the company had not been expropriated. The Tribunal agrees with Respondent 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."[2403] Accordingly, in any model of the cash flows that would have been generated by Yukos had it not been expropriated (*i.e.*, the cash flows in a "but for" scenario), it is necessary to take into account the risks to those cash flows that were eliminated by the expropriation. Those risks must be factored back into the cash flow model in the "but for" scenario.

1804. The Tribunal observes that Mr. Kaczmarek's cash flow model does not factor in those risks in his calculations. To the contrary, Mr. Kaczmarek models Yukos' financial performance after the date of expropriation based, in large measure, on the results achieved by Yukos' assets *in the hands of Rosneft*.[2404] As Respondent rightly submits, "Mr. Kaczmarek effectively valued Yukos as if it were a State-owned strategic enterprise, which it never was."[2405]

1805. The first significant risk that, in the Tribunal's view, is not adequately accounted for in the cash flow models of either expert is the real risk of substantially higher taxes. Since taxes other than income taxes (also referred to as "non-income taxes") consistently account for well over 50 percent of Yukos' net income from year to year,[2406] Yukos' cash flows could be significantly affected by any increases in the tariffs and rates relating to the non-income taxes.[2407] In Mr. Kaczmarek's model, the taxes that are established annually by legislation (such as the export customs duty and domestic excise tax for refined products) are based on actual historical data (if available) and, for the forecast period, are based on the prior year's tax rate plus an adjustment to account for annual inflation.[2408] In other words, there is no accounting for the

---

2402 The relevant calculations with regard to both dividends and interest are set out in Table T3 attached to this Award.

2403 Respondent's Post-Hearing Brief ¶ 239.

2404 Second Kaczmarek Report, Appendix AJ and related Appendices.

2405 Respondent's Post-Hearing Brief ¶ 242.

2406 *See* line items for "taxes other than income tax" and "net income" in Second Kaczmarek Report, Appendix AJ.3.

2407 *See* breakdown of Yukos' non-income taxes (including crude oil unified mineral extraction tax, export customs duties, and various excise taxes) and associated tariffs and rates. Second Kaczmarek Report, Appendix AJ.8.

2408 First Kaczmarek Report ¶ 259.

possibility—even likelihood—that had Yukos remained in private hands, the State would have increased taxes, perhaps even substantially, in order to capture a greater share of the rent earned from the exploitation of Russia's natural resources. Yet, the record shows that this is precisely what the Russian Federation did in 2002 and 2003, when Yukos was still in private hands. In paragraph 188 of his first report, for example, Mr. Kaczmarek explains that large tax increases in 2002 and 2003 caused surging profits at Yukos to level off during that period.[2409]

1806. In this connection, the Tribunal notes that Yukos, in its 2002 Annual Report, disclosed the following concerns about taxation:

> We are subject to numerous taxes that have had a significant effect on our results of operations. Russian tax legislation is and has been subject to varying interpretations and frequent changes. [2410]
>
> . . .
>
> In the context of the significant regulatory changes related to Russia's transition from a centrally planned to a market economy over the past 10 years and the general instability of the new market institutions introduced in connection with this transition, taxes, tax rates and implementation of taxation in Russia have experienced numerous changes. Although there are signs of improved political stability in Russia, further changes to the tax system may be introduced which may adversely affect the financial performance of our Company. In addition, uncertainty related to Russian tax laws exposes us to enforcement measures and the risk of significant fines and could result in a greater than expected tax burden.[2411]

1807. The 2002 Annual Report also alerted the Yukos shareholders to risks related to the Company's dividend policy:

> Reserves available for distribution to shareholders are based on the statutory accounting reports of YUKOS Oil Company, which are prepared in accordance with Regulations on Accounting and Reporting of the Russian Federation and which differ from U.S. GAAP. Russian legislation identifies the basis of distribution as net income. For 2002, the current year statutory net income for YUKOS Oil Company as reported in the annual statutory accounting reports was RR 40,701 million. However, current legislation and other statutory laws and regulations dealing with distribution rights are open to legal interpretation and, consequently, actual distributable reserves may differ from the amount disclosed.[2412]

1808. Finally, and perhaps most significantly, there are the risks 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. This structure

---

[2409] First Kaczmarek Report ¶ 188.

[2410] Yukos Annual Report, 2002, p. 81, Exh. C-26.

[2411] *Ibid.*, p. 84.

[2412] *Ibid.*, p. 58.

is well documented in the reports of Professor Lys. An organizational chart attached as an appendix to a letter from PwC Cyprus to PwC Moscow dated 10 April 2003 shows the complexity of the structure as of that date, and the fact that Yukos' control over it was established by means of call options.[2413] With this structure, Yukos was able to consolidate the profits of the trading companies and offshore holding companies (entities within its "consolidation perimeter") into its results while remaining "free to segregate these profits from minority shareholder claims whenever it served the majority shareholders' or management's interests."[2414]

1809. As Respondent rightly points out, Yukos' claim of corporate governance reforms, Western standards of transparency and protection of minority interests, which Mr. Kaczmarek highlighted in his first report[2415] (and which was a recurring theme heard from Claimants in this case), "was a façade."[2416] Notably, even the company's President, Mr. Theede, testified that they had no knowledge that Yukos was using offshore structures that it did not own.[2417]

1810. The Tribunal notes that even after the tax assessments at issue in the present arbitration were issued, Claimants and their owners were able to divert money earned by Yukos out of Yukos, and into the two Stichtings,[2418] and therefore away from the tax authorities. The Tribunal cannot exclude the possibility that, but for the expropriation, the very same mechanism would have been resorted to by Claimants under different circumstances to divert some of the money earned by Yukos.

1811. In light of all the circumstances, and taking into account: (a) the figures based on Mr. Kaczmarek's calculations; (b) the figures based on Professor Dow's "corrections"; and (c) the additional risks described above, which the Tribunal finds must be factored into its damages analysis, the Tribunal, in the exercise of its discretion, concludes that it is appropriate to determine and fix the dividend payments that it assumes Yukos would have paid to its

---

2413 Exh. R-3165, p. 5. The Tribunal has included a copy of the chart in Annex A2 to this Award. *See also* Second Lys Report, Appendix F.

2414 Respondent's Post-Hearing Brief ¶ 258.

2415 First Kaczmarek Report ¶ 156.

2416 Respondent's Post-Hearing Brief ¶ 260.

2417 Transcript, Day 11 at 59. The Tribunal notes that Mr. Kosciusko-Morizet, the Chairman of the Board's Audit Committee, acknowledged that he had no opinion, and had made no enquries, as to whether Yukos owned the low tax region entities (*see* Transcript, Day 4 at 60–61).

2418 Respondent's Counter-Memorial ¶¶ 528–39. The Tribunal recalls that Claimants do not dispute that money was transferred into the Stichtings. *See* above at ¶¶ 1054–60, 1124.

shareholders in the "but for" scenario in the amounts set out in the far right column of the following table (in USD billion):

Year	Kaczmarek	Dow	Tribunal
2004	3.645	3.218	2.5
2005	4.796	4.489	3.5
2006	4.677	4.396	3.5
2007	8.484	7.670	6
2008	7.819	6.749	6
2009	7.642	5.463	5
2010	4.254	4.842	3.5
2011	6.285	4.283	4
2012	8.395	3.724	5
2013	7.628	3.148	4
2014 (first half)	3.586	1.310	2
Total	67.213	49.293	45

1812. Accordingly, the Tribunal concludes that Yukos' dividends in 2004 would have been USD 2.5 billion, and the sum of Yukos' dividends over the period from 2004 through the first half of 2014 would have been USD 45 billion.[2419]

5. Application of the Methodology Followed by the Tribunal

1813. The Tribunal, applying the methodology outlined above to the two valuation dates of 19 December 2004 and 30 June 2014, can now proceed to the valuation of the expropriated company as of those two dates.[2420]

[2419] The relevant calculations with regard to both dividends and interest are set out in Table T3 attached to this Award.

[2420] *See* Table T1 annexed to this Award.

(a) Calculations Based on 19 December 2004 Valuation Date

1814. The damages suffered by Claimants based on a valuation date of 19 December 2004 are determined as follows.

i. Valuation of Shares in Yukos

1815. As explained earlier, the Tribunal will determine the equity value of Yukos as of 19 December 2004 by adjusting what it considers, based on the Parties' submissions, to be the best available estimate of this value as of 21 November 2007, *i.e.*, an amount of USD 61.076 billion, with a factor that reflects the development of the RTS Oil and Gas index between 19 December 2004 and 21 November 2007. The value of the RTS Oil and Gas index on 19 December 2004 was 92.85, whereas on 21 November 2007 it had a value of 267.8. The adjustment factor to be applied to determine Yukos' value as of the earlier date is therefore x=92.85/267.8=0.3467. By applying this factor to the amount of USD 61.076 billion, the Tribunal arrives at an equity value of Yukos as of 19 December 2004 in the amount of USD 21.176 billion.[2421]

1816. The value of Claimants' 70.5 percent share in Yukos, calculated as a pro rata share of this amount, corresponds to USD (70.5/100)*21.176=14.929 billion.

ii. Dividends

1817. According to the Tribunal's methodology outlined above, the dividends that would have been paid to Yukos' shareholders throughout 2004 will be assumed to be USD 2.5 billion. Since the valuation date is 19 December 2004, there are 12 days missing for the full year which must be taken into consideration. Accordingly, this amount must be multiplied by a factor x=(365–12)/365, corresponding to approximately 97 percent. This gives a total amount of free cash flow to equity based on a valuation date of 19 December 2004 of USD 2.418 billion. Claimants' share of this amount corresponds to dividends of USD (70.5/100)*2.418=1.705 billion.

[2421] *See* Table T2 annexed to this Award.

iii. Interest

1818. By applying an annual interest rate of 3.389 percent,[2422] the total amount of interest payable on the equity value of Yukos and the dividends that would have been paid to its shareholders from 1 January 2005 to 30 June 2014 is 7.596 billion.[2423] The total amount of interest payable to Claimants on this basis is 70.5 percent of this figure, *i.e.*, USD 5.355 billion.

iv. Total Damages Suffered by Claimants

1819. The damages suffered by Claimants due to the breach by Respondent of Article 13 of the ECT based on a 19 December 2004 valuation date is the sum of the Claimants' share of these components calculated above, *i.e.*, 70.5 percent of (21.176 + 2.418 + 7.596), which amounts to USD 21.988 billion.[2424]

(b) Calculations Based on 2014 Valuation Date

1820. The damages suffered by Claimants based on a valuation date of 30 June 2014 are determined as follows.

i. Valuation of Claimants' Share in Yukos

1821. As for the calculations based on the date of the expropriation, the Tribunal will determine the equity value of Yukos as of 30 June 2014 by adjusting what it considers, based on the Parties' submissions, the best available estimate of this value as of 21 November 2007, *i.e.*, the amount of USD 61.076 billion, with a factor that reflects the development of the RTS Oil and Gas index between 21 November 2007 and 30 June 2014. For practical purposes, and in order to eliminate the effects of random fluctuations of the index on the amount to be awarded, the

---

2422 *See* Part XI. The Tribunal has assumed that dividends would have been paid in each case at the end of the relevant year and that interest would have started accruing at the determined pre-award interest rate from 1 January of the year thereafter.

2423 To avoid unnecessarily complicating the calculations, this figure does not take into account interest for the period from 19 to 31 December 2004. Adding this interest would not affect the Tribunal's conclusions.

2424 *See* Table T1 annexed to this Award. Claimants' shareholdings in Yukos, as percentages of Yukos Issued Shares, were 48.72 percent, 2.25 percent and 10 percent for Hulley, YUL and VPL, respectively. Interim Awards ¶ 419 (Hulley); ¶ 419 (YUL); ¶ 419 (VPL). In absolute numbers, out of a total number of 2,236,964,578 Issued Shares, Hulley held 1,090,043,968 shares, YUL held 50,340,995 shares and VPL held 223,699,175 shares, while 302,000,000 shares were Treasury Shares. First Kaczmarek Report, Appendix C.5.b. This translates into a total number of 1,934,964,578 Outstanding Shares, of which 56.33405 percent, 2.60165 percent and 11.56089 percent were held by Hulley, YUL and VPL, respectively. The exact combined share of Claimants in Yukos Outstanding Shares was 70.49659 percent.

Tribunal has chosen to use the average of the values of the index over the period from 6 January 2014 to 24 June 2014 as the basis for its calculations. This average value of the RTS Oil and Gas index is 186.90.[2425] The adjustment factor to be applied to determine Yukos' value as of the later date is therefore x=186.90/267.8=69.79 percent. By applying this factor to the amount of USD 61.076 billion the Tribunal arrives at an equity value of Yukos as of 30 June 2014 in the amount of USD 42.625 billion.[2426]

1822. The value of Claimants' 70.5 percent share in Yukos, calculated as a pro rata share of this amount, corresponds to USD (70.5/100)*42.625=30.049 billion.

ii. Dividends and Interest on Dividends

1823. According to the Tribunal's methodology outlined earlier, the dividends that would have been paid to Yukos' shareholders from the beginning of 2004 to 30 June 2014 will be assumed to correspond to USD 45 billion. Together with interest, the total amount for this period is USD 51.981 billion.[2427]

1824. Claimants' share of this amount corresponds to USD (70.5/100)*51.981=36.645 billion.

iii. Total Damages Suffered by Claimants

1825. The damages suffered by Claimants due to the breach by Respondent of Article 13 of the ECT, based on a valuation date of 30 June 2014, is the sum of the Claimants' share of the two components calculated above, *i.e.*, 70.5 percent of (42.625 + 51.981), which amounts to USD 66.694 billion.[2428]

(c) Comparison of the Results Based on the Two Different Valuation Dates

1826. The total amount of Claimants' damages based on a valuation date of 19 December 2004 is USD 21.988 billion, whereas the total amount of their damages based on a valuation date of 30 June 2014 is USD 66.694 billion. Since the Tribunal has concluded earlier that Claimants are entitled to the higher of these two amounts, the total amount of damages to be awarded

[2425] *See* Table T8 annexed to this Award.

[2426] *See* Table T2 annexed to this Award.

[2427] *See* Table T3 annexed to this Award.

[2428] *See* Table T1 annexed to this Award.

before taking into account any deductions necessary as a consequence of Claimants' contributory fault is USD 66.694 billion.

6. Deductions Due to Claimants' Contributory Fault

1827. As determined earlier,[2429] the Tribunal has concluded that the Claimants contributed to the extent of 25 percent to the prejudice they suffered at the hands of the Russian Federation. As a consequence, the amount of damages to be paid by Respondent to Claimants will be reduced by 25 percent to USD 50,020,867,798 and the Tribunal so finds.[2430]

7. Windfall and Double Recovery

1828. The Tribunal sees no reason to make any further deductions beyond those set out above. In particular, any advantages that Claimants may have obtained through their investments prior to Respondent's expropriatory actions can not have any impact on the damages they have suffered. The Tribunal sees no risk of "double-recovery" in this regard.

1829. Finally, the rate of return that Claimants may realize on their original investment in Yukos as a result of the damages that the Tribunal has awarded to them for the expropriation of their shares is irrelevant. It is the value of the expropriated investment on the date of the Award rather than the amount originally invested by Claimants that is the basis for the calculation of the damages awarded.

XIII. COSTS

A. INTRODUCTION

1830. The Tribunal notes that Claimants and Respondent have each requested that the opposing party be ordered to pay the full costs of the arbitration.[2431]

1831. The Tribunal observes that the Treaty contains no provisions on the allocation of the costs of arbitration in the case of a dispute between an Investor and a Contracting Party.[2432]

2429 *See* Section X.E.4.

2430 Claimants shall be paid this amount in proportion to their shareholdings (as to which see n.2424 above) as follows: EUR 39,971,834,360 (Hulley), EUR 1,846,000,687 (YUL) and EUR 8,203,032,751 (VPL). As per paragraphs 1690–92 above, post-award interest will be due on any outstanding amounts not paid in full within 180 days.

2431 Reply ¶ 1199(5); Rejoinder ¶ 1748(v).

1832. However, Articles 38 to 40 of the UNCITRAL Rules do provide the Tribunal with guidelines with respect to the allocation of costs in arbitration.

1833. Article 38 defines the "costs of arbitration" as follows:

> The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:
>
> (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
>
> (b) The travel and other expenses incurred by the arbitrators;
>
> (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
>
> (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

1834. Paragraphs 1 and 2 of Article 40 of the UNCITRAL Rules set out the guidelines which will inform the Tribunal in its determination of the apportionment of costs. They read as follows:

> 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

1835. On 18 March 2014, the Tribunal requested the Parties to file their claims for costs with appropriate schedules by 17 April 2014 and to submit comments on the opposing Party's claims by 6 May 2014. The Tribunal wrote:

> The Parties are requested to present their claims with schedules showing a breakdown of costs for legal representation and assistance, including lawyers' fees, experts' fees and other costs associated with presenting their case. The breakdown of lawyers' fees should indicate the number of attorneys (together with charge out rates) and the amount of time involved in the discrete phases of these proceedings (Phase 1 being the period up to the

---

[2432] As opposed to the allocation of the costs of arbitration in the case of a dispute between Contracting Parties, which is addressed in Article 27(3)(j) as follows: "The expenses of the tribunal, including the remuneration of its members, shall be borne in equal shares by the Contracting Parties parties to the dispute. The tribunal may, however, at its discretion direct that a higher proportion of the costs be paid by one of the Contracting Parties parties to the dispute."

> Interim Awards; Phase 2 being the period after the Interim Awards). It is expected that the breakdowns should be in sufficient detail for the Tribunal to appreciate the work in respect of which the costs were incurred.

1836. As requested, the Parties filed their cost claims on 17 April 2014 and submitted comments on the opposing side's cost claims on 6 May 2014.

B. CLAIMANTS' POSITION

1. Claimants are Entitled to Recover All Costs Incurred in Connection with these Arbitrations

1837. Claimants note that Article 40 of the UNCITRAL Rules "establishes two approaches with respect to costs."[2433] Firstly, Article 40(1) establishes a "clear presumption" that the losing party pays all costs referred to in Article 38(a) to (d) and (f)—"loser pays" or "costs follow the event."[2434] Secondly, Article 40(2) requires that, when allocating costs for legal representation referred to in Article 38(e), tribunals take into account "the circumstances of the case."[2435]

1838. Claimants submit that Respondent should bear all costs set out in Article 38(a) to (d) and (f), namely the fees and expenses of the Tribunal and the PCA (including those of the PCA's Secretary-General).

1839. Claimants aver that Respondent was the unsuccessful party in the jurisdiction and admissibility phase. Claimants assert that they "prevailed on every single issue that was finally decided in the jurisdiction and admissibility phase of these arbitrations."[2436] They consider that Respondent should bear the fees and expenses of the Tribunal and the PCA related to that phase.

1840. Claimants submit that they should prevail at the merits stage as well and that Respondent should bear the fees and expenses of the Tribunal and the PCA related to that phase.[2437]

[2433] Claimants' Submission on Costs ¶ 4.

[2434] *Ibid.* ¶ 5.

[2435] *Ibid.* ¶ 6.

[2436] *Ibid.* ¶ 10.

[2437] *Ibid.* ¶ 11.

1841. According to Claimants, no circumstances in this case require the Tribunal to depart from the starting point of "costs follow the event"; to the contrary, they argue, the circumstances in this case "only further necessitate" an order of costs in favour of Claimants.[2438]

1842. Claimants submit that, taking into account the circumstances of the case—and in particular the Parties' success in the arbitrations, their conduct during the proceedings, and the actual measures of Respondent which gave rise to the dispute—Respondent should bear all of Claimants' costs of legal representation and assistance.

1843. Claimants contend that where the investor prevails in an investor-State arbitration, an order that the State pay the investor's costs of legal representation is based on the principle of reparation, which mandates that the investor be fully compensated for its losses, including those incurred as a result of having to litigate.[2439]

1844. According to Claimants:

> In the present case, the Respondent's approach to these proceedings has been to raise (and re-raise) as many objections, arguments and issues as possible, no matter how irrelevant or implausible they may be, in the hopes of delaying the proceedings and somehow burying or obfuscating the straightforward facts of the case.[2440]

1845. Claimants opine that Respondent's "obstructionist conduct" in this case should lead the Tribunal to order it to pay all costs of legal representation.[2441]

1846. Claimants submit that "in no other case has the need to take into account the underlying conduct of the host State been more relevant than in these arbitrations."[2442] Claimants argue

---

2438 *Ibid.* ¶ 12.

2439 Claimants' Submission on Costs ¶¶ 17–19 (quoting *Gemplus* ¶¶ 17-21–17-22, Exh. C-1536; *ADC* ¶ 533, Exh. C-980; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, ¶ 207, Exh. C-945.

2440 Claimants' Submission on Costs ¶ 22.

2441 Claimants' Submission on Costs ¶¶ 22, 52–53. Claimants list what they term Respondent's "constant attempts to extend deadlines and otherwise prolong or disrupt the proceedings" (¶¶ 23–31), "deliberate attempts to withhold evidence" (¶¶ 32–39), "manifest disregard for the Arbitral Tribunal's orders" (¶¶ 40–41), "renewed and abandoned jurisdiction and admissibility objections" (¶¶ 42–48), and "overly burdensome, disorganized and fundamentally misleading presentation of its case" (¶¶ 49–51).

2442 Claimants' Submission on Costs ¶ 54 (referring to *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* ICSID Case No. ARB/09/02, Award, 31 October 2012, ¶ 588, Exh. C-1792; *ADC* ¶ 533, Exh. C-980; *Kardassopoulos* ¶ 689, Exh. C-1533.

that Respondent's conduct "has been decried by every single court or tribunal, organization, and independent observer outside Russia" and "must be sanctioned in full."[2443]

2. Claimants' Costs are Reasonable

1847. Pursuant to the Tribunal's directions, Claimants presented a summary of the costs they have incurred in connection with these arbitrations on a per-phase basis:[2444]

Table 1: The Claimants' costs for legal representation incurred in Phase 1

Shearman & Sterling LLP Fees and Expenses	
1. Legal assistants	
Number of legal assistants	4
Charge out rate range (USD/hour)	160.00-200.00
Total hours	4,376.40
Total legal assistant fees	USD 763,222.50
2. Attorneys	
Number of attorneys	21
Charge out rate range (USD/hour)	235.00-995.00
Total hours	52,076.90
Total attorney fees	USD 23,018,168.50
3. Expenses	USD 2,081,685.55
4. Total	USD 25,863,076.55
Expert Fees and Expenses	
1. Prof. James Crawford	USD 53,222.06
2. Mr. Vladimir Gladyshev	USD 1,269,662.80
3. Mr. Brian Green QC	GBP 996,962.10
4. Navigant	USD 1,052,897.49
5. Prof. W. Michael Reisman	USD 204,000.00
6. Total	USD 2,579,782.35 GBP 996,962.10
Deductions[89]	
	USD 482,260.11
Grand Total (Phase 1)	
	USD 27,960,598.79 GBP 996,962.10

[89] The deducted amounts comprise: (*i*) experts' fees and expenses advanced by Shearman & Sterling LLP and subsequently reimbursed by the Claimants (deducted to avoid double-counting of those amounts); and (*ii*) the fees and expenses of persons consulted by the Claimants, but who did not tender testimony.

. . .

[2443] Claimants' Submission on Costs ¶ 55.

[2444] *Ibid.* ¶¶ 56–63.

Table 2: The Claimants' costs for legal representation incurred in Phase 2

Shearman & Sterling LLP Fees and Expenses[90]	
1. Legal assistants	
Number of legal assistants	7
Charge out rate range (USD/hour)	205.00-255.00
Total hours	4,887.60
Total legal assistant fees	USD 1,123,195.50
2. Attorneys	
Number of attorneys	27
Charge out rate range (USD/hour)	290.00-1,065.00
Total hours	70,525.90
Total attorney fees	USD 39,931,981.50
3. Expenses	USD 3,252,001.07
4. Total	USD 44,307,178.07
Expert Fees and Expenses	
1. Dr. Philip Baker QC	GBP 69,500.00
2. Dr. Sergei Kovalev	USD 70,000.00
3. Navigant	USD 7,370,493.22
4. Total	USD 7,440,493.22 GBP 69,500.00
Compensation for Witness Time and Expenses	
1. Mr. Y Schmidt	USD 70,000.00
Deductions[91]	
	USD 150,214.52
Grand Total (Phase 2)	
	USD 51,667,456.77 GBP 69,500.00

[90] The Shearman & Sterling LLP Fees and Expenses for Phase 2 comprise invoices up to and inclusive of December 2012.

[91] The deducted amounts comprise: (*i*) experts' fees and expenses advanced by Shearman & Sterling LLP and subsequently reimbursed by the Claimants (deducted to avoid double-counting of those amounts); (*ii*) the fees and expenses of persons consulted by the Claimants, but who did not tender testimony; and (*iii*) the compensation for the time and expenses of Mr. Schmidt, which were advanced by Shearman & Sterling LLP and subsequently reimbursed by the Claimants (deducted to avoid double-counting of this amount).

1848. Claimants submit that their costs in the jurisdiction and admissibility phase are reasonable given:

> *(i)* the large number of objections raised by the Respondent in the jurisdiction and admissibility phase, *(ii)* the numerous expert opinions tendered by the Respondent, *(iii)* the volume of procedural issues that arose in the course of the proceedings attributable solely to the Respondent, and *(iv)* the matters and amounts at stake in the arbitrations.[2445]

[2445] Claimants' Submission on Costs ¶ 60.

1849. Claimants submit that their costs in the merits phase are reasonable given:

> (*i*) the large number of issues raised by the Respondent in the merits phase, (*ii*) the numerous expert statements tendered by the Respondent, (*iii*) the volume of procedural issues that arose in the course of the proceedings attributable solely to the Respondent, and (*iv*) the matters and amounts at stake in the arbitrations.[2446]

1850. Claimants request interest on any cost award at a rate of LIBOR + 4 percent compounded annually.[2447]

3. Claimants' Comments on Respondent's Submission on Costs

1851. Claimants summarize their comments on Respondent's Submission on Costs as follows:

> Respondent has elected not to provide a "breakdown of costs", as directed by the Arbitral Tribunal. Its so-called "Schedule of Costs" cannot in any way facilitate the Tribunal's task in reaching its decision on costs, including in assessing the reasonableness of either of the Parties' claimed amounts. Moreover, the Respondent's argument that each Party should bear its own costs is based on a flawed presentation of investment treaty case law and a blatantly self-serving description of the Respondent's conduct throughout these arbitrations. At the same time, the Respondent's position speaks volumes as to its true conviction (or lack thereof) in its defenses to the Claimants' claims. Had the Respondent truly believed that the Claimants, Yukos and/or related persons and entities had engaged in large-scale criminal conduct—ranging from embezzlement and money laundering to tax fraud and even murder—it would have insisted that its full costs be shouldered by the Claimants, instead of proposing, as it has done now, that it bear its own costs in defending the Claimants' claims.[2448]

1852. Claimants assert that comparing the comprehensive presentation of their costs for legal representation with Respondent's "opaque" Schedule of Costs would be "akin to comparing apples and oranges."[2449] Even then, Claimants maintain that their costs would still be reasonable. In particular, Claimants note that "in ordering respondent States to bear investors' costs, investment treaty tribunals have found that it is not unusual for claimants' costs to be higher than those of respondents, given that, *inter alia*, the burden of proof generally falls on claimants."[2450]

2446 Claimants' Submission on Costs ¶ 63.

2447 *Ibid.* ¶ 64.

2448 Claimants' Comments on Respondent's Submission on Costs dated 6 May 2014, p. 1.

2449 *Ibid.*, p. 3.

2450 *Ibid.*, p. 3 (referring to *ADC* ¶ 535, Exh. C-980; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 624, Exh. C-998.

C. RESPONDENT'S POSITION

1. Equal Apportionment is an Appropriate Exercise of the Tribunal's Discretion on Costs

1853. Respondent notes that, while Article 40(1) of the UNCITRAL Rules states that the costs referred to in Article 38(a) to (d) and (f) should "in principle be borne by the unsuccessful party," it gives the Tribunal the discretion to "apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case." Respondent asserts that Article 40(2) grants the Tribunal "complete discretion" in its apportionment of the Parties' costs of legal representation.[2451]

1854. Respondent argues that the following factors should inform the exercise of the Tribunal's discretion:

> (a) whether the dispute involved novel and complex questions of law and a long and complex procedure such that it would be unfair to penalize a non-prevailing party for maintaining its positions with an adverse costs award;
>
> (b) the constructive and professional conduct of the parties and their positive impact on the tribunal's settlement of the dispute, which militates in favor of equal apportionment of costs;
>
> (c) any bad faith, unreasonable or unnecessarily burdensome conduct of a party for which the other party should be compensated;
>
> (d) whether the non-prevailing party succeeds in some respects during the arbitration with legal, factual or procedural arguments, making it inappropriate to award the ultimately successful party its costs; and
>
> (e) the nature of the dispute resolution mechanism and the traditional position under public international law and in investor-state arbitration that parties "bear their own costs of legal representation and assistance."[2452]

1855. Respondent submits that, in light of the above-mentioned factors, the "appropriate approach here is for each side to bear its own costs."[2453] Further:

> If, in the exercise of its discretion, the Tribunal decides that equal apportionment of costs in these cases is not appropriate, and that the costs incurred by the prevailing party should be borne by the unsuccessful party, Respondent would then request that Claimants should bear Respondent's costs based upon the relative success of the parties in these arbitrations on issues of jurisdiction, the merits and Claimants' demand for damages. It is clear from

---

2451 Respondent's Submission on Costs ¶ 3.

2452 *Ibid.* ¶ 4 (footnotes omitted).

2453 *Ibid.* ¶¶ 5–8.

the Procedural Orders issued throughout the proceedings and from the Interim Awards on Jurisdiction and Admissibility that neither side has been fully successful.[2454]

2. Schedule of "Types of Costs" Incurred by Respondent

1856. Respondent submits a schedule indicating the "types of costs" incurred by Respondent in defense of Claimants' claims.

A. Tribunal and PCA Fees and Expenses

Initial and supplemental deposits paid to the PCA

TOTAL € 3,950,000

B. Attorneys' Fees and Expenses

Phase 1

For the period from February 3, 2005 to November 30, 2009:

Review of Claimants' Notifications of Claim dated October 27, 2004; review of Claimants' Statements of Claim dated February 3 and February 14, 2005; preparation of Respondent's Statements of Defense dated October 15, 2005; preparation of Respondent's First Memorials on Jurisdiction and Admissibility dated February 28, 2006; review of Claimants' Counter-Memorials on Jurisdiction and Admissibility dated June 30, 2006; preparation of requests for disclosure, preparation of documents and responses to Claimants' requests for disclosure, review of documents produced by Claimants; preparation of Respondent's Second Memorials on Jurisdiction and Admissibility dated January 31, 2007; review of Claimants' Rejoinders on Jurisdiction and Admissibility dated June 1, 2007;

Correspondence and various procedural submissions with the Tribunal and Claimants' counsel;

Attendance at hearings of October 31, 2005, December 1, 2007, May 8-9, 2008 and from November 17 to December 1, 2008.

Lawyers Involved in Phase 1

Partners (5), billing range $700-900/hour, in excess of 3,500 hours

Associates (15), billing range $300-$625/hour, in excess of 12,000 hours

Paralegals/stagiaires/trainees (10), billing range $125-$225/hour, in excess of 5,000 hours

Phase 2

For the period from November 30, 2009 until the present:

Review of Claimants' Memorial on the Merits dated September 16, 2010; preparation of Respondent's Counter-Memorial on the Merits dated April 4, 2011; preparation of requests for disclosure, preparation of documents and responses to Claimants' requests for disclosure, review of documents produced by Claimants; preparation of Respondent's Short Submission on Bifurcation of Liability and Quantum and on Referral under Article 21 of the ECT dated April 29, 2011; preparation of Respondent's First and Second Submissions on Confidentiality dated January 18 and February 2, 2012; review of Claimants' Reply on the Merits dated March 15, 2012;

[2454] *Ibid.* ¶ 9.

preparation of Respondent's Rejoinder on the Merits dated August 16, 2012; preparation of Respondent's Post-Hearing Brief dated December 21, 2012;

Correspondence and various procedural submissions with the Tribunal and Claimants' counsel;

Attendance at hearings of May 7, 2010, May 9, 2011 and from October 10 to November 9, 2012.

Lawyers Involved in Phase 2

Partners (5), billing range $775-950/hour, in excess of 7,000 hours

Associates (20), billing range $375-$675/hour, in excess of 25,000 hours

Paralegals/stagiaires/trainees (15), billing range $150-$275/hour, in excess of 10,000 hours

TOTAL US$ 27,000,000

C. Experts' Fees and Expenses

For services provided by expert witnesses in connection with preparation of expert reports for submission with Respondent's First Memorials on Jurisdiction and Admissibility, Second Memorials on Jurisdiction and Admissibility, Counter-Memorial on the Merits and Rejoinder on the Merits and preparation for testimony at the hearings on jurisdiction and admissibility and the merits and remaining jurisdiction and admissibility issues, and related expenses.

TOTAL US$ 4,500,000[2455]

3. Respondent's Comments on Claimants' Submission on Costs

1857. With respect to Claimants' request for costs, Respondent says it is "plainly excessive and unprecedented in its amount" and opines that it "raises serious questions of credibility."[2456]

1858. Respondent submits that Claimants' characterization of the proceedings amounts to "outright misrepresentations rather than the actual facts."[2457] According to Respondent, the alleged misrepresentations of Claimants include: Claimants' "continued disregard for the ECtHR's unanimous rejections of the essential premise for Claimants' contentions here,"[2458] "misrepresentation that Respondent abandoned its unclean hands defense,"[2459] "mischaracterization of Respondent's justified requests for extensions of deadlines, alleged 'delay tactics' and approach to document production,"[2460] "meritless criticisms of Respondent's

[2455] Respondent's Submission on Costs ¶ 10.

[2456] Respondent's Comments on Claimants' Submission on Costs dated 6 May 2014 ¶ 2 n.1.

[2457] *Ibid.* ¶ 9.

[2458] *Ibid.* ¶¶ 10–15.

[2459] *Ibid.* ¶¶ 16–18.

[2460] *Ibid.* ¶¶ 19–31.

presentation of its case,"[2461] and "conspicuous silence concerning their own misconduct in these arbitrations."[2462]

D. TRIBUNAL'S DECISION ON COSTS

1. Fixing and Allocation of Costs of the Arbitration Pursuant to Article 40(1) of the UNCITRAL Rules

1859. The Parties deposited with the PCA a total of EUR 8,440,000 to cover the costs of the arbitration; EUR 4,240,000 by Claimants and EUR 4,200,000 by Respondent.[2463] In determining the amount of its members' fees, the Tribunal has taken account of Article 39(1) of the UNCITRAL Rules, pursuant to which "[t]he fees and expenses of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case."

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.

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

---

2461 *Ibid.* ¶¶ 32–36.

2462 *Ibid.* ¶¶ 37–38.

2463 Over the course of the proceedings, the Parties contributed in equal shares to the deposits. In July 2014, the Tribunal requested a final supplementary deposit of EUR 40,000 and invited either Party to cover the full amount in advance of issuance of the Final Awards, which Claimants accepted to do.

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.

1867. The Tribunal recalls again the terms of Article 40(1) of the UNCITRAL Rules:

> Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

1868. The costs are therefore to be awarded to the successful party and against the unsuccessful party, unless the circumstances of the case justify a different approach.

1869. In the present proceedings, it is clear that Claimants have prevailed and been successful in both the jurisdiction and merits phases. The Tribunal can see no reason why Respondent, the unsuccessful party, should not bear the costs of the arbitration, EUR 8,440,000, and it so orders Respondent to bear such costs and to reimburse the contributions that Claimants deposited in the amount of EUR 4,240,000.[2464]

1870. There is no unexpended balance on deposit.

2. Fixing and Allocation of Costs for Legal Representation and Assistance of the Parties Pursuant to Article 40(2) of the UNCITRAL Rules

1871. The Tribunal recalls again the terms of Article 40(2) of the UNCITRAL Rules:

> With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

[2464] Claimants shall be paid this amount in proportion to their shareholdings (as to which see n.2424 above) as follows: EUR 3,388,197 (Hulley), EUR 156,476 (YUL) and EUR 695,327 (VPL). As per paragraphs 1690–92 above, post-award interest will be due on any outstanding amounts not paid in full within 180 days.

1872. Paragraph (e) of Article 38 provides that the term "costs" includes:

> The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable.

1873. The Tribunal observes that Claimants' costs for their legal representation and the assistance of their experts amount to USD 79,628,055.56 plus an additional GBP 1,066,462.10, which, Claimants submit, are "reasonable" taking into account the circumstances of the case.

1874. Respondent, on the other hand, provides the Tribunal with a schedule indicating the "types of costs" incurred by Respondent in its defence. It presents a "total" figure of USD 27,000,000 which does not adequately assist the Tribunal in assessing the reasonableness of the Parties' respective costs.

3. Conclusion on the Award of Costs

1875. It is well established that an UNCITRAL tribunal such as the present one has the unfettered discretion to fix and to decide in what proportion the costs for legal representation and assistance of the parties shall be borne by the Parties.

1876. In the present case, the Tribunal has formed the view that Claimants, the successful Party, should be awarded a significant portion of their costs of legal representation and assistance. The Tribunal now has to determine the portion which it considers reasonable. In determining this reasonable portion, the Tribunal takes into account a number of relevant factors. The Tribunal will now proceed to review some of the factors which it considers particularly relevant in the instant case.

1877. Claimants, in their prayer for relief, asked the Tribunal to order Respondent to pay to Claimants damages of more than USD 100 billion.

1878. The stakes were high and, if Claimants were thorough and vigorous in pressing their claims, Respondent was no less thorough and vigorous in presenting its defences.

1879. The thousands of pages of written pleadings and exhibits submitted by the Parties, the myriad requests for production of documents, the Tribunal's lengthy procedural orders, the ten days of hearings in The Hague in the fall of 2008 on Respondent's objections to jurisdiction and admissibility, the 21 days of Hearings on the Merits in The Hague in the fall of 2013, all demonstrate the importance which both sides attached to this arbitration.

1880. The Parties litigated vigorously. Each Party was represented by eminent counsel. The quality of the written and oral pleadings was outstanding. Counsel of both Parties are commended for their high professionalism.

1881. In the circumstances, it is unsurprising that the cost submissions of the Parties, as to their amounts, should reflect the very considerable work which each Party was required to expend in order to, on the one hand, press its claims and, on the other hand, defend itself.

1882. It also is not surprising that Claimants' costs in this case should be higher than those of Respondent since they bore the burden of proof for their claims under the ECT and produced many fact witnesses in the Hearing on the Merits whereas Respondent produced no fact witness.

1883. However, the Tribunal agrees with Respondent that some of the fees of Claimants' experts are "plainly excessive".

1884. Another factor which the Tribunal considers relevant in fixing the costs of Claimants which should be borne by Respondent is the fact that, at the end of the day, Claimants' experts were of limited assistance to the Tribunal in its determination of Claimants' damages.

1885. Even if Claimants were successful in asserting the Tribunal's jurisdiction over Respondent, in prevailing on the liability of Respondent and being awarded an immense sum in damages, at the end of the day, as was seen in Part XII, the damages awarded to Claimants were reduced significantly by the Tribunal from the claims advanced by them.

1886. Finally, a factor which the Tribunal has considered particularly relevant in fixing the portion of their costs which Claimants should be awarded is the egregious nature of many measures of Respondent which the Tribunal has found were in breach of the ECT.

1887. Having scrutinized the costs for legal representation and assistance of Claimants and taking into consideration all the factors traversed above, the Tribunal, in the exercise of its discretion, considers that reimbursement by Respondent to Claimants of USD 60,000,000 as part of their costs would be fair and reasonable in the circumstances and it so orders.[2465] The Tribunal notes that USD 60,000,000 is approximately 75 percent of Claimants' grand total of costs for the jurisdiction and merits phases, namely USD 79,628,055.56 and GBP 1,066,462.10.

[2465] Claimants shall be paid this amount in proportion to their shareholdings (as to which see n.2424 above) as follows: EUR 47,946,190 (Hulley), EUR 2,214,277 (YUL) and EUR 9,839,533 (VPL). As per paragraphs 1690–92 above, post-award interest will be due on any outstanding amounts not paid in full within 180 days.

XIV. DECISION

1888. For the reasons set forth above, the Tribunal unanimously:

(a) DISMISSES the objections to jurisdiction and/or admissibility, based on Article 21 of the Energy Charter Treaty;

(b) DISMISSES the objections to jurisdiction and/or admissibility, pertaining to Respondent's contentions concerning "unclean hands" and "illegal and bad faith conduct";

(c) DISMISSES the renewed objections to jurisdiction and/or admissibility based on Article 26(3)(b)(i) of the Energy Charter Treaty;

(d) HOLDS that the present dispute is admissible and within the Tribunal's jurisdiction;

(e) DECLARES that Respondent has breached its obligations under Article 13(1) of the Energy Charter Treaty;

(f) ORDERS Respondent to pay to Claimant Veteran Petroleum Limited damages in the amount of USD 8,203,032,751;

(g) ORDERS Respondent to pay the amount of EUR 695,327 to Claimant Veteran Petroleum Limited as reimbursement for the costs of the arbitration;

(h) ORDERS Respondent to pay the amount of USD 9,839,533 to Claimant Veteran Petroleum Limited for a portion of the costs of its legal representation and assistance in the arbitration proceedings; and

(i) ORDERS Respondent to pay to Claimant Veteran Petroleum Limited, if within 180 days of the issuance of this Award Respondent fails to pay in full the amounts set forth in paragraphs (f), (g) and (h) above, post-award interest on any outstanding amount starting from 15 January 2015, compounded annually. Post-award interest shall be determined as the yield on 10-year U.S. treasury bonds as of 15 January 2015 and then the dates of compounding yearly thereafter.

Done at The Hague, this 18th day of July, 2014.

Dr. Charles Poncet
Co-arbitrator

Judge Stephen M. Schwebel
Co-arbitrator

The Hon. L. Yves Fortier PC CC OQ QC
Chairman

ANNEXES

A. ANNEX A1: APPENDIX 1.1, APPENDIX J.1 AND APPENDIX J.2 TO SECOND DOW REPORT (modified as described in note 2401 of the Award)

(a) Appendix 1.1

"Updated" Yukos 2007 DCF Error Correction	Corrected?
Upstream Capex Base Year	1
US Cost of Equity	1
Refining Capex Partial Year Error	1
Missing Opex	1
Transport Cost Error	1
Forecasts-Forwards Conflation Error	1
PPP & Inflation Related Errors	1

Enterprise Value		
Original	$	95,251,061,670
New	$	46,461,814,366
Diff.	$	48,789,247,303

Note:
Results obtained from the live (excel) version of Appendix 1 to Second Dow Report provided by Respondent together with its Rejoinder by switching the values in the "Corrected?" column on the first sheet of the Appendix (Appendix 1.1) from 0 to 1. The Annex shows the resulting figures for Appendix J.1 and Appendix J.2 to Second Dow Report.

(b) Appendix J.1 New

Notes and Sources	JD Notes	Calculation Logic	Component	2003	2004	2005	2006	2007 (thru 11/21)
1		[A]	Net Income		3,218,665,217	4,769,239,020	4,605,289,478	5,791,709,065
2		[B]	Tax-Adjusted Interest Payments		195,973,436	248,407,275	314,870,094	354,283,284
1		[C]	Depreciation		1,115,919,143	1,322,594,049	1,567,551,997	2,045,753,987
3		[D]	Working Current Assets	6,162,391,781	6,024,533,190	7,377,817,999	8,724,114,903	9,724,344,823
3		[E]	Working Current Liabilities	2,134,154,107	2,668,988,513	3,420,223,168	4,389,513,676	5,143,659,866
Calc.		[F] = D - E	Working Capital	4,028,237,674	3,355,544,677	3,957,594,831	4,334,601,227	4,580,684,958
Calc.		[G] = F_t - F_{t-1}	Change in Working Capital		(672,692,997)	602,050,154	377,006,395	246,083,731
4		[H]	Capital Expenditures		2,466,678,051	2,397,031,851	2,729,804,072	3,506,855,747
Calc.		**[I] = A + B + C - G - H**	**Free Cash Flow to the Firm**		**2,736,572,742**	**3,341,158,338**	**3,380,901,101**	**4,438,806,858**
2		[J] = -B	Tax-Adjusted Interest Payments		(195,973,436)	(248,407,275)	(314,870,094)	(354,283,284)
5		[K]	Change in Net Debt		659,445,111	944,541,730	1,209,587,786	1,765,630,302
6		[L]	20% of Sibneft Dividends		18,332,400	452,067,800	120,400,000	367,673,425
Calc.		**[M] = I + J + K + L**	**Free Cash Flow to Equity**		**3,218,376,817**	**4,489,360,593**	**4,396,018,793**	**6,217,827,301**
					5.079593664			

Kaczmarek Sources & Notes:

(1) See Appendix J.3 - Updated - Yukos Income Statement

(2) Interest expense from Appendix J.3 - Updated multiplied by (1-t), where t is equal to the tax rate, found in Appendix J.14 - Updated. Tax is deducted because FCFF should not include the tax benefits associated with interest deductions (however, the tax benefit is included in FCFE).

(3) Total current assets and total current liabilities from Appendix J.4 - Updated - Yukos Balance Sheet. To estimate current assets and liabilities as of November 21, 2007, we prorate the growth in current assets and liabilities using the portion of the year that has passed (324 of 365 days).

(4) See Appendix J.11 - Updated - Yukos Capital Expenditures

(5) Equal to the annual change in long-term debt plus short-term debt less cash from Appendix J.4 - Updated - Yukos Balance Sheet. To estimate Change in Net Debt through November 21, 2007, we prorated total annual Change in Net Debt using the portion of the year that has passed (324 of 365 days).

(6) 20 percent of Sibneft dividends paid in period as per Gazprom Neft 2008 Databook at "Consolidated Statement of Cash Flow" tab. **(NAV – 93)**

Note that 2007 dividends through November 21, 2007 are prorated using the portion of the year that has passed (324 of 365 days).

Sibneft Dividend Calculations:

[1]	Sibneft Dividend Percent of FCFE	0.570%	10.070%	2.739%	5.913%
[2]	3-year trailing average:			4.459%	6.241%
[3]	Original 2007 3-year trailing average				5.763%

JD Sources & Notes:

[1] I calculate the percent of Sibneft dividends out of the total Free Cash Flow to Equity

[2] I take a 3-year trailing average of the Sibneft dividend percentage

[3] I use the 3-year trailing average from 2007, from Mr. Kaczmarek's original Appendix J.1 - Updated, not accounting for any of my error corrections.

(c) Appendix J.2 New

Notes and Sources	JD Notes	Calculation Logic	Component	2007 (11/21)	2007 (11/21-12/31)	2008	2009	2010	2011	2012	2013	2014	2015
1		[A]	Net Income		1,361,133,090	7,455,550,093	6,427,501,357	6,006,613,697	5,045,829,975	4,384,146,086	3,708,280,652	3,070,944,832	2,334,065,782
2		[B]	Tax-Adjusted Interest Payments		44,832,144	479,741,072	531,331,847	571,246,674	605,797,716	629,784,929	651,057,050	669,451,288	684,150,862
1		[C]	Depreciation		258,876,276	2,704,730,012	3,104,829,762	3,504,929,511	3,905,029,260	4,305,129,010	4,705,228,759	5,105,328,509	5,505,428,258
3		[D]	Working Current Assets	9,724,344,823	9,850,917,128	12,177,374,651	12,589,339,638	13,407,409,267	13,369,206,217	13,408,627,169	13,531,800,418	13,703,949,405	13,851,885,035
3		[E]	Working Current Liabilities	5,143,659,866	5,239,091,945	6,978,529,152	7,314,488,967	7,856,248,155	7,923,070,306	8,013,305,077	8,146,948,549	8,301,151,669	8,440,844,708
Calc.		[F] = D - E	Working Capital	4,580,684,958	4,611,825,183	5,198,845,499	5,274,850,671	5,551,161,112	5,446,135,911	5,395,322,092	5,384,851,869	5,402,797,736	5,411,040,326
Calc.		[G] = F_t - F_{t-1}	Change in Working Capital		31,140,225	587,020,316	76,005,171	276,310,442	(105,025,201)	(50,813,819)	(10,470,224)	17,945,867	8,242,591
4		[H]	Capital Expenditures		443,768,783	4,431,646,288	4,875,675,642	5,328,869,547	5,477,680,110	5,630,784,296	5,788,308,596	5,950,383,281	6,117,142,509
Calc.		**[I] = A + B + C - G - H**	**Free Cash Flow to the Firm**		**1,189,932,502**	**5,621,354,572**	**5,111,982,153**	**4,477,609,893**	**4,184,002,043**	**3,739,089,547**	**3,286,728,089**	**2,877,395,481**	**2,398,259,802**
5		[J]	Present Value Factor		0.99	0.94	0.85	0.77	0.70	0.63	0.57	0.51	0.47
Calc.		**[K] = I x J**	**21 Nov 2007 Value of Cash Flows**		**1,183,236,882**	**5,288,134,152**	**4,349,283,009**	**3,445,414,267**	**2,911,749,015**	**2,353,394,696**	**1,870,938,602**	**1,481,365,313**	**1,116,672,182**
	[1]		Tax-Adjusted Interest Payments		(44,832,144)	(479,741,072)	(531,331,847)	(571,246,674)	(605,797,716)	(629,784,929)	(651,057,050)	(669,451,288)	(684,150,862)
	[2]		Change in Net Debt		223,428,526	1,218,705,221	567,399,775	656,429,909	457,761,231	400,500,967	330,547,803	260,836,833	178,168,714
	[3]		**20% of Sibneft Dividends**		83,698,156	388,992,116	314,850,715	279,056,857	246,836,495	214,656,963	181,411,623	150,988,716	115,730,221
	[4]		**Free Cash Flow to Equity**	6217827301	1,452,227,040	6,749,310,837	5,462,900,795	4,841,849,986	4,282,802,054	3,724,462,548	3,147,630,465	2,619,769,742	2,008,007,875
					7,670,054,341	6,749,310,837	5,462,900,795	4,841,849,986	4,282,802,054	3,724,462,548	3,147,630,465	2,619,769,742	2,008,007,875

Notes and Sources	JD Notes	Calculation Logic	Component	2007 (11/21)	2008 (11/21-12/31)	2009	2010
		Terminal Value Calculation:					
Calc.		[L] = I_{2015} x (1 + M)	Terminal Year FCFF	2,482,198,895			
6		[M]	Terminal Growth Rate	3.50%			
7		[N]	WACC	10.57%			
Calc.		[O] = L / (N - M)	Terminal Value as of 2015	35,114,161,268			
Calc.		[P] = J_{2015}	Present Value Factor	0.47			
Calc.		**[Q] = O x P**	**Terminal Value as of 11/21/2007**	**16,349,774,549**			
		Enterprise Value Summary:					
Calc.		[R] = ∑(K)	Sum of Discounted Cash Flows	24,000,188,118			
Calc.		[S] = Q	Discounted Terminal Value	16,349,774,549			
8		[T]	Value of 20% of Sibneft	6,111,851,700			
Calc.		**[U] = R + S + T**	**Enterprise Value as of 11/21/2007**	**46,461,814,366**			

Kaczmarek Sources & Notes:

(1) See Appendix J.3 - Updated - Yukos Income Statement

(2) Interest expense from Appendix J.3 - Updated multiplied by (1-t), where t is equal to the tax rate, found in Appendix J.14 - Updated. Tax is deducted because FCFF should not include the tax benefits associated with interest deductions (the benefit is captured through the use of after-tax cost of debt in the WACC).

(3) Total current assets and total current liabilities from Appendix J.4 - Updated - Yukos Balance Sheet. To estimate current assets and liabilities as of November 21, 2007, we prorate the growth in current assets and liabilities using the portion of the year that has passed (324 of 365 days).

(4) See Appendix J.11 - Updated - Yukos Capital Expenditures

(5) Present value factor calculated as 1 / (1+WACC)^t, where t = number of years from 11/21/2007 to cash flow date. We assume mid-year (June 30) cash flows in our DCF valuation.

(6) Terminal growth rate represents the perpetual growth rate for Yukos FCFF. Our estimate of 3.5% is based on analyst estimates for Yukos and Rosneft (which is comprised primarily of former Yukos assets). See HSBC. *Yukos: A potential alignment of interests* at p. 19. 25 May 2004. **(NAV – 401)**; Erste Bank. *Company Report: Yukos* at p. 9. 26 January 2004. **(NAV – 412)**; Smith Barney. *Yukos: A binary issue* at p. 3. 28 April 2004. **(NAV – 173)**; Credit Suisse. *Yukos: Increasing Concerns* at p. 18. 21 December 2004. **(NAV – 402)**; Brunswick UBS Warburg. *Yukos: The "GEM supermajor"* at p. 12. 10 April 2003. **(NAV – 398)**; Morgan Stanley. *Rosneft: All Access* at p. 31. 29 August 2006. **(NAV – 272)**; ABN Amro. *Rosneft: Outcome of Yukos auctions* at p. 18. 5 September 2007. **(NAV – 262)**; HSBC. *Rosneft OAO* at p. 8. 7 December 2007. **(NAV – 273)**; Deutsche UFG. *Rosneft: Blue-Sky's down to Earth* at p. 4. 11 July 2007. **(NAV – 259)**

(7) See Appendix J.15 - Updated - Yukos WACC Calculation

(8) Based on 20% of Sibneft adjusted market capitalization as of 21 November 2007. See Appendix F.4 - Updated.

JD Sources & Notes:

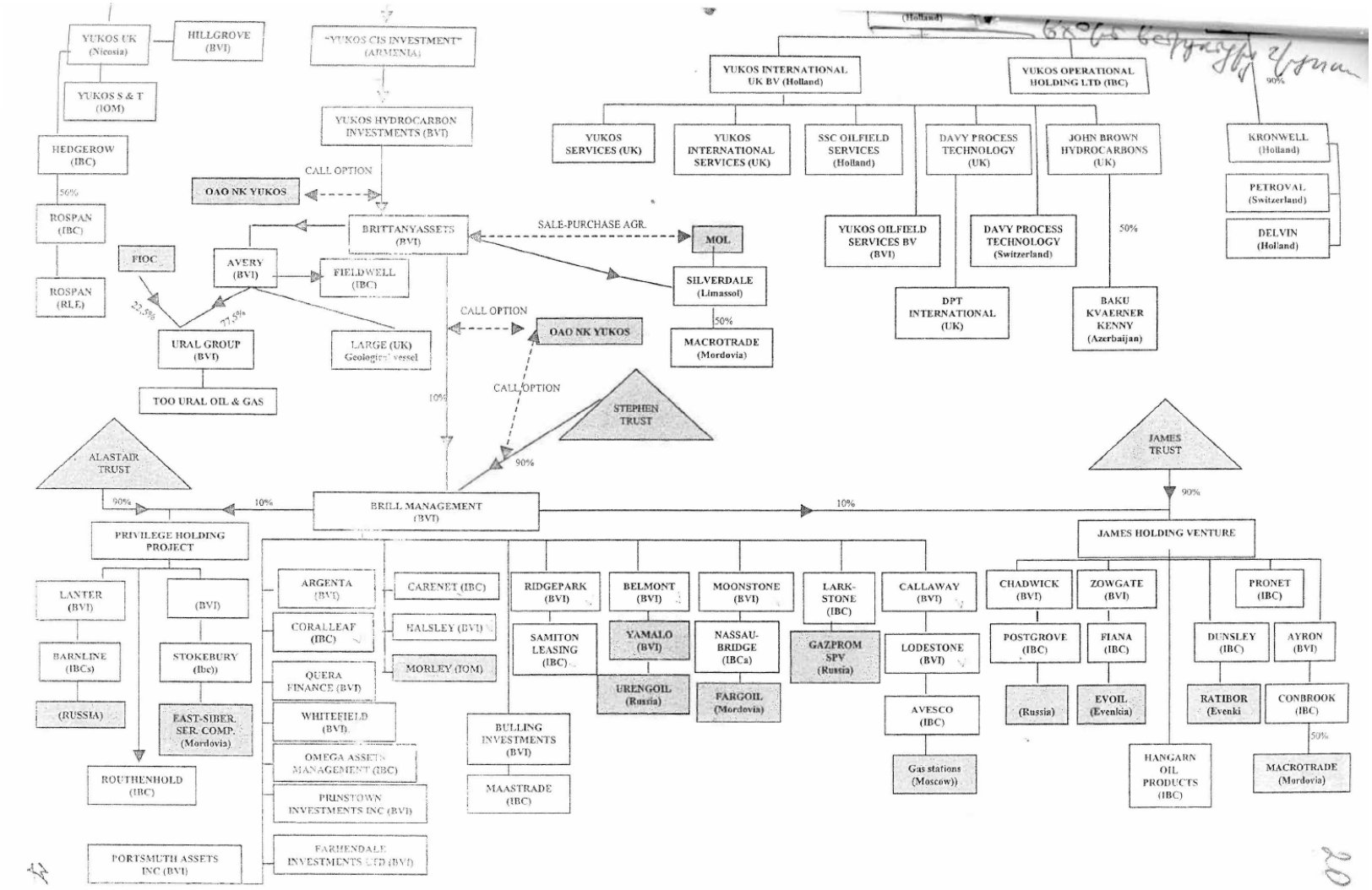
[1] I copy tax-adjusted interest payments from above

[2] I calculate Change in Net Debt using Mr. Kaczmarek's method from his Appendix J.1 - Updated

[3] I infer Sibneft dividends as the difference between FCFE and the non-dividend components of FCFE.

[4] I calculate Free Cash Flow to Equity using Mr. Kaczmarek's method from his Appendix J.1 - Updated. I adjust by a percentage factor to account for Sibneft dividends, equal to the percent of those dividends out of FCFE for the prior 3 years. See Appendix J.1

B. ANNEX A2: YUKOS COMPANY STRUCTURE
(extract from Exh. R-3165, referred to in note 2413 of the Award)



C. TABLES T1–T9 SHOWING THE TRIBUNAL'S DAMAGES CALCULATIONS

1. Table T1: Calculation of Total Damages of Claimants as of 19 December 2004 (Date of Expropriation) vs. 30 June 2014 (Date of Award for Valuation Purposes)

19 December 2004

Damages component	Amount *(in USD)*
Yukos Equity Value	21,175,832,823
Dividends to end of 2004	2,417,808,219
Sum of Equity Value and Dividends	*23,593,641,042*
Interest through 30 June 2014	7,596,090,702
Total	**31,189,731,744**

	Outstanding Shares	% of Outstanding Shares	Damages *(in USD)*
Yukos Total	1,934,964,578	100.00	**31,189,731,744**
Claimant Hulley	1,090,043,968	56.33405	17,570,439,964
Claimant YUL	50,340,995	2.60165	811,447,480
Claimant VPL	223,699,175	11.56089	3,605,811,362
Claimants Total	1,364,084,138	70.49659	**21,987,698,805**

30 June 2014

Damages component	Amount *(in USD)*
Yukos Equity Value	42,625,343,615
Dividends and interest (through 30 June 2014)	51,981,340,000
Total	**94,606,683,615**

	Outstanding Shares	% of Outstanding Shares	Damages *(in USD)*
Yukos Total	1,934,964,578	100.00	**94,606,683,615**
Claimant Hulley	1,090,043,968	56.33405	53,295,779,147
Claimant YUL	50,340,995	2.60165	2,461,334,249
Claimant VPL	223,699,175	11.56089	10,937,377,001
Claimants Total	1,364,084,138	70.49659	**66,694,490,398**

Damages After 25% Reduction	
Claimant Hulley	39,971,834,360
Claimant YUL	1,846,000,687
Claimant VPL	8,203,032,751
Claimants Total	**50,020,867,798**

Note: Claimants' shareholdings and total number of Outstanding Shares taken from Appendix C.5.b to First Kaczmarek Report

2. Table T2: Equity Value of Yukos Based on Adjustments Made by Professor Dow to Mr. Kaczmarek's Comparable Companies Calculations and the Evolution of the RTS Oil & Gas Index

Valuation Date	RTS Oil & Gas Index	Ratio between RTS Index at given date and 21 November 2007	Value of Yukos *(in USD)*
19 December 2004	92.85	0.346713966	21,175,832,823
21 November 2007	267.8	1	61,075,800,000
30 June 2014	186.90*	0.697908887	42,625,343,615

* RTS Oil & Gas Index value corresponding to average of values over first 5 months in 2014, *see* **Table T8**

3. Table T3: Calculation of Dividends and Interest up to Valuation Date for Valuation as of 30 June 2014

Year	*Kaczmarek FCFtE figure*	*Dow-adjusted Kaczmarek FCFtE figure*	*Tribunal's FCFtE figure*	*Interest to 30 June 2014*	**Total**
2004	3,645,331,570	3,218,376,817	2,500,000,000	804,887,500	3,304,887,500
2005	4,796,449,237	4,489,360,593	3,500,000,000	1,008,227,500	4,508,227,500
2006	4,676,741,445	4,396,018,793	3,500,000,000	889,612,500	4,389,612,500
2007	8,484,005,345	7,670,054,341	6,000,000,000	1,321,710,000	7,321,710,000
2008	7,818,745,258	6,749,310,837	6,000,000,000	1,118,370,000	7,118,370,000
2009	7,642,393,629	5,462,900,795	5,000,000,000	762,525,000	5,762,525,000
2010	4,254,461,116	4,841,849,986	3,500,000,000	415,152,500	3,915,152,500
2011	6,285,189,113	4,282,802,054	4,000,000,000	338,900,000	4,338,900,000
2012	8,395,083,921	3,724,462,548	5,000,000,000	254,175,000	5,254,175,000
2013	7,627,873,208	3,147,630,465	4,000,000,000	67,780,000	4,067,780,000
2014 *(to 30 June)*	3,586,359,907	1,309,884,871	2,000,000,000	0	2,000,000,000
Sum	67,212,633,749	49,292,652,101	45,000,000,000	6,981,340,000	**51,981,340,000**

Notes:
- Kaczmarek figures for 2004 to 2011 taken from Second Kaczmarek Report, Appendix AJ.1.
- Kaczmarek figures for 2012 to 2014 calculated as follows:
Free cash flow to equity (FCFTE) = Free cash flow to the firm - Tax-adjusted interest payments + Change in net debt + 20% of Sibneft dividends, see Appendix AJ.1 to Second Kaczmarek Report.
- Dow-adjusted Kaczmarek figures calculated with excel version of Appendix 1 to Second Dow Report (taking into account all of Dow's corrections).
- Interest has been applied in line with the factors stated in Table T7.

4. Table T4: FCFtE for Years 2012–2014
(Based on Mr. Kaczmarek's Figures)

	Free cash flow to the firm	*Total adjustment as calculated in Table T5*	*Adjusted result*
2012	8,650,212,831	-255,128,910	8,395,083,921
2013	7,838,948,724	-211,075,516	7,627,873,208
2014	7,330,053,779	-157,333,965	7,172,719,814

Notes:
- Free cash flow to the firm figures taken from Appendix AJ.2 to Second Kaczmarek Report.
- Total adjustment calculated in Table T5.

5. Table T5: Total Adjustment of Free Cash Flow to the Firm (Required to Obtain FCFtE value for Years 2012–2014 for Mr. Kaczmarek)

	Tax-adjusted interest payments (subtracted)	*Change in net debt*	*20% of Sibneft dividends*	***Total adjustment***
2012	-381,230,527	-19,498,383	145,600,000	-255,128,910
2013	-375,218,163	18,542,647	145,600,000	-211,075,516
2014	-373,949,497	71,015,532	145,600,000	-157,333,965

Notes:
- Total adjustment formula taken from Appendix AJ.1 to Second Kaczmarek Report.
- Figures for tax-adjusted interest payments taken from Appendix AJ.2 to Second Kaczmarek Report.
- Change in net debt calculated in Table T6.
- For Sibneft dividends for years 2012 to 2014, it has been assumed that these were equal to the dividends paid in 2010, the last year for which Claimants have provided annual figures (the 2011 figures were based on annualized third quarter figures, see note (6) to Appendix AJ.1 to the Second Kaczmarek Report).

6. Table T6: Change in Net Debt for Years 2012–2014

	Change in net debt		
	2012	**2013**	**2014**
Long-term debt Y	7,000,000,000	6,965,681,451	6,952,780,045
Short-term debt Y	597,731,821	594,801,351	593,699,697
Long-term debt Y-1	7,189,462,610	7,000,000,000	6,965,681,451
Short-term debt Y-1	613,910,083	597,731,821	594,801,351
Difference between Sum of Long-term and Short-term debt for Y and Y-1	-205,640,872	-37,249,019	-14,003,060
Cash Y	2,468,733,701	2,412,942,035	2,327,923,443
Cash Y-1	2,654,876,190	2,468,733,701	2,412,942,035
Difference Cash Y and Cash Y-1	-186,142,489	-55,791,666	-85,018,592
Difference 1 minus Difference 2	-19,498,383	18,542,647	71,015,532

Note:
- Formula for change in net debt (as change in long-term debt plus short-term debt, less cash) taken from note (5) to Appendix AJ.1 to Second Kaczmarek Report and Appendix AJ.4 to Second Kaczmarek Report.

7. Table T7: Interest Factors Based on Annual Rate of 3.389 percent (see Table T9)

	Interest Factors
0.5Y	0.01695
1Y	0.03389
1.5Y	0.05084
2.5Y	0.08473
3.5Y	0.11862
4.5Y	0.15251
5.5Y	0.18640
6.5Y	0.22029
7.5Y	0.25418
8.5Y	0.28807
9.5Y	0.32196

8. Table T8: RTS Oil and Gas Index Values from 1 January to 24 June 2014

Date	Value
24.06.2014	212.32
23.06.2014	204.45
20.06.2014	202.34
19.06.2014	204.35
18.06.2014	204.70
17.06.2014	201.10
16.06.2014	202.16
11.06.2014	201.74
10.06.2014	200.20
09.06.2014	198.74
06.06.2014	198.02
05.06.2014	193.64
04.06.2014	191.37
03.06.2014	191.84
02.06.2014	192.09
30.05.2014	187.51
29.05.2014	191.62
28.05.2014	190.06
27.05.2014	190.95
26.05.2014	197.69
23.05.2014	196.70
22.05.2014	195.66
21.05.2014	196.28
20.05.2014	193.19
19.05.2014	191.71
16.05.2014	188.03
15.05.2014	186.38
14.05.2014	187.74
13.05.2014	186.26
12.05.2014	184.38
08.05.2014	184.14
07.05.2014	184.98
06.05.2014	177.49
05.05.2014	173.50
02.05.2014	174.25
30.04.2014	175.39
29.04.2014	175.77
28.04.2014	173.16
25.04.2014	170.99
24.04.2014	173.90
23.04.2014	176.68

Date	Value
22.04.2014	177.43
21.04.2014	178.37
18.04.2014	179.98
17.04.2014	175.73
16.04.2014	173.51
15.04.2014	172.15
14.04.2014	176.96
11.04.2014	179.60
10.04.2014	181.58
09.04.2014	177.85
08.04.2014	177.96
07.04.2014	176.97
04.04.2014	181.85
03.04.2014	178.37
02.04.2014	179.82
01.04.2014	181.96
31.03.2014	181.08
28.03.2014	175.42
27.03.2014	175.17
26.03.2014	177.70
25.03.2014	172.92
24.03.2014	167.71
21.03.2014	169.63
20.03.2014	172.14
19.03.2014	172.44
18.03.2014	172.97
17.03.2014	168.16
14.03.2014	162.30
13.03.2014	165.81
12.03.2014	168.25
11.03.2014	171.47
07.03.2014	174.78
06.03.2014	175.04
05.03.2014	177.77
04.03.2014	178.02
03.03.2014	169.50
28.02.2014	186.96
27.02.2014	186.38
26.02.2014	189.54
25.02.2014	191.17
24.02.2014	192.46
21.02.2014	191.80
20.02.2014	190.39
19.02.2014	190.63

	Date	Value
	18.02.2014	195.14
	17.02.2014	195.39
	14.02.2014	195.31
	13.02.2014	192.39
	12.02.2014	196.54
	11.02.2014	194.62
	10.02.2014	193.61
	07.02.2014	193.33
	06.02.2014	191.41
	05.02.2014	189.33
	04.02.2014	186.14
	03.02.2014	186.13
	31.01.2014	188.71
	30.01.2014	192.36
	29.01.2014	189.39
	28.01.2014	192.63
	27.01.2014	195.94
	24.01.2014	196.68
	23.01.2014	199.51
	22.01.2014	200.07
	21.01.2014	200.13
	20.01.2014	199.53
	17.01.2014	199.45
	16.01.2014	199.19
	15.01.2014	200.58
	14.01.2014	199.51
	13.01.2014	200.84
	10.01.2014	199.89
	09.01.2014	198.47
	08.01.2014	198.14
	06.01.2014	198.55
Sum		21680.08
Average		186.90

9. Table T9: 10-Year U.S. Sovereign Bond Rate 2005–2014

Date	Value
2005-01	4.22
2005-02	4.17
2005-03	4.50
2005-04	4.34
2005-05	4.14
2005-06	4.00
2005-07	4.18
2005-08	4.26
2005-09	4.20
2005-10	4.46
2005-11	4.54
2005-12	4.47
2006-01	4.42
2006-02	4.57
2006-03	4.72
2006-04	4.99
2006-05	5.11
2006-06	5.11
2006-07	5.09
2006-08	4.88
2006-09	4.72
2006-10	4.73
2006-11	4.60
2006-12	4.56
2007-01	4.76
2007-02	4.72
2007-03	4.56
2007-04	4.69
2007-05	4.75
2007-06	5.10
2007-07	5.00
2007-08	4.67
2007-09	4.52
2007-10	4.53
2007-11	4.15
2007-12	4.10
2008-01	3.74
2008-02	3.74
2008-03	3.51
2008-04	3.68
2008-05	3.88

Date	Value
2008-06	4.10
2008-07	4.01
2008-08	3.89
2008-09	3.69
2008-10	3.81
2008-11	3.53
2008-12	2.42
2009-01	2.52
2009-02	2.87
2009-03	2.82
2009-04	2.93
2009-05	3.29
2009-06	3.72
2009-07	3.56
2009-08	3.59
2009-09	3.40
2009-10	3.39
2009-11	3.40
2009-12	3.59
2010-01	3.73
2010-02	3.69
2010-03	3.73
2010-04	3.85
2010-05	3.42
2010-06	3.20
2010-07	3.01
2010-08	2.70
2010-09	2.65
2010-10	2.54
2010-11	2.76
2010-12	3.29
2011-01	3.39
2011-02	3.58
2011-03	3.41
2011-04	3.46
2011-05	3.17
2011-06	3.00
2011-07	3.00
2011-08	2.30
2011-09	1.98
2011-10	2.15
2011-11	2.01
2011-12	1.98
2012-01	1.97

	Date	Value
	2012-02	1.97
	2012-03	2.17
	2012-04	2.05
	2012-05	1.80
	2012-06	1.62
	2012-07	1.53
	2012-08	1.68
	2012-09	1.72
	2012-10	1.75
	2012-11	1.65
	2012-12	1.72
	2013-01	1.91
	2013-02	1.98
	2013-03	1.96
	2013-04	1.76
	2013-05	1.93
	2013-06	2.30
	2013-07	2.58
	2013-08	2.74
	2013-09	2.81
	2013-10	2.62
	2013-11	2.72
	2013-12	2.90
	2014-01	2.86
	2014-02	2.71
	2014-03	2.72
	2014-04	2.71
	2014-05	2.56
Sum		383.01
Average		**3.389**

Note:
- Ten-year US treasury constant maturities, according to *http://www.federalreserve.gov/releases/h15/data.htm*