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The Hague District Court
Hearing dated 9 February 2016
Cause-list numbers: 477160 2015/1
477162 2015/2; 481619 2015/112

PLEADING NOTES PROF. A.J. VAN DEN BERG

in the matter of:

the **Russian Federation**,
at Moscow
claimant
counsel: Prof. A.J. van den Berg

versus:

Hulley Enterprises Limited,
with its place of establishment at Nicosia, Cyprus,
defendant (cause-list no. 481619 2015/112);
Veteran Petroleum Limited,
with its place of establishment at Nicosia, Cyprus,
defendant (cause-list no. 477160 2015/1);
Yukos Universal Limited,
with its place of establishment at Douglas, Isle of Man,
defendant (cause-list no. 477162 2015/2);
counsel: Mr M.A. Leijten
hereinafter jointly: HVY

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DISTINGUISHED MEMBERS OF THE DISTRICT COURT,

I. INTRODUCTION

1. The former shareholders of Yukos have sought to turn this case into a political debate. However, there is no room for politics in proceedings to set aside an arbitral award. The question that is before this Court is whether the Yukos Awards must be set aside on the grounds provided by Article 1065 (1) DCCP.

2. In the Yukos cases, the jurisdiction of the arbitrators proves to be a tricky issue.[1] Arbitrators in Yukos cases prove to be eager – too eager – as follows from two parallel Yukos arbitrations in which arbitral awards of likewise eminent arbitrators have meanwhile been set aside by your colleagues in Sweden due to a lack of that jurisdiction.[2]

3. Jurisdiction, which is subject to this Court's comprehensive review, lacks in this case as well. The chairman in the present case, Fortier, has also seen his arbitral awards set aside.[3]

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1 See the overview article 'Swedish court rules Paulsson tribunal should not have heard Yukos claims...', *Global Arbitration Review*, 22 January 2016 (**Exhibit RF-223**).

2 The Russian Federation has introduced the most recent ruling of the Svea Court of Appeal of 18 January 2016 on Quasar de Valores SICAV S.A., et al. v. The Russian Federation prior to this hearing as an exhibit (**Exhibit RF-218**). The arbitral award in the case *RosInvestCo UK Ltd. v. The Russian Federation* was set aside on 5 September 2013, also by the Svea Court of Appeal, see **Exhibit RF-76**. The arbitrators were: Prof. Böckstiegel, Lord Steyn and Sir Berman (in *RosInvestCo UK Ltd. v. The Russian Federation*), and, respectively, Judge Brower, Landau QC and Prof. Paulsson (in *Quasar de Valores SICAV S.A., et al. v. The Russian Federation*).

3 See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015 (**Exhibit RF-219**) ¶ 210 ("is untenable the Tribunal's conclusion […]") and *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Phillippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010 (**Exhibit RF-220)**; violation of the right of both parties to be heard. See for a critical discussion of awards rendered by Fortier: F. Mulder, E. Schrtam & A. Homolova, *'Grote David tegen kleine Goliath; ISDS. Investeerders dagen overheden'*, De Groene Amsterdammer, 25 November 2015, week 48 (**Exhibit RF-221**).

4. This is a case between Russians: a Russian tax dispute between Russian Oligarchs and the Russian Federation concerning Russian tax assessments against a Russian company (Yukos) that the Russian Oligarchs controlled. That is not what the ECT was written for.

5. This Court cannot assume that the large number of pages of the Awards implies that the Tribunal must have properly assessed the case. Such an assumption is incorrect. The Tribunal has, *inter alia*, seriously violated essential ECT rules regarding its jurisdiction and mandate.

6. 90 Minutes is too short to discuss all grounds for setting aside. Each ground discussed in the Writ and in the Reply is fully upheld and in itself warrants the complete setting aside of the Yukos Awards. The Court has an *embarras du choix*.

II. A STATE'S CONSENT TO ARBITRATION

7. Prior to the discussion of ground (a) of Article 1065 (1) DCCP (the lack of a valid arbitration agreement), I would like to bring to your attention the basic rule for a State to be bound by an arbitration agreement**: the consent of a State to arbitration must be "clear and unambiguous" and therefore may not be assumed**.[4]

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[4] The International Court of Justice held in *Bosnia-Herzegovina v Yugoslavia*, ICJ Order of 13 September 1993 (R-199), ¶ 34 (http://www.icj-cij.org/docket/files/91/7311.pdf) that there must be an "*unequivocal indication*" of a "*voluntary and indisputable*" consent. See also the NAFTA case *Fireman's Fund v. Mexico*, ICSID Case No. ARB(AF)/02/01, Decision on the preliminary question, 17 July 2003, ¶ 64 (http://www.italaw.com/sites/default/files/case-documents/ita0330_0.pdf) "*[a claimant] is not entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement.*" See also *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 198 (RME-1007; **Exhibit RF-03.2.C-2.1007**) ("an agreement [to arbitrate] should be clear and unambiguous."); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 175 (**Exhibit RF-81**) ("*it is not possible to presume that consent has been given by a state. Rather, the existence of consent must be established. (…) What is not permissible is to presume a state's consent by reason of the state's failure to proactively disavow the tribunal's jurisdiction. Non-consent is the default rule; consent is the exception.*"); *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014, ¶ 117 (**Exhibit RF-73**) "*Consent always is the essential condition precedent to arbitration and, indeed, to any form of consensual adjudication".*

8. In the recent case *Ecuador v. Chevron*, this Court confirmed the fundamental character of the sovereignty of a State that is a party to an investment treaty:

> "Although this sovereignty can be surrendered in a specific type of case, for example in a BIT, the answer to the question whether sovereignty has also been surrendered in the case at hand is of a fundamental character and must therefore not only be fully reviewed by the arbitrators, but also by the court in the framework of assessing the question whether a valid arbitration agreement is lacking."[5]

III. JURISDICTION GROUND 1 – ARTICLE 45 ECT

HEL Interim Award: Section VIII.A; Writ, Section IV.C, ¶ 113 et seq.; Statement of Defence, Part I, Section 3.2.2, Part II Section 2.1, ¶ II.49 et seq.; Reply, Section III.C, ¶ 42 et seq.; Rejoinder, Section 2.2, ¶ 20 et seq. Principal exhibits Russian Federation: RF-27, 32, 33, 34, 38, 50, 101, 113, 134; Exhibits C-924, R-352, R-365, R-843, R-866 and expert reports of Kostin (RF-03.1.C-1.1.3), Sukhanov (-1.1.5), Pellet (-1.3.9), Nolte (-1.3.7), Koskenniemi (-1.3.4) and the witness statement of Fremantle (-1.3.3).

1. Introduction

9. The question at hand is whether the provisional application of the ECT under Article 45 creates the Tribunal's jurisdiction to rule on HVY's claims.

10. The negative answer to that question follows from a number of provisions in Part VIII (Final Provisions) of the ECT.

2. The Text Of The ECT

11. In accordance with Article 38 ECT[6] ("Signing") the Russian Federation signed the ECT on 17 December 1994. However, the signature did not express the Russian Federation's consent to be bound by the ECT.[7] To achieve that, the

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5 Emphasis added. The Hague District Court dated 20 January 2016, ECLI:NL:RBDHA:2016:385 (Ecuador / Chevron), ground 4.4. See also A-G Spier in his Opinion, no. 11.13.2, preceding Supreme Court 26 September 2014, NJ 2015/318 (Ecuador/Chevron and Texaco), in which he pleads "*in case of doubt to choose an interpretation […] in which the arbitrators' jurisdiction is limited*"

6 "*This Treaty shall be open for signature at Lisbon from 17 December 1994 to 16 June 1995 by the states and Regional Economic Integration Organizations which have signed the Charter.*"

7 In Rejoinder, footnote 134, HVY wrongly assert that it is allegedly undisputed that the Russian representative Davydov, by his signing pursuant to Article 7(1) and Article 12(1)(a) WVV, allegedly expressed the Russian Federation's consent to be bound by the Treaty. That is incorrect, see Reply, ¶¶ 53, 138.

ECT should be ratified, accepted or approved. This results from Article 39 ECT ("Ratification, acceptance or approval"):

> "This Treaty shall be subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Depositary."[8]

12. The Russian Federation never ratified, accepted or approved the ECT.[9] The government did submit a proposal for approval to the Russian Parliament (the Duma) in 1996, but the Duma never accepted that proposal.[10] The ECT therefore never entered into force for the Russian Federation (see Article 44 ECT).

13. The Russian Federation is therefore (undisputedly) not a Contracting Party, but only a Signatory.[11]

14. For this reason the Russian Federation could not be bound by the arbitration clause of Article 26 ECT for "*Disputes between a Contracting Party and an Investor*", because it is (merely) a "*signatory*" and not a "*Contracting Party*". I also refer to the definition of "*Contracting Party*" in Article 1(2) ECT, that clarifies this difference:

> ""Contracting Party" means a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force."[12]

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8 *"The consent of a State to be bound by a treaty is expressed by ratification when: a) the treaty provides for such consent to be expressed through ratification;"*

9 Writ, ¶ 117, undisputed by HVY.

10 The Explanatory Memorandum (C-143, with a correct translation of one of the sentences in **Exhibit RF-66**) in which the Russian government recommends the proposal for ratification is wrongly construed by the Tribunal and HVY as a position taken by the Russian Federation vis-à-vis being bound to the ECT, or as a position taken regarding the question whether the ECT for the purpose of Article 45 ECT is in violation of Russian law (see Interim Awards, ¶¶ 345, 374-375, SoD, ¶¶ II.202-204 and Rejoinder, ¶¶ 83-88). Wrongly so, see *inter alia* Reply, ¶¶ 117-128.

11 In 55 paragraphs of their Statement of Defence, HVY have mixed up the terms of Contracting State and Signatory at least 123 times (see Reply, ¶ 48). They appear to admit this was wrong, Rejoinder, footnote 34.

12 Emphasis added.

The requirements of this definition have not been met, also because the ECT has not entered into force for the Russian Federation pursuant to Article 44(2) ("Entry into force").

15. However, the Tribunal was of the opinion that the arbitration clause did apply to the Russian Federation and that it could therefore decide on HVY's claims. It based its decision on Article 45(1) ECT ("Provisional application"):

> "1. Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."[13]

16. The final passage hereof is crucial: *"to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."* As was also elaborately explained in the expert reports that have not been seriously contested[14], arbitration under Article 26 ECT of a dispute such as the present one was and is in conflict with Russian law. Russian legislation does not allow for the arbitration of public-law disputes.[15] These arbitrations in fact concern a public law dispute.

17. It is no different in the Netherlands. In the Netherlands, too, most administrative disputes, including tax disputes, are not arbitrable.[16]

18. Of course, also in the Russian Federation the legislator can enact a new, specific law to make an exception to a previously enacted general law.[17] For

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

14 Writ, ¶¶ 191-244, Reply, Section III.C under d, ¶¶ 111-185. See, *inter alia*, the expert reports of Asoskov (**Exhibits RF-50 and RF-203**), Kostin (**Exhibit RF-03.1.C-1.1.3**) and Sukhanov (**Exhibit RF-03.1.C-1.1.5**).

15 See Writ, ¶¶ 205-240, and Reply, ¶¶ 150-174. The same applies for other jurisdictions, see Writ, ¶¶ 190, 209.

16 See, *inter alia*, Article 1020(3) DCCP; M. Scheltema, 'Toepassing in de Algemene wet bestuursrecht', in: I.C. van der Vlies & S. Pront-Van Bommel (red.), Van toetsing naar bemiddeling, Deventer: Kluwer 1997, p. 75; Kluwer 80, p. 76, H.J. Snijders 2013, Article 1020 DCCP, annotation 5a. K.J. de Graaf, *Schikken in het bestuursrecht* (diss.) Groningen 2004, p. 27.

example, the Russian Parliament (Duma) has accepted bilateral investment treaties (BITs) with arbitration clauses.[18] Without such a treaty ratified or approved by the Duma as is the case with the ECT, however, one falls back on default rules of Russian law. Those rules do not allow arbitration about a dispute such as the present one.[19]

3. The Tribunal's Interpretation Is Incorrect And Is Widely Rejected

19. In the Interim Awards, the Tribunal wrongly reasoned as follows. First, it rightly rejected HVY's assertion that a declaration pursuant to Article 45(2) ECT[20] is required for a Signatory that does not wish to provisionally apply the Treaty pursuant to Article 45(1) ECT.[21] The Tribunal then reviewed the meaning of the final passage of paragraph 1: *"to the extent that such provisional application is not inconsistent with its constitution, laws or regulations"* (referred to as *"Limitation Clause"*).[22] The Tribunal arrived at the untenable conclusion that the Limitation Clause relates to the application of the entire Treaty ("all or nothing"), and not to specific parts thereof.[23] That is why the Tribunal was of the opinion that it only had to ascertain whether the

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17 Reply, ¶¶ 163. et seq.

18 See Writ, ¶ 203, Reply, ¶¶ 175 et seq.

19 See also the expert reports mentioned in footnote 13. Contrary to what HVY argue, these Russian rules of law do not pertain only to national disputes (see SoD, ¶ II.254 and the refutation thereof in Reply, ¶ 154).

20 Interim Awards, ¶¶ 260-269, see in this context Reply, ¶¶ 189-219. Article 45(2) ECT provides:

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

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

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

21 Interim Awards, ¶¶ 282-289.

22 Interim Awards, ¶¶ 301-329.

23 The Tribunal does not even consider it necessary to consult the history (*travaux préparatoires*) of the ECT in accordance with the contents of Article 32 Vienna Convention on the Law of Treaties. Interim Awards, ¶ 328.

principle of provisional application of treaties as such is contrary to Russian law.[24]

20. The interpretation of the Tribunal is apparently that the words "*to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*" should be read as "*if provisional application is not inconsistent with its constitution, laws or regulations*". However, this is not what the text states nor how it was intended. This removes the foundation from the Tribunal's reasoning.[25]

21. Please note that the issue at stake is the provisional application, without Parliamentary approval, of a treaty clause that is inconsistent with existing national law.

22. There is only one reasonable interpretation of the closing passage of Article 45(1) ECT. If provisional application of a treaty clause is inconsistent with the applicable law of the signatory at the time of signing without prior approval by parliament, then that provision must not (and cannot) be provisionally applied in that State. This also applies in respect of Article 26 ECT: arbitration about tax disputes in Russia, like in the Netherlands, requires a 'specific' statutory basis and therefore cannot be applied 'provisionally'.[26]

23. This interpretation of Article 45 ECT is also expressly endorsed by the United Kingdom[27], Japan[28], Finland,[29] as well as the European Union and each of the

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24 Interim Awards, ¶¶ 330-345.

25 Writ, ¶¶ 137-142, Reply, ¶ 68.

26 The Russian Federation has argued that arbitration of *this dispute* (and not of a treaty provision in abstract terms) is in violation of Russian law. HVY try to cause confusion about this. See HVY's incorrect interpretation of Article 45 ECT and the arguments of the Russian Federation in, inter alia, SoD, ¶ II.198, Rejoinder, ¶¶ 79-81, 94, 116 and 123. See also Reply, ¶¶ 162 (and ¶¶ 111, 150, 157).

27 Writ, ¶177, and Reply, ¶107.

28 Writ, ¶172.

29 Writ, ¶160, and Reply, ¶ 85.

then twelve member states.[30] Their joint statement provides: "*Article 45(1) (…) does not create any commitment beyond what is compatible with the existing internal legal order of the Signatories.*"[31]

24. Article 45 ECT was in fact included to prevent that governments act contrary to their own legislation by signing the treaty.[32] For example, also in the Netherlands the government[33] may not bind the Netherlands to any treaties "*without the prior approval of the States-General*" (Article 91 Constitution).[34] A government's power to provisionally apply treaties is of course also limited by the primacy of Parliament. For the Netherlands this is provided in Article 15(2) of the Kingdom Act Approval and Publication of Treaties, which entered into effect in 1994:

> "With reference to a treaty that requires the approval of the States-General for its entry into force, provisional application is not justified in regard to clauses of that treaty that differ from the law or that necessitate such departures from the law."[35]

25. The Tribunal's ruling therefore diametrically opposes any reasonable interpretation of the closing passage of Article 45(1) ECT and what the negotiating States envisaged with it. That ruling moreover leads to the absurd conclusion that the governments of, *inter alia*, the Netherlands, France,

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30 See *Parliamentary Papers II*, 1995/96 24 545 (R 1560) no. 3, p. 18 for the exact delegation of authority between the Community and the member states.

31 "A" Item Note from the Permanent Representatives Committee to the Council of the European Union, (14 December 1994), Doc. 12165/94 Annex I (R-352 **Exhibit RF-03.2.B-2.352**). See also Writ, ¶¶ 161 et seq., and Reply, ¶¶ 86 et seq.

32 See Article 32 Vienna Convention on the Law of Treaties ("Supplementary means of interpretation"), which the Tribunal refused to apply (Interim Awards, ¶ 328). See about the intent Reply, ¶ 97. See also Writ, ¶¶ 145 and 171, with reference to exhibits, including **Exhibit RF-113** and C-924 (**Exhibit RF-03.2.C-2.294**).

33 See Writ, ¶ 62 about the role of the then Prime Minister Ruud Lubbers in the ECT negotiations.

34 This also holds for (amendments to) the ECT. See Parliamentary Papers II, 1995/96, 24 545 (R 1560) no. 3, "amendments of the Treaty itself [will] *always require the approval of the States General."* The Dutch Senate (*Eerste Kamer*) passed the proposal for a Kingdom Act through which the ECT was approved on 14 May 1996 (*Parliamentary Papers I*, 1995/96, no. 31, p. 1522, 24545, R 1560).

35 Emphasis added.

Finland, Germany, Japan, the United Kingdom[36], and the Russian Federation by signing the ECT, acted in plain violation of their own legislation by assuming a treaty obligation in violation thereof, without the approval of their respective Parliaments.[37]

26. In short: due to the lack of a valid arbitration agreement the Yukos Awards must be set aside (Article 1065(1)(a) DCCP).

IV. JURISDICTION GROUND 2 – MALA FIDE INVESTMENTS AND DOMESTIC INVESTMENTS ARE NOT PROTECTED

HEL Interim Award, Section VIII.B paragraphs 411-434; Writ, Section IV.D, ¶ 248 et seq.; Statement of Defence, Part I, Section 3.2.3, Part II Section 2.2, ¶II.314 et seq.; Reply, Section III.D, ¶ 220 et seq.; Rejoinder, Section 2.3, ¶ 146 et seq. Important exhibits: First ECtHR Ruling (RF-03.2.C-2.3328, RME-3328), Second ECtHR Ruling (RF-04), witness statements of Anilionis (RF-200) and Zakharov (RF-201) and expert reports of Kothari (RF-202) and Asoskov (RF-203).

1. Who Are HEL, VPL And YUL?

27. HVY were the instrumental shareholders of Yukos; in reality the Oligarchs were pulling the strings. HEL and VPL are Cypriot companies, while YUL was established in the Isle of Man. The shares in HVY are held (indirectly) by legal entities from Gibraltar, Guernsey, Jersey and the British Virgin Islands.[38] As the Tribunal determined, HVY conducted their activities from Yukos' established offices in Moscow.[39] HVY are therefore letterbox companies in tax havens.

28. In the Appendix to the Interim Awards, the Tribunal has provided a clear overview of the extraordinarily complex structure of the Yukos group. This clearly shows that Khordokovsky, Nevzlin, Dubov, Lebedev, Brudno, Shaknovsky and Golubovich are the ultimate beneficial owners and actual

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36 See, *inter alia*, the expert reports introduced in the Arbitrations from Pellet (**Exhibit RF-03.1.C-1.3.9**), Koskenniemi (**Exhibit RF-03.1.C-1.3.4**) and Nolte (**Exhibit RF-03.1.C-1.3.7**) in respect of the law of France, Finland and Germany, respectively.

37 See Writ, ¶ 158.

38 See also HVY's assertions in Rejoinder, ¶¶ 154, 180.

39 Final Awards, ¶ 1620. See also Writ, ¶ 257 and the sources cited in footnote 302.

policymakers of HVY during the relevant periods. At the time, these Oligarchs resided in the Russian Federation.[40]

29. These Oligarchs have unlawfully acquired the shares in Yukos in 1995-1996 via their Bank Menatep. Subsequently, they have unlawfully consolidated their control of Yukos and its subsidiaries, and afterwards retained that control. More about these illegalities later.

30. Since the date of their acquisition thereof in 1995-1996, the Oligarchs have retained control of the shares in Yukos Oil without interruption. This was demonstrated, *inter alia*, by Professor Kothari. The many successive share transactions are shown in three diagrams in his expert report.[41] At all times the Oligarchs dictated the long series of transactions.[42]

2. The ECT Does Not Protect 'U-Turn' Investments

31. The fact that investments have been made by Russian nationals in the Russian Federation (shares in Yukos), brings the Yukos-dispute outside the scope of the Treaty. This already becomes clear from the arbitration clause in Article 26 ECT:

> "Disputes between a Contracting Party and an Investor of <u>another</u> Contracting Party relating to an <u>Investment of the latter in the Area of the former</u> (...)"[43]

32. A "U-turn" investment (State A – State B – State A) is not covered by the ECT and also not by Article 26. In relation to the latter, please note the following.

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40 See Writ, ¶ 26, 257-261, Reply, ¶ 26, 255-257. See also the definition in the Final Awards, p. xv. "*Oligarchs: Respondent's style of reference to the individuals who have or had a beneficial interest in the trusts behind Claimants, namely Messrs. Khodorkovsky, Lebedev, Nevzlin, Dubov, Brudno, Shakhnovsky, and Golubovich*." Cf. Final Awards, ¶ 1404.

41 See pages 10, 15 and 21 of his report (**<u>Exhibit RF-202</u>**).

42 See, *inter alia*, the statements of Anilionis (**<u>Exhibit RF-200</u>**) and Zakharov (**<u>Exhibit RF-201</u>**), and the expert reports of Kothari (**<u>Exhibit RF-202</u>**). See also the statement of Khodorkovsky that <u>he</u> has transferred his interest in Yukos, "The Best Defence Is Non-Ownership," *Kommersant* 13 January 2005, (http://www.kommersant.com/p538197/r_1?The_Best_Defence_Is_Non-Ownership): *Mikhail Khodorkovsky announced yesterday that <u>he</u> had transferred control of <u>his</u> 59.5 percent of the shares in the Gibraltar-based Group Menatep (Yukos' principal shareholder*) (emphasis added).

43 Emphasis added.

33. The Tribunal wrongly based its jurisdiction solely on the definitions in Article 1(6) and (7) ECT without taking heed of the context, object and purpose.[44] If one properly looks beyond the wording alone, then it is clear that the Tribunal's ruling cannot be upheld.

34. For the interpretation of an investment treaty, this Court correctly considered in *Ecuador v. Chevron* that according to Articles 31 and 32 VCLT the wording by itself does not suffice; the wording must be interpreted in its context and in light of its object and purpose:

> "The question whether the Tribunal has jurisdiction must be answered on the basis of the interpretation of Article VI BIT. This interpretation must be conducted – and this is not in dispute – in accordance with the provisions of Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. In the present case, the latter entails that Article VI BIT must be interpreted in accordance with the meaning of the wording of this article in normal language use, <u>but in the context it is placed in</u> – consisting, inter alia, of the other contents of the treaty, including the preamble – <u>and with due observance of the object and purpose of the treaty</u>. It becomes clear from the preamble of the BIT included under 2.2 that the purpose of the BIT is to protect and stimulate investments by subjects of a contracting state in another contracting state by a fair and equitable treatment thereof. A term in a treaty, finally, must be given specific meaning if it is established that the parties envisaged that meaning."[45]

35. Therefore, the object, purpose and the context of the ECT must also be taken into account. Object, purpose and context have been analysed elaborately in the Writ and the Reply.[46] In summary, this leads to the following.

36. <u>*Object and purpose:*</u> The ECT is intended to promote and protect foreign investments.[47] The ECT's object and purpose is to establish a "*framework for international cooperation*"[48] in order "*to capitalize on the complementary relationship between the European Economic Community, the USSR and the*

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44 Interim Awards, ¶¶ 411-417, 419-434.

45 The Hague District Court dated 20 January 2016, ECLI:NL:RBDHA:2016:385 (Ecuador / Chevron), ground 4.9. Emphasis added.

46 Writ, ¶¶ 248 et seq., Reply, ¶¶ 227-251.

47 Reply, ¶¶ 227, 232.

48 ECT Introduction, ¶ 2.

countries of Central and Eastern Europe",[49] to "*establish a legal framework in order to promote long-term co-operation in the energy field, based on complementarities and mutual benefits in accordance with the objectives and principles of the* [European Energy] *Charter",*[50] to create a climate favorable "*to the flow of the investments and technologies*" and to promote "*the international flow of investments".*[51] In the words of the Dutch legislator: *"the treaty [creates] an attractive regime for <u>foreign</u> investors.*"[52] The ECT is not intended to protect domestic investors and investments, nor if a foreign holding has been inserted.

37. <u>*Context:*</u> Articles 10(1), 13 and 17 ECT Article 17(1) ECT make it contextually clear that "U-turn" investments are not protected:[53]

- Article 10(1) ECT ("Promotion, protection and treatment of investments") refers to "*Investors of <u>other</u> Contracting Parties to Make Investments in its Area*".

- Article 13 ECT ("Expropriation") refers also to "*Investments (…) in the <u>Area of any other Contracting Party</u>*".

- Article 17(1) ECT ("Denial of benefits") provides that treaty protection can be denied if subjects of a third state own or control a legal entity and this legal entity does not have any substantial business activities on the territory

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49 Communication from the EC Commission on European Energy Charter, COM(91) 36, 14 February 1991, ¶ 1,2 (**<u>Exhibit RF-5</u>**).

50 Article 2 ECT.

51 Concluding Document of The Hague Conference on the European Energy Charter, (17 December 1991), Title I, Objectives <u>C-2</u> (**<u>Exhibit RF-03.2.B-1.2</u>**), 214, 218; CvR, ¶ 227.

52 *Parliamentary Papers II*, 1995/96, 24 545 (R 1560), no. 3, p. 11.

53 Writ, ¶¶ 256, 262-264, Reply, ¶¶ 226-236.

of the Contracting State. A fortiori this applies to the shareholders of the host state.[54]

- Final Act, Understanding IV.3 at Article 1(6) ECT. "*For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an investment means control in fact, determined after an examination of the actual circumstances in each situation.*"[55]

38. States that were involved in the negotiations wanted to prevent the ECT from being abused by investors simply circulating funds.[56]

39. Rules of international law also prohibit investors in investment disputes from bringing an international-law claim against their own State.[57] The Russian Federation referred to a number of arbitral awards in investment disputes that held that domestic investors are not protected by investment treaties, not even if the investment is routed through an offshore 'revolving door' (i.e., a U-turn investment: State A -> State B -> State A).[58]

3. Sham Investors Engaging In Fraud Are Not Entitled To Protection

40. In the Writ, it is explained that HVY are sham entities that have been set up only to evade taxes[59] and that consequently HVY cannot claim investment

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54 Reply, ¶ 233. The Tribunal fails to recognise this in the Interim Awards, ¶¶ 432-433.

55 Emphasis added.

56 European Energy Charter Conference Secretariat, Document 31/92 – BA 13, June 19, 1992, p. 14, (C-928). The assertions in SoD, ¶¶ 345-348, Rejoinder, ¶¶ 156, 161 and 162 are incorrect.

57 Writ, ¶¶ 268 et seq., and Reply, ¶ 236.

58 Writ, ¶¶ 269-272, and Reply, ¶¶ 234, 237-243. See also *Société Immobilière de Gaëta v. Republic of Guinea*, ICSID Case No. ARB/12/36, Award, 21 December 2015, ¶¶ 181-183 (http://www.italaw.com/sites/default/files/case-documents/italaw7038.pdf). See further A.J. van den Berg, 'The Role of Dissenting Opinions, Tokios Tokelès v. Uraine, ICSID Case No. ARB/02/18, Dissenting Opinion of Prosper Weil', Building International Investment Law; The First 50 Years of ICSID, p. 585 et seq. (**Exhibit RF-207**).

59 Writ, ¶¶ 248, 257-261.

protection.[60] This is an independent ground why HVY are not protected under the ECT.

41. The Russian Federation has elaborately addressed several illegalities in the Arbitrations.[61] For example, it has demonstrated the illegal manner in which the Oligarchs gained control over Yukos in 1995/1996 and how they then went on to commit tax fraud on a massive scale.[62] The Russian Federation has identified 28 cases of violations of law and the principle of good faith.[63]

42. HVY did not seriously contest any of this.[64] Because this fraud has not been refuted by HVY, this Court must take it as established.

43. The Tribunal, however, did not even want to investigate the 28 cases of fraudulent conduct (with the exception of the abuse of the Russian-Cypriot tax treaty)[65] because:

> "(…) the alleged illegalities connected to the acquisition of Yukos (…) in 1995 and 1996 (…) [related] (…) to Bank Menatep and the Oligarchs, an entity and persons separate from Claimants, one of which – Veteran – had not even come into existence."[66]

44. The Tribunal's ruling that there is no connection between the Oligarchs and HVY is clearly incorrect. This already becomes clear from the Appendix to the Interim Awards, cited above.[67] The unlawful manner in which HVY acquired

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60 See, *inter alia*, Writ, ¶¶ 30 et seq., 264, 276. Hence, the argument is by no means out of time as suggested by HVY. Rejoinder, ¶¶ 148-149, 191-193.

61 See also Final Awards, ¶¶ 1283 and 1307.

62 See, *inter alia*, Writ, ¶¶ 30 et seq.

63 Reply, ¶ 28, with reference to Final Awards, ¶¶ 1283-1309.

64 They merely asserted that these arguments are irrelevant or were submitted too late, SoD, ¶ I.33, Rejoinder, ¶¶ 149, 192-197. Incidentally, that is incorrect, see inter alia Writ, ¶¶ 248, 257-261.

65 See Final Awards, ¶¶ 1364-1365, 1616-1621.

66 Final Awards, ¶ 1370. English text: "*(…) the alleged illegalities connected to the acquisition of Yukos (…) in 1995 and 1996 (…) involved Bank Menatep and the Oligarchs, an entity and persons separate from Claimants, one of which – Veteran – had not even come into existence*." See also ¶¶ 1366-1369.

67 The Russian Oligarchs also recognise this. See Writ, footnote 308. See also Iton.TV, *Interview of Leonid Nevzlin*, 23 August 2014, 10:45 (**Exhibit RF-204**), also see other public announcements made by Nevzlin (**Exhibit RF-205**), Reply, ¶¶ 265-273.

the shares in Yukos[68] and the uninterrupted control by the Oligarchs have been analysed, *inter alia*, in the aforementioned expert report of Prof. Kothari.[69]

45. The Tribunal's ruling that the Oligarchs were allegedly "*separate from*" HVY[70] is therefore clearly incorrect and moreover in contradiction with other parts of the Yukos Awards.[71] In answering the question whether Article 13 ECT ("Expropriation") was violated, the Tribunal holds, for example, that the Oligarchs, including Khordokovsky and Lebedev, did not have to expect that "*their investments*" would be eviscerated.[72]

46. It follows from the Arbitration file that HVY did not reveal the true origin of their shares in Yukos.[73] In that way they have created the impression that there were no direct ties between Menatep and the Oligarchs on the one hand and HVY on the other, which has now been belied by the new declarations. The true state of affairs also becomes clear from the exhibits that were introduced before today's hearing. These include statements of former confidants of, *inter alia*, Khodorkovsky and Lebedev, who recently turned whistle-blower (Mr Anilionis and Mr Zakharov).[74] Meanwhile, also similar statements of others have become available. The Russian Federation offers to examine all these persons as witnesses.

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68 The Tribunal agreed that this was a relevant criterion, see Final Awards, ¶¶ 1369.

69 **Exhibit RF-202**. See also Writ, ¶¶ 30-50.

70 See footnote 66.

71 See HUL Interim Award, ¶ 462, YUL Interim Award, ¶ 463, and the definition of Oligarchs in the Final Awards.

72 Final Awards, ¶ 1578, "*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 more than thirteen billion dollars in unpaid taxes and fines would be imposed on Yukos for unpaid VAT on oil exports (…) They could not have been expected to anticipate that they risked the evisceration of their investments and the destruction of Yukos.*"

73 See inter alia Claimants'Memorial on the Merits (**Exhibit RF-03.1.B-1**), ¶ 684, Claimants' Reply on the Merits **Exhibit RF-03.1.B-4**, ¶¶ 1135-1136. Also see **Exhibit RF-206**, p. 15 and the sources cited there.

74 **Exhibits RF-200 and RF-201**. They both also provide a description of the Loans for Shares auction in 1995 which Khodorkovsky et al. manipulated. See for example Anilionis, ¶¶ 16-21, 25-27.

47. Mr Anilionis and Mr Zakharov[75] testify about an organisation named RTT ("Russian Trust and Trade"). This was a "factory" with over 200 employees, which spent 98% of its resources to "produce" and "manage" over 600 sham companies domestically and abroad, in close cooperation with Bank Menatep, since 1995.[76] Those sham companies were incorporated and managed at the instruction of the Oligarchs. The sole purpose of these companies (including HVY) was to (i) conceal the control structure of Yukos, (ii) protect the identity of the Oligarchs, (iii) prevent de-privatization as reaction to the 1995 and 1996 fraudulent auctions, and (iv) evade taxes on a large scale. This operation lasted until 2003.

48. HVY were merely tools, key links in the chain of sham companies that the Russian Oligarchs used to hide the significant oil revenues of Yukos from the tax authorities and siphon them away to offshore tax havens like Jersey or Guernsey.[77] The ECtHR ruling of 20 September 2011 speaks volumes (see in particular §§ 591-593).[78] The Tribunal itself also determined that HVY, or others on behalf of them, set up a "*complex and opaque structure (…) in order to transfer money earned by Yukos out of the Russian Federation through a vast offshore structure*" and that Yukos' claim of corporate governance reforms "was a façade".[79]

49. A sham company which: (i) has performed no genuine business activities on Cyprus or the Isle of Man[80], (ii) has only invested money that originated from

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75 **Exhibits RF-200 and RF-201**.

76 **Exhibits RF-200 and RF-201**.

77 See Reply, ¶ 28 under b.

78 First ECtHR Ruling (RME-3328; **Exhibit RF-03.2.C-2.3328**).

79 Final Awards, ¶¶ 1808-1809.

80 See Writ, ¶¶ 248, 257 and footnote 302. HVY admit this.

the Russian Federation[81], and (iii) was established and used for the purpose of performing illegal acts, is not entitled to investment protection under a treaty.[82]

50. This is supported by countless sources in international law.[83] The Tribunal acknowledged this, where it considers:

> "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 (...) should not be allowed to benefit from the Treaty."[84]

51. **In short: given that neither national nor fraudulent investors are protected under the ECT, the Yukos Awards must be set aside (Article 1065(1)(a) and (e) DCCP).**

V. JURISDICTION GROUND 3 – ARTICLE 21 ECT AND THE MASSIVE FRAUD IN MORDOVIA

Final Awards: Section VIII.B.5.b, § 639: Writ: Sections IV.D and VII.D, §316-324 and §526 et seq.; SoD: part I Section 3.5, part II Section 4.2, § II.638 et seq.; Reply: Chapter II.E and VI.D, § 663 et seq.; Rejoinder: Section 5.4, § 399 et seq. Principal exhibits: First ECtHR Ruling (RF-03.2.C-2.3328, RME-3328), Second ECtHR Ruling (RF-04), C-155, C-175, C-190.

1. No Arbitration In Tax Matters

52. Essentially, HVY dispute the legitimacy of the tax measures against Yukos. Such measures do not fall under the scope of the ECT. This follows from Article 21(1) ECT (*taxation carve out*):

> "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." (…)."[85]

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81 Reply, ¶ 250, HUL Interim Award, ¶ 433; YUL Interim Award, ¶ 434, VPL Interim Award, ¶ 490.

82 See *inter alia* Writ, ¶¶ 248, Reply, ¶ 258-273. See also **Exhibits RF-200 and RF-201**.

83 Reply, ¶¶ 259-263, also see **Exhibit RF-206**, p. 16-21.

84 Final Awards, ¶¶ 1352, 1369. See also Reply, ¶ 264.

85 Emphasis added.

53. Article 21 ECT of course also affects Article 26 ECT, which concerns the Tribunal's jurisdiction. For that reason, too, the Yukos Awards cannot be upheld.[86]

2. Tax Measures Were Legitimate

54. The Tribunal adds an additional "motive" requirement to Article 21(1) ECT. It allegedly only concerns *bona fide* taxation measures.[87] The Tribunal primarily bases its decision on two arbitral awards that have been set aside by Swedish courts in the meantime.[88] Because the Tribunal did not consider the taxation measures against Yukos to be *bona fide*, it assumed jurisdiction to decide on HVY's claims.[89]

55. This ruling cannot be upheld because the limitation advocated by the Tribunal does not arise from Article 21(1) ECT.[90] The additional motives of tax officials and judges are irrelevant. The point is merely whether according to objective standards tax measures within the meaning of Article 21 ECT were applied.[91] Any criticism of an investor on the way the authorities apply tax rules does not detract from the tax character of the disputed measures. Therefore, the carve-out should have been respected by the Arbitrators.

56. The Tribunal's ruling that the taxation measures were allegedly not *bona fide* is moreover only based on guesses of the Tribunal and is moreover substantively incorrect. That ruling is diametrically opposed to the rulings of two separate

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86 See Writ, Section IV.D. and Reply, Section II.E. The assertion that Article 21 ECT only concerns the admissibility is incorrect, Rejoinder, ¶¶ 206-209. See Reply, ¶¶ 39, 40, 281-283.

87 Final Awards, ¶¶ 1407, 1437-1438. See also HVY's assertions in Rejoinder, ¶¶ 214-228.

88 Final Awards, ¶¶ 1437-1438. See the decisions rendered by the Svea Court of Appeal in *RosInvestCo UK Ltd. v. The Russian Federation* (**Exhibit RF-76**) and *Quasar de Valores SICAV S.A., et al. v. The Russian Federation* (**Exhibit RF-218**) also mentioned in footnote 2 above.

89 Final Awards, ¶¶ 1407, 1430-1445.

90 See Reply, ¶¶ 284-289 and 312.

91 See Reply, ¶ 301. See also *EnCana Corporation. v. Republic of Ecuador*, LCIA, UNCITRAL, Award (3 February 2006) (RME-328, **Exhibit RF-03.2.B-2.328**), ¶ 147: *[A] taxation measure does not cease to qualify as such because it is arguably in breach of commonly accepted substantive standards for such measures*".

chambers of the ECtHR, which was backed by the Grand Chamber. The ECtHR ruled (a) that Yukos evaded taxes on a massive scale,[92] (b) that the additional tax assessments imposed in that context were legitimate and proportionate and, (c) that these assessments had been imposed without an "*improper motive*".[93] The ECtHR's interpretation of Article 1 First Protocol in conjunction with Article 14 ECHR – the taxation measures disputed in the Arbitration did not form an expropriation or discrimination – must be followed by the Dutch court according to established case law.[94]

57. **In short, pursuant to the carve-out of Article 21(1) ECT, the Arbitrators did not have jurisdiction to rule on the taxation measures contested by HVY (Article 1065(1)(a) DCCP).**

3. The Mordovian Inconsistency In The Ruling On jurisdiction (alternative argument)

58. The invalidity of the "tax" ruling of the Tribunal's decision also becomes clear from its denial of the fraud committed by Yukos with Mordovian sham companies.

59. Yukos abused the low tax rates in underdeveloped regions, such as Lesnoy, Trekhgorniy and Mordovia.[95] It did so by incorporating dozens of sham companies in those regions and by appointing straw-men as their managing directors. These sham companies, in fact managed entirely by Yukos from

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92 First ECtHR Ruling (RME-3328, **Exhibit RF-03.2.C-2.3328**), ¶ 590 "*The conclusions of the domestic courts in the Tax Assessment proceedings 2000-2003 were sound. The factual issues in all of these proceedings were substantially similar and the relevant case files contained abundant witness statements and documentary evidence to support the connections between [Yukos] and its trading companies and to prove the sham nature of the latter entities.*", ¶¶ 588-607 (emphasis added) Second ECtHR Ruling, ¶¶ 786, 811 (**Exhibit RF-04**).

93 Writ, ¶¶ 56, 344-350 referring to the First ECtHR Ruling (RME-3328, **Exhibit RF-03.2.C-2.3328**), ¶¶ 606, 665 and the Second ECtHR Ruling (**Exhibit RF-04**), ¶¶ 786, 821, 902 and 903. The only witness the Tribunal relied on has a reputation for unlikely theories, Reply, ¶ 703, **Exhibit RF-222**.

94 See Article 32 ECHR. See furthermore, *inter alia*, ECtHR 9 June 2009 Appl. No. 33401/02, RvdW 2009, 1291, ¶ 163 (*Opuz v. Turkije*), HUL Interim Award, ¶ 462, YUL Interim Award, ¶ 463 and Supreme Court 10 August 2001, NJ 2002/278 (*Family Life*), ¶¶ 3.7.1 et seq.

95 See Writ, ¶ 52, Reply, ¶¶ 672-689, 704, Konnov Report 1, (**Exhibit RF-03.1.C-2.2.4**), ¶¶ 12-22.

Moscow,[96] purchased oil from Yukos operating companies at knock-down prices, to ultimately sell this oil to third parties at market value.[97] This enabled the sham companies to earn enormous profits on which they hardly paid any tax of any kind. These profits would ultimately, via a detour involving companies Yukos also controlled, end up with Yukos and its shareholders.[98] This fraudulent construction allowed Yukos to evade many billions in taxation and the Oligarchs were enriched at the expense of the Russian Federation.[99]

60. After this fraud had been discovered, the Russian tax authorities took measures that would have been taken in any other normal country: Yukos itself was ultimately assessed for the higher tax rate. Over three-quarters of those additional assessments concerned the Mordovian companies.[100] It concerned companies which – in order to limit the risk of discovery – had changing names such as Alta Trade, Ratmir, Mars XXII, Yu-Mordovia, Fargoil and Makro-Trade.[101]

61. It becomes clear from the case file in the Arbitrations that also all of Yukos' Mordovian trading partners were sham companies controlled by Yukos itself. For example, several witness statements of straw-men were cited, who were directors merely on papers of, *inter alia*, Yu-Mordovia, Makro-Trade and Mars XXII.[102] The Tribunal itself established with respect to a number of Mordovian

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96 For specific arguments with respect to Mordovia, see Respondent's Counter-Memorial on the Merits, ¶¶ 253-255 (**Exhibit RF-03.1.B-3**).

97 Writ, ¶ 39, 52, Respondent's Counter-Memorial on the Merits, ¶¶ 244-248 (**Exhibit RF-03.1.B-3**) with examples concerning Mordovia; Respondent's Rejoinder on the Merits, ¶ 579 (ii)-(iii) (**Exhibit RF-03.1.B-5**); Resp. Op. Ppt., Vol. 1, pp. 26-34 (RME-4678, **Exhibit RF-03.2.C-2.4678**); Konnov Report 1 (**Exhibit RF-03.1.C-2.2.4)**, ¶¶ 21-22; Konnov Report 2 (**Exhibit RF-03.1.C-2.4.2)**, ¶ 6.

98 Respondent's Counter-Memorial on the Merits, ¶¶ 256-277 (**Exhibit RF-03.1.B-3**). For Mordovia, see e.g. Chart 8 (Fargoil) in ¶ 275.

99 Writ, ¶ 52.

100 Final Awards, ¶ 278, Writ, ¶¶ 316-324 and 526-528; Reply, ¶¶ 673-686. According to the Tribunal, approximately 78% of the additional assessments were related to the Mordovian companies; Final Awards, ¶ 500. The activities of Fargoil in particular gave rise to the largest additional assessments; see Final Awards, ¶ 349.

101 Discussed in Final Awards, ¶¶ 327-370.

102 Respondent's Counter-Memorial on the Merits, ¶¶ 242, footnotes 295-297 248 (**Exhibit RF-03.1.B-3**). See also Writ, ¶ 319 (c), and footnotes 426-432, Reply, ¶ 675, footnotes 915-916. See RME-255 (**Exhibit**

companies that (a) they did not have any fixed assets on their balance sheets and (b) did not have any storage facilities for oil,[103] that (c) Yukos in Moscow maintained their accounts and handled their money transactions[104] and that (d) HVY had not submitted any documents showing that those sham companies had themselves carried out any economic activities.[105]

62. In spite of all of this evidence recognised by the Tribunal itself, it nevertheless reaches the bewildering and incomprehensible conclusion that it has not found any evidence in the case file to support the claim of the Russian Federation that the Mordovian companies were sham companies:

> "The Tribunal has not found any evidence in the massive record that would support Respondent's submission that there was a basis for the Russian authorities to conclude that the entities in Mordovia, for example, were shams."[106]

As we have seen, the Tribunal had evidence in abundance available to it; not only with regard to Lesnoy and Trekhgorniy, but also with regard to Mordovia.

63. The Tribunal based its jurisdiction on the lack of *bona fide* taxation measures with respect to the Mordovian companies (in its interpretation of Article 21 ECT).[107] This concerns approximately 78% of all additional tax assessments.[108] That is why this Court must answer the factual question whether in this matter the ECtHR's ruling[109] or the Tribunal's ruling[110] is correct. Given that it concerns the jurisdiction of the Tribunal, this factual question must be fully reviewed by the Court. In addition to the evidence already produced by the

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RF-03.2.C-2.255), RME-257 (**Exhibit RF-03.2.C-2.257**), Konnov Report 2 ¶ 6 (see **Exhibit RF-03.1.C-2.4.2**). See also Final Awards, ¶¶ 351 and 354.

103 Final Awards, ¶ 362.

104 Final Awards, ¶¶ 343, 346, 360, 363 and 365. Cf. Reply, ¶ 675.

105 Final Awards, ¶ 647.

106 Emphasis added..Final Awards, ¶ 639.

107 Cf. Final Awards, ¶ 1404.

108 Final Awards, ¶ 500.

109 In its First Ruling (RME-3328 **Exhibit RF-03.2.C-2.3328**) the ECtHR discusses evidence concerning Mordovia (see ¶¶ 14, 48, 191, 193, 212); for the ruling of the ECtHR in this respect, see ¶¶ 588-606.

110 Contrary to what HVY argue in SoD, ¶¶ II.420, 425, the full review also regards the facts.

Russian Federation, which it considers adequate, it expressly offers to provide **witness testimony** of its argument that Yukos also committed large-scale fraud in Mordovia and that the additional tax assessments and penalties in that respect were *bona fide*.[111]

64. In short, if the Russian Federation and the ECtHR are right, then this removes the foundation from the Tribunal's rulings that the tax assessments imposed on Yukos allegedly (a) were not in good faith[112] and (b) constitute a violation of Article 13 ECT ("Expropriation").[113] And this entails that the carve-out of Article 21(1) ECT remains fully applicable and the Tribunal did not have jurisdiction (Article 1065(1)(a) DCCP).

4. The Reasoning With Respect To Mordovia Is Unconvincing

65. The Yukos Awards must also be set aside because a convincing reasoning regarding that crucial Mordovia issue is lacking. Indeed, the Tribunal ruled that in this context it had not found "*any evidence (…) in the enormous case file*".[114] Please note: the Tribunal does not consider that the evidence of the sham character of Yukos' Mordovian trading partners was not sufficiently convincing. The Russian Federation therefore does not complain about the evaluation of evidence, but about the Tribunal ignoring evidence, against its better judgment of the irrefutable evidence in this case. This reasoning of the Tribunal is thus equivalent to the entire absence of reasoning: a firm ground for setting aside. Due to the gravity of these mistakes the Yukos Awards are also contrary to public policy.[115]

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111 The Russian Federation wants to examine, among others, Anilionis and Zakharov as witnesses. See **Exhibits RF-200 and RF-201**.

112 Final Awards, ¶¶ 1407, 1430-1445. See Writ, ¶¶ 302-343.

113 Final Awards, ¶ 1579.

114 Final Awards, ¶ 639; see the quote in paragraph 62 above.

115 Cf. The Hague District Court dated 20 January 2016, ECLI:NL:RBDHA:2016:385 (Ecuador / Chevron), ground 4.25.

VI. MANDATE GROUND 1 – THE TRIBUNAL FAILED TO PRESENT THE EXPROPRIATION DISPUTE TO THE COMPETENT TAX AUTHORITIES (ARTICLE 21(5)(B) ECT)

Final Awards: Section IX.C.4.b.2 (paragraph 1435): Writ: Section V.C, § 368 et seq.; SoD: part I Section 3.4.2, part II Section 3.10, § II.459 et seq.; Reply: Section IV.C, § 328 et seq.; Rejoinder Section 3.2, § 250 et seq. Principal exhibits: RF-78 – 84, RF-156 -160, RF-03.2.C-2.3576 (RME-3576), C-944.

1. Introduction

66. In the context of Article 21 ECT I now arrive at another ground for setting aside: the violation of Article 21(5) ECT, through which the Tribunal failed to comply with its mandate.

2. The Tribunal Knowingly And Deliberately Violated A Clear And Compelling ECT Rule

67. The Tribunal wrongly failed to submit the matter to the appropriate tax authorities for advice in conformity with the explicit wording of Article 21(5)(b)(i) ECT.[116] As is clear from the word "*shall*", the authentic English wording of the ECT in Article 21(5) contains an mandatory obligation that leaves no room at all for a discretionary determination:[117]

> "(…) bodies called upon to settle disputes (…) shall make a referral to the relevant Competent Tax Authorities."[118]

68. The Yukos Awards must be set aside for that reason alone. This is all the more true due to the fact that it concerns a deliberate refusal by the Tribunal to apply the provision.

(i). Article 21(5) ECT is an important rule. The length and wording of Article 21 ECT and the comprehensive negotiations in this respect[119]

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116 Writ, Section V.C, and Reply, Section IV.C.

117 See S. Nappert, 'The Yukos Awards – A Comment', *Journal of Damages in International Arbitration*, 2015, p. 34 (**Exhibit RF-208**): "*The language leaves no doubt that the ECT Contracting Parties intended that referral is to be mandatory*".

118 Emphasis added. The Dutch text is as follows: "*(…) dan leggen de instanties (…), het geschil voor aan de bevoegde belastingautoriteiten*". See Writ, ¶ 373, and Reply, ¶ 339.

speak volumes as to the importance that the States attached to this provision at the time.[120] That is not surprising. This provision, after all, envisages the safeguarding of the sovereign nature of taxation, which is essential to States.[121] It is telling that Article 21(5) 5 ECT is the only procedural rule included in the Treaty for an arbitral tribunal.[122]

(ii). Advice would have been useful and appropriate.[123] As rightly established by the Tribunal, the assessment of the taxation measure taken by the Russian Federation forms the essence of the dispute.[124] The Arbitrators had no expertise in matters of taxation and it would at the very least have been useful for the tax authorities to have provided information. This is also clear from the various blunders the Arbitrators made as a result of their lack of knowledge of Russian tax law.[125]

(iii). The Russian Federation explicitly and timely pointed out the necessity and importance of applying Article 21(5) ECT.[126] The Russian tax

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119 One issue that was addressed was the coordination between the ECT and double taxation avoidance treaties. Respondent's Rejoinder on the Merits, ¶ 339 (**Exhibit RF-03.1.B-5**). Most of these bilateral treaties are based on the various versions of the OESO Model Tax Convention.

120 S. Nappert, 'The Yukos Awards – A Comment', *Journal of Damages in International Arbitration*, 2015, p. 34 (**Exhibit RF-208**): "*The length and wording of Article 21, and its specific prevailing nature over other provisions, speak volumes as to its importance for the ECT Contracting Parties*."

121 As even HVY themselves argued in the Arbitrations in regard to Article 21, "*this provision ensures that the Contracting Parties are able to freely determine their fiscal policies*". Claimant's Reply on the Merits, ¶ 997 (**Exhibit RF-03.1.B-4**).

122 HVY dispute without substantiation that Article 21 ECT is a fundamental provision (Rejoinder, ¶ 264). They wrong dismiss Article 21(5) ECT as "only" a procedural rule that is not part of the mandate (Rejoinder, ¶ 266).

123 The Tribunal recognises that "*Article 21(5) was designed to assist tribunals 'to distinguish normal and abusive taxes*'." See Final Awards, ¶ 1423.

124 This is wholly in line with the intent of Article 21 (5) ECT. HUL Interim Award, ¶ 583 YUL Interim Award, ¶ 584 and VPL Interim Award, ¶ 595 "*The Tribunal observes that the background to, and motivation behind, the Russian Federation's measures that gave rise to the present arbitration, be they "Taxation Measures" or not, go to the heart of the present dispute*." See Final Awards, ¶ 1401 "*(…) issues that went to the heart of the merits of the dispute*".

125 See Writ, ¶¶ 379-383.

126 See, inter alia, Respondent's Short Submission on Bifurcation of Liability and Quantum, and on Referral under Article 21 ECT, 29 April 2011 (**Exhibit RF-03.1.B-2**); Russian Federation's Statement of Defense YUL, 15 October 2005, ¶ 55 (**Exhibit RF-03.1.A-2.2**); Respondent's First Memorial on Jurisdiction Hulley, 28 February 2006, ¶¶132, 134 (**Exhibit RF-03.1.A-3.1**); Respondent's Second Memorial on Jurisdiction and Admissibility – YUL, 31 January 2007, ¶ 2 (**Exhibit RF-03.1.A-5.2**); Respondent's Rejoinder on the Merits, 16 August 2012, ¶¶ 293, 329-333 (**Exhibit RF-03.1.B-5**); Respondent's Merits Skeleton Argument, 1 October 2012, ¶ 73.

authorities would, after all, have been able to clarify Russian law. The authorities of Cyprus and the United Kingdom would have been able to *confirm* that the contested tax assessments had been imposed according to internationally accepted standards.[127]

(iv). Referrals and timely advice were certainly possible here. After all, the Arbitrations continued for almost 10 (!) years.

69. This failure resulted in the Tribunal ruling that the taxation "in fact" constituted expropriation without having adequate knowledge of the facts.

70. In short, this is a clear and serious violation of the mandate that must lead to the setting aside of the Yukos Awards (Article 1065(1)(c) DCCP).[128]

3. The Futility Exception Does Not Hold And Does Not Apply In The Present Case

71. Article 21(5)(b)(i) ECT does not include any grounds for exception. The flagrant and intentional violation of Article 21(5)(b)(i) ECT is therefore not justified by the specious argument of the Tribunal that an exception applies if it would have been pointless to submit the dispute to the tax authorities:[129]

> "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."[130]

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127 See, *inter alia*, Hulley First Memorial on Jurisdiction, ¶¶ 132, 134 (**Exhibit RF-03.1.A-3.1**) and the expert reports introduced in the Arbitrations of Cullen (**Exhibit RF-03.1.C-2.2.2**), Hart (**Exhibit RF-03.1.C-2.2.3**), Polyviou and Rosenbloom. See also S. Nappert, 'Square Pegs and Round Holes: The Taxation Provision of the Energy Charter Treaty and the Yukos Awards', in: *Cahiers de l'arbitrage*, 1 January 2015, no. 1, p. 8. (**Exhibit RF-209**) "*Competent Tax Authorities included not only that of the Russian Federation, whose capacity and/or objectivity the Tribunals clearly wrote off ex ante, but also that of the United Kingdom and Cyprus.*"

128 The Russian Federation disputes Rejoinder, ¶ 262, where reference is made to a disguised appeal.

129 For the scanty reasoning behind this determination, see Final Awards, ¶¶ 1421-1423, 1426-1428, 1435. See Writ, ¶¶ 369, 372-378, and Reply, ¶ 329.

130 Emphasis added.

72. Even if it must be accepted that the Tribunal in exceptional cases may rely on a futility exception, that does not hold here.[131] The size of the case file is not an argument.[132] As also pointed out by Sophie Nappert, it is impossible for the substantiation given by the Tribunal to qualify as an objective ground for such "*futility*" exception.[133] HVY have not been able to cite a single ruling in which a referral mechanism was discarded as "*futile*".[134]

73. The Tribunal's ruling essentially entails that it was itself able to determine whether it would make sense to ask advice and that it was not obliged to follow the advice of the authorities in any case; that is very different from first having to seek advice. In addition, the Tribunal speculated about whether the tax authorities, appointed by the ECT as mandatory advisors, would be able to provide timely and objective advice,[135] rather than the Tribunal timely asking for that mandatory advice itself and then studying it objectively.

74. This is an evidentiary prognosis which is prohibited[136] – also for arbitrators –; the umpteenth indication of the Tribunal's prejudice;[137] and a fallacy that renders the rule superfluous.[138]

75. In short, no matter how it is regarded: putting aside a mandatory rule in a Treaty, certainly when based on prejudiced guesses is a serious breach of

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131 See, *inter alia*, Writ, ¶¶ 374, 375. The Russian Federation disputes Rejoinder, ¶ 270.

132 Final Awards, ¶ 1422. See also Writ, ¶¶ 377.

133 S. Nappert, 'Square Pegs and Round Holes: The Taxation Provision of the Energy Charter Treaty and the Yukos Awards', in: *Cahiers de l'arbitrage*, 1 January 2015, no. 1, p. 9. (**Exhibit RF-209**). Text between brackets added. "*[T]he Yukos Tribunals' one-sentence assessment that there existed "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 potentially serve to assist the Tribunal's decision-making" fails as an objective, reasoned basis for triggering the application of the futility exception.*"

134 The ´futility exception" of international customary law is not applicable. See Writ, ¶¶ 374-375; Reply, ¶¶ 362-363.

135 Writ, ¶ 378. With regard to partiality and prejudice, see Writ, Section VIII.

136 See Writ, ¶ 378, Reply, ¶ 342. Rejoinder, ¶ 272, does not detract from this.

137 See also Writ, Section VIII.

138 See Writ, ¶ 376.

the mandate, which should lead to the setting aside of the Yukos Awards (Article 1065(1)(c) DCCP).[139]

VII. MANDATE GROUND 2 – THE TRIBUNAL HAS FAILED TO COMPLY WITH ITS MANDATE IN THE DETERMINATION OF THE DAMAGE AMOUNT

Final Awards: Section XII; Writ: Section V.D, § 386 et seq.; SoD part I Section 3.4.3, part II Section 3.2, § II.491 et seq.; Reply: Section IV.D, Annex 1, § 367 et seq.; Rejoinder Section 3.3, § 275 et seq. Principal exhibits: First Kaczmarek Report (RF-03.1.C-2.1), First Dow Report (-2.2.1), Second Kaczmarek Report (-2.3), Second Dow Report (-2.4.1), Kaczmarek Testimony (RF-03.1.G-4 Kaczmarek), Dow Testimony (RF-03.1.G-4 Dow), Dow Report (RF-85).

76. According to the Writ and Statement of Defence, the manner in which the Tribunal has determined the damages also results in various grounds for setting aside.[140]

77. Essentially, the criticism amounts to the following. The Tribunal (a) completely went its own way, (b) went well outside the limits of the party debate and the provisions of the ECT, (c) constructed its own method of damage calculation through copy/pasting, which (d) was completely inconsistent and (e) on which the parties were not heard in advance.

78. The Tribunal recognises this, given the references in paragraphs 1790, 1817 and 1823 of the Final Awards to "*the Tribunal's methodology*". This far exceeds the freedom in the assessment and estimation of damages, as provided for in, for instance, Article 6:97 DCC.

79. The Tribunal should not have sprung a surprise decision on the parties, but should have given the parties the opportunity to express their opinion about the Tribunal's damage calculation method, which method so strongly deviated from the parties' method.[141] In a comparable case involving a surprise decision

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139 The Russian Federation also disputes Rejoinder, ¶ 270.

140 The sources in the documents are included above this paragraph.

141 The Tribunal should also have given parties the possibility to express itself about the three risks that are mentioned in ¶¶ 1804-1810 of the Final Awards to determine the hypothetical dividends. In that case a calculation error in the appraisal of the hypothetical equity value of Yukos in the amount of at least US$ 1.42 billion would have been avoided. See Writ, ¶ 454; Reply, ¶¶ 385-388; Report Prof. Dow (**Exhibit RF-85**), ¶ 116 and Appendix B.2.

in respect of the damage, an arbitral award was recently set aside by the *Cour d'appel* in Paris.[142]

80. The Tribunal acted as follows. HVY had claimed the following heads of damage: (i) the equity value of their share in Yukos (70,5%) on 21 November 2007, or at least the date of the judgment; (ii) dividends as from 30 September 2003 until 21 November 2007, or at least the date of the judgment; and (iii) interest.[143]

81. Article 13 ECT prescribes mandatorily that the reference date for the damage calculation is "*at the time immediately before the Expropriation*". The Tribunal determined that the date of expropriation was 19 December 2004.[144] However, this date had not been argued by the parties. The Tribunal subsequently assumed that in respect of the compensation of damage, it could choose between the value on the date of expropriation (i.e. 19 December 2004) and the date of judgment (established at 30 June 2014). Applying the latter date is contrary to Article 13 ECT.[145]

82. The Tribunal calculated the equity value on both dates (19 December 2004 and 30 June 2014)[146] on the basis of the calculations of HVY's expert (Mr Kaczmarek of the Navigant agency), who applied the date of 21 November 2007 as argued by HVY.[147] In order to subsequently calculate the values on

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142 **Exhibits RF-211 through RF-213**.

143 Writ, ¶ 391.

144 Final Awards, ¶¶ 1407, 1760-1762.

145 That is a *lex specialis* laid down in the treaty. The treaty prevails over anything that general international public law might provide in this respect. HVY can only point out one precedent under the ECT in which the date of Article 13 ECT is also deviated from. See Rejoinder, ¶ 334. *Karadassopoulos v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (3 March 2010), ¶ 513 (Annex (Merits) C 1533, **Exhibit RF-03.2.C-1.1533**). This precedent is not binding and it was also Mr Fortier who was the chairman of the Tribunal in that case. See elaborately for the date of the damages: Reply, ¶¶ 407-458.

146 Final Awards, ¶¶ 1763-1769, footnote 2351. In an article previously written by Mr Valasek it has been argued, on the basis of the same sources, that the assessment of damages should take as a starting point the date of the award (**Exhibit RF-210**), p. 248 et. seq.

147 Final Awards, ¶ 1696.

both dates as conceived by the Tribunal, it calculated from 21 November 2007 back to 19 December 2004 and forth to 30 June 2014, respectively.

83. For this calculation the Tribunal used a standard that was not used by parties for this purpose either: the *RTS Oil & Gas Index*.[148] This is an index for Russian oil and gas companies, similar to the Dutch AEX-index.

84. The Tribunal wrongly justified its choice for the RTS Index on the basis of mere ad hoc references and references made by the parties in different contexts.[149] In fact, an application of the RTS Index, proposed by HVY toward the end of the Arbitrations, was rejected by the Tribunal – and rightly so – for being late:

> "(…) were only introduced by [HVY] at a very late stage of the proceedings (…) and could therefore not be properly addressed by [the Russian Federation]"[150]

85. In short, the choice of date was in violation of the ECT and outside the party debate. The Tribunal's own calculation standard was also in violation of the ECT and the right of the parties to present their case. Therefore, the Yukos Awards must be set aside pursuant to Article 1065(1)(c) and/or (d) and/or (e) DCCP.

86. Had the Tribunal reverted to the parties and allowed them to comment on the methodology it had developed, the Tribunal would not have made the following error. This is described in the expert report of Prof. Dow[151] and in

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148 Final Awards, ¶ 1788; Writ, ¶¶ 418-419; Reply, ¶¶ 389-390. The RTS Index is extremely whimsical, because it depends on the price of oil. Had the judgment been delivered six months later, the amount would have been approximately US$ 3 billion less. See the graph in Reply, ¶ 465.

149 See Final Awards, ¶ 2383 for the references. None of the references concerns a claim of parties on the RTS Index for the determining of the equity value of Yukos (as a whole) for the period 2004 – 2014. Writ, ¶ 417-419; Reply, ¶¶ 389-397.

150 Final Awards, ¶ 1786. Cf. The setting aside of the arbitral award in *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Phillippines*, see footnote 3 above.

151 **Exhibit RF-85**, ¶¶ 57-79; see also Appendix A.1 (Comparison of Dividend Yields) and A.2 (Total Cumulative Returns Since 21 November 2007 As Implied By The Tribunal Award).

the presentation of Ms Paisley, who independently provided commentaries on the Yukos Awards.[152]

87. As mentioned, the Tribunal applied the RTS Index as a standard for the equity value in the present case. It appears that the companies on the RTS Index paid approximately 40% of the available cash as dividend during the period 2004-2014.[153]

88. Yukos would have created far less equity value than the average of the RTS Index because Mr Kaczmarek (who did not apply the RTS index), in the value determination as per 21 November 2007 with his DCF model, for model-technical reasons started from the hypothesis that 100% of the available cash would be distributed as dividend.[154] This leads to an exaggeration of the amount in hypothetically missed dividends, as HVY's own expert (Kaczmarek) also indicated:

> "As a practical matter, we recognize that not all of the free cash flows to equity generated by YukosSibneft would have been issued as dividends to the shareholders, and a portion of this free cash flow would have been invested in positive net present value (NPV) initiatives (…)"[155]

89. There is a so-called "inverse relationship" between equity value and dividend. One can spend a dollar of profit only once; either by distributing it as dividend or by investing it as a result of which the value of the company increases. The unrealistic assumption of Kaczmarek that 100% would have been distributed as

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152 **Exhibit RF-214**, slide 13.

153 **Exhibit RF-85**, ¶¶ 57-79; see also Appendix A.1 (Comparison of Dividend Yields) and A.2 (Total Cumulative Returns Since 21 November 2007 As Implied By The Tribunal Award).

154 The Tribunal's inconsistency is remarkable. As basis for the calculation of dividends, the Tribunal applied the so-called Free Cash Flow to Equity ("FCTE"). This because the FCTE is part of HVY's DCF [Discounted Cash Flow] method. The DCF method was one of the three methods that it had proposed for the valuation of the equity value of Yukos. The Tribunal had rejected the DCF method as being unreliable to establish the equity value of Yukos because HVY's expert (Mr Kaczmarek of Navigant) had indicated during the hearing that his "DCF analysis had been influenced by his own pre-determined notions as to what would be an appropriate result." Final Awards, ¶ 1785. It cannot be the case that the Tribunal uses the FCTE (part of the DCF) again as a basis for the determination of the dividends, in fact eight paragraphs later in its Award (¶ 1793).

155 First Kaczmarek Report, ¶ 392, footnote 488 (**Exhibit RF-03.1.C-2.1**); Writ, ¶¶ 422, 440; Reply, ¶ 440.

dividend, would translate into an equity value of Yukos that would be lower than those of other companies in the end.

90. The Tribunal allowed this "automatic compensation" to be lost and applied apples to the equity value (the RTS Index which started from 40% dividend distribution) and oranges to the calculation of the dividend (100% dividend distribution).

91. The principles of the Tribunal are clearly mutually incompatible. They led to a high equity value, as if 60% of the available cash would always be reinvested, and at the same time a high amount in missed dividends, because the calculation started from 100% distribution of the available cash.

92. The consequence is a double count of more than US$ 20 billion, or 40.4% of the total damages awarded by the Tribunal! For the substantiation of this inconceivable US$ 20 billion mistake I refer to the expert report of Prof. Dow,[156] the Writ and the Reply.[157] See for example the graph "*Dividend Yields*" in the Writ, ¶ 445.[158]

93. In short, this highly detrimental inconsistency as a direct consequence of the omission of the Tribunal to grant the parties the opportunity to provide their views on the method developed by the Tribunal, once again justifies the setting aside of the Yukos Awards due to a failure to comply with the mandate (Article 1065(1)(c) DCCP).

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156 **Exhibit RF-85**, ¶¶ 71-79.

157 Writ, ¶¶ 434-449; Reply, ¶¶ 398-406, Annex I, ¶¶ 30-76.

158 The fundamental error in the method used by the Tribunal also becomes clear from the fact that the damages that the Tribunal attributed to HVY (equity value and dividend) allegedly implies a return on their investments of 28% during the period 2007 – 2014 while an investor in the RTS Index had made a loss of 8% for the same period. See Writ, ¶¶ 448-449, Reply, Annex I, ¶ 76, and Report of Prof. Dow ¶¶ 57-79. See graph "Dividend", *id*., p. 27 and "Cumulative Returns" *id*., p. 29. See also **Exhibit RF-214**, slide 13.

VIII. MANDATE GROUND 3 – THE ARBITRATORS DID NOT PERSONALLY FULFIL THEIR MANDATE

Writ: Section V.E, § 468 et seq.; SoD part I Section 3.4.4, part II Section 3.3, § II.297 et seq.; Reply: Section IV.C, § 477 et seq.; Rejoinder Section 3.4, § 350 et seq. Important Exhibits: Exhibits RF-88 t/m -95, RF-188, RF-189 (Chaski Report), RF-190 t/m -197, Terms of Appointment (RF-03.1.D-3.1 through 3.3); Annex 6 of the SoD.

94. This ground for setting aside has received special interest within the field of international arbitration.[159]

95. For the sake of clarity, I state first and foremost that arbitrators cannot be compared in each and every way to judges who are assisted by official legal assistants. Arbitrators are carefully selected by parties for (i) their specific knowledge and experience, and (ii) available time, while (iii) they are also remunerated accordingly (high). Their appointment is *intuitu personae*. They can and may (a) only delegate subordinate (organisational, administrative, technical and uncontroversial) parts of their mandate to a secretary or assistant, provided that they (b) clearly state in advance which parts they wish to delegate, and (c) have received the express permission of parties in that respect. However, this has gone seriously wrong in all three aspects in this case.[160]

96. The facts are as follows. At the hearing of 31 October 2005, the draft of the *Terms of Appointment* was discussed. Article 7(c) regulates the appointment of an administrative secretary:

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159 See for example GAR 20 October 2015, Alison Ross, 'Valasek wrote Yukos Awards, says linguistics expert' (http://globalarbitrationreview.com/news/article/34234/valasek-wrote-yukos-awards-says-linguistics-expert/); GAR 27 January 2015, Alison Ross, 'Was the tribunal's assistant the fourth Yukos arbitrator?' (http://globalarbitrationreview.com/journal/Article/33333/was-tribunals-assistant-fourth-yukos-arbitrator/); Markus Altenkirch & Benedic Schmeil, 'The Substantial Involvement of Arbitral Secretaries', GlobalArbitrationNews, 17 September 2015 (http://globalarbitrationnews.com/the-substantial-involvement-of-arbitral-secretaries-20150917/).

160 See more elaborately Writ, Sections V.E and VI and Reply, Sections IV.E. and V. The most recently conducted survey reveals that 78% of the respondents demands 'complete transparency' on how a secretary spends his or her time, that 86% considers it inappropriate for a secretary to prepare written legal analysis of the parties' arguments, that 90% opposes participation in the tribunal's deliberations and another 90% considers it inappropriate for a secretary to write substantive parts of the award. A. Ross, *'BLP puts secretaries under scrutiny'*, Global Arbitration Review, 6 January 2016 (**Exhibit RF-216**) and BLP International Arbitration; Research based report on the use of tribunal secretaries in international commercial arbitration, Survey 2015 (**Exhibit RF-217**). See also the expert opinion of prof. P. Lalive d.d. 16 July 2010, pp. 8-13 (**Exhibit RF-224**).

> "The Tribunal may appoint a member of the Registry [the PCA] to act as Administrative Secretary. The Administrative Secretary and other members of the International Bureau [of the PCA] shall carry out administrative tasks on behalf of the Tribunal."[161]

97. The parties were notified of the appointment and task description of the secretary – Mr Daly, assisted by Ms Levine, of the Permanent Court of Arbitration ("PCA") – and they consented thereto by signing the *Terms of Appointment*.

98. During the hearing of 31 October 2005, the chairman of the Tribunal – without giving notice – announced the following:[162]

> THE CHAIRMAN: Thank you, Mr Greig. I would like to bring to the attention of the parties that I have asked one of my colleagues in my office in Montreal to assist me in the conduct of this case. Because, like all of us, I travel a lot, if at any time I am unreachable, you could always contact him. He has been about eight or nine years at the bar. His name is Martin Valasek. If it had not been for
>
> the fact that KLM cancelled the Saturday night flight from Montreal to Amsterdam, he would have been here today. It may come to pass that you wish to find out something with respect to the tribunal that Brooks Daly might not be aware of. Martin at my office in Montreal could be reached and hopefully will have the answer for you.

99. Hence, the thus indicated task of Mr Valasek, the Assistant, was of an administrative and logistical nature. Afterwards, not a single other announcement was made by the Tribunal in respect of the contents of the task

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161 *Terms of Appointment* October 31, 2005, art. 7(c) (**Exhibit RF-03.1.D-3.1**).

162 Transcript of the procedural hearing October 31, 2005, 92:19-93:6 (**Exhibit RF-03.1.G-1.1**).

of the Assistant. HVY attempt to infer a supplement to this task from a single remark and a word of thanks of the Tribunal, but this supplement to the task cannot be identified therein, let alone any consent from the parties.[163]

100. Prior to rendering the Interim Awards on 30 November 2009 the PCA had issued two "Statements of Account".[164] These revealed that the Assistant had charged 381 hours. This was substantially *less* hours (ca. 25%) than the average Arbitrator at that time.[165]

101. Afterwards and prior to the Final Awards of 18 July 2014, there were no more Statements of Account or other documents demonstrating the number of hours spent by the Arbitrators and Assistant. The Russian Federation thus has not forfeited any rights in this regard.

102. In the Final Awards (paragraphs 1860-1866) the Russian Federation was astonished to read that the Assistant had invoiced almost 1 million Euro.

103. This bafflement was all the more justified as the secretary and deputy secretary of the PCA had also charged almost 1 million Euro for their administrative organisational support to the Tribunal.[166]

104. A first and a further request of the Russian Federation for a statement of the time spent, insofar as necessary only the Assistant, were both rejected on the authority of the Tribunal by the PCA Secretariat – with the revealing reference to the confidentiality of deliberations.[167]

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163 Rejoinder, ¶ 372, see Reply, ¶¶ 587 et seq.

164 PCA Statement of Account dated 29-01-2008 and dated 04-02-2009 **(Exhibit RF-03.3.13)**.

165 Fortier: 490.5; Schwebel: 564.6; Price and his replacement Poncet combined: 487.5.

166 Final Awards, ¶ 1864. It concerned over 866,000 Euro.

167 See Writ, ¶ 500.

105. The Russian Federation traced back the amount of hours worked by the Assistant and the Arbitrators by means of the data provided by the PCA, and presented these schematically in the Statement of Defence, ¶ 508:

Name	**(1) Hours from 18-11-2005 through 31-12-2007**	**(2) Hours in 2008, incl. hearing on jurisdiction November & December 2008**	**(3) Hours from 18-11-2005 through 31-12-2008**	**(4) Hours from 1-1-2009 up to end**	**(5) Hours from 18-11-2005 up to end**
Valasek	22	359	381	2625.2	3006.2
Fortier	215	275.5	490.5	1592.25	2082.75
Price	138.05	0	138.05	0	138.05
Poncet (replaced Price)	48.5	300.5	349	1540	1889
Schwebel	411.85	152.75	564.6	1852.6	2417.2

106. This overview reveals a dramatic discrepancy in the hours of the Assistant and the hours of the Arbitrators. Valasek spent over 3,000 hours on the Arbitration Proceedings, whereas the Arbitrators themselves only spent an average of just over 2,100 hours.

107. The question then is: what did Mr Valasek spend the time he invoiced in this case on, which was almost 50% more than the average Arbitrator?

108. The "additional time" cannot have been spent on the announced communicative tasks only, since the PCA Secretariat was responsible for the entire administrative organisation and charged 5,232.1 hours for that.[168]

109. The "additional time" also cannot have been spent on making summaries and comparisons of the parties' arguments. This can not possibly have taken so much more time than the tasks the Arbitrators should have personally fulfilled. Indeed, the Arbitrators also had to personally attend all hearings, study all relevant documents and make their own deliberations.

110. There can therefore be no other conclusion than that Mr Valasek in fact spent his "additional time" of approximately 50% compared to the "average

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168 Writ, ¶ 499.

Arbitrator" on tasks that by law are exclusively and personally assigned to the arbitrators, such as deliberating and (re)formulating the decisions and the grounds for it.

111. The unauthorised delegation also becomes clear from the Tribunal's refusal, based on the confidentiality of the Tribunal's deliberations, to provide a specification of the hours spent by Mr Valasek.[169]

112. For the sake of good order it is repeated here: Arbitrators are personally appointed by the parties because of their expertise and available time. They cannot free themselves of these personal obligations by adopting and signing off a largely unamended version of the assistant's findings as their own.[170] Here applies the maxim: "to draft is to motivate".[171] An arbitrator must form his or her own opinions and may not base his opinion on the study and conclusions of an assistant.

113. Finally, the unauthorised delegation becomes clear from the statistical linguistic analysis of Dr Chaski.[172] With over 95% certainty, Mr Valasek himself wrote approximately 70% of the three most important chapters.[173]

114. In short, because Mr Valasek carried out a task exclusively reserved for the Arbitrators, and de facto acted as fourth arbitrator, the Tribunal failed to comply with its mandate and was also irregularly composed (Article 1065(1)(b) and (c) DCCP).

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169 See Reply, ¶ 511.

170 See inter alia the recently filed **Exhibit RF-216**, **Exhibit RF-217** and **Exhibit RF-224**.

171 Cf. Klaus Peter Berger, Part III, 27th Scenario: 'Deliberation of the tribunal and Rendering of the Award', Private Dispute Revolution in International Business, Negotiation, Mediation, Arbitration (Third Edition), Third Revised Edition, Kluwer Law International 2015, ¶ 27-19, as referred to in Reply, ¶ 625.

172 See Chaski Report (**Exhibit RF-189)**. Also see Dr Chaski's Expert Reply Report (**Exhibit RF-125**) in which Dr Chaski addresses the unfounded arguments in HVY's Rejoinder. Taking into account HVY's criticism leads to the conclusion that Valasek is the author of approximately 60%, respectively 72% of the three sections.

173 See Chaski Report (**Exhibit RF-189)**. It concerns chapters IX, X and XII. Also compare **Exhibit RF-210** and Chapter XII on the assessment of damages.

IX. CONCLUSION

115. For the foregoing reasons and the reasons set out in the Writ and Reply, the Russian Federation demands that the Yukos Awards be set aside, on each ground separately and on all grounds collectively.