**PCA Case No. AA 228**

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH ARTICLE 26 OF THE ENERGY CHARTER TREATY AND THE UNCITRAL ARBITRATION RULES 1976**

**- between -**

**VETERAN PETROLEUM LIMITED (CYPRUS)**

**- and -**

**THE RUSSIAN FEDERATION**

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# INTERIM AWARD ON JURISDICTION AND ADMISSIBILITY

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**30 November 2009**

*Tribunal*
L. Yves Fortier, CC, QC, Chairman
Dr. Charles Poncet
Judge Stephen M. Schwebel

Mr. Brooks W. Daly, Secretary to the Tribunal
Ms. Judith Levine, Assistant Secretary to the Tribunal
Mr. Martin J. Valasek, Assistant to the Tribunal

*Registry*
Permanent Court of Arbitration

*Representing Claimant:*
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Dr. Yas Banifatemi
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**TABLE OF CONTENTS**

## LIST OF DEFINED TERMS

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|---|---|
| **1994 EU Joint Statement** | Joint statement by the Council, the Commission and the Member States of the European Union on Article 45 of the European Energy Charter Treaty, 14 December 1994 |
| **Baikal** | Baikal Finance Group, an entity purportedly controlled by the Russian State |
| **Bering Sea MBA** | Maritime Boundary Agreement for the Bering Sea, in connection with which notes were exchanged between the United States and the USSR on 1 June 1990 |
| **BIT** | Bilateral Investment Treaty |
| **Briefing** | U.S. Administration Briefing on the Energy Charter Treaty, 1 November 1994 |
| **Chiltern** | WJB Chiltern Trust Company (Jersey) Limited |
| **Claimants** | Hulley, VPL and YUL |
| **Constitution** | Constitution of the Russian Federation, 1993 |
| **Cypriot Shares** | Shares of VPL, transferred by YUL to Chiltern on 25 April 2001. Also called "VPL Shares." |
| **Cyprus-Russia DTC** | Cyprus-Russia Double Taxation Convention |
| **Deferred Requests** | Requests and objections from the Parties regarding document production addressed in Procedural Order No. 2, 8 September 1996 |
| **DTA** | Russia-Cyprus Double Taxation Agreement |
| **ECT** | Energy Charter Treaty, 1994 |
| **ECT Explanatory Note** | Explanatory Note submitted by the Russian Government to the Duma together with the draft ECT ratification law, 26 August 1996 |
| **EU** | European Union |
| **GATT** | General Agreement on Tariffs and Trade, 1994 |

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|---|---|
| **GML** | GML Limited, a company incorporated in Gibraltar |
| **GML MS** | GML Management Services S.A. |
| **Guernsey Trusts** | Trusts created in Guernsey in 2003 and 2005 which hold the shares of GML (the Auriga Trust, the Draco Trust, the Mensa Trust, the Tucana Trust, the Pictor Trust, the Southern Cross Trust, and the Palmus Trust) |
| **FLIT** | Federal Law on International Treaties of the Russian Federation, 1995 |
| **Hulley** | Hulley Enterprises Limited, a company organized under the laws of Cyprus and Claimant in PCA Case No. AA 226 |
| **ICJ** | International Court of Justice |
| **ICSID** | International Centre for the Settlement of Investment Disputes |
| **ILC** | International Law Commission of the United Nations |
| **Limitation Clause** | The phrase at the end of Article 45(1) of the ECT: ". . . to the extent that such provisional application is not inconsistent with its constitution, laws or regulations" |
| **NAFTA** | North American Free Trade Agreement, 1992 |
| **P&C Agreement** | Agreement on Partnership and Cooperation between the European Union and the Russian Federation 1994 |
| **Parties** | Claimants and Respondent |
| **PCA** | Permanent Court of Arbitration |
| **Program** | Veteran Social Support Program |
| **Red Cross** | International Committee of the Red Cross |
| **Respondent** | Russia, Russian Federation |
| **RSP** | Russian Service Provider |

| | |
|---|---|
| **RSP Agency Agreement** | An agreement between the RSP and Yukos dated 11 May 2001 |
| **Russian Notification** | Notification of 20 August 2009 by Russian Federation to Portuguese Republic pursuant to Article 45(3)(a) of the Treaty |
| **Russian Shares** | 223,699,175 shares of Yukos, representing 10 percent of the issued share capital of Yukos, transferred from YUL to Chiltern on 25 April 2001. Also called "Yukos Shares." |
| **Trade Amendment** | Declaration made by the Russian Federation under Article 6(2)(a) of the Amendment to Trade-Related Provisions of the ECT |
| **Treaty** | Energy Charter Treaty, 1994 |
| **UNCITRAL Rules** | Arbitration Rules of the United Nations Commission on International Trade Law, 1976 |
| **USSR** | Union of Soviet Socialist Republics |
| **VCLT** | Vienna Convention on the Law of Treaties, 1969 |
| **VPL** | Veteran Petroleum Limited, a company organized under the laws of Cyprus and Claimant in PCA Case No. AA 228 |
| **VPL Shares** | Shares of VPL, transferred by YUL to Chiltern on 25 April 2001. Also called "Cypriot Shares." |
| **VP Trust** | Veteran Petroleum Trust |
| **Yukos** | Yukos Oil Corporation OJSC, a joint stock company incorporated in Russia in 1993 |
| **Yukos Shares** | 223,699,175 shares of Yukos, representing 10 percent of the issued share capital of Yukos, transferred from YUL to Chiltern on 25 April 2001. Also called "Russian Shares." |
| **YUL** | Yukos Universal Limited, a company organized under the laws of the Isle of Man and Claimant in PCA Case No. AA 227 |

## INTRODUCTION

1. Three shareholders of Yukos Oil Corporation OJSC ("**Yukos**")—Hulley Enterprises Limited ("**Hulley**"), a company organized under the laws of Cyprus, Yukos Universal Limited ("**YUL**"), a company organized under the laws of the Isle of Man, and Veteran Petroleum Limited ("**VPL**" or "**Claimant**"), a company organized under the laws of Cyprus (collectively, "**Claimants**")—initiated arbitrations against the Russian Federation ("**Respondent**," "**Russian Federation**" or "**Russia**") which together with Claimants constitute the "**Parties**."

2. The three arbitrations were heard in parallel with the full participation of the Parties at all relevant stages of the proceedings. Mindful of the fact that each of the three Claimants maintains separate claims in separate arbitrations that necessitate separate awards, the Tribunal nevertheless shall discuss these arbitrations as a single set of proceedings, except where circumstances distinct to particular Claimants necessitate separate treatment. Thus throughout Parts I to VI, the introductory portions of this Interim Award, the plural "Claimants" is used collectively for Hulley, YUL and VPL. In Parts VII, VIII and IX, the Issues, Analysis and Decision portions of this Interim Award, the singular "Claimant" refers specifically to YUL.

## I. PROCEDURAL HISTORY

### A. COMMENCEMENT OF THE ARBITRATION PROCEEDINGS

3. On 2 November 2004, all three Claimants delivered to the President of Russia notifications of claim with respect to Russia's alleged violation of obligations said to be owed to Claimants' investments in Russia under the Energy Charter Treaty ("**ECT**" or "**Treaty**")[1] and sought to settle the disputes amicably pursuant to Article 26(1) of the ECT.

4. Having failed to settle their disputes amicably within the three-month period prescribed under Article 26(2) of the ECT, on 3 February 2005, Hulley and YUL initiated arbitration

[1] Energy Charter Treaty, Lisbon, 17 December 1994, 2080 UNTS 95.

proceedings through Notices of Arbitration and Statements of Claim against Respondent. Subsequently, through a Notice of Arbitration and Statement of Claim dated 14 February 2005, VPL initiated arbitration proceedings against Respondent (collectively, the "**Notices of Arbitration and Statements of Claim**"). Claimants' requests for arbitration against Respondent were made pursuant to Article 26(4)(b) of the ECT and the Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL Rules**").[2]

5. Claimants alleged in their Notices of Arbitration and Statements of Claim that Respondent expropriated and failed to protect Claimants' investments in Yukos, resulting in "enormous losses," and sought all available relief in respect of those losses.

### B. CONSTITUTION OF THE ARBITRAL TRIBUNAL

6. In their Notices of Arbitration and Statements of Claim, Claimants appointed Mr. Daniel Price as arbitrator.

7. On 8 April 2005, Respondent appointed Judge Stephen M. Schwebel as arbitrator.

8. By a letter dated 26 May 2005, Claimants informed the Permanent Court of Arbitration ("**PCA**") that the deadline for the appointment of the presiding arbitrator by the Party-appointed arbitrators had expired and requested that the Secretary-General of the PCA designate an appointing authority pursuant to Article 7(3) of the UNCITRAL Rules. Claimants further stated that they would have no objection to the Secretary-General of the PCA acting as the appointing authority. By a letter dated 17 June 2005, Respondent accepted the Secretary-General of the PCA as appointing authority, while making it clear that such acceptance did not constitute acceptance of the Tribunal's jurisdiction in these arbitrations.

9. By letter dated 4 July 2005, the PCA communicated to the Parties a list of three prospective presiding arbitrators in accordance with the list procedure foreseen in Articles 6(3) and 7(3) of the UNCITRAL Rules. On 19 July 2005, the Parties

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[2] UNCITRAL Arbitration Rules (1976) GA Res. 31/98.

communicated their choices to the PCA, but no arbitrator set forth on the list was considered acceptable to both sides. On 20 July 2005, the PCA notified the Parties that the list procedure had failed and on 21 July 2005 the PCA Secretary-General exercised his discretion, pursuant to Article 6(3)(d) of the UNCITRAL Rules, and directly appointed Maître L. Yves Fortier, CC, QC (the "**Chairman**") as presiding arbitrator.

10. Through a letter dated 1 August 2005, Claimants agreed to Respondent's proposal that The Hague be selected as the legal seat of the arbitrations and confirmed that the Parties agreed to have the PCA administer these arbitrations.

11. On 15 October 2005, Respondent submitted its Statements of Defense, in which it objected to the Tribunal's jurisdiction and denied Claimants' allegations of expropriation and unfair and inequitable treatment.

12. On 31 October 2005, a preliminary procedural hearing was held at the Peace Palace, The Hague, during which the Parties and the members of the Tribunal signed Terms of Appointment confirming, *inter alia,* that: (a) the members of the Tribunal had been validly appointed in accordance with the ECT and the UNCITRAL Rules, (b) the proceedings shall be conducted in accordance with the UNCITRAL Rules, (c) the International Bureau of the PCA shall act as registry, (d) the issues in dispute shall be decided in accordance with the ECT and applicable rules and principles of international law, (e) the language of the arbitration shall be English, and (f) all pleadings, documents, testimonial evidence, deliberations and actions taken by the Tribunal, shall remain confidential in perpetuity, unless the Parties release the arbitrators from this obligation. The preliminary procedural hearing was attended by the following:

Tribunal

Maître L. Yves Fortier, CC, QC
Mr. Daniel Price
Judge Stephen M. Schwebel

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*Counsel*
Professor Emmanuel Gaillard
Dr. Yas Banifatemi
Mr. Philippe Pinsolle

Respondent

*Counsel*
Mr. Robert T. Greig
Dr. Claudia Annacker
Mr. Grégoire Bertrou
Mr. Charles Olson

*Party Representatives*
Mr. Tim Osborne
Mr. Kevin Bromley
Mr. Christopher Cook
Mr. Rodney Hodges

Permanent Court of Arbitration

Mr. Brooks Daly
Ms. Evelien ter Meulen

Court Reporter

Mr. Trevor McGowan

13. At the preliminary procedural hearing, the Tribunal also determined that it would rule on Respondent's plea concerning jurisdiction and the admissibility of the claim as a preliminary question and ordered a procedural calendar for the conduct of the arbitration. The procedural calendar was subsequently confirmed through Procedural Order No. 1, dated 8 November 2005.

14. On 31 May 2007, Mr. Daniel Price resigned as arbitrator.

15. On 26 June 2007, Claimants appointed Professor Gabrielle Kaufmann-Kohler as arbitrator to replace Mr. Price. Through a letter dated 29 June 2007, Professor Kaufmann-Kohler disclosed, for purposes of transparency, certain circumstances connecting her then law firm to Claimants and Claimants' counsel which, in her view, did not affect her independence and impartiality. On the basis of those relationships, by its letter of 13 July 2007, Respondent challenged Claimants' appointment of Professor Kaufmann-Kohler pursuant to Article 11 of the UNCITRAL Rules. By a letter dated 20 July 2007, Professor Kaufmann-Kohler maintained that the circumstances disclosed in her letter of 29 June 2007 did not affect her independence and impartiality. Through their letter of 26 July 2007, Claimants did not agree to the challenge of Professor Kaufmann-Kohler's appointment as arbitrator. On 31 July 2007, Respondent requested a ruling from the Secretary-General of the PCA on Respondent's challenge to the appointment pursuant to Article 12 of the UNCITRAL Rules. After providing the Parties the opportunity to comment on the challenge, on 4 September 2007, the Secretary-General of the PCA sustained the challenge of Professor Kaufmann-Kohler as arbitrator and invited

Claimants to appoint a substitute arbitrator in accordance with Article 7 of the UNCITRAL Rules.

16. On 24 September 2007, Claimants appointed Dr. Charles Poncet as arbitrator.

### C. WRITTEN AND ORAL PROCEEDINGS

17. Pursuant to Procedural Order No. 1, Respondent filed its First Memorials on Jurisdiction and Admissibility on 28 February 2006 ("**First Memorials**"). Claimants filed their Counter-Memorials on Jurisdiction and Admissibility on 30 June 2006 ("**Counter-Memorials**").

18. By letter dated 27 March 2006, Claimants requested that Respondent produce certain documents relied upon in its First Memorials. On 8 May 2006, following extensive correspondence, the Tribunal ordered that Respondent produce all the documents relied upon in Respondent's Memorials. These documents were to be submitted by 17 May 2006. On 17 May 2006, Respondent produced certain documents; however, in a letter dated 19 May 2006, Claimants pointed out that Respondent had failed to produce all the required documents and requested that the Tribunal direct Respondent to comply fully with the Tribunal's letter of 8 May 2006 and grant Claimants additional time to prepare their Counter-Memorials. The Chairman requested that Respondent provide its comments on Claimants' letter of 19 May 2006, and by a letter dated 26 May 2006, Respondent stated that it had produced all the requested documents, although some of them were secondary—rather than primary—source documents, and therefore requested that the Tribunal deny Claimants' application. The Chairman requested that Respondent provide its comments on Claimants' letter of 26 May 2006, and by a letter dated 1 June 2006, Claimants reiterated all of the terms of their letter dated 19 May 2006. The Tribunal directed Respondent to produce the primary sources listed in the table attached to Claimants' letter dated 19 May 2006; the deadline for submission of the documents was 23 June 2006. On 23 June 2006 Respondent provided some of the documents requested.

19. On 8 September 2006, after considering various requests and objections from the Parties for the production of certain documents, including the various pleadings and requests

relating to the Parties' respective "unclean hands" contentions and Respondent's contention that "Claimant(s') corporate responsibility must be disregarded because it is an instrumentality of a criminal enterprise" (collectively, the "**Deferred Requests**"), the Tribunal issued Procedural Order No. 2, which granted a number of requests, denied others, and invited the Parties to attempt to reach agreement by 18 September 2006 on whether the Deferred Requests should be considered during the Jurisdiction and Admissibility phase or deferred to the merits phase, if any. If the Parties were unable to reach agreement, the Tribunal invited the Parties to communicate their respective views on the question in writing by 2 October 2006 and to comment on the other Party's submission by 16 October 2006.

20. On 31 October 2006, after receiving the Parties' submissions following their inability to reach agreement, the Tribunal issued Procedural Order No. 3, deciding that it was appropriate to defer consideration of the Parties' contentions concerning "unclean hands," Respondent's "criminal enterprise" contention, and the resolution of the Deferred Requests (or relevant portions thereof) to the merits phase, if any. Prior to rendering its decision on the Deferred Requests, and in order to facilitate identification of the factual issues in dispute as to which further document production ought to be ordered, the Tribunal also invited Claimants to inform the Tribunal whether they were prepared to stipulate certain facts. On 3 November 2006 Claimants submitted a stipulation of facts, and on 8 November 2006, Respondent submitted its observations on the stipulations.

21. On 28 November 2006, the Tribunal issued Procedural Order No. 4, wherein it made a determination on certain of the Parties' Deferred Requests, and modified the procedural calendar.

22. Respondent filed its Second Memorials on Jurisdiction and Admissibility on 31 January 2007 ("**Second Memorials**").

23. On 6 March 2007, the Tribunal issued Procedural Order No. 5, which, *inter alia*, (a) directed Respondent to provide certain documents requested by Claimants (including publicly available documents), (b) reminded the Parties of their obligation to produce and submit to the other Party all documents relied upon in their Memorials or by their witnesses/experts in their statements/opinions, and (c) ruled that a Party's failure to

produce a document within the prescribed time may, on application of the other Party, result in the Tribunal drawing an inference adverse to the defaulting Party or even excluding or limiting the evidence in support of which the document has been invoked.

24. Claimants filed their Rejoinders on Jurisdiction and Admissibility on 1 June 2007 ("**Rejoinders**").

25. On 1 December 2007, a hearing was conducted at the Conference Centre of the World Bank, Paris, concerning certain procedural matters, hearing schedules, the production of additional documents, and Claimants' request for interim measures for the safekeeping of Yukos' company records. In attendance were the following:

Tribunal

Maître L. Yves Fortier, CC, QC
Dr. Charles Poncet
Judge Stephen M. Schwebel

Claimants

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Dr. Yas Banifatemi
Mr. Philippe PinsoIle
Mr. Mark McNeill
Ms. Jennifer Younan
Ms. Anna Crevon
Mr. Jean-Baptiste Godon

*Party Representatives*
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Mr. Christopher Cook
Mr. Rodney Hodges

Respondent

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Mr. Matthew D. Slater
Dr. Claudia Annacker
Mr. J. Cameron Murphy
Dr. Maja Ménard

Assistant to the Tribunal

Mr. Martin Valasek

Permanent Court of Arbitration

Mr. Brooks Daly

Court Reporter

Mr. Trevor McGowan

26. At the procedural hearing, the Tribunal denied a 22 November 2007 request by Claimant for interim measures for the preservation of Yukos documentation in the possession,

custody, or control of Russia, in light of statements concerning the safekeeping of Yukos company records in a decision of the Moscow Arbitrazh Court dated 12 November 2007. This decision was subsequently confirmed on 12 December 2007 as Procedural Order No. 6.

27. On 8 and 9 May 2008, a procedural hearing was conducted at the Peace Palace, The Hague. The Chairman was authorized by his co-arbitrators to chair the procedural hearing alone. The procedural hearing dealt with a number of matters, including Claimants' request for interim measures of preservation dated 1 December 2007, the Parties' respective requests to exclude certain documents from the evidentiary record, and the conduct of the scheduled hearing on jurisdiction and admissibility. In attendance were the following:

Tribunal

Maître L. Yves Fortier, CC, QC

Claimants

*Counsel*
Professor Emmanuel Gaillard
Dr. Yas Banifatemi
Mr. Philippe PinsoIle
Mr. Mark McNeill
Ms. Jennifer Younan
Ms. Anna Crevon
Mr. Jean-Baptiste Godon
Ms. Tania Steenkamp
Mr. Gueorgui Babitchev

*Party Representatives*
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Mr. Christopher Cook

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Dr. Claudia Annacker
Mr. J. Cameron Murphy
Dr. Maja Ménard
Mr. Guillaume de Rancourt

Assistant to the Tribunal

Mr. Martin Valasek

Permanent Court of Arbitration

Mr. Brooks Daly
Ms. Véronique Laughlin

Court Reporter

Mr. Trevor McGowan

28. On 11 June 2008, the Tribunal issued Procedural Order No. 7, in which the Tribunal ruled upon matters arising from the hearing of 8 and 9 May 2008. The Tribunal decided upon the admission of certain ECT documentation. The Tribunal also decided that while it will remain seized of Claimants' application for interim measures, an order would not be issued in light of Respondent's understanding that the relevant Yukos company records at issue would be retained by the Moscow Arbitrazh Court for a period of 5 years.

29. On 5 August 2008, the Tribunal issued Procedural Order No. 8, ruling, *inter alia*, upon the allocation of time between the Parties for cross-examination and excluding a witness statement from the evidentiary record. The Tribunal then declared the evidentiary record of the jurisdiction and admissibility phase of the arbitrations closed.

30. On 23 September 2008, the Tribunal issued Procedural Order No. 9, deciding certain procedural matters with respect to the hearing on jurisdiction and admissibility.

31. On 10 November 2008, Claimants and Respondent submitted their respective Skeleton Arguments in aid of the oral arguments to be presented at the hearing on jurisdiction and admissibility.

32. The hearing on jurisdiction and admissibility was conducted at the Peace Palace, The Hague, on 17 to 21 November, 26 to 29 November, and 1 December 2008. Claimants cross-examined the following witnesses: Professor Suren Avakiyan, Mr. Sydney Fremantle, Mr. Martin Mann, QC, Mr. Daniel Berman, and Mr. Anatoly Martynov. Respondent cross-examined Mr. Vladimir Gladyshev and Mr. Brian Green, QC. The Tribunal also heard the Parties' closing statements and rebuttal. Over the course of the hearing, the following were in attendance:

Tribunal

Maître L. Yves Fortier, CC, QC
Dr. Charles Poncet
Judge Stephen M. Schwebel

| Claimants | Respondent |
|---|---|
| *Counsel* | *Counsel* |
| Professor Emmanuel Gaillard | Dr. Claudia Annacker |
| Dr. Yas Banifatemi | Mr. Matthew Slater |
| Mr. Philippe PinsoIle | Mr. Jonathan Blackman |
| Mr. Mark McNeill | Mr. David Sabel |

Ms. Jennifer Younan
Ms. Coralie Darrigade
Ms. Ximena Herrera
Ms. Anna Crevon
Mr. Jean-Baptiste Godon
Mr. Gueorgui Babitchev
Ms. Jamia Sulayman

*Party Representatives*
Mr. Tim Osborne
Mr. Christopher Cook
Mr. Rodney Hodges

*Witnesses*

Mr. Vladimir Gladyshev
Mr. Brian Green, QC

Mr. William McGurn
Mr. Cameron Murphy
Dr. Maja Ménard
Ms. Ksenia Khanseidova
Mr. Lorenzo Melchionda
Mr. Milo Molfa
Mr. Lee Berger
Mr. Guillaume De Rancourt
Mr. Matthew Bunda
Ms. Rachel Goldbrenner
Mr. Rashid Sharipov
Mr. Thomas Price
Mr. Stephane Sollogoub

*Party Representatives*

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Mr. Konstantin Gavrilov
Mr. Maxim Musikhin

*Witnesses*

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Mr. Sydney Fremantle
Mr. Anatoly Martynov
Mr. Martin Mann, QC
Professor Daniel Berman

Assistant to the Tribunal

Mr. Martin Valasek

Permanent Court of Arbitration

Mr. Brooks Daly
Ms. Judith Levine
Mr. Aloysius Llamzon
Mr. Erwann Nicot

Court Reporter

Mr. Trevor McGowan
Ms. Christina Yanni

Interpreters

Mr. Yuri Somov
Mr. Kirill Savinski

33. By a letter dated 2 December 2008, the Tribunal confirmed that no Post-Hearing Briefs would be requested in these arbitrations.

34. On 31 August 2009, the Tribunal informed the Parties that it had learned from the Government of Portugal that, on 20 August 2009, Russia had notified the Portuguese Republic as Depository of the Treaty of Russia's intention not to become a party to the Treaty pursuant to Article 45(3)(a) of the Treaty (the "**Russian Notification**"). The Tribunal requested the Parties to submit their observations as to what effect, if any, the Russian Notification had on the Tribunal's consideration of the issues now before it. By letters dated 15 September 2009, the Parties submitted their written observations in response to the Tribunal's request.

## II. FACTUAL BACKGROUND

35. The disputes between the Parties to the present proceedings arose during the period between July 2003 and August 2006, after Yukos had emerged following the collapse of the Soviet Union to become the largest oil company in the Russian Federation. In essence, the disputes between the Parties involve various measures taken by the Russian Federation against Yukos and associated companies, that culminated in the bankruptcy of Yukos in August 2006, thereby allegedly adversely affecting Claimants' investments in Yukos. Such acts include both criminal prosecutions and other measures that Claimants allege to be in violation of the ECT.

### A. ENERGY CHARTER TREATY

36. The ECT was opened for signature on 17 December 1994 and entered into force on 16 April 1998. According to Article 2 of the Treaty, its purpose is to establish "a legal framework in order to promote long-term co-operation in the energy field . . . in accordance with the objectives and principles of the Charter."

37. The Russian Federation signed the ECT on 17 December 1994. The Treaty was submitted for ratification to the Parliament of the Russian Federation on 26 August 1996. Respondent notes that its Parliament has "never ratified the Treaty, nor has it ever adopted any law accepting or approving its provisional application." Instead, the proposal to ratify the Treaty met "fierce opposition" in the State Duma hearings in April 1997 and January 2001 and continued to meet such opposition. Respondent therefore contends that at all relevant times, the Treaty had not yet entered into force for the

Russian Federation, and that Claimants cannot rely on its terms in the present proceedings.

38. In contrast, Claimants submit that the Russian Federation has applied the Treaty on a provisional basis since signing it in December 1994, in accordance with Article 45 of the Treaty.

39. On 20 August 2009, the Russian Federation notified the Portuguese Republic, as the ECT Depository, of its intention not to become a party to the ECT. According to Respondent, the Russian Notification is "fully consistent with the positions taken in these proceedings by the Russian Federation, and was not intended to have any effect on the jurisdictional and admissibility issues currently before the Tribunal."

40. Claimants consider that the Russian Notification of 20 August 2009 has "no effect whatsoever on the Tribunal's consideration of the issues before it," other than furnishing further support for the conclusion that by terminating provisional application of the ECT pursuant to Article 45(3) of the ECT, Russia "admits having applied the Treaty from the date of signature with such provisional application giving rise to legally binding rights and obligations."

## B. THE PARTIES TO THESE PROCEEDINGS

### 1. Claimants and Related Entities

41. The three Claimants in these related cases are all part of the Yukos group of companies, which had at its center the Yukos Oil Corporation OJSC, headed by Chief Executive Officer Mr. Mikhail Khodorkovsky.

42. Claimant in PCA Case No. AA 227, YUL, was incorporated on 24 September 1997 in the Isle of Man (a Dependency of the United Kingdom).

43. Claimant in PCA Case No. AA 226, Hulley, was incorporated in the Republic of Cyprus on 17 September 1997 and was a 100 percent owned subsidiary of YUL.

44. Claimant in PCA Case No. AA 228, VPL, was incorporated in the Republic of Cyprus on 7 February 2001.

### 2. Respondent

45. Respondent in these three proceedings is the Russian Federation.

## C. YUKOS OIL CORPORATION OJSC

46. After the collapse of the Soviet Union, Yukos was incorporated as a joint stock company in 1993 by Presidential Decree. Fully privatized in 1995–1996, it was a vertically integrated group engaging in exploration, production, refining, marketing and distribution of crude oil, natural gas and petroleum products. Its three main production subsidiaries were Yuganskneftegaz, Samaraneftegaz and, from 1997, Tomskneft. In May 2002, Yukos became the first Russian company to be ranked among the top ten largest oil and gas companies by market capitalization worldwide. At its peak in 2003, it had 100,000 employees, six main refineries and a market capitalization estimated at over US$33 billion. After its 2003 merger with Sibneft, according to Claimants, YukosSibneft became the fourth largest oil producer worldwide, behind BP, Exxon and Shell. At the time of Respondent's alleged adverse actions in the summer of 2003, Yukos was engaged in merger negotiations with ExxonMobil and Chevron.

47. Respondent, however, contends that Yukos was a "criminal enterprise," engaged in a variety of tax evasion schemes and other fraudulent activities.

## D. CRIMINAL PROCEEDINGS

48. Starting in July 2003, a series of criminal investigations were initiated by the Russian Federation against Yukos management and activities. Claimants characterize these actions as harassment, motivated by Mr. Khodorkovsky's participation in Russian (opposition) politics and intended—together with tax reassessments—to lead to the nationalization of Yukos' assets. Respondent contends that its actions were in response to illegal acts committed by Yukos and its officers and shareholders.

49. Between July and October 2003, three key Yukos officers were arrested. In July 2003, Mr. Platon Lebedev, Director of YUL and Chairman of Hulley, was arrested on charges of embezzlement and fraud; he was sentenced to nine years in prison in May 2005. In October 2003, Mr. Vasily Shakhovsky, President of Yukos–Moscow, was charged with

and later convicted of tax evasion. In October 2003, Mr. Khodorkovsky himself was arrested and charged with crimes including forgery, fraud and tax evasion; he was also sentenced to a nine-year prison term in May 2005. As a result of these arrests, a number of high-ranking Yukos executives fled Russia, such as Mr. Leonid Nevzlin, Deputy Chairman of Yukos until 2003. On 2 February 2007, new charges of embezzlement and money laundering were brought against Messrs. Khodorkovsky and Lebedev.

50. Further arrest warrants were issued from mid-January 2004 against individuals who either held office in Yukos or were associated with it. From late November 2004, mid-level managers and lower-ranking employees were charged or became the subject of criminal investigations. From 2005, several remaining Yukos officials, including many foreign nationals, declined to return to Russia as a result of these investigations. Claimants contend that by April 2006, no fewer than 35 top managers and employees of Yukos had been interrogated, arrested or sentenced and that lawyers acting for Yukos had been obstructed in their work. During the same period, Russian authorities conducted searches, seizures and interrogations of Yukos property and personnel.

51. Claimants contend that all of these actions amounted to harassment and intimidation, that they "severely hampered" the functioning of Yukos as a business and that the underlying motive was to nationalize Yukos' assets.

52. In response, Respondent contends that Claimants are "part of a criminal enterprise engaging in a number of illegal activities [. . .] including tax evasion, tax fraud, and schemes to avoid enforcement of tax liens" and that Claimants have "engaged in a pattern of criminal activity" designed to divert funds from Russian entities through tax fraud and embezzlement. It contends that Claimants had participated in an illegal tax scheme designed to misuse special low-tax zones in Russia and that they were aware of the illegality of the tax fraud scheme.

53. Respondent contends that in addition to participation in tax fraud schemes, Claimants participated in a "massive transfer pricing scheme by which hundreds of millions of dollars from the sales of oil and other products were illegally siphoned off to offshore entities for the benefit of Khodorkovsky/Lebedev and other controlling Russian oligarchs." Through this scheme, oil or other products would be sold by Russian entities

at below-market prices to offshore companies with no official affiliation to Yukos and then re-sold at market prices, with the profits going to Yukos officials. Respondent contends further that Yukos committed other corporate crimes, such as attempting to issue shares in Yukos subsidiaries to offshore companies in order to dilute the shareholdings of minority shareholders, manipulating the Yukos share price in order to buy back Yukos shares from the banks at below-market prices, and embezzlement of funds.

54. Respondent also contends that Yukos officials have been engaged in violent crimes, such as the murder, attempted murder and assault of persons seeking to enforce Russian tax laws or otherwise perceived to threaten Yukos interests.

55. Respondent denies that Yukos and its officers were targeted in a discriminatory way, contending that Russian taxation measures have also applied to other offenders and that the searches and seizures were taken as part of legitimate taxation measures and conducted in accordance with the appropriate procedural protections available under Russian law.

### E. ADDITIONAL MEASURES

56. In the period between October 2003 and August 2006, Yukos and its subsidiaries faced a series of additional measures, including the annulment of Yukos' merger with Sibneft, tax reassessments, the freezing of shares and assets, the threatened revocation of licenses, mutual legal assistance measures and the forced sale of Yukos' main production facility, Yuganskneftegaz. These measures were followed by the bankruptcy of Yukos in August 2006.

#### 1. Annulment of Yukos Merger with Sibneft

57. A merger was completed between Yukos and Sibneft, Russia's fifth largest oil company, in October 2003. According to Claimants, the resulting entity, YukosSibneft, became the world's fourth largest oil company. In November 2003, however, after Yukos had acquired 92 percent of Sibneft's shares and after the arrest of Mr. Khodorkovsky, Sibneft's controlling shareholder, Mr. Roman Abramovich, halted the merger process

based on court findings of Yukos' violations of Russian securities and anti-monopoly laws.

### 2. Tax Reassessments

58. Respondent contends that from 2000 until Mr. Khodorkovsky's arrest in 2003, Yukos had "implemented an illegal and fraudulent tax evasion scheme designed to misuse special low-tax zones within the Russian Federation," known as "ZATOs" or "internal offshore zones." It alleges that the scheme involved setting up numerous sham companies in internal offshore zones to enjoy a favorable tax regime in those territories. Claimants deny that Yukos' actions with regard to these trade subsidiaries was illegal or fraudulent, but rather was consistent with Russian legislation in place at the time. They contend that changes to Russian tax legislation were implemented retroactively and for ulterior purposes.

59. In April 2004, the Russian Ministry of Taxation issued a tax reassessment for Yukos exceeding US$3.4 billion for 2000, which was largely upheld by the Moscow Arbitrazh Court. Similarly large tax reassessments were issued in the period between 2004 and 2006 for subsequent tax years. (For instance, 2001 taxes were re-assessed in the amount of US$4.1 billion, 2002 taxes in the amount of US$6.9 billion and 2004 taxes in the amount of US$6.1 billion.) Yukos' subsidiaries were also faced with large tax reassessment claims for the years 2001–2003. Respondent contends that the reassessments were a consequence of Yukos' activities relating to the tax fraud scheme. Claimants submit, however, that the reassessments "were so excessive that the Russian authorities' strategy of destroying Yukos became plain."

60. Claimants note that Yukos made numerous proposals to the Russian authorities throughout this period to settle the tax claims, which were ignored or rejected by the Russian authorities. Overall, Claimants contend, "there have been over 70 offers to settle Yukos' tax claims, all of which have been ignored by the Russian authorities."

### 3. Freezing of Shares and Assets

61. At the same time that tax reassessments were being filed against Yukos and its subsidiaries, Russian authorities began freezing shares and other assets belonging to

Yukos and related entities. In October 2003, Russian prosecutors froze shares held by Yukos Universal and Hulley in Yukos—thereby freezing 53 percent of all shares in Yukos. Orders issued by the Moscow Arbitrazh Court in April and June 2004 prevented Yukos from disposing of any of its assets. An application by Yukos in July 2004 to have sufficient assets released to meet its tax liabilities was ignored and a US$241 million surcharge was applied for late payment of taxes. Similar fines for late tax payments were charged in 2001 and in 2002.

62. In July 2004, Russian authorities began seizing Yukos' shares in Yuganskneftegaz, Samaraneftegaz and Tomskneft. Yuganskneftegaz bank accounts were frozen in August 2004 and thirteen additional freezing orders were imposed on Yukos' bank accounts in September 2004. The Russian authorities also used mutual legal assistance treaties to affect Yukos' interests abroad.

63. Respondent does not dispute the freezing of Yukos' assets but contends that "[t]he freezing of assets of the debtor, including shares owned by it, is a standard enforcement measure for tax levies and judgments."

### 4. Threatened Revocation of Licenses

64. Between October 2003 and December 2004, the Russian Ministry of Natural Resources conducted a review of Yukos' compliance with oil production license obligations. Searches were conducted in September 2004 concerning Yuganskneftegaz licenses; in October 2004, a Government task force recommended revoking 24 licenses to Yukos' subsidiaries, and a special commission began investigations into Yukos' oil and gas fields in the Saratov Region. Investigations ended in December 2004.

### 5. Sale of Yuganskneftegaz

65. In July 2004, the Russian Federation indicated that it intended to appraise and sell Yuganskneftegaz to pay off Yukos' back taxes. A valuation carried out by investment bank Dresdner Kleinwort Wasserstein at the request of the Russian Federation valued Yuganskneftegaz at between US$15.7 billion and US$18.3 billion. A valuation carried out by JP Morgan, at the request of Yukos, valued Yuganskneftegaz at between

US$16 billion and US$22 billion. The Russian Ministry of Justice announced that Yukos was worth only US$10.4 billion.

66. After Yukos' attempts to file for bankruptcy in both the Russian Federation and the United States failed, Yuganskneftegaz was sold at auction on 19 December 2004 for US$9.37 billion to Baikal Finance Group ("**Baikal**"), an entity purportedly controlled by the Russian State. On 23 December 2004, Baikal was bought by State-owned Rosneft.

### 6. Bankruptcy Proceedings

67. Claimants allege that the Russian Federation first reported in March 2005 that it intended to "push Yukos into bankruptcy in order to redistribute its remaining assets." On 6 March 2006, a syndicate of banks filed a bankruptcy petition before the Moscow Arbitrazh Court, pursuant to a Sale Agreement with Rosneft. Yuganskneftegaz filed a separate bankruptcy petition against Yukos, which was subsequently joined to that of the bank syndicate. On 29 March 2006, bankruptcy proceedings were commenced against Yukos, placing it under external supervision, and on 1 August 2006, Yukos was declared bankrupt.

68. Yukos' remaining assets were acquired by State-owned Gazprom and Rosneft, with the bankruptcy auctions raising a total of US$31.5 billion. In November 2007, Yukos was liquidated and struck off the register of legal entities.

## III. PARTIES' WRITTEN SUBMISSIONS

69. As indicated in Part C of the Procedural History above, the Parties submitted two rounds of memorials. Each party took full advantage of the written phase of these proceedings, filing detailed and extensive written submissions. Respondent's First Memorial runs to 150 pages, and was accompanied by 311 exhibits and five witness statements. Claimant's Counter-Memorial is 137 pages long, and was accompanied by 453 exhibits and three witness statements. Respondent's Second Memorial runs to over 250 pages, and was accompanied by 494 exhibits and 15 witness statements. Finally, Claimant's Rejoinder runs to over 200 pages, and was submitted with 641 exhibits and four witness statements. Hundreds of other additional exhibits and witness statements were submitted in the course of the proceedings.

70. The Tribunal studied these submissions carefully. The Parties' principal arguments are re-stated in the Tribunal's analysis of the issues in Part VIII, below. For purposes of this introductory chapter, the Tribunal reproduces below *verbatim* the written "skeleton arguments" that the Parties submitted prior to the hearing at the Tribunal's request.

### A. RESPONDENT'S POSITION

71. The text of the paragraphs below is produced directly from paragraphs 1 to 53 of Respondent's Skeleton Argument submitted on 10 November 2008.

> A. Claimants' Mandatory Opt-Out Declaration Argument is Without Merit
>
> 1. The Russian Federation is entitled to rely on the inconsistency clause in Article 45(1) of the ECT irrespective of whether the Russian Federation ever made an opt-out declaration under Article 45(2)(a).
>
> 2. Article 45(1) provides that the ECT is to be provisionally applied as to each signatory "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." Article 45(2)(a) separately provides that an ECT signatory "may" deliver to the Treaty Depository a declaration "that it is not able to accept provisional application." Contrary to Claimants' contention, Article 45(2)(a) is not a compulsory procedural mechanism, and a Treaty signatory need not have made an opt-out declaration in order to rely on the inconsistency clause in Article 45(1).
>
> 3. The plain language of Article 45, its context, the Treaty's *travaux préparatoires*, circumstances at the time of the Treaty's conclusion, and State practice in the application of the Treaty all support this conclusion.
>
> 4. By their terms, Article 45(1) is self-executing and does not require the delivery of an opt-out declaration, and Article 45(2)(a) operates in express derogation of Article 45(1) ("Notwithstanding paragraph (1)") and, in any event, is not obligatory (a signatory "may" deliver an opt-out declaration).
>
> 5. The inconsistency clause in Article 45(1) is based on standard inconsistency clauses included in other treaties, none of which provide for an opt-out mechanism. When originally proposed, Article 45(1) was drafted as a stand-alone clause without an opt-out mechanism. Article 45(2)(a) was added later only to accommodate those States

that did not want to apply the Treaty provisionally at all, for political or other reasons.

6. At least six States separately stated that they considered themselves entitled to rely on the inconsistency clause in Article 45(1) without making an opt-out declaration. A Joint Statement of the EU Member States, the Council and the Commission of the European Union is to the same effect. The informal transparency declarations made by several States, relied on by Claimants, are unavailing. While some States did make transparency declarations, none of the transparency declarations was ever delivered to the Treaty Depository, as required by Article 45(2)(a), and several States which expressly relied on Article 45(1), including Germany, France, Spain, and Luxembourg, never made transparency declarations. Though not legally relevant, the Russian Federation's failure to make a transparency declaration is not surprising, given the extraordinarily rapid pace of legal and constitutional change in Russia in the period in question. Under the chaotic circumstances then prevailing, no detailed analysis of the Treaty's consistency with Russian law could fairly be expected.

B. Claimants' All-or-Nothing Approach to Article 45(1) of the Treaty is Without Merit

7. Pursuant to Article 45(1), each provision of the Treaty must be provisionally applied, but only to the extent performance of the obligation created by that provision is not inconsistent with Russia's Constitution, laws or regulations. Claimants' argument notwithstanding, Article 45(1) does not operate on an "all-or-nothing basis" so as to require, as a matter of principle, either that the entire Treaty be provisionally applied, or that no portion of the Treaty be provisionally applied.

8. The plain language of Article 45(1), its context, the Treaty's *travaux préparatoires*, the circumstances at the time of the Treaty's conclusion, and State practice in the application of the Treaty all support the conclusion that Article 45(1) is to be applied provision-by-provision, and not on an all-or-nothing basis.

9. In common usage, confirmed by standard dictionary definitions, "to the extent that" refers to the "scope" or "width of application." "To the extent that" is precisely the language used when drafters wish to make clear that a provision is to be applied only insofar as what follows is the case. If it had been intended that the Treaty would be provisionally applied in whole or not at all, Article 45(1) would have instead provided for the Treaty's provisional

application "if" such provisional application is not inconsistent with a signatory's domestic laws. The drafters of the Treaty likewise could not plausibly have intended that a signatory's provisional application of the entire Treaty would in principle be inconsistent with a signatory's "regulations."

10. The *travaux préparatoires* confirm that the negotiating States expected that provisional application would differ from country to country based on different domestic inconsistencies; that even relatively minor regulations could result in the non-application *pro tanto* of an inconsistent Treaty provision; and that even a signatory which had no objection in principle to provisional application would only have to apply the Treaty's investment protection provisions to the extent not inconsistent with the signatory's own constitution, laws or regulations.

11. State practice is fully in accord. As reflected in the Joint Statement made by the EU Member States, the Council and the Commission of the European Union, Article 45(1), "defining the conditions and limits for the provisional application of the ECT by the Signatories[, . . .] does not create any commitment beyond what is compatible with the existing internal legal order of the Signatories." With specific reference to the Russian Federation, the Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom stated as recently as February 7, 2006, that Article 45 of the Treaty "places <u>some</u> obligations on the Russian Federation, but only to the extent that such provisional application is not inconsistent with its constitution, laws or regulations" (emphasis supplied). Mr. Craig Bamberger, the Chairman of the ECT Legal Subgroup, and other scholars, agree with the views expressed in the Joint Statement and in the more recent statement of the UK Secretary of State.

12. The Tribunal must accordingly determine whether the dispute-settlement obligations imposed by Article 26 of the Treaty are consistent with Russia's Constitution, laws and regulations.

C. <u>The Claims (and their Resolution by Arbitration) are Inconsistent with Russia's Laws and Constitution</u>

13. For purposes of Article 45(1), a Treaty provision is inconsistent with a signatory's constitution, laws or regulations if, prior to ratification, the Treaty provision (a) imposes an obligation that conflicts with the signatory's domestic law, or (b) creates a new obligation that requires the taking of legal action that, under the signatory's constitution, may only be taken by the signatory's legislature (as distinguished from its executive branch). The

*travaux préparatoires* reflect the importance of the latter type of inconsistency, a concern made explicit in Article 45(1) by the addition to that Article of language requiring the Treaty to be provisionally applied only to the extent the Treaty is consistent not just with a signatory's laws and regulations, but also its constitution.

14. Claimants' argument that Russian law is irrelevant in principle to the provisional application of the Treaty would render the Treaty's inconsistency clause a legal nullity and is based on a fundamental misunderstanding of the monist nature of the Russian legal system.

15. According to Claimants, Russian law is irrelevant here because the investors' claim is based on a treaty guarantee rather than domestic law, and thus any resulting investor-State arbitration is "autonomous and distinct from proceedings under the legal system of the host State." This argument is premised on an extreme dualist view, in which investment treaty protections operate on an entirely separate plane from domestic law. Claimants' argument is unavailing both because the argument would, as a matter of principle, deny any possible application to all domestic law exceptions, including the inconsistency clause in Article 45(1), and because Russia does not have a dualist legal system.

16. Following Claimants' tautological argument, there could never in principle be an inconsistency between a treaty provision and a signatory's domestic laws, each operating on its own separate plane. The Russian Federation submits, to the contrary, that the very purpose of a domestic-law exception to provisional application of a treaty is precisely to reconcile treaty-imposed obligations with conflicting domestic-law obligations.

17. Russia's legal system is, in any event, monist (not dualist) in nature. International treaties form an integral part of Russian law, and must be applied directly by Russia's courts. If ratified, the Russian Federation's treaties prevail over inconsistent legislation other than the Constitution. Contrary to Claimants' unstated and incorrect assumption, investment treaty protections are directly enforceable in Russian courts, and do not exist on some "autonomous and distinct" plane.

18. Under Russian law, disputes arising from sovereign acts or omissions, including claims for damages for expropriation, may not be submitted to arbitration absent a legal enactment in the form of a law or a ratified treaty so providing. Disputes involving the lawfulness of expropriation, taxation measures, bankruptcy, and other regulatory matters are

within the exclusive jurisdiction of Russia's courts, and may not be submitted to arbitration. The Russian Federation's Civil Procedure Code, Arbitrazh Procedure Code and Tax Code confirm the exclusive jurisdiction of Russian courts over these issues, and prohibit their arbitration. Claimants' request for damages is based on allegedly illegal sovereign acts of various Russian authorities, none of which under Russian law may be submitted to arbitration, unless a specific law provides otherwise. The ECT, an unratified treaty, is not such a law.

19. In light of the exclusive jurisdiction granted to Russian courts by Russian law to resolve disputes of the type presented here, allowing Claimants' claims to be resolved by mandatory arbitration under Article 26 of the Treaty would be inconsistent with both Russia's laws and its Constitution. The Russian Constitution is based on the principle of separation of powers and the rule of law. Each branch of State power exercises its power independently, and no branch may usurp the power of another branch. The Russian Constitution specifically preserves the prerogatives of Russia's Federal Assembly (parliament) in the treaty-making process—law-making treaties must be ratified by the adoption of a federal law by both the Duma and the Federation Council—and prohibits the Government from legislating through the conclusion and implementation of international treaties that amend or complement federal laws. This ratification requirement is an emanation of the principle of separation of powers established in Article 10 of the Constitution, and is reflected in Article 15(1)(a) of the Federal Law on International Treaties. Under the latter Article, all treaties whose implementation requires "the amendment of existing or the adoption of new federal laws, and also those establishing rules that are different from those provided for by law," are subject to ratification.

20. The Treaty is also inconsistent with other provisions of Russian law, in addition to the non-arbitrability of disputes involving sovereign acts or omissions and the exclusive jurisdiction of Russian courts to resolve those disputes. Russian law requires privity between the parties to an arbitration agreement, unless a ratified treaty (for example, a ratified bilateral investment treaty) provides otherwise. Professor Kostin's expert opinion on this point has not been disputed. The standing offer to arbitrate investor-State disputes contained in Article 26 of the Treaty is thus inconsistent with Russian law.

21. Russian law also does not allow the shareholders of a Russian joint stock company, such as Claimants, to assert a claim based on injuries allegedly suffered by the company, its management or its subsidiaries. Professor Sukhanov's

expert opinion on this point has not been disputed. Claimants' assertion of damages alleged to have been suffered in their capacity as shareholders, in reliance on Article 26, in conjunction with Articles 1(6) and (7), of the Treaty, is thus likewise inconsistent with Russian law.

22. Claimants' contention that Article 23(1) of the Federal Law on International Treaties provides blanket legislative approval for the Russian Government to provisionally apply all treaties, including the ECT, is equally unavailing. Article 23(1) is merely a restatement of Article 25(1) of the Vienna Convention on the Law of Treaties, which, uncontroversially, provides that a treaty may be provisionally applied pending its entry into force if, and under the conditions, agreed in the treaty.

23. Claimants' blanket-approval argument proves too much and is inconsistent with State practice. If Article 23 of the Federal Law on International Treaties constitutes blanket approval for the Treaty's provisional application, then (a) so does Article 25 of the Vienna Convention, and (b) no party to the Vienna Convention would have found provisional application of the Treaty problematic or have invoked the inconsistency clause in Article 45(1). Claimants' view notwithstanding, nine States party to the Vienna Convention deposited declarations under Article 45(2)(a) of the Treaty that they could not accept its provisional application, and four States party to the Vienna Convention stated at the signature conference that they could not apply the Treaty, relying on the inconsistency clause in Article 45(1).

24. Claimants also contend that Article 23 of the Law on International Treaties shows Russian law and treaty practice to be "perfectly familiar" with the concept of provisional application. The Russian Federation's familiarity with provisional application cannot, however, override the express inconsistency clause contained in Article 45(1).

25. Claimants mistakenly rely on general statements made by Russian politicians and officials as to the salutary effect of the Treaty, the Russian Federation's practice with respect to bilateral investment treaties, the Explanatory Note to the draft federal law providing for ratification of the Treaty, and a draft document of unknown origin and authorship.

26. General statements made by certain Russian politicians and officials as to the Treaty's benefits are manifestly not a formal or even informal expression of the Russian Federation's views with respect to the scope of the provisional application of the Treaty, and are directly at odds with the Russian Federation's continuing refusal to ratify the Treaty.

27. The Russian Federation's bilateral investment treaty practice not only does not support Claimants' position, it affirmatively undermines their argument. All of the bilateral investment treaties cited by Claimants were ratified by the Russian Federation, and none of them provides for provisional application prior to ratification. It is undisputed that Claimants have not invoked any of the Russian Federation's bilateral investment treaties. That these treaties, following ratification, provide for mandatory investor-State dispute settlement is irrelevant to the pre-ratification consistency-analysis required under Article 45(1).

28. Several explanatory notes prepared in connection with the ratification of Russian bilateral investment treaties state that these treaties are subject to ratification because they contain "provisions different from those provided by Russian legislation," singling out the investor-State arbitration provisions, among others. The Russian Federation's bilateral investment treaty practice thus confirms (a) that mandatory investor-State arbitration is not merely "additional" to Russian law, as Claimants contend, but is inconsistent with Russian law, and (b) that application of Article 26 prior to ratification would be inconsistent with Russia's Constitution and laws.

29. The Explanatory Note to the draft federal law on the ratification of the Treaty states that "provisional application of the ECT would be implemented to the extent that it would not be inconsistent with the constitution, laws and regulations of the country in question." The Note thus appropriately concludes, in reliance on the "to the extent" clause contained in Article 45(1), that "the provisions on provisional application were in conformity with Russian legal acts." As with most Russian explanatory notes, the ECT Explanatory Note does not contain a detailed or comprehensive analysis of the consistency of the Treaty's provisions with Russian law. The dispute settlement provisions are not mentioned at all, let alone analyzed.

30. The statement in the Explanatory Note that "The provisions of the ECT are consistent with Russian legislation," relied on by Claimants, is a correct statement of Russian law from the post-ratification perspective of the Note, and does not aid in the analysis of the pre-ratification consistency of the Treaty with domestic law, required under Article 45(1). That the Note analyzes the state of Russia's legal affairs following ratification is clear from other statements in the Note, including the need for GATT-related legislation to be enacted and Russia's customs laws to be amended, developments that would manifestly be "consistent" with Russia's domestic law only post-ratification. Although the

Note does not address the Treaty's dispute settlement mechanism, the Note does state that the ECT is "consistent with the provisions of Russian bilateral investment treaties," and that inconsistencies between Treaty provisions and Russian domestic law would be resolved by ratification. It will be recalled that the Russian Federation's bilateral investment treaties, like the Treaty, provide for mandatory investor-State arbitration, and are likewise subject to ratification because their dispute settlement mechanism is inconsistent with domestic Russian law.

31. Claimants also rely heavily on a draft document of unknown origin and authorship, referred to by Claimants as the "Russian Note" even though there is no evidence that this document was prepared, let alone adopted, by the Russian authorities, and overwhelming evidence that the document was never distributed at the session of the Energy Charter Conference identified by Claimants. There is, in any event, nothing in the document at odds with the Russian Federation's position that the Treaty is to be provisionally applied only to the extent consistent with Russian domestic law, and that Article 26 is inconsistent with Russian law.

D. <u>The Claims are Based on Taxation Measures Other than Taxes and are thus Barred under Article 21 of the Treaty</u>

32. The Tribunal lacks jurisdiction or, alternatively, Claimants' claims are inadmissible, because (a) the Treaty does not create any rights or obligations with respect to Taxation Measures (with enumerated exceptions), (b) the claims in these proceedings are based on Taxation Measures, and (c) none of the enumerated exceptions is applicable to the claims asserted by Claimants in these proceedings.

33. Article 21(1) of the ECT provides that "nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties," except as otherwise provided in the sub-sections to that Article. The same Article further provides, "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."

34. Taxation Measures include not only tax laws and regulations, as Claimants contend, but also measures relating to taxes, including the imposition, administration, collection and enforcement of taxes.

35. The plain meaning of Article 21 requires a broad and inclusive interpretation of Taxation Measures. Article 21(7)(a) states, "The term 'Taxation Measure' includes (i) any provision relating to taxes of the domestic law of the

Contracting Party." The quoted text confirms that Taxation Measures was intended to have broad and inclusive scope, covering "*any* provision *relating* to taxes." Had the drafters intended to limit Taxation Measures solely to the (already broad) provisions referred to in Article 21(7), they would have instead provided that Taxation Measures "means" (rather than "includes") the referenced provisions.

36. Articles 21(3) and (6) make clear that Taxation Measures cover not only tax laws and regulations, but also a State's imposition and collection of taxes. Article 21(3) gives preferential treatment to "any Taxation Measure aimed at ensuring the effective collection of taxes." The "collection of taxes" is clearly a subset of the broader class of Taxation Measures. Article 21(6) confirms that Taxation Measures include not only the collection of taxes, but also their imposition. This Article provides, "For the avoidance of doubt, Article 14 [dealing with an Investor's right to transfer capital, returns and other payments] shall not limit the right of a Contracting Party to impose or collect a tax by withholding or other means."

37. The object and purpose of Article 21 supports the Russian Federation's interpretation. States are understandably concerned about possible limitations on their ability to raise revenue. A State's right to promulgate tax laws and regulations is meaningless unless the State also has the right to collect, administer and enforce its tax laws and regulations. The Russian Federation's interpretation is consistent with the purpose intended to be served by Article 21—to protect a State's right to promulgate and enforce its tax laws, and to avoid interference with tax treaties specifically intended to address these issues.

38. The Russian Federation's interpretation of Taxation Measures is supported by other tribunals, and by the testimony of Mr. Stephen Knipler, the executive officer of the International Tax Division of Australia's Tax Office during the ECT negotiations, and of Professor Daniel Berman, the Legislation Counsel to the U.S. Congress Joint Committee on Taxation, during the same period. Claimants have not offered any reason or basis for not crediting Mr. Knipler's testimony that Taxation Measures includes measures relating to taxes, and, in particular, the imposition, administration, collection or enforcement of taxes.

39. Claimants' reliance on the exception to Article 21(1) contained in Article 21(5) is misplaced. Article 21(5) states that Article 13, dealing with expropriation, "shall apply to taxes." It is an established rule of treaty interpretation that different treaty terms are intended to refer to different matters. Article 21(5) refers to "taxes," meaning a State's

tax laws and regulations, and not to Taxation Measures, a broader term that "includes" not only "taxes" but also "any provision relating to taxes." Claimants' contrary argument, based on the French text of the Treaty—that "taxes" is either a broader term or interchangeable with "Taxation Measures"—is inconsistent with the text of the Treaty, and ignores both the fact that the Treaty's tax provisions were negotiated exclusively in English (not French) and the considerable authority that gives primacy to the original (here, English) text, even in cases where several texts are equally authentic.

40. Claimants' reliance on the exception to Article 21(1) contained in Article 21(3) is likewise unavailing. Article 21(3) provides that Articles 10(2) and (7) "shall apply to Taxation Measures," with two enumerated exceptions. Claimants, however, have never asserted a claim under either Article 10(2) or Article 10(7).

41. Claimants' procedural objections to this defense are not well founded. Respondent's Statement of Defense expressly objected to jurisdiction, as required by UNCITRAL Rule 21(3), and even though not so required, also put Claimants on notice of the Taxation Measures carve-out contained in Article 21(1). The cases cited on this issue by Claimants are clearly distinguishable.

E. The Tribunal Lacks Jurisdiction *Ratione Personae* and *Materiae*

42. The Tribunal lacks jurisdiction *ratione personae* and *materiae* (a) because Claimants are shell companies, (b) because Claimants are owned and controlled by Russian oligarchs, including Khodorkovsky, Lebedev and other Russian nationals, and (c) because Claimants are mere nominees who do not own or control the Yukos shares that are the subject of these proceedings.

43. The Russian oligarchs (Khodorkovsky and Lebedev, among others) have publicly conceded in newspaper interviews and in other legal proceedings that they effectively own and control Claimants' nominal investment in Yukos. In the case of Veteran Petroleum Limited ("VPL"), the Swiss *Première Cour de Droit Public* has found that Khodorkovsky, Lebedev, Golubovitch, Nevzlin, Doubov, Brudno and Chakhnovski are the beneficial owners of the totality of Yukos shares allegedly owned or controlled by VPL. VPL has also failed to establish that it was even a Yukos registered shareholder when VPL filed its request for arbitration.

44. The remaining Yukos shares at issue are also only nominally owned by Yukos Universal Limited and Hulley Enterprises

Limited. Both Yukos Universal Limited and Hulley Enterprises Limited are totally dominated by the Russian oligarchs through multiple off-shore shells, for which no *bona fide* purpose is discernable. In large part because of Claimants' less than full compliance with the Tribunal's document production orders, the Tribunal does not now have before it a complete account of the relations between these intermediate legal entities. It is nonetheless clear that one of the principal purposes of the complex legal structure adopted at the Russian oligarchs' behest was to render opaque, but preserve, the oligarchs' continuing *de facto* ownership and control of the Yukos shares. In furtherance of this goal, the oligarchs interposed into the chain of nominal ownership and control legal entities and individuals who appeared to receive limited indicia of ownership and/or control, but who in fact acquired no genuine ownership interest in any of the relevant assets, nor any powers that would diminish the Russian oligarchs' continued effective control in fact over those assets.

45. Claimants have separately acknowledged that they have "no substantial business activity" in their countries of incorporation.

46. The object and purpose of the Treaty is to promote and protect foreign investments and foreign investors. The Treaty was never intended to protect Russian investors investing in Russia, and does not provide a remedy for host State nationals. Under "rules and principles of international law" applicable to this proceeding under Article 26(6) of the Treaty, a shell company dominated and controlled by host State nationals has no right to bring a claim against the host State. Like other fundamental principles of customary international law, the rule that nationals of a State may not assert an international claim against their own State cannot be dispensed with tacitly.

47. Granting shell companies protection under the Treaty would also be inconsistent with Russian law. As a result of its ratification, the EU-Russia Partnership and Cooperation Agreement is now an integral part of Russian law and of the framework for trade, business, and investment conducted by EU companies in Russia. Claimants, EU shell companies lacking the "real and continuous link with the economy" of an EU Member State required by Article 30(h) of the EU-Russia Partnership and Cooperation Agreement, are thus not entitled to protection as investors under Russian law. Insofar as matters covered by the EU-Russia Partnership and Cooperation Agreement are also covered by the Treaty, Article 105 of the EU-Russia Partnership and Cooperation Agreement provides that the Treaty's provisions shall apply,

but not until the Treaty comes into force for the Russian Federation, which has not happened.

48. The Russian Federation's veil-piercing defenses lead to the same conclusion. In accordance with the Tribunal's Procedural Order No. 3 of October 31, 2006, these issues are not addressed here.

49. Under Article 1(6) of the Treaty, the Yukos shares that are the subject of these proceedings must be "owned or controlled" by Claimants. The Understanding with respect to Article 1(6) adopted upon signature of the Treaty is that "control of an Investment means control in fact." Claimants apparently concede that they do not meet this standard, and instead rely on their nominal ownership of the Yukos shares. Nominal ownership is insufficient to establish ownership of an "Investment" within the meaning of Article 1(6) of the Treaty or *ius standi* under "applicable rules and principles of international law."

F. <u>The Claims are Inadmissible Because Part III of the Treaty Does Not Confer Rights on Claimants</u>

50. Article 17 of the Treaty reserves the right to deny the Treaty's benefits to companies owned or controlled by nationals of a third State that do not have substantial business activity in their country of incorporation. Each of the Claimants is a shell company lacking substantial business activity in its country of incorporation.

51. Claimants' contention that host State parties are not third State nationals is unavailing. If Treaty benefits may be denied to third State nationals, *a fortiori* they may be denied to host State nationals. In any event, the term "third State," which is not defined in the Treaty, is used there in a manner that does not exclude the possibility that a third State may be a Contracting Party or a signatory, and a majority in interest of the "Russian" oligarchs are in fact nationals of Israel, a "third" State.

52. The Treaty's object and purpose also support the denial of benefits to host State nationals. Claimants' argument notwithstanding, no notification to Contracting Parties is required in order to invoke Article 17(1), and even if notification were required, the Russian Federation exercised its right to deny Treaty benefits to EU shell companies such as Claimants by ratifying and publishing the EU-Russian Partnership and Cooperation Agreement.

G. The Tribunal Lacks Jurisdiction Over Disputes Submitted to Russian Courts or to the European Court of Human Rights

53. Each of the Russian oligarchs who owns and controls Claimants, including in particular Khodorkovsky and Lebedev, has brought complaints before the European Court of Human Rights containing allegations that overlap with those raised by Claimants in these proceedings. Lawsuits have also been brought before Russian courts against the Ministry of Finance of the Russian Federation and other Russian State bodies based, *inter alia*, on alleged violations of "applicable principles and norms of international law", including the European Convention on Human Rights. The fork-in-the-road clause contained in Article 26(3)(b)(i) of the Treaty precludes these investors from re-litigating in these arbitrations disputes that have already been submitted to the European Court of Human Rights or to a Russian court. Claimants are in effect requesting the Tribunal to sit above the Russian Supreme Court and the Russian courts of appeal that have previously heard and issued final rulings in respect of the same allegations made by Claimants in these arbitrations.

## B. CLAIMANTS' POSITIONS

72. The text of the paragraphs below is produced directly from paragraphs 13 to 47 of Claimants' Skeleton Argument submitted on 10 November 2008 (with footnotes omitted).

III. The Russian Federation is Bound by the ECT—Article 45

13. The Russian Federation contends that it is not bound by the ECT. As a starting point, the Russian Federation argues that the provisional application of treaties does not give rise to legally enforceable rights and obligations. Its chief contention, however, is based on Article 45(1) of the ECT, which it alleges provides for the partial application of the Treaty provisions by virtue of the so-called "inconsistency clause". The Russian Federation claims that it is not bound by the ECT as regards the Claimants in these arbitrations because the application of every relevant provision of the ECT, including Article 45 itself, would be inconsistent with the Russian Federation's Constitution, laws or regulations. The Russian Federation's interpretation of Article 45 of the ECT, which sets out the regime of provisional application under the Treaty, is fundamentally flawed and should be rejected. In any event, the ECT is not inconsistent with the Russian Federation's Constitution, laws or regulations.

14. *Provisional application of treaties creates legally enforceable rights and obligations under international law:* Provisional application is a well-established treaty mechanism creating legally enforceable rights and obligations under international law. The Respondent is all the more familiar with these principles in that the Russian Federation and its predecessor, the USSR, have a long-standing practice of provisionally applying treaties so as to give rise to legally enforceable rights and obligations. Thirty-two international treaties entered into by the Russian Federation, including the ECT, are today provisionally applicable. The Russian Federation's suggestion that provisional application is some kind of legal anomaly, without legal effect, has no basis whatsoever and must fail.

15. *The plain language of Article 45 of the ECT provides for automatic provisional application of the Treaty unless a specific signatory decides to opt out from such provisional application*: Article 45(1) of the ECT establishes the principle of provisional application, while the remainder of Article 45 sets out its operation. In particular, under Article 45(2), any signatory that is not able to accept provisional application can decide to opt out from such provisional application at the time of signature by making a declaration to that effect. This interpretation is based on the plain language of Article 45 of the ECT, and is confirmed by its context and the *travaux préparatoires* of the Treaty. The Russian Federation's interpretation, which would dissociate Article 45(1) from Article 45(2) so as to create two separate regimes in which a signatory State may choose whether or not it is bound by provisional application depending on whether or not it is party to a dispute with an investor, is entirely unsubstantiated. The Russian Federation's interpretation further ignores the fundamental safeguard of reciprocity contained in Article 45(2)(b) of the ECT and, if given effect, would mean that a signatory State can invoke all rights under the Treaty while escaping any obligations by merely relying on the "inconsistency clause" in Article 45(1). Such a position is untenable and must be rejected.

16. *Subsidiarily, the need for a declaration under Article 45(1):* In any event, even assuming that the interpretation of Article 45 of the ECT as proposed by the Russian Federation were the correct interpretation, which the Claimants deny, a declaration is still needed in order for a signatory State to opt out of provisional application under Article 45(1). This is clear from the text of Article 45, and the circumstances of its negotiation and conclusion. It is further confirmed by the fact that all signatory States that expressed concerns regarding provisional application made a declaration with a view to avoiding the application of the Treaty, be it on the basis of Article 45(2) or Article 45(1). Therefore, even under the Respondent's own interpretation, a declaration is needed for a signatory State to

opt out of provisional application on the basis of either paragraph (1) or paragraph (2) of Article 45 of the ECT. As the Russian Federation has not notified its counterparties of any inconsistency of the Treaty with its Constitution, laws or regulations, under either paragraph, it cannot claim that it is not bound by the Treaty.

17. *In any event, the ECT is not inconsistent with the Constitution, laws or regulations of the Russian Federation:* Even assuming that the interpretation of Article 45 of the ECT as proposed by the Russian Federation were the correct interpretation, which the Claimants deny, and that a declaration in relation to Article 45(1) is not required, contrary to the Claimants' submissions, the ECT is not inconsistent with the Russian Federation's Constitution, laws or regulations. Russian law fully recognizes the principle of provisional application, and there is no inconsistency between the substantive provisions of the Treaty and Russian law either. To the contrary, at all times—during the negotiation of the ECT, at the time of its proposed ratification by the Duma, and subsequently—the Russian Federation has maintained and represented that both the mechanism of provisional application and the provisions of the Treaty are consistent with its Constitution, laws and regulations.

18. It follows that, under Articles 45 of the ECT, the Russian Federation is bound by the Treaty.

## IV. The Claimants Qualify as Protected Investors Under the ECT—Article 1(7)

19. The Russian Federation contends that the Claimants are not protected Investors under the ECT, relying on a host of allegations including that the Claimants are allegedly shell companies owned or controlled by Russian nationals. The Russian Federation's arguments are misplaced and must fail.

20. *The* definition *of Investor under the ECT:* Article 1(7)(a)(ii) of the ECT defines "Investor" as, with respect to a Contracting Party, "a company or other organization organized in accordance with the law applicable in that Contracting Party".

21. *The Claimants are organized in accordance with the law applicable* in Contracting *States:* The Claimants are companies organized in accordance with the law applicable in Cyprus, in the cases of Hulley and VPL, and the Isle of Man, in the case of YUL, and therefore meet the requirements of Article 1(7)(a)(ii) of the ECT.

22. *Express* treaty *language cannot be overridden by alleged general principles of law:* The Russian Federation does not dispute that the Claimants are companies organized in

accordance with the law applicable in Contracting States. It claims, however, that the Claimants' nationality should be ignored based on vague and unsubstantiated principles of international law. There is no basis in international law for ignoring the corporate nationality of the Claimants. The language of Article 1(7)(a)(ii) of the ECT is clear and determinative in this regard and, contrary to the Respondent's submission, it is not for this Tribunal to ignore the express language of the Treaty itself. In any event, reference to the state of incorporation is the most common method of defining the nationality of corporate entities under modern BITs and international law.

23. It is clear from the foregoing that the Claimants are protected Investors under the ECT and the Respondent's attempts to suggest otherwise must fail.

## V. The Claimants Have a Protected Investment under the ECT—Article 1(6)

24. The Russian Federation contends that the Claimants do not have protected Investments under the ECT alleging, amongst other things, that the Claimants did not inject any foreign capital into the Russian Federation in connection with their acquisition of Yukos shares. The Russian Federation's arguments are without merit and must fail.

25. *The* definition *of an Investment under the ECT:* "Investment" is defined in Article 1(6)(b) of the ECT as "every kind of asset, owned or controlled directly or indirectly by an Investor and includes [. . .] a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise".

26. *The Claimants own shares in Yukos:* As shareholders of Yukos at all relevant times for the purposes of these arbitrations, the Claimants directly own protected Investments and therefore meet the requirements of Article 1(6)(b) of the ECT.

27. *The Russian Federation's unpersuasive argument on the alleged lack of 'injection of foreign capital':* It cannot be disputed that the Claimants have directly owned Yukos shares at all material times. This, in fact, is not disputed by the Respondent. The Claimants therefore hold protected Investments within the definition provided by Article 1(6)(b) of the ECT. The language of Article 1(6)(b) is clear and determinative in this regard and the Russian Federation's attempt to insert additional requirements regarding "origin of capital" or "injection of foreign capital" finds no support in the text of the definition of Investment, nor in the context in which the term is defined.

28. The Claimants undeniably hold protected Investments under the ECT, and the Russian Federation's numerous and unsubstantiated attempts to override the plain language of the Treaty must be rejected.

## VI. The Conditions for a Denial of the Benefits of Part III of the ECT to Each of the Claimants are not Met

29. The Russian Federation argues that the Claimants should be denied the benefits of Part III of the ECT on the basis of Article 17, and that these arbitrations are nothing but a domestic dispute between Russian nationals and the Russian Federation. As shown below, the cumulative conditions for a denial of the benefits of Part III of the ECT are not met and each of the Claimants fully benefits from the protection of the Treaty.

30. *Article 17 is a reservation of right which must be exercised:* Article 17 provides that each Contracting Party "reserves the right" to deny the benefits of Part III. It follows from the plain meaning of these words that each Contracting Party has a right under Article 17(1) of the ECT to deny a covered investor the benefits of Part III; but as long as that right has not been exercised the investor benefits from the protection of Part III of the ECT. That the right to deny the benefits of Part III is an option that needs to be exercised by a Contracting Party is confirmed by the *travaux préparatoires* of the Treaty. Further, if a Contracting Party is to exercise its reserved right under Article 17(1) of the ECT, it must do so by a clear and unambiguous act. Contrary to the Respondent's contention, Article 17(1) of the ECT does not therefore operate automatically. As the Russian Federation did not exercise its reserved right to effectively deny the benefits of Part III of the ECT to each of the Claimants, Article 17(1) does not apply in these arbitrations.

31. *Once exercised, the right of denial only operates prospectively:* In any event, even assuming that the Russian Federation has effectively exercised its reserved right to deny the benefits of Part III of the ECT to each of the Claimants in its First Memorial of February 28, 2006, which the Claimants deny, the Russian Federation does not challenge that such exercise can only operate prospectively and cannot have a retroactive effect, *i.e.* it can only have effect on new wrongful acts occurring after the date on which the reserved right has been effectively exercised, as opposed to the mere continuation of previous wrongful acts.

32. *The Claimants are not owned or controlled by citizens or nationals of a third State:* In any event, even assuming that the Russian Federation has effectively exercised its reserved right to deny the benefits of Part III of the ECT to each of the

Claimants, which the Claimants deny, Article 17(1) of the ECT still cannot apply because the cumulative conditions for the Russian Federation to exercise its right under Article 17 are not met, *i.e.* the Claimants are not owned or controlled by citizens or nationals of a third State. Hulley is a wholly-owned subsidiary of YUL, a company incorporated in the Isle of Man. YUL, in turn, is a wholly-owned subsidiary of GML Limited, a company incorporated in Gibraltar. GML Limited is owned by Palmus Trust Company Limited (Guernsey) (as trustee for the Palmus Trust) and Rysaffe Trustee Company (C.I.) Limited (as trustees for the remaining Guernsey Trusts). Likewise, VPL is owned by Chiltern Trust Company Limited (Jersey) (as trustee of the Veteran Petroleum Trust). The Claimants are therefore not owned by Russian nationals. Nor are they controlled by Russian nationals since control in each of the Trusts resides with the relevant trustees for the benefit of Russian nationals as regards the Guernsey Trusts and for the benefit of YUL and former Yukos employees as regards the Veteran Petroleum Trust. As a result, the Claimants are not "owned or controlled" by Russian nationals.

33. *The Russian Federation is not a third State under the ECT:* Even assuming that the Claimants are owned or controlled by Russian nationals, which the Claimants deny, the Russian Federation is not a "third State" under the ECT. It is plain that "third State" in Article 17(1) refers to a non-Contracting Party under the ECT and this is confirmed by the Vienna Convention on the Law of Treaties, as well as the *travaux préparatoires* of the ECT. By contrast, when contracting States intend to exclude the benefits of an investment protection regime to entities controlled by nationals of the host State, they so provide expressly. This was not done by the ECT drafters. The Russian Federation, which is bound by the ECT, cannot therefore claim to be a "third State" for the purposes of Article 17(1).

34. It results from the above that the cumulative conditions for the application of Article 17 of the ECT are not met and the Respondent's objection must fail.

## VII. The Russian Federation's Other Unavailing Objections—Articles 26 and 21

### A. The Claimants' *Jus Standi*

35. The Respondent alleges that the Claimants lack *jus standi* because they are supposedly enforcing a claim that properly belongs to Yukos.

36. This is plainly wrong as a matter of fact. The Claimants do not purport to enforce rights belonging to Yukos but are enforcing their own rights arising under the ECT as shareholders.

37. The Respondent's objection is also wrong as a matter of law. The distinction between the rights of a shareholder arising under an investment treaty and the rights that belong to the local company is well-established in international law. The Russian Federation's attempt to rely on the inconsistency clause in Article 45(1) of the ECT to argue that shareholders lack standing under Russian law to bring claims for injuries to companies in which they own shares is equally misplaced. As demonstrated above, the Russian Federation's "inconsistency clause" theory is without merit because both the principle of provisional application and the provisions of the Treaty are consistent with Russian law. Even assuming that Russian law is somehow relevant, which the Claimants deny, it is difficult to see how the alleged lack of a statutory right under Russian law could deprive the Claimants of standing under the ECT, except to demonstrate just how outlandish and all-encompassing the Respondent's theory of Article 45(1) is.

38. The Respondent's objection is ill-founded and must fail.

B. Fork-in-the-Road—Article 26

39. The Russian Federation contends that there exist a very large number of cases that have been brought by or on behalf of Yukos or by the "Russian oligarchs" themselves in the Russian courts and the ECHR in which the actions complained of in these arbitrations were subjected to judicial review. On that basis, the Russian Federation contends the Tribunal lacks jurisdiction to hear and decide the Claimants' claims pursuant to Article 26(3)(b)(i) of the ECT. The Respondent's contention is entirely groundless and must fail.

40. None of the proceedings relied on by the Russian Federation satisfy any of the cumulative conditions set out in Article 26(3)(b)(i) of the ECT, the so-called fork-in-the-road provision: (i) the Claimants in these arbitrations are not parties to any of the proceedings cited by the Russian Federation; (ii) none of the proceedings cited by the Russian Federation concern an alleged breach of Part III of the ECT; and (iii) the Claimants have not submitted these claims to any "previously agreed dispute settlement procedure" or to the Russian courts.

41. The Russian's Federation's objection based on Article 26(3)(b)(i) of the ECT is manifestly without merit and must fail.

C. Taxation Measures—Article 21

42. The Russian Federation contends that the Claimants' claims are premised on Taxation Measures and therefore fall within the exemption of Article 21(1) of the ECT. The Respondent's objection based on the taxation provision of the ECT, which it

now appears to raise as an objection to jurisdiction, fails in a number of respects.

43. *The Respondent's jurisdictional objection is time-barred:* For the first time in its Reply, the Russian Federation sought to state a jurisdictional objection based on Article 21(1), contending that the Tribunal lacks jurisdiction because the phrase "nothing in this Treaty" in that provision allegedly excludes the Russian Federation's "offer to arbitrate [in] Article 26" of the ECT. To the extent that the Respondent's objection based on Article 21(1) of the ECT is stated as a jurisdictional objection, it is time-barred under Article 21(3) of the UNCITRAL Arbitration Rules which provides that an objection to jurisdiction is to be made no later than in the statement of defence.

44. *Article 21 applies to the enactment of tax "provisions":* Further, in any event, even assuming that the Russian Federation is entitled to base a preliminary objection on Article 21 of the ECT, which the Claimants deny, it does not apply here. It is clear that under Article 21 of the ECT a Taxation Measure, as this term is specifically defined in paragraph (7), is an actual "provision" relating to taxes, be it found in domestic law or in a tax treaty, nothing else. Article 21 therefore preserves the liberty of each Contracting State to enact legislation and regulations relating to taxes and the Respondent's numerous attempts to distort and expand the scope of this definition to enforcement actions find no support in the text of the Treaty itself. Because the Russian Federation's right to enact tax "provisions" is not at issue in these arbitrations, Article 21(1) of the ECT does not apply to the Claimants' claims.

45. *Articles 13 and 10 expressly apply to Taxation Measures:* Even assuming that Taxation Measures have the meaning given to them by the Respondent, which the Claimants deny, the Russian Federation conveniently ignores that the Treaty's substantive investment protections contained in Articles 13, 10(2) and 10(7) apply to Taxation Measures of the Contracting Parties by virtue of Articles 21(5) and 21(3), respectively, and that expropriatory or discriminatory actions are sanctioned under the Treaty even where they relate to Taxation Measures.

46. *Conduct under the guise of taxation not covered:* In any event, assuming that Taxation Measures have the meaning given to them by the Respondent, which the Claimants deny, the actions complained of by the Claimants do not fall within the scope of Article 21 because they are not genuine Taxation Measures. Indeed, the Russian Federation's actions were not a genuine exercise of the Russian State's prerogative to impose taxes, but merely a pretext for the Russian Federation's expropriation of Yukos' assets to the benefit of State-owned

entities. Further, the Russian Federation feigns to ignore that a significant part of the acts complained of by the Claimants have no relation whatsoever to taxation.

47. The Russian Federation's objection based on Article 21 of the ECT is therefore ill-founded and must fail.

## IV. THE PARTIES' REQUESTS FOR RELIEF

### A. RESPONDENT'S REQUESTS FOR RELIEF

73. The Russian Federation requests that the Tribunal issue an award:

(a) determining that it lacks jurisdiction to entertain the claims brought by Claimant;

(b) in the alternative, determining that all claims brought by Claimant are inadmissible;

(c) in the alternative, determining that all claims relating to Taxation Measures other than those, if any, based solely on taxes are inadmissible;

(d) in the alternative, determining that all claims relating to taxes, if any, must be referred to the competent authorities pursuant to Article 21(5)(b)(i) of the Treaty;

(e) ordering Claimant to pay all of the Russian Federation's costs, expenses, and attorneys' fees; and

(f) granting any further relief against Claimant that the Tribunal deems fit and proper.

### B. CLAIMANT'S REQUESTS FOR RELIEF

74. Claimant requests the Tribunal:

(a) to render an award determining that it has jurisdiction over the claims brought by Claimant and that such claims are admissible

(b) to order Respondent to pay all of Claimant's costs, including its legal fees and expenses; and

(c) To order any other relief that may be appropriate.

## V. APPLICABLE LAW

75. The procedural law to be applied by the Tribunal consists of the procedural provisions of the ECT (particularly Article 26), the UNCITRAL Arbitration Rules, and, because The Hague is the place of arbitration, any mandatory provisions of Dutch arbitration law. This Interim Award is made pursuant to Article 1049 of the *Netherlands Arbitration Act 1986*.

76. The substantive law to be applied by the Tribunal consists of the substantive provisions of the ECT, the Vienna Convention on the Law of Treaties[3] ("**VCLT**"), and applicable rules and principles of international law. In addition to the foregoing sources, the national law of the Russian Federation is relevant with regard to certain issues, as is the national law of the places in which Claimants and/or related entities are incorporated or established.

77. Throughout this Interim Award, the Tribunal refers to and analyzes specific provisions of the ECT. For ease of reference, the key relevant provisions are also collected and reproduced below, in the order that they appear in the Treaty:

> **Article 1—Definitions**
>
> [. . .]
>
> (6) Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
>
> (a) tangible and intangible, and moveable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

[3] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 331.

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

[. . .]

(7) "Investor" means:

(a) with respect to a Contracting Party:

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

(b) with respect to a "third state," a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.

[. . .]

**Article 17—Non-Application of Part III in Certain Circumstances**

Each Contracting Party reserves the right to deny the advantages of this Part to:

(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized;

[. . .]

**Article 21—Taxation**

(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.

(2) Article 7(3) shall apply to Taxation Measures other than those on income or on capital, except that such provision shall not apply to:

(a) an advantage accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii); or

(b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure of a Contracting Party arbitrarily discriminates against Energy Materials and Products originating in, or destined for the Area of another Contracting Party or arbitrarily restricts benefits accorded under Article 7(3).

(3) Article 10(2) and (7) shall apply to Taxation Measures of the Contracting Parties other than those on income or on capital, except that such provisions shall not apply to:

(a) impose most favoured nation obligations with respect to advantages accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii) or resulting from membership of any Regional Economic Integration Organization; or

(b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure arbitrarily discriminates against an Investor of another Contracting Party or arbitrarily restricts benefits accorded under the Investment provisions of this Treaty.

(4) Article 29(2) to (6) shall apply to Taxation Measures other than those on income or on capital.

(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 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.

(6) For the avoidance of doubt, Article 14 shall not limit the right of a Contracting Party to impose or collect a tax by withholding or other means.

(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.

[. . .]

**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 cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party 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).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

[. . .]

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL")

[. . .]

**Article 45—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.

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

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

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

(3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.

(b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years

following the effective date of termination, except as otherwise provided in subparagraph (c).

(c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor.

## VI. SUMMARY OF WITNESSES' TESTIMONY

78. The Parties submitted extensive evidence relevant to the issues of jurisdiction and admissibility. Respondent submitted statements or opinions from 19 witnesses, while Claimants submitted opinions from four witnesses. In all, the Tribunal has reviewed over 795 pages of written testimony, as well as hundreds of exhibits.

79. The purpose of the present section of the Tribunal's Interim Award is to provide an overview of the witnesses' evidence. The following is not meant to be exhaustive. Rather, it serves to provide a summary of the vast evidentiary universe on the basis of which the Tribunal has reached its conclusions with respect to jurisdiction and admissibility.

80. The Tribunal has considered the evidence of those witnesses that were cross-examined as well as those witnesses who submitted written statements but were not called to the hearing. With respect to this latter category, the Tribunal has kept in mind that these witnesses were not subject to any cross-examination.

### A. RESPONDENT'S WITNESSES

81. At the hearing, Claimants called five of Respondent's 19 witnesses. They were:

1) Professor Suren Avakiyan
2) Mr. Sydney Fremantle
3) Mr. Anatoly Martynov
4) Mr. Martin Mann, QC
5) Professor Daniel Berman

82. Respondent's other witnesses, who did not appear for cross-examination, were:

6) Dr. Marat Baglay
7) Professor Martti Koskenniemi
8) Professor Alexey Kostin
9) Professor Yevgeny Sukhanov

10) Professor Gerhard Hafner
11) Professor Igor Lukashuk
12) Mr. S.V. Vasilyvev, on behalf of the Russian Ministry of Justice
13) Professor Georg Nolte
14) Professor Angelika Nussberger
15) Professor Alain Pellet
16) Mr. Stephen Knipler
17) Professor Myron Nordquist
18) Professor Andrey Lisitsyn-Svetlanov
19) Professor Stef van Weeghel

83. The following summary will first address the testimony of Respondent's witnesses who appeared before the Tribunal, in order of appearance. This is followed by a review of the evidence from Respondent's witnesses who did not appear.

### 1. Professor Suren Avakiyan

84. Professor Avakiyan is the head of the Department of Constitutional and Municipal Law of the Faculty of Law of the Moscow State University of M.V. Lomonosov.

85. In his Expert Opinion,[4] Professor Avakiyan explains the relationship between the 1993 *Constitution of the Russian Federation* ("**Constitution**") and international treaties of the Russian Federation. He concludes that the Russian Federation may not conclude international treaties whose provisions contradict the Constitution and would require its amendment. Professor Avakiyan explains that any treaty that annuls, modifies, or adds provisions to Russian legislation must be ratified in order to become effective. He then explains the ratification process for international treaties in the Russian Federation.

86. Professor Avakiyan summarizes his conclusions as follows: (a) a federal law on ratification gives an international treaty the force of law in the territory of the Russian Federation; (b) in the absence of relevant domestic rules implementing an international treaty that has been ratified and has become effective, the rules of the treaty apply directly; and (c) the application, prior to its ratification, of an international treaty that is subject to ratification contradicts the Constitution.

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[4] Professor Suren Avakiyan, *Expert Opinion on the Constitutional Legal Aspects of the Conclusion and Application of International Treaties of the Russian Federation*, 21 February 2006.

87. With respect to the ECT, Professor Avakiyan testifies that its application is impossible without simultaneous and numerous amendments to Russian legislation. Pursuant to the Constitution, the ECT is subject to ratification by the Federal Assembly; provisional application of the ECT and, in particular, of its dispute-resolution provisions without such ratification would be inconsistent with the Constitution.

88. In his Second Opinion,[5] Professor Avakiyan comments on the Opinion of Claimants' expert, Mr. Gladyshev, dated 29 June 2006. In particular, Professor Avakiyan points out that, in his view, the 1995 *Federal Law on International Treaties* of the Russian Federation ("**FLIT**") does not allow provisional application of the ECT in the present case, because the ECT was not submitted to the Duma within the six-month deadline established in Article 23(2) of the FLIT.

89. Professor Avakiyan appeared before the Tribunal for examination on 17 November 2008.

90. During cross-examination, Professor Avakiyan was taken through the various instruments in the Russian Federation relating to international treaties. Professor Avakiyan stated his belief that international treaties that are subject to ratification should never be applied provisionally. He asserted that Article 23 permits provisional application, but only where a treaty is consistent with and does not require amendments to Russian legislation. He testified that Article 23 of the FLIT should be amended in order to clarify this limitation and avoid any ambiguities.

91. On redirect examination, Professor Avakiyan stated that there was no contradiction between Article 45(1) of the ECT and Article 23 of the FLIT. If the Russian Federation wished to apply the ECT to the extent that it did not conflict with Russian legislation, then the ECT needed to be ratified within the required period. He added that those who had signed the ECT had not complied with the provisions of law governing treaty ratification. He went on to say that the ECT contained a large number of provisions that conflicted with Russian legislation, and that therefore the ECT could not apply

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[5] Professor Suren Avakiyan, *Expert Comments regarding Expert Opinion of V. Gladyshev dated June 29, 2006*, 19 January 2007.

provisionally save for those few provisions that did not contradict Russian legislation, such as those establishing the logistical procedures for the Secretariat.

### 2. Mr. Sydney Fremantle

92. Mr. Fremantle retired from the British Civil Service in November 1994, where he had been head of the International Energy Unit in the Department of Trade and Industry for the previous ten years. In this capacity he participated in the negotiations of the Agreement on the International Energy Programme and represented the United Kingdom on, *inter alia*, the International Energy Agency's Governing Board and the European Commission's High Level Energy Group. He participated in preparatory work leading to the creation of the ECT, although he retired about two months before actual signature of the ECT, with some residual involvement through working groups.

93. In his Opinion,[6] Mr. Fremantle first sets out the working procedures for the ECT negotiations. Mr. Fremantle testifies that while the ECT drew on precedents such as many bilateral investment treaties ("**BIT**s"), the North American Free Trade Agreement ("**NAFTA**"), and the General Agreement on Tariffs and Trade ("**GATT**"), there were deliberate departures from the standard provisions of such texts.

94. The conclusions in Mr. Fremantle's Opinion are: (a) Article 45(1) imposes provisional application upon those signatories who have not made a declaration under Article 45(2); (b) the "to the extent" clause in Article 45(1) is an integral qualification of the obligation to apply the ECT provisionally; (c) no further action is necessary to qualify the obligation; (d) Article 45(2) enables a signatory to avoid all obligations of the ECT (excluding Part VII) even if not consistent with its internal laws; (e) reciprocity was irrelevant to negotiation of the ECT and impossible to achieve; and (f) transparency would have been of little value to the investor and would add nothing to Article 20 ECT.

95. Mr. Fremantle appeared before the Tribunal for examination on 17 and 18 November 2008.

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[6] Mr. Sydney Fremantle, *Opinion Concerning the Provisional Application of the Energy Charter Treaty*, 21 January 2007.

96. Mr. Fremantle was cross-examined on the "boldness" of certain of his statements regarding international law, given that he is not a lawyer. He explained that his opinions were guided by information obtained as a participant in negotiations. He acknowledged that after presentation of the draft to the plenary his own role was less authoritative, but he attended certain plenary sessions until retirement in December 1994 and kept binders of papers in order to write a book.

97. Upon being shown unredacted versions of documents on which he had relied, Mr. Fremantle confirmed names of those delegations, including Austria, Russia, and the European Union, referred to in his Opinion as having constitutional or other problems making provisional application difficult. Mr. Fremantle testified about his perception of the positions of various delegations on provisional application.

98. Mr. Fremantle further testified that there was a sense of urgency in finalizing the ECT, in the belief that it would help overcome the Russian energy crisis. Urgency was also the motivation behind splitting the treaty into the present ECT, dealing with investments, and a later document (never completed) covering the pre-investment stage. He further agreed that provisional application was also due to a sense of urgency.

99. Mr. Fremantle acknowledged that the ECT established formal reciprocity—protecting the investors of each State party in turn. However, he asserted that while Russia was applying the treaty provisionally, Russian investors could bring claims against other member States even if, due to legal and constitutional inconsistencies, Article 45(1) of the Treaty prevented other investors from invoking the ECT against Russia. Mr. Fremantle was of the view that Russia was applying the ECT provisionally.

100. Mr. Fremantle testified that transparency in identifying inconsistent laws was not possible in relation to Article 45(1) and was "abandoned" by the delegates of Working Group II. He acknowledged that Japan continued to seek some transparency discipline as late as February 1994, but abandoned the idea of specifying all inconsistent laws by March 1994.

101. On re-examination, Mr. Fremantle described the trade-off between achieving a comprehensive Treaty and having it apply quickly. He explained that because of

concerns over inconsistency between the Treaty and domestic laws, some countries would not have been willing to sign the Treaty until conflicting laws had been repealed. Thus, the abandonment of transparency was one of the trade-offs enabling the widespread signature of the ECT.

### 3. Mr. Anatoly Martynov

102. Mr. Martynov is the head of a private Russian company providing consultancy on trade policy issues. During the period 1992–1994, he worked at the Ministry of Foreign Economic Relations of the Russian Federation, as the head of the Legal and Treaty Department. In that capacity, he participated in the negotiations on the ECT and the Agreement on Partnership and Cooperation between the European Union and the Russian Federation, signed in June 1994 ("**P&C Agreement**").

103. Mr. Martynov's evidence was given in support of Respondent's contention that without express consent resulting from ratification of the ECT or from specific Russian legislation, the Russian Federation cannot be involved in dispute settlement through international arbitration.

104. In his Statement,[7] Mr. Martynov recalls that he and the Russian delegation considered there were two options under Article 45 of the ECT regarding provisional application for States intending to sign the ECT between 17 December 1994 and 16 June 1995:

- to agree to apply the ECT provisionally under Article 45(1), relying on the limitations imposed in that sub-paragraph by the words "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations"; or

- at the moment of signature of the ECT, to deliver a declaration under Article 45(2) of the ECT, that the State is unable to accept its provisional application.

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[7] Mr. Anatoly Martynov, *Witness Statement concerning the Provisional Application of the Energy Charter Treaty*, 14 December 2006.

105. Mr. Martynov recalls that the Russian delegation considered it possible to propose to the Russian Government provisional application under Article 45(1), relying on the words "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." He explains that this position was motivated by the fact that at the time Russia's economy was in a process of transition, necessitating considerable modification of Russian legislation. The limitation in Article 45(1) would therefore ensure that Russia's obligations under the ECT would be consistent with both existing and future Russian legislation before ratification of the ECT.

106. Mr. Martynov also states that the Russian delegation had a clear understanding that Russia would not be able to apply the international dispute resolution provisions of the ECT. In this regard, he notes that because Russia continues to adhere to the concept of absolute State immunity—as reflected in both the old and new Code of Civil Procedure of the Russian Federation—Russian consent is required in order to be able to bring proceedings against the Russian Federation. He concludes that without express consent resulting from ratification of the ECT or from specific Russian legislation, the Russian Federation cannot be involved in dispute settlement through international arbitration.

107. Lastly, Mr. Martynov asserts that the P&C Agreement was negotiated before the ECT, covered much of the same subject matter and "anticipated the conclusion of the ECT."

108. Mr. Martynov appeared before the Tribunal for examination on 19 November 2008.

109. Under cross-examination, Mr. Martynov affirmed that he participated in negotiations for the ECT. He further acknowledged that he had been appointed by the Minister for Foreign Economic Relations to be a member of the Russian delegation, which was comprised of representatives of five Russian Ministries. With regard to the negotiation process, he testified that each Ministry would develop its own opinion on an issue, to be submitted to the representative of the Ministry of Energy (as coordinator of the Russian delegation) and coordinated into one draft, except where an issue fell under the competence of the Russian Government, in which case an opinion would be submitted to and approved by the Government. Mr. Martynov testified that draft and final written instructions were generated after each conference or working group session, but that he did not keep copies of the classified reports of the delegations to the Ministry in Moscow

generated on issues within his and his Ministry's competence, though he assumed that they were kept at the relevant Ministry or department, or destroyed.

110. Mr. Martynov was then also questioned about the international arbitration provision in Article 26 of the ECT, the difference in meaning between Russian "arbitrazh" courts, which are part of the court system, and private courts of arbitration outside the State judicial system. Mr. Martynov confirmed that the *Law on Foreign Investments* referred to resolution of disputes between a foreign investor and the Russian Federation before a non-government body, outside the State judicial court system, for which consent is required.

### 4. Mr. Martin Mann, QC

111. Mr. Mann has been in independent practice as a commercial chancery barrister since 1970 and is one of the joint heads of the chambers at XXIV Old Buildings, Lincoln's Inn, London. Mr. Mann provided a First Opinion concerning the Auriga-type Trusts, the Palmus Trust, the Southern Cross Trust and the Pavo Trust,[8] as well as a First Opinion concerning the Veteran Petroleum Trust ("**VP Trust**").[9] He also provided a Second Opinion on each of these two categories of trust.[10]

112. In his First Opinion concerning the Auriga-type Trusts and others, Mr. Mann maintains that (a) the trustees of these trusts have no "control" over these trusts and have, at most, illusory powers over the GML Limited ("**GML**") shares, (b) the trustees did not become beneficial owners of the GML shares, and (c) the trusts in respect of these shares were incompletely constituted and ineffective. Mr. Mann refers to (a) the extensive powers and unfettered discretion of the Protectors in the Auriga-type Trusts and the Palmus Trust; (b) the scope of the Anti-Bartlett provisions in the trust documents; and (c) the Call Options granted to GML in respect of the GML shares settled into the Auriga-type Trusts

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[8] Mr. Martin Mann, QC, *Opinion re Auriga Type Trusts, the Palmus Trust, the Southern Cross Trust and the Pavo Trust*, 22 January 2007.

[9] Mr. Martin Mann, QC, *Opinion re the Veteran Petroleum Trust*, 27 January 2007.

[10] Mr. Martin Mann, QC, *Second Opinion re Auriga Type Trusts, the Palmus Trust, the Southern Cross Trust and the Pavo Trust*, 21 July 2008; *Second Opinion re the Veteran Petroleum Trust*, 21 July 2008.

and the Southern Cross Trust. Finally, Mr. Mann refers to the so-called rule in *Saunders v. Vautier*[11] in support of the proposition that the trust can be terminated, even though there exist "discretionary objects," and that this affects the trustees' ownership and control of the GML shares.

113. In his First Opinion regarding the VP Trust, Mr. Mann's interpretation of the trust and related documents leads him to the following conclusions:

- YUL and Yukos can jointly instruct the trustee to vote and/or retransfer the Yukos shares at their discretion and, similarly, can jointly instruct the trustee to retransfer the VPL Shares.

- Neither VPL nor the trustee is the beneficial owner of the Yukos shares.

114. In his Second Opinion regarding the Auriga-type Trusts, in reply to the first written Opinion of Claimants' expert, Mr. Green, QC, Mr. Mann concedes that the trusts are valid by reference to the general law and standard forms and precedents, but opines that the trusts have an impact on control over the GML shares. He asserts that the proper way to address the "control" issue is through the following question:

> Do the rights within any given trust give the trustee meaningful power through its holding of GML shares over the way in which GML's affairs including its daily business are conducted?

115. Mr. Mann then addresses several key related points:

- The Protector is not a fiduciary and is not subject to the control of the court in exercising powers that, as in the case of these trusts, he can exercise in his own interests.

- As a result of the Call Option agreements, the trustees of the Auriga-type Trusts and the Southern Cross Trust can exercise the voting rights attached to the GML shares only in accordance with GML's directions.

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[11] *Saunders v. Vautier* (1841) 41 Eng. Rep. 482 (Ch.).

- It is probable that a court would hold that a transfer of shares, bereft of all the rights normally attached to them, does not carry the beneficial interest.

116. In his Second Opinion regarding the VP Trust, Mr. Mann makes the following points:

- The trust purported to be established for the Mezzanine Amount is invalid as being in relation to a future interest, termed in English law an "expectancy," which, under English law, the Court will only enforce if the intended transfer is a transfer for value, which was not the case with the VP Trust.

- The rule in *Saunders v. Vautier* therefore applies in relation to the Yukos shares, because there are no others, besides YUL, with enforceable rights to the Yukos shares and the fruits of those shares.

- Mr. Green's "theories" regarding impediments to the exercise of the rule in *Saunders v. Vautier* are incorrect. In particular:

  (a) there is no implied agreement not to terminate the VP Trust;

  (b) the Canadian case of *Buschau & National Trust Company v. Rogers Communications Inc.*[12] is irrelevant and distinguishable from the facts in this case, and runs counter to the public policy considerations in *Saunders v. Vautier*; and

  (c) the trustee's indemnity rights do not preclude termination of the VP Trust.

117. Mr. Mann appeared before the Tribunal for examination and cross-examination on 19 November 2008. In respect of the VP Trust, he opined that the trust over the Mezzanine Amount is unenforceable because the interest in this case—the expectation that there will be a capital gain out of which a portion can be carved out for the Russian Service Provider to donate—is merely a speculation or hope.

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[12] *Buschau & National Trust Company v. Rogers Communications Inc.,* [2006] 1 S.C.R. 973, 2006 SCC 28 (Can.).

118. In respect of the Auriga-type Trusts, Mr. Mann testified that the trustees would tend to follow the settlor's wishes concerning the distribution of the trust property. Mr. Mann also explained that, in his opinion, the Anti-Bartlett provisions in the trusts are not standard.

### 5. Professor Daniel Berman

119. Professor Berman is an international tax lawyer with over 20 years experience in the U.S. Government and the private sector. Since July 2008 he has been professor of tax law at Boston University Law School. At the time of preparing his Opinion, Professor Berman was a partner in the law firm of Thelen Reid Brown Raysman & Steiner.

120. In his Opinion,[13] Professor Berman asserts that much of the language of Article 21 of the ECT was inserted at U.S. insistence to conform to U.S. BIT practice, referring in particular to the 1984 U.S. Model BIT.

121. Professor Berman attended an Administration Briefing on the ECT on 1 November 1994 ("**Briefing**"), conducted by officials of the U.S. Departments of State, Commerce, Treasury and Energy and the Office of the U.S. Trade Representatives. Professor Berman explains that the discussion of tax issues at the Briefing, which was led by an official named Ann Fisher (from the Office of Tax Policy of the Department of the Treasury), did not include any suggestion that "tax measures" as defined in the ECT could give rise to rights and obligations under the ECT that were broader or differed in any way from those that could arise from the corresponding definition in U.S. BITs and other trade and investment agreements. He asserts that such a difference surely would have been highlighted at the Briefing.

122. Professor Berman concludes based on his professional experience in public and private practice, as well as the Briefing he attended and subsequent conversations he had with Ms. Fisher in December 2006, that the definition of 'Taxation Measures' in the ECT

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[13] Professor Daniel Berman, *Opinion on the Scope of the Term "Taxation Measures" in the Energy Charter Treaty*, 22 January 2007.

should be interpreted to include any law, regulation, procedure, requirement or practice related to the imposition, administration, or enforcement of taxation.

123. Professor Berman appeared before the Tribunal for examination on 19 November 2008. During a short direct examination he modified his written opinion by noting that the references therein to the U.S. Model BIT should properly have been cited as the NAFTA.

124. During cross-examination, Professor Berman acknowledged that his involvement with the ECT was limited to attending the Briefing in 1994 and to participating in some calls with treasury officials.

125. Professor Berman stated his belief that the negotiations of the tax provisions of the ECT were conducted in English, though his knowledge was based on what Ms. Fisher had told him. He had not reviewed the *travaux préparatoires* and was not familiar with notes prepared by the French delegation in French.

126. When it was recalled that the United States had not signed the ECT, Professor Berman nevertheless maintained that the intention of the party that drafted the provision, even if it did not ultimately become a Contracting Party, should still be given great weight in the interpretation of such a treaty provision.

127. Upon re-examination, Professor Berman explained why U.S. policy had been developed to contain a very broad carve-out for tax measures in relation to trade and investment treaties.

### 6. Dr. Marat Baglay

128. Dr. Baglay is a former judge of the Constitutional Court of the Russian Federation.

129. Dr. Baglay's Opinion[14] was given in support of Respondent's contention that any provisional application of the ECT would violate several provisions of the Russian Constitution. His Opinion addresses the supremacy of the Constitution, the powers of the

[14] Dr. Marat Baglay, *Opinion on Provisional Application of International Treaties according to the Constitution of the Russian Federation*, 26 February 2006.

parliament and government under the system of separation of powers, the provisional application of international treaties and the provisional application of the ECT.

130. According to Dr. Baglay, a non-ratified international treaty may not be legally applied without the adoption of relevant federal law. Such an application would violate Russian constitutional law, including the principle of separation of powers. If a federal executive body were entitled to bind the Russian State through the provisional application of treaties, it would assume legislative powers that have not been granted to this body by the Constitution. Consequently, provisional application of a rule-setting international treaty that is not validly ratified is contrary to the Russian Constitution.

131. Furthermore, Dr. Baglay considers that the ECT, which has not yet been ratified, remains subject to the control of the Constitutional Court. As such, the Constitutional Court has the authority to determine, upon a proper request, the ECT's compliance with the Russian Constitution, including, in particular, the question of whether the provisional application of Parts III and V of the ECT is compatible with the Russian Constitution.

### 7. Professor Martti Koskenniemi

132. Professor Koskenniemi is Academy Professor with the Academy of Finland. He is also the Director of the Erik Castrén Institute of International Law and Human Rights (Helsinki) as well as a Hauser Global Professor of Law at the New York University Law School. He has been a member of the International Law Commission ("**ILC**") since 2002 and has worked for the Finnish Ministry for Foreign Affairs as Counselor for Legal Affairs and as Director of the Division of International Law.

133. Professor Koskenniemi's Opinion[15] covers the provisional application of treaties in the Finnish legal system, and what is meant by the provisional application of the ECT being subject to a State's "constitution, laws or regulations."

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[15] Professor Martti Koskenniemi, *Expert Opinion on the Provisional Application of International Treaties in the Finnish Constitutional Law Context, especially with regard to the Energy Charter Treaty*, 27 October 2006.

134. Professor Koskenniemi notes that the President of Finland expressly authorized the provisional application and the signature of the ECT on 8 December 1994. The ECT was accepted by Parliament and ratified by the President on 11 July 1997. The ECT entered into force in Finland on 16 April 1998. In the Government's report to Parliament on Finland's treaty policy of 7 February 1997, it was noted that Finland had been applying the ECT provisionally since December 1994. According to Professor Koskenniemi, Finland relied on Article 45(1) in accepting provisional application since Article 37(3) of the ECT, which limited the budgetary authority of Parliament, was contrary to Finnish law.

135. Professor Koskenniemi then turns to his interpretation of Article 45(1) of the ECT. As to the object and purpose of provisional application, he opines that when States agree on provisional application, they do so in order to take immediate action in support of the objective of the treaty. Provisional application institutes a transitory system, bridging the temporal gap between the signature of a treaty and its entry into force. This means that clauses on provisional application are regular treaty clauses, in that they establish obligations on treaty parties to do what is required so as to facilitate the commencement of the operation of the main treaty. Clauses on provisional application are also exceptional, in that they temporarily suspend the normal rules on the submission of treaties to the regular constitutional procedure on ratification, acceptance and approval.

136. Turning specifically to the ECT, Professor Koskenniemi observes that given the purpose of clauses providing for provisional application, the well-established rule of international law that a State may not invoke its domestic law as justification for failure to perform an international treaty obligation, does not override the express wording of Article 45(1) of the ECT which makes provisional application subject to the domestic law of the signatory State. When a State agrees on the temporary application of a treaty so as to prepare its entry into force, it is understandable that such application is subject to domestic laws and regulations. Professor Koskenniemi notes that collapsing the distinction between the regular operation of the treaty and its provisional application fails to give meaning to the distinction made in the treaty itself and undermines the fundamental principles of the treaty system on an international and a domestic level.

137. Under the ECT, States have two choices. Under Article 45(1), a State can choose the regular system of applying the treaty provisionally in a manner not inconsistent with its constitution, laws or regulations. Alternatively, under Article 45(2), a State can opt out of provisional application altogether by making the required declaration.

138. Professor Koskenniemi disagrees with Claimants' expert, Professor Crawford, that the second choice is the "obvious mechanism by which a signatory may avoid provisional application." The first choice follows the normal practice of States as regards provisional application and is a balance between the need to prepare the entry into force of the treaty and the need to protect domestic constitutional rules on the division of powers in treaty matters. He also disagrees with the interpretation of Claimants' other expert, Professor Reisman, of treating Articles 45(1) and 45(2) as a single system of provisional application. The provisions indicate no procedural linkage and are understood by the Contracting Parties to operate independently of each other.

### 8. Professor Alexey Kostin

139. Professor Kostin is a lawyer in Russia. He is a senior professor and the head of the Private International and Civil Law Department of the Moscow State Institute of International Relations.

140. Professor Kostin's Opinion[16] was offered in support of the position, that under Russian legislation, claims of a public nature cannot be referred to arbitration and that a specific agreement to arbitrate between the actual disputing parties is also required.

141. According to Professor Kostin, only disputes arising from civil law may be referred to arbitration according to relevant Russian legislation on international arbitration. He cites paragraphs 2 and 4 of the *Russian Law on International Commercial Arbitration* of 1993 and Article 1(2) of the *Russian Federal Law on Arbitral Tribunals* in the Russian Federation.

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[16] Professor Alexey Kostin, *Opinion on Certain Issues of Arbitrability*, 21 February 2006.

142. Citing several Russian scholars, Professor Kostin states that the reference to civil law in these statues means that disputes relating to public law cannot be referred to arbitration. Professor Kostin considers that while a federal law may exempt certain civil law issues from the general scope of "civil law" arbitration, a federal law may not add disputes arising from relationships regulated by other branches of law, such as public law, to its scope.

143. Professor Kostin considers that public law issues such as taxation, enforcement of tax regulations, expropriation and criminal matters would not be subject to arbitration under Russian law unless they could be qualified as civil law disputes.

144. Moreover, Russian legislation requires a written agreement to arbitrate between the Parties. Professor Kostin emphasizes that there are not, nor have there ever been, deviations from this approach.

### 9. Professor Yevgeny Sukhanov

145. Professor Sukhanov is the head of the Civil Law Department of the Law Faculty of the M.V. Lomosonov Moscow University.

146. In his Opinion,[17] Professor Sukhanov addresses the question of "whether a shareholder has a right under current Russian law to bring claim(s) against persons (or entities) that have caused damage to the joint stock company, in which he or it is a shareholder."

147. After discussing the applicable legal rules, Professor Sukhanov explains that while shareholders have the right of claim in respect of the joint-stock company in which they participate, they have no rights in respect of property which belongs to the joint-stock company itself. The rules of tort law cannot be applied in this situation because the damage is inflicted to the property of the joint-stock company and not to the property of its shareholders. Consequently, the right to bring a claim for the protection of its interests is enjoyed only by the joint-stock company itself.

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[17] Professor Yevgeny Sukhanov, *Opinion on the Issue of Possibility of a Shareholder's Claims against Counter-Parties of the Joint-Stock Company in Connection with Damage Caused by the Latter to the Company*, 22 February 2006.

148. Professor Sukhanov notes that under Russian law, shareholders are entitled to bring claims in connection with their ownership against persons other than the joint-stock company itself in three exceptional cases, none of which applies in the situation under review.

149. Accordingly, Professor Sukhanov concludes, shareholders to joint-stock companies cannot bring claims against third parties that have caused damage to the joint-stock company in which they participate.

### 10. Professor Gerhard Hafner

150. Professor Hafner is a professor of Public International Law and European Law at the Law Faculty of the Vienna University.

151. In his Opinion,[18] Professor Hafner addresses (a) the legal effect of the Austrian declaration that it cannot apply the ECT on a provisional basis, and (b) the question of whether Austria was under an obligation to make a declaration in order to avail itself of the "to the extent clause" in Article 45(1) of the ECT.

152. He concludes: (a) Article 45(1) of the ECT provides that provisional application of the ECT upon signature becomes effective only insofar as the domestic legal order of the signatory does not contradict the provisions of the ECT; (b) a signatory may rely on the "to the extent clause" in Article 45(1) of the ECT without making a declaration; (c) Austria's declaration in relation to Article 45(1) of the ECT is declaratory in nature; (d) Article 45(2) of the ECT provides a regime of provisional application that is separate and distinct from that of Article 45(1); and (e) the exclusion of provisional application pursuant to Article 45(2) of the ECT requires a declaration by the signatory, which has constitutive effect.

[18] Professor Gerhard Hafner, *Legal Opinion*, 30 December 2006.

### 11. Professor Igor Lukashuk

153. The late Professor Lukashuk was the Director of the Centre for International Legal Analysis of the Centre for the State and Law of the Russian Academy of Sciences in Moscow and a member of the ILC.

154. In his Opinion,[19] Professor Lukashuk noted that the ECT was not submitted to the Duma for ratification within a six-month period and that the Duma never ratified the ECT. Moreover, the application of the Treaty requires amendments of existing laws or the adoption of new federal laws. Consequently, pursuant to Article 15(1) of the FLIT, ratification is required.

155. In Professor Lukashuk's opinion, pursuant to international and domestic law, the ECT cannot be applied in the Russian Federation even on a provisional basis to the extent that it contradicts the Russian Constitution, laws and regulations, and that only the Russian courts are competent to decide the issues submitted by Claimants.

### 12. Mr. S.V. Vasilyvev, on behalf of the Russian Ministry of Justice

156. In his Report,[20] the Deputy Minister of Justice of the Russian Federation, Mr. S.V. Vasilyev, confirms that the Russian Federation signed the ECT on 17 December 1994, that the Government sent the Treaty to the Duma for ratification on 26 August 1996 and that the Duma had not yet ratified the Treaty.

157. The Russian Ministry of Justice considers that the ECT should not be applied provisionally in the Russian Federation because Article 45 of the ECT provides for its provisional application only in accordance with national law and the ECT was not ratified by the Duma or sent to the Duma within the six-month term established by law.

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[19] Professor Igor Lukashuk, *Opinion on Provisional Application of the Energy Charter Treaty*.

[20] Deputy Minister S.V. Vasilyvev, *Report of the Ministry of Justice of the Russian Federation*, 12 December 2006.

### 13. Professor Georg Nolte

158. Professor Nolte is a professor of comparative public law, international law and European law at the University of Munich. He is also a member of the European Commission for Democracy through Law of the Council of Europe.

159. Professor Nolte's Opinion[21] addresses (a) the relationship between Article 45(1) and Article 45(2) of the ECT, and (b) the question of how German law does not allow for the provisional application of an arbitration clause such as the one contained in Article 26 of the ECT.

160. Professor Nolte submits that the purpose of Article 45(1) is to act as a general safeguard clause that prevents the provisional application of the ECT from affecting domestic law, while the purpose of Article 45(2) is to allow States "not able to accept provisional application" to put their non-application beyond dispute.

161. Professor Nolte submits that the text of Article 45, as well as its object and purpose, all support the notion that Articles 45(1) and 45(2) are separate protective measures. He argues that, from the language of the Treaty and the negotiating history, it is clear that the signatory States included Article 45(2) so as to provide protection for parties that would be unable to provisionally apply the treaty for political or other reasons. Professor Nolte gives several examples of State practice of ECT signatory States in support of his conclusions.

162. Professor Nolte then discusses the relationship between German law and the ECT to illustrate conflicts between domestic law and the Treaty's provisions.

163. Professor Nolte proceeds to discuss "areas reserved for legislation" on institutional grounds, invoked when certain administrative institutions are established or expanded. It is generally understood that this extends to changes to the judiciary. It can be implied that any change to the German judicial system—specifically arbitration proceedings available under the ECT—could not be effected without parliamentary approval.

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[21] Professor Georg Nolte, *Opinion concerning Provisional Application of Article 26 of the Energy Charter Treaty from an International and German Constitutional Law Perspective*, 31 October 2006.

164. Having opined that an arbitration mechanism cannot be created in Germany without parliamentary approval, Professor Nolte contends that there are no domestic laws available under German law that could serve as a basis for arbitration under Article 26 ECT.

165. Professor Nolte concludes that German constitutional law does not allow for the provisional application of the arbitration mechanism in Article 26 ECT without parliamentary authorization. Since Article 45(1) ECT provides for consideration of domestic legal impediments, such a position is in conformity with the regime of provisional application under the ECT.

### 14. Professor Angelika Nussberger

166. Professor Nussberger is a professor of law and the Director of the Institute of Eastern European Law at the University of Cologne.

167. In her Opinion,[22] Professor Nussberger discusses the change in the legal order that has taken place in the Russian Federation since end of the Soviet Era and as a result of the adoption of the 1993 Russian Constitution.

168. Among other things, Professor Nussberger notes that the Constitution is silent with regards to the provisional application of treaties and the VCLT stops short of regulating the status of provisionally applied treaties as a matter of Russian domestic law. However, Article 23(1) of the FLIT permits provisional application, as long as the treaty is submitted to the Duma within six months for ratification. As the ECT was sent to the Duma for ratification after the expiry of the six-month period, and the Duma has not passed a law on ratification or a law extending provisional application, the continued provisional application of the ECT constitutes a breach of Russian domestic law.

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[22] Professor Angelika Nussberger, *Opinion concerning the Provisional Application of the Energy Charter Treaty by the Russian Federation*, 17 January 2007.

169. According to Professor Nussberger, the ECT is different from other treaties that the Russian Federation applies provisionally because its provisional application is restricted by Article 45(1), which provides for the precedence of national law.

170. Professor Nussberger states that provisional application of the ECT violates both the vertical and horizontal separation of powers. First, as a treaty that must be ratified, the provisional application of the ECT cannot continue after six months without the consent of the Duma in the form of a law of ratification. Second, the ECT cannot be applied provisionally insofar as the provisional application would be incompatible with Chapter 7 of the Constitution, which provides that the executive cannot regulate the judicial settlement of disputes as the ECT's arbitration clause seeks to do.

### 15. Professor Alain Pellet

171. Professor Pellet, a professor of law at Paris X-Nanterre University, is a member and former Chairman of the ILC.

172. Professor Pellet's Opinion[23] discusses the provisional application of a treaty under French constitutional law.

173. Professor Pellet explains that under the French Constitution, the Executive Branch has the power to conclude treaties pursuant to Article 52(1) of the Constitution. However, some categories of treaty, enumerated in Article 53 of the Constitution, must be ratified or approved by virtue of a statute adopted by Parliament. These include treaties that, among other things, modify provisions that are matters for statute, commit the finance of the State, relate to international organizations, or are commercial in nature.

174. The ECT was signed by France in the name of the President on 17 December 1994. Its ratification was authorized by Parliament on 27 May 1999. During the ratification process of the ECT, neither the French Parliament nor the Government specified the reasons for referring the matter to Parliament. In Professor Pellet's opinion, this silence

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[23] Professor Alain Pellet, *Legal Opinion on the Provisional Application of a Treaty under French Constitutional Law (Taking the Example of the Energy Charter Treaty)*, 13 December 2006.

cannot hide the fact that this was "not a pure discretionary choice but a legal obligation," because (a) the ratification of this treaty has affected certain "provisions which are matter for statute law" according to Article 53; (b) the ECT falls into the category of "treaties or agreements relating to international organization" because it establishes an international organization; (c) the ECT commits the finance of the State; and (d) the ECT is a "commercial treaty" within the meaning of Article 53.

175. Professor Pellet states that, in France, the provisional application of treaties is only possible when the treaty's subject-matter falls within the power of the Executive Branch or, when Parliament has authorized it in advance. Professor Pellet considers that it is not the mere inclusion of an arbitration mechanism in a treaty that prevents provisional application of the treaty by France. Where, however, the arbitration mechanism itself touches upon one of the subject matters reserved under Article 34 of the Constitution to the legislative branch—such as by exempting foreign investors from the jurisdiction of the domestic courts—ratification pursuant to Article 53 of the Constitution is required.

176. He submits that, by signing the ECT, France only accepted the provisional application of the ECT's provisions to the extent that they did not conflict with its Constitution, in accordance with Article 45(1) of the ECT. Professor Pellet concludes that only the few provisions of the ECT that do not fall under Article 53 of the Constitution may have been applied on a provisional basis before its ratification by France.

### 16. Mr. Stephen Knipler

177. Mr. Knipler has been a Senior Tax Counsel (International) for the Australian Tax Office since 21 March 2002, after having had responsibility for the past 24 years for participating on behalf of Australia in the negotiation of tax provisions in international treaties, in particular the ECT.

178. In his Statement,[24] Mr. Knipler asserts that he attended the ECT negotiations concerning tax provisions held in Brussels in 1994 and was closely involved in the negotiations

[24] Mr. Stephen Knipler, *Witness Statement*, 22 January 2007.

concerning taxation issues, particularly in the drafts of what became Article 21 of the Treaty. Mr. Knipler states that the ECT tax provisions were negotiated solely in English.

179. During the course of the ECT negotiations, the Australian delegation had a clear mandate to ensure that the ECT did not cover any measures related to taxation, including measures relating to imposition, administration, collection or enforcement.

180. At the conclusion of negotiations, Mr. Knipler was satisfied that Article 21 was consistent in its content and effect with the instructions given to the Australian delegation and confirms that is reflected in the final text of the ECT.

### 17. Professor Myron Nordquist

181. Professor Nordquist is a professor of international law and the Associate Director of the Centre for Oceans Law and Policy at the University of Virginia School of Law.

182. Professor Nordquist's Opinion[25] addresses the assertion of Claimants and their expert, Mr. Gladyshev, that the Russian Federation's practice with respect to certain maritime agreements is consistent with the view that the Russian Federation consented to be bound under international law to the provisional application of the compulsory dispute settlement provisions of Article 26 of the ECT. Professor Nordquist considers that this assertion is factually and legally erroneous, and that there is no legal support for the notion that the Russian Federation agreed to the provisional application of a dispute resolution procedure requiring compulsory arbitration at the request of a private party.

183. According to Professor Nordquist, while the Russian Federation accepted "provisional arrangements" under the 1982 United Nations Law of the Sea Convention, this is not the same as provisional application under Article 25 of the VCLT.

184. Similarly, the Exchange of Notes between the United States and the Soviet Union in connection with the maritime boundary agreement for the Bering Sea on 1 June 1990 ("**Bering Sea MBA**") is a source of authority under international law to set up a

[25] Professor Myron Nordquist, *Expert Witness Statement*, 19 January 2007.

"provisional arrangement of a practical nature." The practice of both the Russian Federation and the United States is uniformly consistent with the establishment of provisional arrangements and uniformly inconsistent with the provisional application of the Bering Sea MBA itself. Contrary to what was asserted by Claimants, neither the Bering Sea MBA nor the Exchange of Notes in connection with the Bering Sea MBA called for provisional application of the agreement.

185. Professor Nordquist disagrees with Mr. Gladyshev's assertion that a 2001 submission by the Russian Federation to the United Nations Commission on the Limits of the Continental Shelf demonstrates that Russia is provisionally applying the Bering Sea MBA. He argues that the public information available on the Russian submission clearly does not refer to the agreement as being provisionally applied, nor does it refer to a maritime boundary as having been established by such an agreement, whether as a result of provisional application or otherwise.

186. Professor Nordquist doubts the legal and factual credibility of Mr. Gladyshev's contention that the Russian Federation acquiesced in the issuance of oil exploration licenses by the United States in the Navarin Basin located in the Bering Sea—and that these 'claims' were subsequently withdrawn under the Bering Sea MBA.

187. Finally, Professor Nordquist asserts that no American President would claim competence to bind the U.S. Government to compulsory dispute resolution with a private party on the basis of provisional application of a treaty, without ratification pursuant to the advice and consent of the U.S. Senate, nor would the Senate tolerate such a claim. As a result, even if the Bering Sea MBA were an example of provisional application, it would not be evidence of State practice corroborative of provisional application of compulsory dispute resolution.

### 18. Professor Andrey Lisitsyn-Svetlanov

188. Professor Lisitsyn-Svetlanov is the Director of the Institute of State and Law of the Russian Academy of Sciences and the author of a number of works on the legal regulation of foreign investment in the Russian Federation and the former Soviet Union.

189. In his Opinion,[26] Professor Lisitsyn-Svetlanov asserts that a "foreign investment" under Russian law must involve an injection of foreign capital.

190. Russian investment laws were promulgated with the purpose of granting certain benefits to foreign investors in exchange for obtaining new funds from abroad and essential expertise. In respect of such foreign funds and expertise, the relevant statutes commonly provided that these should be "injected" by foreign investors into the local economy. In the Russian language, "to inject" means to bring something new into something that already exists. It is the injection and contribution of something new that is a characteristic feature of an investment, as differentiated from a general foreign trade transaction.

### 19. Professor Stef van Weeghel

191. Professor van Weeghel is a professor of international tax law at the University of Amsterdam and is a tax partner at Stibbe.

192. In his Opinion,[27] Professor van Weeghel reaches three main conclusions about Claimants and taxation law.

193. First, Hulley was not entitled to obtain the taxation benefits contained in the Cyprus-Russia double taxation convention ("**Cyprus-Russia DTC**") in respect of the Yukos dividends because (a) Hulley had a permanent establishment in Russia under Article 10(4) of the Cyprus-Russia DTC) because it either had a place of management in Russia, or it had an agent in Russia; and (b) those dividends were attributable to the permanent establishment in Russia.

194. Second, VPL was not entitled to obtain the taxation benefits contained in the Cyprus-Russia DTC because it was not the beneficial owner of the Yukos dividends within the meaning of Article 10(2) of the Cyprus-Russia DTC).

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[26] Professor Andrey Lisitsyn-Svetlanov, *Legal Opinion*, 22 February 2006.

[27] Professor Stef van Weeghel, *Expert Witness Report*, 29 January 2007.

195. Third, the Yukos holding structure is a sham or otherwise abusive under general principles of international tax law and designed specifically to avoid taxation obligations. Therefore rights to tax benefits under the Cyprus-Russia DTC should be denied.

196. According to Professor van Weeghel, tax authorities do not always have to accept artificial legal constructions. Anti-abuse doctrines to counter artificial legal constructions have developed in and are common to many countries including the Russian Federation and Cyprus. He refers to the example of a Swiss Federal Court denying the benefits of a double taxation treaty to a Danish company in circumstances analogous to the Yukos holding structure.

197. Professor van Weeghel refers to international efforts to control the use of tax havens and notes that the OECD Forum on Harmful Tax Practices in its 2000 Progress Report identified 35 tax havens which included Isle of Man, Gibraltar, Jersey, and the British Virgin Islands. Professor van Weeghel examines the Yukos holding structure, and notes that the bottom of the structure is the successful and profitable Russian oil company developing and exploiting natural energy resources in Russia, while at the top of the structure is a small number of Russian individual shareholders. He concludes that it is "hardly perceivable" that the Russian individual shareholders, in setting up the Yukos holding structure, had any other goal in mind than low taxation and lack of transparency in respect of ownership of Yukos shares. Such a structure would normally fall within the scope of international efforts to counter the harmful use of tax havens.

### B. CLAIMANTS' WITNESSES

198. As noted, Claimants submitted four expert legal opinions. At the hearing, Respondent called two of Claimants' experts for cross examination—Mr. Vladimir Gladyshev and Mr. Brian Green, QC. Professor James Crawford, SC and Professor W. Michael Reisman were not called to the hearing. The following summary of Claimants' witness evidence follows the order outlined above.

#### 1. Mr. Vladimir Gladyshev

199. Mr. Gladyshev is a Russian attorney in Moscow, who has been in private practice since 1994. From 1981 to 1989 he worked in the Treaty and Legal Department of the Soviet

Ministry of Foreign Affairs and between 1989 and 1994 was posted to the Madrid Embassy of the Union of Soviet Socialist Republics ("**USSR**"). He was not directly involved in the negotiation of the ECT.

200. In his First Opinion,[28] Mr. Gladyshev makes the following main contentions. First, the Russian Federation's long-standing practice shows that it favors the provisional application of treaties and recognizes that the treaties it applies on a provisional basis impose binding obligations on the Russian Federation. Second, the Russian Government declared to the Duma, during the ratification process, that the ECT is consistent with Russian law. In accordance with the rules of international law and its own treaty practice, the Russian Federation has applied the ECT as a binding instrument and has relied on its terms. Third, Mr. Gladyshev contends that the ECT is in fact consistent with Russian law.

201. To reach these conclusions, Mr. Gladyshev discusses the rules of customary international law, the FLIT (which permits the provisional application of treaties), Russian legal scholarship and Russian treaty and judicial practice, citing examples of other treaties to which Russia is party. Attached to his opinion is a list of 45 treaties that he contends are currently being applied by the Russian Federation on a provisional basis, amidst a list of 390 treaties signed by the USSR/Russian Federation that were applied—or are being applied—on a provisional basis prior to ratification.

202. In support of his assertion that the Russian Federation has repeatedly accepted the binding nature of provisionally applied treaties, Mr. Gladyshev cites a number of examples, the most salient of which is the Bering Sea MBA. It was signed on 1 January 1990, and has been provisionally applied since 15 June 1990, in accordance with the express terms of the Exchange of Notes between the United States and Russian Federation, as evidenced by (a) the Russian Government's express reference to the boundaries as defined in the Bering Sea MBA as the outer limits of its continental shelf; (b) the United States' enforcement of the Bering Sea MBA against Russian shipping

[28] Mr. Vladimir Gladyshev, *Opinion concerning the Provisional Application of the Energy Charter Treaty by the Russian Federation*, 29 June 2006.

vessels on multiple occasions, without protest from the Russian Federation; and (c) the Russian Government's acquiescence in the issuance by the United States of licenses to companies for oil exploration in areas to which Russia's earlier claim was withdrawn in the Bering Sea MBA.

203. Mr. Gladyshev's Second Opinion[29] reiterates his view that the Russian Federation repeatedly accepted the binding nature of provisionally applied treaties in general and applied the ECT, in particular, as a binding instrument. He contends that the fact that the ECT was not submitted to the Duma for ratification within the six-month period set out in Article 23(2) of the FLIT has no effect on Russia's continuing application of the Treaty. Attached to his Second Opinion is a list of treaties that were provisionally applied, submitted to the Duma after the six-month period and subsequently ratified.

204. Mr. Gladyshev appeared before the Tribunal on 20 November 2008. Under cross-examination Mr. Gladyshev testified that although he had not been involved in the negotiation of the ECT, he had been involved in negotiation of Russia's other treaties and regularly applies international law in his practice.

205. In response to questions on the FLIT, Mr. Gladyshev affirmed that it prescribes procedures for the ratification of treaties, but that some treaties do not require ratification. Shown several examples of treaties that he had cited in support of Russian practice on provisional application, he maintained that the fact that Russia had signed such treaties supported his contention, regardless of whether Russia had ever applied the provisional application clause. He acknowledged further that, of the treaties listed in Attachment 2 to his opinion, except for the ECT, none provided for investor-State arbitration.

206. In a series of questions on Russian constitutional law and the separation of powers, Mr. Gladyshev maintained that the operation of the separation of powers for treaty-making in Russia is prescribed not only in the Russian Constitution, but in the FLIT, such that there is no category of treaty that cannot be applied provisionally. Questioned

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[29] Mr. Vladimir Gladyshev, *Second Opinion concerning the Provisional Application of the Energy Charter Treaty by the Russian Federation,* 2 May 2007.

further on the distinction between the Soviet approach and that of the Russian Federation, he resisted characterizing the Soviet State as dualist and the Russian Federation as monist, and reasserted that agreement on the provisional application of the ECT amounted to a treaty concluded by the Russian Federation.

207. When questioned about resolutions of the Supreme Court of Russia, Mr. Gladyshev acknowledged that he was familiar with Resolutions 5 and 8. After being shown a statement by Professor Igor Lukashuk that the Russian courts are bound by a Supreme Court decree according to which only ratified treaties can take priority over contrary rules of law, Mr. Gladyshev contended that this includes provisionally applied treaties, invoking Professor Lukashuk's own book, *The Norms of International Law in the Russian Legal System*.

208. When questioned on the text of Article 45(1) of the ECT, Mr. Gladyshev agreed that his Opinion did not discuss whether his list of treaties had such an "inconsistency clause," which he attributed to his belief that international law does not include a regime for such "inconsistency clauses." He restated his opinion that the Russian State took the view that Article 45(1) did not apply to Russia and that the ECT was consistent with its laws.

### 2. Mr. Brian Green, QC

209. Mr. Green is a specialist trusts practitioner at the English Bar. He has been in this practice since 1981, and was appointed a QC in 1997. He practices out of Wilberforce Chambers, Lincoln's Inn, London. Mr. Green provided a first and second opinion on the Auriga-type Trusts, and a first and second opinion on the VP Trust.

210. In his First Opinion regarding Auriga-type Trusts,[30] Mr Green stated that these trusts are routine examples of offshore trusts, substantially similar to the Jersey standard form. An analysis of the salient features of each trust would show a coherent set of trusts operating for the benefit of all or any of the beneficiaries for the duration of the relevant trust period. He defines "control" over the GML shares as "control" over those rights

[30] Mr. Brian Green, QC, *Opinion re Auriga-Type Trusts, the Palmus Trust, the Southern Cross Trust and the Pavo Trust*, 4 May 2007.

attaching to the GML shares that allow "control" to be exercised over GML, and concludes that the trustees have control over the GML shares. Mr. Green opines as follows in relation to the key related issues:

- The Protector's powers, far from being entirely at his discretion, must be exercised in a fiduciary manner and for the benefit of the beneficiaries.

- The Anti-Bartlett provisions, exempting the trustee from a duty to perform certain actions, must be distinguished from provisions that would take away from the trustee the right to do so.

- The Call Option agreements proceed on the explicit basis that legal and beneficial ownership of the GML shares will remain in the trustees pending "Completion," and do not involve any transfer of property to the security holder (*i.e.*, GML itself).

- The rule in *Saunders v. Vautier* has no application to the trust here, since the class of beneficiaries is open.

211. In his First Opinion regarding the VP Trust,[31] Mr. Green opines that Mr. Mann's interpretation of the trust and related documents is incorrect, and offers the following conclusions based on his analysis of the issues:

- The provisions of the trust instrument clearly show that the trustee is vested with ownership and control over the VPL shares.

- The fact that the trustee is required to act in accordance with the instructions of a Voting Committee in exercising any voting powers attaching to the Yukos shares does not interfere with the trustee's ownership and control over the VPL shares.

[31] Mr. Brian Green, QC, *Opinion re the Veteran Petroleum Trust*, 4 May 2007.

- The provisions requiring the trustee to sell the Yukos shares as directed by the Russian Service Provider ("**RSP**") do not equate with the RSP owning or controlling the Yukos shares.

- The trust appears as an arrangement referred to in the UK as an "unapproved profit sharing scheme."

- Successive interests are created in the Yukos shares, which are in the nature of fixed-interest trusts. The beneficiaries are YUL and the veteran employees of Yukos.

- The rule in *Saunders v. Vautier* is inapplicable to the Yukos shares; as for the VPL shares, there are several impediments to the exercise by YUL of any rights under the rule.

212. In his Second Opinion regarding the Auriga-type Trusts,[32] Mr. Green states that, the trusts being typical and valid trusts as regards the GML shares, it cannot seriously be argued that the terms of the trusts have the extraordinary effect that ownership or control of the trust assets resides other than in the trustees. He makes the following principal points:

- As regards the rule in *Saunders v. Vautier*, even when the principle is potentially applicable, it does not justify the conclusion that the GML shares (or any other trust property) is owned or controlled by anyone other than the respective trustees unless and until the principle is effectively invoked.

- The security interest created by the Call Option agreements is at most in the nature of a charge and not a mortgage. A charge does not involve any transfer of property to the security holder, much less does it involve the chargee becoming the legal owner of such shares.

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[32] Mr. Brian Green, QC, *Second Opinion re Auriga-Type Trusts, the Palmus Trust, the Southern Cross Trust and the Pavo Trust*, 30 September 2008.

- In relation to Protector control, Mr. Green observes that the Protectors have no consent power as regards the exercise by the trustee of the voting rights over GML shares.

- Finally, Mr. Green maintains that Mr. Mann has failed to establish that the beneficial interest in the GML shares was retained by the settlor/first-named Protector.

213. In his Second Opinion regarding the VP Trust,[33] Mr. Green opines as follows on the additional points raised by Mr. Mann:

- Reliance on the "expectancy" principle is erroneous, as the question here involves whether a party (YUL), being the present owner of present property (the Yukos shares), was able to assign such present (not expectant) property to a trustee, to hold the same on trust. The trust over the Mezzanine Amount is therefore valid and enforceable, and the beneficiaries are the veteran employees of Yukos.

- There remain significant impediments to the exercise by YUL of the rule in *Saunders v. Vautier* in relation to the VPL Shares, namely: (a) no unilateral right to terminate the trust; (b) inapplicability of the rule in relation to a pension trust fund (*i.e.*, the *Rogers Communications Inc.* case); and (c) the trustee's indemnity rights take priority over YUL/Yukos' rights.

- Finally, even when the rule in *Saunders v. Vautier* is potentially available, that principle does not enable beneficiaries to control the trustee or to claim ownership of the trust property so long as the trust is ongoing.

214. Mr. Green appeared at the hearing for cross-examination on 20 November 2008. His oral testimony addressed the following points, among others:

- Explaining the inclusion of the International Red Cross in discretionary trusts, Mr. Green testified that it is the normal practice in properly-drafted trusts to

[33] Mr. Brian Green, QC, *Second Opinion re the Veteran Petroleum Trust*, 30 September 2008.

ensure that the equitable interests under the trusts are completely disposed of, so that there is no beneficial vacuum at the end of the trust pursuant to which the property, no matter how remote, might be said to fall back into the estate of the settlor.

- Normally, a letter of wishes is designed to communicate to the trustees the settlor's aspirations at the time that the letter is written as to the way in which the beneficial enjoyment of the trust property might devolve over time. It is general in its terms and makes clear that it is only of precatory effect.

- In the Southern Cross Trust, any beneficiary can let the trustees know that he no longer wishes to be a beneficiary. Unlike English law, Guernsey law does not require that disposing of anything like an equitable interest should be in writing. Therefore, it is possible for the trustees to have removed Mr. Khodorkovsky without clear written instructions.

- The Call Option agreements gave each of the individual participants comfort as regards the other. They gave GML a mechanism to remove an individual participant if it decided in the future that a particular participant was no longer desirable. This is not uncommon in partnership or joint venture agreements of the present kind.

### 3. Professor James Crawford, SC

215. Professor Crawford, SC, is the Whewell Professor of International Law at the University of Cambridge and a member of Matrix Chambers.

216. Professor Crawford's First Opinion[34] addresses Respondent's arguments that the Tribunal lacks jurisdiction and that Claimants lack standing. Professor Crawford concludes: (a) provisional application of a treaty is a genuine form of application and provisionally applied treaty provisions may have legal effect; (b) accordingly, by accepting provisional application of the ECT, Respondent accepted the obligations of Parts III and V of the

[34] Professor James Crawford, SC, *Energy Charter Treaty Arbitration: Jurisdiction Issues,* 22 June 2006.

Treaty; (c) in particular, given that the arbitration clause of the ECT was being provisionally applied by Respondent, Notices of Arbitration filed by qualified investors perfected an agreement to arbitrate which was, and remains, independent of the continued provisional application of the ECT itself; and (d) on the facts as stipulated, the dispute settlement provisions of the ECT apply to Claimants.

217. Within an overview of the modes of consent under the law of treaties, Professor Crawford reviews the drafting history of Article 25 of the VCLT and highlights two amendments that confirm that provisionally applied treaties have legal effect. During the Vienna Conference, the draft text was modified to include Article 35(2), which provides specific rules for the termination of a provisionally-applied treaty. Additionally, the draft text was modified to replace the words "enter into force provisionally" with "apply provisionally," a change intended to make clear that "provisionally" referred to the time of the treaty's application, rather than its legal force or effectiveness during that time period. Professor Crawford further rejects Respondent's position that the *pacta sunt servanda* rule in Article 26 of the VCLT only applies to a treaty in force: the VCLT plainly intended provisional application to fall within the framework of that rule.

218. After reviewing State practice in connection with provisional application, including the examples of the GATT and the privatization of the International Telecommunications Satellite Organization, Professor Crawford concludes that a claim based on provisional application is "a form of consent widespread in recent treaties, including the ECT itself, and it involves a mode of application of the treaty to the extent stipulated in it."

219. With respect to Respondent's interpretation of Articles 45(1) and 45(2), Professor Crawford states that the correct construction is that Article 45(1) provides the general rule to accommodate constitutional or other requirements of participating States, and Article 45(2) provides a mechanism under which the rule is to operate. He states that Respondent's position does not make sense given the reciprocity limitation in Article 45(2)(b). A declaration under Article 45(2)(a), by virtue of the operation of Article 45(2)(b), would maintain parity between States, whereas the operation of Article 45(1), according to Respondent's construction—which might occur only after a

dispute had arisen—would be unilateral in its effect. States are not to be taken to have negotiated such anomalous situations unless there is a clear indication to that effect.

220. Professor Crawford states that, assuming that Article 45(1) could operate independently of Article 45(2), the internal law of a State must be clear as to its exclusionary effect to avoid the provisional application of a treaty. Professor Crawford states that it cannot be assumed that the mere existence of a constitutional requirement of ratification is inconsistent with provisional application and international law has traditionally been reluctant to allow internal limitations to affect treaty provisions. Article 46 of the VCLT—which permits the invalidation of consent to a treaty entered into in violation of internal law—has an "exceptional character" and is rarely applicable, and more importantly that its scope does not cover provisional application, but only definitive acceptance.

221. In connection with Article 17 of the ECT, Professor Crawford emphasizes the notification requirement, and observes that tribunals have been clear that notification by the State seeking to deny advantages to investors must be unambiguous. Professor Crawford acknowledges the practical difficulty of notifying offshore companies of the exercise of the Article 17 right but asserts that this is why Article 17(1) allows States to issue, by clear statement, denials respecting the whole class of investors and potential investors. Though international law provides no formal notice requirements in such a situation, the principle is evident in the depositary requirements under Article 80 of the VCLT. To constitute notice under Article 17(1), a clear statement by the Government of Respondent published with an appropriate authority—such as the Energy Charter Secretariat—would be required. Even if the statement in Respondent's pleadings was sufficient, the withdrawal from the arbitration clause would have no retroactive effect.

222. In response to Respondent's objection that Claimants are shell companies, Professor Crawford observes that the ECT requires only that the "investor" be organized under the laws of a Contracting State. Companies incorporated in Contracting Parties are embraced by the definition, regardless of the nationality of shareholders, the origin of investment capital or nationality of the directors or management. In several cases where companies have been registered in tax shelters, arbitral tribunals made no further enquiry to uncover

their "real" nationality or found it unnecessary to go beyond the terms of the treaty definition of "investor."

223. In his Further Opinion[35], Professor Crawford sets out his position on the applicability of *pacta sunt servanda* to provisionally applied treaties and provides detailed responses to and comments on the witness statement of Mr. Fremantle and the expert opinions of Professors Hafner, Koskenniemi, Lukashuk, Nolte and Pellet.

224. In connection with Professor Koskenniemi's opinion, Professor Crawford disagrees that provisional application should be interpreted in a "limitative way." Provisional application has legal effect because it is what the parties have agreed. Interpretative presumptions are beside the point when the terms of the parties' agreement are as explicit as Article 45 of the ECT.

225. With respect to Professor Koskenniemi's opinion that the executive ought not to be able to bind a State internationally in contravention of its domestic constitutional law, Professor Crawford asserts that the position of international law is that treaties can be entered into by more or less formal means; it is—within broad limits—for the State itself to ensure compliance with its constitutional requirements, which Article 45(2) allows them to do freely. Further, there is no rule that treaties cannot have effect before ratification, since there is no rule requiring ratification. Finally, it is necessary to look at the effect on third parties acting in good faith. The Russian Federation consented to provisional application and gave no reason for investors to doubt the effectiveness of its consent.

226. Turning to Professor Lukashuk's opinion, Professor Crawford disagrees with the opinion that provisional application applies in accordance with the State's "constitutional processes." The VCLT does not condition the validity of the legal effect of treaty commitments upon compliance with constitutional processes. He further comments that

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[35] Professor James Crawford, SC, *Further Opinion on Energy Charter Treaty Arbitration: Jurisdiction Issues*, 3 May 2007.

unless a treaty provides otherwise, it is for the State to ensure that it complies with any internal constitutional processes in accepting provisional application.

227. Finally, Professor Crawford addresses the scope of *travaux préparatoires*. *Travaux préparatoires* include evidence of the conference or other meetings where the treaty text was discussed, including proposals communicated, but not private statements or recollections. Professor Crawford regards the following evidence as based upon false *travaux* and as effectively inviting the Tribunal to engage in "an investigation *ab initio* of the supposed intentions of the parties [to the Treaty]": (a) Professor Berman's reference to congressional briefings and his personal knowledge of the facts; (b) Mr. Fremantle's reliance on certain non-comprehensive papers and his memory of negotiations; (c) Mr. Knipler's reference to the "mandate" of the Australian delegation and his personal satisfaction regarding compliance with the Australian delegation's instructions; and (d) Mr. Martynov's "clear understanding that Russia would not be able to apply provisionally those provisions [. . .] that related to a settlement of disputes by international arbitration" though there is no record of this. Professor Crawford confirms that interpretation of a treaty is a matter of law, not of fact, and that much of Respondent's witnesses' testimony is fundamentally inadmissible. Resort to the *travaux* is a subsidiary means of resolving "ambiguities or uncertainties or, in exceptional cases, to correct an interpretation which is 'manifestly absurd or unreasonable.'"

### 4. Professor W. Michael Reisman

228. Professor Reisman is currently the Myres S. McDougal Professor of International Law at Yale Law School, where he has been a member of the faculty since 1965. He has been elected to the Institut de Droit International.

229. Professor Reisman's Opinion[36] addresses the ECT's provisional application regime under Article 45, the denial of benefits regime under Article 17, and the meaning of "investment" in the Treaty and its binding effect on Russia.

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[36] Professor W. Michael Reisman, *Opinion concerning Arbitral Jurisdiction under the European Energy Charter Treaty with Respect to the Russian Federation in the Yukos Case*, 28 June 2006.

230. When a treaty contains a provisional application clause, it imposes obligations on a State by virtue of that State's participation in the adoption of the treaty. According to Professor Reisman the law of provisional application operates according to the twin principles of drafting freedom and State consent; a provisionally-applicable treaty constitutes a binding and enforceable legal instrument between States.

231. Professor Reisman asserts that Article 45 of the ECT establishes two different regimes for provisional application. The first regime—consisting of Articles 45(1), 45(2)(a), 45(2)(b) and 45(3))—is for the ECT as a whole. The second regime—consisting of Article 45(2)(c)—applies exclusively to Part VII of the ECT.

232. The first regime, which includes the dispute settlement obligations in Part V based on alleged breaches of the investment-protection obligations set forth if Part III, applies automatically to every signatory State, without possibility of reservation, subject "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." The only time a signatory can claim that such provisional application is inconsistent with its constitution, laws or regulations, is at the moment of signature. At that time, a State that resists provisional application must deliver a declaration that it is not able to accept the provisional application because of the inconsistency that doing so would create with its constitution, laws or regulations. Other provisions of the ECT make it clear that this is the intended meaning of the text. Moreover, the bulk of the practice with respect to Article 45 confirms that this is the understanding of the parties.

233. Accordingly, Professor Reisman states, it is not permissible for a signatory, which had not previously exercised the option of making a declaration at the moment of signing, to invoke subsequently its constitution, laws or regulations as a justification for dishonoring its commitment to apply the ECT provisionally.

234. Professor Reisman opines that the ECT's provisional application regime applies to Russia. When Russia signed the ECT on 17 December 1994, it did not make a declaration under Article 45(2)(a). Neither did Russia make a declaration, accepting *arguendo* its interpretation of Article 45(1). Notably, Russia consistently held itself out as a member of the ECT and has actively participated in the Conference and Charter mechanisms under Part VII.

235. According to Professor Reisman, the ECT is not a political treaty. Russia's allegation that the *pacta sunt servanda* rule is not applicable to a treaty that is applied on a provisional basis is not correct. All agreements concluded between States are subject to this rule with the possible exception of a *modus vivendi*; the ECT is not a *modus vivendi* and was moreover registered as a treaty with the Secretary of the United Nations. Further, the fact that the ECT's provisional application regime provides for a precise mode of termination indicates that its binding nature.

236. He also notes that Russia cannot claim that the provisional application of the ECT would violate the Russian Constitution, and the provisional application regime is not in manifest violation of Russian law. As provided by Article 46 of the VCLT, the violation must be a manifest, in other words, a violation of internal law regarding the competence to conclude treaties that is objectively evident to any other State. There was no such manifest violation here and Russia cannot advance this claim after allowing third parties to rely on its own assurances.

237. Professor Reisman opines that the arbitration provisions of the ECT are not inconsistent with Russian laws and regulations. It is an undisputed principle of international law that international obligations prevail over provisions of domestic law and that a State cannot invoke domestic provisions to avoid its international obligations. This same principle is applicable in international investment arbitration.

238. Professor Reisman then considers whether Claimants may avail themselves of the protections and benefits of the ECT in view of Article 17. According to Professor Reisman, Article 17 does not operate automatically. The right given by Article 17 to each Contracting Party to deny the advantages of Part III is an executory rather than an executed right; it must be exercised by way of a positive action by a State wishing to benefit from it, until which time the designated class of investors or investments benefit from Part III. Once the right to deny benefits of Part III has been exercised by a Contracting Party, the effect operates prospectively from the date of the exercise of the right.

239. According to Professor Reisman, Russia is a Contracting Party to the ECT. While Russia has not yet ratified the ECT and the ECT has therefore not literally entered into force for

Russia, to exclude Russia and similarly-situated States from the definition of "Contracting Party" would eviscerate the provisional application regime and the provisional application obligations of Article 45. The result would be "manifestly absurd" and "unreasonable" in the sense of Article 32(b) of the VCLT.

240. Professor Reisman states that citizens or nationals of a Contracting Party are not covered by Article 17. Article 17(1) permits a Contracting Party to deny the advantages of Part III to a legal entity organized under the laws of a Contracting Party but owned or controlled by nationals of a third State if that entity "has no substantial business activities in the area of the Contracting Party in which it is organized." ECT case-law supports the position that Article 17(1) does not apply to legal entities owned or controlled by citizens or nationals of a Contracting Party. Had the drafters of the ECT intended to permit a Contracting Party to deny the advantages of Part III to entities owned or controlled by its nationals but organized according to the laws of another Contracting Party, Article 17(1) would not limit the denial option to entities owned or controlled by "citizens or nationals of a third state." Russia is a Contracting Party, not a third State.

241. Professor Reisman then turns to the question of whether the ECT requires the investment to have a cross-border origin. He considers that the requirements for "Investment" have been met. Russia argues that when ascertaining the international character of an investment, the origin of the capital is relevant and decisive. There are however only four requirements that must be fulfilled in order for an "Investment" to qualify under the ECT: (a) "every kind of asset, including shares and stocks;" (b) "owned or controlled"; (c) "directly or indirectly"; (d) by an Investor as defined by the ECT. All four requirements are satisfied in this case: the investment is in the form of shares of the Yukos Oil Corporation; the Notices of Arbitration and Statements of Claim stipulate that Claimants own the shares of Yukos. The ECT does not distinguish between "real owners" or otherwise and disregards the nationality of the investors beyond the requirement that it be a national of a Contracting Party. Also, it is a recognized principle of investment law that claims by shareholders are separate and independent from the claims of the corporate entity. Nor is control a legally-relevant factor. Modern investment law, with which the ECT is consistent, does not require the ownership of a

majority of the shares, but allows minority and non-controlling shareholders to bring a claim to an international tribunal.

242. In a letter dated 14 March 2007, Professor Reisman confirms that he received and read Respondent's Reply and its appended expert opinions and that he does not wish to change his opinion.

## VII. ISSUES FOR ANALYSIS AND DECISION

243. Based on the Parties' written and oral submissions, the following issues arise for analysis and decision by the Tribunal:

A. Does the provisional application of the ECT in the Russian Federation, as defined by Article 45, provide a basis for the Tribunal's jurisdiction over the merits of the claims in this arbitration?

1. Is a declaration required under Articles 45(2)?

2. Is a declaration required under Article 45(1)?

3. What effect should be given to the "to the extent" clause in Article 45(1) as it relates to the Russian Federation?

B. Is Claimant a protected Investor with an Investment under the ECT?

1. Does Claimant qualify as a protected "Investor" under Article 1(7)?

2. Does Claimant "own or control" a protected "Investment" under Article 1(6)?

C. Are the claims barred by the "denial-of-benefits" provision (Article 17) of the ECT?

1. Is there a notification requirement under Article 17 and, if so, did the Russian Federation satisfy such requirement?

2. Is Claimant a legal entity owned or controlled by nationals of a third State?

(a) Who owns and controls Claimant?

(b) Is the Russian Federation a "third State"?

(c) Can the Russian Federation invoke the ownership or control of Claimant by Israeli nationals to take advantage of Article 17(1)?

D. Are all or some of the claims barred by the "Taxation Measures" carve-out (Article 21) of the ECT?

1. What is the scope of the carve-out for "Taxation Measures"?

(a) What is the meaning of "Taxation Measures" as set out in Article 21(7)?

(b) Does the carve-out operate to deprive a tribunal of jurisdiction over the covered matters, or does it merely modulate the obligations that can be enforced in an arbitration, thus going to admissibility/merits?

(c) If the carve-out goes to jurisdiction, did Respondent timely raise the issue?

2. What is the scope of the claw-back for Article 13 (expropriation)?

3. How should the claims be characterized for purposes of Article 21?

E. Are all or some of the claims barred by the "fork-in-the-road" provision in Article 26(3)(b)(i) of the ECT?

## VIII. ANALYSIS

### A. DOES THE PROVISIONAL APPLICATION OF THE ECT IN THE RUSSIAN FEDERATION, AS DEFINED BY ARTICLE 45, PROVIDE A BASIS FOR THE TRIBUNAL'S JURISDICTION OVER THE MERITS OF THE CLAIMS IN THIS ARBITRATION?

#### 1. Introduction

244. The central issue in this phase of the arbitration is the interpretation of Article 45 of the ECT, concerning the meaning of provisional application of the Treaty as provided for in that Article.

245. The Tribunal considers it helpful to quote again the terms of Article 45 of the ECT, which provides, in relevant part, as follows:

> (1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.
>
> (2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.
>
> (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).
>
> (c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.
>
> (3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.

(b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).

(c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor.

246. Special attention is drawn to the phrase at the end of Article 45(1), which reads ". . . to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." The Tribunal will refer to this phrase as the "**Limitation Clause**" of Article 45(1).

247. It is common ground between the Parties that Respondent signed the ECT on 17 December 1994 and made no declaration at that time or at any time thereafter under Article 45(2) or, for that matter, under Article 45(1). It is also common ground that Respondent is not among the signatories, listed in Annex PA of the ECT, that do not accept the provisional application obligation of Article 45(3)(b). Respondent submits to the Tribunal that the dispute settlement provisions in Part V of the ECT are not binding on the Russian Federation because they are inconsistent with the Constitution and laws of the Russian Federation and hence trigger the Limitation Clause of Article 45(1). Respondent therefore submits that this Tribunal does not have jurisdiction to consider the merits of the claims in this arbitration. Claimant counters that the Russian Federation cannot limit provisional application of the ECT without a declaration under Article 45(2) (or at least under Article 45(1)) and that, in any event, the obligations in Part V of the ECT are not inconsistent with the Constitution or laws of the Russian Federation.

248. Thus, the following issues arise for analysis and decision by the Tribunal:

a) Must the declaration referred to in Article 45(2) be made in order for a signatory to benefit from the Limitation Clause of Article 45(1)? In other words, in the language of Claimant's submission, is the declaration

provided for in Article 45(2) the "mechanism" through which the Limitation Clause of Article 45(1) is implemented?

b) If the answer to issue (a) is no, is some form of prior declaration or notice to the other ECT signatories nevertheless required under Article 45(1) in order for a signatory to be able to invoke the Limitation Clause of Article 45(1)?

c) If the answer to (b) is no, what effect should be given to the Limitation Clause of Article 45(1)? In order to determine this question, the Tribunal must answer the preliminary issue of whether the Limitation Clause of Article 45(1) represents an "all-or-nothing" proposition, that is—whether it concerns the inconsistency of *the principle* of provisional application with the Constitution, laws or regulations of Respondent, or whether it requires a "piecemeal" approach which requires the analysis of the consistency of *each provision of the ECT* with the Constitution, laws and regulations of Respondent. Depending on its answer to this preliminary question, the Tribunal must determine either (i) whether the principle of provisional application *per se* is consistent with the Constitution, laws and regulations of Respondent, or (ii) whether particular inconsistencies between specific provisions of the ECT (those of Part V in particular) and the Constitution, laws and regulations of Respondent preclude the Tribunal's jurisdiction over the merits of the claim in this arbitration.

### 2. Is a Declaration Required under Article 45(2)?

249. In this subsection, the Tribunal turns its attention to the first issue which it has identified, namely whether the declaration referred to in Article 45(2) must be made in order for a signatory to benefit from the Limitation Clause of Article 45(1). Since Respondent did not make such a declaration, an affirmative answer to this question would dispose of the Article 45 issue in favour of Claimant.

### a) Parties' Submissions

250. Respondent argues that Articles 45(1) and 45(2) represent, respectively, two separate regimes on provisional application. The difference between Articles 45(1) and 45(2), submits Respondent, is that the former applies only in case of inconsistency between the treaty provisions and a signatory's constitution, laws or regulations, whereas a signatory may also avail itself of the latter provision and thus declare that it is unwilling—for political or other reasons—including inconsistency, to apply the ECT provisionally. This gives rise, Respondent argues, to the fundamental difference in procedural regimes: Article 45(2) calls for an express declaration whereas none is required as regards 45(1). Respondent submits that its interpretation of the relationship between Articles 45(1) and 45(2) is supported by the unambiguous wording of Article 45(2), by the ECT drafting history (the *travaux préparatoires*) and by the State practice of the ECT's signatories.

251. According to Claimant and its expert witnesses (Professors James Crawford and Michael Reisman), it is clear, pursuant to applicable principles of international law and the plain meaning of the provisions, that Article 45(1) establishes the *principle* of provisional application whereas Article 45(2) establishes the *procedure* according to which a signatory State may opt out of the concept of provisional application agreed in Article 45(1). Claimant argues, moreover, that Article 45(2) establishes the legal regime resulting from a State's decision to withdraw from provisional application. Claimant affirms that it is only this interpretation which ensures reciprocity for States that choose to rely on the Limitation Clause of Article 45(1), via the safeguard of Article 45(2)(b). Article 45(2)(b), it is recalled, states:

> 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).

252. Claimant also notes that the Russian Federation made a declaration under Article 6(2)(a) of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty (the "**Trade Amendment**"), rather than rely on the limitation clause of Article 6(1) of the Trade Amendment, which mirrors Article 45(1) of the ECT, by providing for provisional application of the Trade Amendment subject to a limitation clause. Claimant submits that the Russian Federation, being familiar with the mechanism and operation of provisional

application, would have made a declaration under Article 45(2) if it had a problem with the provisional application of the Treaty.

253. In its Second Memorial, Respondent emphasizes that Article 45(2) of the ECT is an "all or nothing proposition with respect to the substantive provisions of the Treaty," distinct from Article 45(1) of the ECT, which calls for an analysis of inconsistency between each provision of the Treaty and Russian law. Respondent highlights the plain meaning of Article 45(2), which is introduced by the word "notwithstanding," and which provides that any signatory "may" deliver a declaration. This evidences, Respondent argues, that the declaration under Article 45(2) is independent of Article 45(1) and, as opposed to Article 45(1), is optional. In support of its interpretation of Article 45, Respondent refers to the expert opinions of Sydney Fremantle, the chairman of Working Group II,[37] and Professors Hafner, Koskenniemi, Nolte and Pellet.

254. In its Second Memorial, Respondent also relies, among others, on the following arguments:

- Six States that expressly relied on Article 45(1) in their declarations did not make a declaration under Article 45(2), namely Austria, Luxembourg, Italy, Romania, Portugal and Turkey.

- Three other States made no declaration at all, but relied on the Limitation Clause in Article 45(1), namely Finland, France and Germany.

- European Union ("**EU**") authorities, through a joint "Statement by the Council, the Commission and the Member States on Article 45 of the European Energy Charter Treaty" approved in December 1994 ("**1994 EU Joint Statement**"), have

[37] Under the auspices of the European Energy Charter Conference, Working Group II was charged with preparing and negotiating the Treaty during the period 1990 to 1994.

relied on the Limitation Clause of Article 45(1) in concluding that there is no obligation to enter a declaration of non-application under Article 45(2).[38]

- Article 45(1) is a standard inconsistency clause, similar to such clauses found in a number of other treaties; Respondent avers that treaties providing an exception to provisional application generally do not include a mechanism for a signatory to avail itself of the exception.

- The issue of reciprocity of rights and obligations in relation to Article 45(1) was raised and dismissed during the ECT negotiations as being both an impossible and an undesirable objective; furthermore, treaty practice demonstrates that reciprocity is rarely applied in the context of provisional application.

- The link drawn by Claimant between Article 6(2)(a) of the Trade Amendment and Article 45(2) is "absurd": Lithuania, like Russia, only made a declaration under Article 6 of the Trade Amendment and not under Article 45(2).

255. In its Rejoinder, Claimant submitted a number of arguments, including the following:

- Applicable rules of treaty interpretation, particularly Articles 31 and 32 of the VCLT, lead to the conclusion that Article 45(1) establishes the principle of provisional application while Article 45(2) provides the procedural mechanism for a State to opt out of such provisional application.

- Article 45(2)—and, specifically, paragraph (b) thereof—ensures reciprocity of the rights granted and the obligations undertaken by virtue of provisional application, an important safeguard, confirmed by the *travaux préparatoires*, that necessarily applies to any State's derogation from provisional application.

- The Russian Federation is not among the following States which have, in some way, refused provisional application of the ECT:

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[38] "Statement by the Council, the Commission and the Member States on Article 45 of the European Energy Charter Treaty," *in "A" Item Note from the Permanent Representatives Committee to the Council of the European Union*, Doc. 12165/94, 14 December 1994, Annex I, p. 3, Exhibit R-352.

- the twelve States that availed themselves of the opting-out mechanism pursuant to a declaration under Article 45(2)(a);[39] or

- the six States that declared, in one way or another, that they would not apply the ECT provisionally in accordance with Article 45(1).[40]

- As regards the three States—Finland, Germany and France—which, according to Respondent, purportedly relied on the inconsistency clause of Article 45(1) in not applying the ECT or provisions thereof without making any declaration, the *travaux préparatoires* do not establish that any one of these States ever took the view that it had an issue of "inconsistency" that would create an obstacle to provisional application of the ECT.

- The 1994 EU Joint Statement is similarly of no avail, as its purpose was to enable the Communities, on the basis of the proposed interpretation of Article 45, to apply the Treaty provisionally within the limits of their competence. This is confirmed by the Council decisions of 15 December 1994 on the provisional application of the Treaty by the European Community and the European Atomic Energy Community, respectively, providing that each Community would apply the Treaty "to the extent that the Community has *competence* for the matters governed by the Treaty" [emphasis added].[41] The transparency requirement of Article 45 was thus satisfied, since this "*declaration*," made at the time of the signature of the Treaty by the Communities, allowed the provisional application of the Treaty by the Communities within the *limits* of their competence.

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[39] Australia, Bulgaria, Cyprus, Hungary, Iceland, Japan, Lichtenstein, Malta, Norway, Poland, Switzerland and Turkmenistan.

[40] Austria, Luxembourg, Italy, Romania, Portugal and Turkey.

[41] *See* Council decision of 15 December 1994 on the provisional application of the Energy Charter Treaty by the European Community (94/998/EC), Official Journal of the European Communities, 31 December 1994, Annex C-1010; Council decision of 15 December 1994 approving the provisional application of the ECT by Decision of the Commission on behalf of the European Atomic Energy Community (94/067/Euratom), Official Journal of the European Communities, 31 December 1994, Annex C-1009.

256. During oral argument, Respondent reiterated its written arguments that Articles 45(1) and 45(2) represent separate and different regimes. Respondent focused on the plain and ordinary meaning of the provisions, particularly the use of the adverb "[n]otwithstanding" at the beginning of Article 45(2), as well as the extensive *travaux préparatoires* demonstrating that Article 45(2) was drafted because of the specific concerns of several countries regarding political obstacles to provisional application. Respondent also highlighted the 1994 EU Joint Statement, in which the Council, the Commission and the Member States of the EU agreed, according to Respondent, that Article 45(1) does not create any commitment beyond what is compatible with the existing internal legal order of the signatories and that "on the basis of this interpretation of Article 45(1) to the ECT, a signatory is not bound to enter a declaration of non-application, as is provided for in Article 45(2) of the ECT." Finally, with the help of a comparative timeline of ECT negotiations and political events in Russia, Respondent sought to demonstrate that, while the ECT was being negotiated, the Russian Federation was undergoing dramatic political and constitutional change which, Respondent argues, made it very difficult for Russia to be able to take a firm stand on the inconsistency of provisional application under the ECT.

257. During the oral hearing, Claimant challenged Respondent's arguments. It referred to the clear language of Articles 45(1) and 45(2) and submitted that, whereas Article 45(1) contains "the obligation" to apply the ECT provisionally, Article 45(2) is the mechanism which allows a State to opt out of that obligation on grounds of inconsistency or for any other reason. Claimant also sought to demonstrate, by highlighting testimony from the cross-examination of Mr. Fremantle, that the negotiating countries did place emphasis on the importance of reciprocity. Finally, according to Claimant, a careful analysis of the *travaux préparatoires* confirms that Article 45(2) was conceived as the necessary mechanism for the implementation of the Limitation Clause of Article 45(1).

258. In its oral reply submissions, Respondent addressed mainly the issues of reciprocity and transparency. It submitted that the parties had agreed upon a formal concept of reciprocity in relation to Article 45(1), namely that "[e]ach signatory assume[d] the

obligation to apply the Treaty to the extent not inconsistent with its domestic law."[42] Respondent again highlighted the *travaux préparatoires*. Respondent sought to demonstrate that Article 45(2) was not inserted to provide a transparency discipline to countries relying on Article 45(1), but rather to allow a separate regime for certain countries to be able to opt out of provisional application for reasons other than legal or constitutional inconsistency.

259. In rebuttal, Claimant countered in relation to the reciprocity issue (again by reference to Mr. Fremantle's testimony) and argued that the State practice of countries like Austria did not support Respondent's reliance on the Limitation Clause of Article 45(1) because those countries were transparent in putting other countries and their investors on notice that they could not and would not apply the ECT provisionally. Claimant argued that Respondent's analysis of the *travaux préparatoires* was misleading since it was not presented in chronological order. Again, Claimant sought to demonstrate, by reference to the *travaux préparatoires*, that the negotiators had inserted in Article 45(2) a mechanism to implement the Limitation Clause of Article 45(1). As for the 1994 EU Joint Statement, Claimant argued that, on its face, the document shows that the EU was not convinced of the interpretation of Article 45(1) on which it was basing its position. In any event, Claimant maintained, the EU has no or very little competence in relation to Part III of the ECT (on investment promotion and protection). Finally, Claimant contrasted the transparency of the European Community, which declared that it was applying the ECT ". . . to the extent that it has competence for the matters governed by the Treaty," with the conduct of the Russian Federation, which "let the world think that [it was] applying the Treaty provisionally."[43]

**b) Tribunal's Decision**

260. The applicable rules of treaty interpretation, as codified by the VCLT, read as follows:

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[42] Hearing Transcript, 1 December 2008, p. 4:9-11.

[43] Hearing Transcript, 1 December 2008, p.144:14-16.

*Article 31—General rule of interpretation*

1. 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

*Article 32—Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

   (a) leaves the meaning ambiguous or obscure; or

   (b) leads to a result which is manifestly absurd or unreasonable.

261. Each side deployed arguments based on the ordinary meaning of Article 45, on State practice and on the *travaux préparatoires*.

262. In accordance with Article 31 of the VCLT, the Tribunal begins by considering the language of Article 45 and its ordinary meaning in its context and in the light of the

Treaty's object and purpose. After having considered the totality of the evidence and reviewed the Parties' submissions, the Tribunal has little difficulty in concluding that Respondent's thesis and interpretation of Articles 45(1) and 45(2) are to be preferred over those of Claimant. Article 45(1), while establishing a binding obligation for each signatory to apply the ECT provisionally, on its face limits the scope of that obligation through the Limitation Clause beginning with "to the extent." Nothing in the language of Article 45 suggests that the Limitation Clause in Article 45(1) is dependent on the mandatory making of a declaration under Article 45(2). To the contrary, as argued by Respondent, the use of the word "may" rather than "shall" in relation to the making of a declaration makes clear that a declaration under Article 45(2)(a) is permissive, not obligatory. Furthermore, the use of the word "[n]otwithstanding" to introduce Article 45(2) plainly suggests that the declaration in Article 45(2)(a) can be made whether or not there in fact exists any inconsistency between "such provisional application" of the ECT and a signatory's constitution, laws or regulations.

263. Claimant argues that paragraph (1) of Article 45 sets out the principle of provisional application, and that paragraph (2) sets out the mechanism which must necessarily be invoked by a signatory to opt out of provisional application. As Respondent points out, however, it is not uncommon for a limitation clause of the kind included in Article 45(1) to be self-executing. Indeed, Article 45(2)(c), which claws back the provisional application of Part VII of the Treaty for a signatory that has made an opt-out declaration under Article 45(2)(a), contains a similar limitation clause which, on its face, is self-executing and clearly does not require a declaration.

264. In sum, the ordinary meaning to be given to the terms of Articles 45(1) and 45(2), when read together, demonstrates to the satisfaction of the Tribunal that the *declaration* which is referred to in Article 45(2) is a declaration which is not necessarily linked to the Limitation Clause of Article 45(1).

265. Further support for the Tribunal's conclusion is provided by the State practice of some of the other signatories to the ECT. In particular, the Tribunal notes that while twelve States did make a formal declaration under Article 45(2) opting out of provisional application, six States (Austria, Luxembourg, Italy, Romania, Portugal and Turkey) relied on the

Limitation Clause in Article 45(1), or the ability to opt out of provisional application for inconsistency with the domestic regime, *without delivering a formal declaration* to the Depository under Article 45(2). While the Tribunal accepts Claimant's point that four of these countries made some form of declaration prior to signing the Treaty (Austria, Italy, Romania and Portugal), both Luxembourg and Turkey relied on Article 45(1) when they signed the ECT without submitting any kind of declaration.

266. The Tribunal notes that Claimant made extensive reference to the *travaux préparatoires* in an attempt to support its argument that there was a linkage between Article 45(1) and Article 45(2)(a). Claimant highlighted the chronology of the development of Article 45 and pointed to the many proposals and counter proposals of the negotiating parties which, it argued, demonstrate the linkage. The Tribunal acknowledges that the preparatory work of the Treaty could lead to a finding of linkage between Articles 45(1) and 45(2).

267. At the same time, the Tribunal recalls that, according to the VCLT's principles of treaty interpretation, Article 32 provides supplementary means of interpretation. Under Article 32 of the VCLT, recourse may be had to the *travaux préparatoires*:

> in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

268. The Tribunal does not consider that its interpretation of Article 45 resulting from the application of the general rule of interpretation leads to a result which is manifestly absurd or unreasonable. Nor has the Tribunal found that its interpretation of Article 45 according to Article 31 of the VCLT "leaves the meaning ambiguous or obscure"; quite the contrary. The Tribunal recognizes that, in practice, tribunals and other treaty interpreters may consider the *travaux préparatoires* whenever they are pleaded, whether or not the text is ambiguous or obscure or leads to a manifestly absurd or unreasonable result. But, in the present case, the Tribunal concludes that the plain and ordinary meaning to be given to these two treaty provisions, read together, demonstrates that there

is no linkage between them. It is thus the terms of the Treaty as finally adopted that govern.[44]

269. The Tribunal notes that its conclusion is in harmony with the conclusion reached by the ICSID tribunal in the *Kardassopoulos*.[45] In a passage which the Tribunal finds apposite to the present case, that tribunal reasoned as follows:

> There is no necessary link between paragraphs (1) and (2) of Article 45. A declaration made under paragraph (2) may be, but does not have to be, motivated by an inconsistency between provisional application and something in the State's domestic law; there may be other reasons which prompt a State to make such a declaration. Equally, a State whose situation is characterised by such inconsistency is entitled to rely on the proviso to paragraph (1) without the need to make, in addition, a declaration under paragraph (2). The Tribunal is therefore unable to read into the failure of either State to make a declaration of the kind referred to in Article 45(2) any implication that it therefore acknowledges that there is no inconsistency between provisional application and its domestic law.[46]

### 3. Is a Declaration Required under Article 45(1)?

270. Having concluded that the regimes limiting or excluding provisional application in Articles 45(1) and 45(2) are independent of one another, the Tribunal now addresses the question whether some form of prior declaration or notice to the other signatories is nevertheless required under Article 45(1) in order for a signatory of the ECT to be able to later invoke the Limitation Clause. Since it is common ground between the Parties that

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[44] As Professor Reisman notes: "Article 32 provides only a supplementary means of interpretation. Parties to a dispute are first obliged to construe the ordinary meaning of the text in application of Article 31." Professor W. Michael Reisman, *Opinion concerning Arbitral Jurisdiction under the European Energy Charter Treaty with Respect to the Russian Federation in the Yukos Case*, 28 June 2006, para. 15. He further cites *Methanex Corp. v. United States*, First Partial Award on Jurisdiction and Admissibility, 7 August 2002 (UNCITRAL). Professor Crawford, for his part, affirms that *travaux préparatoires* "cannot contradict the actual language of the treaty (absent manifest absurdity)." Professor James Crawford, SC, *Further Opinion on Energy Charter Treaty Arbitration: Jurisdiction Issues*, 3 May 2007, para. 34. *See also*, *e.g.*, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judgment, ICJ Reports 1995, p. 6 (applying Article 31 of the VCLT and discussing the proper role of *travaux préparatoires*).

[45] *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007.

[46] *Ibid.* at para. 228.

Respondent did not make such a prior declaration or give prior notice, an affirmative answer to this question would dispose of the Article 45 issue in favour of Claimant.

### a) Parties' Submissions

271. In its First Memorial, Respondent argues that no declaration is required pursuant to Article 45(1). In support of its position, Respondent highlights the case of Luxembourg. In Luxembourg, the bill submitted to the Chamber of Deputies for approval of the ECT stated explicitly as follows:

> The adoption of this Treaty being based on Article 37 of the constitution of the Grand Duchy of Luxembourg, there will be no provisional application of this Treaty in Luxembourg up until its due and proper ratification.
>
> [emphasis added]

272. Luxembourg was not included on the Energy Charter Conference Secretariat's preliminary list of signatories that indicated either that they would not apply the Treaty provisionally in accordance with Article 45(1) or that they made or intended to make a declaration under Article 45(2)(a). Respondent concludes:

> Thus, the language of the Treaty itself, its negotiating history, and the practice of signatories demonstrates conclusively that provisional application of the Treaty is subject to a signatory's constitution, laws and regulations pursuant to Article 45(1) of the Treaty, regardless of whether the signatory made a declaration pursuant to Article 45(2).

273. In its Counter-Memorial, Claimant argues that, even if Article 45(1) operates independently of Article 45(2), both provisions nevertheless require an express declaration of some kind. The rationale for the requirement, argues Claimant, is transparency: no State is supposed to know or should be required to know another State's internal legal constraints. Finally, Claimant also refers to State practice:

> As regards the ECT, all signatories that have declined to apply the Treaty on a provisional basis have made a declaration to that effect. The Russian Federation, however, has not made any declaration, at any time, in any manner and on any basis with respect to the provisional application of the ECT.

274. In its Second Memorial, Respondent again highlights the example of Luxembourg. In addition, invoking the expert opinions of eminent Finnish, German and French jurists,

Respondent asserts that Finland, Germany and France each relied on the Limitation Clause of Article 45(1) because of an inconsistency between its internal laws and the obligation of provisional application without making a declaration.

275. In response, Claimant argues in its Rejoinder that the fundamental principles of transparency and reciprocity in modern international law dictate that other signatories be put on timely notice of legal barriers to provisional application:

> For the sake of transparency and predictability, it is only legitimate that States, when negotiating an instrument as important as the ECT and a binding mechanism as important as provisional application, are informed at the time of signature of their counterparts' unwillingness (for political reasons or otherwise) or inability (for constitutional reasons or otherwise) to apply to the Treaty on a provisional basis.

276. The importance of these principles, Claimant submits, is illustrated by Article 45(3)(b) of the ECT, which states that, in the event that a signatory terminates provisional application, the signatory's obligation to apply Parts III and V of the ECT with respect to any investment made during such provisional application shall nevertheless remain in effect for twenty years following the effective date of termination.

277. Claimant, as evidence of transparency, notes that six States flagged their respective concerns with provisional application under Article 45(1) during the negotiations, namely Switzerland, Austria, Hungary, Japan, Norway and Romania. As regards Finland, Germany and France, which Respondent refers to as examples of countries that remained silent yet relied on the Limitation Clause of Article 45(1), Claimant submits that the *travaux préparatoires* do not establish that any of these countries ever took the view during the negotiations that they had an issue of "inconsistency" that would create an obstacle to the provisional application of the ECT. Claimant adds that, while emphasis was placed during the negotiations of the ECT on the need for States wishing to opt out of provisional application to inform the other parties prior to signature,[47] it is noteworthy that the Russian Federation was not among the delegations which stated that provisional application was not acceptable to them; to the contrary, Claimant asserts, the Russian

[47] *See* Energy Charter Secretariat Note, 28 April 1994, Exhibit R-355.

Federation emphasized the importance of provisional application throughout the negotiations.

278. Respondent's position on this issue was well summarized in its Pre-Hearing Skeleton Argument:

> At least six States separately stated that they considered themselves entitled to rely on the inconsistency clause in Article 45(1) without making an opt-out declaration. A Joint Statement of the EU Member States, the Council and the Commission of the European Union is to the same effect. The informal transparency declarations made by several States, relied on by Claimants, are unavailing. While some States did make transparency declarations, none of the transparency declarations was ever delivered to the Treaty Depository, as required by Article 45(2)(a), and several States which expressly relied on Article 45(1), including Germany, France, Spain, and Luxembourg, never made transparency declarations. Though not legally relevant, the Russian Federation's failure to make a transparency declaration is not surprising, given the extraordinarily rapid pace of legal and constitutional change in Russia in the period in question. Under the chaotic circumstances then prevailing, no detailed analysis of the Treaty's consistency with Russian law could fairly be expected.

279. In oral argument, Respondent further developed each one of the points dealt with in the previous paragraph.

280. In response, Claimant pointed to the tables created by the ECT Secretariat concerning the position of signatories that did not intend to apply the ECT provisionally. Both the original list dated 19 December 1994[48] and the updated list dated 1 March 1995[49] identify certain signatories which intended not to apply the ECT provisionally "in accordance with Article 45(1)" and others as having made a declaration that they would not apply the ECT provisionally "in accordance with Article 45(2)(a)." Claimant's submission, in respect of these lists, is that even those countries which relied only on Article 45(1) nevertheless responded to the ECT Secretariat's request that their position in relation to provisional application be made clear to all the other signatories of the Treaty.

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[48] Annex C-1003.

[49] Annex C-1004.

281. Claimant also made the related argument that the Russian Federation should be estopped today from claiming constitutional or other legal impediments to provisional application because, not only did it give no notice of inconsistency under Article 45(1), it had, rather, throughout the negotiation of the ECT, consistently been a strong proponent of provisional application and an ardent advocate of a robust regime.

**b) Tribunal's Decision**

282. The Tribunal's decision on this issue turns on the distinction which must be made between what may have been said to be desirable during the negotiations and what, eventually, became legally required in the Treaty. The evidence which Claimant has adduced makes it abundantly clear that, during the negotiations, a number of States stressed the importance of transparency when discussing the inconsistency provision of what eventually became Article 45(1). The Tribunal notes in this connection that the six delegations (Switzerland, Austria, Hungary, Japan, Norway and Romania) that had flagged their problems with provisional application during the negotiations ended up filing or making some form of declaration. It is equally clear that the Secretariat encouraged signatories to be transparent in relation to provisional application and the obligations which flowed from such provisional application and, in this connection, tracked the signatories' intentions vis-à-vis provisional application under either Articles 45(1) or 45(2). The Tribunal accepts that, throughout the ECT negotiations, great emphasis was put on transparency by different actors, including the Russian Federation.

283. However, the fact remains that, at the end of the day, when the negotiations were concluded and the ECT signed by the Russian Federation, Article 45(1) did not expressly require any form of declaration or notification in order to allow a signatory to invoke the Limitation Clause. Transparency did not trump the clear inconsistency provision of Article 45(1). Applying the rules of interpretation of Articles 31 and 32 of the VCLT, which were quoted earlier, the Tribunal cannot read into Article 45(1) of the ECT a notification requirement which the text does not disclose and which no recognized legal principle dictates.

284. The Tribunal therefore concludes, based on the ordinary meaning of Article 45(1) in its context, and subject to considerations of estoppel (addressed below), that the Russian

Federation may, even after years of stalwart and unqualified support for provisional application and, until this arbitration, without ever invoking the Limitation Clause, claim an inconsistency between the provisional application of the ECT and its internal laws in order to seek to avoid the application of Part V of the ECT.

285. In closing its analysis on this issue from the point of view of treaty interpretation, the Tribunal notes Claimant's argument that the object and purpose of the ECT, namely investment promotion and protection, requires the Tribunal to read a notification requirement into Article 45(1). The Tribunal cannot accept this argument. The evidence, particularly the testimony of Mr. Fremantle, which it accepts on this point, demonstrates that the negotiating parties were driven by their objective to have as many signatories as possible apply the ECT provisionally from the very beginning.[50] The relative flexibility of Article 45(1), interpreted in accordance with its terms as not requiring any notification or declaration, certainly serves this purpose.

286. The Tribunal noted above that its conclusion on the interpretation of Article 45(1) was subject to considerations of estoppel. Indeed, Claimant argued that the Russian Federation should be estopped from seeking to rely on the Limitation Clause in Article 45(1) due to its long-standing and unqualified support for the provisional application of the ECT during the negotiations. Respondent replied that the conditions for the existence of a situation of estoppel are not met in this case because, according to the *North Sea Continental Shelf Cases*, Claimant, to succeed with its estoppel argument, would need to establish more than mere support by the Russian Federation during the negotiations of the Treaty for the provisional application of the ECT.

287. Respondent referred the Tribunal to the following passage from the judgment of the International Court of Justice ("**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 [the contention that the Federal

[50] *See* Hearing Transcript, 18 November 2008, p. 163:7-15. The Tribunal also notes Professor Crawford's statement that one of the main functions of provisional application of treaties generally is "giving immediate effect to treaty provisions because of their importance or urgency." Professor James Crawford, SC, *Further Opinion on Energy Charter Treaty Arbitration: Jurisdiction Issues*, 3 May 2007, para. 22.

> Republic was bound by the Geneva Convention on the Continental Shelf] [. . .], – that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evidence acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice.[51]
>
> [emphasis added]

288. Applying the standard thus established by the ICJ, the Tribunal concludes that the present case does not satisfy the conditions for the existence of a situation of estoppel. The Tribunal finds that the estoppel argument fails principally because Respondent's support for provisional application of the ECT during the negotiations, even if it could be considered "consistent," never "clearly" excluded the possibility that Respondent was in fact relying on its interpretation of the operation of the Limitation Clause in Article 45(1) which would in any event exclude or limit provisional application of the Treaty.

289. The Tribunal therefore now turns to the issue of what effect should be given to the Limitation Clause in Article 45(1) of the ECT.

### 4. What Effect Should Be Given to the Limitation Clause in Article 45(1)?

#### a) All-or-Nothing vs. "Piecemeal" Approach

290. The Tribunal has concluded that Respondent may rely on the Limitation Clause of Article 45(1) even though it has neither made a declaration under Article 45(2) nor served any prior notice under Article 45(1). Thus, the Tribunal must determine what effect should be given to the Limitation Clause itself and it now turns its attention to that issue.

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[51] *North Sea Continental Shelf Cases* (*Germany v. Denmark / Germany v. Netherlands*), ICJ Judgment of 20 February 1969, ICJ Reports 1969, p.3, Exhibit R-415, p.26, para. 30.

291. It is helpful to recall the text of Article 45(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.
>
> [emphasis added]

292. Firstly, the Tribunal must address the preliminary question of what triggers the Limitation Clause in Article 45(1). The Parties' positions differ. According to Respondent, the clause requires a "piecemeal" approach which calls for the analysis of the consistency of each provision of the ECT with the Constitution, laws and regulations of the Russian Federation. According to Claimant, the inquiry is an "all-or-nothing" exercise which requires an analysis and determination of whether the principle of provisional application *per se* is inconsistent with the Constitution, laws or regulations of the Russian Federation. The Parties' arguments will now be summarized.

### (i) Parties' Submissions

293. According to Respondent, the Limitation Clause of Article 45(1), by giving priority to the Constitution, ensures that provisional application of the ECT does not infringe upon the prerogatives of the Legislature (in Russia, the State Duma): any particular provision of the ECT thus applies on a provisional basis, Respondent submits, only if it is either (a) in conformity with existing legislation, (b) within the exclusive competence of the Executive or (c) approved by the Duma.

294. In its written submissions, Respondent argues that the plain language of Article 45(1), its context, the Treaty's *travaux préparatoires*, the circumstances at the time of the Treaty's conclusion and State practice in the application of the Treaty all support the conclusion that the applicability of the Limitation Clause of Article 45(1) must be examined on a provision-by-provision basis. Specifically, Respondent submits as follows:

- In common usage, confirmed by standard dictionary definitions, "to the extent that" refers to the "scope" or the "width" of provisional application. "To the extent that" is precisely the language used when drafters of a clause in a treaty or a statute wish to make clear that a provision is to be applied only insofar as what

then follows is the case. If the drafters had intended that the Treaty would be provisionally applied in whole or not at all, Article 45(1) would have instead provided for the Treaty's provisional application "if" such provisional application is not inconsistent with a signatory's domestic laws. In addition, the drafters of the Treaty, adds Respondent, could not seriously have intended that a signatory's provisional application of the entire Treaty could in principle be inconsistent with a signatory's "regulations."

- The *travaux préparatoires* confirm that the negotiating States expected that provisional application would differ from country to country based on different domestic inconsistencies and that even relatively minor regulations could result in the non-application *pro tanto* of an inconsistent Treaty provision. Respondent concludes that even a signatory which had no objection in principle to provisional application would only have to apply the Treaty's investment protection provisions to the extent they were not inconsistent with the signatory's own constitution, laws or regulations.

- State practice is fully in accord with Respondent's interpretation. Respondent refers to the 1994 EU Joint Statement to the effect that Article 45(1), "defining the conditions and limits for the provisional application of the ECT by the Signatories [. . .] does not create any commitment beyond what is compatible with the existing internal legal order of the Signatories." With specific reference to the Russian Federation, the Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom stated as recently as 7 February 2006 in the House of Commons that Article 45 of the Treaty "places some obligations on the Russian Federation, but only to the extent that such provisional application is not inconsistent with its constitution, laws or regulations" [emphasis added].[52]

295. In its Rejoinder, Claimant presents a comprehensive rebuttal of Respondent's arguments, starting with the argument based on the plain meaning of the words used in the

[52] *See* House of Commons Hansard Written Answers, pt. 3, Column 1045 W et seq., Exhibit R-365.

Limitation Clause of Article 45(1). Claimant notes that the express limitation of Article 45(1) is: "to the extent that such provisional application is not inconsistent with [each signatory's] constitution, laws or regulations." According to Claimant, therefore, what must be consistent with a signatory's domestic law is "such provisional application." In other words, Claimant asserts, each signatory agrees to be bound by the Treaty if the principle of provisional application is consistent with its domestic law. If, on the other hand, a signatory's domestic law does not allow it to be bound by way of provisional application, it may decline to assume any international obligations under the Treaty.

296. In response to Respondent's argument that Article 45(1) allows for a "piecemeal" assessment of inconsistency between particular provisions of the ECT and a signatory's domestic law, which could lead to provisional application of some but not all provisions of the Treaty, Claimant argues that neither Respondent nor its experts provide any justification for the basis on which the text of Article 45 would make a distinction between a "partial" application under Article 45(1) and an "all or nothing" application under Article 45(2)(a). To the contrary, Claimant observes, both provisions refer to "provisional application" without further qualification: consistency of "provisional application" with a signatory's internal law under Article 45(1), and opting out of "provisional application" under Article 45(2)(a).

297. Indeed, Claimant argues that Respondent's interpretation, even if admissible under the most basic principles of treaty law—which, Claimant argues, do not permit domestic law to take priority over international obligations—requires a rewriting of Article 45 to accord with Respondent's submission. According to Claimant, Respondent's interpretation would require the Tribunal to accept the equivalent of the following revision: "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~~ [the Treaty's provisions are] not inconsistent with its constitution, laws or regulations." Respondent's interpretation, Claimant argues, would add an entirely new concept—inconsistency with the substantive provisions—that finds no basis in the text of the Treaty.

298. Claimant also refers to the *travaux préparatoires* of the Treaty. Claimant notes that the initial exception to the obligation to apply the Treaty provisionally was introduced by the U.S. delegation in the following terms:

> The signatories agree to apply this Agreement provisionally following signature, to the extent that such provisional application is not inconsistent with their national laws pending its entry into force in accordance with Article 40 above.

Claimant submits, in this respect, that the language "such provisional application," which was never modified afterwards, reflected the requirement of consistency between "provisional application" *per se* and the signatories' internal laws and not consistency between "the provisions of the Treaty" and the signatories' internal laws.

299. Finally, Claimant argues that the concept of "inconsistency" under Article 45 must necessarily relate only to the principle of provisional application and not to the Treaty's substantive provisions, because Part VI of the Treaty, entitled "Transitional Provisions," already addressed the issue of granting signatories sufficient time to adapt the particulars of their legal regime to the framework of the Treaty. Article 32 of the ECT provides as follows:

> (1) In recognition of the need for time to adapt to the requirements of a market economy, a Contracting Party listed in Annex T may temporarily suspend full compliance with its obligations under one or more of the following provisions of this Treaty [. . .]

Claimant notes that the Russian Federation filed notifications with respect to Article 6(2) and Article 20(3) and was thus listed in Annex T of the "Contracting Parties entitled to transitional arrangements."

300. During the hearing, each side presented a focused version of its arguments on this point, in large measure emphasizing differences on what each considered the proper ordinary meaning to attribute to the language used in Article 45(1).

### (ii) Tribunal's Decision

301. Having reviewed the totality of the evidence and considered the written and oral arguments of both Parties, the Tribunal finds that the ordinary meaning of the terms of Article 45(1), in their context and in the light of the object and purpose of the Treaty,

favours Claimant's interpretation. In the Tribunal's opinion, by signing the ECT, the Russian Federation agreed that the Treaty *as a whole* would be applied provisionally pending its entry into force unless *the principle* of provisional application itself were inconsistent "with its constitution, laws or regulations."

302. Again, the starting point for the Tribunal must be the words used in Article 45(1). The Limitation Clause states that each signatory agrees to apply the Treaty provisionally "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." Respondent and Claimant focus on different parts of this clause in support of their respective positions:

- Respondent argues that " '[t]o the extent that' is precisely the language used when drafters of a clause in a treaty or a statute wish to make clear that a provision is to be applied only insofar as what then follows is the case." Respondent adds that had the drafters intended the Treaty to be provisionally applied in whole or not at all, Article 45(1) would have instead provided for the Treaty's provisional application "if" such provisional application is not inconsistent with a signatory's domestic laws.

- Claimant, by contrast, emphasizes the use of the terms "such provisional application" in the Limitation Clause: "to the extent that such provisional application is not inconsistent with [each signatory's] constitution, laws or regulations." According to Claimant, therefore, what must be consistent with a signatory's domestic law is "such provisional application." In other words, Claimant asserts, each signatory agrees to be bound by the Treaty if *the principle* of provisional application is consistent with its domestic law.

303. The Tribunal finds that neither party has properly parsed the Limitation Clause of Article 45(1). While each party has provided a starting point for the analysis, neither has carried it through to its conclusion:

- Considering Respondent's argument first, the Tribunal agrees that the phrase "to the extent that" is often the language used when drafters of a clause in a treaty or a statute wish to make clear that a provision is to be applied only insofar as what

then follows is the case. Far from being determinative of the meaning of the Limitation Clause, however, the use of the introductory words "to the extent that" requires the Tribunal to examine carefully the words that follow, namely "that such provisional application is not inconsistent with [each signatory's] constitution, laws or regulations."

- Turning to Claimant's argument about the meaning of these words, the Tribunal finds that Claimant does not provide sufficient support for its interpretation of the phrase "such provisional application" as necessarily referring to the principle of provisional application. Article 45(1) does not refer anywhere to the principle of provisional application, but rather to "[e]ach signatory agree[ing] to apply this Treaty provisionally . . ."

304. For the Tribunal, the key to the interpretation of the Limitation Clause rests in the use of the adjective "such" in the phrase "such provisional application." "Such," according to Black's Law Dictionary (Seventh Edition), means "that or those; having just been mentioned." The Merriam-Webster Collegiate Dictionary (Tenth Edition) defines "such" as "of the character, quality, or extent previously indicated or implied." The phrase "such provisional application," as used in Article 45(1), therefore refers to the provisional application previously mentioned in that Article, namely the provisional application of "this Treaty."

305. The Tribunal concludes, therefore, that the meaning of the phrase "such provisional application" is context-specific, in that its meaning is derived from the particular use of provisional application to which it refers. In Article 45(1), the particular use of provisional application to which it refers is provisional application of "this Treaty." Accordingly, Article 45(1) can therefore be read as follows:

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

306. By contrast, the Tribunal refers to the Limitation Clause in Article 45(2)(c), which reads:

> (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.
>
> [emphasis added]

In this context, the phrase "such provisional application" necessarily has a different meaning, referring to the provisional application of only Part VII of the Treaty.

307. In order to interpret the meaning of the Limitation Clause in Article 45(1), and thereby determine the scope of Respondent's obligation under Article 45(1), the Tribunal must therefore determine what is meant by "the provisional application of this Treaty," for it is the inconsistency of "such provisional application" which determines the scope of Respondent's obligation under Article 45(1).

308. There are two possible interpretations of the phrase "the provisional application of this Treaty": it can mean either "the provisional application of the entire Treaty" or "the provisional application of some parts of the Treaty." The Tribunal finds that, in context, the former interpretation accords better with the ordinary meaning that should be given to the terms, as required by Article 31(1) of the VCLT. Indeed, without any further qualification, it is to be presumed that a reference to "this Treaty" is meant to refer to the Treaty as a whole, and not only part of the Treaty.

309. The Tribunal notes that its finding on the scope of provisional application in Article 45(1) is entirely consistent with the decision on jurisdiction rendered in the *Kardassopoulos* case. In the relevant passages of that decision, to which the Tribunal subscribes, that tribunal wrote:

> 205. Article 45(1) does not say in terms what it meant by saying that each signatory agreed to "apply this Treaty provisionally." The meaning of that concept is thus to be determined by (i) an interpretation of that phrase, and (ii) the generally accepted meaning of the notion of the provisional application of a treaty.

206. As noted in the earlier section of this decision, the general rule for the interpretation of a treaty is set out in Article 31(1) of the Vienna Convention.

207. The treaty's context includes in particular the text of the treaty taken as a whole, including its preamble (Article 31(2)). Article 31(3)(c) of the Vienna Convention further provides that together with the context:

> "There shall be taken into account [. . .] any relevant rules of international law applicable in the relations between the parties."

208. This includes relevant rules of general customary international law.

209. Applying the ECT provisionally is used in contradistinction to its entry into force: "[. . .] agrees to apply this Treaty provisionally pending its entry into force [. . .]." Provisional application is therefore not the same as entry into force. But the ECT's provisional application is a course to which each signatory "agrees" in Article 45(1): it is (subject to other provisions of the paragraph) thus a matter of legal obligation. The Tribunal cannot therefore accept Respondent's argument that provisional application is only aspirational in character.

210. It is "this Treaty" which is to be provisionally applied, *i.e.*, the Treaty as a whole and in its entirety and not just a part of it; and use of the word "application" requires that the ECT be "applied." Since that application is to be provisional "pending its entry into force" the implication is that it would be applied on the same basis as would in due course result from the ECT's (definitive) entry into force, and as if it had already done so.

211. It follows that the language used in Article 45(1) is to be interpreted as meaning that each signatory State is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so.

[. . .]

219. There is, nevertheless, in the Tribunal's view a sufficiently well-established practice of provisional application of treaties to generate a generally accepted understanding of what is meant by that notion. Where what is in issue is, as in the present case, the provisional application of the whole treaty, then such provisional application imports the application of all its provisions as if they were already in force, even though the treaty's proper or definitive entry into force has not yet occurred.

[emphasis added]

310. The Tribunal's determination also becomes obvious when the alternative phrases are inserted into Article 45(1), leading to a choice between the following alternative interpretations:

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

311. In the Tribunal's opinion, there is no basis to conclude that the signatories would have assumed an obligation to apply only part of the Treaty provisionally, without making such partial provisional application explicit. The Tribunal therefore concludes that the Limitation Clause in Article 45(1) contains an "all-or-nothing" proposition: either the entire Treaty is applied provisionally, or it is not applied provisionally at all.

312. Furthermore, the Tribunal concludes that the determination of this "all-or-nothing" question depends on the consistency of the principle of provisional application with a signatory's domestic law. The alternative—that the question hinges on whether, in fact, each and every provision of the Treaty is consistent with a signatory's domestic legal regime—would run squarely against the object and purpose of the Treaty, and indeed against the grain of international law.

313. Under the *pacta sunt servanda* rule and Article 27 of the VCLT, a State is prohibited from invoking its internal legislation as a justification for failure to perform a treaty. In the Tribunal's opinion, this cardinal principle of international law strongly militates against an interpretation of Article 45(1) that would open the door to a signatory, whose domestic regime recognizes the concept of provisional application, to avoid the provisional application of a treaty (to which it has agreed) on the basis that one or more provisions of the treaty is contrary to its internal law. Such an interpretation would

undermine the fundamental reason why States agree to apply a treaty provisionally. They do so in order to assume obligations immediately pending the completion of various internal procedures necessary to have the treaty enter into force.

314. Allowing a State to modulate (or, as the case may be, eliminate) the obligation of provisional application, depending on the content of its internal law in relation to the specific provisions found in the Treaty, would undermine the principle that provisional application of a treaty creates binding obligations.

315. Provisional application as a treaty mechanism is a question of public international law. International law and domestic law should not be allowed to combine, through the deployment of an "inconsistency" or "limitation" clause, to form a hybrid in which the content of domestic law directly controls the content of an international legal obligation. This would create unacceptable uncertainty in international affairs. Specifically, it would allow a State to make fluctuating, uncertain and un-notified assertions about the content of its domestic law, after a dispute has already arisen. Such a State, as Claimant argues, "would be bound by nothing but its own whims and would make a mockery of the international legal agreement to which it chose to subject itself." A treaty should not be interpreted so as to allow such a situation unless the language of the treaty is clear and admits no other interpretation. That is not the case with Article 45(1) of the ECT.

316. In respect of the relationship between international obligations and domestic law in the treaty context, the Tribunal accepts the evidence of Professor Crawford on "a strong presumption of the separation of international from national law":

> The fact is, nonetheless, that international tribunals are reluctant to allow States to plead their internal law as a basis for avoiding what would otherwise appear to be their treaty commitments, and that reluctance extends to cases such as the present. It reflects a strong underlying value against self-judgement and a strong presumption of the separation of international from national law. Article 27 VCLT (and the corollary, Articles 3 and 32 of the ILC Articles on State Responsibility) are routinely cited across a range of contexts. Even where there is an express treaty exception for domestic legal requirements, that is not treated as a self-judging or "automatic" reservation, and it has to be explained to the satisfaction of the international tribunal — which retains

> its *Kompetenz-Kompetenz* — what the domestic requirement means, why it applies and how far it goes.[53]
>
> [emphasis added]

317. Turning specifically to the ECT and the meaning of Article 45(1), Professor Crawford observes as follows:

> The negotiating parties having opted for an unusually strong system of immediate provisional application of the ECT (while allowing States to opt out of it and take the consequences of doing so under Article 45(2)(b)), I do not accept that they intended to allow ready evasion of the regime.[54]
>
> [emphasis added]

318. Similarly, the Tribunal accepts the testimony of Professor Reisman on this issue. In his Opinion dated 28 June 2006, Professor Reisman writes:

> Hence, whatever the mode by which provisional application is achieved, "it can hardly be challenged that provisional application is based on the mutual consent of states."[55] The alternative view, "that provisional application is based on a unilateral declaration of intent by contracting parties to *de facto* apply a treaty subject to existing constitutional and legislative possibilities," is untenable insofar as "[t]he adoption of such a view could seriously impair the legal effects of provisional application as national law may prevail over the treaty."[56] That result would be inconsistent with Article 27 of the Vienna Convention.[57]

319. The Tribunal also finds pertinent to its conclusion the writings of Mr. Osminin, who participated in the drafting of the Russian FLIT and in the negotiation of numerous international treaties entered into by the Russian Federation. He writes as follows:

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[53] Professor James Crawford, SC, *Further Opinion: Energy Charter Treaty Arbitration: Jurisdiction Issues*, 3 May 2007, para. 15.

[54] *Ibid.* at para. 23.

[55] René Lefeber, "The Provisional Application of Treaties," *in* Jan Klabbers (ed.) *Essays on the Law of Treaties* pp.81, 89 (1998).

[56] *Ibid.*

[57] VCLT, Article 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

> [T]he principle that "obligations must be observed" (*pacta sunt servanda*) extends also to provisionally applied treaties. In this respect the legal consequences of the provisional application of a treaty are the same as the legal consequences of its entry into force. [. . .] The regime of provisional application presupposes that the obligations arising from the provisionally applied treaty will be complied with in full until the treaty enters into force, or until its provisional application is terminated by mutual agreement of the States among which the treaty is being applied provisionally, or until the State notifies the other States provisionally applying the treaty of its intention not to become a party to the treaty."[58]
>
> [emphasis added]

320. The Tribunal reiterates that its interpretation of the Limitation Clause of Article 45(1) is based on its specific language in its context. The Tribunal recognizes, as do Claimant's experts, Professors Crawford and Reisman, that parties negotiating a treaty enjoy drafting freedom and could (using clear and unambiguous language) overcome the "strong presumption of the separation of international from national law." Indeed, parties to a treaty are free to agree to any particular regime. This would include a regime where each signatory could modulate (or eliminate) its obligation of provisional application based on consistency of each provision of the treaty in question with its domestic law. For the reasons set out above, however, agreement to such a regime would need to be clearly and unambiguously expressed, a standard which Article 45(1) does not meet.

321. The Tribunal's interpretation of Article 45(1) is also supported by State practice. As already noted in an earlier section, six States (Austria, Luxembourg, Italy, Romania, Portugal and Turkey) relied expressly on the Limitation Clause in Article 45(1). An analysis of the statements or declarations made by these States confirms that each one of them relied on Article 45(1)—sometimes alone and sometimes in conjunction with Article 45(2))—for the non-application of the *entire* Treaty under the provisional application regime. Respondent itself has described these six signatories as States who "consider themselves unable to apply and have not applied any provision of the Treaty on a provisional basis." Not one of these six States, in other words, relied on the Limitation Clause in Article 45(1) for the interpretation now posited by Respondent, namely the

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[58] B.I. Osminin, *Adoption and Implementation of Treaty Obligations by States* (2006), p. 319, Annex C-267.

selective or partial provisional application of the ECT based on the non-application of only those individual provisions that are claimed to be inconsistent with a signatory's domestic law.

322. Similarly, in the lists it maintained to keep track of the intentions of the signatories, the ECT Secretariat identified the States that intended to rely on Article 45(1) as intending to do so in order to avoid provisional application of the Treaty altogether. Thus, the preliminary list of signatories prepared by the ECT Secretariat, dated 19 December 1994, described signatories intending to rely on Article 45(1) as States "which will not apply the Treaty provisionally in accordance with Article 45(1)"[59] [emphasis added]. This preliminary list identified Austria, Italy, Portugal, Romania and Turkey. The updated list prepared by the ECT Secretariat, dated 1 March 1995, described the same category of signatories in exactly the same way, as States "which will not apply the Treaty provisionally in accordance with Article 45(1)"[60] [emphasis added]. In addition to the countries already identified on the list dated 19 December 1994, this list included Hungary[61] and Luxembourg.

323. Respondent refers to France, Finland and Germany in order to support its position that some signatories of the ECT in fact do rely on the Limitation Clause of Article 45(1) in order to limit or reduce the scope of their provisional application obligation under the Treaty. To make its point, Respondent relies on expert reports in respect of each country, submitted respectively by Professors Pellet, Koskenniemi and Nolte.

324. In their respective reports, Professors Pellet, Koskenniemi and Nolte focus on the separation of powers and the treaty-making process in France, Finland and Germany, respectively. The Tribunal notes that Professors Koskenniemi and Nolte, in addition, opine in their reports on the provisional application regime of the ECT. Respondent has not, however, provided any evidence that France, Finland or Germany represented to its

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[59] Annex C-1003.

[60] Annex C-1004.

[61] Hungary ultimately made an opt-out declaration under Article 45(2)(a) of the ECT.

counterparts, at the time of the negotiation of the Treaty, that it understood Article 45(1) as meaning that it could rely at any time on this provision in order to single out for exclusion individual ECT provisions that were "inconsistent" with its domestic law, or that its obligations under the ECT would be restricted in any manner.

325. Respondent also seeks support for its interpretation of Article 45(1) from the interpretation given to Article 45(1) by the Council, Commission and Member States of the European Union. In connection with the EU Council's decisions approving the provisional application of the ECT by the European Community and the European Atomic Energy Community, the following joint statement by the Council, Commission and the Member States (the 1994 EU Joint Statement) was entered into the minutes:

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

326. Respondent points to the 1994 EU Joint Statement as an example of State practice supporting an interpretation of Article 45(1) that would allow the partial provisional application of the ECT, in this case limited to those matters falling within the competence of the European Community.

327. The Tribunal finds this argument unpersuasive:

- First, even if the 1994 EU Joint Statement could be said to support Respondent's position, the weight of State practice, as demonstrated above, supports Claimant's position—namely that the Limitation Clause in Article 45(1) has been used as the basis for opting out of the provisional application of the Treaty altogether.

- Second, and even more important, the Tribunal does not find that the 1994 EU Joint Statement supports Respondent's position. The 1994 EU Joint Statement

does not say, and cannot be read as meaning, that certain elements of the ECT will not be provisionally applied by the European Community because they are inconsistent with the Community's internal legal order. The 1994 EU Joint Statement, rather, says that Article 45(1) "does not create any commitment beyond what is compatible with the existing internal legal order of the Signatories." On this basis, the 1994 EU Joint Statement concludes that the European Community can safely sign the ECT, and accept the obligation of provisional application, without taking on any obligation to do anything that is beyond its competence. This is therefore not so much an example of partial provisional application of the ECT due to inconsistency with the EC's legal order, as it is an example of the EC's partial jurisdiction for the provisional application of the whole ECT—meaning, necessarily, that some parts of the ECT simply cannot be provisionally applied by the EC.

- Third, the 1994 EU Joint Statement entered into the minutes has no legal or binding value, as opposed to the Council decisions themselves. The Tribunal notes that the preamble of the Council decision in respect of the provisional application of the ECT by the European Community does not refer to Article 45(1) of the ECT or the notion of partial provisional application due to inconsistency. Rather, the Council decision focuses on the partial competence of the European Community for the matters covered by the provisional application of the Treaty:

> Whereas the provisional application of the Energy Charter Treaty will help attain the objectives of the European Community;
>
> Whereas the European Community has competence for parts of the Energy Charter Treaty;
>
> [. . .]
>
> The European Community shall apply on a provisional basis from the time of signature the Energy Charter Treaty to the extent that it has competence for the matters governed by the Treaty.
>
> [emphasis added]

- Finally, the Tribunal notes that the Council Legal Service considered the interpretation of Articles 45(1) and (2) included in the 1994 EU Joint Statement to be "restrictive and possibly unilateral" and cautioned that the interpretation could "create a problem of transparency in relation to other negotiating Parties."[62]

328. In light of the Tribunal's conclusion on the interpretation of Article 45(1), the Tribunal does not find it necessary to consider the *travaux préparatoires* concerning the Limitation Clause in Article 45(1).

329. The Tribunal therefore concludes that Article 45(1) requires an analysis and determination of whether the principle of provisional application *per se* is inconsistent with the Constitution, laws or regulations of the Russian Federation. If it is not inconsistent, then this Tribunal has jurisdiction to hear Claimant's claims under Article 26 of the Treaty, which would apply provisionally in the Russian Federation in accordance with Article 45(1). It is to that issue that the Tribunal now turns.

**b) Is the Principle of Provisional Application Inconsistent with Russian Law?**

330. There is no significant debate between the Parties on the issue of whether the principle of provisional application *per se* is inconsistent with the Constitution, law or regulations of the Russian Federation. Claimant asserts that the principle is not inconsistent with Russian law, citing ample legislative and doctrinal authorities in support of its submission, and concludes on that basis that the Limitation Clause in Article 45(1) is unavailable to the Russian Federation. Respondent does not seriously challenge the authorities cited by Claimant on this point. Respondent's principal argument against provisional application of the ECT, as seen earlier, is based on the interpretation of Article 45(1), not on the assertion that provisional application *per se* is unknown or unrecognized by Russian law.

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[62] Report from the Presidency to the Permanent Representatives Committee, 8 December 1994, Annex C-921, at p.4 n. 6, *in fine*.

331. Although the issue therefore does not raise much controversy, the Tribunal nevertheless confirms that Claimant has demonstrated to the Tribunal's satisfaction that the principle of provisional application of treaties is recognized in the Russian Federation, as it was in the Soviet Union.

332. The Tribunal's analysis commences with the applicable legislation of the Russian Federation. Article 23(1) of the FLIT provides clear and unequivocal confirmation of Claimant's submission:

> 1. An international treaty or a part thereof may, prior to its entry into force, be applied by the Russian Federation provisionally if the treaty itself so provides or if an agreement to such effect has been reached with the parties that have signed the treaty.

333. Article 23(2) of the FLIT then provides that decisions on the provisional application of a treaty shall be made by the body that signs the treaty, in accordance with the procedure set out in Article 11 of the FLIT. Article 11 of the FLIT, in turn, specifies that the President of the Russian Federation has the authority to negotiate and sign international treaties that are being concluded on behalf of the Russian Federation.

334. Although Professor Avakiyan, one of Respondent's experts, was asked to opine on provisional application, he made no reference to these provisions of the FLIT in his first written opinion. Under cross-examination, Professor Avakiyan acknowledged the legislative basis for provisional application of international treaties in the Russian Federation under the FLIT, and also acknowledged that the FLIT is in conformity with the Constitution and the principle of separation of powers of the Russian Federation.[63] Indeed, during oral submissions, Respondent's counsel stated clearly that "Russian law is of course familiar with the concept of provisional application, and that was never in dispute."[64]

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[63] Hearing Transcript, 17 November 2008, p. 46:10-16. His own personal opinion was that treaties that have provisions that are inconsistent with Russian law should never be provisionally applied, and that Article 23 of the FLIT, which permits such provisional application, should therefore be amended in order to clarify this limitation. *Ibid.* at pp. 39:22 to 40:5.

[64] Hearing Transcript, 26 November 2008, p. 143:5-7.

335. Claimant's expert on Russian law, Mr. Gladyshev, opined that Article 15(4) of the Constitution gives priority to all international treaties of the Russian Federation over domestic law, whether such treaties are ratified or whether "the parties agreed to have provisional application of an international treaty as a binding instrument, as they did in the case of the Energy Charter Treaty."[65]

336. The question regarding the principle of provisional application under Russian law was answered perhaps most clearly in the response of the Russian Federation to a question posed in the context of a study commissioned by and prepared for the Committee of Legal Advisers on Public International Law of the Council of Europe in 2001:

> *15. Is the provisional application of a treaty before its entry into force possible in your legal system and under what conditions?*
>
> Yes, if a treaty itself so provides or signatory states so agreed.[66]
>
> [emphasis added]

337. In his written expert opinions, Mr. Gladyshev referred to the long tradition of provisional application in the treaty practice of the Russian Federation and, previously, of the USSR According to Mr. Gladyshev—and this was not challenged by Respondent—there are currently some 45 treaties being applied provisionally by the Russian Federation.

338. The Tribunal therefore has no difficulty in concluding that the principle of provisional application is perfectly consistent with the Constitution, laws and regulations of the Russian Federation. Accordingly, the Tribunal finds that the whole of the ECT applied provisionally in the Russian Federation until such provisional application was terminated, in accordance with the notification that the Russian Federation made on 20 August 2009, pursuant to Article 45(3)(a) of the Treaty, of its intention not to become a Contracting Party to the Treaty. Article 45(3)(a) provides that: "Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the

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[65] Hearing Transcript, 20 November 2008, p. 83:12-15; *see* generally *ibid.* at pp. 81:20 to 83:22.

[66] Annex C-315.

date on which such signatory's written notification is received by the Depository." The 60-day period expired on 19 October 2009.

339. Furthermore, pursuant to Article 45(3)(b) of the Treaty, investment-related obligations, including the obligation to arbitrate investment-related disputes under Part V of the Treaty, remain in force for a period of 20 years following the effective date of termination of provisional application. In the case of the Russian Federation, this means that any investments made in Russia prior to 19 October 2009 will continue to benefit from the Treaty's protections for a period of 20 years—*i.e.*, until 19 October 2029. As a result, the Tribunal finds that the provisional application of the ECT, including the continuing provisional application of Article 26 in this case, does provide a basis for the Tribunal's jurisdiction over the merits of this claim.

340. There remains an issue which, although not controlling in this arbitration, needs nevertheless to be addressed, in the opinion of the Tribunal, in the present Interim Award. The Tribunal refers to the temporal aspect of the Limitation Clause: at what moment in time (or over what period) should a signatory's domestic legal regime be examined in order to determine whether the principle of provisional application is consistent with its laws?

341. According to Respondent, which made the argument in relation to its theory of inconsistency under Article 45(1), there is no temporal restriction in Article 45(1). Respondent thus argues that "the inconsistency clause in Article 45(1) is not limited to inconsistencies existing at the time of the signature of the Treaty."[67]

342. Claimant's argument on the temporal issue was made in paragraph 232 of its Counter-Memorial:

> [T]he coming into <u>existence</u> of the Russian Federation's international obligations under the ECT by virtue of its provisional application was subject to the consistency of such provisional application with Russian law <u>at the time the Russian Federation signed the Treaty</u>.
>
> [emphasis added]

[67] Hearing Transcript, 26 November 2008, p. 175:5-8.

343. The Tribunal is of the view that the determination as to whether or not the principle of provisional application is consistent with the constitution, the laws or the regulations of the host State in which the Investment is made must be made in the light of the constitution, laws and regulations *at the time of signature* of the ECT.

344. Any other interpretation would allow a State to modify its laws after having signed the ECT in order to evade an obligation that it has assumed by agreeing to provisional application of the Treaty. The Tribunal cannot accept such an interpretation.

345. In connection with this temporal issue, the Tribunal notes the representations of the Government of the Russian Federation in the Explanatory Note which it submitted to the State Duma of the Federal Assembly of the Russian Federation when the ECT was submitted for ratification ("**ECT Explanatory Note**"). The following extract from the Note suggests that the time of signature of the Treaty was also the reference point for the Government's assessment of consistency of the "provisions on provisional application" with the internal legal regime:

> Prior to the entry into force of the ECT, the majority of the Contracting Parties agreed to apply the treaty on a provisional basis. In this respect, it was decided that such provisional application of the ECT would be implemented to the extent that it would not be inconsistent with the constitution, laws and regulations of the country in question.
>
> At the time for the signing of the ECT, its provisions on provisional application were in conformity with the Russian legal acts. For that reason, the Russian side did not make declarations as to its inability to accept provisional application (such declarations were made by 12 of the 49 ECT signatories).
>
> [emphasis added]

### c) Are the Provisions of the ECT Relating to Dispute Resolution Inconsistent with Russian Law?

346. In view of the Tribunal's conclusion with respect to the interpretation of Article 45(1), there is no need, in principle, to address Respondent's submission that the provisions of the ECT relating to dispute resolution are themselves inconsistent with Russian law.

347. However, since both sides made extensive submissions to the Tribunal with respect to the so-called "piecemeal" approach and because, as will be seen, the Tribunal's analysis and

findings with respect to the consistency with Russian laws and Constitution of these provisions of the ECT relating to dispute resolution lead the Tribunal to the same conclusion, the Tribunal has nevertheless decided to set out its analysis under this alternative approach.

348. At the outset, however, the Tribunal wishes to state that, as established in the previous section of this Interim Award, Article 45(1) is solely concerned with the consistency of the principle of provisional application with the constitution, laws or regulations of the host State at the time of signature. That is the Tribunal's interpretation of the Limitation Clause in Article 45(1). Once such consistency is established, the Limitation Clause cannot be invoked subsequently to argue inconsistency between the host State's domestic law and specific elements of the ECT, be it the dispute-resolution provisions in Part V of the ECT or the material rules for the protection of investments in Part III of the ECT.

349. With this important clarification in mind, the Tribunal will now analyze the dispute-resolution mechanism for investment disputes between investors and the host State, as defined in Articles 1(6), 1(7) and 26 of the ECT, and determine whether or not they are consistent with the Constitution, laws and regulations of the Russian Federation.

**(i) Parties' Submissions**

350. Under Article 26(1) of the ECT, this Tribunal has jurisdiction over "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 [of the Treaty]." Disputes that are not settled amicably may, at the option of the Investor, be submitted to international arbitration. "Investor" is defined in Article 1(7). "Investment" is defined in Article 1(6).

351. In its First Memorial, Respondent submits principally that, in Russia, the power to provide for mandatory dispute resolution in an international forum is vested in the Legislature and that applying Article 26 on a provisional basis as a result of the signature of the ECT by the Executive, before ratification of the Treaty by the Legislature, violates the fundamental principle of the separation of powers under the Constitution.

352. In its Skeleton Argument submitted to the Tribunal prior to the hearing, Respondent summarized its inconsistency argument based on the principle of separation of powers as follows:

> The Russian Constitution is based on the principle of separation of powers and the rule of law. Each branch of State power exercises its power independently, and no branch may usurp the power of another branch. The Russian Constitution specifically preserves the prerogatives of Russia's Federal Assembly (parliament) in the treaty-making process—law-making treaties must be ratified by the adoption of a federal law by both the Duma and the Federation Council—and prohibits the Government from legislating through the conclusion and implementation of international treaties that amend or complement federal laws. This ratification requirement is an emanation of the principle of separation of powers established in Article 10 of the Constitution, and is reflected in Article 15(1)(a) of the Federal Law on International Treaties. Under the latter Article, all treaties whose implementation requires "the amendment of existing or the adoption of new federal laws, and also those establishing rules that are different from those provided for by law," are subject to ratification.[68]

353. Respondent argues that the arbitration of this dispute in an international forum violates the principle of separation of powers because the Tribunal's jurisdiction is based on Article 26 of the ECT—a provision of a treaty that has not been ratified—whereas, under Russian law, disputes arising from sovereign acts or omissions, including claims for damages for expropriation, may not be submitted to arbitration absent a legislative enactment (including ratification of the ECT) that provides for arbitration.

354. Respondent also argues that, under Russian law, disputes arising from public and administrative law relationships, such as disputes concerning taxation, enforcement of tax liens, nationalization or criminal-law matters, are not arbitrable. Finally, Respondent submits that arbitration without privity (*i.e.*, arbitration with an investor based on an open offer to arbitrate by the host State, as is the case in Article 26(3)(a) of the ECT) is not recognized under Russian law.

355. In its Skeleton Argument, Respondent explained:

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[68] *See* Skeleton Argument, para. 19.

> Disputes involving the lawfulness of expropriation, taxation measures, bankruptcy, and other regulatory matters are within the exclusive jurisdiction of Russia's courts, and may not be submitted to arbitration. The Russian Federation's Civil Procedure Code, Arbitrazh Procedure Code and Tax Code confirm the exclusive jurisdiction of Russian courts over these issues, and prohibit their arbitration. Claimants' request for damages is based on allegedly illegal sovereign acts of various Russian authorities, none of which under Russian law may be submitted to arbitration, unless a specific law provides otherwise. The Energy Charter Treaty, an unratified treaty, is not such a law.

356. In response, Claimant submits in its Counter-Memorial that there is no inconsistency between the provisional application of the ECT, including its dispute-resolution mechanism, and Russian law. In support of its argument, Claimant cites, in particular, the ECT Explanatory Note, which includes an unqualified statement that the provisional application of the ECT was consistent with "Russian legal acts."[69]

357. Claimant also argues that investor-State arbitration provisions similar to Article 26 of the ECT can be found in various BITs concluded by the Russian Federation, which have been deemed consistent with its laws. Finally, Claimant notes that Respondent's objection to the arbitrability of the subject-matter of Claimant's claims under Russian law is inconsistent with the fact that the Russian Federation has committed itself to submitting such disputes to arbitration in the 38 BITs to which it is a Party that have entered into force.

358. In its Second Memorial, Respondent reiterates that many of the ECT's provisions are inconsistent with its Constitution, laws or regulations. It refers to:

- investor-State arbitration in the absence of a ratified treaty, noting that the Russian Federation's invariable practice is to have every BIT which it signs subject to ratification;

[69] *See* Annex C-143.

- the fact that according an EU shell company, such as any one of the three Claimants, the benefit of Part III of the ECT is not in harmony with Article 30 of the P&C Agreement;[70]

- the fact that according standing to Yukos' shareholders as "investors" is an inadmissible derivative claim unknown to Russian law; and

- the fact that protecting an "investment" which was made without the injection of any foreign capital is contrary to Russian law, according to the expert opinion of Professor Andrey Lisitsyn-Svetlanov.

359. In its Rejoinder, Claimant notes, in particular, that Respondent's position in this arbitration does not accord with the statements made by the Russian Government in the ECT Explanatory Note and in the explanatory notes submitted to the Duma in the context of the ratification of other BITs.[71] In none of those documents, Claimant avers, does the Russian Government state that ratification is required because the respective BITs contradict Russian law. At most, ratification is said to be required for the BITs in question because the treaties add something different to the Russian legal framework. Claimant further notes that none of these BITs include a provisional application regime.

360. During the hearing, Respondent's counsel argued that the claims in this arbitration were (a) non-arbitrable under Russian law, (b) within the exclusive jurisdiction of the courts in Russia, and (c) advanced by parties without standing under Russian law.

361. There were several arguments advanced by Respondent in relation to inarbitrability. It asserted that:

- arbitration is permissible under Russian law only in private-law relationships;

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[70] *See* Exhibit R-286. Respondent submits that the P&C Agreement applies in the instant case as it provides for a framework for investment protection and energy cooperation of which the ECT forms part and, by its very terms (Article 105), prevails over the latter up until the day the ECT has entered into force.

[71] *See* Exhibits R-402 through R-406.

- the subject-matter of arbitration under Russian law is limited to the sphere of civil-law relationships and therefore cannot extend to disputes arising from public-law relationships, including tax matters;[72] and

- in addition, under Russian law, it is impossible to submit for consideration by an arbitral tribunal "those disputes for the recovery of damages that arose as a result of illegal actions of State bodies and officials in their exercise of public-law functions."[73]

362. The following assertions were made by Respondent in relation to the exclusive competence of Russian courts concerning the matters brought before this Tribunal:

- the Arbitrazh Courts in the Russian Federation have exclusive competence over cases involving foreign persons which arise from administrative or other public legal relationships;[74]

- the courts of the Russian Federation have jurisdiction over, among other things, cases arising from public legal relationships[75] and cases involving foreign citizens;[76] and

- the Arbitrazh Courts also have jurisdiction over "challenges of individual legal acts of bodies of State authority of the Russian Federation."[77]

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[72] *See Civil Procedure Code of the Russian Federation of 14 November 2002*, Article 3(3), Exhibit R-173; *Arbitrazh Procedure Code of the Russian Federation of 24 July 2002*, Article 4(6), Exhibit R-172; *Tax Code of 31 July 1998*, Article 138(1), Exhibit R-877.

[73] O. Yu. Skvortsov, "About Certain Matters Concerning Recovery of Damages in the Arbitration Proceedings," *in* M.A. Rozhkova (ed.), *Damages and Practice of their Recovery* (2006), pp. 522, 525, Exhibit R-874.

[74] *See Arbitrazh Procedure Code of the Russian Federation of 14 November 2002*, Article 248, Exhibit R-879.

[75] *See Civil Procedure Code of the Russian Federation of 14 November 2002*, Article 22(1)(3), Exhibit R-883.

[76] *See ibid*., Article 22(2).

[77] *Arbitrazh Procedure Code of the Russian Federation of 14 November 2002*, Article 29(2), Exhibit R-879.

363. On the issue of standing, Respondent argues that Russian law does not permit a shareholder to claim for injury to a joint stock company. In support of its argument, Respondent refers to the expert opinion of Professor Yevgeny Sukhanov, who writes:

> [I]nfliction of damages upon the property of a joint stock company represents infliction of damages upon that particular owner and not its shareholders, whose property is segregated from the property of the company. Consequently, the right to bring a judicial claim for the protection of its interests in such situation is enjoyed only by the joint stock company itself, as an independent owner of its property, and not by its shareholders.[78]

Respondent also refers to decisions of the European Court of Human Rights, which establish that a shareholder cannot file a claim for violation of the company's rights.

364. Respondent concludes that the Executive Branch of the Russian Government cannot modify these various arbitrability, jurisdictional or standing norms, by signature of the ECT, without violating the Constitution. It is Respondent's position that, because the ECT's dispute resolution provisions are inconsistent with these various provisions of Russian law, the ECT is one of those types of treaties which in accordance with Article 15(1)(a) of the FLIT must be subject to ratification:

> 15(1) The following international treaties of the Russian Federation shall be subject to ratification:
>
> a) treaties whose implementation requires the amendment of existing or the adoption of new federal laws, as well as those establishing rules that are different from those provided for by law.

365. During the hearing, Claimant argued and sought to demonstrate that the substantive provisions of the ECT are not inconsistent with Russian law.

366. In relation to investor-State arbitration under Article 26 of the ECT, Claimant cites Article 9 of the Russian Federation *Law on Foreign Investments of 4 July 1991* and Article 10 of the Russian Federation *Law on Foreign Investment in the Russian*

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[78] Professor Yevgeny Sukhanov, *Opinion on the Issue of Possibility of a Shareholder's Claims against Counter-Parties of the Joint-Stock Company in Connection with Damage Caused by the Latter to the Company*, 22 February 2006, Section IV, para. 6.

*Federation of 9 July 1999*. Article 9 of the 1991 Law sets out the "procedure for settling disputes." It provides, in relevant part, that "disputes of foreign investors and enterprises with foreign investment with State bodies of the Russian Federation . . . are subject to settlement in courts of the Russian Federation or, on agreement between sides, in a Court of Arbitration" [emphasis added]. Article 10 of the 1999 Law provides, in turn, as follows:

> Any dispute involving a foreign investor and related to the investment and business activities of such investor in the Russian Federation shall be settled in compliance with the international treaties of the Russian Federation and federal laws in a court, an arbitration court or international arbitration (arbitration tribunal).
>
> [emphasis added]

Claimant thus submits that investor-State arbitration such as that provided for in Article 26 of the ECT is authorized by Russian law, subject only to establishing that the Russian Federation has consented to the arbitration.

367. According to Claimant, the 1991 and 1999 Foreign Investment Laws also establish that the definitions of investor and investment in the ECT are entirely consistent with Russian law. Claimant cites Articles 1 and 2 of the 1991 Law (defining foreign investor and foreign investment, respectively) and the definition of both terms in Article 2 of the 1999 Law. Consistency is also confirmed, submits Claimant, by the statement of the Government in the ECT Explanatory Note to the Duma that the ECT is consistent with the provisions of the existing law on foreign investment and "does not require the acknowledgement of any concessions or the adoption of any amendments to the abovementioned Law."

368. On the issue of arbitrability, Claimant refers the Tribunal to Article 16 of the *Civil Code* of the Russian Federation, which provides that civil-law rights include the right to seek compensation for the illegal acts of a State. According to Claimant, therefore, even assuming Respondent's argument about the arbitrability issue is correct, the type of claim before this Tribunal would be considered arbitrable in Russia. Claimant relies primarily, however, on Article 9 of the 1991 *Law on Foreign Investment*, under which, it says, investment disputes are clearly arbitrable. But, arbitrability, Claimant recognizes, does

not automatically allow a claim to be submitted to an arbitral tribunal. Consent of both parties is required. Consent, Claimant submits, is clearly provided in the present case by Articles 26(3)(a) and 26(4) of the ECT, which are applied provisionally in the Russian Federation based on the signature of the Treaty by the Russian Government.

369. Finally, in response to Respondent's argument that these claims are impermissible derivative actions, unknown to Russian law, Claimant submits that it is not claiming in the name of Yukos, but rather is seeking compensation on its own behalf for loss of the value of the shares it owns in Yukos.

### (ii) Tribunal's Decision

370. After having considered the totality of the Parties' submissions and having deliberated, the Tribunal concludes that Article 26 of the ECT is not inconsistent with the Constitution, laws or regulations of the Russian Federation. The terms of the Russian Federation's *Law on Foreign Investment* (both the 1991 and 1999 versions) are crystal clear. Investor-State disputes such as the present one are arbitrable under Russian law. The Tribunal recalls the key provisions of the law which inform its conclusion. Article 9 of the 1991 Law provides, in relevant part, as follows:

> Disputes of foreign investors and enterprises with foreign investment with state bodies of the Russian Federation, enterprises, public organizations and other juridical persons of the RSFSR, disputes among investors and enterprises with foreign investment on matters linked with their economic activities, as well as disputes between participants of an enterprise with foreign investment and the enterprise itself are subject to settlement in courts of the Russian Federation or, on agreement between sides, in a Court of Arbitration.[79]
>
> [emphasis added]

Article 10 of the 1999 Law provides, in relevant part:

> Any dispute involving a foreign investor and related to the investment and business activities of such investor in the Russian Federation shall be

[79] During the hearing, Mr. Martynov explained that the use of "Court of Arbitration" in this English translation of the law was meant to refer to a non-governmental dispute resolution mechanism, such as a privately constituted arbitration tribunal, as opposed to the Russian arbitration or arbitrazh courts, which are part of the judiciary. *See* Hearing Transcript, 19 November 2008, p. 31:7-21.

> settled in compliance with the international treaties of the Russian Federation and federal laws in a court, an arbitration court or international arbitration (arbitration tribunal).
>
> [emphasis added]

371. Furthermore, the definitions of "foreign investor" and "foreign investment" in both the 1991 and 1999 versions of the *Law on Foreign Investment* are consistent with the definitions of "Investor" and "Investment" in Article 1 of the ECT. The 1991 Law defines the terms, in relevant part, as follows:

> Article 1
> *Foreign Investors*
>
> Foreign investors in the RSFSR may include:
>
> - foreign juridical persons, including, specifically, any companies, firms, enterprises, organizations or associations, set up and entitled to make investments in conformity with the legislation of the country where they are located;
>
> [. . .]
>
> Article 2
> *Foreign Investment*
>
> All types of property and intellectual assets, invested by foreigners in business ventures and other types of activity with the aim of deriving profit (income) shall be deemed foreign investments.

Similar definitions are found in Article 2 of the 1999 Law:

> *"Foreign investor"* shall mean: foreign legal entities, the civil legal capacity of which shall be determined by the laws of the jurisdiction of their incorporation and which have the right to invest on the territory of the Russian Federation under the laws of the jurisdiction of incorporation; [. . .]
>
> *"Foreign investment"* shall mean the investment of foreign capital in objects of business activity on the territory of the Russian Federation in the form of objects of civil rights belonging to a foreign investor, unless such objects are excluded from the turnover or are restricted in the Russian Federation pursuant to federal laws, including money, securities (denominated in foreign currency or in the currency of the Russian Federation), other property, property rights, exclusive rights to the results of intellectual activities (intellectual property) which can be evaluated in a monetary form, and services and information.

372. On the issue of standing, the Tribunal concludes that Claimant is claiming for violation of its own rights under the ECT, not the rights of Yukos. The Tribunal agrees with Claimant's characterization of its claim, which is not a derivative action, but an action for the direct loss by Claimant of its shares and their value.

373. The Tribunal agrees with Claimant that the definitions in the P&C Agreement are not relevant to the analysis of the ECT, since the definitions in Article 30 of the P&C Agreement are expressly limited to be "for the purpose of this agreement [*i.e.*, the P&C Agreement, not the ECT]."

374. The Tribunal's conclusions are confirmed by the representations of the Government of the Russian Federation in the Explanatory Note which it submitted to the State Duma of the Federal Assembly of the Russian Federation when the ECT was submitted for ratification. The following extracts from the Note are particularly relevant:

> Prior to the entry into force of the ECT, the majority of the Contracting Parties agreed to apply the treaty on a provisional basis. In this respect, it was decided that such provisional application of the ECT would be implemented to the extent that it would not be inconsistent with the constitution, laws and regulations of the country in question.
>
> At the time for the signing of the ECT, its provisions on provisional application were in conformity with the Russian legal acts. For that reason, the Russian side did not make declarations as to its inability to accept provisional application (such declarations were made by 12 of the 49 ECT signatories).
>
> [. . .]
>
> The provisions of the ECT are consistent with Russian legislation.
>
> [. . .]
>
> <u>The legal regime of foreign investments envisaged under the ECT is consistent with the provisions of the existing Law of the RSFSR on Foreign Investments in the RSFSR</u>, as well as with the amended version of the Law currently being discussed in the State Duma, and does not require the acknowledgement of any concessions or the adoption of any amendments to the abovementioned Law. The ECT is also consistent with the provisions of Russian bilateral international treaties on the promotion and protection of investment.
>
> [emphasis added]

375. During his cross-examination, Professor Avakiyan, one of Respondent's expert witnesses, confirmed that he agreed with the contents of the Explanatory Note cited in the previous paragraph.[80] The Tribunal's conclusion on the consistency of Article 26 of the ECT with Russian law is also supported by the writings of Professor Yershov, who was a member of the Russian delegation to the ECT negotiations. During parliamentary hearings concerning the ECT, Professor Yershov submitted a paper in which he noted the following:

> From the standpoint of Russian interests, the compromise achieved in developing the ECT language guarantees Russia a solution to a critical foreign trade problem: receipt and codification of a liberal non-discriminatory trade policy regime for an EMP exporter otherwise unattainable in such a short time. In exchange for this, under the ECT, Russia grants foreign investors an energy investment regime acceptable to them that does not require any concessions on Russia's part beyond the framework of current law.[81]
>
> [emphasis added]

376. As to the BIT practice of the Russian Federation, in the Tribunal's opinion, it is of little assistance to either Party. On the one hand, Claimant refers to the many BITs entered into by the Russian Federation that provide for investor-State arbitration, inviting the conclusion that investor-State arbitration is not inconsistent with Russian law. As Respondent has pointed out, however, the BITs in force in the Russian Federation have all been ratified, thus eliminating any concern with provisions in the BITs that might be different from the underlying Russian legislation. The ratified BITs therefore do little to advance Claimant's position.

377. On the other hand, Respondent seeks support for its position by pointing out that some of the explanatory notes submitted to the Duma in connection with the ratification of BITs have made it explicit that the BIT in question is subject to ratification because it contains a provision for the settlement of investor-State disputes through international

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[80] Hearing Transcript, 17 November 2008, p. 12:15-17.

[81] Yu. A. Yershov, "Dogovor k Energeticheskoi Khartii [The Energy Charter Treaty]," *reproduced in* (2001) 1(1) *Ekologiya -- XXI Vek [Ecology -- XXI Century]* pp. 23-42 at 25, Annex C-153.

arbitration.[82] As Claimant points out, however, none of the BITs in question contains a provisional application regime such as that found in Article 45(1) of the ECT. Ratification by the State Duma is thus required in order for the Russian Federation to express its consent to arbitration.

378. At this point, the Tribunal recalls again its fundamental finding on the meaning and interpretation of Article 45(1): irrespective of any inconsistencies that might exist between Article 26 of the ECT and Russian law, Article 26 of the ECT, as well as other provisions of the Treaty, apply provisionally and the Russian Federation has therefore consented to international arbitration.

379. Pursuing nevertheless its detailed analysis of Article 26, in particular, through the prism of the FLIT, the Tribunal will now seek to answer the question whether the signature of a treaty which contains a provisional application clause is sufficient to establish the consent of the Russian Federation to international arbitration of disputes arising under the Treaty.

380. Respondent argues that the consent required in order to give Article 26 binding effect can only be expressed by the legislative branch of the State (*i.e.*, the Duma) through the mechanism of ratification of the ECT. This was the gist of the testimony of Mr. Martynov, one of Respondent's expert witnesses. He testified that consent to arbitration under the ECT required ratification of the Treaty by the State Duma.[83] Respondent also argues that, pursuant to Article 39 of the ECT, "the Treaty is expressly subject to ratification," and that "States, such as Respondent, that have not ratified the Treaty have not expressed their consent to be bound by the Treaty."

381. In response, Claimant asserts that it "never suggested that the Treaty was not 'subject to ratification.'" Claimant argues, however, that Article 39 cannot render ineffective the Treaty's regime of provisional application, which is set out in Article 45. Claimant refers to the FLIT in support of its position that consent to be bound by the provisions of a

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[82] *See*, *e.g.*, Explanatory Note on the Issue of Ratification of the Agreement between the Government of the Russian Federation and the Government of the Republic of Argentina on Encouragement and Reciprocal Protection of Investments, Exhibit R-402.

[83] *See* Hearing Transcript, 19 November 2008, Day 3, p. 42:18-22.

treaty can be granted by the Government's signature of a treaty that provides for the provisional application of its terms. Claimant cites, in particular, Article 6 of the FLIT, which sets out how "consent" of the Russian Federation to be bound by an international treaty may be expressed, as well as Article 2, which defines "ratification," "signature" and "conclusion." These key provisions of the FLIT read as follows:

> Article 2 Use of terms
>
> For the purposes of this Federal Law:
>
> [. . .]
>
> b) "ratification," "approval," "acceptance," and "accession" mean in each case a form whereby the Russian Federation expresses its consent to be bound by an international treaty;
>
> c) "signature" means either a stage in the conclusion of a treaty, or a form of expressing consent of the Russian Federation to be bound by an international treaty, if the treaty provides that signature shall have that effect, or it is otherwise established that the Russian Federation and the other negotiating States were agreed that signature should have that effect, or the intention of the Russian Federation to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation;
>
> d) "conclusion" means the expression of consent of the Russian Federation to be bound by an international treaty;
>
> [. . .]
>
> Article 6 Expression of consent of the Russian Federation to be bound by an international treaty
>
> 1. Consent of the Russian Federation to be bound by an international treaty may be expressed by means of:
>
> signature of the treaty;
> exchange of the documents forming the treaty;
> ratification of the treaty;
> approval of the treaty;
> acceptance of the treaty;
> accession to the treaty; or
> any other manner of expressing consent on which the contracting parties have agreed.
>
> 2. Decisions to grant consent for the Russian Federation to be bound by an international treaty shall be made by state organs of the Russian Federation in accordance with their competence as defined by the Constitution of the Russian Federation, this Federal Law and other legislative acts of the Russian Federation.
>
> [emphasis added]

382. These provisions of the FLIT are very clear. There is no room for ambiguity. The Tribunal therefore concludes that the Russian Federation has consented to be bound—albeit provisionally—by Article 26 of the ECT by its signature of the ECT. Article 45(1) of the ECT establishes beyond the shadow of a doubt, and notwithstanding Article 39 of the ECT, that the Russian Federation and other signatories agreed that their signature of the Treaty would have the effect of expressing the consent of the Russian Federation (and each other signatory) to be provisionally bound by its terms.

383. The Tribunal notes that Article 11 of the FLIT provides that the decision to sign a treaty is a decision which rests with the Executive:

> 1. Decisions to negotiate and to sign international treaties of the Russian Federation shall be made:
>
> a) with respect to treaties to be concluded on behalf of the Russian Federation, by the President of the Russian Federation, but with respect to treaties to be concluded on behalf of the Russian Federation on matters under the jurisdiction of the Government of the Russian Federation, by the Government of the Russian Federation;
>
> b) with respect to treaties to be concluded on behalf of the Government of the Russian Federation, by the Government of the Russian Federation.
>
> 2. Decisions to negotiate and to sign international treaties of the Russian Federation on matters under the jurisdiction of the Government of the Russian Federation shall be made by the President of the Russian Federation if circumstances so require.

Moreover, as we saw earlier, Article 23(1) of the FLIT makes it clear that provisional application is permissible under the legislation of the Russian Federation. Therefore, the obligation assumed by the Russian Federation to be bound, prior to ratification, by the dispute settlement provisions (including international arbitration) of a provisionally applied treaty such as the ECT, and the consent expressed therein, are not inconsistent with the Constitution, laws or regulations of the Russian Federation, and the Tribunal so finds.

384. Respondent argues that a treaty must be ratified by the Russian Federation, and therefore be in force, in order to establish the consent of the Russian Federation to an arbitration provision of the treaty. As shown above, however, under the FLIT, ratification is not the

only means by which the Russian Federation can express its consent to the terms of a treaty: signature can express consent where the treaty, such as the ECT, so provides, as it does by specifying in Article 45 the obligations not of a party to the treaty but of a "signatory."

385. That there is a distinction between consenting to be bound provisionally by the treaty and, on the other hand, the treaty being "in force" for a State is also clear from the definition of "Contracting Party" in Article 1(2) of the ECT. As used in the ECT, "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." [emphasis added] The use of the conjunction "and" between the clauses "which has consented to be bound by this Treaty" and "for which the Treaty is in force" means that there must be circumstances, in the eyes of the parties to the ECT, including the Russian Federation, where a State for which the ECT is not "in force," has nevertheless consented to be bound by its terms.

386. There is one last argument of Respondent which the Tribunal finds important to address. Article 23(2) of the FLIT requires that a treaty subject to provisional application must be submitted to and ratified by the State Duma within six months from its signature and the start of its provisional application. It is common ground between the Parties that the ECT which was signed on 17 December 1994 has never been ratified by the State Duma. Respondent submits that since the six-month period had long expired, any continued provisional application of the ECT would have been inconsistent with Russian law.

387. In the view of the Tribunal, the six-month limit is merely an internal requirement; failure to respect that procedure does not in and of itself automatically terminate provisional application. The Tribunal reaches this conclusion based first on the plain meaning of Articles 23(2) and 23(3) of the FLIT. According to Article 23(2), where a treaty provides for provisional application, "this treaty shall be submitted to the State Duma within six months from the start of its provisional application." Article 23(3) provides, however, that provisional application of a treaty by the Russian Federation "shall be terminated upon notification to the other States that apply the treaty provisionally of the intention of the Russian Federation not to become a party to the treaty." The Russian Federation gave

no such notification until 20 August 2009, when it notified the Depository of the ECT, the Portuguese Republic, pursuant to Article 45(3)(a) of the Treaty, of its intention not to become a Contracting Party to the Treaty. Article 45(3)(a) provides that "Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository." The 60-day period expired on 19 October 2009.

388. Accordingly, from the date of signature of the ECT on behalf of the Russian Federation, 17 December 1994, until 18 October 2009, the ECT was provisionally binding upon the Russian Federation. That conclusion is in accord with the terms of Article 25(2) of the VCLT. Furthermore, as explained above,[84] pursuant to Article 45(3)(b) of the Treaty, any investments made in Russia prior to 19 October 2009 will continue to benefit from the Treaty's protections for a period of 20 years, *i.e.*, until 19 October 2029. Therefore, the Russian Federation's 20 August 2009 notification does not affect the analysis and conclusion of this Tribunal.

389. The Tribunal's conclusion is further supported by the following documentary evidence emanating from Respondent:

- The opinion on the draft Federal Law "On Amending and Supplementing the Federal Law 'On International Treaties of the Russian Federation'," attached to the letter of the President of the Russian Federation dated 28 May 2001 (No. PR-966),[85] which states: "The legal limits for the termination of provisional application are clear (Article 23(3) of the Federal Law and Article 25 of the VCLT). Provisional application of an international treaty is terminated by agreement of the parties, or by the coming into force of the treaty, or by the communication of State to the other States provisionally applying the treaty of its determination not to become a party to the treaty."

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[84] *See* paras. 34, 338.

[85] Annex C-145.

- The Russian Note dated 8 July 1997,[86] which provides expressly that "timely submission of the treaty to the State Duma (according to the time limits specified in the Law) has no automatic consequences on its provisional application. If six months from the beginning of provisional application have expired and the State Duma has not discussed the issue of this treaty, its provisional application continues until the relevant decision is taken by State Duma."[87]

- The Russian statement to the Energy Charter Conference (RP-3516),[88] in which the Russian delegation informed all delegations that "the Russian Federation has yet to ratify the Energy Charter Treaty but, as a signatory Country, it implements the Treaty from the day it entered into force."

- The website of the Ministry of Foreign Affairs of the Russian Federation which contains an information bulletin on the ECT dated 25 November 2005 that "the Russian Federation applies [the ECT] on a provisional basis in accordance with Part II of the Vienna Convention on the Law of Treaties (1969) and Section II of the Federal Law on International Treaties of the Russian Federation of June 16, 1995."[89]

390. With respect to Article 23(3) of the FLIT, there is no evidence before the Tribunal that, before 20 August 2009, the Russian Federation notified the Depositary and the other States that apply the Treaty, provisionally or otherwise, of its intention not to become a party to the ECT. The Russian Federation may have made it known earlier that it did not plan to ratify the ECT, but it nevertheless continued to apply it provisionally while omitting formally and officially to notify other signatories of its intentions not to ratify

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[86] Annex C-925.

[87] Respondent contests the origin of the Russian Note. *See* Transcript of Procedural Hearing, 8 May 2008, pp. 81-95. The Tribunal notes, however, that Respondent has not tendered affidavits or sworn statements from the persons who attended the meeting of 8 July 1997 on behalf of the Russian Federation, which would support its position. *See* Transcript of Procedural Hearing, 8 May 2008, pp. 95-96.

[88] Annex C-1020.

[89] Annex C-9. This information bulletin appeared on the website as recently as 23 May 2007. *See* Annex C-1143.

the Treaty until 20 August 2009. It appears that the Russian Federation remains—or remained—a Member of the Energy Charter Conference "in which ratification of the Energy Charter Treaty is still pending . . ."[90] and a national of the Russian Federation remains—or remained—Deputy Secretary-General of the Energy Charter Secretariat. The Russian Federation has participated in the meetings of the Energy Charter Conference, pursuant to Article 34 of the ECT, and in particular the quinquennial review of the Treaty provided for in sub-paragraph 7. The Russian Federation cannot be heard, during the pendency of these proceedings, to claim the benefits of provisional application of the ECT while disclaiming the obligations which that status imposes. Therefore, the Russian Federation was bound by the obligation to arbitrate investor-State disputes pursuant to Part V of the ECT as of the date of the filing of Claimant's Notice of Arbitration and remains so bound, despite the fact that, on 20 August 2009, it notified the ECT Depository of its intention not to become party to the ECT. As set out above,[91] this conclusion is also dictated by Article 45(3)(b) of the Treaty.

391. Finally, the Tribunal notes that its conclusion on the meaning of the concept of provisional application and the distinction to be drawn between consent to be bound by the treaty and the treaty being in force, is entirely consistent with the decision on jurisdiction rendered in the *Kardassopoulos* case. In the relevant passages of that decision to which the Tribunal subscribes, that tribunal wrote:

> 211. It follows that the language used in Article 45(1) is to be interpreted as meaning that each signatory State is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so.
>
> 212. This interpretation of the significance of Article 45(1) is consistent with Article 45(3). That provision refers to the possibility that a signatory may terminate its provisional application of the Treaty by giving written notification to the Depositary that it does not intend to become a Contracting Party to the ECT: that provision applies to provisional application pursuant to Article 45(1). When such notification is given Article 45(3)(b) provides that

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[90] Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation* (2004), p. 17.

[91] *See* para. 388.

> "[T]he obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination [...]."
>
> 213. This provision confirms that Parts III (concerning investment promotion and protection) and V (concerning dispute settlement) apply during the period of provisional application, and that the operation of those Parts gives rise to an "obligation."
>
> [. . .]
>
> 219. There is, nevertheless, in the Tribunal's view a sufficiently well-established practice of provisional application of treaties to generate a generally accepted understanding of what is meant by that notion. Where what is in issue is, as in the present case, the provisional application of the whole treaty, then such provisional application imports the application of all its provisions as if they were already in force, even though the treaty's proper or definitive entry into force has not yet occurred.
>
> [. . .]
>
> 223. For all the foregoing reasons the Tribunal is satisfied that, properly interpreted in accordance with international law, the language used in Article 45(1) is to be interpreted as meaning that each signatory State is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so, and that the language used in Article 1(6), particularly its use of the term "entry into force," is to be interpreted as meaning the date on which the ECT became provisionally applicable for Georgia and Greece.
>
> [emphasis added]

392. The Tribunal's analysis leads it to conclude that Article 26 of the ECT is not inconsistent with the Constitution, laws or regulations of the Russian Federation. Although, as noted at the outset of this section, this analysis was not essential in view of the Tribunal's dispositive interpretation of Article 45(1), it does sustain the Tribunal's decision.

### 5. Conclusion

393. As noted at the outset of this chapter of the Tribunal's Interim Award, the interpretation of Article 45 of the ECT, concerning the scope of provisional application, is the central issue before the Tribunal in this phase of the arbitration.

394. In this chapter, the Tribunal has found that:

d) The regimes of provisional application in Article 45(1) and 45(2) are separate, and the Russian Federation can benefit from the Limitation Clause in Article 45(1) even though it made no declaration under Article 45(2);

e) The Russian Federation can invoke the Limitation Clause in Article 45(1) even though it made no prior declaration nor gave any prior notice to other signatories that it intended to rely on Article 45(1) to exclude provisional application;

f) The Limitation Clause of Article 45(1) negates provisional application of the Treaty only where the principle of provisional application is itself inconsistent with the constitution, laws or regulations of the signatory State; and

g) In the Russian Federation, there is no inconsistency between the provisional application of treaties and its Constitution, laws or regulations.

395. Accordingly, the Tribunal has concluded that the ECT in its entirety applied provisionally in the Russian Federation until 19 October 2009, and that Parts III and V of the Treaty (including Article 26 thereof) remain in force until 19 October 2029 for any investments made prior to 19 October 2009. Respondent is thus bound by the investor-State arbitration provision invoked by Claimant.

396. The Tribunal is comforted in its decision by its further finding that, had it been an essential consideration under the Limitation Clause of Article 45(1)—which it is not—Article 26 of the ECT itself, as well as Articles 1(6) and 1(7), are consistent with Respondent's Constitution, laws and regulations.

397. The Tribunal therefore has jurisdiction over the merits of this claim, subject to the other objections addressed in the other chapters of this Interim Award.

398. The Tribunal emphasizes again that although it considered the question of consistency of particular provisions of the ECT (notably Article 26) with Respondent's domestic legal

regime, it will not be admissible for Respondent to argue in any merits phase[92] of the present arbitration that certain provisions of the ECT, including the provisions of Part III, cannot be applied provisionally because they are inconsistent with Respondent's Constitution, laws or regulations. The Tribunal's interpretation of the Limitation Clause in Article 45(1), coupled with its finding that the principle of provisional application *per se* is consistent with the domestic legal regime of the Russian Federation, results necessarily in the conclusion that each and every provision of the ECT applied provisionally in the Russian Federation.

## B. IS CLAIMANT A PROTECTED INVESTOR WITH AN INVESTMENT UNDER THE ECT?

### 1. Introduction

399. In the previous chapter, the Tribunal has come to the conclusion that Article 26 of the Treaty applies provisionally in the Russian Federation, and that the Tribunal therefore has jurisdiction over the merits of this claim, subject to the other objections raised by Respondent. The first set of such objections, which the Tribunal now addresses, relates to the requirements for jurisdiction *ratione personae* and *ratione materiae* found in Article 26.

400. Article 26 provides, in relevant part, that investor-State arbitration pursuant to sub-paragraph 4 (including arbitration in accordance with the UNCITRAL Rules, pursuant to sub-paragraph 4(b)) is available for "[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III [. . .]."

401. In the previous chapter of this Interim Award, the Tribunal has found that, for purposes of Article 26, the Russian Federation is bound as if it were a Contracting Party. Respondent, however, objects to the jurisdiction of this Tribunal on the grounds that

[92] Throughout the present Interim Award, and for obvious reason, the Tribunal will continue to refer to "any merits phase" of this arbitration. In the *dispositif* of this Interim Award, the Tribunal will use the appropriate description dictated by its conclusion in respect of jurisdiction and admissibility.

Claimant is not "an Investor of another Contracting Party" and/or that the dispute does not relate to "an Investment" of such an Investor.

402. In the sections that follow, the Tribunal analyzes each one of these issues in turn.

### 2. Does Claimant Qualify as a Protected "Investor" under Article 1(7)?

403. In Article 1(7) of the Treaty, "Investor" is defined to mean:

> (a) with respect to a Contracting Party:
>
> (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
>
> (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;
>
> (b) with respect to a "third state," a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.

404. Claimant was incorporated in the Republic of Cyprus on 7 February 2001. Claimant was duly incorporated and in existence under the laws of that jurisdiction as at the date of its Notice of Arbitration (14 February 2005).

405. Cyprus signed the ECT on 17 December 1994, ratified the ECT on 2 January 1998 and deposited its instrument of ratification on 16 January 1998, at which point the ECT entered into force for Cyprus. Claimant is accordingly a company organized in accordance with the laws applicable in a Contracting Party to the ECT.

#### a) Parties' Submissions

406. Respondent does not dispute these basic facts, which, on their face, lead to the conclusion that Claimant qualifies as an "Investor" under Article 1(7) of the Treaty. Rather, Respondent argues that Claimant has failed to meet the burden of demonstrating that the terms of Article 1(7), as *lex specialis*, displace consideration of applicable rules and principles of international law bearing upon the exercise of treaty interpretation. These general principles of international law, which Respondent submits are applicable, require

the Tribunal to go beyond the facts relating to Claimant's formal incorporation in order to determine whether Claimant qualifies as an Investor for purposes of Article 1(7) of the ECT.

407. Respondent refers in this respect to various instruments of international law, such as Article 9 of the ILC Draft Articles on Diplomatic Protection or the Draft Articles on International Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens, as well as to the P&C Agreement, and argues that on the basis of these instruments, Claimant does not qualify as an "Investor" for the purposes of Article 1(7) of the ECT. In particular, Respondent asserts that Claimant does not qualify for protection under the ECT since it is a shell company beneficially owned and controlled by Russian nationals and, as such, by nationals of the host State.

408. In response, Claimant submits that Respondent is "engaging . . . in a tortuous and innovative process of re-writing the Treaty." Claimant asserts that "there is no basis for interpreting Article 1(7) in any way other than pursuant to its plain, express terms, which look only to the Claimant's country of incorporation." Claimant concludes that general principles of international law cannot override the "simple, determinative definition" of Article 1(7) of the Treaty.

409. In support of its position, Claimant refers to the opinion of Professor Crawford, who writes:

> No doubt reference to substantive principles of international law may have a role in treaty interpretation. But international law does not prescribe any rule for qualifying entities as investors for the purposes of treaty arbitration, still less any peremptory rule. The plain meaning of a treaty's terms may be taken to reflect the parties' intentions.[93]

Claimant also refers to the decisions of arbitral tribunals that have considered this issue and have rejected attempts to introduce limitations or exceptions not provided for in the language of the Treaty under consideration. Claimant refers specifically to *Plama v.*

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[93] Crawford Opinion of 22 June 2006, at para. 125.

*Bulgaria*,[94] *Petrobart v. The Kyrgyz Republic*,[95] *Saluka Investments BV (the Netherlands) v. The Czech Republic*,[96] and *Tokios Tokelės v. Ukraine*.[97]

410. Finally, Claimant submits that Respondent's reliance on international instruments other than the ECT, which contain language different from the ECT, is also unavailing. Claimant states that "the Respondent cannot rely on the language contained in irrelevant international instruments to provide for the additional requirements and exceptions that the Respondent now seeks to insert into the ECT."

**b) Tribunal's Decision**

411. As noted earlier in the present Interim Award, according to Article 31 of the VCLT, a treaty must be interpreted first on the basis of its plain language. On its face, Article 1(7)(a)(ii) of the ECT contains no requirement other than that the claimant company be duly organized in accordance with the law applicable in a Contracting Party. The Tribunal agrees with Professor Crawford that in order to qualify as a protected Investor under Article 1(7) of the ECT, a company is merely required to be organized under the laws of a Contracting Party. As Professor Crawford rightly points out:

> The Treaty imposes no further requirements with respect to shareholding, management, *siège social* or location of its business activities (. . .). Companies incorporated in Contracting Parties are embraced by the definition, regardless of the nationality of shareholders, the origin of investment capital or the nationality of directors or management.[98]

412. The Tribunal is not unmindful of Respondent's assertions concerning ownership and control of Claimant. The proper context in which to examine these assertions, however,

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[94] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, (2005) 20:1 *ICSID Review* 262.

[95] *Petrobart Limited v. The Kyrgyz Republic*, Arbitration No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce, Award of 29 March 2005, available on http://ita.law.uvic.ca.

[96] *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, Partial Award of 17 March 2006, UNCITRAL, *available at*: http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf.

[97] *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 April 2004, *available at*: http://icsid.worldbank.org.

[98] Professor James Crawford, SC, *Energy Charter Treaty Arbitration: Jurisdiction Issues,* 22 June 2006, para. 126.

is in the analysis of Article 17 of the Treaty, according to which ownership or control of a claiming party by citizens or nationals of a third State may, if certain other conditions are met, entitle a responding State to deny the benefits of Part III of the Treaty to the claiming party. The Tribunal will address Respondent's ownership and control argument in the next chapter of this Interim Award.

413. Here, however, the Tribunal is dealing not with Article 17 but with Article 1(7). The Tribunal is bound to interpret the terms of the ECT, including Article 1(7), not as they might have been written but as they were actually written. Article 1(7) is more comprehensively and neutrally cast than, for example, Article 21 of the ILC Draft Articles on International Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens. Article 1(7) provides that, "Investor" means:

> (a) with respect to a Contracting Party:
>
> [. . .]
>
> (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

Claimant was organized "in accordance with the law applicable" in a Contracting Party. Claimant accordingly qualifies as a company so organized in the instant case. The Tribunal is not entitled, by the terms of the ECT, to find otherwise.

414. In so concluding, the Tribunal follows the holding of the Partial Award in *Saluka Investments BV (The Netherlands) v. The Czech Republic,* of 17 March 2006. That tribunal, of which the late Sir Arthur Watts was the distinguished chairman, held:

> 240. The Tribunal has some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty. Such a possibility lends itself to abuses of the arbitral procedure, and to practices of 'treaty-shopping' which can share many of the disadvantages of the widely criticized practice of 'forum shopping'.
>
> 241. However that may be, the predominant factor which must guide the Tribunal's exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal's jurisdiction. In the present context, that means the terms in which

> they have agreed upon who is an investor who may become a claimant entitled to invoke the Treaty's arbitration procedures. The parties had complete freedom of choice in this matter, and they chose to limit entitled 'investors' to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add.[99]

415. The Tribunal knows of no general principles of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party. The principles of international law, which have an unquestionable importance in treaty interpretation, do not allow an arbitral tribunal to write new, additional requirements—which the drafters did not include—into a treaty, no matter how auspicious or appropriate they may appear.[100]

416. Indeed, in similar circumstances, other arbitral tribunals have held the opposite: they have emphasized that the reference to the State of incorporation is the most common method of defining the nationality of a company and that, in any event, once a treaty makes that choice in specific and unambiguous terms, any other method of assessing the company's nationality is ruled out.[101] Specifically with regard to Article 1(7) of the ECT, the arbitral tribunal held in the case of *Plama v. Bulgaria* that to qualify as an investor it was

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[99] *See also Petrobart Limited v. The Kyrgyz Republic*, Arbitration No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce, Award of 29 March 2005, available on http://ita.law.uvic.ca.

[100] *See Acquisition of Polish Nationality*, Advisory Opinion (1923), PCIJ ser. B, No. 7, p. 20 ("To impose an additional condition for the acquisition of Polish nationality, a condition not provided for in the Treaty . . ., would be equivalent not to interpreting the Treaty, but to reconstructing it.") Exhibit C-144. Respondent argues, in the alternative, that the general rules and principles of international law are an integral part of Russian domestic law, pursuant to Article 15(4) of the Constitution, and that an interpretation of Article 1(7) of the Treaty that "dispense[d]" with such rules would therefore be inconsistent with Russian law, triggering the inconsistency clause of Article 45(1) of the Treaty. The Tribunal cannot accept this argument, however, in light of its decision on the proper interpretation of Article 45(1) (*See* Chapter A, above.)

[101] *See Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 April 2004, *available at* http://icsid.worldbank.org, paras. 28-29 (with a dissenting opinion by Prosper Weil).

sufficient for a company to be organized in accordance with the law applicable in Cyprus, irrespective of who might own or control the Investor.[102]

417. The Tribunal accordingly holds that Claimant, being a company organized in accordance with the laws of the Republic of Cyprus, qualifies as an Investor for the purposes of Article 1(7)(a)(ii) of the ECT.

### 3. Does Claimant "Own or Control" a Protected "Investment" under Article 1(6)?

418. In Article 1(6) of the Treaty, "Investment" is defined to mean:

> [. . .] every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
>
> (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens and pledges;
>
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
>
> (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
>
> (d) Intellectual Property;
>
> (e) Returns;
>
> (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.
>
> [. . .]

[102] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, (2005) 20:1 *ICSID Review* 262, para. 128.

419. At issue in this section of the Interim Award is whether, as alleged by Claimant, Claimant owns 223,699,175 shares (or 10 percent) of Yukos and if so, whether such Yukos shares qualify as an "Investment" for purposes of Article 1(6) of the Treaty.

420. Before turning to the Parties' submissions on each of these issues, the Tribunal sets out below the key elements of the relevant factual background, based on the uncontested documentary evidence in the record:

a) From the date of its incorporation (7 February 2001) until 25 April 2001, Claimant was wholly-owned by YUL.

b) On 25 April 2001, YUL, as Settlor, and WJB Chiltern Trust Company (Jersey) Limited ("**Chiltern**"), as Custodian Trustee, established the VP Trust under the laws of Jersey.[103]

c) By a separate instrument of transfer dated 25 April 2001, YUL transferred all of its shares (*i.e.*, 100 percent) of Claimant to Chiltern.[104]

d) By a separate deed of transfer, also dated 25 April 2001, YUL transferred to Chiltern 223,699,175 shares of Yukos, representing 10 percent of the issued share capital of Yukos (defined in the VP Trust as the "**Russian Shares**" and referred to herein as either the Russian Shares or the "**Yukos Shares**").[105]

e) On 26 April 2001, Chiltern became the registered owner of all of the shares of Claimant that had been transferred by YUL to Chiltern the day before (defined in the VP Trust as the "**Cypriot Shares**," and referred to herein as either the Cypriot Shares or the "**VPL Shares**").[106]

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[103] Annex C-1163.

[104] Annex C-1164.

[105] Annex C-1165.

[106] Annex C-1161.

f) As mentioned, the Russian Shares were initially transferred to Chiltern upon constitution of the VP Trust. At the same time, the VP Trust expressly contemplates the Russian Shares being owned by Claimant either directly as a "company which is owned by the Custodian Trustee,"[107] since Claimant was owned by Chiltern as of 25 April 2001, or "as nominee of the Custodian Trustee."[108]

g) The VP Trust states in its recitals that Yukos has established in Russia a program to be known as the Veteran Social Support Program (the "**Program**") to provide subsidy and assistance to employees who wish to relocate upon termination of their employment with Yukos, and that "a portion of the proceeds of sale of the [Yukos Shares] is to be transferred to the Russian Service Provider for donation to certain participants in the Program."[109]

h) Consistent with the statements in the recitals, Clause 3(2) of the VP Trust provides that the Russian Shares are to be sold by Chiltern (or by Claimant, through operation of Clause 6(3) or Clause 6(6) of the VP Trust) on instructions from the Russian Service Provider ("**RSP**").

i) Clause 3(3) of the VP Trust provides for the proceeds of the sale of the Russian Shares to be divided into three tranches, as follows:

> (a) to pay to the Settlor [*i.e.*, YUL] the Basic Sum (being a sum equal to the lesser of the Gross Consideration [*i.e.* the gross proceeds of the sale of each Yukos share] and the sum of US$1.20) less the costs of the sale of the Russian Share and related expenses;

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[107] Clause 6(3) states: "The provisions of this agreement relating to the Shares [*i.e.*, the Cypriot Shares and/or the Russian Shares] shall also apply mutatis mutandis in respect of Shares which are not owned by the Custodian Trustee but are owned by a company or a subsidiary of any company which is owned by the Custodian Trustee."

[108] Clause 6(6) states: "The Custodian Trustee may hold or allow to remain in the name or under the control of any person or corporation except an Unacceptable Person as nominee of the Custodian Trustee all or any of the Shares as the Custodian Trustee shall in its discretion think fit except an Unacceptable Person."

[109] Annex C-1163.

(b) to pay to the RSP the Mezzanine Amount (being a sum equal to the difference between the Basic Sum and the lower of the Gross Consideration and the sum of US$3.25);

(c) to pay to the Settlor [*i.e.*, YUL] the balance of the Gross Consideration.

j) Clause 4 of the VP Trust provides that any income arising on the Russian Shares prior to any such sale and other than the proceeds of such sale shall be paid to the Settlor (*i.e.*, YUL)

k) Clause 5(1) of the VP Trust provides that Chiltern (or Claimant, through operation of Clause 6(3) or Clause 6(6) of the VP Trust) shall exercise any voting rights attaching to the Russian Shares pursuant to "Voting Instruction" received from a "Voting Committee" as set forth in Clause 9.

l) Clause 9(3) of the VP Trust explains that the Voting Committee shall be composed of four members, with YUL, the Central Commission of the Veteran Social Support Program and the Board of Directors of Yukos appointing one member each and a fourth member, with a casting vote, appointed by unanimous consent of the first three.

m) Pursuant to the "Rules and Regulations of the Voting Committee of the Veteran Petroleum Trust,"[110] the objectives in determining the voting instructions for the Yukos Shares are as follows, in descending order of priority:

(1) Maximize the value of the [Yukos] shares in order to achieve the full realization of the Mezzanine Amount [. . .] which will be used to fund the Veteran Social Support Program for the employees of OAO NK Yukos

(2) Maximize the value of the Gross Consideration [. . .]

[110] Annex C-1168.

n) Pursuant to an Agreement between the RSP and Yukos dated 11 May 2001 ("**RSP Agency Agreement**"),[111] the Mezzanine Amount is to be distributed by the RSP directly to the retiring Yukos veteran employees included in a regularly updated list provided to the RSP by Yukos.

o) On 8 October 2007, the VP Trust was amended[112] to introduce a new definition of the RSP and to take into account the fact that (i) Yukos went into liquidation on 1 August 2006 and (ii) VPL had commenced an arbitration claim against the Russian Federation under the Energy Charter Treaty (*i.e.*, the present arbitration). The amendment provides that any amount recovered in respect of this arbitration (whether in the form of an award or a settlement) shall be treated as the Gross Consideration on a sale of the Yukos Shares, and disposed of in accordance with Clause 3(3) of the VP Trust. The amendment provides further that the RSP "shall apply the Mezzanine Amount in accordance with the Program or in such other manner as it may in its absolute discretion think fit for the benefit of all or any one or more of the employees and former employees of Yukos and their respective spouses and former spouses children and remoter issue and dependants." Finally, the amendment modified the composition of the Voting Committee from four members to three members, with YUL and the Board of Directors of VPL each appointing one member, and the third member, with a casting vote, selected unanimously by the first two members.

#### a) Parties' Submissions

421. Having set out the key elements of the relevant factual and documentary background in the record, the Tribunal will now summarize the Parties' contentions relating to Claimant's ownership of the Yukos Shares, and relating to whether the Yukos Shares

[111] Annex C-1167.

[112] Annex C-1186.

constitute an "Investment" for purposes of Article 1(6) of the Treaty. The Tribunal will set out the Parties' submissions under the following subheadings:

(i) Claimant's Legal Title to the Yukos Shares

(ii) Interpretation of Article 1(6) and the Relevance of Beneficial Ownership and Control of the Yukos Shares

(iii) Beneficial Ownership and Control of the Yukos Shares under the VP Trust

(1) The Power to Vote the Yukos Shares

(2) The Power to Direct the Sale of the Yukos Shares

(3) Beneficial Interest in the Income and Sale Proceeds from the Yukos Shares

(4) Validity of the Settlement into the VP Trust of the Mezzanine Amount; and

(iv) Injection of Foreign Capital as a Requirement for a Qualifying "Investment" under Article 1(6) of the Treaty.

### (i) Claimant's Legal Title to the Yukos Shares

422. Respondent argues that Claimant has failed to establish that it has legal title to the Yukos Shares or that it had legal title during the periods relevant to this arbitration.

423. Respondent's argument on this point developed over the course of these proceedings. In its written pleadings, Respondent challenges Claimant's ownership of Yukos Shares only as of and after 2 December 2003. For example, at paragraph 334 of Respondent's Second Memorial, Respondent explains:

> 334. The Yukos Quarterly Report for the second quarter of 2006 lists shareholders in possession of 5% of more of Yukos shares as of certain given dates. On the dates when the shares held by Claimant were held at UBS (Moscow), the quarterly report names Claimant as the shareholder. However, after the shares were transferred to UBS AG on December 2, 2003, the quarterly report names UBS as the shareholder, and Claimant is not named.
>
> [emphasis added]

As for the period prior to 2 December 2003, Respondent then asserts that Claimant owned the Yukos shares for only a series of very short time periods and "was not a shareholder for extremely long periods, including periods during which the alleged injury occurred."

424. During the hearing, Respondent contended that the evidence presented by Claimant to establish its legal title to the Yukos Shares was wholly inadequate. Respondent argued that Claimant had never acquired valid title to those shares in the context of the transactions establishing the VP Trust. In particular, Respondent averred that the only deed of transfer in the record[113] evidenced that YUL transferred the Yukos Shares to Chiltern on 25 April 2001, and that Claimant had not produced any deed of transfer of the Yukos Shares from YUL or Chiltern to Claimant itself.

425. Respondent also asserted that other evidence in the record confirms that it is Chiltern, the Custodian Trustee, rather than Claimant that owns the Yukos Shares. Specifically:

- Clause 3 of the VP Trust provides that: "the Custodian Trustee shall hold the Cypriot Shares and the Russian Shares as trustee . . ." [emphasis added].

- The opinion letter of Mourant dated 28 June 2006 states expressly that "Chiltern holds certain shares ('Russian Shares') in Open Joint Stock Oil Company Yukos ('Yukos') as custodian trustee on trust for YUL" [emphasis added].

- The Investor's relations page of the Yukos website page dated 3 April 2003, which was included in Claimant's own presentation at the hearing, identified "Veteran Petroleum Trust" (not Veteran Petroleum Limited, Claimant) as owner of 10 percent of Yukos shares in a pie chart of Yukos' capital structure.[114]

426. In the same vein, Respondent submitted that, although Claimant's expert on trust law, Mr. Green, wrote very lengthy opinions, he never opines on Claimant's ownership of the Yukos Shares. Citing to paragraphs 5(5) and 5(6) of Mr. Green's First Opinion,

[113] Annex C-1165.

[114] *See* Annex C-1301.

Respondent noted that Mr. Green merely states that he had been instructed by Claimant's counsel to assume that Claimant owned the Yukos Shares. In paragraph 5(5) of his First Opinion, Mr. Green writes "I understand that VPL remains registered owner of the Yukos Shares at the present time" [emphasis added]. In paragraph 5(6) of his first opinion, he writes "I am instructed that VPL became registered owner of the Yukos Shares on 26 April 2001 pursuant to clause 6(3) of the Trust" [emphasis added].

427. Respondent submits that there is "overwhelming evidence" that the VP Trust, not Claimant, is the "actual owner" of the Yukos Shares. In the alternative, Respondent argued that Claimant was a "mere nominee" of Chiltern, and thus not entitled to the protection of the Treaty.

428. In response, Claimant asserts that it has held the Yukos Shares continuously since 26 April 2001 and, in particular, on all dates relevant to this arbitration—including when it delivered to Respondent its notification of claim under the ECT (2 November 2004) and when Claimant's Notice of Arbitration and Statement of Claim was filed (14 February 2005). Claimant also asserts that it was a shareholder of Yukos at all times during the events which led to the present arbitration. Thus, Claimant argues, under any measure of the relevant date for purposes of jurisdiction, "Claimant was unquestionably a Yukos shareholder as of the relevant date, and thus holds a qualified 'Investment' pursuant to Article 1(6)." In support of these submissions, Claimant refers to its bank account statements with UBS in Moscow[115] and Zurich.[116]

429. In response to Respondent's argument during the hearing that Claimant never acquired legal title to the Yukos Shares in the first place, Claimant submitted that this contention was contradicted by Respondent's own admissions. For example, Claimant pointed to paragraph 5 of Respondent's First Memorial dated 28 February 2006 in the parallel arbitration between YUL and the Russian Federation, where Respondent states:

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[115] Annex C-1177.

[116] Annex C-1179.

> At all relevant times, Claimants [YUL] together with Hulley Enterprises Limited and Veteran Petroleum Limited owned, directly or indirectly, an outright majority of the shares of Yukos.
>
> [emphasis added]

430. Claimant also reiterates that its bank account statements at UBS confirm that it was the owner of the Yukos Shares. These bank account statements, Claimant asserts, show clearly that, during the relevant time period, the client (identified as "Veteran Petroleum Limited") held 223,699,175 shares of Yukos in its equities portfolio. Claimant contends that these statements demonstrate that this shareholding has not changed since 11 August 2004, the date of the last transaction in respect of these shares.

431. Claimant also argues that it is clear from Clause 6(3) of the VP Trust that it was the intention of YUL and Chiltern that Claimant should and would own the Yukos Shares within the trust structure. Clause 6(3) states: "The provisions of this agreement relating to the Shares shall also apply mutatis mutandis in respect of Shares which are not owned by the Custodian Trustee but are owned by a company or a subsidiary of any company which is owned by the Custodian Trustee" [emphasis added]. At the hearing, Claimant's counsel explained Clause 6(3) as follows:

> And it was for the trust to hold the shares in the way they wanted to. And the intention was, obviously: if you transfer VPL to a trust, and if you transfer the 10% of Yukos in a trust, the intention was to have VPL, the so-called Cypriot company, having the 10%. And you see that in [Clause] 6(3)[.][117]

432. Finally, Claimant asserts that it is irrelevant to an enquiry under Article 1(6) of the ECT whether Claimant holds the Yukos Shares directly or as a nominee for Chiltern because, in either event, Claimant is the legal owner of the Yukos Shares. Claimant affirms, however, that it is not a nominee, and is rather "a direct owner of the Yukos shares, holds the Yukos shares directly as a subsidiary of Chiltern, being equally bound by the Veteran Trust Deed pursuant to Clause 6(3)."

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[117] *See* Hearing Transcript, 1 December 2008, p. 208:6-11.

### (ii) Interpretation of Article 1(6) and the Relevance of Beneficial Ownership and Control of the Yukos Shares

433. Respondent maintains that, even if Claimant has nominal legal ownership of the Yukos Shares, it does not have beneficial ownership or control of the Yukos Shares. Respondent argues that this is material since nominal legal ownership of an asset is insufficient to establish ownership of an "Investment" under the Treaty:

> In the absence of a specific Treaty provision defining the quality of ownership and control, the quality of ownership and control needs to be determined pursuant to the applicable rules and principles of international law. In addition, under the rules of treaty interpretation, Article1(6) of the Treaty itself needs to be interpreted in accordance with general international law.[118]

On the basis of this premise, Respondent asserts that:

> General international law ignores nominal or record ownership in favour of real or beneficial ownership in order to determine the nationality of a claim.[119]

434. In response, Claimant submits that, as for purposes of determining whether it qualifies as an "Investor" under Article 1(7) of the Treaty, the determination of whether Claimant holds a qualified "Investment" must begin with an examination of the language of the ECT. Considering the express terms of Article 1(6) of the Treaty, Claimant asserts that it holds a qualified "Investment" because it owns the Yukos Shares and has done so at all relevant times for purposes of this arbitration.

435. Claimant argues that nothing in the language of the ECT requires a showing of anything more than legal ownership to establish a qualified "Investment." Claimant contends that it is sufficient to show that it owns or controls the asset in question, other purported requirements being "superfluous and unnecessary" once ownership is established. As for the type of ownership required, Claimant asserts that there is no basis for Respondent's argument that beneficial ownership is necessary. Claimant argues that this is contrary to

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[118] Respondent's First Memorial, para. 86.

[119] *Ibid.* at para. 87.

the plain language of the ECT, which provides for a very broad, simple definition of "Investment" that includes legal ownership.

436. In other words, Claimant argues that Respondent's assertion that Claimant does not "beneficially own" or "control" the Yukos Shares is irrelevant for purposes of determining this Tribunal's jurisdiction because even if it were true, it does not negate Claimant's direct legal ownership of the Yukos Shares.

### (iii) Beneficial Ownership and Control of the Yukos Shares

437. On the premise that beneficial ownership or control is material for the determination that the Tribunal must make under Article 1(6) in this case, Respondent argues, based on the terms of the VP Trust and the principles of the applicable trust law, that the real owners of the Yukos Shares purportedly placed in trust and nominally owned by Claimant (or Chiltern) are YUL and/or Yukos, and thus the "Russian oligarchs" themselves.

438. In respect of the relevant trust-law issues, the Parties called upon their legal experts, Mr. Martin Mann, QC for Respondent and Mr. Brian Green, QC for Claimant. Each expert submitted two opinions in relation to the VP Trust.

439. Respondent's various arguments under this theme, and Claimant's responses thereto, are particularized in the following subsections.

#### *(1) The Power to Vote the Yukos Shares*

440. Clause 5(1) of the VP Trust provides that Chiltern (or Claimant, under Clause 6(3) or Clause 6(6)) "shall exercise and shall only exercise any voting rights attaching to the Russian Shares pursuant to a Voting Instruction," where such Voting Instruction is to be issued by the Voting Committee.

441. Respondent notes that the power to vote the Yukos Shares thus rests with the Voting Committee, which, Respondent argues, is controlled by YUL and thus Yukos interests, and "dominated ultimately by Khodorkovsky/Lebedev."[120]

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[120] First Memorial, para. 5.

442. While Mr. Green concedes that "there can be no doubt" that the effect of Clause 5(1) of the VP Trust is to confer "control" of the exercise of voting rights attaching to the Yukos Shares on the Voting Committee, he opines that "there is no basis for suggesting that the Yukos Shares are not 'owned' by Chiltern (or by VPL, such shares having been vested in VPL pursuant to clause 6(3) of the Trust), as a result of the existence of the Voting Committee."

***(2) The Power to Direct the Sale of the Yukos Shares***

443. Clause 3(2) of the VP Trust provides that Chiltern (or Claimant, under Clause 6(3) or Clause 6(6)) must sell the Yukos Shares it holds in trust "at such times and on such terms as the Russian Service Provider may from time to time direct in writing."

444. The legal relationship between the RSP and Yukos is set out in the RSP Agency Agreement.

445. Respondent argues that Clause 3(2) is another example of a provision in the VP Trust that removes beneficial ownership and control of the Yukos Shares from Claimant (or Chiltern). Since the power to direct the sale of the Yukos Shares rests with the RSP, an agent of Yukos, Respondent argues that this provision of the VP Trust demonstrates that beneficial ownership and control of the Yukos Shares rests with Yukos itself.

446. On this issue of ownership, Mr. Green responded as follows in his First Opinion:

> 142. These provisions do not affect the "ownership" of the Yukos Shares for so long as no such direction is given.
>
> 143. The most that could be said is that if and when the RSP gives a valid direction to Chiltern, Chiltern becomes subject to a binding equitable obligation to sell[63] so many Yukos Shares as are subject to such direction and ceases to be[64] the "owner" of such Yukos Shares as of that time.
>
> 144. Absent any such direction from the RSP, and it is to be borne in mind as regards this that a direction would require the antecedent making of "resolutions" by commissions or committees constituted for the purposes of the Program [. . .], the fact that the RSP has power to direct the sale of Yukos Shares does not impact on the proposition that Chiltern is[65] the "owner" of such shares in the meantime.

[63] Or to exercise its voting and other powers over VPL, so as to procure that VPL sell (given that VPL holds the Yukos Shares).

[64] Or by VPL under clause 6(3) of the Trust to be.

[65] Or is by VPL under clause 6(3) of the Trust.

447. Mr. Green adds the following points on the issue of control of the Yukos shares:

> 145. Nor does it seem to me that the fact that the RSP may in the future direct a sale of the Yukos Shares mean that the RSP in the present "controls" the Yukos Shares.
>
> [. . .]
>
> 147. In addition, it is to my mind inconceivable that Chiltern would not be subject to a fully-fledged active duty to refuse to act on directions by the RSP, if (e.g.) Chiltern knows that the RSP intends to misappropriate the Mezzanine Amount: see clause 7(2) of the Trust confirming that Chiltern will be liable in respect of "*fraud, wilful [i.e. deliberate of reckless] misconduct or gross negligence*". This too is an example or Chiltern having "control" over the Yukos Shares.

### *(3) Beneficial Interest in the Income and Sale Proceeds from the Yukos Shares*

448. Clause 3(3) of the VP Trust provides that, upon the sale of the Yukos Shares, as directed by the RSP, the proceeds of such sale are to be divided into three tranches. The first tranche (the Basic Sum) is paid to YUL, as the Settlor. The next tranche—the Mezzanine Amount—is to be paid to the RSP (as agent for Yukos), for distribution to veteran employees of Yukos in accordance with the Program. The final and third tranche (any balance of the proceeds of the sale) is again to be paid to YUL, as the Settlor. Moreover, Clause 4 of the VP Trust provides that any income arising on the Yukos Shares (*e.g.*, dividends) prior to sale in accordance with the VP Trust is to be paid to YUL, as the Settlor.

449. On the basis of these provisions, Respondent argues that, on a true construction of the VP Trust, the only beneficiaries of the trust are YUL (which receives income from the Yukos Shares, and both the Basic Sum and any balance of the Gross Consideration upon a sale of the Yukos Shares directed by the RSP) and Yukos (which, through the agency of the RSP, receives any Mezzanine Amount upon a sale of the Yukos Shares directed by the RSP).

450. In his First Opinion, Mr. Mann describes the operation of the VP Trust as follows:

> 11. The trust deed can be summarised as providing for the transfer of the Cypriot shares and the Russian shares to Chiltern as custodian trustee (clause 2) on defined trusts for YUL and YUKOS (clause 3).
>
> 12. The defined trust of the Russian shares (clause 3) is a trust for sale (clauses 3(2) and 11(2)(c) and (d)). The trigger for sale is to be a written direction given by an entity to be appointed by YUKOS, defined as the Russian Service Provider ("the RSP"). In the meantime, the Russian shares are only voted in accordance with a "Voting instruction" (clause 5(1)) to be given by a "Voting Committee", whose members are to be one person appointed by YUL, one person appointed by the Central Commission of the Program, one person appointed by the board of YUKOS and a fourth person who is to be selected unanimously by the first three (clause 9). The proceedings of the Voting Committee are governed by 'Rules and Regulations' incorporated in a separate document. These consist of rudimentary procedural rules plus a mission statement, a "*mission*", stated as, "*to determine and deliver to [Chiltern] voting instructions for the shares in [the VPT]*", and "*objectives*", stated as (in so far as material), *"to maximise the value of the shares,"* which I take to mean Russian shares, *"in order to achieve the full realization of the Mezzanine Amount (as such term is defined in [the VPT] which will be used to fund [the Program] . . .*", and to, "*maximize the value of the Gross Consideration (as such term is defined in [the VPT])*". The trusts of the proceeds of sale in the VPT are (again in so far as material) to pay a portion defined as the "*Mezzanine Amount*" to the RSP and the balance to YUL, irrespective of whether the sale is pursuant to a direction given by the RSP or on termination of the trust (clause 3(3) and clause 11(2)). <u>It is observable that the RSP is not a party to the VPT and that neither it nor YUKOS are expressed to hold the Mezzanine Amount on trust, whether on the trusts (if any) of the Program, or any other trust. And, crucially, Clause 1 of the VPT states that the RSP is the agent of YUKOS</u>.
>
> 13. It follows that under the VPT Chiltern is to hold the Russian shares until sale and any proceeds of sale of the Russian shares which it receives following sale on trust for YUL and YUKOS absolutely according to their respective entitlements.
>
> [emphasis added]

451. Notably, Mr. Mann opines that the Mezzanine Amount effectively belongs to Yukos, since neither Yukos nor the RSP (as Yukos' agent) holds the Mezzanine Amount on trust for the veteran employees of Yukos that are allegedly supposed to benefit under the Program.

452. In paragraph 18 of his First Opinion, Mr. Mann summarizes what he considers to be "the significant legal consequences" of the VP Trust in respect of beneficial ownership and control of the Yukos Shares. According to Mr. Mann, these are:

> (1) YUL and YUKOS have concurrent beneficial interests in the Russian shares, YUL in the income (clause 4) and both of them in the proceeds of sale (clause 3);
>
> (2) YUL and YUKOS can jointly instruct Chiltern to vote and/or re-transfer the Russian shares at their direction. Chiltern must comply because YUL and YUKOS are the beneficial owners as regards Chiltern. Chiltern cannot refuse. Chiltern, although a custodian trustee, is little more than a mere nominee.

453. In order to reach his second conclusion, namely that YUL and Yukos control Chiltern's (or Claimant's) nominal ownership of the Yukos Shares to the point of being able to have those shares returned to them at their discretion, Mr. Mann relies on the principle of trust law referred to as the rule in *Saunders v. Vautier*. Mr. Mann explains the rule as follows:

> Beneficiaries can, if *sui juris*, and [if] they are together entitled to the whole beneficial interest, put an end to the trust and direct the trustees to hand over the trust property as they direct. This is often referred to as the rule in *Saunders v. Vautier* (1841) 4 Beav. 115.

454. Mr. Mann therefore concludes that neither Claimant nor Chiltern is the beneficial owner of the Yukos Shares, and that neither of them is in control of these shares.

455. In response, Claimant refers to the following points made by its expert, Mr. Green:

- The VP Trust is an example of the kind of trust instrument which, as at 2001, might have been expected to be used in an offshore jurisdiction to establish an employee benefit scheme for the benefit of employees of a company based in another jurisdiction and is uncontroversial (Mr. Green notes that such

arrangements are referred to in UK legal parlance as "unapproved profit sharing schemes" and are perfectly admissible).

- Based on a proper construction of the VP Trust, the veteran employees of Yukos who are meant to benefit from the Mezzanine Amount derived from the sale of the Yukos Shares are the beneficiaries of the trust, not Yukos itself.

- It is incorrect to assume that Yukos was intended to be the absolute beneficial owner of the Mezzanine Amount simply because the RSP is referred to as Yukos' agent in relation to the Program in the recitals of the VP Trust. The RSP—as is made very clear by the terms of the RSP Agency Agreement—is a mere conduit for the payment of proceeds from the sale of the Yukos Shares directly into the bank accounts of the retired Yukos employees.

456. In relation to the rule in *Saunders v. Vautier*, Mr. Green opines that it is not available in the context of the trust over the Yukos Shares because, on what he considers to be the proper interpretation of the trust, the Yukos employees constitute an open beneficiary class. In any event, it is Mr. Green's opinion that, until the principle is actually invoked by the beneficiaries who would be entitled to invoke it, the rule in *Saunders v. Vautier* cannot justify the conclusion that YUL and Yukos "own" or "control" the Yukos Shares.

### *(4) Validity of the Settlement into the VP Trust of the Mezzanine Amount*

457. In his Second Opinion, Mr. Mann raises a new argument in relation to the Mezzanine Amount. He argues that the VP Trust was never effectively constituted in relation to the Yukos Shares. Specifically, he asserts that the trust purported to be established for the Mezzanine Amount is invalid as being in relation to a future expectancy. He opines as follows:

> 2.1 A useful starting point is in fact Mr. Green QC's ¶87 in which he accurately opines,
>
> "*YUL has retained to itself all interest in the fruits of the YUKOS Shares with the exception of the Mezzanine Amount*".
>
> He falls into error, however, in the next sentence,

"*It is only the Mezzanine Amount which has been settled for the benefit of employees within the contemplation of the Program in the present case*".

The reason is that the Mezzanine Amount, using his parlance, is but a possible future fruit of a chose in action (the Russian shares) which might or might not materialise. What has happened is that there has been an attempt to settle a future interest, termed in English law an 'expectancy', which under English law the court will only enforce if the intended transfer is a transfer for value. This was clearly not the case with the VPT, as Mr. Green QC appears to agree. Therefore, whichever way one views the VPT, there is not and has never been a fully constituted enforceable trust of the Mezzanine Amount.

[. . .]

2.3 As I would fully expect the Royal Court of Jersey to follow English law in this respect, it necessarily follows that YUL's attempt to settle the Mezzanine Amount was entirely nugatory.

[emphasis added]

458. Having concluded that the trust as applied to the Mezzanine Amount was unenforceable, Mr. Mann, in his Second Opinion, argues for a somewhat different application of the rule in *Saunders v. Vautier*. He sets out his argument as follows:

3.3 In the present case, we have a situation in which only the Mezzanine Amount is theoretically given to another (for this purpose it does not matter whether arguably either for YUL, YUKOS or the beneficiaries under the '*program*'), where the realization of this amount is both contingent and the right to receive it unenforceable (see C ¶¶2.1-2.3 above) and where the subject matter of the gift to Chiltern is Russian shares the income of which until sale is receivable only by YUL. This is a classic case, therefore, for the application of the doctrine [of *Saunders v. Vautier*] because there are no others with enforceable rights to the Russian shares and fruits besides YUL.

3.4 I should observe before turning briefly to Mr. Green QC's other theories that Mr. Green QC opines (¶¶40 and 41) that the trust continues irrespective of the doctrine until a valid request for the re-transfer of the Russian shares has been fully executed and therefore that neither YUL nor YUKOS could exercise control in the meantime. This is theoretically correct but YUL could require Chiltern to cause VPL to re-

> transfer the Russian shares at any time and, in my opinion, obtain an order from the Royal Court compelling Chiltern so to do. Chiltern's 'control' is thus seen to be truly illusory.

459. In his Second Opinion, Mr. Green disagrees with Mr. Mann's new argument, both in respect of the validity of the trust as it relates to the Mezzanine Amount and in respect of the application of the rule in *Saunders v. Vautier*. He opines that the VP Trust was completely and effectively constituted since YUL, being the owner of present property (the Yukos Shares), was able to assign such present property to a trustee (Chiltern) to hold the same on what are otherwise conceptually certain trusts. In Mr. Green's view, the Mezzanine Amount will be paid into the Program on sale of the Yukos Shares or on termination of the VP Trust and whether or not it translates into actual money does not make it a mere expectancy. Mr. Green argues that the cases concerning assignments of future property or expectancies therefore have absolutely nothing to do with the VP Trust.

460. Mr. Green also reiterates his previously expressed opinion that the application of the rule in *Saunders v. Vautier* cannot lead to the conclusion that the Yukos Shares are "owned or controlled" by YUL and/or Yukos.

#### (iv) Injection of Foreign Capital as a Requirement for a Qualifying "Investment" under Article 1(6) of the Treaty

461. Finally, Respondent asserts that Claimant's nominal ownership of the Yukos Shares does not qualify as an "Investment" because no injection of foreign capital into the Russian Federation took place as a result of the acquisition of the shares. Respondent submits that Russian law requires that a foreign investment be acquired with capital of foreign origin, and that Respondent can invoke Russian law requirements in connection with the interpretation of Article 1(6) of the Treaty by operation of the inconsistency clause of Article 45(1).

462. Drawing support from the expansive definition of "Investment," Claimant asserts that "how the Claimant acquired its Yukos shares—including the 'origin of capital', whether it made an 'injection' of 'foreign capital', and whether it paid for the shares with cash or some other consideration—has no bearing on the Tribunal's determination whether

Claimant holds a qualified 'Investment.'" Claimant argues that no authority exists to support Respondent's argument with respect to the necessity for injection of foreign capital and cites the decision in *Tokios Tokelės v. Ukraine* in support of its position.

463. Claimant also points to various public statements by then President Vladimir Putin in which he stressed that "repatriation" or "return" of Russian capital from countries like Germany and Cyprus was "a very good sign" and "a good signal."[121]

464. Finally, although insisting that it is not required by the ECT and not relevant therefore to the issue of jurisdiction, Claimant asserts, by reference to the transactions through which the VP Trust was established, that it did in fact legally acquire the Yukos Shares in 2001.

### b) Tribunal's Decision

465. The Tribunal's decision will proceed in accordance with the same subheadings used in the previous section.

#### (i) Claimant's Legal Title to the Yukos Shares

466. As noted earlier, Respondent's first and principal argument is that Claimant has failed to establish that Claimant itself, as opposed to Chiltern, actually acquired legal title to the Yukos Shares. For the following reasons, the Tribunal cannot accept Respondent's argument.

467. First, the VP Trust itself provides the following at Clause 6(3):

> the provisions of this agreement relating to the Shares [that is, both the Yukos Shares and the VPL Shares] shall also apply mutatis mutandis in respect of Shares which are not owned by the Custodian Trustee but are owned by a company or a subsidiary of any company which is owned by the Custodian Trustee.[122]

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[121] President Vladimir Putin, Speech at the Energy Conference, London, 26 June 2003, *available at* the President of Russia's official website at http://www.kremlin.ru, Annex C-1437. President Vladimir Putin, Answers to Questions from the Participants in the Business Meeting of the APEC Members, Shanghai, 19 October 2001, *available at* http://www.kremlin.ru, Annex C-1436.

[122] Annex C-1163.

468. The Tribunal agrees with Claimant that this very specific language in the deed of trust itself strongly suggests that it was the intention of YUL, as Settlor, and Chiltern, as Custodian Trustee, to transfer the Yukos Shares into Claimant's ownership once YUL's 100 percent interest in Claimant was itself transferred to Chiltern. Indeed, given the transactions that were concluded as part of the constitution of the VP Trust, namely the simultaneous transfer to Chiltern of a 100 percent interest in Claimant and of a 10 percent interest in Yukos, it was Claimant (and Claimant only) that qualified as "a company owned by the Custodian Trustee," leaving the 10 percent interest in Yukos (and only this asset) to qualify as "Shares which are not owned by the Custodian Trustee but are owned by a company [i.e., Claimant] . . . which is owned by the Custodian Trustee."

469. Second, the language in the Mourant opinion letter dated 28 June 2006 that Respondent invokes against Claimant only makes clear that Chiltern holds both the VPL Shares and the Yukos Shares on trust for the Settlor of the VP Trust. This language is not inconsistent with ownership of the Yukos Shares by Claimant since, pursuant to Clause 6(3) of the VP Trust, and as confirmed by Mr. Green, whose evidence the Tribunal accepts on this point, "the trusts as they affect the Yukos Shares apply equally as regards such shares where they are held by a company owned by Chiltern (i.e., VPL) as they would do if the Yukos Shares were held directly by Chiltern" [emphasis added].[123]

470. Third, Respondent's argument that Claimant does not own the Yukos Shares because its legal title to those shares vested on 26 April 2001, after they had already been transferred to Chiltern by YUL on 25 April, is contradicted by the bank account statements in the record. Notwithstanding Respondent's attempt to impugn these records, the Tribunal is satisfied that the bank account statements constitute reliable evidence.

471. Annex C-1177 shows the Yukos Shares being credited to the VPL account with UBS on 26 April 2001. On 21 June 2001, the Yukos shares were transferred to UBS AG—that is UBS Zurich—and Annex C-1179 shows the shares held on the VPL account with UBS Zurich as of 30 June 2001. The bank records are also available for 30 September 2001,

[123] Mr. Brian Green, QC, *Opinion re the Veteran Petroleum Trust*, 4 May 2007, note 11.

31 December 2001, 31 March 2002, 30 June 2002, 30 September 2002, 31 December 2002, 31 March 2003, 30 June 2003, 31 October 2003, 31 December 2003, 31 March 2004, and 30 June 2004. Annex C-1180 then contains similar statements for the UBS account in London. These records demonstrate that, as of 30 September 2004, VPL, which is the holder of the account, owns the 223,699,175 Yukos shares. The same is true as of 31 December 2004, 31 March 2005, 30 June 2005 and so on. The Tribunal considers these bank statements to be compelling evidence of ownership.

472. Fourth, even assuming that the Yukos Shares were "owned" by Chiltern as of 25 April 2001 and therefore not "validly" transferred by YUL to VPL on 26 April 2001, Chiltern, which held the VPL Shares and the Yukos Shares as trustee, clearly ratified the arrangement and carried on for several years as if VPL was indeed the owner of the Yukos Shares, by knowing and indeed controlling the corporate entity on whose account with UBS in Zurich and London the Yukos Shares were deposited. The Tribunal finds apt the following language used by Mr. Green to describe the situation: "the apparent purpose of Chiltern holding the VPL Shares is closely connected with its holding the Yukos Shares (which as noted Chiltern has caused or permitted YUL to vest in VPL)" [emphasis added].

473. While the Swiss Federal Tribunal, in a recent decision, was only called upon to determine whether Chiltern and VPL had standing to appeal or not, the Tribunal cannot ignore its decision of 10 June 2004 (Annex C-302), which comforts its present finding:

> VP [*i.e.*, VPL] est une société de Chypre dont le capital est entièrement détenu par Yukos. Celle-ci exploite plusieurs gisements pétrolifères dans des régions inhospitalières de la Russie (notamment le Grand Nord). Afin d'assurer à ses employés la possibilité de se réinstaller après leur retraite dans d'autres régions de Russie, YUKOS a mis sur pied en 1999 et 2000, un projet intitulé « Yukos Veteran Program »: Celui-ci a consisté à transférer environ 10% du capital social de Yukos à VP. Les bénéficiaires, soit les personnes ayant travaillé au moins dix ans au service de Yukos à compter du 1er janvier 1999 et dont la demande a été agréée, reçoivent le produit de la vente d'une part déterminée des actions de Yukos.
>
> WJB [*i.e.*, Chiltern] est une société des Iles Anglo-Normandes. Le 25 avril 2001, Yukos a passé un accord (Appointment of Custodian Trustee) avec WJB, en confiant à celle-ci comme « Trustee » le mandat de gérer les fonds codés à VP, selon des modalités et des procédures définies.

[emphasis added]

*Tribunal's translation:*

*VPL is a Cyprus company the capital of which is entirely held by Yukos. The latter exploits several oil wells in some inhospitable areas of Russia (particularly in the North). In order to ensure for its employees the possibility to resettle in other regions of Russia after their retirement, YUKOS set up in 1999 and 2000 a project entitled "Yukos Veteran Program". That consisted in transferring about 10 % of the capital of Yukos to VPL. The beneficiaries, namely the people having worked at least ten years in Yukos' service as from 1 January 1999 and whose request was accepted, receive a determined share of the sale of the Yukos shares.*

*Chiltern is a company of the Channel Islands. On 25 April 2001, Yukos entered into an agreement (Appointment of Custodian Trustee) with Chiltern, entrusting to the former as "Trustee" the mandate to manage the funds entrusted to VP according to some defined procedures and modalities.*

[emphasis added]

474. For all of these reasons, the Tribunal concludes that Claimant has satisfied its burden of proof and demonstrated that it has legal title to the Yukos Shares.

475. Nor can the Tribunal accept Respondent's argument based on alleged gaps in ownership of the Yukos Shares by Claimant during certain periods. The record shows that the Yukos shares held by Claimant were transferred to its account with UBS London in August 2004.[124] Before then, as of 26 April 2001, they were consistently held on Claimant's bank account with Brunswick UBS Nominees in Moscow[125] or with UBS Zurich.[126]

### (ii) Interpretation of Article 1(6) and Relevance of Beneficial Ownership and Control of the Yukos Shares

476. Having established that Claimant has valid legal title to the Yukos Shares, the Tribunal now turns to the interpretation of Article 1(6) of the Treaty and, specifically, to whether

[124] *See* Annex C-1180 and Annex C-195.

[125] *See* Annex C-1177.

[126] *See* Annex C-1179.

nominal legal ownership of an asset by an "Investor" is sufficient to establish ownership of an "Investment" under Article 1(6) or whether either beneficial ownership or control is required.

477. The Tribunal finds that the ECT, by its terms, applies to an "Investment" owned nominally by a qualifying "Investor," and that nothing more is required. Respondent's submission that simple legal ownership of shares does not qualify as an Investment under Article 1(6)(b) of the ECT finds no support in the text of the Treaty. The breadth of the definition of Investment in the ECT is emphasized by many eminent legal scholars.[127] As defined in Article 1(6) of the ECT, an "Investment" includes "every kind of asset" owned *or* controlled, directly or indirectly, and extends not only to shares of a company but to its debt (Article 1(6)(b) of the ECT), to monetary claims and contractual performance as well as "any right conferred by law" (Article 1(6)(f) of the ECT, emphasis added). The Tribunal recalls again that, according to Article 31 of the VCLT, a treaty is to be interpreted in good faith in accordance with the ordinary meaning of its terms. The Tribunal reads Article 1(6)(b) of the ECT as containing the widest possible definition of an interest in a company, including shares (as in the case at hand), with no indication whatsoever that the drafters of the Treaty intended to limit ownership to "beneficial" ownership.

### (iii) Beneficial Ownership and Control of the Yukos Shares under the VP Trust

478. In light of the Tribunal's interpretation of Article 1(6) of the Treaty, and its finding that Claimant has valid legal title to the Yukos shares, the Tribunal need not, strictly speaking, decide the issues of beneficial ownership or control. For sake of completeness, however, the Tribunal sets out below its views on these questions.

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[127] *See* Craig Bamberger, "An Overview of the Energy Charter Treaty," pp. 8-9, *in* Thomas Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (1996); Thomas Wälde, "International Investment under the 1994 Energy Charter Treaty," pp. 271-273, *in* Thomas Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (1996); Esa Paasivirta, "The Energy Charter Treaty and Investment Contracts: Towards Security of Contracts," pp. 356-358, *in* Thomas Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (1996).

479. The Tribunal sees no reason to depart from the pertinent and convincing analysis set forth by Mr. Green in his two opinions. In short, while Mr. Green conceded that Claimant does not control the Yukos Shares (since Voting Instructions for voting the Yukos Shares come from the Voting Committee), he provided persuasive evidence that none of the elements of the VP Trust undermine Claimant's ownership of the Yukos Shares

480. Thus, in relation to the Mezzanine Amount, the Tribunal finds as follows in relation to Respondent's first argument, which was based on Mr. Mann's First Opinion:

- The beneficiary of the Mezzanine Amount is not Yukos or its agent, the RSP. Rather, the beneficiaries are the veteran employees of Yukos who were intended to benefit from the Mezzanine Amount under the Program.

- Accordingly, since the beneficiary class (*i.e.*, the employees) is open, there is no scope for the application of the rule in *Saunders v. Vautier*.

481. In his First Opinion, Mr. Green interprets the VP Trust in some detail. He considers in particular the issue as to whether the veteran employees of Yukos could be said to be the beneficiaries of the trust. He criticizes Mr. Mann's analysis of this question in the following terms:

> 59. (1) Mr Mann was undoubtedly disadvantaged by the limited documentary material on the basis of which he appears to have been advising. But even on the basis of the documentation which he did have (the Trust and the Voting Committee Regulations), I have to say that I find the lack of analysis surprising.
>
> (2) So far as I can see, Mr Mann's analysis in support of what for him is clearly the critical proposition that Yukos "owns" the Mezzanine Amount consists only of the final two sentences of paragraph 12 of his Opinion, on the basis of which he states his conclusion at paragraph 13 of his Opinion.
>
> 60. I too am disadvantaged by not having the Guidelines or any other internal Yukos documentation relating to the terms and implementation of the Program. However, in my opinion based on the material that I do have (i.e. the provisions of the Trust referred to at paragraph 16 above as corroborated by the provisions of the Agency Agreement and the other documentation referred to at paragraphs 17 to 19 above)-

(1) An interpretation which recognizes that the Mezzanine Amount was intended under the Trust to be held for the benefit of employees under the Program (and not other persons), is bound to be preferred to

(2) An interpretation under which the employees are not entitled under the Trust to benefit from the Mezzanine Amount at all, Yukos being entitled under the Trust to deal with the Mezzanine Amount entirely as it sees fit (which is Mr Mann's unsupported interpretation).

482. Mr. Green then delivers his own analysis. He opines:

87. There are three main analyses of the beneficial interest in the Mezzanine Amount: two which I regard as serious contenders, and a third which is suggested by Mr Mann in his Opinion. Each of these analyses is potentially capable of being deployed in relation to any Jersey proper law employment benefit arrangement, whether or not the assets in question are limited to a fractional share of the property comprised within the trust. However, in the present case, such analyses are only relevant to the Mezzanine Amount, since YUL has retained to itself all interest in the fruits of the Yukos Shares with the exception of the Mezzanine Amount. It is only the Mezzanine Amount which has been settled for the benefit of employees within the contemplation of the Program in the present case.

88. The three analyses are as follows:

(1) The Mezzanine Amount is held on trusts of which the beneficiaries are the employees of Yukos falling within the ambit of the Program, with such beneficiaries' interests under the Trust reflecting those provided for in respect of them under the rules of the Program (the Guidelines). Under this analysis, whilst the employees may or may not have had parallel contractual rights as against Yukos as regards the provision of such benefits, such employees will be beneficiaries of a trust established to provide for such benefits and have received enforceable rights through that medium at least.

(2) Whilst the employees under the Program were the intended beneficiaries, nevertheless the terms of the Trust suggest that the RSP rather than such employees was the only party intended to have enforcement rights directly as against Chiltern. The trust of the Mezzanine Amount would be a valid purpose trust (a trust for the provision of monies for funding the Program), but its validity would depend on the RSP being the "enforcer" of such trust under Articles 12 and 13 of the Trusts (Jersey) Law 1984.

> (3) The Mezzanine Amount is held on trust for Yukos, so that Yukos is intended to be free to call for the Mezzanine Amount to be paid over to it, for application by it (Yukos) for any purpose in complete disregard of the interests of the employees under the Program.
>
> 89. Of these three analyses, I believe that the first would be the preferred approach of the Royal Court.
>
> [. . .]
>
> 91. This construction (and this construction alone) gives proper weight to the fact that it is the participants in the Program who are ultimately intended to benefit from the Mezzanine Amount, and that the RSP (as is made very clear by the terms of the Agency Agreement) is a mere conduit for the payment of proceeds from the sale of the Yukos Shares directly into US$ denominated bank accounts of such employees.
>
> [emphasis added]

483. Mr. Green adds that:

> 108. [. . .] There is no serious support in the Agency Agreement for the proposition that Yukos is intended to be absolute beneficial owner of the Mezzanine Amount.

484. Mr. Green concludes at paragraph 115 that:

> (1) YUL's establishment of the Trust as a means of making provision for employees of Yukos is coherent, in a way in which
>
> (2) YUL's establishment of the Trust for the purpose of gifting to Yukos (part of) the proceeds of sale of its (Yukos's) own shares is not.

485. The Tribunal finds Mr. Green's interpretation of the VP Trust more persuasive than Mr. Mann's and adopts it.

486. Furthermore, the Tribunal does not accept Mr. Mann's later theory, presented in his Second Opinion, that the Mezzanine Amount was never settled into an enforceable trust. Rather, the Tribunal accepts Mr. Green's opinion that the VP Trust was completely and effectively constituted since YUL, being the owner of present property (the Yukos Shares), was able to assign such present property to a trustee (Chiltern) to hold the same on what are otherwise conceptually certain trusts.

487. In any event, the Tribunal is satisfied that Article 8(a) of the Trusts (Jersey) Law 1984 allows "any property" to be placed in a trust, including "contingent" or "future" property. This is provided for expressly by the definition of "property" in Article 1(i) thereof. Thus, to the extent that the Mezzanine Amount is to be considered separate "property" distinct from the Yukos Shares—a proposition which was not substantiated by Respondent—the Tribunal finds that the Mezzanine Amount could be validly settled into trust under the definition of property given in the statute.

### (iv) Injection of Foreign Capital as a Requirement for a qualifying "Investment" under Article 1(6) of the Treaty

488. The Tribunal cannot accept Respondent's argument that an "Investment," to qualify under the ECT, requires an injection of foreign capital. Indeed, as already explained above, the definition of investment in Article 1(6) of the ECT does not include any additional requirement with regard to the origin of capital or the necessity of an injection of foreign capital. Specifically, paragraph 3 of the ECT Understandings, relating to Article 1(6) of the ECT, is of no assistance to Respondent, as it refers to the "control" facet of Article 1(6), not "ownership." The Tribunal refers, again, to the reasoning of the tribunal in the *Saluka* Award: "the predominant factor which must guide the Tribunal's exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal's jurisdiction." The Tribunal cannot in effect impose upon the parties a definition of "Investment" other than that which the parties to the ECT, including Respondent, have agreed.

489. Respondent in its written pleadings argued that the ECT is a treaty whose purpose is to promote foreign investment in the energy sector. The Introduction to the ECT prepared by the Energy Charter Secretariat provides, under the heading, "Investment," that "[t]he Treaty ensures the protection of foreign energy investments . . . By accepting the Treaty, a state takes on the obligation to extend national treatment, or most-favoured nation treatment (whichever is more favourable), to nationals and legal entities of other Signatory states who have invested in its energy sector."[128] Various provisions of the

[128] Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation* (2004), p. 14.

Treaty, such as those of Article 9, which speak of investments in the areas of other Contracting Parties, particularly those with economies in transition, and Article 10, which speaks of each Contracting Party encouraging "Investors of other Contracting Parties to make Investments in its Area," show that the Treaty was written in contemplation of international investment, notably of investment by investors of developed States in economies in transition. It was not written in contemplation of investments by Russian nationals resident in Russia of capital generated in Russia. (At the same time, as the Tribunal has just pointed out,[129] Claimant has referred to statements of President Putin welcoming the repatriation of capital controlled by Russians which has been placed abroad.)

490. As the Tribunal noted earlier, these conflicting contentions of the Parties go to the heart of the present dispute. The Tribunal accepts that the ECT is directed towards the promotion of foreign investment, especially of investment by Western sources in the energy resources of the Russian Federation and other successor States of the USSR. The Treaty is meant, as specified in the Secretariat's Introduction, to ensure "the protection of foreign energy investments." If the States that took part in the drafting of the ECT had been asked in the course of that process whether the ECT was designed to protect—and should be interpreted and applied to protect—investments in a Contracting State by nationals of that same Contracting State whose capital derived from the energy resources of that State, it may well be that the answer would have been in the negative, not only from the representatives of the Russian Federation but from the generality of the delegates. The ultimate source of the investments at issue in the instant cases may be Russian. The fortunes of the "oligarchs"—a term constantly employed in the pleadings of Respondent which the Tribunal for its part repeats without pejorative intent—may derive from investments by Russians in Russian resources.

491. But, as the Tribunal noted earlier,[130] the Tribunal is bound to interpret the terms of the ECT not as they might have been written so as exclusively to apply to foreign investment

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[129] *See supra*, para. 463.

[130] *See supra*, para. 413.

but as they were actually written. They are more comprehensively and neutrally cast. Specifically, Article 1(6) provides that, "'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor. . . ." Article 1(7) provides that "Investor" means:

> (a) with respect to a Contracting Party:
>
> [. . .]
>
> (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

Claimant is organized "in accordance with the law applicable" in the Republic of Cyprus and owns shares of Yukos. Thus, Claimant owns an "Investment" protected by the ECT and the Tribunal so finds. The Tribunal is not entitled, by the terms of the ECT, to find otherwise.[131]

492. 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 or 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.

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[131] The Tribunal also notes that the Secretariat's Introduction to the Treaty was "included for convenience and must not be read as part of any official document or as an interpretation of any provisions therein." Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation* (2004), p. 11 (para. 2 of "Explanatory Note").

## C. ARE THE CLAIMS BARRED BY THE "DENIAL-OF-BENEFITS" PROVISION (ARTICLE 17) OF THE ECT?

### 1. Introduction

493. Having concluded, in the previous chapter, that Claimant is a protected Investor with an Investment under the ECT, the Tribunal now turns to Respondent's argument that the benefits of Part III of the Treaty have been denied to Claimant by operation of Article 17 of the ECT.

494. Part III of the ECT comprises the Treaty's substantive articles on "Investment Promotion and Protection." Most notably they prescribe, in Article 10, the standards of treatment, "the conditions," that each Contracting Party shall accord to "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 . . . constant protection and security. . . ," managerial control and observance of "any obligations" a Contracting Party has entered into with an Investor as well other treatment no less favorable than that required by international law. Article 13 provides that Investments shall not be nationalized or expropriated except under prescribed conditions.

495. Article 17 of the ECT, the final article of Part III, provides for "Non-Application of Part III in Certain Circumstances." It specifies that:

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

496. The foregoing "denial-of-benefits" clause has been a focus of conflicting arguments of the Parties. The Tribunal summarizes and evaluates those arguments in the sections that follow.

497. However, insofar as those arguments are deemed to address the question of whether the Tribunal has jurisdiction to pass upon the merits of the claims of Claimant, they are not

on point. That is because Article 17 specifies—as does the title of that Article—that it concerns denial of the advantages of "this Part," *i.e.*, Part III of the ECT. Provision for dispute settlement under the ECT is not found in "this Part" but in Part V of the Treaty. Whether or not Claimant is entitled to the advantages of Part III is a question not of jurisdiction but of the merits. Since Article 17 relates not to the ECT as a whole, or to Part V, but exclusively to Part III, its interpretation for that reason cannot determine whether the Tribunal has jurisdiction to entertain the claims of Claimant.

498. The holding of the tribunal in *Plama v. Bulgaria* is on point:

> Article 26 provides a procedural remedy for a covered investor's claims; and it is not physically or juridically part of the ECT's substantive advantages enjoyed by that investor under Part III. [. . .] This limited exclusion from Part III for a covered investor, dependent on certain specific criteria, requires a procedure to resolve a dispute as to whether that exclusion applies in any particular case; and the object and purpose of the ECT, in the Tribunal's view, clearly requires Article 26 to be unaffected by the operation of Article 17(1).[132]

499. This Tribunal finds the reasoning of the *Plama* tribunal on this point convincing and adopts it. At the same time, the Tribunal takes note of the fact that the Parties have treated the application of Article 17 as a question of admissibility, not jurisdiction,[133] on which they differ. Accordingly, the Tribunal will pass upon the arguments of the Parties and determine the issue of the application of Article 17 definitively in this phase of the arbitration.

500. First, in Section 2, the Tribunal addresses the general issue of whether there is a notification requirement in Article 17 and whether Respondent satisfied any such requirement. Then, in Section 3, the Tribunal considers whether the substantive conditions for the application of Article 17(1) have been met.

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[132] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, (2005) 20:1 *ICSID Review* 262, para. 148.

[133] *See* First Memorial, Section III.C; Counter-Memorial, Section VII.C; Second Memorial, Section XIV; Rejoinder, Section IV.B.

### 2. Notification Requirement

#### a) Parties' Submissions

501. Respondent maintains in this phase of the arbitration that, even if it has any obligations towards Claimant under the ECT (which Respondent contests) it is entitled to deny the advantages of them to Claimant by reason of Article 17(1), and that it has done so. Respondent recalls that the terms of Article 17 derive from the "denial-of-benefits" clauses of bilateral investment treaties of the United States of America. While some but not all of these clauses require prior consultation and notification before invocation, as does NAFTA, Respondent notes that:

> [N]o such notification and consultation requirement or other formal requirements are included in Article 17 of the Treaty. Thus, a company that is owned or controlled by nationals of a third State, and *a fortiori* by nationals of the host State, does not enjoy any benefits under Part III of the Treaty if it lacks substantial business activities in the Contracting Party in which it is organized.[134]

502. In order to benefit from Treaty protections, Respondent contends, a company that comes within the scope of Article 17 must obtain a commitment from the host State that it will be treated as a protected investor. No such commitments have been obtained. On the contrary, Russia has, contemporaneously with negotiation of the ECT, ratified and proclaimed the P&C Agreement, which stipulates that companies having only a registered office in a State Party are not considered companies of that State unless "its operations possess a real and continuous link" with the latter's economy. The Russian Federation was not and is not in a position to know when, if ever, an investment is to be made within its territory or if a controlling investor even exists outside Russia, says Respondent, adding: "This is patently so where as here the controlling Russian oligarchs have employed dozens if not hundreds of offshore tax haven companies and ever shifting structures specifically designed to disguise ownership and control, evade taxes and launder money."[135]

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[134] First Memorial, para. 124.

[135] *Ibid.* at para. 128.

503. Respondent concludes: "For all the above reasons, Article 17(1) of the Treaty denies, the Partnership and Cooperation Agreement has denied, and the Russian Federation hereby denies any and all benefits of Part III of the Treaty to the Russian oligarchs themselves, and to each and every one of their offshore shell companies and structures."[136]

504. Claimant replies that Article 17 specifies that each Contracting Party "reserves the right to deny the advantages" of Part III. Thus the "right to deny" must be exercised "but until such time as this right has been effectively exercised," the investor benefits from the protection of Part III of the Treaty. Claimant disputes the reliance of the Russian Federation on the P&C Agreement, "a wholly irrelevant instrument in this arbitration."[137] It maintains that the purported denial of benefits by the Russian Federation quoted in the foregoing paragraph—which is defective, Claimant says, because it does not expressly identify the particular Claimant companies (but refers just to "Russian oligarchs" and "offshore shell companies")—rather demonstrates Respondent's recognition that Article 17 requires an exercise of the reserved right. The reason for that exercise is to ensure legal certainty for investors in the ECT area. It quotes the Expert Opinion of Professor James Crawford:

> To place on an individual investor the task of obtaining express assurance as to the extension of advantages would change the ECT from a general framework for investment in the energy sector to an invitation to establish, case-by-case, bilateral relations between investors and the host State. This was plainly not the intention.[138]

505. Claimant relies also on the jurisdictional holding of the arbitral tribunal in the case of *Plama v. Bulgaria:*

> In the Tribunal's view, the existence of a "right" is distinct from the exercise of that right. [. . .] [A] Contracting Party has a right under Article 17(1) ECT to deny a covered investor the advantages of Part III; but it is not required to exercise that right; and it may never do so. The language of Article 17(1) is unambiguous; and that meaning is consistent with the different state practices of the ECT's Contracting States under

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[136] *Ibid.* at para. 128.

[137] Counter-Memorial, para. 281.

[138] *Ibid.* at para. 284 (citing para. 118 of the Expert Opinion).

> different bilateral investment treaties: certain of them applying a generous approach to legal entities incorporated in a state with no significant business presence there (such as the Netherlands) and certain others applying a more restrictive approach (such as the USA). The ECT is a multilateral treaty with Article 17(1) drafted in permissive terms, not surprisingly, in order to accommodate these different state practices. . . .[139]

506. Moreover:

> [A] putative covered investor has legitimate expectations of such advantages until that right's exercise. A putative investor therefore requires reasonable notice before making any investment in the host state whether or not that host state has exercised its right under Article 17(1) ECT. [. . .] [T]he object and purpose of the ECT suggest that the right's exercise should not have retrospective effect.[140]

507. Respondent counters that the ECT and P&C Agreement, contrary to Claimant's contentions, are not independent of each other, but cover much of the same ground. The P&C Agreement, upon its ratification, was published in the Russian Federation's Official Gazette and the official gazettes of the EU Member States. Investors must be deemed to be on notice of it, argues Respondent. In Article 30(h), the P&C Agreement denies benefits to companies incorporated in an EU Member State that do not have their principal place of business or central administration in such State and whose operations do not "possess a real and continuous link with the economy" of one of the EU Member States.

508. Respondent also maintains that the *Plama* case is "weak authority with respect to its treatment of denial of benefits clauses" and "is suspect in its reasoning."[141] It argues that:

> The *Plama* standard, if accepted, would also impose an impossible standard for States, particularly for States in transition to a free market economy. The *Plama* standard converts something that the investor knows with certainty, whether it has substantial business in the State of incorporation and whether it is owned or controlled by third or host State

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[139] *Ibid*. at para. 285 (citing para. 155 of the *Plama* decision).

[140] *Ibid.* at para. 286 (citing paras. 161-162 of the *Plama* decision).

[141] Second Memorial, paras. 384, 386.

> nationals, into a burden to make such a determination with respect to a potential investor that a host State cannot know or determine.[142]

509. Respondent concludes:

> At bottom, this is a domestic dispute involving enforcement of Russian taxes. [. . .] Accepting the Russian Federation's interpretation of Article 17(1) and of the interrelationship between Article 17(1) and Article 30(h) of the EU-Russia Partnership Agreement would constitute a principled basis, supported by the language of the two treaties, for distinguishing essentially domestic disputes from disputes involving genuine investors of Contracting Parties into the Russian Federation.[143]

510. Claimant contends that the reserved right to deny under Article 17(1) must be exercised. Article 17(1) could have been otherwise drafted, as is Article VI of the ASEAN Framework Agreement on Services, to state that the advantages of Part III "shall be denied" to "a juridical person owned or controlled by persons of a non-Member State constituted under the laws of a Member State, but not engaged in substantive business operations in the territory of Member States." But the drafters of the ECT, submits Claimant, deliberately chose to provide for a reserved, optional right in Article 17(1), a right that must be exercised to take effect, and only prospectively. Russia's reliance on the P&C Agreement is unavailing, argues Claimant, because it defines a "Community company" or a "Russian company" for the purpose of that Agreement itself ("for the purpose of this Agreement"); the ECT makes no reference to that Agreement while it does refer to other "related instruments."

511. Finally, at the stage of oral argument, the above contentions were canvassed anew by both Parties.

#### b) Tribunal's Decision

512. In the view of the Tribunal, the position of Claimant on the interpretation and application of Article 17(1) to the instant case is more persuasive than that of Respondent. Article 17(1) does not deny *simpliciter* the advantages of Part III of the ECT—as it easily

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[142] *Ibid*. at para. 387.

[143] *Ibid*. at para. 388.

could have been worded to do—to a legal entity if the citizens or nationals of a third State own or control such entity and if that entity has no substantial business in the Contracting Party in which it is organized. It rather "reserves the right" of each Contracting Party to deny the advantages of that Part to such an entity. This imports that, to effect denial, the Contracting Party must exercise the right. Has the Russian Federation done so, either by concluding the P&C Agreement with the EU or by the passage in its pleading quoted at the end of paragraph 503 above? Not in the Tribunal's view.

513. The P&C Agreement makes no reference to the ECT and the ECT makes no reference to it. They cover some common ground, and the P&C Agreement does require that benefiting companies have their principal place of business in and possess a real and continuous link with the economy of an EU State. But the lack of any reference to the ECT in the P&C Agreement and the lack of any reference to the P&C Agreement in the ECT defeats reliance upon Article 30(h) of the P&C Agreement as constituting the required exercise of a right under Article 17(1) of the ECT.

514. In any event, if the passage in Respondent's First Memorial quoted above in paragraph 503 is construed as an exercise of the reserved right of denial, it can only be prospective in effect from the date of that Memorial. To treat denial as retrospective would, in the light of the ECT's "Purpose," as set out in Article 2 of the Treaty ("The Treaty establishes a legal framework in order to promote long-term cooperation in the energy field . . .") be incompatible "with the objectives and principles of the Charter." Paramount among those objectives and principles is "Promotion, Protection and Treatment of Investments" as specified by the terms of Article 10 of the Treaty. Retrospective application of a denial of rights would be inconsistent with such promotion and protection and constitute treatment at odds with those terms.

515. In sum, the Tribunal finds, on the basis of the evidence before it, that Respondent has not denied and cannot now be heard to deny, and will not be able to deny to Claimant in any merits phase of these proceedings, the advantages and the benefits of Part III of the ECT on the basis of Article 17.

### 3. Substantive Conditions

516. It is convenient here to revisit the text of Article 17(1), which specifies that:

> Each Contracting Party reserves the right to deny the advantages of this Part to:
>
> (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized [. . .]
>
> [emphasis added]

It is apparent from the wording of Article 17(1) that two additional cumulative substantive conditions must be met before the "denial-of-benefits" clause can be exercised in respect of any particular legal entity. First, such legal entity must be owned or controlled by citizens or nationals of a third State; second, the legal entity must have no substantial business activities in the place in which it is organized.

517. In view of the Tribunal's conclusion, explained in the previous section, that Respondent cannot invoke Article 17(1) due to its failure to give notice to Claimant that it was doing so, there is no need, in principle, to address Respondent's submissions that these substantive conditions for the application of Article 17(1) have been satisfied. However, since the Tribunal was briefed extensively on the issues of ownership and control, and on the issue of whether Russia is a "third state" for purposes of Article 17(1), the Tribunal has decided to set out its analysis and conclusions in respect of these issues. The Tribunal also addresses in this section Respondent's alternative contention that Claimant is owned and/or controlled by Israeli nationals, it being undisputed that Israel is a "third state" for purposes of Article 17(1). Since Claimant has conceded that it conducts no substantial business activities in Cyprus, the Tribunal does not need to address that issue.

#### a) Ownership and Control of Claimant

##### (i) Factual Background

518. The Tribunal refers to the factual and documentary background set out above at paragraph 420.

### (ii) Parties' Submissions

519. Respondent submits that Claimant is no more than an instrumentality of the "Russian oligarchs," owned and controlled by them through YUL, GML and the Guernsey Trusts. In order to reach this conclusion, Respondent submits that the VP Trust is essentially a sham.

520. Claimant's position is that the VP Trust is perfectly valid and legitimate, with the result that Chiltern (the Custodian Trustee) owns the VPL Shares (*i.e.*, owns Claimant), pursuant to Clause 3 of the VP Trust, and controls VPL (*i.e.*, controls Claimant), pursuant to Clause 5(2) of the VP Trust. Clause 5(2) expressly provides that Chiltern "shall have discretion as to the exercise of voting rights attaching to the Cypriot Shares [*i.e.*, the VPL Shares]." Claimant notes further that, pursuant to Clause 6(5) of the VP Trust, Chiltern or any of its officers or employees may act as director or other officer or employee of VPL.

521. Accordingly, Claimant submits that, because both ownership and control of Claimant is vested with Chiltern, a company incorporated in Jersey, and because the UK has confirmed that its ratification of the ECT covers the Bailiwick of Jersey, ownership and control of Claimant is vested with a national of a Contracting Party. As a result, Claimant argues, Article 17 cannot apply.

522. In response, relying on the expert opinions of Mr. Mann, Respondent submits that, notwithstanding the formal structure of the VP Trust, Chiltern does not have beneficial ownership and control of the VPL Shares. Mr. Mann opines that YUL (and Yukos, if necessary) can invoke the rule in *Saunders v. Vautier* to terminate the trust and cause the VPL Shares to be retransferred to them.

523. In paragraph 18 of his First Opinion, Mr. Mann states:

> (3) YUL and YUKOS can jointly instruct Chiltern to re-transfer the Cypriot shares. The necessity for a joint instruction is not on account of joint beneficial ownership (it is obvious that YUL is nominally sole beneficial owner of these shares) but because it is a reasonable inference that YUKOS has some arrangements with YUL which, if these two entities are not one and the same for all practical

> purposes, could enable YUKOS to obstruct re-transfer at any time without its consent and before termination.
>
> [emphasis added]

524. As set out in the previous chapter of this Interim Award,[144] Mr. Green, Claimant's expert, disagrees with Mr. Mann's analysis of the VP Trust. Mr. Green also disagrees with Mr. Mann that the rule in *Saunders v. Vautier* finds application in the circumstances of this case.

525. Mr. Green sets out, in his First Opinion, the reasons for his conclusion:

- There is an implied agreement in the VP Trust not to exercise *Saunders v. Vautier* rights.
- The rule in *Saunders v. Vautier* is inapplicable in the context of the employee benefit program.
- The trustee's rights of indemnity take priority over any other equitable interest in the VPL Shares.
- In any event, *Saunders v. Vautier* rights do not confer a right of present "ownership" or "control" if they are not actually exercised by the beneficiaries.

526. Mr. Mann devotes a substantial part of his Second Opinion to explain that these three factors, in his view, do not rule out the application of the rule in *Saunders v. Vautier* to this case. He concludes that Mr. Green's opinion that Chiltern owns and controls the VPL Shares is unsound.

527. In his Second Opinion, Mr. Green reaffirms his position that the rule in *Saunders v. Vautier* cannot be invoked in the circumstances of this case and that, in any event, the rule has not been invoked by any beneficiary who may be entitled to do so. As a result, Mr. Green confirms his conclusion that "the mere existence of such principle does not and cannot displace the proposition that Chiltern 'owns' and 'controls' the VPL Shares."

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[144] *See* paras. 111-118, 209-214, 426, 438, 446-460, 479-486.

528. Respondent submits a further argument to support its proposition that Chiltern does not control Claimant:

> 276. In these very particular circumstances, where Claimant is a mere nominee deprived of any power over its assets whatsoever, it does not matter who controls Claimant itself. What matters is who beneficially owns and controls the sole assets nominally held by Claimant.
>
> 277. Claimant admits as much:
>
> > *"Chiltern Trust exercises control on the shares of Yukos until completion of the Veteran Trust. Both the ownership and control of the Claimant is thus vested with Chiltern Trust, a company incorporated in Jersey."*
>
> Thus Claimant acknowledges that whoever controls the Yukos shares held by Claimant controls, by implication, Claimant itself.
>
> [emphasis added]

529. Respondent submits that because YUL and Yukos (through the Voting Committee) exercise control over the Yukos Shares held by Claimant, and because the relevant question for control of Claimant, as admitted by Claimant itself, is control over the Yukos Shares, it is the "Russian oligarchs," through YUL and Yukos, who control Claimant.

530. As with the other issues, the Parties' experts square off on this point in their respective reports. In his First Opinion, Mr. Mann asserts, in support of Respondent's position, that "without the power to vote the Russian shares in its discretion, the power to vote the Cypriot shares is illusory."

531. Mr. Green, in his First Opinion, replies as follows:

> 50. (1) Though Chiltern is subject to restrictions as to how it may exercise its voting powers attaching to the VPL Shares *insofar as they relate to a particular investment held within VPL* (the Yukos Shares), this does not render such voting control "illusory". On any view, Chiltern controls the voting rights attaching to the VPL Shares so as (e.g.) to enable Chiltern to sanction the appointment of members of the board of the VPL.

532. In his Second Opinion, Mr. Mann criticises Mr. Green for focusing exclusively on "theoretical control over VPL" thereby "totally fail[ing] to recognise the plain and obvious realities."

533. In rebuttal, Mr. Green states that Mr. Mann is "eschewing conventional legal analysis" by acknowledging that Chiltern owns and controls the VPL Shares, but stating that Chiltern "could not utilise such control in relation to the [Yukos] Shares in any meaningful practical way." Mr. Green concludes:

> In any case, I do not see as a matter of English / Jersey trust laws, that any question arises as to whether the Voting Committee's control over voting rights attaching to the Yukos Shares is material to the question of whether Chiltern has control over the VPL Shares.
>
> Like any other company, VPL may (e.g.) have entered into contracts which determine *its* freedom of action, and whose existence cannot be ignored by any person who controls VPL's shares any more than by VPL's board of directors, but that does not affect the question of whether VPL's trustee shareholder has control of VPL.

534. Finally, Respondent argues that the actual seat of management and financial control of Claimant is in Russia, notably at the "representative" office of GML Management Services S.A. ("**GML MS**") in Moscow.

535. Claimant submits, in response, that Respondent's argument that the Moscow representative office of GML MS is the "seat of management and financial control of Claimant" is a *non sequitur*, as the question of "management and control" is a pure tax issue related to Cyprus tax law and the Russia-Cyprus Double Taxation Agreement ("**DTA**") and has no bearing on the ownership or control of Claimant under the ECT.

### (iii) Tribunal's Decision

536. As noted earlier,[145] the Tribunal's decision concerning the notification requirement in Article 17 renders the "ownership/control" issue moot for purposes of the admissibility objection raised by Respondent on the basis of the denial-of-benefits provision. The Tribunal considers that it is nevertheless its duty to set out its decision on

[145] *See supra* at para. 517.

ownership/control of Claimant, not only because of the substantial effort and resources the Parties expended in order to present the relevant facts, arguments and expert opinions on this issue, but also because it recognizes that the VP Trust (and the ownership/control structure more generally) may well feature in Respondent's arguments and allegations in any merits phase of this arbitration.[146]

537. The Tribunal has little difficulty in concluding that, in its terms, the VP Trust vests ownership and control of the VPL Shares in Chiltern, the Custodian Trustee. Indeed, this appears to be common ground between the Parties' experts. As Mr. Green explained in his Second Opinion,

> 7 (1) Dealing with the VPL Shares first, it is common ground between Mr Mann and me that the trust on which the VPL Shares are held is *not* a bare trust (paragraphs 14 to 15 of Mr Mann's First Opinion; paragraphs 28 to 31 of my First Opinion).
>
> (2) Therefore, as I explained in paragraphs 23 to 27 of my First Opinion, the prima facie position is that Chiltern "*owns*" and "*controls*" the VPL Shares of which it is registered owner, and of which it is trustee.

538. Respondent seeks to undermine this conclusion with a number of different arguments. The Tribunal addresses each argument in turn.

539. Respondent's first argument is that the rule in *Saunders v. Vautier* entitles YUL (and Yukos, if necessary) to terminate the trust in respect of the VPL Shares, and thus to remove ownership and control of these shares (and thus of Claimant) from Chiltern.

540. The Tribunal cannot accept this argument. In the Tribunal's view, the determining factor is that the rule in *Saunders v. Vautier* was *not* exercised. Its mere existence does not lead to the conclusion that because *Saunders v. Vautier* rights *may* be invoked at some later point in time, the Trustee is not the "owner" or in "control" of the VPL Shares settled into the VP Trust in the meantime. Therefore, YUL cannot simply equate its rights under the *Saunders v. Vautier* principle with "ownership" or "control" in the present case. Beyond this fundamental point, the Tribunal also finds convincing Mr. Green's opinion that (a) there is an implied agreement not to exercise *Saunders v. Vautier* rights in the VP

[146] *See* Respondent's First Memorial, Factual Appendix, pp. 103–130.

Trust; (b) the *Saunders v. Vautier* principle is inapplicable in the context of the employee benefit program; and (c) the trustee's rights of indemnity take priority over any other equitable interest in the VPL Shares.

541. Respondent's second argument is that Chiltern's control of Claimant is illusory because YUL and Yukos control Claimant's sole asset, namely the Yukos Shares.

542. Once again, the Tribunal cannot accept Respondent's position. First, the Tribunal agrees with Claimant that Respondent cannot be permitted to change the inquiry under Article 17 to one that is contrary to the plain language of Article 17. Indeed, Article 17 requires the Tribunal to focus on ownership and control of Claimant itself, not on ownership and control of any asset (or even the sole asset) that Claimant itself might own. Second, the Tribunal finds persuasive Mr. Green's opinion that restrictions on how Chiltern may exercise its voting powers attaching to a particular investment held within VPL do not render Chiltern's voting control over VPL "illusory." As Mr. Green notes, Chiltern controls the voting rights attaching to the VPL Shares so as, for example, to enable Chiltern to sanction the appointment of members of the board of VPL.

543. Respondent's third argument invokes the fact that the representative office of GML MS is in Moscow. On this basis, Respondent submits that the actual seat of management and financial control of Claimant is in Russia.

544. The Tribunal is of the view that this argument is of no assistance to Respondent in respect of Article 17. Article 17 of the ECT inquires only about who owns or controls Claimant (and whether they are "citizens or nationals of a third state"). The question of "management and control" under the DTA, namely where a company's management and control is exercised, is a separate issue altogether and not relevant to a determination under Article 17.

545. This disposes of Respondent's arguments that Chiltern does not own or control Claimant. At this point, the Tribunal adds that even if Respondent had been successful in convincing the Tribunal that Claimant was owned or controlled by YUL, Respondent's case under Article 17 would not have been advanced. Indeed, YUL, which is incorporated in the Isle of Man, is not a national of a third state for purposes of

Article 17, since the UK is a Contracting State, and the UK extended the ratification of the ECT to the Isle of Man. As for the ownership and control of YUL itself, proceeding up the chain of ownership through GML and the Guernsey Trusts, the Tribunal refers to its reasoning on the Article 17 issue in the parallel arbitrations involving YUL and Hulley, respectively.[147]

546. Finally and before summarizing its conclusion in respect of the Trust issues in the instant case, the Tribunal notes that transferring ownership of assets to a trustee pursuant to a trust instrument is a centuries-old institution of the English common law. Settling certain properties into a trust, thus transferring legal ownership to the trustee and adopting provisions with regard to the beneficiaries, is a well-established legal institution at common law, which is recognised internationally today pursuant to the Hague Convention on the Law Applicable to Trusts and their Recognition of 1 July 1985. The Tribunal sees no reason to unsettle a centuries-old legal institution when the instrument of trust at hand is used in an offshore profit sharing scheme for employees, and in that respect is uncontroversial. To do so would put into question the validity of the very concept of trusts at a time when their recognition goes well beyond the common-law countries. Indeed, in recent years, trusts have found a significant measure of acceptance in some civil law jurisdictions, although there is no evidence before the Tribunal that they are accepted instruments in Russian law. This is a question which will remain open for argument in any merits phase of this case in connection with Respondent's contentions about Claimant's "unclean hands" and about Claimant being the instrumentality of a "criminal enterprise."

547. On the basis of the foregoing, the Tribunal finds as follows in relation to Claimant:

- Claimant is wholly-owned by the VP Trust.
- Chiltern, as Custodian Trustee of the VP Trust, owns and controls Claimant.

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[147] *See* PCA Case No. AA 226, *Hulley Enterprises Limited v. Russian Federation,* Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 461-554; PCA Case No. AA 227, *Yukos Universal Limited v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 462-555.

548. As a result of these findings, the Tribunal concludes that Chiltern (of Jersey) owns and controls Claimant. Chiltern is a UK national, since Jersey is a covered territory by virtue of the UK's declarations under the ECT. Accordingly, Chiltern is not a citizen or national of a third state. Therefore, Article 17(1) does not apply to Claimant.

### b) Is the Russian Federation a Third State?

549. In the previous section, the Tribunal found that, for purposes of Article 17 of the ECT, Claimant was owned and controlled by entities that are not nationals or citizens of third States. That could be the end of the Tribunal's analysis of different issues which arise from the wording of Article 17. However, as the Tribunal noted earlier, Respondent argued that control of Claimant resided with individuals of Russian nationality. On this basis, in order to benefit from Article 17, Respondent argues that the Russian Federation is a "third state" for purposes of Article 17. Although the Tribunal's conclusions in the previous section render this issue moot, the Tribunal nevertheless considers that, in the context of all issues which have arisen and which may arise later, it should proceed with a review of the Parties' submissions on this point and thus present its analysis and conclusions.

#### (i) Parties' Submissions

550. The Parties differ over whether, under Article 17(1), the Russian Federation is or can be treated as a "third state."

551. Respondent argues that Claimant is an entity owned or controlled by citizens or nationals of a "third state" and has no substantial business in the Contracting Party in which it is organized. What is the "third state"?

552. Respondent initially argued that it is the Russian Federation. The term, "third state," is not defined in the Treaty. However, Article I of the ECT, "Definitions," provides, in (7):

> "Investor" means:
>
> (a) with respect to a Contracting Party:
>
> (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

(b) with respect to a "third state," a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.

553. Respondent argues that the term, "third state," while not defined in the Treaty, is used in a manner that does not exclude the possibility that a third State may be a Contracting Party or signatory (Respondent being the latter), and cites in support of this conclusion the terms of ECT Article 7(10)(a)(i), which, in defining "transit," specify "so long as either the other state or the third state is a Contracting Party." Respondent also argues that the reference to a third State in Article 17(1) "applies *a fortiori* to nationals of the host State." It observes that the usage of the ECT does not show that the term "third state" precludes reference to the host State. If it is accepted that a Contracting Party may be equated with a third State, then, in pursuance of Article 17(1), Respondent may deny the advantages of Part III to Claimant, since in point of fact—Respondent maintains—Russian nationals control Claimant, which has no substantial business activities in the State of its incorporation.

554. Claimant challenges this reasoning. It argues that it is plain on its face that Article 17(1) distinguishes between a Contracting Party and a third State, as do other provisions of the Treaty; there is no equation. The singular transit provision of Article 7(10)(a)(i) is distinguishable. Article 2(1)(h) of the VCLT defines a third State as "a State not a party to the treaty." The Russian Federation, while not a Contracting Party, is a signatory of the ECT, and applied the Treaty provisionally in accordance with Article 45; it had not terminated provisional application pursuant to Article 45(3) by the time of the filing of the Notice of Arbitration in these proceedings. The *travaux préparatoires* of the ECT demonstrate that the term "third state" was substituted for the term "non-Contracting Party" not to change the substance, nor to vary the meaning, but to render it in more appropriate style. In its Rejoinder, Claimant contends, among other arguments, that, if the drafters of the ECT intended to apply the optional exclusion of Article 17 to nationals of the host State and not limit it to nationals of third States, they would have so provided, but did not. The ECT's *travaux préparatoires* show that the term "third state" cannot be equated with the host State. Respondent itself has recognized that nationals of the host

State are not nationals of a third State by contending that: "If Treaty benefits may be denied to third State nationals, *a fortiori* they may be denied to host State nationals."

**(ii) Tribunal's Decision**

555. In the view of the Tribunal, Respondent's contentions on this count are unconvincing. The Treaty clearly distinguishes between a Contracting Party (and a signatory), on the one hand, and a third State, which is a non-Contracting Party, on the other. The Tribunal agrees with Claimant that, on their face, several provisions distinguish between a Contracting Party and third State (for example, Articles (1)(7), 10(3) and 10(7), and 17) and that there is no equation in the ECT between a Contracting Party and a third State. This conclusion is further supported by the *travaux préparatoires*, which demonstrate that the term "third state" was substituted for the term "non-Contracting Party."

556. The transit provision of Article 7(10)(a)(i) is clearly distinguishable. That provision defines "transit" as

> (i) the carriage through the Area of a Contracting Party, or to or from port facilities in its Area for loading or unloading, of Energy Materials and Products originating in the Area of another state and destined for the Area of a third state, so long as either the other state or the third state is a Contracting Party;

In this particular context, the term "third state" is used simply to designate the third of the three States necessarily involved in the transit relationship, and not a category of States distinct from Contracting Parties. The French version of the Treaty uses the term "troisième Etat" in Article 7(10)(a)(i), but "Etat tiers" elsewhere in the Treaty, clearly supporting the distinct meaning of the term in the different contexts.

557. As a result, the Tribunal concludes that the Russian Federation, for purposes of Article 17 of the ECT, is not a third State.

### c) Can the Russian Federation Invoke Ownership or Control of Claimant by Israeli Nationals in Order to Take Advantage of Article 17(1)?

#### (i) Parties' Submissions

558. Apparently without relinquishing the foregoing line of argument concerning Russia as a third State, at the oral hearings, Respondent advanced the further argument that it is entitled to deny the advantages of Part III of the Treaty to Claimant because it is now controlled by nationals of a third State, Israel (where certain of the former "Russian oligarchs" now reside) and has no substantial business activities in the Area of the Contracting Party in which it is organized. Counsel of the Russian Federation observed that leading "oligarchs" reside in Israel, have done so for some five years, and apparently have adopted Israeli citizenship as under Israeli law they could easily do. They thus imputed that the claims of Claimant could be denied pursuant to Article 17(1).

559. Claimant's counsel strenuously resisted any such imputation.

560. They recalled that Respondent's pleadings from the outset up to the oral hearings have repeatedly described Claimant as in reality being owned or controlled by Russian nationals. They questioned whether Russia's counsel was authorized to raise this "moving target" but, if they were, Claimant maintained that Respondent was "stuck" with its characterization in its written pleadings of Claimant being owned or controlled by Russian nationals.

561. Claimant further argued that Respondent is estopped from characterizing the "oligarchs" as Israeli. Claimant points out that the Russian Federation has issued international arrest warrants for the "oligarchs" that describe them as nationals of the Russian Federation and has repeatedly described them as Russian nationals in its pleadings. It cannot now be heard to denominate the "oligarchs" as Israeli nationals in derogation of those descriptions. Moreover, according to Claimant, if the "oligarchs" have taken refuge in Israel and assumed Israeli nationality, not only does that not deprive them of Russian nationality but they have done so only because of the wrongs that they have suffered at the hands of the Russian Federation. Respondent is not entitled to assert rights springing from those wrongs.

### (ii) Tribunal's Decision

562. Because the dates on which some of the "oligarchs" moved to Israel were not clearly established,[148] this confrontation raises the question of whether the rule of nationality of claims in international law means that nationality is adjudged as of the date of the filing of the claim, or as of a later date, such as that of the judgment. The Award in the NAFTA case of *Loewen v. United States of America* accepted the judgment day standard.[149] That holding has been the subject of criticism.[150] It is not generally sustained by the study of diplomatic espousal undertaken in recent years by the International Law Commission of the United Nations, whose Special Rapporteur, Professor John Dugard, has concluded that the date of the filing of the claim should govern rather than the judgment day.[151] This Tribunal is not disposed to apply the judgment day standard in the

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[148] *See* Hearing Transcript, 27 November 2008, pp. 117-129; nor was it agreed which Party would have the burden of proof on this issue (*see* Hearing Transcript, 1 December 2008, pp. 114-116).

[149] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, Award, 26 June 2003, 42 *ILM* 811 (2003), 7 *ICSID Rep.* 442 (2005), para 225, *available at* http://www.state.gov/documents/organization/22094.pdf ("In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*.").

[150] *See, e.g.,* J. Paulsson, "Continuous nationality in *Loewen*," (2004) 20 *Arbitration International* pp. 213-216 at 214 ("The tribunals' treatment of the continuous nationality issue, considering its outcome-determinative effect was startling in its succinctness . . . The *dies ad quem* requirement which commended itself to the *Loewen* arbitrators was perhaps the least plausible of a long series of alternative candidates . . ."); M.S. Duchesne, "The continuous-nationality-of-claims principle," *George Washington International Law Review,* vol. 36 (2004) 783 at 808. ("there is good reason to discount the weight [of *Loewen*] . . . . Whatever other reaction the *Loewen* tribunal's decision might invite, its discussion on the continuous nationality 'rule' was, if not cursory, then at least conclusory. . . the tribunal's discussion of the continuous nationality issue simply asserts the existence of a rule without citation or even discussion . . . [The Tribunal] approached the issue with a preconceived notion of customary international law and felt little need to put that notion to the test of careful examination."); ILC, Fifty-Eight Session, *Seventh report on diplomatic protection by John Dugard, Special Rapporteur,* UN Doc. A/CN.4/567, 7 March 2006, para. 41. ("The [*Loewen* decision]—on this aspect of the case—is seriously flawed. While most of the decision is carefully reasoned and researched . . . the crucial issue before the tribunal, that of the *dies ad quem*, is disposed of in a manner which gives no indication that the tribunal applied its mind to the matter at all. It simply asserts, without any examination whatsoever of authority (despite the fact that counsel referred the tribunal to the relevant authorities), that under customary international law "there must be continuous national identity from the date of the events giving rise to the claim . . . through to the date of the resolution of the claim.").

[151] *See, e.g.,* ILC, Fifty-fifth session, *Fourth report on diplomatic protection by John Dugard, Special Rapporteur,* UN Doc. A/CN.4/530, 13 March 2003 (para 98: "In all the circumstances it seems appropriate to require that a State which exercises diplomatic protection on behalf of a corporation must prove that the corporation was a national under its laws both at the time of injury and at the date of the official presentation of the claim.") *See also*: ILC, Fifty-Eight Session, *Seventh report on diplomatic protection by John Dugard, Special Rapporteur,* UN Doc. A/CN.4/567, 7 March 2006, paras. 43-45 ("In the light of the uncertainty surrounding the *dies ad quem* the Commission is required to make a choice between the date of the official presentation of the claim and the date of

light of the authorities and considerations assembled by Dugard, and in view of the fact that this proceeding in any event is not an exercise in the diplomatic espousal by a State of the claims of its national but a Treaty-authorized proceeding brought directly against a State by an entity which qualifies as an Investor of another Contracting Party. Thus the pertinence of rules of diplomatic protection to these proceedings is not to be assumed.

563. The Tribunal must therefore consider the nationality of the "oligarchs" as of the date of the filing of the claim, namely February 2005. At the hearing, Respondent referred to various newspaper clippings which predate February 2005 and which, according to Respondent, establish that the "oligarchs" who, it alleges, controlled Claimant (notably Messrs. Nevzlin, Brudno and Dubov) were already citizens of Israel at that time.[152]

564. In response, Claimant argues that Respondent is estopped from arguing that the "oligarchs" are Israeli because, if they are, their so being results from the wrongs of Respondent.[153]

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the resolution of the claim. The authorities are inconclusive and the response of States, while small, favours the date of the presentation of the claim. In these circumstances the Commission must be guided by principle and policy in the exercise of its choice. Principle supports the date of the presentation of the claims as this most favours the interests of the individual. So too does policy, if we equate policy with fairness. Many years may pass between the presentation of a claim and its final resolution and it is unfair to deny the individual the right to change nationality, through marriage or naturalization, during this period. Moreover, the date of presentation is significant as it is the date on which the State of nationality shows its clear intention to exercise diplomatic protection. "Different policy considerations apply where the national on whose behalf the claim is brought acquires the nationality of the respondent State after the presentation of the claim as occurred in *Loewen* . . . In such circumstances fairness dictates that the date of the award be selected as *dies ad quem*, as the contrary position would, in the words of *Loewen,* 'produce a result so unjust that it could be sustained only be irrefutable logic or compelling precedent, and neither exists.' It is therefore proposed that the Commission retain the official date of presentation of the claim as the *dies ad quem* for the continuous nationality rule but that an exception be made for the case in which the national on whose behalf the claim is brought acquires the nationality of the respondent State after the presentation of the claim. Here the date of the resolution of the claim is the *dies ad quem.*") (*See also* para 56, with respect to claims on behalf of corporations). *See also Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic,* ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 31 ("[I]t is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted.")

[152] *See* Hearing Transcript, 27 November 2008, pp. 118-126.

[153] *See* Hearing Transcript, 1 December 2008, pp. 234-236.

565. The Tribunal cannot, in the present phase of this proceeding, address Claimant's estoppel argument, which, as Claimant itself put it, relies on "wrongdoings of Russia which are at the heart of this arbitration."[154]

566. If this issue were not moot (as it is, given the Tribunal's earlier rulings on notice and ownership/control), the Tribunal would defer its further consideration to the merits phase. Since it is moot, the Tribunal's inquiry on Article 17 ends here.

## D. ARE ALL OR SOME OF THE CLAIMS BARRED BY THE "TAXATION MEASURES" CARVE-OUT (ARTICLE 21) OF THE ECT?

### 1. Introduction

567. Article 21 of the ECT provides 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.
>
> (2) Article 7(3) shall apply to Taxation Measures other than those on income or on capital, except that such provision shall not apply to:
>
> (a) an advantage accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii); or
>
> (b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure of a Contracting Party arbitrarily discriminates against Energy Materials and Products originating in, or destined for the Area of another Contracting Party or arbitrarily restricts benefits accorded under Article 7(3).
>
> (3) Article 10(2) and (7) shall apply to Taxation Measures of the Contracting Parties other than those on income or on capital, except that such provisions shall not apply to:
>
> (a) impose most favoured nation obligations with respect to advantages accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii) or resulting from

[154] *Ibid.* at p. 236:8-10.

membership of any Regional Economic Integration Organization; or

(b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure arbitrarily discriminates against an Investor of another Contracting Party or arbitrarily restricts benefits accorded under the Investment provisions of this Treaty.

(4) Article 29(2) to (6) shall apply to Taxation Measures other than those on income or on capital.

(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 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.

(6) For the avoidance of doubt, Article 14 shall not limit the right of a Contracting Party to impose or collect a tax by withholding or other means.

(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.

568. As set out earlier in this Interim Award, the Parties' arguments in respect of this provision raise the following issues:

(a) What is the scope of the carve-out for "Taxation Measures"?

(1) What is the meaning of "Taxation Measures" as set out in Article 21(7)?

(2) Does the carve-out operate to deprive a tribunal of jurisdiction over the covered matters, or does it merely modulate the obligations that can be enforced in an arbitration, thus going to admissibility/merits?

(3) *If* the carve-out goes to jurisdiction, did Respondent timely raise the issue?

(b) What is the scope of the claw-back for Article 13 (Expropriation)?

(c) How should Claimant's claims be characterized for purposes of Article 21?

569. The Tribunal will now review the Parties' submissions on each one of these issues, before reaching its decision.

### 2. Parties' Submissions

#### a) What is the Scope of the Carve-out for "Taxation Measures"?

##### (i) What is the Meaning of "Taxation Measures" as Set Out in Article 21(7)?

570. According to Respondent, "Taxation Measures" is not limited to specific provisions of legislation or tax treaties, but extends also to enforcement and collection measures, for example. In sum, Respondent submits that the carve-out in Article 21 extends broadly to all measures relating to taxation.

571. Respondent submits that its interpretation of "Taxation Measures" is supported by the plain and ordinary meaning of Article 21(7), where the definition of "Taxation Measures," Respondent notes, uses expansive terms such as "includes," "any" and "relating to." Respondent contends that the *travaux préparatoires* demonstrate that "includes," as used in Article 21(7), was meant to introduce an illustrative list not a closed definition. In support, Respondent invokes the position of France, for example, in the negotiations of the Treaty.

572. Respondent also submits that Article 21(7) must be read together with other paragraphs of the same Article. In particular, Article 21(3) gives preferential treatment to "any Taxation Measure aimed at ensuring the effective collection of taxes." The "collection of

taxes," submits Respondent, must therefore be a subset of the broader class of Taxation Measures. Further, Article 21(6) confirms, according to Respondent, that Taxation Measures include not only the collection of taxes, but also their imposition. This Article provides, "For the avoidance of doubt, Article 14 [dealing with an Investor's right to transfer capital, returns and other payments] shall not limit the right of a Contracting Party to impose or collect a tax by withholding or other means."

573. Finally, Respondent argues that a broad carve-out in Article 21, for the full protection of the sovereign prerogative over taxes, tax collection and tax enforcement, accords with the object and purpose of the Treaty. It is also supported, notes Respondent, by the testimony of its witnesses, Messrs. Berman and Knipler.

574. Claimant holds a different view. According to Claimant, "Taxation Measures" in Article 21 means the specific provisions in a country's tax legislation or in its tax treaties. Invoking, like Respondent, the plain and ordinary meaning of Article 21(7), Claimant focuses on the use of the words "provision . . . of domestic law" or "convention . . . or . . . any other international agreement" in the definition.

575. For Claimant, the *travaux préparatoires* demonstrate that "includes" was meant to be inclusive, and interchangeable with "means." Claimant relies on the position of Norway, which introduced the language during the negotiation of Article 21, as well as the position of Canada and France.

576. As for the evidence of Messrs. Berman and Knipler, Claimant submits that their respective testimony is irrelevant and unreliable.

577. Finally, Claimant submits that the Tribunal should resolve any remaining ambiguity according to the principle that an exception in a treaty, such as the carve-out in Article 21(1), must be interpreted restrictively.

**(ii) Does the Carve-out Operate to Deprive a Tribunal of Jurisdiction over the Covered Matters, or Does it Merely Modulate the Obligations that Can Be Enforced in an Arbitration, thus Going to Admissibility/Merits?**

578. According to Respondent, the carve-out in Article 21(1) deprives the Tribunal of jurisdiction. Article 21(1) states: "nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties"; and "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" [emphasis added]. According to Respondent, the phrase "nothing in this Treaty" means, *inter alia*, that Article 26 jurisdiction is not applicable to an arbitration which is grounded in a taxation measure of the Russian Federation. Article 21 states clearly that it "prevails" over "any other provision," which must mean, avers Respondent, that its carve-out in relation to Taxation Measures must defeat jurisdiction under Article 26 for any claims related to such Taxation Measures.

579. Claimant responds that the carve-out goes to admissibility/merits. Claimant notes that disputes over the effect of Article 21(1) relate to the existence of rights and obligations (including under Part III of the Treaty) with respect to alleged Taxation Measures, and thus must fall within Article 26 of the Treaty (Dispute Settlement), because Article 26 defines arbitral jurisdiction by reference to "an alleged breach of an obligation . . . under Part III" [emphasis added].

**(iii) If the Carve-out Goes to Jurisdiction, Did Respondent Timely Raise the Issue?**

580. Respondent argues that it satisfied the basic requirement under the UNCITRAL Rules, namely to state a clear objection to the Tribunal's jurisdiction as a general matter. Respondent contends that it put Claimant on notice that Article 21 was one of its preliminary concerns, even if initially stated as an admissibility objection.

581. To the extent the carve-out in Article 21 goes to jurisdiction, Claimant takes the position that Respondent failed to raise its objection as one pertaining to jurisdiction. As Respondent has conceded, and as is clear from the record, submits Claimant, Respondent initially raised Article 21 as an objection to admissibility.

### b) What is the Scope of the Claw-back for Article 13 (Expropriation)?

582. While Article 21(1) creates a carve-out from the protections of the Treaty "with respect to Taxation Measures," Article 21(5), on the other hand, reinstates the protection against alleged expropriation by providing that "Article 13 shall apply to taxes." What is the scope of this claw-back in case of an expropriation?

583. According to Respondent, the scope of the "claw-back" in Article 21(5)—which is defined by reference to "taxes"—is not co-extensive with the carve-out of Article 21(1), which is defined by reference to "Taxation Measures." Respondent submits that the claw-back extends only to "taxes," which is a concept that is *narrower* than "Taxation Measures," leaving Claimant unprotected for allegations of expropriation in relation to a category of measures that can be defined as "Taxation Measures other than taxes." For Respondent, this category includes tax collection and enforcement measures, since these are Taxation Measures, but not taxes *per se*.

584. Finally, Respondent submits that, in any event, any claim that falls within the claw-back for allegedly expropriatory taxes must be submitted to the "Competent Tax Authorities" in the Russian Federation, pursuant to Article 21(5)(b).

585. According to Claimant, the distinction drawn by Respondent between "Taxation Measures" and "taxes" is unavailing. Claimant submits that the claw-back for expropriation in Article 21(5) extends to any expropriation in relation to "Taxation Measures," thus giving back to an Investor, in relation to expropriation, whatever protection may have been taken away by Article 21(1)—including jurisdiction, if the carve-out is found by the Tribunal to have been formulated as a jurisdictional objection.

586. In support of its position, Claimant contends that while different words ("tax" and "Taxation Measures") are used in the English version of Article 21 of the ECT, the fact that they refer to the same concept is demonstrated by the French, German and Italian versions of Article 21. In those versions, all equally authentic, the words "tax" and "Taxation Measure" are used interchangeably. The interpretation of Article 21, avers Claimant, should thus be reconciled with the non-English versions.

587. Furthermore, Claimant submits, Respondent's interpretation of Article 21(5) would result in a huge loophole for States wishing to expropriate assets of investors "under the guise" of Taxation Measures. Claimant asserts that such an interpretation would defeat the object and purpose of the Treaty, as it would destabilize the investment climate in host States.

588. Finally, Claimant argues that it cannot be required to submit its claims to the local Russian authorities before proceeding to international arbitration, since such a recourse would be entirely futile.

589. In respect of the different language versions of the Treaty, Respondent answers that the non-English versions of Article 21 should not be given much weight, because Article 21 was negotiated in English. Citing several authorities, Respondent submits that where multiple language versions of a treaty are being compared for the interpretation of a particular provision, the version in which the provision was negotiated should be given primacy.

### c) How should the Claims be Characterized for Purposes of Article 21?

590. Respondent submits that all of the claims in these proceedings relate to "Taxation Measures" other than "taxes," and that therefore none of the exceptions enumerated in Article 21 is applicable to the claims asserted by Claimant.

591. Respondent observes that according to Claimant's own factual matrix underpinning its allegations against the Russian Federation, the alleged breach of the ECT by Respondent started with "tax audits" and all of the claims asserted by Claimant are based, initially, on "massive tax liabilities."[155]

592. In response, Claimant's primary position is that since the claw-back of Article 21(5) for expropriation claims is co-extensive with the carve-out under Article 21(1), it does not matter how its claims are characterized. In the words of Claimant: "no matter what the

[155] *See* Hearing Transcript, 1 December 2008, pp. 59:18 to 61:25.

scope of the so-called exclusion in Article 21(1), it does not exclude any expropriation claims that are not reincorporated by Article 21(5)."[156]

593. Alternatively, Claimant submits that the claims are not captured by the exclusion in Article 21(1) because they do not relate to *bona fide* "Taxation Measures" and/or they extend to matters beyond "Taxation Measures" such as expropriation through gross under-valuation, "phoney bankruptcy" and intimidation of management.

### 3. Tribunal's Decision

594. As the Tribunal has just noted, Claimant argues, *inter alia*, that its claims do not relate to *bona fide* "Taxation Measures" and also that its claims extend to matters beyond "Taxation Measures" and are thus not captured by Article 21, whatever its interpretation.

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.

596. The Tribunal will not rule on this crucial issue in a vacuum. Therefore, the Tribunal has decided to defer its definitive interpretation of Article 21, and its characterization of Claimant's claims for purposes of Article 21, to the next phase of the arbitration, when it will have a complete record on the nature of the claims themselves and a fuller understanding of the facts.

597. For greater certainty, the Tribunal notes that it is deferring as well the issue of whether Respondent's objection based on Article 21 goes to jurisdiction or admissibility and, if it goes to jurisdiction, whether it was made in a timely manner by Respondent.

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[156] Rejoinder, para. 413.

## E. ARE ALL OR SOME OF THE CLAIMS BARRED BY THE "FORK-IN-THE-ROAD" PROVISION (ARTICLE 26(3)(B)(I)) OF THE ECT?

### 1. Parties' Submissions

598. Article 26(3)(b)(i) contains the ECT's "fork-in-the-road" provision. It must be read together with the preceding paragraphs of Article 26:

> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible be settled amicably.
>
> (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
>
> (a) to the courts or administrative tribunals of the Contracting Party 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).

599. In accordance with Article 26(3)(b)(i), 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.

600. The Russian Federation, which appears on the list at Annex ID, argues that "Claimant or persons who control Claimant or who are under common control with Claimant have

previously submitted the matters complained of in the Statement of Claim to the Russian courts and the European Court of Human Rights."[157]

601. Respondent submits that the term "dispute," which is not a defined term under the Treaty, "should be interpreted as a dispute between essentially the same parties relating to the same material facts or injuries that constitute the basis of the dispute before the Arbitral Tribunal."[158] Respondent submits that a more restrictive interpretation of "dispute" would defeat the object and purpose of this "fork-in-the-road" clause.

602. The specific proceedings to which Respondent refers are, first, various proceedings commenced by Yukos in the Russian courts (including the Moscow Arbitrazh Court, the Federal Arbitrazh Court for the Moscow region and the Constitutional Court) and, second, applications submitted to the European Court of Human Rights by Mr. Lebedev, Mr. Khodorkovsky and Yukos, respectively, in 2004. Respondent submits that the matters considered in these *fora* include some of the principal allegations made in the Statement of Claim in this arbitration.

603. In response, Claimant asserts that Respondent's position ignores the clear language of the ECT. Specifically, Claimant submits that Respondent is "openly attempting to expand the scope of the exception found in Article 26(3)(b)(i) of the ECT," as follows**:**

- *ratione personae*, to persons or entities not mentioned by the Treaty;
- *ratione materiae*, to disputes other than disputes concerning an alleged violation of Part III of the Treaty;
- *ratione temporis*, to disputes that would arise after the commencement of the arbitration.[159]

604. Claimant argues that, consistent with the guidance of arbitral tribunals in respect of fork-in-the-road provisions generally, an objection based on Article 26(3)(b)(i) of the ECT

[157] First Memorial, para. 90.

[158] First Memorial, para. 92.

[159] Counter-Memorial, para. 316.

must be based on a prior proceeding that satisfies the so-called "triple identity" test: identity of parties, cause of action and object of the dispute.[160]

605. Addressing the specific legal proceedings invoked by Respondent in order to rely on the "fork-in-the-road provision," Claimant asserts that it is not a party in any of the Russian Court proceedings cited by Respondent, nor in any of the proceedings before the European Court of Human Rights, and that, in any event, none of them concerns an alleged breach of Part III of the ECT.

606. Claimant therefore concludes that Respondent has failed to satisfy the triple identity test, and that its objection based on Article 26(3)(b)(i) must fail.

607. Respondent counters that, while substantial authority does exist for the triple identity test, the "fork-in-the-road" objection should nevertheless be sustained in the context of this particular dispute, because "Claimant is in effect requesting that this Tribunal sit above the Russian Supreme Court, the Russian Constitutional Court, and the various Russian courts of appeal that have heard and decided claims based on each of the allegations in the Statement of Claim."[161]

608. In its final submission, Claimant submits that Respondent's response amounts to "a total capitulation" on this issue. Moreover, Claimant takes issue with its characterization of this Tribunal's mission, asserting that:

> The Claimant is not seeking to appeal any decision of the Russian courts, or asking the Tribunal to determine whether those cases were rightly or wrongly decided as a matter of Russian law. Rather, the Claimant seeks

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[160] Claimant relies on the decisions in the following cases: *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, Annex C-247 (available on http://ital.law.uvic.ca); *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/08, Decision on Objections to Jurisdiction, 17 July 2003, 42 ILM 788 (2003), para. 80, Annex C-242; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Objections to Jurisdiction, 8 December 2003, 43 ILM 262 (2004), para. 89, Annex C-243; *Enron Corporation and Ponderosa Assets, LP v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 98, Annex C-244.

[161] Second Memorial, para. 377.

> compensation with respect to certain actions taken by the Russian State that violated the Claimant's rights under the Energy Charter Treaty.[162]

### 2. Tribunal's Decision

609. 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 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.

610. There remains Respondent's argument that the Tribunal should look beyond the triple identity test in this particular case, because the effect of the Tribunal accepting jurisdiction will be to create, in effect, a Tribunal that sits in judgment over the various Russian courts seized of the proceedings referred to by Respondent.

611. The Tribunal cannot accept this argument. The Tribunal agrees with Claimant that by virtue of its claim under the ECT it does not appeal from any decision of the Russian courts or seek to have determined by the present Tribunal whether any of those cases was rightly or wrongly decided as a matter of Russian law. The purpose of the present claim, in contradistinction to any of the other proceedings referred to by Respondent, is to determine whether Respondent breached Claimant's rights under the ECT, an international treaty which it applied provisionally and pursuant to which, this Tribunal has found, Respondent has binding obligations by virtue of the application of Article 45.

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[162] Rejoinder, para. 302.

## IX. DECISION

612. For the reasons set forth above, the Tribunal:

(a) DISMISSES the objections to jurisdiction and/or admissibility based on Article 1(6) and 1(7), Article 17, Article 26(3)(b)(i) and Article 45 of the ECT;

(b) DEFERS its decision on the objection to jurisdiction and/or admissibility based on Article 21 of the ECT to the merits phase of the arbitration, consistent with paragraphs 594 to 597, above;

(c) CONFIRMS that its decision on the objections to jurisdiction and/or admissibility involving the Parties' contentions concerning "unclean hands" and Respondent's contention that "Claimant's personality must be disregarded because it is an instrumentality of a criminal enterprise" is deferred to the merits phase of the arbitration, consistent with Procedural Order No. 3;

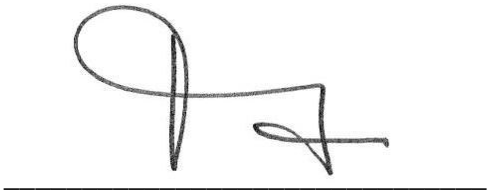
(d) HOLDS that, subject to the preceding two sub-paragraphs, the present dispute is admissible and within its jurisdiction, and that the Tribunal has jurisdiction over the Russian Federation in connection with the merits of the present dispute;

(e) RESERVES all questions concerning costs, fees and expenses, including the Parties' costs of legal representation, for subsequent determination; and

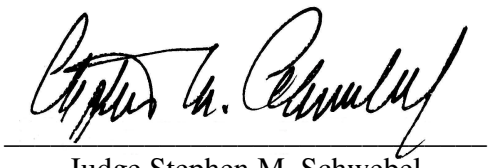
(f) INVITES the Parties to confer regarding the procedural calendar for the merits phase of the arbitration, and to report to the Tribunal in this respect within 60 days of receipt of this Interim Award.

So decided in The Hague, The Netherlands.

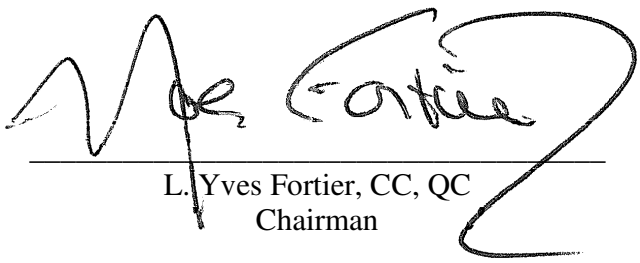
Date: 30 November 2009



Dr. Charles Poncet
Co-arbitrator



Judge Stephen M. Schwebel
Co-arbitrator



L. Yves Fortier, CC, QC
Chairman