

**ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE**

ROSINVESTCO UK LTD.,

CLAIMANT,

v.

THE RUSSIAN FEDERATION,

RESPONDENT.

Final Award

Made on 12 September 2010

Seat of Arbitration: Stockholm, Sweden

SCC ARBITRATION V (079/2005)

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Abbreviations

Award on Jurisdiction	Award of the Tribunal on Jurisdiction dated 5 October 2007
BIT	Bilateral Investment Treaty
Borisova Report	The report of Professor Elena Alexandrovina Borisova accompanying R-I and Professor Borisova's supplemental report accompanying R-II
C-I	Claimant's Statement of Claim of 22 August 2008
C-II	Claimant's Reply of 21 September 2009 C-1 et seq. Claimant's Exhibit (followed by the exhibit's number)
CB	Common Bundle (followed by the exhibit's number)
CHB	Claimant's Hearing Binder (followed by the exhibit's number)
CLA	Claimant's Legal Authority (followed by the exhibit's number)
CM	Claimant's Memorial (followed by the exhibit's number)
CPHB-I	Claimant's Post-Hearing Brief of 26 March 2010
CPHB-II	Claimant's Post-Hearing Reply Brief of 4 May 2010
CSFB	Credit Suisse First Boston
Denmark-Russia BIT	Agreement between the Government of Denmark and the Government of the Russian Federation concerning the Promotion and Reciprocal Protection of Investments dated November 4, 1993
Dow Report	The report of Professor James Dow accompanying R-I (Dow Report I) and Professor Dow's Rebuttal Report accompanying R-II (Dow Report II)
fn	Footnote
Hearing	The hearing on the merits of the case from 18 January to 22 January 2010 held at the ICC hearing centre in Paris, France.
IPPA	Agreement between the Government of the United Kingdom and the Government of the USSR for the Promotion and Reciprocal Protection of Investments signed in London on April 6, 1989
Konnov or Konnov Report	The report of Oleg Y. Konnov accompanying R-I (Konnov I), Mr Konnov's second report accompanying R-II (Konnov II) and Mr Konnov's third report of 11 January 2010 (Konnov III)
LECG Report	The report of Dr. Abdala and Dr. Spiller of LECG, LLC accompanying C-I (LECG Report I) and also the supplemental Expert Report of Dr. Abdala and Dr. Spiller of LECG, LLC accompanying C-II (LECG Report II)
Low Tax Regions	The administrative regions in the Russian Federation in which Yukos had a presence and which included the regions of Mordovia, Kalmykia, Evenkia, Baikonur and a number of other regions classified as ZATOs
Maggs or Maggs Report	The reports of Professor Peter Maggs attached at Exhibit A to C-I (Maggs I) and the second report of Professor Maggs accompanying C-II (Maggs II) and the third report of Professor Maggs dated 21 December 2009 (Maggs III)
p	Page
para or ¶	Paragraph
PO	Procedural Order

	Pages
PP	
R-I	Respondent's Statement of Defence of 20 April 2009
R-II	Respondent's Surreply to Claimant's Reply of 16 November 2009
R-1 et seq.	Respondents' Exhibit (followed by the exhibit's number)
RHB	Respondent's Hearing Binder (followed by the exhibit's number)
RLA	Respondent's Legal Authority (followed by the exhibit's number)
RM	Respondent's Memorial (followed by the exhibit's number)
RPHB-I	Respondent's First Post-Hearing Memorial of 26 March 2010
RPHB-II	Respondent's Second Post-Hearing Memorial of 4 May 2010
RosInvest	Claimant
Russian Federation	Respondent
RSlide, date, name, page	Respondent's Slide (followed by relevant date, counsel's name and page number)
SCC	Stockholm Chamber of Commerce
SCC-Institute	Arbitration Institute of the Stockholm Chamber of Commerce
SCC Rules	Rules of the Arbitration Institute of the SCC
Tr	Transcript of the Hearing from 18 to 22 January 2010 (followed by the page reference)
VAT	Value added tax
VCLT	Vienna Convention on the Law of Treaties of May 23, 1969
YNG	Yuganskneftegaz
Yukos	Yukos Oil Corporation OJSC

A. The Parties

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C. Short Identification of the Case

C.I. The Claimant's Perspective

1. The following quotation is from the Statement of Claim and summarises the main aspects of the dispute from the Claimant's perspective as follows (C-I, ¶¶ 1-7):

"1. Claimant RosInvestCo UK Ltd. ("Claimant" or "RosInvestCo"), an investment company incorporated under English law and based in London, England, purchased a total of seven million ordinary shares of OAO NK Yukos Oil Company OJSC ("Yukos"), a Russian oil company then traded on the Moscow and other stock exchanges, on two occasions on 17 November and 1 December of 2004.

2. Claimant is an investor, and its shares of Yukos are an investment, under the Agreement between the Government of the United Kingdom and the Government of the Union of Soviet Socialist Republics ("USSR") for the Promotion and Reciprocal Protection of Investments (the "UK-Soviet BIT"). Respondent the Russian Federation is under international law the successor or "continuator" of the USSR.

3. Article 5.1 of the UK-Soviet BIT expresses the agreement of the United Kingdom and the USSR that investments shall not be expropriated, except for a purpose in the public interest that is not discriminatory and against the payment of prompt and effective compensation. Article 5.2 of the UK-Soviet BIT expressly confers on an investor such as RosInvestCo rights under Article 5.1 in the event of an expropriation of assets of a company in which it has a shareholding.

4. Respondent expropriated all of the assets of Yukos by a series of measures carried out from 19 December 2004 to 15

August 2007. RosInvestCo therefore brings this claim under Articles 5.1 and 5.2 of the UK-Soviet BIT to seek compensation for the injury to its investment in Yukos caused by the expropriation by the Russian Federation of the assets of Yukos, in the amount of the proportional value of those assets represented by its shareholding.

5. *At the time that Claimant made its purchases, Yukos shares were trading at prices well below their historic highs, due in large part to the menacing tone that had been taken toward Yukos by the Government of the Russian Federation. By the autumn of 2004, the CEO and other top managers of Yukos had been arrested and were being detained on various charges, and the tax authorities of the Russian Federation had begun to assert enormous claims for back taxes against Yukos going back to the year 2000. The hostility of the Russian Government toward Yukos was manifest, and the fall in the price of Yukos stock suggests that investors had begun to sell their shares.*

6. *Many investment firms such as RosInvestCo specialize in purchasing shares at such moments of market distress, judging that the market has overreacted to transient events and has undervalued a company's underlying assets. Some of these investments turn out to be profitable, and some do not, and the investor may be presumed to understand the market risks when it makes the investment. But when an investment becomes worthless, not because of market movements, but because of unlawful government action, an investor does not lose its rights under treaties such as the UK-Soviet BIT simply because it bought its shares at a moment of uncertainty. Yukos would have appreciated in value after Claimant's purchase of shares, but for the unlawful acts of Respondent, ... [].*

7. *When Claimant purchased its Yukos shares, it was far from certain that the company's troubles would prove to be anything other than temporary. At that time:*

- *Yukos was still operating as a successful oil company, with very large current production and*

proven petroleum reserves, and substantial revenues reported in financial statements prepared in accordance with Western accounting standards;

- *Yukos was contesting the tax assessments against it; and*
- *Officials of the Russian Federation, including President Putin himself, had recently made public statements professing Russian adherence to the rule of law and denying that the Russian Government had any intention of destroying Yukos or of driving it into bankruptcy.*

2. Claimant's Reply of 21 September 2009 (C-II, ¶¶ 1-11) summarises the case further:

"1. Claimant seeks in this arbitration compensation under the Agreement between the Government of the United Kingdom and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments (the "UK-Soviet BIT") for the expropriation by the Russian Federation of the assets of Yukos, a company organized under Russian law, in which Claimant, a U.K. investor, had a shareholding. While the Russian Federation seeks to defend its taking of Yukos' assets as a proper exercise of its power to enforce its tax laws, the evidence before the Tribunal shows that the tax measures directed against Yukos were an unconvincing pretext for an unlawful expropriation.

2. The first step in that expropriation was taken on 19 December 2004, when the Russian Federation conducted a so-called auction at which all of Yukos' common shares in Yuganskneftegaz ("YNG"), Yukos' principal production facility, were conveyed to Baikalfinansgroup ("BFG"), an unknown company with no assets. BFG has already been shown to have been a special purpose vehicle created to protect Rosneft, the state-owned company that was the ultimate recipient of almost all of Yukos' assets. Since filing its Statement of Claim, Claimant has learned that Rosneft owned at least twenty

percent of BFG at the time of the 2004 auction, so that BFG itself was at least a partially state-owned company at the time of that auction.

3. In the days that followed the YNG auction, Andrei Illarionov, then-President Putin's economic advisor and the Russian Federation's representative to the G-8, confirmed what the rest of the world already knew: that the YNG auction was the "swindle of the year" motivated by nothing less than "a great desire to expropriate private property." The subsequent forced bankruptcy, seizures of Yukos' remaining assets, and the sale of those assets at auction over the course of 2007 completed the expropriation. When the dust settled, the Russian Federation had bankrupted and liquidated Yukos, and state-owned Rosneft was in possession of virtually all of Yukos' oil producing assets. As President Putin himself put it shortly after the YNG auction:

"Rosneft is a 100-percent state-owned company and it has acquired the known asset, Yuganskneftegaz. . . . Today the state, using absolutely legal market mechanisms, is securing its interests. I consider this to be quite normal."

Claimant would take issue only with the words "absolutely legal."

4. In its Statement of Defense, the Russian Federation attempts to dismiss RosInvestCo's claim as a dispute about tax enforcement and an unproven "conspiracy theory" that is "utterly implausible." It is neither. It is a claim for expropriation based on the documented actions of the Russian Federation. There can be no dispute that the measures taken by the Russian Federation deprived Yukos of its assets and conveyed them by auction to itself, and no dispute that the Russian Federation paid no compensation for those assets. [] The Russian tax assessments only enter into the picture because the Respondent seeks to disguise its taking as a legitimate exercise of its tax power.

5. *Nor is Claimant alone in concluding that the Russian Federation's actions against Yukos amounted to a deliberate expropriation. The evidence on which Claimant relies is the same evidence that has convinced courts, government bodies, and commentators from around the world that the destruction of Yukos was not a collateral consequence of bona fide efforts to enforce the Russian tax code, as the Respondent would have the Tribunal believe, but was rather the calculated outcome of the Russian Federation's determination to reassert state control over strategic petroleum assets, and incidentally to suppress political opposition.*

6. *Those bodies came to the following conclusions:*

- *"It can be said with some justification that the Yukos case involved both what might be described as the re-nationalisation of strategic assets and the damaging of a political opponent." (Lord Justice Moore-Bick, Court of Appeal (Civil Division), July 2009.)*
- *"[T]he circumstances of the arrest and prosecution of leading Yukos executives suggest that the interest of the state's action in these cases goes beyond the mere pursuit of criminal justice, and includes elements such as the weakening of an outspoken political opponent, the intimidation of other wealthy individuals and the regaining of control of strategic economic assets." (Council of Europe Parliamentary Assembly, January 2005.)*
- *"The Yukos/Khodorkovsky trial in Russia was politicized, that is, not based on criminal arguments but on the will of the authorities to ruin the political opposition and to regain control of strategic economic assets." (Supreme Administrative Court, Vilnius, Lithuania, October 2006.)*
- *"The District Court is of the opinion that the course of affairs as represented . . . can only lead to the conclusion that the way in which the additional tax assessment owed by Yukos Oil, and the size thereof,*

was assessed first by the Russian Tax Authorities and subsequently by the tax court cannot stand the test of criticism. . . . The subsequent hearing before the tax court and the appeal are a violation of the fundamental principles of due process of law as generally accepted in the Netherlands and laid down in article 6 ECHR.” (District Court, Amsterdam, Netherlands, October 2007.)

- *“Rosneft has insufficiently rebutted that the Russian judiciary in cases that pertain to the (former) Yukos group (or parts thereof) or the (former) directors thereof and which concern interests which the Russian state considers to be its own, is not impartial and independent, but allows itself to be led by the interests of the Russian state and is instructed by the executive.” (Amsterdam Court of Appeal, Netherlands, 28 April 2009.)*

7. *To distract the Tribunal from the evidence that the Russian Federation used its tax laws to engineer the expropriation and re-nationalization of Yukos’ assets, the Russian Federation first attacks Claimant and its relationship to the Elliott, a private investment partnership, which it describes as “a notorious US-based ‘vulture fund’ and an archetype of . . . ‘anything goes’ capitalism.” The Russian Federation’s characterizations of Claimant and Elliott are mistaken and gratuitous, but utterly irrelevant to the Russian Federation’s liability in these proceedings. (See Part III.A, below.)*

8. *The Respondent next mounts a belated, unfounded, and scarcely veiled assault on the Tribunal’s jurisdiction, more than a year after the Tribunal issued a detailed award finding that it had jurisdiction in this case.*

- (a) *The Russian Federation begins by arguing that Claimant did not qualify as an “investor” under the UK-*

Soviet BIT until 2007. But Claimant qualified as an investor under the UK-Soviet BIT when, as a company organized under the laws in force in the United Kingdom, it purchased 7,000,000 common shares of Yukos in November and December 2004. Those shares are an investment. Contrary to what the Russian Federation would have the Tribunal believe, Claimant's inter-group "participation agreements," in force between late-2004 and early-2007, have no bearing on Claimant's status as an investor in these proceedings. The Respondent's arguments to the contrary rely on legal authorities from the field of diplomatic protection, not bilateral investment treaties. [] proven that Rosneft, as the successor in interest to YNG, had breached its obligation to repay certain loan agreements between YNG and the offshore Yukos entity. The Russian courts had annulled the awards, but the Amsterdam Court of Appeal enforced them, expressly rejecting the argument that the loan agreements were part of an illegal tax structure put in place by the Yukos group.

(b) The Russian Federation next argues that Claimant's share purchase should not qualify as an "investment" under the UK-Soviet BIT because (1) "nominally owned" assets should not be considered an investment for the purposes of the UK-Soviet BIT, and (2) the share purchases allegedly did not further the UK-Soviet BIT's stated objective of encouraging investments. This argument also relies on authorities from the field of diplomatic protection. It suffices, however, to look at the plain language of Article 1(a) of the UK-Soviet BIT to confirm that Claimant has satisfied the treaty's requirements for a qualified investment. []

(c) The Russian Federation raises an objection to the Tribunal's jurisdiction *ratione temporis* on the grounds that some of the events described in Claimant's Statement of Claim preceded Claimant's investment. The Tribunal

should reject this argument, because the Tribunal is entitled to consider events that preceded Claimant's investment to establish the context of the expropriation and as evidence of the Respondent's true purpose. []

*(d) Finally, the Russian Federation argues that the Tribunal lacks jurisdiction *ratione materiae* under Article 11(3) of the Denmark-Russia BIT. Besides being another emanation of the Respondent's vain wish to make this a tax dispute, this argument is without merit, because Article 11(3) of the Denmark-Russia BIT does not apply to this claim and does not have the meaning the Respondent would like to give it. The same argument was firmly rejected in another arbitration brought by Yukos shareholders against the Russian Federation. (See Part IV.B, below.)*

9. When these diversionary arguments are put aside, it becomes clear that the Russian Federation has but one defense: that its actions against Yukos should be deemed proper, because its domestic courts upheld them. Similar legal arguments were advanced about the legal processes by which two of Henry VIII's wives lost their heads, and the Russian Federation's present arguments are as unconvincing as those were. The conclusions of the Russian courts are hardly surprising – Yukos could not have been destroyed without the acquiescence and complicity of the Russian courts. And in any event, a party may not invoke its own internal law to excuse itself from performing its obligations under a treaty. (See Part II.A, below.)

*10. The Russian Federation's actions vis-à-vis Yukos must be judged against international standards, as incorporated into the UK-Soviet BIT. International standards generally exempt a State's proper exercise of its police powers – including its power to tax – from charges of expropriation, but only when the exercise of these powers is *bona fide*, non-discriminatory, and non-confiscatory.*

11. *Here, the Russian Federation's exercise of its power to tax fails to meet international standards on all three counts. []*

(a) The Russian Federation has failed to rebut the overwhelming evidence that the tax assessments against Yukos were not bona fide.

- The Russian Federation has failed to demonstrate that its purpose was other than to cause the return of Yukos' assets to state control.*
- The Russian Federation has failed to rebut the evidence that the profit tax strategies used by Yukos were legal during the years in question and that the Russian government was well aware of Yukos' use of those strategies from prior audits of Yukos and of the trading companies controlled by Yukos.*
- The Russian Federation's tax enforcement defense does not explain or justify its assessment of US\$ 13.5 billion of value added tax ("VAT") against Yukos for transactions upon which VAT had already been paid.*

(b) Nor has the Russian Federation rebutted the evidence that the tax assessments were discriminatory, because the treatment of Yukos by the Russian tax authorities was drastically different from its treatment of other similarly situated Russian oil companies.

(c) Finally, the Russian Federation can hardly dispute that the tax assessments were confiscatory, because they caused the liquidation of Yukos, the deprivation of all its assets, and the transfer of such assets to Russian state control.

12. *The UK-Soviet BIT provides a remedy for such violations of a state's obligations. Claimant should be compensated for its proportional share of the value of Yukos had the assets of Yukos*

not been unlawfully expropriated by the Russian Federation. []”

3. Claimant provides a further summary in ¶¶1 – 5 of CPHB-I:

“1. On 19 December 2004, the Russian Federation commenced the process of expropriating and renationalizing the assets of OAO NK Yukos Oil Company OJSC (“Yukos”) by transferring at a staged auction all of Yukos’ common shares in Yuganskneftegaz (“YNG”), Yukos’ principal production facility, to Baikalfinansgroup (“BFG”). BFG was a special purpose vehicle for Rosneft, the state oil company that had owned many of Yukos’ assets prior to their privatization in the 1990s and that now owns them again.

2. By 15 August 2007, the Russian Federation’s expropriation and renationalization of Yukos’ assets was complete. It had forced Yukos into bankruptcy, seized its remaining assets, and liquidated those assets in a series of bankruptcy auctions from which Russian state companies – principally Rosneft and Gazprom – emerged in possession of Yukos’ properties.

3. RosInvestCo, an investment company organized under English law, purchased a total of 7,000,000 ordinary shares of Yukos on 16 November and 1 December 2004. RosInvestCo continuously held those shares in its brokerage account at Credit Suisse First Boston until Yukos’ shares were delisted on 21 November 2007 as a result of the Russian Federation’s actions against Yukos. RosInvestCo and its investment are entitled to the protections afforded by Article 5 of the IPPA against the expropriation of its investment.

4. The Russian Federation cannot excuse its taking of Yukos’ assets as a bona fide exercise of its tax enforcement powers. In fact, the contrary is true: the Russian Federation misused its tax enforcement powers to achieve and attempt to legitimize its seizures of strategic petroleum assets from a troublesome

political opponent. The Russian Federation disregarded existing Russian law to impose more than US\$ 9.4 billion in retroactive profits taxes on Yukos, and then imposed a further US\$ 13.5 billion in unjustified VAT assessments. Included in these amounts was US\$ 3.9 billion of repeat offender penalties imposed with no basis in law. Far from excusing the Russian Federation's actions, its power to tax was the instrument by which it accomplished the unlawful expropriation and nationalization of Yukos' assets.

5. *The Russian Federation's expropriation of Yukos' assets constitutes an expropriation of RosInvestCo's investment. RosInvestCo should be compensated for this unlawful expropriation in accordance with the standard set forth in the Chorzów Factory case, i.e., in an amount sufficient to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." Anything less would reward the Russian Federation for its illegal actions.*

4. Claimant provides a further summary in ¶¶1 – 4 and ¶¶49 – 56 of CPHB-II:

1. *In its First Post-Hearing Memorial, the Respondent continues to defend its expropriation and renationalization of all of the assets of OAO NK Yukos Oil OJSC ("Yukos") as a bona fide exercise of its tax enforcement powers. The Respondent argues that RosInvestCo "has the full burden of establishing that the measures it complains of do not benefit from the presumption of legality to which they are entitled under international law."¹*

2. *While Claimant certainly has the burden of persuading this Tribunal of the elements of its claim, the late-Professor Thomas Wälde explained why the Respondent also has the burden of persuading the Tribunal that its defenses are well founded:*

“A tax or tax enforcement that singles out a particular investor (or group of investors) becomes suspect, in particular if such singling-out and discriminatory enforcement correlate with political opposition between that investor and the powers controlling the state. . . . In such cases, the burden of showing a ‘legitimate reason’ has to be much higher than in cases of differentiated tax treatment where no particular suspect reason for the differentiation is available. It is possible to distil from such principles – or rather guidelines for assessing the tax and balancing the criteria for and against its expropriatory character – a system of presumptions (involving burden of proof and legal persuasion). As ‘red flags’ attach themselves to a tax measure, the burden of proof and legal persuasion is on the taxing state to show that the measure is not discriminatory, has legitimate reasons, and is not intended to harm foreign investors and carry out expropriation in legally camouflaged ways”
(CLA-76)

3. *The record in this case is replete with “red flags.” RosInvestCo has rebutted any presumption of legitimacy to which the Respondent’s actions could reasonably be entitled. The sequence of events, and the sheer number and accumulation of hostile actions, all point to the conclusion that the Russian Federation abused its tax enforcement powers to expropriate strategic petroleum assets controlled by a political opponent of the Russian State:*

- *As early as 1997, Vladimir Putin advocated that the Russian State should regain and maintain control over privatized petroleum resources. After his election in 2000, President Putin publicly expressed a desire to “liquidate the oligarchs as a class,” although he then offered the oligarchs a “truce”*

pursuant to which the perceived sins of the privatizations would not be revisited as long as the oligarchs stayed out of politics.

- *Although the Russian tax authorities identified no material tax deficiencies when they audited Yukos and its trading companies in 2002 and early in 2003. First, Mikhail Khodorkovsky, Yukos' Chief Executive Officer, publicly denounced corruption in the Putin administration and began heavily funding opposition parties. At the same time, Yukos promoted two private pipelines that would have undermined the Transneft state monopoly over the infrastructure for exporting oil from Russia. In addition, by planning to sell a majority stake in itself to ExxonMobil, Yukos threatened to put a large part of the Russian Federation's oil reserves under foreign control.*
- *In response to these provocations, the Russian authorities arrested Mr. Khodorkovsky in October 2003, on charges largely related to a company called Apatit, which was not part of Yukos. The Apatit charges, which the General Prosecutor's Office had previously rejected, were revived after President Putin personally intervened.*
- *RosInvestCo has extensively documented the "supervisory re-audit" of Yukos's 2000 tax year that the Russian Federation commenced and concluded in December 2003, after Mr. Khodorkovsky's arrest. The Respondent's ostensible "discovery" of a US\$ 3.5 billion tax shortfall during the three-week audit (no trace of which had been found during the previous audits of Yukos and its trading companies in 2002 and 2003) is wholly implausible. Equally implausible are the results of the Russian Federation's subsequent audits of Yukos' 2001 to 2004 tax years, which cumulatively led to the assessment of an additional US\$ 20.6 billion in taxes, interest, and fines. The timing of the audits and speed with which the tax authorities suddenly uncovered an alleged US\$ 24.1 billion tax fraud are powerful support*

for the inference that the tax assessments – lawful or not under Russian law (and they were not) – were a pretext for eliminating Mr. Khodorkovsky while renationalizing all of Yukos' oil and gas assets.

- The Respondent's assessment against Yukos of US\$ 13.5 billion of VAT (including US\$ 2.3 billion in repeat offender fines) is perhaps the most glaring "red flag." It is uncontested that Yukos' trading companies had exported the relevant oil, that no VAT is due on exports, and that the trading companies had complied with all of the legal requirements for claiming the 0% rate of VAT applicable to exports. The Respondent freely attributed to Yukos the revenues earned by Yukos' trading companies, but it steadfastly refused to give Yukos the benefit of the paperwork filed by those same companies. These two positions are only reconcilable if the Respondent's true objective was to destroy Yukos.*
- The Respondent's assessment against Yukos of US\$ 9.4 billion of profit taxes (including US\$ 1.5 billion in repeat offender fines) is also striking. After companies affiliated with Yukos and incorporated in Low-Tax Regions had for years filed returns and paid billions of dollars in taxes, those companies were suddenly, using novel legal theories, declared to be shams.*
- The Respondent's actions leading up to the YNG auction point in the same direction. Rather than seeking to preserve the continuing ability to do business and pay taxes of the Russian Federation's largest private company, the Russian authorities instead consistently exercised their discretion in such a way as to ensure Yukos' destruction. To that end, the Russian authorities (i) gave Yukos the minimum amount of time possible to pay tax assessments; (ii) obtained an injunction that froze Yukos' assets such as to impede Yukos' ability to pay those assessments; (iii) seized all of Yukos' shares in Yuganskneftegaz ("YNG"), Yukos' principal*

production facility, to enforce the assessments; (iv) refused to accept any of Yukos' offers to satisfy the tax claims with other assets; and (v) refused to delay or forego the auction of the voting shares of YNG even though Yukos had (pending a resolution of its legal challenges) by the time of the auction satisfied the entirety of its alleged year 2000 liability.

- *The orchestrated auction of YNG to Rosneft, the Russian Federation's state-owned oil company, behind an unconvincing screen known as Baikalfinansgroup ("BFG"), remains one of the most obvious "red flags." The lengths to which the Respondent went to conceal Rosneft's relationship with BFG is highly suggestive of a male fide intent. The Russian tax authorities' abandonment, after YNG was transferred to Rosneft, of most of their claim to almost US\$ 4.4 billion in back taxes that had been assessed against YNG while it was owned by Yukos is equally instructive.*
- *The Respondent's hidden role (through Rosneft) in arranging the initiation of bankruptcy proceedings against Yukos, along with the refusal of Rosneft and the Russian Tax Ministry to accept a rehabilitation plan sponsored by Yukos' management that would have allowed Yukos to remain in business, are additional indications of the Respondent's intent to destroy Yukos. The post-bankruptcy transfer of virtually all of Yukos' remaining oil and gas assets to state control likewise points in the same direction.*
- *Finally, the targeting of business people and lawyers affiliated with Yukos and its shareholders, the procedural inequities in the Russian court proceedings, and the disparate treatment of Yukos' competitors all contradict the Respondent's continued professions of good faith.*

4. *Professor Newcombe has observed that, "[w]here there is evidence of intent to expropriate, it is unlikely that a state could rely on the good faith exercise of its police powers as justification for non-compensation." The conjunction of events*

described above are not mere happenstance or coincidence. Claimant has demonstrated that those events cannot be justified as a bona fide exercise of the Russian Federation's power to tax. The liquidation of a company under the pretext of tax enforcement constitutes an unlawful expropriation. This is true regardless of whether, and to what extent, the tax enforcement measures themselves may have complied with Russian domestic law. Formal compliance with domestic law may not be used to justify the destruction of a private company and excuse the uncompensated transfer of that company's assets to the state. Such actions constitute an unlawful expropriation under international law, regardless of how they might be viewed under domestic law, and have been so perceived by international courts and commentators.

...

49. *The Respondent contends that Claimant has not established that any post-investment measures deprived it of (i) the total or substantial value of its investment in Yukos, (ii) any fundamental ownership rights in its investment, or (iii) any legitimate expectation in its investment. The Respondent is wrong.*

50. *The Respondent first contends that Claimant was not deprived of the total or substantial value of its investment because the YNG auction "occurred long before Claimant acquired an economic interest in the Yukos shares, in March 2007, and long before the UK-Soviet BIT could have become applicable to Claimant and the Yukos shares." Claimant became a protected investor beginning on 16 November and 1 December 2004. This argument therefore has no merit.*

51. *The Respondent next contends that, even assuming that Claimant made its investment in 2004 (as it did), Claimant was not deprived of the total or substantial value of its investment, because various tax liens became enforceable prior to*

Claimant's purchase of its shares, the shares had lost a significant part of their market value, and Yukos' management had declared that the company was insolvent as of 31 October 2004. Once again, the Respondent's argument must be rejected.

52. When Claimant made its investment, Yukos was a fully functioning company. All of its assets remained in its possession and its business operations were ongoing. By 15 August 2007, the Respondent had taken all of Yukos' assets. The forced sale of a company's assets under the pretext of tax enforcement constitutes an unlawful expropriation. There can be no dispute that the taking of Yukos' assets had the effect of expropriating Claimant's shareholding in Yukos, because the Respondent's actions left Claimant the owner of shares in an empty shell. Article 5(2) of the IPPA expressly confers on a shareholder the right to assert claims under Article 5(1) under such circumstances. The YNG auction and the Bankruptcy Auctions thus deprived Claimant of "the total or substantial value of its investment."

53. The Respondent's argument is premised on the mistaken belief that the value of Claimant's Yukos shares must be determined by reference to their stock market price. Under ideal circumstances, a company's share price should reflect the company's net asset value and the market's prediction as to the effect of future events on earnings. In this case, the market depressed the share price toward the end of 2004 to account for the Respondent's menacing posture toward Yukos. While the Respondent's threats may have allowed Claimant to acquire its Yukos shares at a depressed price, the value of its investment is properly determined by calculating Claimant's proportionate share of the net asset value of Yukos. If the measures taken by the Respondent against Yukos after Claimant acquired its shares were unlawful, as Claimant has demonstrated, those measures deprived Claimant of the full value of its investment – US\$ 232.7 million as of the date of the last bankruptcy auction, 15 August 2007.

54. *The Respondent also argues that Claimant has not shown that it was deprived of any “fundamental ownership rights” in its investment. If the Respondent is correct that “the appointment of a receiver to liquidate a business or other property constitutes an expropriation if it does not constitute a legitimate exercise of the State’s regulatory power,” then the Respondent’s appointment of a receiver on 4 August 2006 also deprived Claimant of fundamental ownership rights in its investment on that date.*

55. *Finally, the Respondent contends that it did not deprive Claimant of any legitimate investment-based expectation, because it was under no obligation after November/December 2004 to reverse the 2000-2003 tax liens or the order to sell the YNG common shares at auction, or to do anything to reverse the decision in 2006 to liquidate Yukos’ remaining assets. But a state always has the opportunity, and the obligation, to pull back at the brink from committing an unlawful act. Investors are encouraged by treaties such as the IPPA to invest on the expectation that states will follow the law and honor their treaty obligations. The Respondent’s argument to the contrary is unbecoming a state that professes to adhere to the rule of law.*

C.II. The Respondent’s Perspective

5. In Statement of Defence Respondent inter alia states (R-I, at I. Introduction):

“[The] Claimant [is] seeking, through a treaty claim with no valid basis in public international law, damages it never suffered in respect of measures that took place long before it became a protected investor.

Documents [] demonstrate that Claimant first became the beneficial owner of the Yukos shares in 2007, long after these

proceedings were commenced and only months before completion of Yukos' liquidation in bankruptcy proceedings. At all times prior to 2007, the recently produced documents show the beneficial owner of the Yukos shares to have been a limited partnership established in the Cayman Islands, a jurisdiction not covered by the UK-Soviet BIT. Contrary to the representation made by Claimant in its Statement of Claim that it had "continuously held" the Yukos shares from the date of their first purchase in 2004, during the entirety of this period Claimant was only one in a chain of nominees interposed between Yukos and the Cayman Islands beneficial owner of the Yukos shares, which, like Claimant, is owned and controlled by the Elliott Group.

The Elliott Group is a notorious US-based "vulture fund" and an archetype of pre-crash Wall Street "anything goes" capitalism. The modus operandi of the Elliott Group, [] consists of "buying lawsuits"—purchasing the securities of an issuer not because they offer the prospect of a reasonable return, but because they furnish a pretext for the Elliott Group to threaten legal action unless its demands are promptly satisfied. In this upside-down world, the Elliott Group's strategy involves a classical politique du pire: the more desperate the situation of the issuer becomes, the better the outcome for the Elliott Group, as they can then leverage the resulting "losses" into huge damage claims.

The present proceedings also illustrate three other characteristic features of an Elliott Group "investment."

The first is greed. Claimant paid only US\$ 3.5 million for the Yukos shares at issue in 2007, when Claimant first became their beneficial owner. Claimant nonetheless demanded US\$ 276.1 million in damages in its Statement of Claim—over 78 times the amount of its purchase price. Even if measured against the US\$ 11.66 million purchase price paid by Claimant for the same Yukos shares in November and December 2004 (though then only as a nominee of a Cayman Islands limited partnership and

fellow member of the Elliott Group), Claimant is here seeking more than 23 times that purchase price. And as will be seen below, for many months after Claimant first became a nominal owner of the Yukos shares, they could have been sold for what a reasonable investor would have considered a very handsome profit—a return of almost 20% per annum. But a decision was made not to sell the Yukos shares for “small” profits, but instead to keep the shares, and bring this claim, seeking damages wholly divorced from the amount of any investment that Claimant may plausibly be regarded as having made.

Another hallmark of the Elliott Group is secrecy. In the present case, secrecy has resulted in Claimant's refusal to accommodate most of Respondent's requests for documents, and its belated compliance with the few requests that Claimant has chosen to honor.

The third characteristic feature of the Elliott Group is lack of credibility. Members of the Elliott Group, including Claimant, present themselves as traditional investors, better able than others to assess distressed market conditions, and yet, with remarkable constancy, the courts hearing the legal actions they have brought seeking windfall profits have found their proffered explanations incredible, finding instead that their investments made sense only if immediately backed by legal action [], this is also the case here in relation to Claimant's purchase of Yukos shares.

It is axiomatic [] that an investor cannot complain of acts that preceded its investment. It is also clear [] that a mere nominee cannot qualify as an investor. Accordingly, Claimant can complain only of actions or events that occurred after it became the beneficial owner of the Yukos shares in 2007. By then, however, virtually all of the acts complained of in its Statement of Claim were already past history.

Chronology would also be fatal to Claimant even if quod non it were entitled to assert claims based on events occurring from November-December 2004 onwards, when it was a mere

nominee for its Cayman Islands affiliate, as Claimant bases its case on events that occurred even before this period. For example, all the contested tax assessments for the years 2000-2003, the related injunction and freezing of Yukos assets, and all of the procedural irregularities alleged by Claimant took place prior to the purchases of any of the Yukos shares. Even though the auction of most of Yukos' shareholding in OAO Yuganskneftegaz ("YNG")—the centerpiece of Claimant's claim—took place a few days after Claimant's December 2004 purchase of Yukos shares, all of the Russian Government's decisions relating to that auction had likewise been taken beforehand, and were thus also faits accomplis.

In addition to the foregoing time-based defenses, there are other equally strong grounds for dismissal of Claimant's claim on the basis of the provisions of the UK-Soviet BIT and as a matter of public international law.

- *[], the post-investment measures complained of did not result in a total or substantial deprivation of Claimant's shareholding, and thus no claim of expropriation can validly be asserted.*
- *Allegations of due process violations and discrimination cannot be asserted under Article 5(1) of the UK-Soviet BIT, unless they rise to the level of measures tantamount to expropriation, and in this case, the alleged violations of due process and discrimination do not come close to meeting that threshold. [].*
- *[], virtually all the measures complained of are tax enforcement measures, and selective tax enforcement (even if it occurred quod non) does not constitute discrimination within the meaning of Article 5(1) of the UK-Soviet BIT.*
- *The Russian court decisions complained of do not themselves amount to measures tantamount to expropriation, and in any event, did not result in a total or substantial deprivation of Claimant's shareholding, nor were any of the tax assessments or related enforcement*

measures or bankruptcy proceedings, all of which were upheld by Russian court decisions, expropriatory. [].

The foregoing defenses amply justify the dismissal of this case, without need for the Tribunal to conduct a detailed examination of several years' worth of records relating to tax assessments, enforcement measures and bankruptcy proceedings. Respondent has nevertheless addressed all of these facts in detail, both in the Statement of Facts [] and in the three Annexes attached to this Statement of Defense, described below.

[], this Tribunal is not called upon to sit as an appellate court of last resort reviewing the Russian court decisions already exhaustively litigated by Yukos. The Tribunal must instead determine whether quod non any actions taken by the Russian authorities were sufficiently egregious as to constitute measures tantamount to expropriation as a matter of public international law. [], the burden of proof here is squarely on Claimant's shoulders.

The facts, once understood, also sharply contradict the highly implausible conspiracy theory Claimant proposes (on the basis of what it admits is "circumstantial evidence") as an explanation for Yukos' demise. Claimant's grand conspiracy, which accuses Respondent of intentionally destroying Yukos in order to "re-nationalize" its petroleum assets, is essentially borrowed from the self-serving propaganda that Yukos' former managers and controlling shareholders spread throughout the media in their attempts to intimidate Respondent from enforcing its laws. The facts undermining Claimant's conspiracy theory—which illogically depends to a critical extent on the significant assistance of the alleged targets of the conspiracy (Yukos and its core shareholders) and implausibly hypothesizes the cooperation by third parties with no connection to the Russian Government []."

6. Respondent's Surreply of 16 November 2009 (R-II, section I) summarises the case as follows:

Claimant, in its Request for Arbitration, asserted that it had been the "continuous" owner of seven million Yukos ordinary shares since late 2004, and that its interest in those shares had been expropriated as a result of the taxes assessed on Yukos by the Russian authorities and the sale at auction, in December 2004, of 43 ordinary shares of Yuganskneftegaz ("YNG") in partial satisfaction of Yukos' tax liabilities.

In its Statement of Defense, Respondent demonstrated that Claimant was not in fact the "continuous" owner of the Yukos shares from late 2004 onwards, and indeed only first acquired an economic interest in the Yukos shares in 2007, well after all the principal events previously complained of had occurred.

In response, Claimant has fundamentally changed its story. As set out in Claimant's Reply, Claimant now asserts that it was the legal (or nominal) owner of the Yukos shares at all times until they were de-listed in late 2007, and that Yukos' assets (as opposed to Claimant's interest in the Yukos shares) were expropriated in the YNG auction and in subsequent auctions held, beginning in March 2007, in implementation of the bankruptcy court's order that Yukos be liquidated. Claimant also now expressly disclaims that the assessment of Yukos' taxes, which featured so prominently in its prior submissions, constituted acts of expropriation.

[...] Claimant was in fact never the legal (or nominal) owner of the Yukos shares, and never had any rights in relation to the Yukos shares as a matter of Russian law, the law that determines the existence and scope of ownership rights in Yukos shares. To the contrary, under Russian law, Credit Suisse First Boston was at all relevant times the sole legal (or nominal) owner of the Yukos shares.

[...] Claimant first acquired an economic interest in the Yukos shares in March 2007, long after the liquidation of Yukos had become irreversible. Contrary to Claimant's attempt to diminish the importance of the Participation Agreements – initially withheld by Claimant until finally produced on March 6, 2009 – both of the Participation Agreements expressly transferred 100% of Claimant's interest in the Yukos shares to Elliott International, a Cayman Islands company not eligible for investment treaty protection.

As a result, for so long as the Participation Agreements remained in place, Elliott International was the economic owner of the Yukos shares and alone enjoyed all of the rights of a shareholder in a Russian company – the right to receive and enjoy the use of the dividends paid on the Yukos shares, and the right to direct how the Yukos shares were voted. Claimant, by contrast, was during this entire period nothing more than an uncompensated financial intermediary, obligated to act (for no fee) solely pursuant to Elliott International's instructions and to pay over to Elliott International all the dividends received on the Yukos shares.

Claimant's rights and offsetting duties in relation to the Yukos shares prior to March 2007 thus did not have – and could not have had – any economic value. Indeed, Claimant would have had to pay someone to step into its shoes for so long as the Participation Agreements remained in place

It is thus now clear that prior to March 27, 2007, Claimant's "rights" in relation to the Yukos shares were not an "asset" within the meaning of Article 1(a) of the UK-Soviet BIT. There was, in consequence, prior to that date, no "disput[e] between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former" within the meaning of Article 8(1) of the UK-Soviet BIT, and no "investmen[t] of [an] investo[r] of either Contracting Party" entitled to protection under Article 5(1) of the UK-Soviet BIT.

Several consequences follow from this state of affairs, which serially and collectively mandate the dismissal of Claimant's claim.

First, the Tribunal has no jurisdiction over, and Article 5 of the UK-Soviet BIT does not apply to, any of the pre-March 27, 2007 measures of which Claimant complains.

Second, at the critical date – the date of commencement of this arbitration in October 2005 – Claimant was not entitled to most-favored-nation treatment as regards the management, maintenance, use or enjoyment of a protected investment pursuant to Article 3(2) of the UK-Soviet BIT in connection with Article 8 of the Denmark-Russia BIT – the only basis on which this Tribunal has previously determined that it could assume jurisdiction over Claimant's claim.

Third, the Tribunal lacks jurisdiction over a dispute that arose prior to Claimant's having made an "investment," and thus has no jurisdiction to adjudicate this dispute. The present dispute crystallized long before Claimant even arguably made a protected "investment" under the UK-Soviet BIT. In 2005, Claimant notified the Russian Federation (under Article 8(2) of the UK-Soviet BIT) of a dispute over "expropriatory acts" and filed a Request for Arbitration formally asserting its expropriation claims. Respondent rejected these claims on February 28, 2006, in its Reply to the Request for Arbitration. The dispute that had already crystallized by March 2007 includes Yukos' tax assessments, the seizure and auction of YNG's ordinary shares, the alleged denial of the means and opportunity to challenge Yukos' tax assessments and the YNG auction in Russian courts, and the alleged deficiencies in the YNG auction itself.

The termination of the Participation Agreements on March 27, 2007 could not, in any event, have created a protected investment. By that time, the tax assessments against Yukos were final and irreversible, the YNG shares had been sold at auction, Yukos had been declared bankrupt and the final

decision to sell Yukos' assets and dissolve the company had been made. Claimant could then have had no reasonable expectation that Yukos would have emerged from liquidation as a viable economic enterprise. Certainly, Claimant has not produced – despite repeated requests⁴ – a single document memorializing the reasons for its supposed “investment” in the Yukos shares on March 27, 2007, the very day on which the first of Yukos' bankruptcy auctions was held

The only plausible explanation for Claimant's termination of Elliott International's economic interest in the Yukos shares in the midst of Yukos' ongoing liquidation was the Elliott Group's desire to take advantage of the rights thought to be available under the UK-Soviet BIT – rights that clearly would not have been available to Elliott International, a Cayman Islands company. In the absence of a legitimate expectation of realizing a return from the economic activity of a going concern, even Claimant's 2007 acquisition of an economic interest in the Yukos shares did not constitute an “investment” within the meaning of Article 1(a) of the UK-Soviet BIT. The Tribunal thus also lacks jurisdiction over, and Article 5 of the UK-Soviet BIT does not apply, to the measures of which Claimant complains that post-date the termination of the Participation Agreements.

Even assuming quod non that this Tribunal has jurisdiction over Claimant's claim, there was no expropriation for which Claimant could recover. As an initial matter, Claimant itself expressly disclaims an expropriation of the Yukos shares. Claimant instead seeks, based on a misreading of Article 5(2) of the UK-Soviet BIT, to recover for the alleged expropriation of the assets of Yukos itself. But Article 5(2), in providing that “the provisions of paragraph (1) of this Article shall apply,” does not allow a shareholder to recover for the taking of the assets of a company in which it has invested, but rather merely creates standing for a shareholder to claim an expropriation of its own shareholding as a result of the expropriation of the assets of a local company.

Second, it is indisputable, for the reasons discussed below, that virtually all of the complained-of measures had long since occurred, and had become irreversible, by the time Claimant first obtained an economic interest in the Yukos shares, in March 2007. Yukos was permanently deprived of the economic value, use, and enjoyment, and possession and control, of all of its assets in September 2006, at the latest, when the decision to liquidate Yukos' remaining assets became final and irreversible under Russian law. Any measures that occurred thereafter did not concern a viable company and valuable assets to be expropriated. The expropriation Claimant alleges thus took place, if ever, before Claimant first acquired even an arguably protected interest, and, Claimant's new theory notwithstanding, the same asset may not be expropriated twice.

Respondent has, in any event, demonstrated in its Statement of Defense – and Claimant has not challenged Respondent's showing – that none of the events that occurred after March 27, 2007 caused a substantial or total loss in the value of the Yukos shares. The bankruptcy auctions were, moreover, conducted in full compliance with Russian law and in accordance with international practice, and, in the event, realized amounts that corresponded favorably to market values of the auctioned assets, [...].

Because Claimant did not make a protected investment until March 2007, if at all, RosInvestCo has abandoned its claim that the tax assessments were themselves expropriatory measures. Claimant has instead attempted to argue that the tax assessments were merely the "pretext" for Respondent's alleged expropriation of Yukos' assets. In order to prove that the tax assessments were a sham or pretext, Claimant must meet a high standard of proof – a "demanding" one, according to Claimant.⁶ Claimant would, in particular, need to show collusion among several branches of the Russian Government and the Russian judiciary, as well as the participation in the conjectured conspiracy of Western financial institutions and Yukos itself. As discussed in Annex E, the convoluted and

contradictory positions advanced by Claimant on this issue, supported only by limited and unconvincing circumstantial evidence, do not come close to satisfying the required high standard of proof.

Even if the tax assessments were subject to review under Article 5 of the UK-Soviet BIT, which they are not, Claimant has not rebutted the presumption of bona fide taxation. As demonstrated below, Claimant has failed to establish that the tax assessments were either mala fide or discriminatory or confiscatory. Annex AA and the supplemental expert report of Mr. Oleg Y. Konnov rebut each of the arguments raised by Claimant and Professor Maggs with respect to taxes, and demonstrate that the actions of the Russian tax authorities were fully in line with both Russian law and international tax practice. In particular, Respondent and Mr. Konnov establish that Yukos' tax assessments were not discriminatory, retroactive or excessive, a conclusion supported by Respondent's survey of the international tax practices of other States, which shows that the abusive tax practices used by Yukos would have been treated more severely under the tax systems of numerous Member States of the Council of Europe and many non-European States. Claimant's empty claim that the tax treatment of Yukos does not meet international standards is not supported by the actual tax practice of other countries, and Claimant, while it invokes international tax standards, has neither challenged the authorities from other countries relied on by Respondent, nor cited any of its own.

In a similar vein, Annex BB and the supplemental expert report of Professor Elena A. Borisova refute Claimant's charge that the YNG auction – which likewise occurred and became irreversible before March 2007 – was "rigged," resulted in a below-market price and was otherwise improper. To the contrary, the YNG auction comported with Russian law as well as international practice. Here too, Claimant fails to address the conduct of the YNG auction in the context of international practice. Claimant, in its Reply, does not contest Respondent's

demonstration in Annex B to the Statement of Defense that the starting price, final price and other parameters of the YNG auction were in compliance with Russian law and in line with international practice, and that the actions of Yukos and its management – in blocking the participation of the most likely bidders and sources of finance – were responsible for the fact that the price realized for the YNG shares, while higher than many pre-auction valuations, was not higher still

For the foregoing reasons, Claimant has failed to establish a violation of Article 5 of the UK-Soviet BIT. Even if Respondent were somehow found to have breached Article 5, Claimant would, for several independent reasons, still not be entitled to damages.

First, Claimant could not have had a legitimate expectation of realizing an economic return when it acquired an economic interest in the Yukos shares in March 2007, but was instead then engaging in impermissible treaty shopping.

Second, Claimant has not challenged either the authorities cited by Respondent that impose a duty to mitigate damages or the facts marshaled by Respondent showing that Claimant had an opportunity, following its acquisition of an economic interest in the Yukos shares, not only to mitigate its damages, but to sell its interest in the shares at a profit. Experience suggests that Claimant may be alone among investment treaty claimants in still being able to have realized a profit on its investment more than 17 months after the filing of its Request for Arbitration, which, not surprisingly, asserted that its investment had already been expropriated. But, according to Claimant, realizing a profit on its investment would have required that it abandon its treaty claim. Respondent would have thought that it goes without saying that the purpose of an investment treaty is to encourage investment, not the filing of treaty claims in lieu of readily available financial returns.

Third, the damages Claimant seeks are based on an analysis at odds with the statements in Claimant's Reply that Yukos' tax assessments were not themselves expropriatory measures. As the supplemental expert report of Professor James Dow shows, LECG's calculation of damages, on which Claimant relies, is based on the same "retroactive" tax claims that RosInvestCo now acknowledges did not constitute acts of expropriation and, in any event, occurred well before Claimant first acquired an economic interest in the Yukos shares.

Fourth, Claimant, having previously offered to update its ex post calculation of damages only to discover that its prior estimate had been reduced by roughly a third as a result of the recent stock-market sell-off, now argues that its damages should instead be calculated on the date that would produce the highest possible award, regardless of whether the damages so calculated correspond to any loss actually suffered. Claimant's ex post approach to damages is contrary to economic reality as well as common sense, and rather than returning Claimant to its position had there been no alleged treaty violations, would result in an enormous and unwarranted windfall for Claimant.

D. Procedural History

7. The Award on Jurisdiction dated 5 October 2007 contains a procedural history up to the release of that Award. The Decision of the Tribunal in section I of that Award is recalled at the beginning of the Tribunal's Considerations below.
8. Following the Parties' receipt of the Award on Jurisdiction, on 24 October 2007, the Tribunal invited the Parties to agree and submit a timetable by 23 November 2007 for the Tribunal's further consideration of the case.
9. The Parties requested (and were granted) an extension of time to complete negotiations to agree a timetable and on 29 February 2008 submitted a proposed timetable to the Tribunal. The Tribunal provided comments on the timetable to the Parties for their consideration.
10. On 18 April 2008 the Parties submitted a final proposed timetable which was accepted by the Tribunal.
11. On the basis of the proposed timetable provided by the Parties, the Tribunal issued a draft procedural order on 26 April 2008 requesting final comments by 2 May 2008.
12. After receiving comments from the Parties regarding the draft, the Tribunal issued **Procedural Order (PO) No. 2** on 16 May 2008 which set out as follows:

1. Earlier Rulings

- 1.1. The rulings in Procedural Order No.1 remain valid and shall be applicable also to the procedure on the merits, unless ruled otherwise in this Order.*

- 1.2. *However, Section 2.7. of PO-1 shall be applicable as amended hereafter:*

To facilitate that parts can be taken out and copies can be made, submissions of all documents including statements of witnesses and experts shall be submitted separated from Briefs, unbound in 2-ring binders and preceded by a list of such documents consecutively numbered with consecutive numbering in later submissions (CM-1, CM-2 etc. for Claimants; RM-1, RM-2 etc. for Respondents) and with dividers between the documents. As far as possible, in addition, documents shall also be submitted in electronic form (preferably in Windows Word to facilitate word processing and citations).

To facilitate work for all concerned in this 2nd phase of the procedure on the merits, rather than referring to the documents submitted in the earlier phase on jurisdiction, all documents the Parties wish to rely on in this procedure on the merits shall be submitted in new ring binders starting with a new numbering (CM-1, CM-2, etc. for Claimant and RM-1, RM-2, etc for Respondent).

2. Timetable

The timetable based on the agreement between the Parties and the Tribunal shall be as follows:

<i>Friday, January 18th, 2008</i>	<i>Claimant to propound its First Merits Document Request to Respondent</i>
<i>Friday, March 14, 2008</i>	<i>Respondent to table any objections to Claimant's First Merits Document Request</i>

<i>Friday, April 04, 2008</i>	<i>Claimant to submit its response to Respondent's objection to Claimant's First Merits Document Request</i>
<i>Friday, April 18, 2008</i>	<i>Respondent to submit reply to Claimant's response to Respondent's objection to Claimant's First Merits Document Request; Respondent to commence rolling production of documents in response to requests not objected to.</i>
<i>Friday, June 06, 2008</i>	<i>Respondent to complete response to Claimant's First Merits Document Request.</i>
<i>Friday, August 22, 2008</i>	<i>Claimant to submit its Statement of Claim</i>
<i>Wednesday, September 24, 2008</i>	<i>Respondent to propound its First Merits Document Request to the Claimant</i>
<i>Wednesday, October 8, 2008</i>	<i>Claimant to table any objections to Respondent's First Merits Document Request</i>
<i>Wednesday, October 22, 2008</i>	<i>Respondent to submit its response to Claimant's objection to Respondent's First Merits Document Request</i>
<i>Friday, October 31, 2008</i>	<i>Claimant to submit reply to Respondent's response to Claimant's objection to</i>

	<i>Respondent's First Merits Document Request; Claimant to commence rolling production of documents in response to requests not objected to.</i>
<i>Friday, November 14, 2008,</i>	<i>Claimant to complete response to Respondent's First Merits Document Request</i>
<i>Friday, February 13, 2009</i>	<i>Respondent to file its Statement of Defense</i>
<i>Tuesday, February 24, 2009</i>	<i>Pre-Hearing Conference between the Parties and the Tribunal, if considered necessary by the Tribunal. Location of hearings to be determined by this date.</i>
<i>Friday, March 6, 2009</i>	<i>Claimant to propound its Second Merits Document Request to Respondent</i>
<i>Friday, March 20, 2009</i>	<i>Respondent to table any objections to Claimant's Second Merits Document Request; Respondent to commence rolling production of documents in response to requests not objected to.</i>
<i>Friday, May 29, 2009</i>	<i>Respondent to complete response to Claimant's Second Merits Document Request</i>
<i>Tuesday, June 05, 2009</i>	<i>Preliminary notification of which witnesses identified by the other party that each party is likely to</i>

	<i>wish to cross examine at hearings</i>
<i>Friday, July 24, 2009</i>	<i>Claimant to file its Reply to Respondent's Statement of Defense</i>
<i>Friday, August 21, 2009</i>	<i>Respondent to propound its Second Merits Document Request to Claimant</i>
<i>Friday, September 11, 2009</i>	<i>Claimant to table any objections to Respondent's Second Merits Document Request; Claimants to commence rolling production of documents in response to requests not objected to.</i>
<i>Friday, September 25, 2009</i>	<i>Claimant to complete response to Respondent's Second Merits Document Request</i>
<i>Friday, October 30, 2009</i>	<i>Respondent to file its Surreply to Claimant's Reply</i>
<i>Tuesday, November 10, 2009.</i>	<i>Parties to submit final notifications of which witnesses and experts presented by themselves or by the other Party that they wish to examine at the Hearing.</i>
<i>Friday, November 20, 2009.</i>	<i>Parties to submit (1) final list of witnesses who will appear at the hearing; and (2) a chronological list of all exhibits with indications where the respective documents can be found in the file.</i>

<i>Monday, December 7, 2009</i>	<i>Final Pre-Hearing Conference between the Parties and the Tribunal, if considered necessary by the Tribunal.</i>
<i>By Monday, December 21, 2009</i>	<i>Tribunal issues PO regarding further details of the Hearing</i>
<i>Monday, January 18, 2010</i>	<i>Parties to submit binders of Hearing Exhibits to the Tribunal at the place of the hearings</i>
<i>January 18 – 22, with a possible extension to January 29, 2010.</i>	<i>Hearing</i>

3. Hearing

- 3.1. *As indicated in the timetable above, the Hearing shall be from January 18 to 22, 2010, but after consultation with the Parties, the Tribunal may extend the Hearing into the next week up to January 29, 2010. Therefore, as a precaution, all concerned shall block the full periods of these two weeks for the Hearing.*
- 3.2. *The Hearing shall be held in Stockholm at a site selected by the Parties after consultation with the Tribunal. The Parties shall make the necessary logistical arrangements and reservations and shall share the respective costs. They shall take the necessary steps and inform the Tribunal as soon as possible.*
- 3.3. *Further details and the final Agenda for the Hearing shall be established by the Tribunal after consultation with the Parties in a Procedural Order by December 21, 2009.*

- 3.4. *No new documents may be presented at the Hearing. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.*
- 3.5. *To allow all concerned the necessary evaluation of the day and preparation of the next day, the Hearing will start at 9:00 and end at 17:00 hours, subject to changes decided by the Tribunal after consultation with the Parties.*
- 3.6. *Taking into account the time available during the period provided for the Hearing in the Timetable, the Tribunal intends to establish equal maximum time periods both for the Claimant and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest at the time of the Pre-Hearing Conference.*
- 3.7. *A transcript shall be made of the Hearing and sent to the Parties and the Arbitrators. The Parties, who shall share the respective costs, shall try to agree on and make the necessary arrangements in this regard and shall inform the Tribunal accordingly before the time set for the Pre-Hearing Conference.*
- 3.8. *Should the Parties be presenting a witness or expert not testifying in English and thus requiring interpretation, they are expected to provide the interpreter unless agreed otherwise. However, the Parties are encouraged to agree on interpreters and make common arrangements in this regard. Should more than one witness or expert need interpretation, to avoid the need of double time for successive interpretation, simultaneous interpretation shall be provided.*
13. On 2 June 2008, in response to the Tribunal's request, and taking into account PO No. 2, the SCC-Institute extended the time for rendering of the Award to 30 September 2010 in accordance with Article 33 of the SCC Rules.

14. On 23 August 2008, the Tribunal received the Statement of Claim in addition to a report of Peter B. Maggs and a report of Dr. Manuel Abdala and Dr. Pablo Spiller of LECG, LLC.
15. Following the sudden illness of one counsel for one of the Parties, the Tribunal consulted with the Parties and on the basis of discussions released Procedural Order (PO) No. 3 on 7 January 2009 which set out the following new timetable:

Procedural Order (PO) No.3 (establishing a new Timetable for the further procedure on the merits)

This PO puts on record the results of the recent e-mail consultations and agreement between the Parties and the Tribunal regarding modifications of the Timetable of PO-2.

<i>Date from Procedural Order No. 2</i>	<i>New Date</i>	
<i>Wednesday, October 22, 2008</i>	<i>Wednesday, October 29, 2008</i>	<i>Respondent to submit its response to Claimant's objection to Respondent's First Merits Document Request.</i>
<i>Friday, October 31, 2008</i>	<i>Friday, November 7, 2008</i>	<i>Claimant to submit reply to Respondent's response to Claimant's objection to Respondent's First Merits Document Request; Claimant to commence rolling production of documents in response to requests not objected to.</i>
<i>Friday, November 14, 2008</i>	<i>Friday, November</i>	<i>Claimant to complete response to Respondent's</i>

	28, 2008	<i>First Merits Document Request.</i>
<i>Friday, February 13, 2009</i>	<i>Monday, April 13, 2009</i>	<i>Respondent to file its Statement of Defense.</i>
<i>Friday, March 6, 2009</i>	<i>Monday, May 4, 2009</i>	<i>Claimant to propound its Second Merits Document Request to Respondent.</i>
<i>Friday, March 20, 2009</i>	<i>Monday, May 18, 2009</i>	<i>Respondent to table any objections to Claimant's Second Merits Document Request; Respondent to commence rolling production of documents in response to requests not objected to</i>
<i>Tuesday, February 24, 2009</i>	<i>Tuesday, 19 May, 2009</i>	<i>Pre-Hearing Conference between the Parties and the Tribunal, if considered necessary by the Tribunal. Location of hearings to be determined by this date.</i>
<i>Friday, May 29, 2009</i>	<i>Monday, July 27, 2009</i>	<i>Respondent to complete response to Claimant's Second Merits Document Request.</i>
<i>Tuesday, June 5, 2009</i>	<i>Monday, August 3, 2009</i>	<i>Preliminary notification of which witnesses identified by the other party that each party is likely to wish to cross examine at hearings.</i>
<i>Friday, July 24, 2009</i>	<i>Monday, September 21, 2009</i>	<i>Claimant to file its Reply to Respondent's Statement of Defense.</i>
<i>Friday, August 21,</i>	<i>Friday,</i>	<i>Respondent to propound</i>

2009	October 2, 2009	its <i>Second Merits Document Request to Claimant.</i>
<i>Friday, September 11, 2009</i>	<i>Friday, October 16, 2009</i>	<i>Claimant to table any objections to Respondent's Second Merits Document Request; Claimants to commence rolling production of documents in response to requests not objected to.</i>
<i>Friday, September 25, 2009</i>	<i>Friday, October 30, 2009</i>	<i>Claimant to complete response to Respondent's Second Merits Document Request.</i>
<i>Friday, October 30, 2009</i>	<i>Monday, November 16, 2009</i>	<i>Respondent to file its Surreply to Claimant's Reply.</i>
<i>Tuesday, November 10, 2009</i>	<i>Wednesday, November 25, 2009</i>	<i>Parties to submit final notifications to each other and the Tribunal of which witnesses and experts presented by themselves or by the other Party that they wish to examine at the Hearing. [words in italics added]</i>
<i>Monday, December 7, 2009</i>	<i>Monday, 7 December, 2009</i>	<i>Final Pre-Hearing Conference between the Parties and the Tribunal, if considered necessary by the Tribunal.</i>
<i>Friday, November 20, 2009</i>	<i>Wednesday, December 16, 2009</i>	<i>Parties to submit (1) final list of witnesses who will appear at the hearing;</i>

		<i>and (2) a chronological list of all exhibits with indications where the respective documents can be found in the file.</i>
<i>By Monday, December 21, 2009</i>	<i>Monday, December 21, 2009</i>	<i>Tribunal issues PO regarding further details of the Hearing.</i>
<i>Monday, January 18, 2010</i>	<i>Monday, January 18, 2010</i>	<i>Parties to submit binders of Hearing Exhibits to the Tribunal at the place of the hearings.</i>
<i>January 18-22, with a possible extension to January 29, 2010</i>	<i>January 18-22, with a possible extension to January 29, 2010</i>	<i>Hearing</i>

16. On 30 March 2009, the Parties communicated their agreement to an amendment to PO No. 3 extending the deadline for the submission of Respondent's Statement of Defence from 13 April 2009 until 20 April 2009.
17. On 20 April 2009, Respondent submitted its Statement of Defence to the Tribunal.
18. On 26 April 2009, the Parties communicated a proposal to consider the pre-hearing conference set down in PO No. 3 for 19 May 2009 as not necessary and for the hearings scheduled for January 2010 to be moved from Stockholm to the ICC Hearing Centre in Paris. The Tribunal agreed to these proposals by e-mail on 28 April 2009 and revoked ¶3.7 of PO No. 2. The Tribunal requested that the Parties make arrangements for a court reporting service for the hearings.
19. On 22 September 2009, the Tribunal received the Claimant's Reply (C-II)

20. On 25 September 2009, the Parties communicated to the Tribunal an agreed amendment to PO No. 3 allowing the Claimant until 26 October 2009 to submit to the Tribunal any additional exhibits from among the documents provided to it by the Respondent (most of which are in the Russian language) upon which the Claimant intends to rely at the hearing on the merits. By e-mail of 26 September 2009, the Tribunal agreed with the proposal.
21. On 26 October 2009, Claimant submitted the additional exhibits referred to in ¶20 above together with an index of those exhibits.
22. On 12 November 2009, the Tribunal provided the Parties with a draft for a Procedural Order regarding further details of the hearing proper and invited the Parties to submit any comments by 25 November 2009.
23. On 16 November 2009, Respondent submitted its Surreply to Claimant's Reply (R-II).
24. On 25 November 2009, Claimant and Respondent separately provided substantial comments by e-mail on the draft for a Procedural Order provided by the Tribunal to the Parties on 18 November 2009.
25. On 30 November 2009, the Parties were provided with a further draft for a Procedural Order taking into account their helpful comments of 25 November 2009 and were invited to make any comment on it by 16 December 2009.
26. On 16 December 2009 the Parties submitted a joint e-mail of comments on the draft for a Procedural Order and a proposal for the division of the hearing days according to when witnesses would be examined and submissions made.
27. Also on 16 December 2009, in accordance with PO No. 3, the Parties separately provided the Tribunal with DVD discs containing

chronological lists of all exhibits with hyperlinks to the document exhibits themselves.

28. On 18 December 2009, the Tribunal issued Procedural Order (PO) No. 4 which set out as follows:

18 December 2009.

Procedural Order (PO) No.4

regarding further details of the hearing on the merits

Taking into account the very helpful comments received from the Parties on 25 November 2009, and the agreements of the Parties notified on 16 December 2009, the Tribunal now issues this Order in its final form.

1. Introduction

1.1. This Order recalls the earlier agreements and rulings of the Tribunal and particularly takes into account the recent submissions and letters of the Parties.

1.2. In particular, the revised final part of the timetable is recalled from PO-3:

1.2.a. In view of the submissions received from the Parties regarding the draft of PO-4, the Tribunal does not consider it necessary to have the Pre-Hearing Conference anticipated as an option in PO-3 for 7 December 2009.

<i>Monday, December 21, 2009</i>	<i>Tribunal issues PO regarding further details of the Hearing.</i>
<i>Monday, January 18, 2010</i>	<i>Parties to submit binders of Hearing Exhibits to the Tribunal at the place of the hearings.</i> <i>In this context, to avoid misunderstanding, the Tribunal would need four sets of the Hearing Exhibits so that</i>

	<i>each Arbitrator as well as the Tribunal Secretary have one set to use.</i>
<i>January 18-22, with a possible extension to January 29, 2010</i>	Hearing

1.2.b) *In addition to the above timetable, by 21 December 2009, each Party may submit a further statement by one of its witnesses or experts, but only regarding any relevant developments which occurred after their last statements submitted in accordance with the timetable.*

1.2.c) *In case of such further submissions, by 11 January 2010, the other Party may submit a rebuttal statement by its own witnesses or experts, however limited to the subject and substance of the statement rebutted.*

1.3. *Further, for convenience, the following sections of PO-2 are recalled and hereby confirmed unless changed hereafter. The Parties are invited to assure that these provisions are complied with.*

3. **Hearing**

3.1. *As indicated in the timetable above, the Hearing shall be from January 18 to 22, 2010, but after consultation with the Parties, the Tribunal may extend the Hearing into the next week up to January 29, 2010. Therefore, as a precaution, all concerned shall block the full periods of these two weeks for the Hearing.*

3.1.a. *In this context, the Tribunal takes note of and agrees with the Parties' agreed suggestion notified on 16 December 2009 to the effect that the hearing can be concluded within the first week. Therefore, the Parties*

may cancel the reservation of the ICC Hearing Centre for the 2nd week.

- 3.2. *The Hearing shall be held in Stockholm (later agreed to be in Paris) at a site selected by the Parties after consultation with the Tribunal. The Parties shall make the necessary logistical arrangements and reservations and shall share the respective costs. They shall take the necessary steps and inform the Tribunal as soon as possible.*
- 3.3. *Further details and the final Agenda for the Hearing shall be established by the Tribunal after consultation with the Parties in a Procedural Order by December 21, 2009.*
- 3.4. *No new documents may be presented at the Hearing. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.*
- 3.5. *To allow all concerned the necessary evaluation of the day and preparation of the next day, the Hearing will start at 9:00 and end at 17:00 hours, subject to changes decided by the Tribunal after consultation with the Parties.*
- 3.6. *Taking into account the time available during the period provided for the Hearing in the Timetable, the Tribunal intends to establish equal maximum time periods both for the Claimant and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest at the time of the Pre-Hearing Conference. In view of the cancellation of the Pre-hearing Conference it is recalled that the respective date is 7 December 2009.*
- 3.7. *A transcript shall be made of the Hearing and sent to the Parties and the Arbitrators. The Parties, who shall share the respective costs, shall try to agree on and make the*

necessary arrangements in this regard and shall inform the Tribunal accordingly before the time set for the Pre-Hearing Conference. In view of the cancellation of the Pre-hearing Conference it is recalled that the respective date is 7 December 2009.

3.8. Should the Parties be presenting a witness or expert not testifying in English and thus requiring interpretation, they are expected to provide the interpreter unless agreed otherwise. However, the Parties are encouraged to agree on interpreters and make common arrangements in this regard. Should more than one witness or expert need interpretation, to avoid the need of double time for successive interpretation, simultaneous interpretation shall be provided.

2. Place of Hearing

*The Hearing shall be held at
ICC HEARING CENTRE
112 Avenue Kleber
75016 Paris, France
Tel. +33 (0)1 49 53 33 00
Fax +33 (0)1 49 53 33 01
www.icchearingcentre.org*

3. Conduct of the Hearing

3.1. In addition to the above provisions of PO 2, taking into account the Parties' agreement notified on 16 December 2009, the following shall apply:

3.2. The following Agenda is established for the Hearing:

1. Introduction by the Chairman of the Tribunal.

*2. Opening Statements of not more than three hours each for the a) Claimant,
b) Respondent.*

3. *Examination of witnesses and experts in the order and with the timetable as agreed by the Parties and notified on 16 December 2009.*

For each:

- a) Affirmation of witness or expert to tell the truth.*
- b) Short introduction by presenting Party of up to 10 minutes.*
- c) Cross-examination by the other Party.*
- d) Re-direct examination, but only on issues raised in cross examination.*
- e) Re-cross examination, but only on issues raised in re-direct examination.*
- f) Remaining questions by members of the Tribunal, but they may raise questions at any time.*

4. *Any witness or expert may only be recalled for rebuttal examination by a Party or the members of the Tribunal, if such intention is announced in time to assure the availability of the witness and expert during the time of the Hearing.*

6. *Closing arguments of up to three hours each for the*

- a) Claimant,*
- b) Respondent.*

7. *Remaining questions by the members of the Tribunal, if any.*

8. *Discussion regarding the timing and details of post-hearing submissions and other procedural issues.*

3.3. *Unless otherwise agreed between the Parties or ruled by the Tribunal, witnesses and experts may be present in the Hearing room during the testimony of other witnesses and experts.*

3.4. *In accordance with section 3.6 of PO-2 cited above, the Tribunal establishes the following maximum time periods which the Parties shall have available for their presentations and examination and crossexamination of all witnesses and experts. Taking into account the Calculation of Hearing Time attached to this Order, the total maximum time available for the Parties (including their opening statements and closing arguments, if any) shall be as follows:*

13 hours for Claimant,

13 hours for Respondent

It is left to the Parties how much of their allotted total time they want to spend on the Agenda items 2, 3, 4, and 6, as long as the total time period allotted to them is maintained.

3.5. *The Parties shall prepare their presentations and examinations at the Hearing on the basis of the time limits established.*

3.6. *If a witness whose statement has been submitted by a Party and whose examination at the Hearing has been requested by the other Party, does not appear at the Hearing, his statement will not be taken into account by the Tribunal. A Party may apply with reasons for an exception from that rule.*

3.7. *In so far as the Parties request oral examination of an expert, the same rules and procedure shall apply as for witnesses.*

4. Other Matters

4.1. *In order not to delay the hearing by long lunch breaks, the Parties, in their administrative arrangements with the ICC Hearing Centre, will make arrangements for catering to be provided in the breakout rooms of the Parties and the Tribunal, not only for the coffee breaks, but also for the lunch breaks*

4.2. The Tribunal may change any of the rulings in this Order, after consultation with the Parties, if considered appropriate under the circumstances.

29. On 22 December 2010 Claimant submitted the third report of Professor Peter Maggs (Maggs III).
30. On 12 January 2010, the Tribunal invited the Parties to submit final lists of the persons attending from their respective sides including their names and function.
31. On 13 January 2010, the Parties informed the Tribunal in a joint e-mail of the manner in which they proposed to use the 13 hours allocated to their respective sides for the hearing, to which the Tribunal confirmed its agreement on 15 January 2010.
32. On 15 January 2010, the Claimant and the Respondent submitted to the Tribunal their final lists of the persons attending.
33. From 18 to 22 January 2010, the hearing on the merits of the case took place in Paris. It was attended by the following persons:

The Tribunal:	Professor Dr Karl-Heinz Böckstiegel (Chairman)
	The Rt. Hon. Lord Steyn
	Sir Franklin Berman, KCMG, QC
Tribunal Secretary:	Mr Andreas Heuser
Court Reporters:	Ms Karyn Semler
	Ms Fiona Irving
	of BRIAULT REPORTING SERVICES
On behalf of Claimant:	Mr John M Townsend
	Mr James H Boykin
	Mr Marc-Olivier Langlois
	of HUGHES HUBBARD & REED LLP
	Professor Dr Kaj Hober

Dr Nils Eliasson
of MANNHEIMER SWARTLING
ADVOKATBYRA

Also present:

Mr Michael Flynn-O'Brien

Ms Kelly McCullough

Mr Vitaly Morozov

Mr Matthieu Rossignol

Professor Peter Maggs

On Behalf of Respondent: Mr Matthew Slater
Dr. Claudia Annacker
Mr David Sabel
Mr Robert Greig
Mr William McGurn III
Ms Giulia Gosi
of CLEARY GOTTLIEB STEEN &
HAMILTON LLP

Also Present:

Mr Rashid Sharapov

Mr Scott Senecal

Mr Ksenia Khanseidova

Mr Lorenzo Melchionda

Mr Milo Molfa

Ms Marina Akchurina

Mr Cameron Murphy

Ms Maja Menard

Ms Laurie Achtouk-Spivak

Mr Dan Fernandez

Mr Michele Maltese

Mr Eno Lacoella

Mr Oleg Konnov

34. On 22 January 2010, during the concluding remarks of the hearing on the merits, the Parties were asked by the Chairman if there were any procedural issues that they wished to raise (Tr p. 933). The Parties confirmed they had agreed a process to exchange comments

on substantial corrections to the hearing transcript. The Chairman further asked the Parties “do the Parties have any objections to the way the Tribunal has conducted the procedure up to now?” (Tr p. 934). Respondent only noted its continued objection to the inclusion of document Provisional CM-532 and otherwise had no comment. Claimant raised no objections.

35. On 22 January 2010, the hearing on the merits concluded.

36. On 26 January 2010, the Tribunal provided the Parties with Procedural Order (PO) No. 5 regarding further procedure after the Hearing, which set out as follows:

Procedural Order (PO) No.5

regarding the further procedure after the hearing in Paris

Taking into account the discussion and the agreements reached with the Parties at the Hearing held in Paris from 18 to 22 January 2010, the Tribunal issues this Procedural Order No. 5 as follows:

1. Post-Hearing Briefs

1.1. By March 26, 2010, the Parties shall simultaneously submit a 1st round of Post-Hearing Briefs, limited to a maximum of 60 pages (double-spaced) in length, containing the following:

1.1.1. Any comments they have regarding issues relevant in this case in the light of the results of the Hearing;

1.1.2. Separate sections responding in particular to the questions and issues mentioned in section 3 below.

1.2. By April 30, 2010, the Parties shall simultaneously submit a 2nd round of Post-Hearing Briefs, limited to a maximum

of 30 pages (double-spaced) in length, but only regarding issues raised by the other Party in its 1st round Post-Hearing Briefs.

1.2. The sections of the 1st round Post-Hearing Briefs requested under 1.1.1 and 1.1.2 above and the 2nd round Post-Hearing Briefs shall include short (in so far as possible, hyperlinked) references to all sections in the Party's earlier submissions, as well as to exhibits (including legal authorities, witness statements, and expert statements) and to the sections of the hearing transcript on which the Party relies regarding the respective issue.

1.3. Except for the agreed documents handed out during the hearing, no new documents shall be attached to the Post-Hearing Briefs unless expressly authorized in advance by the Tribunal.

1.4. However, as agreed during the hearing:

- (a) Claimant may submit new documents in rebuttal to the new documents handed out by Respondent with its Closing Statement at the hearing; and*
- (b) the Parties are invited to submit with their 1st round Post-Hearing Briefs an agreed English translation of the full text of "Law 9-Z" of the Republic of Mordovia of which a partial text has been submitted as RM-644.*

2. Cost Claims

2.1. By May 14, 2010, the Parties shall simultaneously submit Cost Claims, briefly setting out the costs incurred by each side. Such Cost Claims need not include supporting documentation for the costs claimed.

2.2. By May 21, 2010, the Parties shall simultaneously submit any comments on the Cost Claims submitted by the other side.

3. Questions

The Parties are particularly requested to address the following questions and issues in separate sections of the Post-Hearing Briefs:

3.1. Regarding Claimant's Exhibit CM-532 admitted for the time being by the Tribunal in a ruling during the hearing, the Parties are invited to comment in their Post-Hearing Briefs on the following aspects:

- (a) the procedural admissibility of the document;*
- (b) the evidentiary value of the document; and*
- (c) the relevance for the issues in the present case.*

3.2. In view of the earlier Award of this Tribunal accepting its jurisdiction and of the exception made in so far in section I.4 of its Decisions in that Award by transferring the issue of expropriation to the merits phase of this arbitration, in which way can and does Respondent still raise objections on jurisdiction at the present time?

3.3. In which way is "discrimination", either between different competitors in Russia or between domestic and foreign investors, relevant for the issues to be decided in this case, and was there such relevant discrimination?

3.4 Given the terms of Article 5(1) of the Investment Protection and Promotion Agreement between the Soviet Union and the United Kingdom (IPPA), the Tribunal would be grateful to hear from the Parties what test should be applied in order to determine whether a measure not in itself amounting to "nationalisation or expropriation" should be considered a measure "having effect equivalent to" nationalisation or expropriation.

3.5 *Could the Parties explain in more detail:*

(a) the various options and steps in Russian law and practice regarding the registration of shareholders, and on that basis;

(b) whether Claimant could have been registered as the owner of the Yukos shares;

(c) what were the legal effects of the procedure chosen for registration in the present case; and

(d) whether similar procedures of registration were used for other shareholders of Yukos and for shareholders of other companies in Russia.

3.6 *Given that Article 5(2) of the IPPA foresees expressly the case of a shareholding in a company of which assets are expropriated, the Tribunal would be grateful to hear from the Parties how the terms of Article 5(1) should be understood to apply to a case in which the claimant's interest is one which derives from Article 5(2).*

3.7 *Regarding the Participation Agreements, what is the relevance of New York law as the governing law, of Russian law and of international law, particularly the IPPA, for the issues to be decided by the Tribunal in the present case?*

3.8 *Taking into account the language, context and governing law of the Participation Agreements, was it permissible for Claimant to sell the Yukos shares without the consent of Elliott, and irrespective thereof, if the Claimant would indeed have sold them, what would have been the legal consequences for the issues relevant in the present case?*

3.9 *The Parties are invited to comment in greater detail on the link that has been alleged to exist between the criminal prosecutions of Mr. Khodorkovsky and the reassessments of the taxes claimed to be due from Yukos.*

3.10 Without prejudice to any future decision of the Tribunal, in case the Tribunal makes an award of compensation, what are the final positions of the Parties regarding intent on such compensation?

37. On 26 March 2010 the Parties submitted their first Post-Hearing Briefs (CPHB-I and RPHB-I) to the Tribunal.

38. On 15 April 2010 the Tribunal met in person for deliberations on the hearings, briefs and evidence provided to date.

39. On 26 April 2010 Respondent requested the Tribunal grant an extension of time to 4 May 2010 for both parties to submit their second post-hearing briefs (CPHB-II and RPHB-II) due to counsel being stranded due to the disruption caused to air travel in Europe by the Icelandic volcano eruption. Claimant had already indicated to Respondent its assent to the request. The Tribunal granted the request on 27 April 2010.

40. On 4 May 2010 the parties each submitted their 2nd round Post-Hearing Briefs (CPHB-II and RPHB-II).

41. On 14 May 2010 the parties each submitted the cost claims.

42. On 21 May 2010 the parties each provided comments on the other's cost claim.

E. The Principal Relevant Legal Provisions

E.I. IPPA

43. The principal relevant legal provisions in the IPPA for this arbitration are:

“[PREAMBLE:]

...

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics (hereinafter referred to as the “Contracting Parties”);

Desiring to create favourable conditions for greater investment by investors of one State in the territory of the other State;

Recognising that the promotion and reciprocal protection under international agreement of such investments will be conducive to the stimulation of business initiative and will contribute to the development of economic relations between the two States;

Have agreed as follows:

...

ARTICLE 1

Definitions

For the purpose of this Agreement:

(a) the term “investment” means every kind of asset and in particular, though not exclusively, includes:

(i) ...;

(ii) shares in, and stock, bonds and debentures of, and any other form of participation in, a company or business enterprise;

...

...

(d) the term "investor" shall comprise with regard to either Contracting Party:

(i) ...

(ii) any corporations, companies, firms, enterprises, organisations and associations incorporated or constituted under the law in force in the territory of that Contracting Party;

provided that that natural person, corporation, company, firm, enterprise, organisation or association is competent, in accordance with the laws of that Contracting Party, to make investments in the territory of the other Contracting Party.

(e)

ARTICLE 2

Promotion and Protection of Investments

(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such investments.

(2) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into consistently with this Agreement with regard to investments of the other Contracting Party.

ARTICLE 3

Treatment of Investments

(1) *Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of investors of any third State.*

(2) *Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to investors of any third State.*

(3)

ARTICLE 5

Expropriation

(1) *Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a purpose which is in the public interest and is not discriminatory and against the payment, without delay, of adequate and effective compensation. Such compensation shall amount to the real value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall be made within two months of the date of expropriation, after which interest at a normal commercial rate shall accrue until the date of payment, and shall be effectively realizable and be freely transferable. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.*

(2) *Where a Contracting Party expropriates the assets of a company or enterprise which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party have a shareholding, the provisions of paragraph (1) of this Article shall apply.*

E.II. Denmark-Russia BIT

44. The principal relevant legal provision in the Denmark-Russia BIT for this arbitration are:

"PREAMBLE:

The Government of the Russian Federation and the Government of the Kingdom of Denmark (hereinafter referred to as the "Contracting Parties"),

desiring to create favourable conditions for increasing investments by investors of one Contracting Party in the territory of the other Contracting Party,

recognizing that a fair and equitable treatment of investments on a reciprocal basis will serve this aim,

have agreed as follows:

ARTICLE 1

Definitions:

For the purposes of this Agreement:

(1) The term "investment" shall comprise every kind of asset invested by an investor of one Contracting Party in the territory

of the other Contracting Party in accordance with its laws and regulations and shall include in particular:

(a) moveable and immovable property, related property rights, such as mortgages and guarantees, as well as leases,

(b) shares, parts or other forms of participation in enterprises,

(c) claims to money and claims to performance pursuant to contracts having an economic value and associated with an investment,

(d) intellectual property rights, as well as technology, goodwill and know-how,

(e) any rights, conferred by law or under contract, to undertake economic activity, including rights to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments.

(2) The term "returns" shall mean the amounts yielded by an investment and includes in particular: profit, interest, capital gains, dividends, royalties or other fees.

(3) The term "investor" shall mean with regard to either Contracting Party:

(a) natural persons having the citizenship or nationality of that Contracting Party in accordance with its laws,

(b) any corporations, companies, firms, enterprises, organizations and associations organized in the territory of that Contracting Party in accordance with its legislation,

provided that those natural persons, corporations, companies, firms, enterprises, organizations and associations are

competent, in accordance with the legislation of that Contracting Party, to make investments in the territory of the other Contracting Party.

ARTICLE 2:

Promotion and Reciprocal Protection of Investments

(1) Each Contracting Party shall promote in its territory investments by investors of the other Contracting Party, create favourable conditions for them and admit such investments in accordance with its legislation.

ARTICLE 3

Treatment of Investments

(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of investors of any third State.

(2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to investors of any third State.

(3) Each Contracting Party may have in its legislation limited exceptions from national treatment provided for in section 1 and 2 of this Article. Any new exception will, however, apply only to investments made in its territory by investors of the other Contracting Party after the entry into force of such exception.

(4) The provisions of this Article relative to the granting of Most Favoured Nations treatment shall not be construed so as to oblige one Contracting Party to extend to the investors of the

other Contracting Party, preferences or privileges resulting from:

(a) its participation in a free trade area, customs or economic union or similar multilateral agreement,

(b) the agreements in the field of economic cooperation of the Russian Federation with the states that constituted the former Union of Soviet Socialist Republics.

ARTICLE 4:
Expropriation

(1) Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for measures taken in the public interest on a basis of non-discrimination and against prompt, adequate and effective compensation. Such compensation shall amount to the value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge. The compensation shall be paid without delay, be freely transferable and shall include interest at the normal commercial rate established on a market basis from the date of expropriation until the date of payment.

(2) The investor affected shall have the right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this Article.

ARTICLE 11.

Application of this Agreement:

...

(3) The provisions of this Agreement shall not apply to taxation.

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F. Relief Sought by the Parties

F.I. Relief Sought by Claimant

45. As set out in the Statement of Claim (C-I, para. 274) Claimant makes the following request for an award:

“... Claimant respectfully requests that the Tribunal issue an Award:

- (a) Ordering the Russian Federation to pay compensation for the injury to the value of Claimant’s shareholding in Yukos equal to the value that investment would have had at the date of the award absent Respondent’s unlawful expropriation of the assets of Yukos in the amount of US\$ 276.1 million, or, any alternative, compensation in the amount of US\$ 220.4 million as per 15 August 2007;*
- (b) Ordering the Russian Federation to pay interest on US\$ 276.1 million at a normal compounded, commercial rate as of 31 July 2008 until full payment has been made, or, in the alternative interest in US\$ 220.4 million at a normal compounded, commercial rate as of 15 August 2007 until full payment has been made;*
- (c) Ordering the Russian Federation to Claimant’s costs in these arbitration proceedings in an amount to be specified later together with interest thereon, including all attorneys’ fees and expert witness fees, and as between the parties, alone to bear the responsibility for compensating the Arbitral Tribunal and the SCC-Institute.”*

46. As set out in Claimant's Reply (C-II, para. 211) Claimant makes the following request for an award:

[] Claimant respectfully requests that the Tribunal issue an Award:

- (a) Ordering the Russian Federation to pay compensation for the injury to the value of Claimant's shareholding in Yukos equal to the value of that investment on 15 August 2007, US\$ 232.7 million, or, in the alternative, equal to the value that investment would have had at the date of the award absent Respondent's unlawful expropriation of the assets of Yukos;*
- (b) Ordering the Russian Federation to pay interest on the amount awarded at a normal compounded, commercial rate from the date of valuation until full payment has been made, [];*
- (c) Ordering the Russian Federation to pay Claimant's costs in these arbitration proceedings in an amount to be specified later together with interest thereon, including all attorneys' fees and expert witness fees, and as between the parties, alone to bear the responsibility for compensating the Arbitral Tribunal and the SCC-Institute."*

47. As set out in its First Post Hearing Brief (CPHB-I) Claimant seeks following relief:

- (a) Ordering the Russian Federation to pay compensation for the injury to the value of Claimant's shareholding in Yukos equal to the value that investment would, but for the Respondent's unlawful conduct, have had on 15 August 2007, which is US\$ 232.7 million. In the alternative, Respondent should be ordered to pay compensation equal to the value that investment would have had at the date of the award;*

- (b) *Ordering the Russian Federation to pay interest on the amount awarded at a normal commercial rate, such as LIBOR plus 4%, compounded semi-annually from the date of valuation until full payment has been made;*
- (c) *Ordering the Russian Federation to pay Claimant's costs in these arbitration proceedings in an amount to be specified later together with interest thereon, including all attorneys' fees and expert witness fees, and as between the parties, alone to bear the responsibility for compensating the Arbitral Tribunal and the SCC Institute.*

48. As set out in its Second Post Hearing Brief (CPHB-II) Claimant repeated its prayer for relief set out in CPHB-I.

F.II. Relief Sought by Respondent

49. In its Statement of Defence (R-I, at XI) Respondent seeks the following relief:

"For the foregoing reasons, the Russian Federation respectfully requests that the Tribunal issue an Award:

- (a) *Dismissing Claimant's claims in their entirety;*
- (b) *Declaring that Claimant is not entitled to the award of any damages;*
- (c) *Ordering Claimant to pay the Russian Federation's costs, expenses, and attorney's fees;*
- (d) *Ordering that Claimant alone shall be responsible for the costs of the arbitration, including the fees and expenses of the Tribunal and the SCC-Institute, and that Claimant shall reimburse the Russian Federation for its deposits previously made in regard to the fees and expenses of the Tribunal and the SCC-Institute; and*

(e) *Granting such further relief as the Tribunal deems fit and proper.*"

50. As set out in the Surreply to Claimant's Reply (R-II, at VIII) Respondent seeks the following relief:

"For the foregoing reasons, the Russian Federation respectfully requests that the Tribunal issue an Award:

(a) *Dismissing Claimant's claims on the grounds that the Tribunal lacks jurisdiction to entertain them;*

(b) *In the alternative, dismissing Claimant's claims on the merits in their entirety;*

(c) *In the alternative, declaring that Claimant is not entitled to the award of any damages;*

(d) *Ordering Claimant to pay the Russian Federation's costs, expenses, and attorney's fees;*

(e) *Granting such further relief against Claimant that the Tribunal deems fit and proper."*

51. In its First Post-Hearing Brief (RPHB-I) Respondent repeated its prayer for relief set out in R-II.

52. In its Second Post-Hearing Brief (RPHB-II) Respondent repeated its prayer for relief set out in R-II.

G. Statement of Facts

53. Claimant and Respondent both submitted very detailed statements of facts which were not always set out in chronological order, rather in an order reflecting the significance of certain events. The following part G is a summary of the Statement of Facts according to the Claimant and Statement of Facts according to the Respondent. The detailed Statements have been taken into account by the Tribunal without repeating all of them. References to amounts of money have been amended to United States dollars (US\$) using the exchange rates referenced in the Parties' submissions to ensure uniformity and ease of comparison.

G.I. Statement of Facts According to the Claimant

54. Claimant points out at the outset that it is a minority shareholder of Yukos that bought its shares on the open market and had no role in the management or operation of Yukos and therefore has to rely on publicly available information to support its case. (¶¶27 - 28 C-I)

Overview of the post-Soviet history of Russian oil industry

55. Claimant puts the present case in the context of the post-Soviet history of the Russian oil industry, illustrating the transfer of oil industry assets from the USSR's Ministry of the Petroleum Industry to its successor, the state-owned company Rosneft and the subsequent privatisation of the oil industry via the so-called "Loans for Shares initiative". (¶¶29 - 30 C-I)

56. Yukos was acquired from State control in 1995 by a group of investors led by Mikhail Khodorkovsky and the Menatep Bank after the Russian state failed to repay loans under the "Loans for Shares initiative". Under that initiative, the lenders of funds to the state were provided with a security interest over shares in state-owned

companies, in the present case over shares in Yukos. Upon default on the loan agreement by the Russian state, the lenders were able to exercise rights to sell the shares at auction, and in the present case in 1995 those shares were sold to the investors led by Khodorkovsky and Menatep Bank. Prior to being re-nationalised at **the end of 2004** Yukos was the leading producer of crude oil in Russia and had 25% of its shares traded on markets in Moscow, London, Frankfurt, and New York. Its accounts were audited under US GAAP standards and it had Western directors appointed to its board. (¶¶31 - 32 C-I)

57. Yukos lost its status as Russia's leading oil producer following the auction of shares in its main asset, YNG, under an auction where a straw purchaser, Baikalsfinansgroup, purchased the shares as the only bidder for a price half the value ascribed to the shares by investment bankers. Immediately following that auction, Rosneft a company under Russian state control purchased the shares. Thereafter, Rosneft acquired Yukos' remaining assets in a series of further auctions with none of the proceeds going to Yukos shareholders, until eventually Yukos was de-registered and ceased to exist under Russian law. Claimant alleges the auction of YNG shares and other Yukos assets was an unlawful expropriation and Claimant is entitled to compensation under the IPPA. (¶¶33 - 37 C-I)

Tax regime in Low Tax Regions

58. The basis upon which the Respondent claimed authority to conduct the auctions is a series of tax audits and court hearings that purported to have found Yukos to be in breach of various tax laws. Yukos claimed the benefit of use of the law in Low Tax Regions to reduce the overall tax obligations of the Yukos group of companies, a practice Claimant asserts was widespread and routine for other Russian oil companies. Claimant cites the Maggs Reports and other sources in support of its claim that tax planning and optimisation strategies such as the use of the Low Tax Regions were routine and legal practices utilised to the same extent by other large Russian oil companies. (¶¶38 - 51 C-I)

59. Claimant points to the strategy of both Soviet and the successor Russian government to attract investment in economically depressed regions, the so called Low Tax Regions. This practice, despite some resistance from the Ministry of Finance, remained legal and upheld by the courts for the Low Tax Regions until legislation was passed on **8 December 2003**, effective from 1 January 2004, abolished the system of tax breaks and low-tax in the Low Tax Regions. Up until this point, use of the Low Tax Regions to minimise tax liability remained legal, and despite attempts by the Tax Ministry to impose requirements beyond those in the low-tax laws, courts consistently rejected anything other than a literal interpretation of the relevant tax zone's laws, this, even in cases where a company had a superficial presence in a Low Tax Region. It was not until the Tax Ministry's pursuit of Yukos in 2004 that the interpretation of those laws changed. Up until that point the Tax Ministry could have elected to use another legal norm in section 40 of the Russian Tax Code to challenge the transfer pricing policies of Yukos and other entities claiming the benefit of the Low Tax Regions, however due to deficiencies in that law which were not removed until after the pursuit of Yukos in 2004 by the Tax Ministry. (¶¶52 - 64 C-I)

60. Claimant points to a report on **29 November 2004** by the Rapporteur to the Committees on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (of which the Russian Federation is a member) (the "Council of Europe Report") regarding the Low Tax Regions laws that confirmed that the change only occurred after 2004. Further evidence recognising the inconsistency of the Respondent's treatment of Yukos with the applicable law is cited by Claimant in a resolution on **25 January 2005** of the Parliamentary Assembly of the Council of Europe. (¶¶65 - 66 C-I)

Tax audits

61. In **December 2003** the Tax Ministry undertook extraordinary retroactive tax audits of Yukos as a pretext to the auctions which stripped Yukos of its assets. These extraordinary retroactive audits resulted in an assessment for US\$ 20.4 billion in back taxes, penalties

and interest that far exceeded Yukos' pre-tax profits and, in some cases, even Yukos' gross annual revenues. Respondent refused Yukos to pay these assessments and ultimately this led to the expropriation of Yukos assets by way of auction. Prior to these audits, Yukos' accounts for 2000 and 2001 had in fact been audited by the authorities and relatively minor amounts of tax were due which Yukos duly paid. (¶¶67 - 70 C-I)

Khodorkovsky targeted

62. Claimant asserts that the arrest of Mikhail Khodorkovsky, the Chief Executive Officer of Yukos on **25 October 2003** was the beginning of the downfall of Yukos and foreshadowed the nature of events to follow. The arrest was the result of the public challenging by Khodorkovsky of President Putin and his administration and, as Claimant alleges, the plans of Khodorkovsky and Yukos to build pipelines which would have threatened the monopoly of Transneft, a state-owned company and a possible sale of a stake in Yukos to a U.S. oil company. (¶¶70 - 74 C-I)

Tax Ministry second audit and report

63. The Tax Ministry conducted a second audit of Yukos 2000 tax year in **December 2003** which audit Claimant cites in the Maggs Reports as being prohibited and without lawful justification. Shortly after the audit on **29 December 2003**, the Tax Ministry produced its report finding the use of the Low Tax Regions by Yukos were contrary to the spirit of the law and assessed approximately US\$ 3.5 billion in tax, penalty and interest for the 2000 tax year. The Tax Ministry's findings were full of irregularities and inconsistencies with established laws and they failed to justify their findings with reference to the relevant laws. Had the Tax Ministry applied the law correctly, in the case of a transfer pricing re-assessment, under section 40 of the Tax Code then it could have only assessed individual pricing transactions in respect of the entities involved and not Yukos itself. Furthermore, the presumption of good faith was not observed and some of the claims of the Tax Ministry were time-barred. The objections of Yukos were provided to the Tax Ministry

on **12 January 2004**, however shortly thereafter on **14 April 2004** the Tax Ministry's resolution to collect the tax assessment amounts of US\$ 3.5 billion was issued requiring payment in two days on 16 April 2004. Yukos did not receive the order for payment until 16 April 2004. (¶¶75 - 85 C-I)

Enforcement action and Yukos' appeals to the courts

64. On **15 April 2004** before expiry of the deadline for payment, the Tax Ministry filed suit against Yukos in the Moscow Arbitrazh Court to collect the US\$ 3.5 billion demanded for the tax year 2000. At the same time, the Tax Ministry sought and obtained an *ex parte* freeze order from the Moscow Arbitrazh Court preventing Yukos from selling any of its assets to pay that liability. (the "Freeze Order") Those frozen assets were valued at almost US\$ 19 billion, more than five times the amount of taxes, penalty, and interest allegedly due for year 2000. In effect the Tax Ministry had issued a demand for payment then the very next day obtained judgment making it impossible for Claimant to pay the demand. The demand for payment was not received by Yukos until the day after the judgment freezing the assets making payment impossible was issued. (¶¶87 - 89 C-I)
65. On **7 May 2004**, Yukos commenced a separate suit against the Tax Ministry asking the court to declare the Resolution unlawful and in the interim a stay on the enforcement of the resolution. Judge Natalya Cheburashkina granted the stay but was promptly removed from the case by her superior. The next judge assigned abruptly resigned and the third judge assigned was removed after ruling in favour of Yukos. By the time a fourth judge was assigned in **August 2004** the Tax Ministry's claim had been tried, adjudicated, appealed and enforced in separate proceedings leading to the judge who finally heard Yukos' claim getting the message and adopting the reasoning and conclusions of the courts in the Tax Ministry's proceedings. In contrast to Yukos' suit, the Tax Ministry's claim proceeding swiftly and was unfairly weighted toward the Ministry, with masses of unsorted evidence presented by the Ministry and mere hours of time available to Yukos to prepare its case in contrast to days available to the Ministry. On **28 May 2004** the court rendered its judgment

awarding the Ministry its US\$ 3.5 billion claim and rejecting a very small portion – US\$ 14,960 – which allowed the Ministry to immediately appeal. (¶¶90 - 91 C-I)

66. The appeal process began on **1 June 2004** and was also subject to irregularities such as truncated time periods available to Yukos to prepare its case and in turn present it case in contrast to the extended periods and allowances granted to the Ministry. On **29 June 2004** the decision was announced and the next day a writ of enforcement was issued allowing the Moscow Bailiffs Service to initiate proceedings to execute the US\$ 3.5 billion judgment. Yukos was given five days to pay. Yukos, however, was prevented from paying the assessment by the terms of the Freeze Order, furthermore, its attempts on **2 July 2004** to appeal the Freeze Order to use its Sibneft shares to pay the assessment were dismissed by the Arbitrazh court. Yukos application, on same day to the Bailiffs Service to use its Sibneft shares (valued at US\$ 4.6 billion at the time) to meet the tax assessment was never responded to. (¶¶92 – 95 C-I)

67. On **7 July 2004** Yukos had its applications both to the Moscow cassation court for suspension of the execution of the lower courts decisions and also the Finance Ministry to pay the US\$ 3.5 billion assessment over six months rebuffed. On **9 July 2004** the Bailiffs Service issued a penalty for failure to pay the assessment within five days. Yukos promptly successfully appealed the penalty on the basis that it had made an offer to pay using the Sibneft shares. However, soon after, their appeal was overturned on formal grounds allowing the Bailiffs Service to seize all of Yukos' shares in YNG on **14 July 2004**. Dresdner Kleinwort Wasserstein (“DKW”) was commissioned to appraise the YNG shares for auction to satisfy the tax assessment. (¶¶96 – 99 C-I)

68. After commissioning DKW to appraise the YNG shares, the Tax Ministry promptly issued payment demands for the 2001 – 2003 tax years, all premised on the same departure from established Russian tax law and practice as set out above in relation to the 2000 assessment. Additionally, the Tax Ministry assessed almost US\$ 9 billion in VAT against Yukos for export transactions by its trading

companies. The transactions in question were exempt from VAT, however, due to a formality, the Tax Ministry charged Yukos and not the trading companies with the VAT. This charge which amounted to almost half the US\$ 20 billion in retroactive tax claims assessed against Yukos for years 2000-2003 was plainly inconsistent with Russian law. (¶¶100 – 102 C-I)

69. The Tax Ministry then moved to enforce the 2001-2003 assessments without involving any court process at all. It issued a resolution on **2 September 2004** finding Yukos liable for US\$ 4.1 billion of retroactive taxes and penalties for 2001 and doubled the fine on the basis Yukos was a repeat offender. The demand for payment gave Yukos a mere two days to pay the demand, however, Yukos was again unable to pay due to the asset freeze. Just three days after receiving the demand, the Tax Ministry confiscated US\$ 2.7 billion from Yukos' banks, then brought suit against Yukos to collect the fines, in respect of which the Bailiffs service instituted formal collection proceedings on **9 September 2004**. (¶¶103 – 104 C-I)

70. The imposition of liability for the 2002 tax year followed a similar script and on **16 November 2004** the Tax Ministry found Yukos liable for US\$ 6.8 billion of retroactive taxes and penalties, again doubling the penalties on the basis that Yukos was a repeat offender. Collection proceedings were commenced two days after the resolution and the 2002 liability was promptly combined with the processes for the 2000 and 2001 tax assessments. The Bailiffs Service issued an order to the Russian Federal Property Fund ("RFFP") to sell enough shares in YNG to cover the amount of the combined (2000, 2001 and 2003 tax years) amount. By this time, however, Yukos had already satisfied its 2000 liabilities in full and a portion of its 2001 liabilities. Yukos informed the Bailiffs Service of this, however its response was to commence proceedings on 18 November 2004 to recover the 2002 taxes and penalties by merging that collection process with the 2000 and 2001 processes and announcing that all of the YNG shares would be auctioned to satisfy the liabilities. The auction was scheduled for **19 December 2004**, a Sunday, and the day before an emergency Yukos shareholder meeting

to vote to file for bankruptcy. Finally on **6 December 2004**, the Tax Ministry issued another assessment for the 2003 tax year, again doubling the fine as Yukos was a “repeat offender”. The total tax assessments against Yukos now totalled more than US\$ 20 billion. (¶¶105 – 108 C-I)

71. From **December 2004** Yukos had a number of outstanding legal challenges before the Russian courts. In all the suits regarding Yukos’ tax liabilities, the position of the Tax Ministry was upheld, Yukos’ rejected and in many cases penalties increased. In all cases standards of Russian legal procedural fairness were ignored and judges who ruled in favour of Yukos were removed from the case or the bench, those who ruled against were awarded the Order of Friendship and the Medal for Service to the Fatherland. (¶¶109 – 112 C-I)

72. Meanwhile, Russian government figures consistently denied an intention to destroy Yukos, including statements by President Putin that the government would “try to do everything not to topple [Yukos]” leading the share price to soar. Further statements were made during 2004 in a similar vein denying any intent to nationalise Yukos. (¶¶113 – 117 C-I)

Expropriation and re-nationalisation of Yukos

73. On **19 November 2004** the RFFI announced it would sell all of YNG’s common shares at auction on 19 December 2004 (a Sunday). The Russian government appointed DKW to value YNG for auction. DKW valued YNG between US\$ 15.7 billion and US\$ 18.3 billion. JP Morgan, at Yukos’ request, valued YNG at between US\$ 16 billion and US\$ 20 billion. The starting price for the auction was set at US\$ 8.9 billion, substantially below either of the valuations. RFFI procedures normally require that the appraised value of assets be used as the starting price at auction. The RFFI did not justify the low starting auction price. At the time, press reports indicated that state owned Gazprom would use a company called Gazpromneft to bid for YNG, and furthermore, that two unknown companies First Venture

Co. and Intercom had also registered for the auction to give it the appearance of legitimacy. (¶¶120 – 124 C-I)

74. On **14 December 2004**, Yukos made a last-ditch attempt to prevent the auction by declaring bankruptcy United States Bankruptcy Court for the Southern District of Texas in Houston (the “Houston Bankruptcy Court”) and immediately applied for an injunction to prevent the auction of YNG and compelling arbitration. The court enjoined Gazpromneft, First Venture Co. and Intercom in addition to Western lenders ABN Amro, BNP Paribas, Calyon, Deutsche Bank, JP Morgan and DKW from participating in the auction. This prevented Western lenders from financing Gazpromneft’s bid forcing the Russian government to change its plans by creating a mysterious, unknown company called Baikalfinansgroup (“BFG”) with no physical presence at its registered address which emerged as a new bidder for the auction. (¶¶125 – 127 C-I)

75. On **19 December 2004**, in an auction that lasted ten minutes, the voting shares in YNG were acquired by BFG. BFG made the only bid at the auction while Gazpromneft sat silent. The auction was highly unusual and departed from normal Russian practice without ground rules, no appraisal price as the starting price and it appeared the Parties to the auction had colluded. BFG won the auction, literally bidding against itself with a resulting price of US\$ 9.4 billion. (¶¶128-129 C-I)

76. Four days after the auction, and before BFG was required to pay the sale price, Rosneft (the state owned oil company) acquired BFG for a token payment of approximately US\$ 360, thus returning the voting shares of YNG to state control. It subsequently transpired from admissions by President Putin that BFG was created to insulate Rosneft from any potential liability had it acquired YNG directly at auction. It is also not clear whether BFG actually paid for YNG with press reports pointing to a complex structure involving various banks and state Parties. (¶¶130 – 134 C-I)

77. On **25 January 2005** the Parliamentary Assembly of the Council of Europe adopted a resolution concluding that the tax assessments and

auction of YNG went beyond enforcing laws and were directed at regaining control of strategic assets highlighting the sale at auction for a price far below market value following spurious tax reassessments. (§135 C-I)

78. Following the transfer to Rosneft, the tax assessments which purportedly caused the low starting price at auction suddenly vanished. Rosneft also captured most of the “purchase price” paid for YNG by bringing claims against Yukos for US\$ 3.9 billion which were ultimately credited in full to YNG (i.e. Rosneft) in the course of Yukos’ bankruptcy. Additionally, Rosneft caused YNG to repudiate a loan guarantee to a Yukos affiliate worth US\$ 1.6 billion. The net sum of these claims and manoeuvres was that YNG had credited to it an amount just under the US\$ 9.4 billion Rosneft had paid for YNG. (§§136 – 137 C-I)

79. Rosneft’s value vastly increased following the acquisition of YNG and at the time of Rosneft’s initial public offer of shares on the London market in 2006, Rosneft was forced to acknowledge that YNG was worth far more than BFG had paid for it. In the course of the IPO, due to the fact that the preferred non-voting shares in YNG (representing 23.21% of YNG’s equity) were still owned by Yukos, and due to its bankers’ advice not to politicise the deal, Rosneft was forced to swap 1,000,000,000 Rosneft shares for the remaining 23.21% in YNG. This swap valued YNG at US\$ 46.18 billion by October 2006. (§§138 – 140 C-I)

Bankruptcy auctions

80. The next step in expropriating the assets of Yukos was to force the company into bankruptcy so that it could be liquidated under the supervision of the Russian authorities.

81. Due to the tax proceedings against Yukos and especially the asset freeze, Yukos was in a position in breach of a credit agreement with a consortium of banks led by Société Générale (the “SocGen Group”), who had informed Yukos on **2 September 2004** that it was in default. In June 2005 the SocGen Group filed a claim with the High Court of

Justice in London seeking repayment of the amounts owed by Yukos. The High Court issued a judgment ordering Yukos to pay the SocGen group on **24 June 2005**. (¶142 C-I)

82. On **8 September 2005**, the SocGen Group applied in the Moscow Arbitrazh Court for the English judgment to be recognised. In a move departing from established Russian law regarding recognition of foreign judgments, the Russian courts recognised the English judgment on **21 December 2005**. In the meantime, the SocGen Group agreed with Rosneft on **13 December 2005** that Rosneft purchase Yukos' debt to the group in exchange for the SocGen Group issuing bankruptcy proceedings against Yukos in Russia. Once the English judgment was recognised in Russia, the SocGen Group filed a bankruptcy application against Yukos in the Moscow Arbitrazh Court on **6 March 2006** and then assigned its claims to Rosneft on **14 March 2006**. (¶¶143 – 146 C-I)

83. On **28 March 2006**, the Arbitrazh Court appointed Eduard K. Rebgun as interim manager of the bankruptcy proceedings who promptly applied for and was granted an injunction to prevent Yukos from entering into transactions over a certain threshold without Mr Rebgun's consent. In the process of proceedings before a United States bankruptcy court and Dutch courts which the interim manager had instigated to prevent Yukos from dealing in its foreign assets, Yukos successfully negotiated a consent order that required the interim manager to submit a management financial rehabilitation proposal creditors in advance of the scheduled creditors' meeting. The proposal demonstrated Yukos was able to continue as a profitable enterprise provided that Yukos could continue to challenge the US\$ 11.5 billion tax assessments which were the subject of pending appeals. (¶¶147 – 148 C-I)

84. The creditor's meeting took place on **20-25 July 2006** and creditors were able to vote on the management of Yukos' proposal. Sixteen of the twenty-four creditors voted in favour, however, four creditors – Tax Ministry, Rosneft, YNG plus a small creditor – representing 93.87% of the votes at the meeting voted against. Those creditors proceeded to vote to file a petition with the Arbitrazh Court seeking

that Yukos be declared bankrupt. The court issued a decision on 4 **August 2006** declaring Yukos bankrupt, initiating receivership proceedings, approving Mr Rebgun as receiver and terminating Yukos' management. (¶¶149 – 150 C-I)

85. From **27 March 2007**, Yukos' remaining assets were sold in a series of liquidation auctions organised by the bankruptcy receiver. Again, procedural irregularities and a concerted effort to prevent Yukos from existing after the receivership proceedings were apparent. During the proceedings, whenever assets of Yukos were valued at amounts which would have enabled Yukos to pay its tax "liability", the Tax Ministry would recalculate the overdue tax debt to a higher amount. Finally, despite the tax authorities collecting more than was actually owed, Yukos was still treated as a bankrupt company. (¶¶151 – 152 C-I)

86. Once the auctions had concluded, state-controlled Gazprom had acquired Yukos shares in Sibneft, Rosneft had acquired all of Yukos production assets, including the Rosneft shares used to acquire Yukos' preferred shares in YNG. In the instances where other bidders won oil-producing assets, their bids were declared void or they subsequently sold those assets to Rosneft. The final auction was completed on **15 August 2007** which left Yukos with no assets at all. (¶¶153 – 154 C-I)

Disparate treatment of Yukos' competitors

87. Yukos was not the only Russian oil company to have tax claims made against it, however it was the only oil company not given the opportunity to settle the claims, which in comparison were much larger than those made against other oil companies. For instance in March 2004, Sibneft was able to settle tax claims against it of US\$ 1.4 million for a payment of US\$ 300 million. Sibneft's principal shareholder, Roman Abramovich, sold his 72% share in Sibneft for US\$ 13.1 billion to Gazprom, something shareholders of Yukos were unable to do. In addition, Lukoil, a company which had reported saving US\$ 800 million through the use of on-shore tax havens, was assessed back taxes, however was able to settle the claims for US\$

103 million. The main difference appeared to be connections to and consultation with the Kremlin. TNK-BP, a joint venture between four Russian oligarchs and British Petroleum also had more favourable treatment than Yukos with respect to its tax assessments. In all these cases the companies concerned were able to settle the tax dispute whereas Yukos had its assets frozen and then sold at auction. This discrepancy was highlighted in the Council of Europe Report. (¶¶155 – 162 C-I)

Harassment and persecution of Yukos executives, shareholders, lawyers and accountants

88. In addition to the arrest, trial and imprisonment of Mikhail Khodorkovsky, many other persons associated with companies related to Yukos were also treated to processes lacking fairness, impartiality and objectivity and to actions excessively in disregard of fundamental rights of the deference guaranteed by the Russian Criminal Procedure Code and by the European [Convention] on Human Rights. A detailed description of the treatment of Yukos executives and shareholders who had removed themselves from Russian jurisdiction by foreign courts is set out at ¶166 C-I, wherein the foreign jurisdictions generally granted the individuals political asylum and/or condemned Russian action as politically motivated. (¶¶163 – 166 C-I)
89. Yukos' lawyers were also targeted by the Russian authorities, including unauthorised searches, intimidation and interrogations. The head of Yukos legal department from 1996 to 2003, Vasily Aleksanyan was specifically targeted following his arrest on 6 April 2006. In clear contravention of orders of the European Court of Human Rights, the Russian Federation failed to transfer Mr Aleksanyan to a specialised hospital for treatment for advanced cancer and AIDS. (¶¶167 – 169 C-I)
90. Yukos' auditor PWC was also targeted and charged with falsifying its audits in respect of Yukos for years 2002, 2003 and 2004 and failure to pay approximately US\$ 14 million in taxes. PWC took the extraordinary step of withdrawing a decade's worth of audits in

respect of Yukos in order to avoid losing its licence to operate in Russia. (¶¶170 – 172 C-I)

International condemnation of the Respondent's treatment of Yukos

91. The actions of the Respondent in respect of the expropriation and re-nationalisation of Yukos' assets has been uniformly condemned. The Council of Europe passed a resolution on 25 January 2005 recognising the non-conformity of the proceedings with the rule of law. The Houston Bankruptcy Court also found that the assessments against Yukos deviated from established Russian law when it enjoined Gazprom and Western banks from participating in the auction of YNG. The Amsterdam District Court declared on **31 October 2007**, that the Russian proceedings violated the principle of due process and that therefore the Dutch courts would not recognise the Russian bankruptcy. Even before the auction of YNG, the International Commission of Jurists, a non-profit non-governmental agency raised its concerns with President Putin himself. The English courts also recognised the politicised nature of the processes against a Yukos board member and refused to extradite him. Other courts around the world have also refused judicial assistance to the Russian Federation in relation to the extradition of defendants and collection of documents. (¶¶173 – 179 C-I)

Claimant's purchase of Yukos shares

92. Claimant, RosInvestCo, an investment company incorporated under English law and based in London, England, purchased a total of seven million shares in Yukos, then traded on the Moscow and other stock exchanges, on two occasions on **17 November** and **1 December of 2004**. (¶1 C-I)
93. Claimant specialises in purchasing shares at such moments of market distress, judging that the market has overreacted to transient events and has undervalued a company's underlying assets. Some of

these investments turn out to be profitable, and some do not, and the investor may be presumed to understand the market risks when it makes the investment. But when an investment becomes worthless, not because of market movements, but because of unlawful government action, an investor does not lose its rights under treaties such as the IPPA simply because it bought its shares at a moment of uncertainty. (§7 C-I)

94. Claimant is an indirect subsidiary of Elliott Associates, L.P., as openly disclosed in Claimant's published English accounts, which state: "*The company's ultimate parent undertaking is Elliott Associates L.P., a limited partnership organised under laws of Delaware, United States.*" (§104 C-II)
95. Elliott Associates, founded in 1977, has been described, together with its sister fund, Elliott International, L.P. ("Elliott International"), as one of the oldest funds of its kind under continuous management. Elliott is said to manage in excess of US\$ 14 billion in assets for large institutional investors and individuals. Elliott has been described as preferring to invest in "situations that are complex," because those "may have greater discounts and fewer participants." Elliott's reported investments cover a wide range of asset classes, many of which meet the "complex, greater discounts, fewer participants" formula. (§105 C-II)

G.II. Statement of Facts According to Respondent

Overview

96. Respondent contends that the conduct of the persons behind Yukos following its privatisation, namely Mikhail Khodorkovsky and his associates, amassed wealth on the basis of tax evasion, fraud and violent crime which ultimately led to the collapse of the company. Respondent further contends that this collapse of Yukos was foreseeable on the basis of publicly available information also at the time when Claimant alleges it purchased the Yukos shares (§§45 - 46 R-I).
97. Respondent rejects Claimant's presentation of the acquisition of Yukos by Khodorkovsky and his associates under the Loans for Shares initiative as a bona fide transaction and highlights the manipulation of the Loans for Shares initiative by the ultimate beneficiaries based on their tax delinquency, and other practices including exclusion of rival bidders in the auction for Yukos so that Khodorkovsky's affiliate could purchase Yukos at a discount to true value. Respondent points to the valuation of Yukos' assets two months after the aforementioned auction at 17 times the price paid at auction (§§47 - 50 R-I).
98. Respondent goes on to point out alleged criminal, corrupt and aggressive acts by Khodorkovsky and his associates during his tenure as the majority owner of Yukos. Respondent alleges that tax evasion was a consistent feature of Khodorkovsky and his associates businesses especially in relation to Yukos. (§51 R-I)
99. According to the Respondent the tax evasion scheme of Yukos "involved two key ingredients: (1) the massive, systematic use of dozens of Yukos-controlled shell companies organized in special no-tax and low-tax zones ("internal offshore zones") within the Russian Federation (Low Tax Regions) [...] to unlawfully evade taxes, and (2) the transfer to Yukos of the artificially inflated and untaxed (or

lightly taxed) profits generated by those shell companies using various techniques intended to shelter those profits from taxation upon receipt by Yukos, most notoriously through bogus “donations” by some of the shell companies. Over the years, the scheme underwent refinements, but none of the changes altered the basic structure of the scheme or its ultimate purpose—the evasion of massive amounts of taxes.” (§§52 - 54 R-I)

100. Respondent explains the establishment of Low Tax Regions by the Russian Federation and the intent to foster economic development in those regions. Respondent alleges the special tax regimes in the Low Tax Regions were abused by Yukos in its creation of independent shell companies and shell subsidiaries which would purchase oil products from other Yukos entities and under a deliberate scheme buy and sell the oil amongst themselves until it was ultimately sold to third parties resulting in profits which were lightly taxed or not taxed at all as a result of the use of the scheme. Respondent alleges Yukos employed a variety of methods to ensure the scheme did not attract the Tax Ministry’s attention such as changing the names of the shell companies and ensuring the reported profits of each company were low. The sole object of the scheme was to avoid taxes which Yukos euphemistically labelled “tax minimisation”. (§§55 - 59 R-I)

101. Yukos used a further scheme to recover profits from the Low Tax Regions in that it engineered the donation of profits to a sham fund. Respondent points to the disavowal of ZAO PricewaterhouseCoopers Audit (“PWC”) of its own audit certificate in respect of financials statements which referred to the scheme to pay profits to the sham fund as evidence that the scheme was contrary to tax laws. Respondent alleges the scheme was totally artificial without logical reason other than to evade taxes. Respondent also points to the use of promissory notes issued by Yukos in exchange for untaxed “loans” by the shell entities located in the Low Tax Regions. These “loans” were then co-mingled with the other profits of the company. (§§60 - 64 R-I)

102. The shell entities had no substance or business activities in the Low Tax Regions other than on paper with the schemes administered

centrally from Yukos headquarters in Moscow. Various means were used to “window dress” the conduct as legitimate business activity, however the reality was that at all times the schemes were controlled centrally with little or no actual activity or presence by the relevant directors or the oil products being traded in the Low Tax Regions. The contribution to the economic development of the Low Tax Regions was merely symbolic and presence had no substance. (¶¶65 - 70 R-I)

103. Respondent uses the example of the exploitation of Mordavia Low Tax Region to illustrate Yukos’ tax evasion. The purported original director and founder of one of Yukos’ shell companies Fargoil told the tax authorities that he had not heard of the name of the company, nor had he ever been to Mordavia when questioned. Fargoil was one of many shell entities used in the tax avoidance scheme interposed to “mark-up” the price of oil products bought and sold between similar such Yukos entities before eventual sale to third parties. (¶¶71 - 78 R-I)

Events leading to Claimant’s first purchase of Yukos shares

104. Beginning on **2 July 2003**, a series of events undermined investor confidence in Yukos and foreshadowed its bankruptcy. Firstly associates of Mikhail Khodorkovsky and Group Menatep were arrested and some, including Mikhail Khodorkovsky himself, were charged with tax evasion charges. These events occurring through until **late October 2003** drove the Yukos share price down. On **30 October 2003** a court order obtained by Russian prosecutors freezing the sale and transfer of Yukos shares by Khodorkovsky, pushed the share price further down. Public statements by President Vladimir Putin and the Deputy Economic Development and Trade Minister further publicly highlighted the investigations and proceedings in respect of Yukos. At this point in time it was publicly clear that the business practices of Yukos were being critically reviewed by authorities. (¶¶79 – 84 R-I)

105. On **8 December 2003**, eleven months prior to Claimant’s first purchase of shares, Tax Ministry began a review of Yukos past tax

practices. An audit was concluded on **29 December 2003** and a report produced setting out in detail the wilful, bad faith schemes concluding that Yukos owed approximately US\$ 3.4 billion in taxes, default interest and fines with respect to tax year 2000. (§§85 – 86 R-I)

106. On **12 January 2004** Yukos filed written objections to the Tax Ministry's audit report and Yukos' counsel met with the Tax Ministry two weeks later to discuss the objections. (§87 R-I)

107. On **14 April 2004** a comprehensive 121 page tax assessment was issued by the Tax Ministry upholding the findings of the audit and providing a detailed response to the objections of Yukos and finally concluding that Yukos owed a total of US\$ 3.5 billion. Yukos was given until 16 April 2004 to pay the amounts due which was more than adequate under Russian law given the circumstances of the Yukos case. Yukos did not pay the amount due. (§§88 – 89 R-I)

108. On **15 April 2004**, anticipating Yukos' refusal to pay the amount due based on its objections to the assessment and with a view to securing collection of the full 2000 tax assessment amount, the Tax Ministry commenced civil proceedings to obtain an injunction from the Moscow Arbitrazh Court preventing Yukos from selling, transferring or encumbering specified types of assets and restricting share registries for Yukos subsidiaries from registering changes. Important assets were excluded from the injunction including all accounts used in connection with Yukos' oil business and Yukos' non-Russian assets. Upon deciding a request by Yukos to vary the injunction, the Moscow Arbitrazh Court found no evidence that the injunction was adversely affecting the company's production or activities. (§90 – 91 R-I)

109. On **26 May 2004**, the Moscow Arbitrazh Court upheld the Tax Ministry's assessment that Yukos owed US\$ 3.4 billion rejecting all of Yukos objections. On **1 June 2004** an affiliate of Yukos filed appeal against this decision followed on **2 June 2004** by an appeal by the Tax Ministry against the same 26 May ruling. Yukos itself also appealed, and the matter was heard by the Ninth Appellate Division

of the Moscow Arbitrazh Court ("the Appellate Court") from **18 June 2004** to **29 June 2004**. The Appellate Court's ruling affirmed the tax assessment for 2000 in all respects. (¶¶92 – 94 R-I)

110. The Appellate Court issued a writ of enforcement on **30 June 2004** which the Bailiffs Service commenced enforcement of on the same day, issuing orders to freeze cash in Yukos' bank accounts up to the amount of tax due of RUR 99.3 billion (*approximately US\$ 3.3 billion, although not indicated in R-I*). When Yukos failed to pay, the Bailiff's Service imposed a 7% enforcement fee in accordance with Russian law and practice. On **14 July 2004** the Bailiffs Service seized Yukos' shares in YNG as security for the overdue tax, as the amounts frozen in the bank accounts was insufficient to meet the amount due. (¶¶95 – 97 R-I)

111. Respondent asserts that Yukos was given the opportunity to appeal all Tax Ministry and all court decisions. In some cases there is no evidence that Yukos exercised its right to appeal. The court decisions in respect of the tax assessment for 2000 and corresponding enforcement procedures complied in all material respects with well settled principles of Russian tax law and practice. (¶98 R-I)

Yukos attempts to resist payment of overdue taxes

112. In contrast to other Russian oil companies who had back taxes assessed against them, Yukos did not co-operate with the tax authorities and pursued a different approach involving media and many lawyers to belligerently oppose and obstruct the tax authorities' investigations and subsequent proceedings. Its subsidiaries refused to comply with audit requests by the tax authorities and Yukos itself failed to provide key delivery orders which might have exonerated it. It also obstructed justice by attempting to prevent authorities seizing securities that it or its subsidiaries held by attempting to terminate the share registries. Another example of its aggressive strategy was its attempt to mislead authorities into accepting shares in Sibneft as collateral for the claims, however, failing to disclose the vigorous claims by third parties on those shares. Furthermore, it attempted to mislead the tax authorities and courts by claiming its ability to

operate smoothly would be harmed by the April Injunction preventing it from transferring assets, when in fact the Yukos CFO was publicly admitting that the April Injunction would have no effect on the company's operations. Yukos in fact paid US\$ 784 million of its tax bill for year 2000 in a period of six weeks from **30 June 2004** and **11 August 2004** and further payments were made by **19 November 2004**. (¶¶99 – 104 R-I)

Market adjusts its expectations for Yukos amid more bad news

113. Yukos maintained its stance that the tax assessments were wrong and that its practices in the Low Tax Regions was proper. When Yukos finally did pay part of its tax bills from 30 June 2004 it was too little too late and the Tax Ministry had already begun its investigation into Yukos tax schemes in years after 2000. On **2 September 2004** the tax assessment for 2001 was issued finding an amount owing of US\$ 4.1 billion. On **16 November 2004** the tax assessment for 2002 was issued holding Yukos liable for US\$ 6.8 billion. Then on **19 November 2004** the tax assessment for 2003 was issued finding Yukos owed an additional RUR 170.4 billion (US\$ 5.98 billion, although not contained in the submission R-I). As expected Yukos vigorously contested each of these assessments, however the courts upheld in all material aspects the tax assessments relating to years 2001, 2002 and 2003. (¶¶105 – 107 R-I)
114. The bad news mounted for Yukos during the course of **2004** and its position became fragile. Yukos' creditors responded negatively, including the SocGen Group, which notified Yukos of a potential event of default on a loan agreement and eventually declared default on the loan on **2 July 2004**. Yukos' affiliate, Group Menatep declared default on a loan issued to Yukos in September 2003 which investment analysts saw as an attempt by Group Menatep to become a creditor of Yukos to gain rights and extract value if Yukos became bankrupt. Furthermore, Yukos management began openly talking of bankruptcy and financial ruin of the company following the 26 May 2004 court ruling that the tax assessment for 2000 was upheld. Yukos persisted in insisting that bankruptcy was imminent, including on 22

July 2004 and in August 2004 when the company declared that bankruptcy was imminent. (¶¶108 – 114 R-I)

115. On **2 November 2004**, when Yukos announced its shareholder meeting for 20 December 2004, the CEO noted that Yukos would file for bankruptcy even without shareholders approval. According to internal management calculations as of 31 October 2004 the company was already effectively insolvent. Investment analysts and oil industry experts also publicly voiced bleak assessments of Yukos reflecting its imminent bankruptcy. However, even though Claimant's purchase of Yukos shares occurred in November 2004, negative assessments of Yukos' situation were being publicly made since April 2004. Credit rating agencies lowered their ratings several times in 2004. The stock price plummeted in 2004, dropping 85% from April until Claimant made its first purchase on 19 November 2004. (¶¶114 – 120 R-I)

Preparations for the YNG auction and other enforcement actions prior to Claimant's first purchase of Yukos shares

116. While the market had taken into account the negative events and dire warnings of Yukos bankruptcy Russian authorities proceeded with enforcement measures to collect the outstanding taxes. On **20 July 2004** the Ministry of Justice announced plans to assess the value of the YNG shares and to sell the shares to cover Yukos' tax bill. Yukos' appeals at multiple levels were all dismissed. Respondent's commissioned report by Professor Elena A. Borisova declares the seizure as in compliance with Russian law. (¶¶121 – 122 R-I)
117. The valuation provided by DKW in advance of the auction valued 100% of YNG's share capital on a going concern basis, i.e. on the assumption that the entirety of YNG was sold on an arm's length basis to a willing buyer with complete knowledge of Yukos' operations and financial results. The DKW report did not consider YNG's tax liabilities in its valuation and was not considered a recommendation for the starting price of the auction or the ultimate price of an auction and did not identify all the risks involved in purchasing the YNG shares. The Bailiffs Service issued an order

proceed with the sale of the YNG shares which was then confirmed by the Ministry of Justice. On **18 November 2004**, the Russian Federal Property Fund (RPPI) was appointed to sell the shares at auction and provided with the parameters for the auction such as the starting price of US\$ 8.9 billion, an auction date of 19 December 2004. All of these measures were in compliance with Russian law as confirmed by the Borisova Report. (¶¶123 – 127 R-I)

118. On **19 November 2004**, Claimant purchased two million Yukos shares at US\$ 2.40 per share, almost certainly from an affiliated member of the Elliott Group. At this point, Claimant may not have become, even briefly, the beneficial owner of any Yukos shares, as 100% of the beneficial interest in the shares purchased on 19 November 2004 would appear to have been purchased and sold to Elliott International, a Cayman Islands affiliate of the Elliott Group. (¶128 R-I)

Events after Claimant's first purchase and prior to its second purchase of Yukos shares

119. During this period, Yukos management continued to predict Yukos' demise including in a statement, issued shortly before Claimant's second purchase of Yukos shares, by Yukos management board reporting that increasing pressure from prosecutors, the upcoming sale of YNG and massive new tax claims had destroyed any chance of saving the company. Press reports were also of this view. On **7 December 2004**, Claimant made its second, and larger, block of Yukos shares for US\$ 1.12 per share representing a 93% drop from its high in April 2004. (¶¶129 – 132 R-I)

Events after Claimant's Second Purchase of Yukos Shares and Prior to it Becoming the Beneficial Owner of the Yukos Shares

120. After Claimant's second purchase of Yukos shares on **7 December 2004** and until Claimant became the beneficial owner of the Yukos shares over two years later (no earlier than January 24, 2007), Yukos' management and its controlling shareholders continued their aggressive behaviour in the hopes of delaying the demise of the

company from the self-inflicted wounds it had suffered prior to November 19, 2004. On **10 December 2004**, Yukos undertook litigation before the Houston Bankruptcy Court and sought a temporary restraining order against Western banks which were reporting to fund bids for YNG. Yukos also publicly threatened litigation against any potential bidder in a concerted attempt to disrupt the YNG auction. (§§132 – 137 R-I)

121. On **19 December 2004** the bankruptcy auction for YNG proceeded as planned, however due to Yukos' litigation and threatened litigation bidders were scared off and only Gazpromneft and BFG attended. BFG won the auction with a bid of US\$ 9.4 billion. The price realised at auction reflected the DKW valuation. Following the auction, Yukos continued to refuse to pay its creditors (including the Russian Federation) and the stripped its assets to prevent its creditors from satisfying their claims against Yukos. Its credit rating was downgraded to "default" grade.. Then on 31 December 2004 BFG paid the remaining price on the auction and was declared official winner. (§§138 – 140 R-I)

122. Yukos challenged the results of the YNG auction in Russia and the U.S., staying true to its promise of a "*lifetime of litigation*". In Russia the claims were dismissed and in the Houston Bankruptcy Court on **24 February 2005**, Yukos' voluntary bankruptcy action was dismissed on jurisdiction grounds and as it was in the best interests of creditors. (§§141 – 142 R-I)

123. The SocGen Group had already notified Yukos on **2 July 2004** that Yukos had defaulted on its US\$ 1 billion loan agreement with a syndicate of Western banks. This entitled SocGen Group to demand immediate repayment. Despite the April Injunction and cash freeze orders (which Claimant alleges prevented Yukos from paying of its liabilities), Yukos paid the loan amounts through its affiliate guarantors of the loan until 31 March 2005, when it defaulted in payment of a monthly interest instalment. Shortly thereafter, the SocGen Group initiated bankruptcy proceedings before the English High Court for recovery of the outstanding loan amount. The court granted the SocGen Group's request on **17 and 24 June 2005** and

drew particular attention to an acknowledgment by Yukos' attorneys that Yukos had assets outside Russia free from the freezing order which could have been used to make payments under the loan agreement. This is evidence of Yukos' ability to pay its liabilities despite the April Injunction. Furthermore, Yukos used foreign trust entities in attempts to shield cash and other assets from the Russian authorities. (§§143 – 146 R-I)

124. On **19 May 2005** the directors of Yukos resolved to transfer all assets outside the Russian Federation to Yukos International B.V., incorporated in the Netherlands, fully controlled by a trust-like entity. The purpose of this manoeuvre was to “*reduce the risk of interference of by the Russian state*” and to evade payments of tax assessments and other liabilities. (§§147 – 148 R-I)
125. On **8 September 2005** the SocGen Group applied to the Moscow Arbitrazh Court for recognition and enforcement of the English judgment, and on **21 December 2005** the Moscow court formally recognised it and issued a writ of enforcement. On 13 December 2005, the SocGen Group entered into an assignment agreement with Rosneft to assign SocGen's claim against Yukos in exchange for payment of a sum certain. The claim was thus transferred to Rosneft. (§§149 – 150 R-I)

Yukos bankruptcy proceedings: Initiation, creditors' meeting and receivership

126. On **6 March 2006**, the SocGen Group filed an application with the Moscow Arbitrazh Court seeking a declaration of bankruptcy for Yukos. On **9 March 2006**, the court granted petition and initiated bankruptcy proceedings with respect to Yukos. This order of the Moscow Arbitrazh Court was in compliance with Russian law and international practice. (§151 R-I)
127. On **14 March 2006**, Rosneft paid the agreed purchase price and received an executed assignment of claims from the SocGen Group later that same day. On **29 March 2006**, the validity of the

assignment of the claim to Rosneft was formally recognised by the Moscow Arbitrazh Court, which authorised Rosneft to take the place of the SocGen Group as a creditor in Yukos' bankruptcy proceedings. Yukos challenged the Moscow Arbitrazh Court's order to validate the assignment, but this legal challenge was subsequently dismissed by the Federal Arbitrazh Court of the Moscow District. (¶¶152 – 153 R-I)

128. Also on **29 March 2006**, the Moscow Arbitrazh Court initiated supervision over Yukos and appointed Mr. Eduard K. Rebgun as interim manager of the company. This order too was challenged by Yukos, but was ultimately upheld by the Federal Arbitrazh Court of the Moscow District. Mr. Rebgun undertook measures to preserve Yukos' property (including the filing of several applications for interim measures before Russian and foreign courts), he formed a creditors' register and provided an interim evaluation of Yukos' assets and liabilities. Upon concluding that Yukos' solvency could not be restored, Mr. Rebgun recommended to the first meeting of Yukos' creditors that receivership proceedings should be initiated. (¶154 R-I)

129. On **20 – 25 July 2006**, the Yukos' creditors attended a meeting convened by Mr. Rebgun to consider, inter alia, whether to accept a financial rehabilitation plan offered by Yukos' core shareholders and management or to initiate receivership proceedings. The rehabilitation plan was overwhelmingly rejected by the creditors, with 93.87% voting against it. The creditors were also in near-unanimity (99.56%) in rejecting a proposal that would have placed Yukos under external management. The creditors instead voted in favour of filing a petition with the Moscow Arbitrazh Court to formally declare Yukos bankrupt and initiate receivership proceedings requiring the receiver to sell off Yukos' assets in discharge of Yukos' creditors' claims. (¶¶155 – 156 R-I)

130. On **4 August 2006**, in accordance with the decision approved at the creditors' meeting, the Moscow Arbitrazh Court formally declared Yukos bankrupt, authorized the initiation of receivership proceedings

over Yukos, ultimately resulting in its liquidation, and appointed Mr. Rebgun as Yukos' receiver. (§157 R-I)

131. In **October 2006**, Mr. Rebgun held a public tender to select an independent appraiser to inventory and value Yukos' assets which was won by a consortium of independent appraisal companies, with ZAO ROSEKO acting as the general contractor (the "Roseko Consortium"). From **October 2006 to July 2007**, the Roseko Consortium carried out an evaluation of Yukos' assets, submitting reports on the valuation of an overwhelming majority of Yukos assets on **19 January 2007**. On **20 February 2007**, Yukos' creditors committee adopted a procedure for the holding of public auctions for the sale of Yukos' properties, which were subsequently divided into twenty separate lots. (§158 R-I)

132. In the period following Claimant's second purchase of Yukos shares on 7 December 2004 but prior to its becoming the beneficial owner of the Yukos shares, Yukos continued to challenge the Tax Ministry's assessments and the bailiffs' actions to enforce those assessments. In a series of rulings from June 2005 to December 2005, the Federal Arbitrazh Court of the Moscow District and the Supreme Arbitrazh Court upheld in all material respects the claims for back taxes, interest and fines for tax years 2000, 2001, 2002 and 2003. All of their rulings were final and not able to be appealed. (§§ 159 – 164 R-I)

133. From **27 March 2007 to 15 August 2007**, 17 public auctions of Yukos' assets were held. All auctions were held in accordance with Russian law and international practice and open to a variety of participants, Russian and foreign. Rosneft and its affiliates won 9 of the 17 auctions. The auctions generated US\$ 33.3 billion in proceeds for the bankruptcy estate. In keeping with its aggressive behaviour, Yukos' shareholders and management threatened years of litigation against auction participants. The bankruptcy estate was used entirely to satisfy creditor claims, however, at the conclusion Yukos' liabilities still amounted to US\$ 9.2 billion. On 15 November 2007 the Moscow Arbitrazh Court acknowledged the completion of Yukos' receivership. (§§165 – 168 R-I)

Yukos share price

134. On **7 December 2004** when Claimant purchased its second (and larger) tranche of shares, Yukos' share price was US\$ 1.12. From September 2005 to March 2006 the price recovered and did not go below US\$ 1.00. Between 30 December 2005 and 17 January 2006 the price did not close below US\$ 2.00. After 9 March 2006 the price dropped incrementally. Therefore at any time between 7 December 2005 and 9 March 2006, Claimant could have sold the shares for a profit.

Implausibility of conspiracy theory of Claimant

135. Respondent sets out in ¶¶172 – 191 R-I that the conspiracy theory alleged against Respondent is implausible. The more reasonable explanation is that the injury Claimant alleges it sustained was ultimately caused by the actions of Yukos' management and core shareholders, and not by the Russian Federation. Yukos' core shareholders and management knowingly pursued unlawful tax strategies to avoid tax and conceal assets from the authorities. If Claimant's conspiracy theory is to be believed then it would necessitate the complicity of the following to serve as puppets: other private oil companies in Russia, Houston bankruptcy court, major Western financial institutions in the SocGen Group, participants in the bankruptcy auctions and a variety of other individuals and entities. Furthermore, the theory fails to explain why, if Respondent planned to nationalise Yukos' assets, it did not then act in a far more direct manner which would have had a far greater probability of success. Yukos and its controlling shareholders ultimately have a long and varied history of unlawful activity, especially with regard to tax evasion.

H. Considerations and Conclusions of the Tribunal

136. The Tribunal has given consideration to the extensive factual and legal arguments presented by the Parties in their written and oral submissions, all of which the Tribunal has found helpful. In this Award, the Tribunal discusses the arguments of the Parties most relevant for its decisions. The Tribunal's reasons, without repeating all the arguments advanced by the Parties, address what the Tribunal itself considers to be the determinative factors required to decide the issues arising in this case. On the other hand, the Tribunal considers the short repetition of certain of its conclusions in the context of particular issues necessary or at least appropriate in order to avoid misunderstandings and avoid the need to refer to earlier specific sections of its Award.

H.I. Jurisdiction

137. It is recalled that, in its **Award on Jurisdiction dated 5 October 2007**, in the final section I, the Tribunal decided as follows:

1. *The Tribunal does not have jurisdiction over the claims submitted by Claimant based on Article 8 of the UK-Soviet Treaty.*
2. *The Tribunal has jurisdiction over the claims submitted by Claimant on the basis of the Most-Favoured Nation Clause in Article 3 UK-Soviet BIT in connection with Article 8 of the Denmark-Russia BIT.*
3. *The claims submitted by Claimant are admissible.*

4. *The issue whether the actions of Respondent have to be considered as expropriations under the UK-Soviet BIT is transferred to the merits phase of this arbitration.*
5. *The decision on costs of the arbitration is also joined to the merits phase of this arbitration.*
6. *After this Award on Jurisdiction, the Tribunal will enter into consultation with the Parties regarding the further conduct of the merits phase of this arbitration.*

With regard to further arguments on jurisdiction at this stage of the procedure, the Tribunal has taken note of the new relief sought by Respondent regarding jurisdiction, and of the parties' replies to the Tribunal's Question 3.2 in PO-5 summarized below. In so far as relevant, these issues will be considered later in this Award.

H.II. Preliminary Considerations

(A) Parties' Answers to Tribunal's Questions in Procedural Order No.5:

Hereafter, the parties' answers to the Tribunal's Questions in PO-5 are summarized. The Tribunal will take these answers into account in later sections of this Award in so far as it considers them to be relevant for the conclusions regarding the respective issues.

Question 3.1:

138. *Regarding Claimant's Exhibit CM-532 admitted for the time being by the Tribunal in a ruling during the hearing, the Parties are invited to comment in their Post-Hearing Briefs on the following aspects:*
- (a) the procedural admissibility of the document;*
 - (b) the evidentiary value of the document; and*
 - (c) the relevance for the issues in the present case.*

Claimant (¶128 CPHB-I)

139. Exhibit CM-532 is a one-page extract from the records of ING Bank (Eurasia) ZAO. It was submitted in response to the argument

made in the Surreply that the Claimant was not the legal owner of its Yukos shares. Exhibit CM-532 simply demonstrates that ING Bank did not consider itself the owner of the shares, but rather that it held them for CSFB, in a sub-account for the Claimant. CSFB has confirmed in other documents that it, in turn, held the shares for the Claimant. The Claimant provided CM-532 to the Respondent on the day its counsel obtained it. It does not form a necessary part of the Claimant's case, but it should be accepted by the Tribunal as fair evidence in rebuttal of arguments made for the first time in the Respondent's Surreply. Claimant further refers the Tribunal to its answer to this question as expressed in closing arguments and in ¶¶16-23 of CPHB-I, *supra*.

Respondent (¶38 RPHB-I)

140. Respondent refers to and relies upon the existing record as to the procedural admissibility. During the hearings, Respondent made three main submissions contesting the admissibility of CM-532. Firstly that the submission of CM-532 violates the procedural rules. Secondly that the document is not a document maintained and created in the ordinary course of business and it is a document created at Claimant's request for purposes of litigation. This makes CM-532 inherently testimony and in effect a witness statement which Respondent has no opportunity to cross examine. Thirdly and finally, Claimant had the opportunity to inform the Tribunal and Respondent that it had requested and was awaiting the document and it did not do so. (pp. 220-223, 228-234, 852-856 Tr.)

Question 3.2

141. *In view of the earlier Award of this Tribunal accepting its jurisdiction and of the exception made in so far in section I.4 of its Decisions in that Award by transferring the issue of expropriation to the merits phase of this arbitration, in which way can and does Respondent still raise objections on jurisdiction at the present time?*

Claimant (¶129 CPHB-I)

142. Claimant notes that this question is directed to the Respondent. Claimant refers the Tribunal to its position on jurisdiction as expressed during closing arguments.

Respondent (¶¶ 1-32 RPHB-I.)

143. Respondent argues that the Tribunal lacks jurisdiction because Article 3(2) of the IPPA did not apply at the commencement of the arbitration. The jurisdiction of this Tribunal is based on Article 3(2) of the IPPA in conjunction with Article 8 of the Denmark-Russia BIT. Article 3(2) applies to “*investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments.*”
144. Respondent has established that the Yukos shares at issue were not an investment of a UK investor when Claimant commenced this arbitration on October 28, 2005. As set forth at ¶¶ 1-14 of R-II, pages 1-6 of Annex D to R-II, CSFB LLC, a US company, was at all times the legal owner of the shares, which were controlled and beneficially owned by Elliott International, a Cayman Islands company, until the termination of the Participation Agreements in March 2007. While the Participation Agreements were in force, Claimant had no rights to the Yukos shares having financial value and could not incur any loss or damage with respect to these shares. On October 28, 2005, the critical date for purposes of establishing jurisdiction, Article 3(2) of the IPPA was therefore inapplicable to Claimant and the Yukos shares at issue, and cannot constitute a basis for this Tribunal’s jurisdiction.
145. Respondent argues that the Tribunal lacks jurisdiction over the present dispute because it arose prior to Claimant making an investment. Article 8(1) of the IPPA confers jurisdiction over “*any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount of payment of compensation under Articles 4 or 5 of this Agreement [...].*” Article 3(2) of the IPPA in conjunction with Article 8 of the Denmark-Russia BIT confers jurisdiction over “*any dispute which may arise between an investor of one Contracting Party and the other Contracting party in connection*

with an investment on the territory of the other Contracting Party” other than a dispute over claims based on “taxation,” which are expressly exempted from the scope of Article 8 by Article 11(3) of the Denmark-Russia BIT.

146. As set forth at ¶¶ 84-86 of R-II with supporting authorities that stand un rebutted, the Tribunal lacks jurisdiction over disputes that arise prior to the making of a protected investment.
147. Respondent has established at ¶¶ 87-90 of R-II, and Claimant does not contest, that the present dispute arose prior to March 2007, Claimant having sent a Notice of Dispute on June 2, 2005 and commenced this arbitration on October 28, 2005.
148. Respondent has also established in ¶¶ 91-94 of R-II that the post-March 2007 measures complained of – the Bankruptcy Auctions – do not constitute – and Claimant does not claim they constitute – a new dispute. Indeed, Claimant acknowledged at the hearing that the “*tax assessments formed the basis on [sic] what subsequently happened to Yukos and its shareholders. From that perspective, needless to say, these tax assessments are very important and, indeed, central to the expropriation of Yukos.*” The tax assessments thus were the “*real causes*” of and “*continued to be central*” to the dispute concerning the Bankruptcy Auctions. The Tribunal accordingly lacks jurisdiction over the present dispute because it arose prior to the making of a protected investment.
149. The Tribunal also lacks jurisdiction because Article 8 of the Denmark-Russia BIT does not apply to disputes over claims premised on “taxation.” As confirmed by Claimant at the hearing, all of Claimant’s claims are premised on the allegation that the auctions of Yukos’ assets were expropriatory because the tax assessments were not *bona fide*, not non-discriminatory and were confiscatory.
150. The Respondent argues that the Tribunal lacks jurisdiction over claims based on pre-investment acts and facts. As set forth in ¶¶ 207-221 of R-I, ¶¶ 66-72 of R-II and at page 163, line 17 to page 164, line 11 of Respondent’s Opening Statement (in Tr.) with supporting

authorities that stand unrebutted, the Tribunal lacks jurisdiction over claims based on pre-investment acts and facts.

151. Claimant alleges that it made a protected investment in November and December 2004. On Claimant's own case, the tax assessments for the years 2000 to 2003 in the amount of approximately US\$ 14.6 billion are pre-investment measures outside the jurisdiction of this Tribunal.

152. The taxes and interest for the years 2001 to 2003 were enforced through administrative proceedings. These tax liabilities became enforceable tax liens upon the expiration of the deadline specified in the payment demand issued by the tax authorities. Payment Demand No. 133 (CM-100, p.1), covering taxes and interest for the year 2001 (approximately US\$ 2.6 billion), was issued on September 2, 2004 and became an enforceable tax lien two days later. Payment Demand No. 175 (CM-249, p.2), covering taxes and interest for the year 2002 (approximately US\$ 3.8 billion), was issued on November 16, 2004 and became enforceable one day later. Payment Demand No. 186 (CM-250, p.2), covering taxes and interest for the year 2003 (approximately US\$ 3.4 billion), was issued on December 6, 2004 and became enforceable one day later.

153. The tax assessment for the year 2000 and the fines (but not the tax assessment and interest) for the years 2001 through 2003 were enforced through court proceedings. For the 2000 tax assessment to become an enforceable tax lien there had to be a judgment of an appellate court upholding the tax assessment. That judgment was issued by the appellate instance of the Moscow Arbitrazh Court on June 29, 2004 and upheld tax liabilities, including interest and fines, of approximately US\$ 3.5 billion. The judgment that converted the fines for the year 2001 – approximately US\$ 1.3 billion – into an enforceable tax lien was rendered by the Ninth Arbitrazh Appellate Court on November 18, 2004, one day prior to Claimant's first purchase of Yukos shares.

154. The 2000-2003 tax liens were challenged by Yukos and upheld by the Russian courts but for negligible amounts after November and

December 2004 but before March 2007. The subsequent substantial failure of Yukos' challenges of the pre-investment tax liens neither establishes the Tribunal's jurisdiction over the tax liens nor constitutes post-investment expropriatory conduct within the Tribunal's jurisdiction.

155. The IPPA does not bind the Contracting Parties in relation to any pre-investment act or fact. Superior organs, if appealed to after a State becomes bound by an international obligation, are not internationally required to overturn or amend conduct of an inferior organ that occurred while no obligation of the State existed, since such conduct was not then contrary to international law. Thus, on Claimant's own case, the tax liabilities arising from taxes assessed for the years 2000 to 2003, and default interest as well as the fines for the year 2001, are outside the Tribunal's jurisdiction even though Yukos' challenges of the tax liens were finally dismissed after Claimant alleges it made its first investment. The taxes assessed for the year 2003 and default interest became enforceable tax liens on December 7, 2004, three days prior to the second purchase of the Yukos shares, and are thus outside the Tribunal's jurisdiction over claims based on Claimant's alleged second investment even though Yukos' challenges of the tax liens were finally dismissed after Claimant alleges it made its second investment.

156. Thus, on Claimant's own case, tax liens in the aggregate amount of US\$ 14.6 billion are outside the jurisdiction of this Tribunal.

157. In any event, Claimant's allegation that it made a protected investment in 2004 is unsustainable. First, the record demonstrates that Claimant never became the legal or even the nominal owner of the Yukos shares at issue.

158. Second, Claimant acknowledged at the hearing that an "asset" within the meaning of Article 1(a) of the IPPA "has to have some sort of financial value." Claimant did not, however, acquire "something of value" in 2004. As the record now shows, Claimant sold the entirety of the economic interest in the Yukos shares to Elliott International before it acquired the related shares, and did not

under the Participation Agreements retain any right having a financial or economic value. Following the signing of the Participation Agreements, Claimant instead took on the obligations of an unpaid collection agent for Elliott International, and as a result could not have suffered any loss from any alleged expropriatory act.

159. At the hearing, Claimant stressed that Elliott International and Claimant “are related companies under common management” (p. 755 Tr.) and “[w]hile the Participation Agreements gave Elliott International an economic interest in the shares for a period of time, they did not convey the shares themselves.” (p. 754 Tr.)

160. Neither argument advances Claimant’s case. While both companies were under the common management of Elliott Associates, L.P., a Delaware partnership, US companies are not eligible for treaty protection.

161. Claimant is also mistaken in arguing that “it did not convey the shares themselves” (meaning, presumably, ownership of the shares) to Elliott International. The Yukos shares, like all shares, represented a bundle of rights (including voting rights and rights to receive dividends and liquidating distributions), and, under the Participation Agreements, Claimant transferred to Elliott International all the rights represented by the Yukos shares having financial value. The ownership rights that Claimant supposedly retained were in fact nothing more than the obligation to follow the instructions given by Elliott International as to how CSFB LLP should in turn be instructed to exercise its rights as the legal owner of the Yukos shares. For as long as the Participation Agreements remained in place, Claimant did not retain any right or interest that could constitute ownership within the meaning of Article 1(a) of the IPPA.

162. Not a single authority relied upon by Claimant in its written or oral pleadings supports the proposition that Claimant made a protected investment in 2004. Claimant studiously ignores the fact that in each of *Saluka v. Czech Republic* (CLA-34), *CSOB v. Slovak Republic* (CLA-10) and *Rumeli v. Kazakhstan* (CLA-32), the claimants were the legal and beneficial owners of the investment at the time of the

alleged expropriation. At the hearing, Claimant simply recited these authorities, ignoring Respondent's rebuttal arguments set forth at ¶¶ 38-41 and 50-62 of R-II and at pp. 162 -163 Tr.

163. Claimant's position is also not supported by the Interim Awards rendered in the proceedings initiated by the majority shareholders of Yukos under the Energy Charter Treaty ("ECT"). The ECT tribunal interpreted Article 1(6) of the Energy Charter Treaty, which defines "*investment*" as "*every kind of asset, owned or controlled directly or indirectly by an Investor,*" followed by a non-exhaustive list of examples (see p. 2, RLA-137). The ECT tribunal concluded that Article 1(6)(b) ECT includes legal or nominal ownership of shares in a Russian company.

164. Indeed, unlike Claimant, the claimant companies in the ECT proceedings were registered with the Russian registrar. In interpreting the terms "*every kind of asset, owned or controlled directly or indirectly*" by a protected investor, the ECT tribunal emphasised that Article 1(6) ECT "*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'*". As stated in one of the articles cited by the ECT tribunal, for purposes of Article 1(6) ECT, a "*right conferred by law*" is a protected investment if "*it was created effectively, under the law applicable (mostly national law) and if this right, for the foreign 'investor' has some financial value ('asset')*." Respondent did not dispute (except with respect to Veteran Petroleum), and the ECT tribunal held, that the claimant companies were the legal and nominal owners of the Yukos shares.

165. Unlike the claimant companies in the ECT proceedings, Claimant was not, under applicable Russian law, the nominal or legal owner of the Yukos shares at issue. The claimant companies in the ECT proceedings, again unlike Claimant, were thus entitled to receive dividends and vote the shares, and held all of the fundamental ownership rights associated with the Yukos shares.

166. Claimant acknowledges that pre-investment acts and facts may only be relied upon to inform the meaning of post-investment acts and

facts. Nevertheless, Claimant requests the Tribunal to determine that the tax assessments were illegal, seeking to extend the protection under Article 5 of the IPPA to pre-investment conduct. It is Claimant's case that the post-investment conduct, i.e., the auctions of Yukos' assets, were expropriatory on the ground that the tax assessments were "*not bona fide and non-confiscatory, and non-discriminatory.*" A review of the legality of pre-investment conduct, however, is outside the jurisdiction of this Tribunal, and on Claimant's own statement of its case, the supposed illegality of the auctions cannot be separated from the alleged illegality of the tax assessments (and requires an examination of the legality of the tax assessments). A determination that the auctions are contrary to Article 5 of the IPPA would thus require an extension of the Tribunal's jurisdiction to acts outside its competence.

167. Respondent argues that the Tribunal lacks jurisdiction over post-March 2007 measures because Claimant attempted to acquire a treaty claim in March 2007, not a protected investment. Respondent has established at ¶¶ 95-100 of R-II and pp. 164-170 Tr. that the termination of the Participation Agreements in March 2007 did not give rise to a protected investment because Claimant sought to invest in its pending expropriation claim (this arbitration, it will be recalled, was initiated in 2005), not in a protected investment. By March 2007, Yukos was a bankrupt company undergoing final liquidation. Claimant has failed to provide any rationale or justification in its written or oral pleadings for its acquisition of an economic interest in the Yukos shares after Yukos had already been declared bankrupt and after the decisions to liquidate its assets had become final and irreversible.

168. According to Claimant, the motivation of the investor "*has no role to play*" (p.107 Tr.). While the motivation of an investor who engages in economic activity in the host State may well be irrelevant to the investment's protection under an investment treaty, transactions engaged in for litigation purposes after a dispute has arisen and after damages have been incurred are not protected. Economic activity is the fundamental prerequisite of investment protection. Transactions undertaken for litigation purposes without economic activity are an

abuse of the investment treaty system. The authorities relied upon by Respondent at ¶¶ 97-99 of R-II and at the hearing in support of this proposition stand un rebutted.

169. Respondent argues that it can raise objections on jurisdiction at the present time. Respondent established in its Closing Statement that under applicable Swedish law it can raise objections to jurisdiction at the present time and the Tribunal is not prevented by the Award on Jurisdiction from finding that it lacks jurisdiction on a ground other than a finding that there was no expropriation.
170. As confirmed by the Svea Court of Appeal, (RLA-186) under the Swedish Arbitration Act (section 2, RLA-178), the Award on Jurisdiction is a non-final and non-binding decision, which can be changed at any time by the Tribunal, in particular, based on new circumstances.
171. Claimant did not reveal during the jurisdictional phase that it had sold the economic interest in the shares even before they had been purchased. This fact constitutes a new circumstance, which requires the Tribunal, as a matter of applicable Swedish law, to reconsider the jurisdictional premises of the Award on Jurisdiction.
172. Moreover, the Award on Jurisdiction did not make factual findings as to the existence of a protected investment, but accepted Claimant's assertions as the basis for upholding jurisdiction. Pursuant to the doctrine of assertion as applied by Swedish Supreme Court, the Tribunal was required to accept Claimant's assertions concerning the existence of a protected investment at the jurisdictional phase. In the final award, the Tribunal is not prevented from dismissing the claims for lack of jurisdiction or on the merits based on a finding that Claimant did not make a protected investment.
173. While Claimant characterized Respondent's jurisdictional objections as "*belated*" (¶¶ 7, 164, C-II), Claimant acknowledged at the hearing that "*these issues are important and have to be addressed by the Tribunal*" (p. 749 Tr.). It is uncontroversial that a party cannot be deemed to have waived a jurisdictional objection under Article

34(2) of the Swedish Arbitration Act (RLA-178) unless it knew of the facts permitting it to raise the objection. Respondent raised jurisdictional objections based on the fact that Claimant did not acquire an economic interest in the Yukos shares prior to March 2007 in the Statement of Defense shortly after it had learned this fact in March 2009. Respondent therefore cannot be deemed to have waived any jurisdictional objection based on this fact, withheld by Claimant.

Question 3.3

174. *In which way is "discrimination", either between different competitors in Russia or between domestic and foreign investors, relevant for the issues to be decided in this case, and was there such relevant discrimination?*

Claimant (¶130 CPHB-I)

175. In this claim for expropriation, no showing of the sort of discrimination that would be required to support a claim for denial of national treatment is necessary. Rather the significance of the Respondent's discrimination against Yukos is that it impeaches the Respondent's claim that its tax measures were legitimate. Despite having used nearly identical tax structures, no other Russian oil company was subjected to the same relentless and inflexible attacks as Yukos. Claimant further refers the Tribunal to its answer to this question as expressed in closing arguments (pp. 739-741 Tr.)

176. At the hearing Claimant submitted that it is not the Claimant's claim that RosInvestCo was discriminated against on the basis of its UK nationality. The relevance of discrimination, to the case, is not that Yukos was discriminated against vis-a-vis other Russian oil companies, but that it impeaches the legitimacy of the tax measures, because the claim is one of expropriation. The Russian Federation took the assets of Yukos. Under Articles 5(1) and 5(2) of the IPPA, Claimant was entitled to make a claim based upon the expropriation of the assets of Yukos. Respondent attempts to claim that the taxation measures were legitimate. Respondent may only claim that the tax measures were legitimate provided the laws themselves and the

enforcement are bona fide and non-discriminatory and non-confiscatory. (pp. 739 – 740 Tr.)

177. Claimant submits that these tax laws, as enforced, met none of the above three elements. The significance of discrimination is that Respondent has not shown that its enforcement of its tax laws was non-discriminatory. If it cannot do that, and it can also show that it was bona fide and non-confiscatory, then those tax measures are not entitled to respect, as a matter of international law, and are properly characterised as expropriation. (p. 741 Tr.)

Respondent (¶¶66 – 71 RPHB-I)

178. Claimant has failed to establish that the auctions were measures having effect equivalent to nationalisation or expropriation on the ground that they were for a discriminatory purpose within the meaning of Article 5(1) of the IPPA.

179. Claimant expressly admitted at the hearing that it does not claim “that RosInvestCo was discriminated against on the basis of its UK nationality” (p. 739 Tr.). Nor does Claimant contend that the alleged expropriation of Yukos’ assets was by reason of any foreign ownership of Yukos. Indeed, Claimant alleges that Yukos was singled out for domestic political reasons germane to its Russian majority shareholders.

180. The authority discussed at ¶¶ 287-290 R-I and ¶¶ 154 and 157-159 of R-II supports the proposition that a discriminatory expropriation is cognizable under Article 5(1) of the IPPA only if there is discrimination based on foreign nationality. These authorities stand un rebutted.

181. Claimant nonetheless contends that discrimination between competitors in Russia renders the tax assessments illegal.

182. Claimant’s argument is based on the fundamental misconception that selective tax enforcement is for a discriminatory purpose under Article 5(1) of the IPPA. To the contrary, Respondent has established that selective tax enforcement does not constitute or imply an

unreasonable distinction, is a proper use of tax administration resources and a legitimate means employed by tax authorities around the world to discourage tax evasion. Again, Claimant has failed to rebut any of the authorities supporting these propositions.

183. Claimant has, in any event, failed to establish that Yukos was in fact treated differently from other Russian and non-Russian oil companies, (as discussed in greater detail at ¶¶ 88-92 of RPHB-II). Given the egregiousness of Yukos' abuses, their long duration, Yukos' concealment of the abuses and its refusal to pay, when it could, to satisfy the taxes assessed by the tax authorities, Yukos' case was unique.

Question 3.4

184. *Given the terms of Article 5(1) of the Investment Protection and Promotion Agreement between the Soviet Union and the United Kingdom (IPPA), the Tribunal would be grateful to hear from the Parties what test should be applied in order to determine whether a measure not in itself amounting to "nationalisation or expropriation" should be considered a measure "having effect equivalent to" nationalisation or expropriation.*

Claimant (¶131 CPHB-I)

185. Claimant stands by its statement at the hearings that, in determining whether a measure (or set of measures) is "equivalent to" expropriation, the Tribunal should evaluate whether the "net effect" of the measure (or set of measures) is the same as an outright expropriation, *i.e.*, a substantial or total deprivation of the economic value of an (see also pp. 719-721 Tr.). Claimant's submission, of course, is that the Tribunal need not address this question, because it is confronted with a complete taking of all of the assets of Yukos that amounts to nationalisation or expropriation of RosInvestCo's investment.

Respondent (¶¶50 – 63 RPHB-I)

186. Respondent established in its Closing Statement that the term "*measures having effect equivalent to nationalisation or*

expropriation” covers indirect expropriation, but without dispensing with the requirement of a substantial or total deprivation of (i) the economic value of an investment (as Claimant articulated the standard at the hearing), (ii) fundamental ownership rights, in particular, control of an ongoing business, or (iii) deprivation of legitimate investment-backed expectations.

187. The consensus view of the OECD Member States on the distinction between taxation and measures having effect equivalent to nationalisation or expropriation is articulated in the interpretative note on Article VIII(2) of the Multilateral Agreement on Investment (p. 7, RLA-81), which Respondent emphasised in its submissions, but Claimant failed to address in its written pleadings and failed even to mention at the hearing. The interpretative note confirms that (i) taxation measures do not generally constitute expropriation, (ii) taxation measures generally within the bounds of internationally recognised tax policies and practices do not constitute expropriation, (iii) taxation measures aimed at preventing the avoidance or evasion of taxes do not generally constitute expropriation, (iv) a taxation measure which was in force and transparent when the investment was undertaken is not expropriatory, and (v) a taxation measure which by itself is not expropriatory is “extremely unlikely” to be an element of an indirect expropriation.

188. Far from requiring Respondent to show that the tax and enforcement measures against Yukos were *bona fide*, not discriminatory and not confiscatory, as Claimant insists throughout its written and oral pleadings, Claimant has the full burden of establishing that the measures it complains of do not benefit from the presumption of legality to which they are entitled under international law. For the reasons set forth below, Claimant has failed to meet this burden.

189. Respondent argues that Claimant has failed to establish that post-investment measures deprived it of the total or substantial value of its purported investment in Yukos. Claimant alleged in its June 2, 2005 Notice of Dispute and October 28, 2005 Request for Arbitration that its purported investment in Yukos was rendered valueless as a result

of the alleged expropriation of Yukos' principal asset, the YNG ordinary shares. Claimant thus conceded that the measure allegedly having effect equivalent to nationalisation or expropriation of the Yukos shares occurred long before Claimant acquired an economic interest in the Yukos shares, in March 2007, and long before the IPPA could have become applicable to Claimant and the Yukos shares.

190. Claimant has never put forward an alternative theory of how and when its purported investment in Yukos was expropriated. Claimant has instead focused exclusively on the alleged expropriation of Yukos' remaining assets through the Bankruptcy Auctions and specifically on the Bankruptcy Auction held on August 15, 2007, the date when "*Respondent stripped away the last of Yukos' assets,*" i.e., approximately US\$ 450 million of accounts receivable, without alleging, much less establishing, any effect of the Bankruptcy Auctions on its purported investment. As confirmed, for example, in *GAMI v. Mexico* (CLA-42), not every expropriation of an asset of a company constitutes an indirect expropriation of the shares of that company.
191. Applying Claimant's own standard for establishing a "*measure having effect equivalent to nationalisation or expropriation,*" it is Claimant's position that the total or substantial destruction of the value of the Yukos shares occurred shortly after Claimant's second purchase of Yukos shares in December 2004, long before Claimant first acquired an economic interest in the shares in March 2007.
192. Even on Claimant's own case, Claimant has failed to establish that post-investment conduct caused a substantial or total deprivation of the value of the Yukos shares. To the contrary, tax liens in the aggregate of amount of US\$ 11.2 billion had become enforceable prior to Claimant's first purchase of Yukos shares (i.e., prior to November 19, 2004), and tax liens in the additional amount of US\$ 3.4 billion had become enforceable prior to the second purchase of Yukos shares (i.e., prior to December 10, 2004). The order to sell the YNG ordinary shares at auction and the resolution setting the minimum starting price and other parameters of the auction were

issued on November 18, 2004.¹⁰⁷ Significantly, Yukos shares lost approximately 85% of their market value between April 2004 and November 19, 2004, more than 93% of their market value between April 2004 and December 10, 2004 and were de-listed on the Moscow Stock Exchange in 2003 and on the Moscow Interbank Currency Exchange in 2004.

193. Claimant has failed to develop any theory that the post-November/December 2004 measures effected a total or substantial deprivation of the value of the Yukos shares. Indeed, Yukos' own management declared under penalty of perjury that Yukos was insolvent (in both the balance sheet and liquidity senses of the term) as of October 31, 2004. Claimant instead alleges that its claim "*is predicated under Article 5(2) on the reversal of the injury that Yukos suffered as a result of the Russia Federation's unlawful expropriations.*" Respondent, however, was under no international obligation to undo the 2000-2003 tax liens or the order to sell the YNG shares, since these acts were not in breach of the IPPA when they occurred. Claimant's claim therefore fails even on the false assumption that Claimant made an investment in November and December 2004.

194. Contrary to its allegations, Claimant did not, in any event, acquire an economic interest in the Yukos shares until March 2007. It cannot be disputed that by March 2007 Claimant was purchasing shares in a bankrupt company in the process of undergoing final liquidation. By March 2007, the 2000-2004 tax assessments, as well as the decisions to liquidate Yukos' assets, had become final and irreversible. As of June 30, 2006, Yukos' Financial Statements showed liabilities of almost triple its assets. Post-March 2007 conduct therefore cannot constitute "*a measure having effect equivalent to nationalisation or expropriation,*" because such conduct did not concern a viable company. As confirmed by the *ELSI* case (RM-89), measures concerning a company that is already required to file for bankruptcy do not constitute an expropriation. They are acts of supererogation. Tellingly, Claimant had to admit at the hearing that "*when the application for the bankruptcy on Yukos was made [...] Credit Suisse wanted to have its money back*" and no longer accepted the Yukos

shares as security for a US\$ 2 million loan. The petition for Yukos' bankruptcy was filed with and accepted by the Moscow Arbitrazh Court in March 2006, more than one year prior to the termination of the Participation Agreements.

195. Between April 2004 and March 2007, Yukos shares lost more than 95% of their value, and in February 2005 were also de-listed from the A1 quotation list of the Russian Trading System. The seven million Yukos shares at issue thus could not have been sold in any reasonable timeframe to an independent third party in a market transaction or otherwise. Indeed, seven million shares represented the entire aggregate trading volume of Yukos shares for the period between March 27 and July 24, 2007, and the trading volume in Yukos shares during this period was frequently zero. Claimant has not and cannot justify on any economic basis the arbitrary US\$ 3.5 million price assigned in the intra-group transaction terminating the Participation Agreements in March 2007.

196. It follows that under Claimant's own test for establishing "*a measure having effect equivalent to nationalisation or expropriation*," the total or substantial destruction of the value of the Yukos shares, occurred before Claimant made an investment and before the IPPA could have become applicable to Claimant and the Yukos shares.

197. Respondent argues that Claimant has failed to establish that the post-investment measures deprived it of fundamental ownership rights in its purported investment. Respondent has established that the appointment of a receiver to liquidate a business or other property constitutes an expropriation if it does not constitute a legitimate exercise of the State's regulatory power, as it deprives shareholders of the exercise of their fundamental ownership rights, the right to participate in the management of the company and to receive dividends. The case law and scholarly writings supporting this proposition stand un rebutted.

198. On August 4, 2006, the Moscow Arbitrazh Court initiated receivership proceedings requiring the receiver to sell Yukos' assets

in discharge of its creditors' claims, appointed Mr. Rebgun as receiver and terminated Yukos' management. Thus, Yukos' shareholders were deprived of the exercise of their fundamental ownership rights at the latest in September 2006, when the August 4, 2006 decisions became final and irreversible, and the IPPA was thereafter inapplicable to Claimant and the Yukos shares.

199. Respondent argues that Claimant has failed to establish that the post-investment measures deprived it of any legitimate expectation. The reasonably expected economic benefit of property is one of the touchstones for determining whether an expropriation occurred. Claimant does not dispute the authorities relied upon by Respondent that stand for this proposition. Nor does Claimant justify the purchase of the Yukos shares in 2004 and 2007 on any ground other than its expectation that Respondent could and should have reversed the "*unlawful expropriation*." Respondent has demonstrated that even if the IPPA were applicable to Claimant as of November/December 2004, which it was not, Respondent had no obligation to undo the 2000-2003 tax liens in the amount US\$ 14.6 billion or the order to sell the YNG shares at auction after November/December 2004. As regards post-March 2007 conduct, Respondent was not obliged to reverse, and could not have reversed the "*unlawful expropriation*" since the decisions to liquidate the YNG ordinary shares and Yukos' remaining assets had already become final and irreversible in 2005 and 2006, respectively.

Question 3.5

200. *Could the Parties explain in more detail:*

- (a) the various options and steps in Russian law and practice regarding the registration of shareholders, and on that basis;*
- (b) whether Claimant could have been registered as the owner of the Yukos shares;*
- (c) what were the legal effects of the procedure chosen for registration in the present case; and*
- (d) whether similar procedures of registration were used for other shareholders of Yukos and for shareholders of other companies in Russia.*

Claimant (¶132 CPHB-I)

201. Claimant refers the Tribunal to its answer to this question as expressed in closing arguments, and submits the following additional observations:

- (a): Shares of Russian joint stock companies are recorded in the register of shareholders maintained either by the company itself or by an independent "Registrar." The register of shareholders may also contain accounts of nominal holders of shares, such as depositories or brokers holding shares on behalf of the owner (Law on the Securities Market, Article 8 (2), RM-848) However, due to the particularities of Russian securities markets legislation, foreign entities could not be formally registered as nominal holders.
- (b): Claimant could have been the registered "shareholder" if Claimant had held the shares through a Russian custodian, instead of through its global Custodian, CSFB .
- (c): The legal effects of the procedure Claimant chose are described in detail in ¶¶29 to 35 of CPHB-I. In summary: (i) CSFB was the registered owner of the shares under Russian securities market legislation, but (ii) Claimant was the true owner of the shares under Russian civil law.
- (d): Although some foreign investment banks have subsidiaries in Russia that can act as licensed depositories/custodians, it was in 2004 (and still is today) common practice for investors to use their global custodians to hold Russian securities. In fact, the claimant in *Veteran Petroleum Ltd. (Cyprus) v. The Russian Federation*, one of the pending Energy Charter Treaty cases arising out of the Respondent's expropriation of Yukos, held its shares in the same manner as RosInvestCo.

Respondent (¶¶39 – 41 RPHB-I)

202. Claimant's unfounded assertion at the hearing notwithstanding, nothing in Russian law or practice would have prohibited Claimant from becoming the legal owner of the Yukos shares. Respondent

cited at the hearing a leading commentary on Russian company law, and two cases involving foreign parties who had become the legal owners of Russian shares. These materials stand unrebutted.

203. In order for Claimant to have become the legal owner of the Yukos shares, Claimant need only have entered into a depositary account agreement with an authorized Yukos share depositary. Russian residents and foreigners alike may become parties to a depositary account agreement.
204. Had Claimant become the legal owner of the Yukos shares, Claimant would have been entitled to vote the Yukos shares and to receive dividends and, more generally, would have enjoyed all of the rights of a shareholder under Russian law.

Question 3.6

205. *Given that Article 5(2) of the IPPA foresees expressly the case of a shareholding in a company of which assets are expropriated, the Tribunal would be grateful to hear from the Parties how the terms of Article 5(1) should be understood to apply to a case in which the claimant's interest is one which derives from Article 5(2).*

Claimant (¶¶133, 118 – 121 CPHB-I)

206. Claimant refers to its answer expressed in closing arguments stating that it did not need to rely on Article 5(2). While Claimant does rely on that Article, as a matter of treaty interpretation, Claimant submits that Article 5 (2) makes it very clear that in the situations described in (2), the provisions of Article 5 (1) apply mutatis mutandis. (pp. 721-722 Tr.)
207. The expropriation and re-nationalisation of Yukos' assets constitute expropriation of RosInvestCo's "Investment" under Article 5(1) of the IPPA, because the expropriation of the assets of a company has the same effect as an expropriation of the shares in such company. To leave no doubt that the expropriation of the assets of a company also constitutes expropriation of an investment in shares in such company,

Article 5(2) of the IPPA expressly confirms that the standard of protection in Article 5(1) applies:

“Where a Contracting Party expropriates the assets of a company or enterprise which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party have a shareholding, the provisions of paragraph (1) of this Article shall apply.”

208. Thus, the plain language of Article 5(2) confirms that an expropriation of the assets of a company incorporated in the Contracting State, constitutes expropriation of the shares in that company of an investor from the other state. A claimant demonstrates an entitlement to compensation under Articles 5(1) and 5(2) when it establishes the expropriation of the assets of a company in which it holds shares. The Russian Federation’s seizures and auctions of Yukos’ assets, without the payment of prompt, adequate and effective compensation, constituted an unlawful expropriation of those assets and, under Article 5(1) and 5(2), an expropriation of RosInvestCo’s investment.

209. The Russian Federation’s effort to avoid the application of Article 5(2) rests on its argument that RosInvestCo did not become a protected investor until 27 March 2007. RosInvestCo has already demonstrated that this is not the case.

Respondent (¶¶48 – 49 RPHB-I)

210. As set forth at ¶¶ 239-241 of R-I and ¶¶ 107 and 108 of R-II and discussed in Respondent’s oral pleadings, Article 5(2) of the IPPA permits a shareholder, including a minority shareholder, to assert indirect claims based on an alleged de jure or de facto expropriation of the assets of a locally incorporated company that deprives the shareholder of use and benefit of its shares.

211. Claimant therefore has the burden of establishing that (i) Respondent expropriated all or some of Yukos’ assets and thereby adopted a “*measure having effect equivalent to nationalisation or*

expropriation” of the Yukos shares and (ii) the conduct that caused the indirect expropriation of the Yukos shares occurred after Claimant made an investment.

Question 3.7

212. *Regarding the Participation Agreements, what is the relevance of New York law as the governing law, of Russian law and of international law, particularly the IPPA, for the issues to be decided by the Tribunal in the present case?*

Claimant (¶¶134 CPHB-I)

213. Claimant stands by its statement at the hearings, that only the language of the IPPA – as interpreted on the basis of the rules and principles of customary international law codified in the Vienna Convention – is relevant to the question whether Claimant is an “investor” with an “investment.” New York law is relevant only to the construction of the Participation Agreements.

214. During the hearings, Claimant submitted that Russian law, Russian Securities Legislation and the Participation Agreements, are irrelevant. This case should not, cannot and does not turn on the interpretation application of Russian law or the law of the State of New York. Claimant has, at all times qualified as an investor under the IPPA. While Respondent now argues that Claimant was not a beneficial owner, this is irrelevant. The *Saluka* case (CLA-34) and a recent jurisdiction decision taken by a tribunal reviewing another case involving Yukos have established that beneficial ownership is irrelevant. In the other Yukos case, Professor Gaillard summarised the Tribunal’s findings: “The Tribunal also found that the treaty, by its terms, applies to an investment owned nominally by a qualified investor. It held that the Russian Federation'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.” (CLA-83) The Tribunal also found that the drafters of the ECT did not intend to limit ownership to beneficial ownership.

Respondent (¶¶33 – 37 RPHB-I)

215. Article 5 of the IPPA protects “*investments of investors of either Contracting Party.*” As stated in *EnCana v. Ecuador*, “*for there to have been an expropriation of an investment [...] the rights affected must exist under the law which creates them.*” (pp. 33-34, RM-116)
216. Neither general international law nor the IPPA creates property rights. The rights associated with the Yukos shares that are protected under the IPPA are instead created by the laws of Russia, Yukos’ place of incorporation. Russian law therefore determines the existence and scope of the rights associated with the Yukos shares.
217. Russian private international law permits the parties to a contract to select the law that will govern their contractual rights and duties. Since New York law is the law selected by Elliott International and Claimant to govern the Participation Agreements, New York law determines Claimant’s related rights and duties.
218. The rights associated with the Yukos shares created under Russian and New York law are protected under the IPPA only if they are an “*asset*” of a UK investor for purposes of Article 1(a), i.e., “*something of value*” to a UK investor. At a minimum, Claimant must show that under the legal position created by Russian and New York law it “*would suffer financial loss if the property were damaged and destroyed.*” (*Azurix v. Argentina*, RLA-181)
219. The record demonstrates that Claimant was never the legal owner of the Yukos shares at issue, transferred the economic interest in the Yukos shares to Elliott International even before it purchased the shares, and could not have suffered any damage from an expropriation of the Yukos shares.

Question 3.8

220. *Taking into account the language, context and governing law of the Participation Agreements, was it permissible for Claimant to sell the Yukos shares without the consent of Elliott, and irrespective thereof,*

if the Claimant would indeed have sold them, what would have been the legal consequences for the issues relevant in the present case?

Claimant (§135 CPHB-I)

221. Claimant refers the Tribunal to its answer to this question as expressed in closing arguments. The Respondent's argument relies, for support, on three cases that are inapplicable to the context before this Tribunal. The Respondent's primary support for the proposition that rights cannot be assigned if they are "*inextricably bound up with a party's duties*" involves a contract for personal services from 1920; personal services are far afield from the context presented here. The Respondent's remaining cases concern the doctrine of adequate assurance – a doctrine limited to contexts involving the sale of goods and a limited "type of long-term commercial contract between corporate entities [like a 25 year contract for the sale of electricity], which is complex and not reasonably susceptible of all security features being anticipated, bargained for and incorporated in the original contract." As the Claimant demonstrated during closing argument, the Participation Agreements left RosInvestCo's ability to sell the shares unimpeded, and RosInvestCo might indeed have had good reason to sell the shares if their price had suddenly risen. New York law does not read implied terms into otherwise complete agreements (the cases *Reiss v. Financial Performance Corp.* (CLA-98), *Vermont Teddy Bear Co. v. 538 Madison Realty Co.* (CLA-99)), and no such term would in any event have been needed in these agreements. If the Claimant had sold the shares, the legal consequence under the Participation Agreements would have been that RosInvestCo would have paid the proceeds of the sale, minus expenses, to Elliott International.

Respondent (§§42 – 46 RPHB-I)

222. As an initial matter, a distinction must be drawn between Claimant's *right* and Claimant's *ability* to sell the Yukos shares. The short answer to the first question is that Claimant did not – and knew that it did not – have the right to sell the Yukos shares while the Participation Agreements remained in place. Why else would Claimant have purportedly paid US\$ 3.5 million in March 2007 to

terminate the Participation Agreements if Claimant already had the right to sell the shares?

223. It is in any event clear as a legal matter that the Participation Agreements conveyed a property interest *in rem* in the Yukos shares to Elliott International. Respondent's demonstration that New York law would treat the Participation Agreements as having transferred a property interest in the Yukos shares to Elliott International stands un rebutted. Under the long line of cases cited by Respondent, (at ¶25 R-II) the Participation Agreements effected a "true" sale of the Yukos shares such that, in the event of Claimant's insolvency, Elliott International – and not Claimant's bankruptcy estate – would have been entitled to receive Yukos' dividends and to exercise the rights of a shareholder. It follows as a matter of hornbook property law that Claimant, having sold the ownership of the Yukos shares to Elliott International, did not have the right to turn around and sell the same shares to someone else.

224. At the hearing, Claimant for the first time suggested that a New York court would not read into the Participation Agreements a prohibition on Claimant's right to sell the Yukos shares. This argument is meritless. Inasmuch as the Participation Agreements already conveyed the entirety of the economic interest in the Yukos shares to Elliott International, there was no need for the Participation Agreements to provide that Claimant could not sell the same shares a second time. Simply to state Claimant's argument is to refute it.

225. Respondent clarified at the hearing that a bona fide purchaser (for value) from Claimant could have acquired good title to the Yukos shares, even though Claimant was not the legal or economic owner of the shares. This possible outcome does not, however, say anything about Claimant's rights as an owner of the shares, but instead answers to New York law's solicitude for the rights of an innocent purchaser and desire to promote a liquid trading market in securities, untrammelled by defects in an upstream seller's title. This is clear from the fact that, under New York law, even a good faith purchaser for value from a thief can acquire title. (Indeed, if a thief is defined to include someone who sells someone else's property, then Claimant

would have been acting as a thief had Claimant sold the Yukos shares to a bona fide purchaser for value.)

226. Respondent submits that a sale of property in violation of the rights of the lawful owner cannot transform an unauthorized seller into a protected investor. If Claimant was not otherwise a protected investor – and Claimant was not – then Claimant did not become a protected investor merely because Claimant’s *bona fide* purchaser would have been able to acquire good title to the Yukos shares had Claimant compounded its wrongdoing, and failed to disclose that it was not the owner of those shares. It cannot be the case either that the violation of a party’s property rights can give rise to treaty rights or that the interests of a thief are to be preferred over those of an “honest” seller who informs his purchaser that he is not the owner of the property being sold, and as result cannot deliver good title.

Question 3.9

227. *The Parties are invited to comment in greater detail on the link that has been alleged to exist between the criminal prosecutions of Mr. Khodorkovsky and the reassessments of the taxes claimed to be due from Yukos.*

Claimant (¶135 CPHB-I)

228. Russian authorities arrested Mr. Khodorkovsky on 25 October 2003 on charges primarily stemming from the 1994 privatization of Apatit (a company unrelated to Yukos), even though the General Prosecutor’s Office of the Russian Federation had concluded that there were “no grounds for it to take action.” (CM-423) Six weeks later, in December 2003, tax authorities commenced the re-audit of Yukos that reversed the findings of their earlier audit and assessed billions of dollars of tax claims. The Audit Report of the December 2003 re-audit expressly referred to the criminal prosecution of Yukos executives as a basis for rebutting the presumption of good faith to which Russian taxpayers are entitled. (CM-60 at 14)

229. The 6 April 2004 letter from the Deputy Minister of Taxes and Levies of the Russian Federation to Yukos again expressly connected the tax assessments against Yukos to Mr. Khodorkovsky, this time with reference to his political writings. Taken together with the numerous departures from established Russian law that enabled the expropriation and renationalisation of Yukos' assets, these facts suggest that the strategic objective of returning petroleum assets to the control of the Russian State was closely linked to an effort to suppress a political opponent.

Respondent (¶¶113 – 125 RPHB-I)

230. The hearing showed what Yukos' management could have done to save the company – but failed to do. As explained by Mr. Konnov, Yukos – following receipt of the December 2003 audit report for tax year 2000, which quantified the full extent of its tax scheme – could have paid the assessment for 2000 and filed amended returns for the other years at issue, thereby avoiding all fines (except the single willful violation fine for 2000) as well as all VAT assessments (except for the 2000 VAT assessment). As shown with timelines at the hearing, Yukos was given ample time to make this choice (RSlide, 22/01/10, McGurn, pp. 107, 109-110) Prof. Maggs did not disagree, although he suggested that if Yukos had adopted such a strategy, “*it would have essentially lost its right to contest the legality*” of the authorities' view of Yukos' scheme. (p. 468 Tr.) This is simply wrong, as Mr. Konnov made clear on the following day. In Russia, as in most countries, taxpayers wishing to challenge the authorities' position are free to do so even if they have (prudentially) elected to pay the contested taxes in the meantime. Tellingly, Claimant chose not to cross-examine Mr. Konnov on this point.

231. Yukos itself never sought to blame its failure to pay its taxes (or to file amended returns) on fears that this would jeopardize its right to challenge the authorities' position in court. Instead, it falsely tried to blame its failure to pay its 2000 tax bill on the freeze that the authorities obtained on April 15, 2004. Prof. Maggs conceded at the hearing that Yukos could in fact have easily paid that bill, whose amount had been known to Yukos for 109 days – not two days – as shown on the table at page 45 of Annex A (whose accuracy Prof.

Maggs likewise confirmed). As was also conceded by Prof. Maggs, prior to the April Injunction, Yukos remained totally free to dispose of all of its Russian and foreign assets as it pleased, and even after that date, Yukos retained full control of its cash as well as its very sizable foreign assets (because the freeze covered only assets in Russia). Clearly, had Yukos ever wished to pay its 2000 tax bill, it would not have waited until April 15, 2004 to convert fixed assets into cash, but would instead have long since generated and set aside the necessary cash.

232. The record likewise makes clear that Yukos, had it wanted to, could also have paid its liabilities for later years, without borrowing, by following the course of action outlined by Mr. Konnov and by drawing on its vast resources. Instead, it pursued a disastrous strategy of die-hard resistance, inside Russia and abroad, trying to frustrate the authorities' collection efforts at every turn, including by unlawful means. Yukos' actions were almost certainly due in part to the interrelation between the Yukos tax assessments and the criminal prosecution of Mr. Khodorkovsky, as to which the Tribunal invited the parties' comments.
233. Mr. Khodorkovsky was arrested on October 25, 2003 on charges that included – but were not limited to – running Yukos' tax evasion scheme while serving as that company's CEO. Under Russian law, a corporation such as Yukos could not be held criminally liable. Yukos was, however, obviously liable for any evaded taxes, independently of any criminal proceedings against individual managers. It was thus predictable that the authorities would re-audit Yukos, determine the amount of taxes evaded, and make the assessments contemplated under the tax laws – all the more so as there were other circumstances suggesting that Yukos had been evading taxes.
234. Given this background, prudent managers would have husbanded the company's liquid assets, to facilitate the payment of taxes likely to be assessed in the near future. Instead, Yukos' managers did the exact opposite, declaring on November 28, 2003 – only days before the start of the authorities' re-audit – the largest dividend in the company's history (US\$ 2 billion), which was distributed in cash to

Yukos' shareholders (with well over half of this amount going to Mr. Khodorkovsky and his allies, through their holding companies and trusts).

235. On December 29, 2003, the authorities issued their audit report, which quantified Yukos' liability for 2000 at RUR 99 billion (approximately US\$ 3.5 billion – barely US\$ 1.5 billion more than the just-declared dividend). In that report, the authorities mentioned Mr. Khodorkovsky's role in overseeing Yukos' "tax optimization" program, which had been charged in the criminal proceedings, as one reason among several justifying the levying of a fine for "willfulness" – *i.e.*, for the intentional avoidance of taxes. In any event, with or without reference to the role played by Mr. Khodorkovsky, the intentional nature of Yukos' scheme was undeniable. Yukos did not create, and for years operate, dozens of companies in Low-Tax Regions – for the avowed purpose of "tax optimization" – inadvertently or negligently.

236. From the start, both in the Russian court proceedings and in the international media, Mr. Khodorkovsky, Yukos and their spokesmen adamantly denied any wrongdoing, insisting, with respect to Yukos' taxes, that the company's "tax optimization" schemes had been "perfectly legal" at the time, and that he and Yukos were the victims of politically-inspired persecution through retroactive and discriminatory tax assessments – notwithstanding the evidence showing that all of Yukos' competitors recognised the illegality of schemes such as Yukos' (and notwithstanding the fact that in no country in the world is a claim of political persecution a valid defence to the payment of taxes otherwise due).

237. As recognised by Prof. Maggs at the hearing, the management of Yukos, upon their receipt of the December 2003 audit report, "*had to make a decision.*" They could have implemented the strategy suggested by Mr. Konnov and thereby reduced the company's tax exposure to levels that would have enabled the company to survive (without, as noted above, forfeiting the right to challenge the tax authorities' position in the courts). Fatefully, however, Yukos' key

managers – all of whom owed their careers to Mr. Khodorkovsky – chose to give priority to their loyalty to him over the best interests of the company, adopting a strategy of die-hard resistance on all fronts, including in the Russian and international press, in which Mr. Khodorkovsky and Yukos cast themselves as victims of politically-motivated persecution.

238. This is the background against which the Ministry of Taxes and Levies, on April 6, 2004, sent the letter to Yukos that was discussed by Claimant at the hearing – in what can now be shown to be highly misleading terms – and which gave rise to Sir Franklin Berman’s initial question. In that letter, the Ministry had asked:

“In connection with the letter by Mikail Borisovich Khodorkovsky (who in the year 2000 was Chairman of the Management Board of OAO NK YUKOS) published in newspaper Vedomosti at the end of this March, the Ministry of Taxes and Levies requests you to confirm the existence or absence of non-resolved differences between the tax authorities and OAO NK Yukos in the context of the tax control measures for year 2000.”

239. At the hearing, Claimant argued that this letter constituted retaliation against Yukos for the “*problem*” created by Mr. Khodorkovsky’s “*speaking up*” against the Russian Government by publishing “*a letter addressing the political situation in Russia.*”

“[Mr. Townsend: ...] we submit that the fair inference to be drawn is that there was a connection in the mind of the tax authorities between Mr. Khodorkovsky and the political positions taken by Mr. Khodorkovsky, and Mr Khodorkovsky at this point was in gaol, and the tax assessments against Yukos.”
(p. 717 Tr.)

240. While urging the Tribunal to draw this allegedly “*fair inference,*” Claimant also said that it did not consider it “*necessary*” to put Mr. Khodorkovsky’s actual letter in the record, for reasons that are now obvious. At the hearing, Counsel for Respondent, never having seen

Mr. Khodorkovsky's letter, was not in a position to respond. After the hearing, however, counsel for Respondent were able to download a copy of the letter (in English) from various websites. That text totally negates the "*fair inference*" alleged by Claimant. It instead shows that the true reason for the Ministry's inquiry was the exact opposite of politically-motivated retaliation. The reason is that, in reality, Mr. Khodorkovsky's letter contained an astounding mea culpa, lambasting fellow "liberals" and himself for having been dishonest, cynical, lawless (including through acts of bribery), frivolous, selfish, and insensitive to the interests of the country and its people – and urging that this history of wrongdoing be acknowledged "*with a sense of shame.*" Far from criticizing President Putin, Mr. Khodorkovsky's letter uncharacteristically urged support for him as "*an institution that guarantees the country's territorial integrity and stability.*". The letter concluded, "*To change the country, we must change ourselves.*"

241. The tax authorities evidently viewed these unprecedented admissions by Mr. Khodorkovsky as a possible offer of an olive branch and, on the equally reasonable assumption that Yukos' management would on this occasion too follow Mr. Khodorkovsky's leadership, wrote to Yukos asking, in effect, whether Mr. Khodorkovsky's letter was a signal that Yukos was interested in settling the tax claims, which it did by requesting the company "*to confirm the existence or absence of non-resolved differences*" regarding taxes for the year 2000 (which at that point was still the only tax year that had been reassessed). Oddly in light of the seemingly clear import of Mr. Khodorkovsky's letter, Yukos instead rejected this overture. Instead, in its response of April 8, 2004, which is in the record (RM-1548), Yukos once again reiterated the position that the tax assessment was contrary to law, adding a legally irrelevant – but politically unambiguous – reference to the support that Yukos claimed to enjoy from parties "*in Russia and abroad,*" an unsubtle signal that Yukos intended to continue to mobilize foreign allies to put pressure on the Russian Government. Confronted with this indication that, whatever Mr. Khodorkovsky's letter might have meant, Yukos was not interested in compromising its tax liability but intended instead to continue resisting payment, the authorities one

week later obtained the freeze order of April 15, 2004, citing *inter alia* the continuing “*unresolved controversies*” with Yukos.

242. Thereafter, Yukos’ management intensified its resistance, failing to make court-ordered payments of taxes, concealing corporate books to frustrate attachments, attempting to mislead the authorities into accepting already-encumbered assets as security, “*bleeding*” nearly US\$ 2 billion out of YNG when it became clear that it would be auctioned, trying to sabotage that auction by commencing bankruptcy proceedings in the United States (on the strength of an 11th hour deposit of all of US\$ 1.5 million in a US bank account), and diverting additional billions of dollars worth in assets into a Dutch *stichting* whose founding instrument recited that its purpose was to defeat Russian tax claims. While the result of all of this is that Mr. Khodorkovsky and his allies (including some of Yukos’ former managers) have so far been able to retain control of those foreign assets, their strategy was in all other respects unsuccessful, and disastrous for Yukos’ other shareholders.

Question 3.10

243. *Without prejudice to any future decision of the Tribunal, in case the Tribunal makes an award of compensation, what are the final positions of the Parties regarding interest on such compensation?*

Claimant (¶137 CPHB-I)

244. Claimant refers the Tribunal to ¶¶ 270–71 in C-I for its position on interest. As described in those paragraphs, Claimant believes that the interest rate to be applied in this case of an unlawful expropriation, should be no less than the “normal commercial rate” that Article 5(1) of the IPPA contemplates for instances of lawful expropriation. Furthermore, Claimant submits that a “normal commercial rate” would: (i) be compounded at some appropriate interval; and (ii) take into account the element of risk associated with the investment and the unlawful character of the Respondent’s actions. Claimant suggests that a standard commercial rate, such as LIBOR + 4 percent, compounded semi-annually, should be added to any award from the date of valuation to the date of the award.

Respondent (¶¶1143 – 146 RPHB-I)

245. Article 5(1) of the IPPA provides that the compensation in case of expropriation “*shall be made within two months of the date of expropriation, after which interest at a normal commercial rate shall accrue until the date of payment.*” Respondent submits that if the Tribunal makes an award of compensation, the normal commercial rates prevailing in Europe, the one-year LIBOR or EURIBOR rate, are appropriate interest rates that provide “*adequate and effective compensation.*”
246. Respondent submits that it is not appropriate that the interest pursuant to Article 5(1) of the IPPA be awarded as compound interest. As explained by the tribunal in *Vivendi II*, “[t]he object of an award of interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive.” (RLA-198)
247. Claimant sold all of the economic interest in the Yukos shares to Elliott International even before it purchased the related shares. Under the terms of the Participation Agreements, Claimant was not entitled to retain any compensation for damage to the Yukos shares, or for their expropriation, but was required to pass that compensation on to Elliott International. While the Participation Agreements were in force, Claimant thus could not use or invest the amount of compensation due, nor could it have earned any income from the Yukos shares.
248. In March 2007, Claimant acquired in an intra-group transaction, an economic interest in a block of seven million shares in a bankrupt company undergoing final liquidation – a block of shares which it could not have sold at any price to a third party or in a market transaction within a reasonable period of time. An award of compound interest would therefore not reflect economic reality or make Claimant whole, but cause “*a benefit, and indeed a profit, to accrue to the successful party*” which is “*wholly out of proportion to*

the possible loss that the successful party might have incurred by not having the amounts due at its disposal.”

(B) Applicable Law

249. The Parties seem to agree, and the Tribunal finds that the law applicable to the claim under the IPPA is the IPPA itself and international law. Russian law comes into play only in so far as it is relevant in determining whether the Respondent acted in breach of an international obligation.

(C) Burden of Proof

250. Taking into account the above contentions of the Parties, the Tribunal notes that the Parties seem to agree on the principle that the burden of proof generally lies with the Claimant to establish the facts on which the claim is based. The Tribunal confirms that view and only adds that, however, the burden of proof can shift to the Respondent with regard to any exception on which the Respondent relies in its defence.

(D) Whether the contention of Respondent that Claimant has no standing is relevant to Merits stage.

1. Claimant

251. Claimant argues that the Tribunal should reject Respondent's belated objection to the Tribunal's jurisdiction *ratione temporis*. Claimant became a protected investor under the IPPA at the time of its share purchases on 16 November 2004 and 1 December 2004. The Tribunal has jurisdiction to hear Claimant's claim of expropriation because the measures giving rise to the expropriation – the auction of YNG and the bankruptcy auctions – occurred after Claimant's acquisition of the Yukos shares. (¶164 C-II)

252. During the Hearing Professor Hobér for Claimant submitted that Respondent has made a belated objection to the jurisdiction of the Tribunal by challenging the ownership of the Yukos shares and whether they constitute a protected investment under the IPPA. (Tr p. 72).
253. Professor Hobér also argued that it was not necessary for Rosinvest to be registered as the owner of the shares in the share registry. Based on Russian civil law legislation, Rosinvest was the true owner of the shares. (Tr pp. 742-743) Notwithstanding that under Russian civil law, Rosinvest was the true owner, the information on the computer print-out document from ZAO ING Bank (CM-532), demonstrated to all involved that Rosinvest was the true owner of the Yukos shares. (Tr pp. 746-748)

2. Respondent

254. As also set out in section H.IV regarding *rationae temporis*, Respondent argues that Claimant has no basis whatsoever for claiming rights under the IPPA based on conduct before Claimant became the beneficial owner of Yukos shares. Furthermore, Respondent submits that it is able to object to the jurisdiction of the Tribunal as the participation agreements between Claimant and Elliott International (RM-16 and RM-19) (hereinafter referred to as the "Participation Agreements") which show that Claimant has no economic interest in the Yukos shares prior to March 2007 were not known to Respondent. (fn. 81 R-II)
255. Respondent also contends that the Tribunal lacks jurisdiction on the basis of Article 3(2) of the IPPA in connection with Article 8 of the Denmark-Russia BIT on the basis that Claimant was not an "investor" when the arbitration commenced. Claimant commenced arbitration on 28 October 2005. Claimant was not legal owner of the Yukos shares and did not become the economic owner until March 2007. (§72 R-II)

256. The Tribunal expressly reserved the jurisdictional question whether the actions complained of may constitute expropriations under the

IPPA. This question can be interpreted in two ways. On the one hand, it can be posited that the Tribunal implicitly determined that Claimant was an investor with a protected investment at the time of commencement of the arbitration, thus providing a basis for making the MFN clause in Article 3(2) applicable. On the other hand, the Award on Jurisdiction could be read as leaving open the question whether Claimant was an investor having made a protected investment capable of being expropriated on the date of commencement of the arbitration. Under this approach, if Claimant was not an investor having made a protected investment at the date of commencement of this proceeding, the MFN clause in Article 3(2) was not applicable. (¶¶74 – 75 R-II)

257. Respondent respectfully requests the Tribunal to bear in mind that both the jurisdictional and merits phases of this proceeding are still open. The Tribunal can either find that Claimant was neither the legal or economic owner of the Yukos shares at the critical time. Alternatively, to the extent that the Tribunal is of the view that the Award on Jurisdiction implicitly left open the question whether Claimant was an investor having made a protected investment capable of being expropriated on the date of commencement of arbitration, Respondent respectfully requests the Tribunal to issue an award denying jurisdiction on this basis. (¶¶76 – 79 R-II)

258. During the Hearing, Dr Annacker for Respondent addressed the question of whether the Tribunal is prevented by the Award on Jurisdiction from finding that it lacks jurisdiction rather than going on to address the question of whether there has been an expropriation. Respondent submits that the Tribunal is not so prevented. The Award on Jurisdiction did not make any factual findings regarding the existence of a protected investment, relying only on Claimant's assertions. Claimant did not reveal that it had, as Respondent submits, not acquired an economic interest in the Yukos shares until March 2007 and that it had not purchased the shares on its own behalf, rather that it sold the economic interest in the Yukos shares even before the shares were purchased. Swedish law does not prevent the Tribunal from reaching a different finding from the Award on Jurisdiction, this is supported by the fact that Respondent's own

challenge of the Award on Jurisdiction in the Swedish Courts (RLA-186) was dismissed on the basis that the Award on Jurisdiction was a non-final decision in the arbitration which can be changed by the Tribunal in the later merits stage. (pp. 789-795 Tr.)

3. Tribunal

259. Beyond its comments above regarding jurisdiction, the Tribunal does not regard it necessary to reopen the matter with respect to jurisdiction, notwithstanding that some points raised by Respondent are relevant to the merits stage of the Tribunal's examination. The Tribunal further observes that, particularly as its Award on Jurisdiction, by section I.4, transferred the qualification as expropriation to the merits phase of these proceedings, it is not possible regarding all issues to make a rigid distinction between the Tribunal's assessment of the matter with respect to jurisdiction and the merits of the claim.

(E) Whether the consideration of taxation is excluded due to Article 11 of the Denmark-Russia BIT

1. Claimant

260. Claimant objects to the Respondent's claim that the Denmark-Russia BIT is excluded from application due to Article 11(3). Firstly, Claimant points out that the Award on Jurisdiction applied more favourable provisions of the Denmark-Russia BIT and that the Tribunal is not obliged to now apply less favourable provisions of the Denmark-Russia BIT. Secondly, even if Article 11(3) applied to the present dispute, Claimant is not claiming that the tax assessment by Respondent caused substantial deprivation of value to the investment (the shares in Yukos), rather, Claimant claims that the unlawful expropriation occurred when Respondent auctioned Yukos' assets. The tax assessments are only relevant to because the Russian Federation has sought to excuse its taking of Yukos' assets as legitimate exercises of its tax power, when in fact those assessments were nothing more than a pretext for the Respondent's unlawful expropriation. (¶¶173 - 174 C-II)

261. Furthermore, the fact that the Tribunal in the Award on Jurisdiction applied *more favourable* provisions of the Denmark-Russia BIT does not mean that the Tribunal must also apply less favourable provisions of the Denmark-Russia BIT. (§175 C-II)
262. In any case, Claimant is not claiming that the retroactive tax assessments caused a substantial deprivation of the value of its investment, rather, it claims that Respondent expropriated Yukos assets via the auctions. The retroactive tax assessments are relevant because Respondent has sought to exercise its taking of Yukos' assets as legitimate exercises of its tax power, when in fact those assessments were nothing more than a pretext for the Respondent's unlawful expropriation. (§176 C-II)
263. The Respondent argues that the Tribunal lacks jurisdiction because "claims based on 'taxation' . . . are expressly exempted from the scope of Article 8 [of the IPPA] by Article 11(3) of the Denmark-Russia BIT. This argument has no merit. Article 3 of the IPPA extends to investors more favorable provisions of other treaties. It explicitly forbids a Contracting Party to subject an investor to less favourable treatment. (§47 CPHB-II)
264. The Respondent raised precisely this argument in *Renta 4 S.V.S.A v. The Russian Federation*, (CLA-31) another arbitration arising out of the Respondent's expropriation of Yukos' assets. That tribunal refused to allow "*ten words appearing in a miscellany of incidental provisions . . . [to] provide a loophole to escape the central undertakings of investor protection.*" As the tribunal explained: "*Complaints about types and levels of taxation are one thing. Complaints about abuse of the power to tax are something else.*" Here, as in *Renta*, "*[a]buse and pretext are at the heart of Claimant's allegations.*" Accordingly, even if Article 3 of the IPPA could be used to import Article 11(3) of the Denmark-Russia BIT, RosInvestCo's claims should still be heard on the merits. (§48 CPHB-II)

2. Respondent

265. Respondent claims that the Denmark-Russia BIT is excluded from applying to the present case as Article 11(3) of that treaty provides: "The provisions of this Agreement shall not apply to taxation.". Respondent asserts that therefore all claims premised on Russian "taxation" should be excluded. Claimant has made no attempt to show, much less to quantify, that it was totally or substantially deprived of its investment as a result of acts complained of, if any, other than taxation. On this basis as well, Claimant's claim should be denied. (¶234 R-I)
266. In the event that the Tribunal considers that this defence based on exclusion of taxation matters due to Article 11(3) of the Denmark-Russia BIT should be classified as another jurisdictional objection, Respondent claims that the Tribunal has authority and discretion under Article 22 of the 1999 Stockholm Arbitration Rules to permit Respondent to amend its pleading. Claimant would not be prejudiced by such a ruling since Claimant was not a beneficial owner of the Yukos shares during virtually all of the period in which Russian "taxation" is alleged to have violated the IPPA. (Footnote 432 R-I)
267. Article 8(1) of the IPPA confers jurisdiction over "any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount of payment of compensation under Articles 4 or 5 of this Agreement [...]." Article 3(2) of the IPPA in conjunction with Article 8 of the Denmark-Russia BIT confers jurisdiction over "any dispute which may arise between an investor of one Contracting Party and the other Contracting party in connection with an investment on the territory of the other Contracting Party" other than a dispute over claims based on "taxation," which are expressly exempted from the scope of Article 8 by Article 11(3) of the Denmark-Russia BIT. The Tribunal also lacks jurisdiction because Article 8 of the Denmark-Russia BIT does not apply to disputes over claims premised on "taxation." As confirmed by Claimant at the hearing, all of Claimant's claims are premised on the allegation that the auctions of Yukos' assets were expropriatory because the tax assessments were not bona fide, not non-discriminatory and were confiscatory (¶4, ¶8 RPHB-I).

3. Tribunal

268. Without repeating the contents, the Tribunal takes particular note of the following documents on file:

Party Submissions:

C-II ¶175

CPHB-II ¶¶47 - 48

RPHB-I ¶4, 8

Exhibits:

CLA-31 *Renta 4 S.V.S.A. v. Russian Federation*, Award on Preliminary Objections, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration V (024/2007), 20 Mar. 2009

269. Claimant correctly points out that the so-called “most favoured nation” (MFN) provisions in Article 3 of the IPPA are the basis for the Tribunal, by its Award on Jurisdiction, applying the more favourable provisions in Article 8 of the Denmark-Russia BIT to the question whether the Tribunal had jurisdiction for an examination of a claim of expropriation. The Tribunal considers that if, as Respondent submits, this reasoning also required the Tribunal to import less favourable provisions in treaties, as well as the more favourable ones, then many treaties would lose relevance. The IPPA does not exclude claims based on taxation and the Tribunal is considering a claim under that treaty, therefore on a plain reading the Tribunal ought not to be bound to importing less favourable provisions from another treaty.

270. The Tribunal notes that Respondent has not placed much emphasis on this issue in its presentation of the case. This notwithstanding, the Tribunal is reluctant to give a shallow treatment to the MFN issue. Article 3 of the IPPA prevents Respondent from subjecting investments or returns of investors to *treatment* less favourable than that which it accords to investments or returns of investors of any third state. In interpreting that clause and importing Article 8 of the

Denmark-Russia BIT to the present dispute, the Tribunal appreciates that conflicting arguments are possible in this context:

- a. On one hand, it could be argued that it is necessary to read that provision in the context of the treaty of which it forms a part. Article 8 of the Denmark-Russia BIT allows a claimant of one contracting party to the treaty to claim for expropriation by the other contracting party. However Article 11 states that the treaty does not apply to taxation. Thus Article 8 of the Denmark-Russia BIT in its context does not apply to claims based in taxation. The Tribunal is bound to import Article 8 in its context, i.e. *subject* to Article 11. Were a Danish investor to make a claim under the Denmark-Russia BIT for an expropriation by way of taxation, the *treatment* afforded to the Danish investor under the Denmark-Russia BIT would mean that the investor was precluded from making a claim.
- b. On the other hand, the Tribunal notes its prior decision on jurisdiction which allowed the importing of the broader consent to arbitration clause in Article 8 of the Denmark-Russia BIT. That interpretation allowed Claimant to bring its present claim for an alleged breach of the IPPA by expropriation.

271. The Tribunal notes that its conclusions regarding liability in the present case do not depend on these two possible interpretations, because – as will be seen later in this award – its decision on liability will not consider an expropriation by way of taxation, but rather an expropriation by a cumulative combination of measures of Respondent of which taxation is only one. Therefore, for the present case, this discussion of the MFN issue turns out to be irrelevant to the final conclusions reached by this Tribunal.

(F) Can the Tribunal review Russian Court decisions?

272. The Tribunal agrees with Respondent that it cannot act as an appeal court on Russian court decisions. (¶¶305 et seq R-I) However, the following has to be taken into account:

273. It is widely accepted, and the Tribunal agrees that the standard of international law includes the protection against what is generally considered as the international delict of denial of justice. Therefore, the obligation provided for in Article 5(1) IPPA for measures which might be considered expropriatory implies that there is also no discrimination or taking without compensation by denial of justice.
274. On one hand, with regard to liability under international law and specifically the IPPA, the two standards are synonymous with regard to acts of courts because no support is provided by the IPPA for a distinction between different organs of the state and particularly between acts of courts and acts of other State entities. But, on the other hand, one will have to take into account the different functions held by administrative organs and judicial organs of a state and the resulting differences in their discretion when applying the law and in the appeals available against their decisions. In view of these specific aspects of the conduct of national courts, the specific criteria for denial of justice have been developed in international law. As will be seen later, the Tribunal feels it must consider the totality of Respondent's measures in their cumulative effect including the conduct of the courts, but by no means restricted to them.
275. The Tribunal emphasises again that an international arbitration tribunal, and also this Tribunal dealing with alleged breaches of the IPPA, is not an appellate body and its function is not to correct errors of domestic procedural or substantive law which may have been committed by the national courts. The Tribunal stresses that the threshold of the international delict of denial of justice is high and goes far beyond the mere misapplication of domestic law.
276. To determine the scope of denial of justice, the Tribunal takes into account the several authorities which have been referred to by the Parties. In *Mondev v. United States of America (Ex RA-19)*, para. 127, the NAFTA tribunal, relying on the ELSI case, held:

"The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the

judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment."

277. The Tribunal further takes into consideration the definition of denial of justice in Article 9 of the Harvard Law School, Draft Convention on the Law of the Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners:

"A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable in the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice."

278. The Tribunal, finds further support for the above position regarding the interpretation of denial of justice in the *Loewen* case, Final Award (Ex CA-10) para. 132: "*Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough ...*" This qualification seems correct even if one does not agree with all other conclusions of that award.

279. Taking into account the above authorities, the Tribunal concludes that the Respondent can only be held liable for denial of justice by the Russian courts if the Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be adopted in cases of major procedural errors such as lack of due process. The

substantive outcome of a case can be relevant as an indication of lack of due process and thus can be considered as an element to prove denial of justice.

280. Therefore, in addition to this Tribunal not acting as an appeal court on the decisions of the Russian courts, this high threshold must be applied in order to conclude that, the conduct of the Russian courts, by itself, would be a breach of the IPPA in the form of a denial of justice. However, this does not exclude that the Tribunal, in the consideration of the totality of Respondent's measures in their cumulative effect which it finds to be appropriate as seen later in this Award, includes the consideration of the decisions of the courts in that context.

(G) Relevance of Decisions of other Tribunals and Courts

281. In the legal arguments made in their written and oral submissions, the Parties relied on numerous decisions of other courts and tribunals. Accordingly, it is appropriate for the Tribunal to make certain general preliminary observations in this regard.

282. First of all, the Tribunal considers it should make it clear from the outset that it regards its task in these proceedings as the very specific one of applying the relevant provisions of the IPPA as far as that is necessary in order to decide on the relief sought by the Parties. In order to do so, the Tribunal must, as required by the "General rule of interpretation" of Article 31 VCLT, interpret the IPPA's provisions in good faith in accordance with the ordinary meaning to be given to them in their context and in light of the IPPA's object and purpose. The "context" referred to in the first paragraph of Article 31 is given a specific definition in the second paragraph of Article 31 and comprises three elements: (i) the IPPA's text, including its preamble; (ii) any agreement between the Parties to the IPPA in connection with its conclusion; and (iii) any instrument which was made by one of the Parties in connection with the conclusion of the IPPA and accepted by the other Party. The "ordinary meaning" as defined above applies

unless a special meaning is to be given to a term if it is established that the parties so intended, as it is stated in the fourth paragraph of Article 31.

283. As provided in the "Supplementary means of interpretation" of Article 32 VCLT, the Tribunal may have recourse to supplementary means of interpretation (i) in order to confirm the meaning resulting from the application of Article 31 VCLT, or (ii) when the interpretation according to Article 31 VCLT either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. Those supplementary means of interpretation include the preparatory work of the treaty and the circumstances of its conclusion. Thus, recourse to the supplementary means of interpretation of Article 32 may only be had if the situations mentioned at (i) and (ii) above occur.

284. While Article 38.1.d. of the Statute of the International Court of Justice expressly mandates the Court to also take into account "*judicial decisions*", there is no such express rule either in the IPPA or other applicable part of international law as to whether and if so to what extent arbitral awards are of relevance to the Tribunal's task. It is in any event clear that the decisions of other tribunals are not binding on this Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion.

285. However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they shed any useful light on the issues that arise for decision in this case.

286. Such an examination is conducted by the Tribunal later in this Award, after the Tribunal has considered the Parties' contentions and arguments regarding the various issues argued, and in so far as considered relevant for the interpretation of the applicable IPPA provisions, while taking into account the specificity of the IPPA to be applied in the present case.

H.III. Whether IPPA applies *rationae personae* to the Claimant

1. Claimant

Overview

287. Claimant contends that it was a shareholder in Yukos when it bought a total of 7 million shares on 17 November 2004 (or 16 November 2004 – see ¶21 of C-I) and 1 December 2004 and therefore it qualifies as an investor with an investment under the IPPA. Claimant is a private limited company incorporated under the English Companies Act and has been incorporated in the United Kingdom since its formation on 29 November 2001 (incorporation details: CM-4; name change: CM-396) and therefore fulfils the requirements of Article 1(d) (¶¶110 – 111 C-II).

288. Claimant dismisses the contention of Respondent that Claimant only became a qualified investor under Article 5 of the IPPA when the Participation Agreements between Claimant and Elliott International L.P. were terminated in 2007 (RM-0016 and RM-0019) (see ¶¶2 - 6 R-I). Claimant denies that the Participation Agreements have any effect on its status as an investor under Article 1(d).

289. Firstly, Claimant points out regardless of the Participation Agreements and that they may have transferred some economic interest to Elliott International L.P., Claimant became a shareholder on 16 November and 1 December 2004 and maintained legal ownership of those shares until they were de-listed in late 2007. Claimant relies upon brokerage account statements and a letter from Credit Suisse Securities (USA) LLC (CM-5, CM-430) to demonstrate it held the shares in question continuously from November 2004. (¶¶113 – 116 C-II)

290. Secondly, Claimant asserts that despite the Participation Agreements whereby Claimant (then called Highberry) sold and

transferred to Elliott International L.P. “a 100% interest in and to Highberry’s interest” in total of seven million Yukos shares that Claimant acquired on 16 November and 1 December 2004 respectively. (CM-398 and CM-399) and had contractual obligations, Claimant retained legal ownership of the shares with all the attendant rights, including the right to vote the shares and receive dividends and other distributions. This temporary transfer of an economic interest, Claimant argues, had no effect on Claimant’s status as the legal owner of the shares. Claimant remained at all times the legal owner of the Yukos shares and an investor under the IPPA. (¶¶118 – 119 C-II)

291. Claimant rejects Respondent’s allegation that the Participation Agreements meant that Claimant was a mere intermediary between Elliott International L.P. and the ZOA ING Bank (Eurasia), the local Russian depository for the shares. Claimant points to the contractual restriction on Elliott International L.P. from transferring or encumbering the shares without Claimant’s consent which is inconsistent with rights and protections afforded to mere nominal holders. (¶¶120 – 121 C-II)
292. Notwithstanding this, Claimant asserts that even if the Participation Agreements transferred an economic interest in the shares to Elliott International L.P., such a transfer would not affect Claimant’s status as a protected investor under Article 1(d) of the IPPA. Claimant invokes the Article 31(1) of the Vienna Convention to support its argument that Article 1(d) is to 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.” Accordingly, Claimant is an investor under an interpretation of Article 1(d) consistent with the Vienna Convention. (¶¶122 – 125 C-II, ¶¶8 – 11 CPHB-I)
293. Article 1(d) is clear and unambiguous in stating that the decisive prerequisite for an “investor” under the IPPA is the nationality of the protected investor. Claimant contends that the only issue for the Tribunal to consider in order to determine Claimant’s standing as an investor under the IPPA is whether Claimant is a corporation

incorporated in the territory of a contracting party to the IPPA, in this case the United Kingdom. (¶¶126 C-II, ¶¶8 - 11 CPHB-I)

Respondent's arguments rejected

294. Claimant rejects Respondent's argument that the nationality of the beneficial owner of an investment is essential. The tribunal need not go further than examining the nationality of the investor and therefore the Tribunal need not consider Respondent's arguments in Section IV of R-I. Furthermore, Respondent bases its reasoning in Section I V (¶¶197 - 204) in R-I on irrelevant authorities as those authorities are only relevant to natural persons for the purposes of diplomatic protection claims, and not the definition of "investor" within the scope of a bilateral investment treaty. The Award on Jurisdiction in this arbitration underlines the Claimant's view that the definition of "investor" ought to be considered in the context of investment treaties, not diplomatic protection which is governed by customary international law. Claimant points to two cases (*CSOB v. Slovakia* CLA-10, *Rumeli v. Kazakhstan* CLA-32) dealing with investment treaties which affirm the Claimant's view that the definition of "investor" is to be determined with adherence to the ordinary meaning of the definition and not looking beyond to beneficial interests or importing restrictions not found in the wording of the relevant treaty. (¶¶127 - 135 C-II)

295. Claimant disputes the relevance of cases cited by Respondent from the Iran-U.S. Claims Tribunal and the U.S. Foreign Claims Settlement Commission as those decisions do not address whether the legal owner of an investment covered by the IPPA, if it transferred an economic interest in such investment, meets the definition of "investor" contained therein. Claimant goes on to cite the following authority to support its argument that beneficial ownership by someone other than the claimant in an investment dispute does not affect standing to bring a claim: *CSOB v. Slovakia* (CLA-10) and *Rumeli v. Kazakhstan* (CLA-32). Also in the cases *Tokios Tokelés v. Ukraine* (RLA-42) and *Saluka v. Czech Republic* (CLA-34), the respective tribunals focussed on the text of the treaty, and did not import restrictions not contained in the wording. Claimant is a

corporation incorporated in the U.K. under the English Companies Act and therefore is an “investor” under the IPPA. (¶¶136 – 139 C-II)

2. Respondent

296. Respondent claims that Claimant did not become a beneficial owner of the Yukos shares until 24 January 2007, when the termination agreement (RM-20), terminating the Participation Agreements between Claimant and Elliott International L.P., was first arguably executed. Until that time, Respondent claims Claimant was merely a nominee holder, and that the beneficial owner was the Cayman Islands incorporated limited partnership, Elliott International L.P. Needless to say, Elliott International L.P. as a Cayman Islands entity does not qualify as an “investor” in terms of Article 1(d) of the IPPA. (¶¶2 – 4, 20-21 and 192 – 194 R-I)

297. Claimant is not an investor protected by the IPPA as it is a nominee holder. Nominee holders are not protected by the IPPA when the treaty is interpreted in accordance with general international law. Respondent cites US Foreign Claims Settlement Commission cases and decisions decided under customary international law to underline that the beneficial owner, not the nominal owner, is a protected investor with a qualified investment. Respondent also points to case law which consistently disregards nominal ownership and looks at the beneficial owner to determine standing to bring a claim. (¶¶195 – 204 R-I)

298. Respondent claims that nominal ownership cannot imply investment as by definition, a nominal owner does not invest any of its own capital or have any economic interest in the investment. A nominal owner has less rights than a guarantor. Guarantees have been disregarded as assets under the definition of investment in bilateral investment treaties in the case *Joy Mining Machinery Limited* (CLA-21). Claimant has effectively acknowledged that nominal ownership is precluded from protection by the IPPA by misrepresenting its status as “owner” of the Yukos shares in its Request for Arbitration. (¶¶205 – 206 R-I).

299. Respondent argues that since Claimant was not an “investor” in terms of the IPPA until January 2007, it follows that Claimant cannot claim protection of Article 5 (1) of the IPPA for alleged expropriatory acts that occurred before that date. Therefore Claimant is in a fundamentally different position to someone who purchased Yukos shares in 2003. Instead, Claimant has purchased shares from non-UK companies in January 2007 and cannot claim it was an investor, even on the basis of assignment or succession claims. (¶¶207 – 212 R-I)
300. Claimant cannot claim protection for events that occurred before it qualified for protection under the IPPA. Respondent cites customary international law as confirmed in the case *Société Générale v Dominican Republic* (RLA-18) in support of its argument that a claimant must have the nationality of the relevant contracting party at the time of the occurrence of the alleged illegal conduct. A party cannot acquire or create the protection of a treaty through the transfer of an investment after the alleged injury occurred. (¶¶213 – 214 R-I)
301. Respondent alleges Claimant acquired shares from Caribbean and Cyprus sellers. It does not claim to be an assignee or successor of claims potentially held by a party who sold shares to it. Respondent also cites the *Mihaly* award (RLA-35) which sets out that claims cannot be assigned by a party which is incorporated in a state which is not signatory to an investment treaty regime (in that case ICSID) to a party which is a signatory. On this basis, Claimant enjoyed no treaty protection whatsoever until it became the beneficial owner of the Yukos shares in 2007. (¶¶215 – 217 R-I)
302. In the alternative, at the very least, Claimant enjoys no treaty protection on any possible theory with respect to acts alleged to be in violation of the IPPA that predate 19 November 2004, when Claimant became nominal owner of the first tranche of shares, or between 19 November 2004 and 7 December 2004, when Claimant became a nominal owner of the second tranche of shares. (¶¶218 – 219 R-I)

303. Claimant thus enjoys no treaty protection whatsoever with respect to the following acts alleged to be in violation of the IPPA:

a. Acts occurring on or prior to the date of Claimant's acquisition of beneficial ownership of Yukos shares (i.e., January or March, 2007):

- the auction of the YNG shares;
- the Tax Assessments for years 2000-2003 (and later years);
- the recognition and enforcement of the English High Court Judgment by the Russian courts;
- the formal declaration of Yukos' bankruptcy; and
- the inclusion in Yukos' receivership proceedings of the claims relating to Yukos' unpaid tax liabilities.

b. Acts occurring on or prior to the date of Claimant's first purchase of Yukos shares (i.e., November 19, 2004):

- the Tax Assessments for Years 2000, 2001 and 2002;
- the Audit Report for Tax Year 2003;
- the entirety of the enforcement measures related to the Tax Assessment for Year 2000 (including, inter alia, the June 30, Cash Freeze Order) and the initiation of enforcement measures with respect to the Tax Assessment for Year 2001 and the Tax Assessment for Year 2002;
- the April Injunction;
- acts concerning the auction of YNG shares (including, inter alia, (i) the seizure of YNG shares by the bailiffs, (ii) the valuation process regarding the YNG shares, (iii) the setting of the starting price and all other parameters for the YNG auction, and (iv) the publication of such parameters);

- the alleged infringement of Yukos' due process rights with respect to the court proceedings relating to the Tax Assessment for Year 2000; and
- the alleged impropriety of the refusal of Russian authorities to accept Yukos' tax settlement proposals in lieu of full and timely payment.

(¶220 R-I)

304. Claimant makes no separate claim based on acts that occurred after Claimant acquired beneficial ownership in 2007. In any event, no claim of expropriation could be based solely on such acts, since by that date the Tax Assessments for each of Years 2000-2003 (and later years) had been definitely upheld by the Russian courts, YNG had already been sold, Yukos had already been formally declared bankrupt, and its remaining assets were in the process of being liquidated. (¶221 R-I)

Contentions in Respondent's Surreply R-II

305. In its **Surreply** (R-II) Respondent argues that Claimant was neither the legal nor was it the economic owner of the Yukos shares before 2007. Respondent also rebuts Claimant's arguments that Respondent's reliance on customary international law is irrelevant.

Claimant not the legal owner

306. With regard to its claim that Claimant was not the legal owner, Respondent argues that the law under which the Tribunal must evaluate Claimant's assertion that it is the legal owner of the Yukos shares is Russian law. Under applicable Russian law, CSFB was the legal owner of the Yukos shares. Under Russian law, specifically the Federal Law "On the Securities Market" (RM-841 and RM-845), only persons listed (in so-called "depo-accounts") on the books and records of a licensed securities depository are legally recognised as the owners of the relevant shares, and no other person has any legally recognised rights as a shareholder in relation to the company. (¶¶1 - 7 R-II)

307. CSFB was registered with the depository as the holder of the Yukos shares and therefore was at all relevant times the only person with legal ownership of the shares and therefore the only person entitled to legal rights as a shareholder in relation to the company as a matter of Russian law. (§8 R-II)
308. Under the Russian Joint Stock Companies Law, and confirmed by the Supreme Arbitrazh Court (in a case cited in RM-851), CSFB, as the legal owner of the shares, was the only person entitled to receive notices of shareholders' meetings, attend shareholders' meetings and to vote the Yukos shares. CSFB is also the only person entitled to receive dividends and other distributions from Yukos. Accordingly, Claimant's allegation that it "*alone had the power to vote the shares and to receive any dividends or residual funds upon liquidation*" (§149 C-II) is unsupported and false. Claimant had no rights in relation to the Yukos shares and was only a financial intermediary standing between the legal (or nominal owner) CSFB and the economic owner Elliott International (§§9 - 14 R-II)

Claimant's arguments on ownership under Russian law rejected

309. Respondent continues its argument that the legal owner under Russian law was CSFB. In CPHB-I at §§32 and 35, Claimant actually concedes that CSFB was the legal owner on the basis of the same Law on the Securities Market which Respondent cites as the basis for its argument. Claimant's arguments that the shares were held for administrative reasons through its "global custodian" CSFB is of no basis. Under the Russian system, CSFB would have been entitled to all dividends and would have the right to vote the shares, the rights of the depository was minor. (§§1-3 RPHB-II)
310. Claimant's argument that nonetheless it was the "true owner" of the shares is deficient: It ignores that Claimant actually sold 100% of its interest to Elliott International. The argument has been invented for the purposes of this arbitration and effectively acknowledges that Claimant was never the legal owner, nor the beneficial owner until March 2007 of the Yukos shares. Furthermore, under Russian law there can only be one

owner of the shares, any other outcome would amount to chaos. Claimant's "true ownership" argument is also based on a misreading of Russian law, and is not supported by the facts in this case. According to Claimant, (a) the Yukos shares were acquired by CSFB as a "commission agent" on behalf of Claimant, (b) "title" to the Yukos shares passed to RosInvestCo as "principal" under Article 996 of Russia's Civil Code and (c) the provisions of Russia's Civil Code take precedence over Russian civil law statutes such as the Law on the Securities Market, pursuant to which CSFB, Claimant now acknowledges, was the legal owner of the shares. (¶¶4 - 5 RPHB-II)

311. The "true ownership" argument is wrong for the following four reasons:

- a. The relationship between Claimant (UK company) and CSFB (US company) was governed by an agreement under New York law, therefore any arguments Claimant makes citing the Russian Civil Code are irrelevant. There was (and is) no provision of Russian law that would require their relationship to be governed by Russian law.
- b. Respondent has established that Russian law determines the relationship between a Russian company and its shareholders. The Law on the Securities Market sets out in Article 28 that for a company such as Yukos, the owner of the shares is the person registered as the owner on the books of the company's depository.
- c. A 2006 Moscow Arbitrazh Court decision (RM-851) involving a broker and the broker's client held that the broker (and not the client) was entitled to the dividends because the broker was listed on the depo account as the owner. This decision, discussed at the hearing, remains unchallenged, and confirms that a Russian company's relationship with its shareholders is governed by the Law on the Securities Market and the Joint Stock Companies Law, a conclusion now acknowledged by Claimant.
- d. Even if Russian law governed the relationship between Claimant and CSFB, and even if CSFB had acted as Claimant's "commission agent", Claimant would in fact have been acting as the agent for

Elliott International, the principal and beneficial owner of the shares for as long as the Participation Agreements were in effect.
(¶¶5 – 9 RPHB-II)

Claimant was not the economic owner – the Participation Agreements

312. Claimant was not the economic owner even during the supposed brief period between initial acquisition of the shares and the entering into force of the Participation Agreements (RM-16 and RM-19). Claimant sold its entire economic interest even before Claimant first acquired any interest in those shares. (¶16 and Annex DD, R-II)
313. Respondent contends that in order to determine the rights retained by Claimant under the Participation Agreements, reference must be made to their terms and to New York law, applicable in this case pursuant to Russian private international law rules. Those Participation Agreements (RM-16 and RM-19) provide that Claimant “*hereby irrevocably participates and sells to [Elliott International], and [Elliott International] hereby purchases, the Participated Interest,*” defined as “*a 100% interest in and to Highberry’s Interest.*” (Highberry later became RosInvestCo, the Claimant). Furthermore, in section 6 of each Participation Agreement, Claimant undertook to pay to Elliott International all the cash and other payments and property received by Claimant in respect of the Yukos shares (less any related expenses and taxes), and in section 7 to vote the participated Yukos shares only in accordance with Elliott International’s instructions. The Participation Agreements transferred 100% of the economic ownership and beneficial interest in the Yukos shares to Elliott International. (¶¶17 – 20 R-II)
314. Claimant retained none of the basic rights of an ordinary shareholder and rights to receive dividends under Russian law. Furthermore, under New York law the Yukos shares were the property of Elliott International. As long the Participation Agreements were in force Elliott International was the sole beneficial owner of the Yukos shares, the Yukos shares as property of Elliott

International, were not an asset of Claimant, and had Claimant become insolvent, would not have been included in Claimant's bankruptcy estate; and Claimant was either Elliott International's uncompensated collection agent or an uncompensated constructive trustee acting on behalf of Elliott International, and was obligated, in either of those capacities, to collect the Yukos dividends paid to CSFB, and to pay those dividends over to Elliott International. (§§21 – 25 R-II, pp. 8-10 Annex DD to R-II)

315. Claimant contends it was not a mere nominal owner because Claimant retained the right under Section 5 of the Participation Agreements, to bar Elliott International from transferring or encumbering the shares without the prior written consent of RosInvestCo. This argument is fundamentally mistaken. First, Claimant was not even "*a mere nominal owner*" of the Yukos shares. Second, the contractual limitation in Section 5 was not an expression of Claimant's continuing ownership of the Yukos shares and did not bestow upon Claimant any right having an economic value. Rather, Section 5 was an attempt by Claimant to avoid the potentially serious US securities law consequences that might otherwise have resulted from Claimant's sale of the economic interest in the Yukos shares to Elliott International. (pp. 11 to 17 Annex D R-II) And third, the free assignability of a company's shares is not an essential right of a Russian shareholder. Banks and other creditors, for example, routinely prohibit the transfer of shares pledged as security, without calling into question the debtor's continuing ownership of the encumbered shares. (§§26 – 28 R-II)

316. From the Claimant's perspective the Participation Agreement were at all times a strictly cash-in, cash-out arrangement. Claimant was not entitled to retain any dividends. This is underlined by the fact that the Claimant's interest in the Yukos shares did not appear on Claimant's balance sheet in its financial statements until those statements for the year ended 31 December 2007 (RM-856), the year when the Participation Agreements were terminated. (§§29 – 32 R-II)

Respondent's argument supported by customary international law

317. Respondent points out that Claimant does not contest that the authorities quoted in ¶¶197 to 204 R-I fairly stand for the proposition that a mere nominal or record holder has no right to bring a claim under general international law. The holder of a nominal interest lacking an economic interest in the subject property lacks protection under both the IPPA and rules of diplomatic protection. That the customary international law rules of diplomatic protection are relevant is fully supported by the authorities set forth in fn 384 of R-I (RLA-1, RLA-177, CLA-18). Since the IPPA does not derogate from the general international law rule that a person who has no economic interest cannot bring an international claim, these authorities are to be taken into account in interpreting the IPPA pursuant to the rule of treaty interpretation codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties. (¶¶48 – 49 R-II)
318. Respondent points to further authority supporting its claim that a BIT cannot be read and interpreted in isolation from general international law in the case *Phoenix v. Czech Republic* (RLA-124). (¶49 R-II)
319. Respondent argues that the main reason for denying holders of nominal interests standing to bring international claims under the rules of diplomatic protection is equally valid in international investment law. A nominal interest lacks “a real interest in the subject property” and thus does not deserve protection. A nominal owner is neither economically harmed by violations of investment treaty protections nor does it economically benefit from the payment of compensation for such violations. (¶50 R-II)
320. Claimant purports to cite awards in investor-State arbitrations for the proposition that, derogating from general international law, investment treaties protect legal owners who have transferred their economic interest. These awards, however, support Respondent’s position. The arguments are set out below under Respondent’s submissions in the *rationae materiae* section at H.IV.

3. Tribunal

321. Without repeating the contents, the Tribunal takes particular note of the following documents on file:

Party Submissions:

C-I ¶21
R-I ¶¶2 – 4, ¶¶195 - 204
C-II ¶¶110 - 126
R-II ¶¶21 – 32, ¶50
Hearing Submissions of Respondent pp. 220 – 223, 228 – 234, 823 - 831 & 852 – 861 Tr.
CPHB-I ¶¶7 – 11
RPHB-I ¶38, ¶¶39 – 41
RPHB-II pages 1 to 9

Exhibits:

CM-4 Companies House, Company Details for RosInvestCo, 26 May 2005
CM-396 Companies House, Certificate of Incorporation on Change of Name, Company No. 4331189, 17 January 2005
CM-430 Credit Suisse brokerage statements for RosInvestCo, 1 Nov. 2004 to 29 February 2008
CM-532 ING Bank (Eurasia) ZAO, Statement of holding for safekeeping account K40043640006
RM-16 Participation Agreement between Highberry Limited and Elliott International, dated 17 November 2004
RM-19 Participation Agreement between Highberry Limited and Elliott International, dated 3 December 2004
RM-20 Termination Agreement between RosInvestCo UK Limited and Elliott International, dated 24 January 2007
RM-22 Emails between Elliot Greenberg and Oksana Bitetti, dated 26-27 March 2007

Legal Authorities:

CLA-03 Vienna Convention on the Law of Treaties, 23 May 1969

CLA-10 *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/97/4, 24 May 1999

CLA-32 *Rumeli Telekom AS & Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan*, Award, ICSID Case No. ARB/05/16; IIC 344, 29 July 2008

CLA-34 *Saluka Investments BV v. The Czech Republic*, Partial Award, UNCITRAL Rules, 17 Mar. 2006

RLA-42 *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Award of 26 July 2007

Meeting the definition of “investor”

322. Article 1 (d) (ii) of the IPPA sets out the definition of “investor” as the Tribunal regards it applies to Claimant. Claimant has asserted and provided evidence, which the Tribunal has no reason not to accept, that it is a company incorporated under the law in force in the United Kingdom. On this basis, the Tribunal considers that Claimant has proven that it is *prima facie* an investor in terms of the IPPA.

323. Respondent argues that the Participation Agreements with Elliott International preclude the definition applying to Claimant as Claimant was a mere nominal owner. This analysis is not supported by a plain reading of the definition in the IPPA. The Tribunal is bound by the Article 31 VCLT when interpreting the definition. The plain meaning of the definition encompasses Claimant. Claimant’s submissions and supporting evidence bear out its qualification as an investor under the IPPA in light of this plain reading. The Tribunal is prevented from imposing a stricter interpretation on the IPPA’s definition in light of its very wide drafting. Accordingly, the Participation Agreements have no bearing in terms of the definition of investor contained in Article 1(d)(ii).

324. Respondent’s further argument is that under Russian private law, Claimant was not the legal owner of the Yukos shares. According to Respondent, it was not Claimant but CSFB who was the legal owner under Russian law due to CSFB being registered in the “depo-

account” of ING Bank, the licensed securities depository. In this context, the Tribunal takes note of the parties’ answers to the Tribunal’s Question 3.5 in PO-5. The Tribunal is not persuaded by Respondent’s submissions in this regard. Claimant acquired the shares by way of a purchase for value and the formalities associated with the recording of the ownership of those shares in a registry are immaterial to the question whether Claimant is considered an “investor” under the definition contained in the IPPA. Any other interpretation of the facts regarding the financial intermediary, in this case a share broker and custodian, being held to be an “investor” under the IPPA would lead to absurd results and would be inconsistent with the object of the IPPA.

Exhibit CM-532

325. With regard to the question of the admissibility of exhibit CM-532, the Parties provided argument during the Hearing and in response to the Tribunal’s question in PO-5. The Tribunal does not regard CM-532 as hearsay. It is certainly not a contemporaneous document and it was effectively introduced as new evidence. The Tribunal is unable to assess the quality of the document especially in light of how late in the arbitration it was produced. However, in any case the Tribunal considers that the document is not relevant to the Tribunal’s review of the *rationae personae* question, as Claimant has already met the test for a qualifying investor under the terms of the IPPA.

H.IV. Nature of Claimant’s Investment in Yukos – *rationae materiae*

1. Claimant

326. In its Statement of Claim, C-I, Claimant plainly states it is the owner of seven million (7,000,000) ordinary shares of Yukos. At all times relevant to this dispute until its liquidation, Yukos was an open-joint stock corporation incorporated under the laws of the Russian Federation. (¶20 C-I)

327. Claimant purchased its shares of Yukos on two occasions. Initially in C-I, Claimant asserted that the shares were brought on the open market. Later, in C-II and in CPHB-I it claimed the shares were purchased from financial intermediaries. First, Claimant purchased two million (2,000,000) ordinary shares of Yukos on 16 November 2004. On 1 December 2004, Claimant purchased an additional five million (5,000,000) ordinary shares of Yukos (CM-5). It has continuously held its 7,000,000 Yukos shares until the present, although Yukos' shares were delisted on 21 November 2007 when the company was stricken from the corporate register and ceased to exist as the result of the Russian Federation's actions. (§21 C-I)
328. Claimant's shares in Yukos constituted an "investment" under the IPPA, which defines that term to include "shares in, and stock, bonds and debentures of, and any other form of participation in, a company or business enterprise." (§23 C-I)
329. Claimant clarified the manner of the share purchase in its CPHB-I. Claimant stated that the Yukos shares were acquired in two lots. Both lots were held by two financial intermediaries, CSFB and ING BANK (EURASIA) ZAO ("ING Bank"). CSFB was RosInvestCo's broker as well as its custodian, and held the shares on behalf of RosInvestCo. In turn, CSFB held the shares through a Russian custodian, ING Bank, which was registered as the nominee holder of the shares with the Registrar for the shares of Yukos, ZAO M-Reestr. (§§16 – 17 CPHB-I)
330. CSFB executed RosInvestCo's first order by acquiring 2,000,000 Yukos shares on RosInvestCo's behalf from Credit Suisse Moscow/Credit Suisse Europe on 16 November 2004. RosInvestCo paid for these shares on 19 November 2004, when RosInvestCo's account at CSFB was debited for the price. (§18 CPHB-I)
331. RosInvestCo purchased the second lot of 5,000,000 Yukos shares, effective 1 December 2004, through a security sale and purchase agreement with Alfa Capital Holdings (Cyprus) Ltd. RosInvestCo paid for those shares on 7 December 2004 when its account at CSFB was debited for the full price of the shares. (§19 CPHB-I)

332. It is undisputed that these 7,000,000 Yukos shares were valid under Russian law from the acquisition of the shares by RosInvestCo on 16 November and 1 December 2004 until they were delisted on 21 November 2007. It is also undisputed that shares in a Russian company, such as Yukos, are “assets” within the meaning of Article 1(a) of the IPPA, and thus qualify as an “investment.” RosInvestCo has therefore satisfied what Respondent has described as “the first condition for an expropriation claim,” i.e., that there is “an investment of an investor of the other contracting party.” (§20 CPHB-I)
333. That RosInvestCo, and no one else, acquired the protected “investment” is confirmed by the account information that CSFB and ING Bank provided. First, RosInvestCo’s acquisition and continued holding of a protected investment is proven by the CSFB monthly account statements, which show that RosInvestCo held the Yukos shares in its CSFB account from their acquisition until their eventual delisting on 21 November 2007. (§21 CPHB-I)
334. Second, as the local Russian custodian for the 7,000,000 Yukos shares, ING Bank held the shares on CSFB’s account. In turn, CSFB, acting as RosInvestCo’s broker and custodian, held the shares on RosInvestCo’s account. Although it does not matter whether ING Bank knew on whose behalf CSFB was acting, the account information that ING Bank provided confirms that CSFB held the shares on RosInvestCo’s behalf, because the shares were held in a special sub-account #4364072 entitled “CSS LLC/RosInvestCo UK Ltd (704780)” within CSFB’s account with ING Bank. (§22 CPHB-I)
335. In *Veteran Petroleum Ltd. v. The Russian Federation* (CLA-97), one of the three pending Energy Charter Treaty cases that arise out of the Russian Federation’s expropriation of Yukos, the claimant – like RosInvestCo in the present case – held its Yukos shares through global custodians, in that case UBS AG in London and Zurich. In its recent jurisdictional award, the arbitral tribunal in *Veteran Petroleum* had no difficulty in finding the UBS bank statements “to be

compelling evidence of ownership” of Veteran Petroleum’s Yukos shares. (§23 CPHB-I)

Meeting the definition of investment

336. Claimant claims that Article 5(2) of the IPPA applies in respect of its investment in Yukos shares as it is an investor, and its shares of Yukos are an investment under the IPPA (§2 C-I). Claimant asserts that similarly to other investment companies, it specialises in purchasing shares in moments of market distress when the market has overreacted to transient events and undervalued a company’s underlying assets (§6 C-I). Claimant rejects Respondent’s claim that it is a “vulture fund” pointing to the fact that Elliott International L.P.’s alleged “controversial” sovereign debt holdings comprise only 2% of Elliott International’s investments. Claimant does not pursue a “litigation first” approach to investment, but invests in “situations that are complex” when markets may have undervalued assets. Claimant invested in Yukos because it represented an opportunity if one were to expect that the Russian Federation would respect the rule of law. (§105 C-II)

337. In its Surreply (C-II) Claimant argues that its purchase of a total of seven million common shares of Yukos in November and December 2004 qualifies as an investment under Article 5(2) of the IPPA. To evidence this claim, Claimant relies on documents from its share broker CSFB (CM-5 and CM-430). (§§114-116, 141 C-II).

338. Claimant contends, in response to Respondent’s assertion that “nominally owned” assets cannot be considered an investment for the purposes of Article 1(a) of the IPPA (in §§195 – 206 R-I), that that definition of “investment” is very broad. The definition states:

“the term ‘investment’ means every kind of asset and in particular, though not exclusively, includes:

(ii) shares in, and stock, bonds and debentures of, and any other form of participation in, a company or business enterprise;”

(the "Investment Definition")

339. Claimant argues that there is no restriction on the class of asset in the Investment Definition. The only prerequisite is that an "investment" is an "asset". Shares in Yukos qualify as an investment as they are assets. The Investment Definition does contain any qualification as to the kind of asset in question – every "asset" qualifies as an *investment*. (¶¶143 – 145 C-II).
340. The Investment Definition also includes a non-exhaustive list of assets that are expressly and unquestionably protected under the IPPA: *"shares in, and stock, bonds and debentures of, and any other form of participation in, a company or business enterprise."* Claimant argues that under the normal meaning of "share" in a commercial context from the Oxford English Dictionary: *"each of the equal parts into which the capital of a joint-stock company or corporation is divided"*, it only need demonstrate that it holds such a part of the capital of joint-stock corporation. Neither the wording of the IPPA, nor its context, object or purpose lends any support to Respondent's claim that *"assets only nominally owned are not covered"* (¶205 R-I) by the Investment Definition. (¶¶146 – 148 C-II)

Participation Agreements

341. The Participation Agreements which transferred some economic interest in the Yukos shares to Elliott International do not support Respondent's argument. Ownership remained with Claimant and consequently, Claimant remained at all times since the purchase in November and December 2004 the formal and legal owner of the Yukos shares. Elliott International had no rights it could exercise in respect of the shares independently of Claimant and therefore Claimant was the only entity holding an ownership interest in the shares, and thus a qualified *investment* under the IPPA. The Participation Agreements were contractual obligations to transfer payments in respect of the Yukos shares. Nothing in the Investment Definition excludes an *investment* in which an economic interest has been transferred to a third party. If the contracting parties to the IPPA had intended to exclude *investments* where an economic

interest has been transferred to a third party, it would have been expressly spelled out in the IPPA. (¶¶149 – 150 C-II)

342. Respondent cannot justify its argument that “*assets only nominally owned are not covered*” (¶305 R-I) by the Investment Definition. Claimant distinguishes the decision in *Joy Mining Machinery* (CLA-21) argued by the Respondent on the basis that it related to a claim for protection under a BIT for a guarantee based claim, not a shareholding claim. Claimant also distinguishes the decision in *Saluka* (CLA-34), as the tribunal in that case had no difficulty recognising that formal ownership of shares qualified as an investment under the Czech-Netherlands BIT in that case. Claimant argues that similarly, the Tribunal may not vary the clear terms of the IPPA by excluding from its protection Claimant’s investment in the 7,000,000 Yukos shares. (¶¶151 - 154 C-II)

343. During the Hearing, Claimant cited an article published by Emmanuel Gaillard (CLA-83), counsel for the claimants in another investment arbitration relating to Yukos in which the Russian Federation is also defending claims, where he stated that the Russian Federation’s argument that simple legal ownership did not qualify for protection under the definition of investment in the Energy Charter Treaty “finds no support in the text of the Treaty”. (Tr p. 724)

344. During the Hearing Claimant submitted that the two Participation Agreements in force between Claimant and Elliott International (RM-16 and RM-19) did not affect Claimant’s shareholding in Yukos. The agreements transferred an interest in the Yukos shares to Elliott, but that interest was something different to the shareholding in Yukos. (Tr pp. 98-99)

Ability to sell the Yukos shares

345. There was nothing in the Participation Agreements preventing Claimant from selling the Yukos shares. The agreements also deal with the possibility that the participated interest could be considered a newly issued securities, and therefore something different from the interest in the Yukos shares purchased by Claimant. The parties went

to great lengths in the Participation Agreements to ensure they meet the requirements of Regulation D of the United States Securities Act 1933, exempting the interest from stringent United States securities laws. Those requirements only apply to issuers of securities – this demonstrates that the Elliot's interest under the Participation Agreements was something new and distinct from Claimant's shareholding in Yukos. (Tr pp. 100-102, ¶¶41 – 42 CPHB-I)

346. While the Participation Agreements existed, Claimant borrowed USD 2 million from CSFB using the shares as security for that loan. (CM-430) This highlights that the shares had a financial value for Claimant while the Participation Agreements were in force. (Tr pp. 106-107)

347. Under the Participation Agreements, Claimant retained the basic ownership right to sell the shares. Under New York law, the absence of any provision in the Participation Agreements restricting Claimant's right to sell the Yukos shares means that Claimant was free to sell the shares while the Participation Agreements were in force. New York law would not imply a term into the Participation Agreements making it impossible for Claimant to sell the shares. (¶¶46 - 47, CPHB-I)

348. Notwithstanding that the IPPA does not require that an investor hold a beneficial interest in the investment, Claimant retained a beneficial interest in its Yukos shares while the Participation Agreements were in force. (¶¶45, 49 - 50 CPHB-I)

349. Respondent's argument that beneficial ownership is a pre-requisite is based on irrelevant authority. The U.S. Foreign Claims Settlement Commission decisions (RLA-6) are based on a rule that expressly *requires* beneficial ownership. The definition of "investment" in the IPPA does not contain such a qualification. Investment treaty tribunals have reached the opposite conclusion, for instance *CSOB v. The Slovak Republic* (CLA-10) and *Saluka* (CLA-34), in addition to the three pending ECT cases involving Yukos all set out that the drafters of the relevant investment treaties in those cases did not set out to limit ownership to beneficial ownership.

Position under Russian law

350. Claimant submits that Respondent's argument that Russian securities legislation would see CSFB as the registered owner is irrelevant and incorrect. (¶24, CPHB-I)
351. For the purposes of the IPPA, Claimant need not be the registered shareholder under Russian securities legislation. There are no requirements in Article 1(a) of the IPPA requiring the investor to hold an "investment" in a particular way. The *Saluka* case (CLA-34) found that a tribunal "*cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed.*". Furthermore the tribunal in *Azurix Corp. V. The Argentine Republic* (RLA-181) also found that legal ownership was not required for treaty protection. The tribunal in the recent ECT case *Veteran Petroleum* (CLA-97) also had no difficulty in finding that the claimant was the owner of Yukos shares even though those shares were held through global custodians. (¶¶25 – 28 CPHB-I)
352. In any case, Claimant submits that under Russian law, the Civil Code (CLA-84) is predominant requiring all other civil law legislation to conform with it. Under the "law on the securities market" (RM-844), for a company as large as Yukos, shares must be registered with an outside registry. Under Russian securities legislation, only Russian custodians licensed by the Federal Securities Commission can be registered as nominal holders. Claimant used CSFB as its broker and custodian. CSFB, as it was not incorporated or licensed in Russia, used a local custodian ZAO ING Bank to hold the shares and appear on the registry as holder. The nature of this legal relationship is one of a commission agency under Articles 990 and 996 of the Russian Civil Code (CLA-84). Under Russian law and the concept of a commission agency, the true owner of the shares was always Claimant. (Tr pp. 84-98, ¶¶29 – 35 CPHB-I)

Intention to make an investment

353. Claimant rejects Respondent's assertion that Claimant merely bought a treaty claim not an investment (cf. ¶¶37 – 44, 247 R-I). Firstly, as explained above, it bought Yukos shares constituting an investment under the Investment Definition. Secondly, the limits Respondent attempts to put on the Investment Definition are not supported by its wording. The protection of investments under investment treaties is not conditional on the investment furthering the goals of the treaty. Claimant points to the *Saluka* (CLA-34) decision which concluded that “*nothing in [the definition of investment] makes the investor's motivation part of the definition of investment*”. Thirdly, even if good faith were a pre-condition of making an investment under the IPPA, Respondent has not demonstrated that making an investment in order to bring a treaty claim, should the host-state breach the treaty, would be illegitimate or in violation of the principle of good faith. Fourthly, should the Tribunal find that the reason for an investor making an investment is a relevant consideration under the IPPA, then it would be up to the Respondent to prove an improper purpose on the part of Claimant – which cannot be done. There are various reasons *why* Claimant *may* have made its investment, however, none would deprive it of protection under the IPPA. (¶¶155 – 163 C-II)

2. Respondent

354. Respondent makes similar submissions to those set out in relation to *rationae personae* under X.III of this Award. It argues that the actual beneficial owner of the Yukos shares was a Cayman Islands company until late 2007. Until that time, Claimant was only one in a long chain of nominal owners of the Yukos shares.

355. Pursuant to the Participation Agreements (RM-16 and RM-19) signed in November and December by Elliott International, a Caymans Islands limited partnership, and Claimant, Elliott International became the beneficial owner of the Yukos shares, while claimant became merely a nominal owner of the shares.

356. Respondent does not dispute that the Yukos shares themselves qualify as an “investment” under the IPPA. Its argument rests on the alleged nominal ownership of the Yukos shares by Claimant.
357. Respondent directs its main arguments on the *rationae materiae* issue at the **intent** of the Elliott Group and Claimant in purchasing the Yukos shares. Respondent claims that Claimant obtained ownership of the Yukos shares in order to pursue a treaty claim in the hope of realising windfall profits. Claimant has a history of making highly speculative investments, against the run of the market, which make sense only if promptly backed by aggressive litigation. The questionable motive of Claimant and Elliott Group is also highlighted by the timing of the share purchases, the timing and the amount of the damages initially sought by Claimant, and the decision not to sell the Yukos shares in late 2005 or early 2006, when a more than reasonable return could have been achieved without recourse to arbitration. (¶¶37 – 38 R-I)

Investment treaty claims are not an “investment”

358. Respondent argues that Claimant’s shareholding is a speculative holding and not an investment in terms of Article 5(2) of the IPPA. Respondent cites the object and purpose of the IPPA and argues that Claimant’s “investment” in no way furthers these aims. Claimant purchased claims or shares reflecting the value of the claims, and these are not protected. Tribunals have distinguished between transactions involving real investments on the one hand and speculative activities on the other in the past. Claimant has not fulfilled its burden of establishing that it has made an investment in good faith. To the contrary, as discussed above, all indications point to the conclusion that Claimant’s real purpose was to buy a treaty-based claim; indeed, to purchase the possibility of bringing the very claim presented to this Tribunal. Respondent points to Claimant’s parent, Elliott International, and its history of investment-by-litigation strategy. (¶¶242 – 243, 247 R-I)
359. Respondent cites various authority to support its argument that speculative activities are distinguished from “investments” (*African*

Holding v. Democratic Republic of Congo RLA-38) and are not protected under investment treaties (*Société Générale v. Dominican Republic* RLA-18). A qualifying investment must be made in good faith. (¶¶244 – 246 R-I)

360. Respondent argues that Claimant has not made a reasonable, *bona fide* investment. In order to exercise the rights of an investor under the IPPA to protect an investment, Claimant's actions must be reasonable, *bona fide* and generally for the purpose for which those rights were conferred. The IPPA confers rights for the promotion and protection of genuine investments. Claimant's attempt to claim rights are an abuse. Claimant has offered no evidence that it had a reasonable or *bona fide* investment purpose when it purchased Yukos shares (as a nominee) in November and December 2004 and also when it first became the beneficial owner of the Yukos shares in 2007. (¶¶247 – 250 R-I)

361. In RPHB-I, Respondent argues further that Claimant has failed to demonstrate that it was owner of an object capable of expropriation under Article 5 of the IPPA. (¶47, RPHB-I)

362. Respondent addresses the *rationae materiae* issue in its responses to the Tribunals questions set out *supra*, in particular questions 3.7 (applicable law), 3.5 (shareholder registration under Russian law), 3.8 (possibility of sale of Yukos shares under terms of Participation Agreements).

Arguments regarding the Investment Definition

363. Respondent rejects Claimant's arguments in ¶¶145 *et seq* C-II that the Yukos shares are an "investment" under the Investment Definition as the shares are "assets". Respondent points to the plain meaning of the term "asset" in the Oxford English Dictionary: an "asset" is "an item of value owned" (RM-860). Having adopted the requirement in the chapeau of Article 1(a) of the IPPA that an "investment" must be an "asset," Claimant then ignores this requirement and jumps to the dictionary definition of the term "share" in Article 1(a)(ii). It is self-evident that an interest in a share having no economic value cannot

be an “investment”. The Investment Definition not only expressly states that an “investment” must be an “asset” – which carries with it the requirement that an “investment” must have value – but the object and purpose of the IPPA would not make sense, indeed, cannot even be understood, if a protected investment need not have economic value. (¶¶33 – 36 R-II)

364. Respondent cites *Nagel v. Czech Republic* (RLA-114) which interpreted a definition of “investment” in the UK-Czech and Slovak Republic BIT and required that an investment was “something which has a financial value”. The authority *Saluka v. Czech Republic* (CLA-34) cited by Claimant as evidence that formal ownership was evidence of a qualified investment can be distinguished, according to Respondent, as Saluka was the legal owner of the shares (Claimant in this case is not) and Saluka enjoyed “the beneficial use of and interest in” its shareholding. Claimant first acquired a “beneficial use of and interest in” the Yukos shares in March 2007. (¶¶37 – 41R-II)

365. Prior to March 2007, and as set out in Respondent’s submissions above regarding *rationae personae*, CSFB possessed the right to vote the Yukos shares and receive dividends in respect of them. Claimant’s contractual rights to receive dividends paid to CSFB and to instruct CSFB on how to vote the shares were defeased under the terms of the Participation Agreements by Claimant’s obligation to pay all the Yukos dividends to Elliott International and to instruct CSFB to vote the Yukos shares in accordance with the instructions Claimant received from Elliott International. These are the duties of an uncompensated financial intermediary, not the rights of an investor. In short, Claimant’s supposed bundle of rights was, in reality, a bundle of duties imposed by the Participation Agreements. (¶¶42 – 44 R-II)

366. Claimant possessed no “asset” within the meaning of the Investment Definition, but rather owed a bundle of duties to Elliott International, the holder of the entirety of the economic interest in the Yukos shares, with the right alone to control all of the essential powers of a shareholder. Under the plain meaning of the Investment Definition, Claimant did not hold a qualified investment prior to the

termination of the Participation Agreements in March 2007. (§§45 – 46 R-II)

Further submissions on the Investment Definition

367. In its second Post-Hearing Brief (RPHB-II), Respondent argues that Claimant's assertion that as soon as an investment falls within one of the categories mentioned in Article 1(a) of the UK-Soviet BIT, it automatically, without any further evaluation, constitutes an 'asset' and, thus, a protected 'investment' (§15 CPHB-I). That reasoning has recently been rejected in the case *Romak v Uzbekistan* (RLA-200). The tribunal in *Romak* required a further evaluation, otherwise the definition of "investment" would lose any inherent meaning. The *Romak* tribunal also interpreted the definition in light of Article 31(1) of the Vienna Convention: together with the ordinary meaning of the terms of the treaty, their context, and the object and purpose of the treaty – the need to promote and protect foreign investments with the aim to foster the economic prosperity of and economic cooperation between the Contracting Parties. Furthermore, the *Romak* case found that adopting a mechanical application of the facts to the definition would produce a result which is "manifestly absurd or unreasonable," contrary to Article 32(b) of the Vienna Convention. The case held that an investment entailed a contribution extending over a period of time. (§§20 – 25 RPHB-II)

368. Claimant's assertion that the never defined "rights" it held under the Participation Agreements were "shares" and therefore an "investment" under the IPPA is rejected. Claimant had no economic interest and suffered no loss with the rise and fall of the Yukos share price. Claimant's own financial records showed that the alleged "investment" carried no value for Claimant until it appeared in 2007 as an asset following termination of the Participation Agreements. Claimant acknowledged at the Hearing that an "investment" must have financial value (Tr. p. 104) but attempts in CPHB-I (at §48) to enlarge the meaning of the term so as to exclude only "rights or interests inherently incapable of having financial value". This is contrary to the ordinary meaning of "asset". The case *Eureko v Poland* (RLA-166) cited by Claimant established that an

“investment” must be something “having economic value”. Claimant interest was not a bundle of rights, rather it was a bundle of duties. Claimant was incapable of sustaining injury. (¶¶26 – 30 RPHB-II)

369. Claimant cited the tribunal in *Azurix v Argentina* (RLA-181) for the proposition that legal ownership is not required for treaty protection, however suppressed the passage in that award requiring a claimant to have had a financial or other commercial interest in the shares and, accordingly, to have suffered a financial or economic loss. Claimant’s reliance on the tribunal’s findings in the *Veteran Petroleum* (RLA-195) case is equally misplaced. Unlike this case, claimant in *Veteran Petroleum* undeniably held beneficial ownership from time to time. The Russian law issue was not relevant to that case, as it is in this case. (¶¶31 - 34 RPHB-II)

370. Respondent points to the use of the term “asset” in Article 5 (Expropriation). The use of the term “asset” in the definition of “investment” in Article 1 of the IPPA must have implied term that the asset have value. A valueless asset cannot be expropriated. Respondent not only cites the US Foreign Claims Settlement Commission and decisions decided under customary international law but also has previously cited written and oral pleadings on the interpretation of Articles 1(1) and 5 of the UK-Czechoslovakia BIT in *Nagel v. Czech Republic* (RLA-114), which fully supports Respondent’s interpretation of Article 5 of the IPPA and also correctly emphasises that financial value is the effect of the rules of domestic law that create rights and give protection to them. (¶¶35 – 37 RPHB-II)

Respondent’s argument supported by general international law

371. Respondent further argues that a plain meaning interpretation of the Investment Definition is confirmed by customary international law rules applicable between the contracting parties. General international law supports Respondent’s argument that a protected investment needs to be something of value. Claimant does not challenge the authorities cited by Respondent (see ¶¶197 – 204 R-I). Further, the

rules of diplomatic protection support Respondent's arguments: a nominal interest lacks "a real interest in the subject property" and therefore does not deserve protection. (¶¶47 – 50 R-II)

372. Respondent disputes the arguments of Claimant that investment treaties protect legal owners who have transferred their economic interest (see ¶¶134 – 138 C-II, detailed under the *rationae personae* section of this paper at X.III).
373. Respondent argues that the *CSOB* (R-23/CLA-10) case requires that an investor have control over the investment. Claimant cannot even meet the test for *de-facto* control of the "investment". Control over the Yukos shares was held by Elliott International under the Participation Agreements. Claimant's "power alone" to vote the shares was in fact a duty to instruct CSFB to vote in accordance with Elliott International's instructions and its right "alone" to receive dividends, was a duty to pay the dividends to Elliott International. (¶¶53 – 59 R-II)
374. The case cited by Claimant - *Rumeli v. Kazakhstan* (CLA-32), is also distinguishable. That case involved a transfer of legal and beneficial ownership after the expropriation and furthermore, the Participation Agreements involved in the present case, remove control of the investment from the vehicle used to acquire the investment. Claimant was never the legal owner of the shares, nor was it in control of the shares due to the Participation Agreements. (¶¶60 – 64 R-II)
375. Respondent argues that whether Claimant suffered financial loss is important to whether it had an investment protected by the IPPA. At a minimum, Claimant must show it has suffered financial or economic loss if the Yukos shares had been expropriated (Tr p. 798). The analogy is drawn to insurance contracts, and if a party was capable of insuring an interest for economic or financial loss then it could claim under a BIT in the *Azurix v Argentine Republic* case (RLA-181), even if that party is not the legal owner. In the present case, Claimant did not suffer any financial loss from an expropriation of Yukos shares under the terms of the Participation Agreements. It

was Elliott International, the Cayman Islands entity, which would have suffered loss or benefited from any gain in value. Where there is nothing left of value, public international law cannot create a protected investment. (Tr pp. 799-801; RSlide, 22/01/10, Annacker, pp. 14-17)

Participation Agreements – Right to sell the shares

376. Respondent reiterates in RPHB-II that Claimant did not hold a “protected investment” in terms of the IPPA and that Claimant’s position that the Participation Agreements transferred to Elliott International only “contractual” and “economic rights” is wrong for at least three related reasons. Firstly the only ownership rights Claimant had were contractual in origin. These rights could in theory give rise to *in rem* rights, however Claimant transferred all its Yukos related rights under the Participation Agreements. Second, Claimant did not transfer to Elliott International something other than the entirety of its interest in the Yukos shares. Claimant transferred the entirety of its interest (and retained no rights at all) in relation to the Yukos shares. As a result, prior to March 2007, Elliott International was the only owner of the Yukos shares and Claimant was a mere collection agent with no more rights than an uncompensated custodian. Third, the fact that the Participation Agreements may have constituted separate securities for purposes of the US securities laws does not mean that the Participation Agreements did not also transfer all of Claimant’s interest in the Yukos shares. (¶¶10 - 14 RPHB-II)

377. Claimant’s argument that nothing in the Participation Agreements or in New York law prevented it from selling or pledging the shares is fundamentally wrong. Claimant transferred 100% of its interest to Elliott, agreed not to take any action other than in accordance with Elliott International’s instructions and exercise care in respect of the shares as if it were the beneficial owner. It is abundantly clear as a matter of New York law that Claimant did not have the right to sell or pledge the Yukos shares for so long as the Participation Agreements remained in effect. The essential right of ownership – to transfer property – was Elliott International’s right. This was

unaffected by its agreement not to exercise its right to transfer without RosInvestCo's consent. (§§15 – 16 RPHB-II)

378. Respondent has previously noted that no one has the right to sell property that belongs to someone else. Claimant pledged the shares to secure borrowings from CSFB. Respondent contends this occurred as Claimant did not inform CSFB of the existence of the Participation Agreements and Claimant's silence on this point compounds the fraud perpetrated at the time on CSFB. Claimant concedes in CPHB-I that even its supposed right to sell the Yukos shares did not represent an economic interest in the shares because, in the event of a sale, Claimant would have been obligated to pass on the net sales proceeds to Elliott International, thus confirming that Claimant was nothing more than an uncompensated collection agent. Claimant's concession has important consequences as well for its supposed right to pledge the shares. As Claimant had no right to retain any of the net sales proceeds, (a) Claimant did not have the right to pledge the sales proceeds as collateral for a loan (and Claimant's pledge of the shares was thus in breach of both New York law and the Participation Agreements) and (b) it is completely implausible that CSFB would ever have knowingly accepted collateral for a loan having no market value in the hands of the borrower. (§17 - 18 RPHB-I)

379. Claimant also argues that it was the owner of the Yukos shares by virtue of the "account information" maintained by CSFB. CSFB's account statements are not at all helpful to Claimant's case. A broker's statement of account by definition shows the security positions held by the broker for the benefit of the broker's client. CSFB's account statement thus provides further support for Respondent's position that CSFB (and not Claimant) was the legal owner of the shares. The fact that, insofar as CSFB was concerned, the shares were still being held for the benefit of its client completely misses the point that Claimant was then itself nothing more than an uncompensated custodian. A custodian's custodian is not a protected "investor." (§19 RPHB-I)

3. Tribunal

380. Without repeating the contents, the Tribunal takes particular note of the following documents on file:

Party Submissions:

C-I ¶¶21 - 22
R-I ¶¶20 - 21
C-II ¶¶143 - 148, fn. 233,
R-II ¶¶42 - 44, ¶¶120 -
CPHB-I ¶¶16 - 23
RPHB-I ¶¶17 - 19
R Tr. pp. 799 - 801

Exhibits:

CM-5 Letter from Matthew Gregory, Credit Suisse Securities (USA) LLC to RosInvestCo UK Ltd, 17 June 2008
CM-398 Participation Agreement between Highberry Limited and Elliott International dated 17 November 2004
CM-399 Participation Agreement between Highberry Limited and Elliott International dated 3 December 2004
CM-400 Termination Agreement between RosInvestCo and Elliott International dated 24 January 2007
CM-430 Credit Suisse brokerage statements for RosInvestCo, 1 November 2004 to 29 February 2008
CM-513 Credit Suisse First Boston, Confirmation and Statement for Trade No. FTG20, 16 November 2004
RM-16 Participation Agreement between Highberry Limited and Elliott International, dated 17 November 2004
RM-19 Participation Agreement between Highberry Limited and Elliott International, dated 3 December 2004
RM-20 Termination Agreement between RosInvestCo UK Limited and Elliott International, dated 24 January 2007
RM-22 Emails between Elliot Greenberg and Oksana Bitetti, dated 26-27 March 2007

RM-18 Securities Sale and Purchase Agreement between RosInvestCo (then Highberry Ltd.) and Alfa Capital Holdings (Cyprus) Ltd., 1 December 2004

Legal Authorities:

CLA-03 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331

CLA-10 *Československa Obchodní Banka, A.S. v. Slovak Republic*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/97/4, 24 May 1999

CLA-21 *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, Award on Jurisdiction, ICSID Case No. ARB/03/11, 6 Aug. 2004

CLA-34 *Saluka Investments BV v. Czech Republic*, Partial Award, UNCITRAL Rules, 17 March 2006

CLA-97 *Veteran Petroleum Ltd. (Cyprus) v. Russian Federation*, PCA Case No. AA 227, UNCITRAL Rules, Interim Award on Jurisdiction and Admissibility, 30 November 2009

RLA-16 *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Second Phase)* (Belgium v. Spain), International Court of Justice, Judgment of 5 February 1970, ICJ Reports 1970

RLA-181 *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009

Meeting the definition of “investment”

381. The Tribunal notes that, while Claimant meets the definition of “investor” (as set out above), the arguments presented by Respondent in respect of that definition equally apply to whether Claimant’s holding of shares meets the definition of “investment” under the IPPA.

382. The Tribunal considers that a purchase by an investor of shares in a company incorporated in a host state is an investment in the territory of the host state, in this case Russia. The IPPA defines “investment”

as “shares in, and stock, bonds and debentures of, and any other form of participation in, a company or business enterprise.” This definition is very wide and therefore leaves little doubt that on a *prima facie* assessment, Claimant held an investment under the terms of the IPPA.

383. The present case is unlike the case in *Joy Mining v Egypt* cited by Respondent which involved a contingent liability and not a clear shareholding. In the present case, the internal custodial arrangements with CSFB did not affect the clear status Claimant enjoyed as a shareholder in Yukos, notwithstanding Claimant’s internal arrangement with Elliott International.

384. The Tribunal has considered the arguments of Respondent in respect of the manner in which the shares were acquired. From the file, the Tribunal accepts as correct Claimant’s submission that the shares were purchased in two tranches, first in a purchase arrangement via CSFB on 16 November 2004 and then by way of a security sale and purchase agreement from Alfa Capital Holdings Ltd. effective 1 December 2004.

385. Following the purchase of the shares, the Tribunal is satisfied that Claimant was the owner in terms of the IPPA despite the points raised by Respondent in relation to the recording of the shareholding under Russian law. The purchase of the shares via brokers and the recording of ownership via broker and custodian accounts is a standard practice in both national and international securities transactions and also those in Russia.

Participation Agreements

386. In addition to the above summary of the parties’ arguments, in this context, the Tribunal takes note of the parties’ answers to the Tribunal’s Questions 3.7 and 3.8 of PO-5.

387. Claimant entered into the Participation Agreements with Elliott Group even before it had purchased the shares. The Tribunal is faced with arguments by Respondent that it should examine the beneficial

ownership of the shares, not the legal ownership. Respondent submits that Claimant did not hold an investment under the IPPA until the Participation Agreements were terminated on either 24 January 2007 (RM-20) or 27 March 2007 (RM-22).

388. Despite the arguments of Respondent as to the underlying nature of the rights and duties of Claimant under the Participation Agreements, the Tribunal must answer the question whether Claimant's shareholding meets the definition in Article 1(a) with reference to the IPPA. The very wide wording of that definition does not contain any term limiting "investment" to something created under applicable national law. The definition states that "investment" means *every kind of asset and goes on to set out a non-exhaustive list of types of asset including "shares in, and stock, bonds and debentures of, and any other form of participation in, a company or business enterprise"*. In drafting this straightforward and very wide definition, the State parties to the IPPA clearly expressed the intention that *any* asset should be included and the Tribunal considers Claimant's holding of Yukos shares to be such an asset. Accordingly, the Tribunal considers that the Participation Agreements are immaterial to the question whether Claimant had an investment under the IPPA. However, the value attributed to that investment for the purposes of assessing the damage caused is a separate question and will, also taking into account the Participation Agreements, be considered later in this Award in so far as relevant.

389. In that context, the Tribunal notes the inconsistency between the exhibits RM-20 and RM-22 as those documents relate to the termination of the Participation Agreements. The Tribunal is unable to determine from exhibit RM-22 any conclusive evidence that the Participation Agreements were in fact terminated on 26 March 2007. Faced with a choice between accepting the evidentiary value of the two exhibits, the Tribunal notes RM-22 refers to an already executed termination agreement. Therefore the Tribunal is more inclined to accept that RM-20 represents evidence of the termination of the Participation Agreements on 24 January 2007. Respondent's reference in ¶4 of RPHB-II to a concession by Claimant (in fn. 38 of CPHB-I) that the Participation Agreements were terminated on 26

H.V. Whether the IPPA Applies *rationae temporis* to Claimant Having Regard to the Timing of the Share Purchase

1. Claimant

390. As already stated, Claimant became a protected investor under the IPPA at the time of its share purchases on 16 November 2004 and 1 December 2004. Respondent's belated objection to the Tribunal's jurisdiction *rationae temporis* should be rejected. The Tribunal has jurisdiction as the measures giving rise to expropriation (auction of YNG and bankruptcy auctions) occurred after Claimant's acquisition of the Yukos shares. (§164 C-II)
391. Claimant contends that the tax assessments were the pretext for an expropriation of Yukos' assets that commenced with the auction of YNG on 19 December 2004 and concluded with the Russian Federation's auction of the last of Yukos' assets during the final bankruptcy auction on 15 August 2007. Claimant cites *Duke Energy International Peru Investments v. Republic of Peru* (CLA-17) in which the tribunal explained that the decisive element for jurisdiction *rationae temporis* is the point in time when the instant legal dispute between the parties arose, not the point in time during which the factual matters on which the dispute is based took place. (§165 C-II)
392. Claimant goes on to outline the differences between direct and indirect or creeping expropriation. It argues, however, that regardless of the form of expropriation, there is no doubt that the Russian Federation expropriated all of Yukos' assets through a series of auctions. Claimant's claim is based on this permanent deprivation of Yukos of all of its property and the resulting series of direct transfers of the majority of Yukos' property to the Russian state. These transfers occurred *after* Claimant's investments on 16 November 2004 and 1 December 2004. (§§166 – 170 C-II)

393. While the Tribunal has jurisdiction to determine whether an expropriation of Yukos' assets occurred from 19 December 2004 to 15 August 2007, it may also consider events which occurred prior to this, and prior to Claimant's investment, to the extent that they may assist in understanding the acts that fall within the scope of the Tribunal's jurisdiction *rationae temporis*. Claimant cites the Commentary to the ILC Articles on State Responsibility (CM-451) in this regard to support its view that a court is not prevented from taking into account earlier actions or omissions for the purpose of establishing the factual basis for a later breach or to provide evidence of intent. (¶¶171 – 172 C-II)
394. In CPHB-II, Claimant points out that it is common ground that the Tribunal has jurisdiction *ratione temporis* to determine whether the Russian Federation's conduct after Claimant acquired a protected investment constitutes an unlawful expropriation in violation of Article 5 of the IPPA. It is also common ground that the Tribunal may evaluate pre-investment measures to inform the meaning of post-investment conduct. Claimant became a protected investor under the IPPA when it made its share purchases on 16 November 2004 and 1 December 2004. The Tribunal has jurisdiction *ratione temporis* to determine Claimant's expropriation claim, because the measures constituting the expropriation – the auction of YNG and the Bankruptcy Auctions – occurred after Claimant's acquisition of the Yukos shares, contrary to what the Respondent claims. (¶¶43 – 45 CPHB-II)
395. Claimant submits that it has never asked the Tribunal to determine that the tax assessments themselves constituted an unlawful expropriation of Claimant's investment under Article 5 of the IPPA. The relevance of the tax assessments is that they were the pretext for – and also form the basis for the Respondent's defense of – the expropriation of Yukos' assets that commenced on 19 December 2004 and concluded on 15 August 2007. The tax assessments made prior to 16 November 2004 simply **inform** the meaning of the post-investment measures (the auctions) that constitute the unlawful expropriation. Those tax assessments also fail, as discussed above, to provide a defense for that expropriation. (¶46 CPHB-II)

2. Respondent

396. Respondent claims that the events which Claimant alleges amount to expropriation, predate Claimant's becoming an investor and Claimant's having made an investment and therefore are not subject to review under the IPPA. (¶207 R-I)
397. Respondent relies on its arguments relating to *rationae personae* that Claimant did not become an "investor" under the IPPA until it became the beneficial owner of the Yukos shares in 2007. As Claimant was not an "investor" at the time of the alleged expropriation, it follows that it cannot claim protection of the IPPA. (¶¶208 – 217 R-I)
398. Alternatively Respondent argues that even if *quod non* Claimant, as a mere nominee, qualified as a protected investor prior to 2007, all of the material acts critical to the foundation of Claimant's complaint had already occurred on or prior to 19 November 2004. By 19 November 2004, Yukos had already received the tax assessments for the years 2000, 2001 and 2002, and the audit report for the year 2003. Claimant could not have had a serious expectation that these assessments would have been reversed. (See also Respondent's arguments on damages at H.IX.). (¶228 R-I)
399. At the time Claimant became (nominal) owner of Yukos shares, Yukos was already bankrupt in the balance sheet sense (liabilities exceeded assets) and therefore any expropriatory act alleged to have occurred after 19 November 2004 could not have resulted in a total or substantial deprivation of Claimant's shareholding. By 19 November 2004, Yukos was already afflicted with a terminal illness and its ultimate death was simply a matter of time. (See also Respondent's submissions on damages at H.IX.). (¶¶229 – 230 R-I)
400. In its **Surreply**, Respondent contends that the Tribunal lacks jurisdiction over disputes between the Russian Federation and a UK investor relating to measures that predate an investment by such UK

investor. Respondent argues that to Article 8(1) of the IPPA, the Tribunal has jurisdiction over “any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former [...] concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement.” The Tribunal accordingly lacks jurisdiction over disputes between Respondent and a UK investor relating to measures that predate an investment by such UK investor. (¶¶66 – 67 R-II)

401. Pursuant to Article 5(1) of the IPPA, “[i]nvestments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as ‘expropriation’) in the territory of the other Contracting Party except for a purpose which is in the public interest and is not discriminatory and against the payment, without delay, of adequate and effective compensation.” Article 5 is thus inapplicable to acts and omissions that predate an investment by an investor of a Contracting Party. (¶68 R-II)

402. Respondent points to further authority than that which it cited in R-I (at ¶¶213 – 216 R-I). First *Phoenix v. Czech Republic* (RLA-124) supports the contention that a tribunal has no jurisdiction *rationae temporis* to consider a claimant’s claim relating to an “investment” made prior to the alleged act in breach of the investment treaty. *Europe Cement v. Turkey* (RLA-125) and *Cementownia v. Turkey* (RLA-126) stand for the same proposition. Accordingly, since Claimant only became an investor under the IPPA by March 2007, when virtually all of the measures complained of had become irreversible under Russian law including the December 2004 auction of YNG, the Tribunal has no jurisdiction over those acts complained of. (¶¶69 – 72 R-II)

403. Respondent also argues that the dispute at issue had only crystallised at the latest by 28 February 2006. The tax assessments on Yukos, seizure and auction of YNG shares, alleged denial of any means or opportunity to defend before the Russian courts against these tax assessments and the auction of YNG ordinary shares, and the alleged substantive and procedural deficiencies of that auction

had all occurred before Claimant became an “investor” under the IPPA. (¶¶84 – 94 R-II)

3. Tribunal

404. Without repeating the contents, the Tribunal takes particular note of the following documents on file:

Party Submissions:

C-I ¶¶120 – 121; ¶¶141 - 154
R-I ¶138; ¶¶151 – 168
C-II ¶¶164 - 172
CPHB-II ¶46

405. The Tribunal considers as an initial matter that, on the basis of its findings in relation to the meeting of the definitions of “investor” and “investment”, it has jurisdiction over the dispute as Claimant was an investor with an investment from the date of the share purchases in late 2004 until the date that Yukos ceased to exist. During that period the IPPA applied to Respondent and investors from the United Kingdom.

406. The major alleged acts of Respondent breaching the IPPA, namely the auction of YNG shares and the bankruptcy auctions, all occurred after Claimant was an investor under the IPPA.

407. Certain tax assessments and related acts and conduct of Respondent that are material to Claimant’s claim occurred prior to Claimant becoming an investor. The Tribunal considers that it is not prevented from reviewing those acts and the conduct of Respondent in order to inform its decision on whether Respondent breached the IPPA and damaged Claimant’s investment during the period Claimant owned the shares and qualified as an investor. The alleged acts (YNG auction and bankruptcy auctions) that occurred during the period Claimant was an investor under the IPPA were inextricably linked to the taxation assessments and audit reports that occurred prior to Claimant becoming an investor. The tax assessments, audits and

enforcement actions may therefore be taken into account when considering the YNG auction and bankruptcy auctions.

408. The Tribunal, therefore, considers that it is able to review factual matters and legal steps that occurred prior to Claimant's purchase of Yukos shares in order to inform its investigation of the alleged acts which, taking into account the Tribunal's conclusion on meeting the definition of "investor" and "investment", indisputably occurred when Claimant held Yukos shares.

409. However, while the Tribunal is not prevented from finding that Respondent breached the IPPA in respect of Claimant on the basis of *rationae temporis*, the Tribunal may take into account the timing of the share purchase in its consideration of damages and their valuation. The Tribunal considers that the timing of Claimant's share purchase will inform the Tribunal's consideration of the quantum of any damages awarded.

H.VI. Whether Respondent Breached the IPPA

410. The Parties have argued in great detail the factual and legal issues involved in the disputed measures taken by Respondent, particularly regarding taxation assessments and the auctions. The Tribunal also notes in particular the submissions of the parties on the cumulative effect of the various strands of Respondent's actions in respect of Yukos. The Tribunal considers that an assessment of whether Respondent breached the IPPA can only be effectively made if and after the conduct as a whole is reviewed, rather than isolated aspects. Therefore, hereafter, the arguments presented by the Parties regarding each major disputed issue are recalled by short summaries and commented, but the Tribunal will only after all these summaries, taking into account these submissions by the Parties, turn to its own considerations as to whether Respondent's measures, seen together and in their cumulative effect, can be considered as a breach of the IPPA.

(A) The Taxation Laws Applicable to Yukos

411. Claimant and Respondent have submitted opposing views of the taxation laws applicable to Yukos during the relevant period (tax years 2000 up to and including 2003) supported by the Maggs Reports on Claimant's side and Konnov Reports on Respondent's side. The tax assessments by the Russian tax authorities focussed on the activities of Yukos in the Low Tax Regions. The Parties disagree on what laws and rules applied to companies claiming the benefit of operating in the Low Tax Regions.

1. Claimant

Bad Faith Doctrine

412. Claimant argues that the "bad faith" doctrine which the tax authorities attempted to impose was inconsistent with the laws providing the low-tax regimes in the Low Tax Regions and furthermore, was inconsistent with the Russian Constitutional Court's decisions. (§§93 and 103 Maggs I)

413. The doctrine was radically expanded in the case of Yukos to hold that Yukos was in bad faith for minimising taxes through the Low Tax Regions and as a basis for not applying the statute of limitations. None of the court cases Respondent cites (in the Konnov Reports) to show the application of the doctrine occurred prior to the Yukos case. The cases Respondent cites from the Kalmykia region relating to the "bad faith" doctrine (RM-655) concern only Kalmykia law and are not relevant to the Yukos case. (pp. 3-4 Maggs III)

414. Respondent arbitrarily applied the 'bad faith' doctrine to disguise the preordained destruction of Yukos. Respondent deviated from established law and practice. This doctrine was notoriously vague. (§91 CPHB-I)

415. Professor Maggs explains that, before the first case against Yukos, no Russian court had ever declared a company to be a “sham” lacking “economic substance” and then attributed its income to another company. By declaring the companies “shams,” the Tax Ministry avoided the rigorous showing required by the Tax Code for challenging transfer pricing and attributing a subsidiaries’ obligations to its parent. Respondent contends that Yukos’ use of a network of “sham” trading companies in Low-Tax Regions to claim for itself profit tax incentives available only to companies incorporated in those regions amounted to “bad faith.” The Russian Federation argues that this “bad faith” was established by Yukos’ failure to meet two requirements: (a) that the tax benefits be proportional to contributions made to the regional economies; and (b) that the company claiming the tax benefits have “economic substance.” Both alleged requirements lack objective criteria and both were applied against Yukos in an arbitrary and discriminatory manner. (§§92 - 93, CPHB-I)

416. Respondent’s justification for imposing US\$ 9.4 billion in profit tax and related interest and fines on Yukos has shifted throughout these proceedings. In his first report, Mr. Konnov argued that Yukos’ trading companies did not qualify for the tax breaks because they failed to achieve the stated goals of the regional legislation. In his second report, Mr. Konnov took a different position, arguing that “[t]he amounts of tax assessed on YUKOS were primarily based on the breach by YUKOS of federal rather than regional legislation.” In its RPHB-I, however, the Respondent concedes that Yukos’ trading companies complied with the requirements of both the regional and the federal statutes. Now, the Respondent argues that Yukos violated amorphous “federal jurisprudential ‘good faith taxpayer’ and ‘substance over form’ doctrines, which . . . require that the local company have economic substance and that investments be made in the local economy . . . in amounts that are ‘proportional’ to the tax benefits received.” (§12 CPHB-II)

417. Respondent contends that its tax authorities “brought literally thousands of ‘bad faith taxpayer’ cases, hundreds of which involved abuses of Low-Tax Regions similar to Yukos’.” But the Respondent

has never identified a single instance before the Yukos case where the Russian tax authorities applied these “jurisprudential doctrines” to attribute one company’s profits to another. Nor does the summary table contained in a study published by S.V. Savseris fill the gap. Respondent has not produced or even cited a single instance among the cases referred to in Mr. Savseris’ table in which the Russian Federation applied the “bad faith taxpayer” doctrine in the same way it was applied to Yukos. This application against Yukos was novel and expansive and has never been as blatantly abused by the tax authorities as it was against Yukos. (¶¶14 – 15 CPHB-II)

Proportionality Principle

418. Claimant submits that there was no requirement in the laws of the Low Tax Regions which set out any requirement that the tax benefit gained must be commensurate with the amount invested in the Low Tax Region. Neither the law of Mordavia (a Low Tax Region where Yukos had a subsidiary which claimed a substantial tax benefit), nor any individual investment agreements between Yukos companies and a Low Tax Region government, nor even federal law, provided for proportional investment. In any case, in Mordovia, Yukos paid one billion rubles over three years under an investment agreement entered into under the tax benefit law (Law 9Z, RM-644) providing Mordavia with the benefit it bargained for. Mr Konnov confirmed in cross examination that there was no accusation that the Yukos parties did not perform their obligations under those agreements. Nevertheless, Yukos was accused suddenly in December 2003 of having underpaid its corporate profits tax. (Tr pp. 761-762)

419. Respondent has stressed the importance of the alleged lack of proportionality between the investments by Yukos’ trading companies in the Low-Tax Regions and the tax benefits conferred. At the hearings, however, Mr. Konnov testified that “proportionality” was only one piece of “evidence” that demonstrated that Yukos’ trading companies were shams that lacked economic substance. Mr. Konnov’s shift was understandable. The Respondent cannot explain how or why a requirement of “proportionality” should prevail over

the express terms of investment agreements negotiated by regional governments (such as Mordovia) pursuant to authority given to them under federal statutes. (§§94, CPHB-I)

420. Yukos' trading companies made investments in the Low-Tax Regions. This is undisputed. They also complied with the requirements of the investment agreements and local law which fixed the amount of required investment independently from any amount of tax savings. The position of Respondent is illogical with regard to the proportionality requirement. In the case of a taxpayer making large tax savings, that taxpayer would not be able to "...go back and say, 'My benefit is very significant, I want to pay more taxes'" (p. 569, Konnov, 20/01/10, Tr), rather a taxpayer (according to Mr Konnov's testimony) is required to approach regional authorities and make unspecified amorphous voluntary donations of indeterminate amounts to special "non-budgetary" funds. This alleged requirement of the law is fundamentally inconsistent with the rule of law and invites corruption and abuse. It is also inconsistent with Russian tax law which – as Mr Konnov acknowledged, requires tax laws to be specific. Yukos complied with the letter of the law in the Low-Tax Regions, and Respondent concedes this, yet attempts to claim that an amorphous proportionality standard applies. (§§95 – 98 CPHB-I)

421. Respondent relies on a series of decisions from the Federal Arbitrazh Court for the North-Caucasian District. These decisions assessed additional profit tax liability against Kalmykia companies based upon an alleged lack of "proportionality" between those companies' local investments and the profit tax benefits they obtained. Mr. Konnov effectively rejected the reasoning of those decisions when he conceded that a lack of "proportionality" could not result in additional tax liability, because "taxes are fixed." It is likely for this reason that no court outside of the Federal Arbitrazh Court for the North-Caucasian District, until the Yukos case, ever applied this alleged principle of "proportionality" to increase a taxpayer's tax liability. But even the Federal Arbitrazh Court for the North-Caucasian District never assessed liability against any taxpayer other than the entity based in Kalmykia that had claimed the tax

benefit. Yukos' case was, as the Respondent itself puts it, "unique." (§14 CPHB-II)

Transparency of Yukos and Awareness of Tax Authorities

422. Claimant points out that Yukos was transparent in its disclosures of use of the Low Tax Regions. In its US GAAP public financial statements contained in its annual reports (CM-15), Yukos reported the many billions of dollars of tax savings. As Yukos was the largest privately held Russian company at the time, and its reports carefully analysed by the market it is inconceivable that the Russian tax authorities were unaware of Yukos' tax minimisation methods. (Tr pp. 57-58; p. 5 Maggs III)

Applicable VAT Law

423. Under Russian law (Articles 20 and 40 of the Tax Code – CM-242) as interpreted by the Constitutional Court (CM-283), the tax authorities could not use formalistic interpretations of the tax laws to disregard separate legal identities and to deny refunds of VAT on oil actually exported. The tax claims filed against Yukos in 2004 demanded that Yukos pay VAT on oil exported by the trading companies, as they had taken the position that Yukos was the real exporter. (§§ 111 – 128 Maggs I).

424. Claimant argues that Article 164 of the Tax Code (CM-363) provided for a 0% rate of VAT on exported goods. Yukos was held liable in the tax assessments following December 2003 for VAT on goods sold by its subsidiaries. The Tax Ministry took the position that Yukos and its trading companies were a **single consolidated enterprise** and did not credit Yukos with the VAT already paid by the trading companies. The Tax Ministry did not dispute that the oil exports of the trading companies were exempt from VAT nor did it dispute that the trading companies had submitted the necessary documentation to qualify for the VAT exemption. Instead the Tax Ministry refused to pay the refunds to the trading companies and took the position that Yukos could not receive the VAT refunds because the trading companies – and not Yukos had submitted the

documentation in support of the VAT refund. This was a novel interpretation of the Tax Code and allowed the total tax assessments against Yukos to increase by US\$ 9 billion. (§§ 211-213 C-I)

425. Charging VAT on oil actually exported was inconsistent with Russian law as interpreted by the Constitutional Court. The Constitutional Court had previously indicated that a 0% rate should be granted if it was clear that goods had been exported, even though there was some formal defect in documents submitted (CM-39). The courts in the Yukos case ignored this rule to uphold the substantial VAT assessments against Yukos. The courts in the Yukos case also ignored the right of the taxpayer Yukos to submit VAT declarations later in its own name, in order to comply with the novel interpretation of the law. (§128 Maggs I; §§73-75 Maggs II)

426. Respondent does not articulate a credible theory to justify its assessment against Yukos of the more than US\$ 13.5 billion in VAT-related taxes, penalties and interest. This amount represented the largest single block of tax assessed against Yukos. Were it not for the VAT assessments, Yukos would have remained a profitable, viable company. None of the foreign tax sources cited by Respondent permits the tax authorities to disregard the existence of separate entities to justify profit tax assessments, yet for VAT those same entities are viewed as distinct companies. Respondent took starkly contradictory positions in order to double the amount of tax that Yukos would have owed if the tax authorities had collected only the amounts Yukos saved through its profit tax structures. Therefore, the collection of a tax which was never owed is compelling evidence that the tax assessments against Yukos do not satisfy international standards of bona fide taxation. (§§102 – 108 CPHB-I)

427. Respondent's submissions that there was no inconsistency between its treatment of Yukos with respect to VAT and profit taxes. The issue is whether, after attributing the profits and turnover of Yukos' trading companies to Yukos, the Tax Ministry acted properly in refusing to attribute to Yukos the VAT returns filed by those same trading companies. Furthermore, Respondent's arguments regarding the "mechanistic" nature of the assessment of VAT are irrelevant.

The imposition of the VAT cannot be justified given that it was imposed on export oil sales that were not subject to tax and for which the proper paperwork had been filed. (§§7 - 8 CPHB-II)

428. Respondent's continued reliance on the Russian domestic cases *Far Eastern Shipping* (RM-650), *Korus-Holding* (RM-665), and *MIAN* decisions is misplaced. Those cases can be distinguished and involved cases of the secondary companies not complying with VAT obligations – which Yukos' trading companies did. Equally telling is the Respondent's treatment of Sibneft. The Russian Federation contends that Sibneft was able to avoid being assessed VAT on the revenue earned by its subsidiaries "by merging [its] trading entities into the parent company" and thereby taking the benefit of those trading entities' VAT submissions. Assuming this is true, and leaving aside the fact that the use of mergers to avoid tax liability can hardly be considered morally or legally superior to the methods employed by Yukos, the fact remains that the Russian Federation effectively merged Yukos' trading companies into Yukos when they attributed those trading companies' revenues and profits to Yukos. (§§9 – 10 CPHB-II)

429. The Russian Federation collected US\$ 13.5 billion of VAT from Yukos that was never owed. The Respondent's formalistic defense of these assessments, without which Yukos would still exist, is logically indefensible and contradicts the asserted basis for the profit tax assessments. There is no evidence that any other company that reduced its profit tax obligation through the use of domestic low tax zones was assessed VAT on the same scale, or at all. This is compelling evidence that the VAT assessments against Yukos were not bona fide and were discriminatory. (§11 CPHB-II)

Repeat Offender Fines

430. Claimant submits that Respondent imposed repeat offender fines which deviated from established Russian law and these illustrate the confiscatory nature of the tax assessments against Yukos. Prior to the Yukos case, repeat offender fines pursuant to Articles 112 and 114 of

the Tax Code could be assessed only if the *commission* of the second alleged offense occurred *after* the offender had been “brought to responsibility” for an analogous offense. The first time Yukos was “brought to responsibility” for the use of Low-Tax Regions to minimise profit taxes was on 14 April 2004. Thus only conduct after that date could be used to justify imposition of the repeat offender fines. Notwithstanding this, Respondent imposed fines for *each* of Yukos’ 2001-2003 tax years by pressing two novel interpretations of Russia’s tax laws. The first was that Yukos was “brought to responsibility” on the date of the first audit report. Secondly, Respondent pressed repeat offender fines could be assessed even if the second “offense” occurred before the taxpayer was brought to responsibility for the first tax offense. The Russian courts acquiesced in this departure from the established application of Articles 112-114 of the Tax Code, however, after the Yukos case they reversed that interpretation.

431. Respondent defends the US\$ 3.8 billion of repeat offender fines by speculating on their basis. However the Tax Ministry plainly stated – and the courts subsequently affirmed – that the basis for assessing repeat offender fines for Yukos’ 2001-2003 tax years was the Tax Ministry’s 14 April 2004 resolution. In so doing, they ignored established Russian law that a taxpayer could not be subjected to repeat offender fines for conduct that occurred before that taxpayer was “brought to responsibility” for an analogous offense. After the Yukos cases, the Respondent reverted to its prior interpretation of the Tax Code. Respondent has never identified any analogous offenses on the part of Yukos that predated the 14 April 2004 resolution, much less any other analogous offense that the Russian courts specifically cited. To impose fines for “repeat offenses” allegedly committed during the 2001-2003 tax years, even though the Tax Ministry did not establish the predicate first offense until 2004, runs counter to the most basic requirements of the rule of law (¶¶16 – 17 CPHB-II)

2. Respondent

Bad Faith Taxpayer Doctrine

432. Respondent points to the jurisprudence of the Russian Constitutional Court beginning in 2001 (RM-210) according to which taxpayers who have acted in bad faith are not entitled to the same degree of protection as taxpayers who act in good faith. The existence of this doctrine is not disputed by Claimant or Professor Maggs. The doctrine has been applied to cases unrelated to Yukos (RM-44, RM-153, RM-212, RM-560) to deny benefits that had been claimed on the basis of Low Tax Region legislation. (Annex A R-I, Konnov Report I ¶ 74, RSlide 19/01/10 McGurn pp-55-57)

Proportionality Principle

433. Related to the “bad faith” doctrine is the claim by Respondent that there was a principle in effect during the relevant period that required a taxpayer in a Low Tax Region, who wished to claim the benefit of the relevant low tax legislation, to make investments in the territory which were in proportion to the amount of tax savings claimed by the taxpayer. (pp. 23-25 and p88 Konnov Report I; ¶¶ 31-34 Konnov Report II)

434. During his cross examination, Mr Konnov referred to the proportionality principle as being applied in various cases and derived by the Russian judicial practice together with the bad faith doctrine in order to combat the abuse of law. The principle of proportionality “basically means what you do is you compare the amount of tax savings actually which the taxpayer benefitted with the amount of the investment made.” (Tr pp. 565-566)

435. The Tribunal should therefore not be led astray by the lengthy series of questions put by Claimant to Mr. Konnov regarding the minutiae of Mordovian law, and compliance therewith by Yukos’ Mordovian affiliates (and to a lesser extent, regarding the federal statute). They – as well as the discussion of translations of Mordovian law – are simply irrelevant, because, as Mr. Konnov made clear over and over again, it is common ground that the literal terms of the Mordovian statute (and its counterparts elsewhere) were generally complied

with, as were the terms of the federal statute. The real issues, as made clear by the decisions of the tax authorities and the Russian courts, have always been different: whether (a) Yukos abused those statutory provisions in a way that violated the above-cited federal jurisprudential doctrines (and in particular, the principle of “proportionality”), by using sham local affiliates and making only nominal investments; and whether (b) the Russian tax authorities’ application of those doctrines to Yukos constituted a bona fide exercise of their taxing powers. (§78 RPHB-I)

436. Yukos itself never seriously contended that the Trading Shells had genuine economic substance, nor that the investments in local economies had been significant in comparison to tax benefits. Instead, Yukos has always contended that at the time, as a matter of law, the Trading Shells did not need to have substance, and that “proportional” investments were not required, provided only that the conditions (if any) expressly spelled out in the local laws had been met. (§79 RPHB-I)

437. The critical issue, then, both in the tax litigation in Russia and in this arbitration, is whether – as Respondent believes it has amply shown – the jurisprudential requirements of economic substance and proportionality were already in effect at the relevant times, or whether – as contended by Claimant (and, before it, by Yukos) – they were somehow applied to Yukos “retroactively” or “discriminatorily.” (§80 RPHB-I)

Transparency of Yukos and Awareness of Tax Authorities

438. Respondent contends that contrary to Claimant’s submission that the tax authorities were aware of Yukos’ tax practices with respect to the Low Tax Regions, in fact they were not. The alleged disclosure in Yukos’ US GAAP financial statements (CM-14, CM-15 and CM-16) of the aggressive techniques used to transfer trading shell company profits was in fact opaque and a mere discussion of the earnings of “equity affiliates and foreign subsidiaries” and a statement on tax legislation. The disclosures were named “Investment tax credits and

other rates” and did not give the reader any clue whether they had been legally or illegally obtained. In any case, only 2% of the Russian population reads English and therefore it is unlikely that the tax inspectors involved in the initial assessments of Yukos for tax years 2000, 2001 and 2002 could read those reports. (pp. 10-11 Annex A to R-II; RSlide 22/01/10, McGurn, pp. 65-69)

439. Yukos tried to conceal its trading shell companies by: using straw men directors, changing their corporate names, restructuring to conceal affiliation and evade taxes and also failing to submit documents to and cooperate with audits. (pp. 14-19 Annex A to R-II; RSlide 19/01/10 McGurn pp. 21-35)

Applicable VAT Law

440. Respondent argues that the nature of VAT as a tax is mechanistic, applied formalistically. (RSlide, 22/01/10, McGurn, p. 95). Contrary to the statements in the Maggs Reports, both before and after the Yukos tax cases, tax authorities and arbitrazh courts interpreted VAT requirements in a strict formal way. (pp. 26-27 Annex A to R-I; ¶¶137-138 Konnov Report I)

441. The Constitutional Court decision upon which Claimant relies (CM-39), actually contains a decision that made clear that even if an export has insiputably occurred, full VAT is due. (Tr pp. 418-421; RSlide, 22/01/10, McGurn, pp. 88-89). Yukos did not file, or attempt to file VAT returns for tax years 2000 or 2001. The returns Yukos attempted to file for 2002 and 2003 were filed in a manner (annual basis) which made their rejection inevitable. (RSlide, 22/01/10, McGurn, pp. 90-94)

442. Respondent submits that the approach of the authorities has no logical inconsistency as Claimant contends. All over the world, VAT is imposed on gross revenues – unlike income or profits taxes which relate to the underlying economic reality. One of the attractions of VAT is that it is assessed mechanistically. In Russia as in other countries, exemption from VAT for exports is not applied automatically but conditional on strict and timely compliance with

formal requirements of law. Respondent cites the Russian domestic *Far Eastern Shipping* (RM 650) and *Korus Holding* (RM-665) cases (also cited in ¶¶139 – 140 of Konnov I) for the proposition that the imposition of VAT on Yukos for failure to file the correct documents when an export has indisputably occurred was not unique or anomalous. (¶¶93 – 95 RPHB-I)

443. It also became clear at the hearing that Claimant simply misunderstands the VAT payments and refunds that were made in this case. Granting Yukos a refund for “input VAT” paid by its trading affiliates, as suggested by Counsel for Claimant, would have involved an unjustified double payment in favor of Yukos, because, as confirmed by Prof. Maggs, “input VAT” had already been refunded in full to the Trading Shells. Claimant has also not refuted Respondent’s showing that Yukos’ *modus operandi* made it especially vulnerable to VAT assessments – a risk that other companies (such as Sibneft, as explained by Mr. Konnov) were able to avoid, e.g., by merging their trading entities into the parent company. Finally, Claimant leaves Respondent’s international precedents completely unchallenged. (¶¶96 – 99 RPHB-I)

Repeat Offender Fines

444. The hearing confirmed that, for each of the years 2000-2004, Yukos was assessed a 40% penalty for “wilful” violations, instead of the normal 20% rate (p. 679 Tr.). As explained by Mr. Konnov, it is sufficient for a company’s violation to be deemed “wilful” that it resulted from intentional acts of the company’s management (pp. 612, 614, 615 – 616). It is obvious that Yukos’ complex “tax optimization” scheme was intentional, and not inadvertent (or merely negligent). Concealment, on the other hand, is not a prerequisite to “wilfulness.” Even if Yukos had been entirely transparent, its scheme would have been “wilful.” In any event, Yukos was never transparent; instead, as shown at the hearing and in Respondent’s prior submissions, it took great pains to conceal its scheme. (¶100 RPHB-I)

445. Respondent’s position regarding the repeat offender fines is that the concept is broadly interpreted by the courts and even a very small first fine would have sufficed to make the second offence a repeat

offence. In any case, Yukos could have avoided the repeat offender fines (as acknowledged by Prof. Maggs (p. 234, Tr)) by simply filing proper amended tax returns and paying back taxes. The fines are not dissimilar to fines that would have been imposed in many other countries. (§216, Konnov Report-I and §§101-102 RPHB-I)

3. Tribunal

446. The Tribunal, having to consider only Respondent's alleged liability under the IPPA, is neither an appeal body for the determination of Russian tax law nor claims that it has expert knowledge of that law. The Tribunal takes into account the parties' submissions in this regard the most relevant aspects of which are summarized above as well as the expert reports the parties have submitted from Prof. Maggs and Mr. Konnov.

447. Hereafter, the Tribunal, without repeating the extensive arguments presented by the parties regarding the various disputed issues, presents its conclusions therefrom in so far as they may be relevant for Respondent's responsibility under the IPPA in so far as they might be seen as one of several aspects relevant for the consideration of the cumulative effect of the totality of Respondent's conduct which the Tribunal will examine later in this Award.

448. Though some of Respondent's explanations and arguments seem justified or at least plausible, the Tribunal is inclined to find them not persuasive particularly regarding the following aspects:

Bad Faith Doctrine

449. From the sources mentioned, the Tribunal concludes that the bad faith doctrine and Respondent's relying on Yukos being a "sham" without "economic substance", as applied to Yukos in comparison to other competitors, was to a great extent a novel application of the law, rather vague in content and limits, and expansively used against Yukos in a way not shown to have been used before or against other comparable tax payers.

Proportionality Principle

450. This alleged principle undisputedly was not included in any provision of the law of the Low Tax Region of Mordovia nor in the investment agreements concluded by Yukos with that Region, it again is rather vague, and the Tribunal does not see in the file any application of that principle before Yukos and to another competitor in a comparable situation. As Repondent itself concedes, "Yukos case was unique".(¶ 71, RPHB I and the sources mentioned there in footnote 136)

Transparency and Awareness of Tax Authorities

451. It is undisputed that Yukos disclosed all its billions of tax savings in its financial statements contained in its annual reports. The Tribunal finds it unpersuasive that, for one of the largest and most important companies in Russia frequently discussed in the media, the tax authorities nevertheless were not aware or at least could not have informed themselves in this regard.

Applicable VAT Law

452. The extremely formalistic interpretation of the VAT tax law regarding Yukos and its trading companies to the effect that, though exports were undisputedly not subject to VAT, the documentation also undisputedly submitted by the trading companies could not be used in relation to Yukos and thus Yukos was liable for more than US\$ 13.5 billion in VAT related taxes is difficult to accept as a justification for a tax liability the size of which was sufficient to lead Yukos into bankruptcy.

Repeat Offender Fines

453. From the evidence on file, the Tribunal concludes that the interpretation of Articles 112 and 114 of the Tax Code used on Yukos was not used before or thereafter in any comparable cases. Again, this resulted in an extremely large tax liability in the range of US\$ 3.8 billion.

Conclusion

454. In view of the above considerations, the Tribunal, again recalling that it is not an appeal body for Russian tax law, concludes that, even though some of Respondent's explanations and arguments seem plausible, the application of Russian tax law on Yukos must be seen as a discriminatory and as not a bona fide treatment of Yukos.

455. Even if taxation as such is excluded by Article 11(3) of the Denmark-Russia BIT in connection with the MFN clause of the IPPA, in any case, these doubts regarding the application of Russian tax law on Yukos must be taken into account in the context of the examination later in this award regarding the question whether the cumulative affect of the totality of Respondent's conduct is a breach of the IPPA.

(B) Tax Assessments In Respect Of Yukos

456. Claimant asserts that the tax assessments, audits and the reports, court decisions and administrative proceedings following them were the precursors to the auctions which expropriated the majority of Yukos' assets. Claimant argues Respondent misused its police powers in an attempt to re-nationalise Yukos' strategic petroleum assets. Respondent counter-argues that the tax assessments were a legitimate consequence of Yukos' flagrant breaches of tax laws.

1. Claimant

457. Claimant bases the bulk of its claim in relation to the tax assessment on the conclusions contained in the Maggs Reports.

458. Claimant contends that the tax assessment in respect of Yukos commenced by the Tax Ministry in December 2003 and completed on 29 December 2003 was a procedure solely aimed at expropriating the assets of Yukos. The Tax Ministry undertook an unprecedented reinterpretation of Russian tax laws to transform previously legal practices into unlawful tax evasion schemes, without any notice of a change in the law. It had no statutory or other basis to assert that Yukos' trading companies were shams, nor to assert that the trading companies had failed to comply with the requirements of the legislation in the Russian Federation's Low Tax Regions, nor to assert that either of the foregoing could generate a tax liability for which Yukos could somehow be responsible under Russian law. Without any legal authority and without providing notice of its novel interpretation of Russian law, the Tax Ministry summarily declared Yukos' trading companies to be "shams" and held Yukos liable for those trading companies' profits at the rates applicable to Yukos rather than the more favourable rates that applied to the trading companies located in the low tax zones. (¶¶201 – 203 C-I)

459. The radical nature of the interpretation of tax law applied to Yukos is evidenced by the fact that, immediately prior to the issuance of the report from the extraordinary re-audit of 2000, the tax authorities had already audited Yukos' 2000 and 2001 tax years and had repeatedly certified that Yukos did not have any outstanding tax liabilities. (§204 C-I)
460. Claimant argues that Yukos complied with the literal requirements of the relevant tax laws and the Respondent (Tax Ministry) retrospectively imposed the requirement of "intention to improve the economy [in the low tax zones]" (CM-60). An independent report on Russian tax policy from December 2003 set out that the Russian courts had unequivocally rejected arguments that attempted to shift blame for deficiencies in the tax laws to taxpayers. (§§205 – 207 C-I)
461. The Tax Ministry did not allow Yukos to claim the presumption based on Russian law that it was a good faith taxpayer on the basis that criminal cases had been brought, but not yet decided, against its executives. However, courts in the U.K. (CM-222, CM-223 & CM-225), Cyprus (CM-224), Switzerland, the Netherlands, Lithuania (CM-220), Liechtenstein and the U.S. (CM-81) have all found in various contexts that those charges were politically motivated. Furthermore, none of the executives had been convicted of any crime at the time the Ministry prepared the report of the extraordinary re-audit of 2000. Minimum requirements of procedural fairness should have barred the tax authorities from relying on unproven and suspect criminal allegations to brush away legal presumptions that impeded their pursuit of their policy objectives. (§§208 – 209 C-I)
462. Respondent's actions toward Yukos constitute a denial of justice and a breach of international law. At a minimum, they establish the non-bona fide nature of the Russian Federation's tax measures. (§210 C-I)

Reversal of Prior Audits

463. Claimant submits that Respondent's three week supervisory re-audit of Yukos in December 2003 was not credible. Yukos was the largest taxpayer in Russia and the Interregional Tax Inspectorate No.

1 – a top level specialised division of the Russian Tax Ministry established for the purposes of monitoring the large oil companies had already completed a six month audit of Yukos only eight months earlier, in April 2003. That initial audit had only uncovered minor tax liabilities, not massive fraud. The same tax inspectorate had audited Yukos' trading companies incorporated in Mordavia (Ratmir and Alta-Trade) and had not expressed any concern about Yukos evident control over those companies, whereas now, Respondent argues that Yukos had concealed that control. (§§85 – 86 CPHB-I)

464. While the Russian Federation now argues that its Tax Ministry had been slowly putting together pieces of the puzzle that eventually revealed a network of "sham" trading companies controlled by Yukos, Ministry of Taxation of the Russian Federation, Report No. 66, 28 Apr. 2003 (CM-50), the supervisory audit report itself does not refer to any such discovery, nor do any of the subsequent audits conducted with respect to the 2001–2004 tax years. The Russian Federation has not put forward a single fact witness to testify to this allegedly sudden discovery of a US\$ 24 billion tax fraud by its largest private taxpayer. (§§87 – 88 CPHB-I)

465. The implausibility of the Russian Federation's shifting explanations is further demonstrated by the VAT filings. Every month, Yukos' trading companies provided the Russian Tax Ministry with copies of every sales contract, bill of lading, customs declaration, and payment confirmation for the oil they exported. The Tax Ministry required this documentation as part of those companies' applications for refunds of input VAT. The Respondent does not dispute that the trading companies properly filed these applications and received those refunds. (§89 CPHB-I)

466. Well before the audits of Yukos and its trading companies in 2002 and 2003, the Russian Government had shown that it was acutely aware of the use of low tax regions by major oil companies. The Minister of Finance had called for changes in the federal law that authorized Low-Tax Regions to provide profit tax incentives to companies registered in their regions. These same laws were criticized in the Duma for allowing oil companies to shelter their

profits. Yet in 2002, the Audit Chamber of the Russian Federation concluded that Sibneft's network of trading companies in Kalmykia (which was similar to Yukos' network in Mordovia) was legal under existing law, notwithstanding its negative effect on total tax collections. The Russian Federation's account of tax investigators hard at work to unearth an elaborately concealed scam by Yukos cannot be reconciled to this evidence that the Russian Government had understood the legal problem for years. (§90 CPHB-I)

Conclusions of Professor Peter Maggs

467. The assessment of profits tax (and related penalty interest and fines) by the Russian Tax Ministry against Yukos in 2004 for the 2000-2003 tax years was inconsistent with established Russian tax law and practice governing the use of trading companies in low tax zones.
468. Yukos complied with the tax laws in each of the Low Tax Regions: Mordovia (CM-268), Kalmykia (CM-269), Evenkia (CM-270) and the former Soviet restricted military areas known as ZATOs (CM-273 & CM-273). The Tax Ministry, however, in its report (CM-60), classified the entities in low tax areas as "fake companies" on four bases: (1) few resident employees and limited assets, (2) strong ties with banks and other organizations associated with Yukos, (3) de facto control by Yukos, and (4) lack of physical oil processing facilities. The authorities concluded that since these companies were "fake," their profits were really profits of Yukos. (§§77 - 111 Maggs I)
469. The second major change from prior law came in the departure from the previous strict observance in Russian tax law of formal legal personality. The tax authorities This "fake company" approach was a major innovation in Russian tax law. This led to the assessment of Yukos' VAT liabilities for oil actually exported by the trading companies. Charging Yukos VAT on oil actually exported by the trading companies was inconsistent with Russian law. Under Russian law, as interpreted by the Constitutional Court (CM-283), the tax authorities could not use formalistic interpretations of the tax laws to disregard separate legal identities and to deny refunds of

VAT on oil actually exported. When this interpretation was reviewed by the courts when Yukos challenged it (CM-39), the courts ignored clear precedent from the superior Constitutional Court and imposed a 20% VAT rate when a 0% rate for goods exported should have been applied. (¶¶ 111 – 128 Maggs I)

Court cases following tax assessments

470. Claimant argues that there were irregularities in the judicial process and failure to follow due process during 2004 following the tax assessments.
471. Maggs I sets out that the courts did not act in accordance with the Russian Tax Code (Article 113 CM-283) as interpreted by the High Arbitrazh Court (CM-280) in applying the statute of limitations to tax claims against Yukos. The law was re-interpreted in respect of Yukos on the basis that Yukos acted in “bad faith”. The Arbitrazh Court of the City of Moscow (CM-67) cited a Constitutional Court decision (CM-288) incorrectly as that decision related to a very narrow set of facts resulting in the dramatic expansion of the “bad faith doctrine”. (¶¶ 129 – 134 Maggs I)
472. Furthermore, the courts imposed penalties on Yukos as a “repeat offender” which did not accord with Russian law. The tax authorities successfully argued that the fine could be doubled for a second offence even if the second offence occurred before the taxpayer was brought to responsibility for the first tax offence. This interpretation diverged from the plain text of the law (Paragraph 2 of Article 112 CM-283). This interpretation was later overturned in a case unrelated to Yukos by the Supreme Arbitrazh Court in 2008 deciding that the interpretation used in the Yukos case was wrong (CM-292). (¶¶ 144 – 149 Maggs I)
473. The freezing of assets by the court was in violation of the clear rulemaking orders of the High Arbitrazh Court as set out in the instruction issued to lower courts in CM-44 and later in a Resolution CM-291. (¶¶ 150 – 152 Maggs I)

474. The Russian courts (in a decision CM-192) recognised the English court judgment (CM-263) which SocGen Group had sought against Yukos for payment. The Russian courts enforcement of the decision in a manner plainly inconsistent with Russian Arbitrazh Procedure Code (Article 241, CM-297) and on the basis of a plainly false interpretation of treaties in force between Russia and the United Kingdom (CM-302). Appeals by Yukos were also denied the correct application of the law (CM-301). (¶¶153 – 164 Maggs I)

2. Respondent

475. Respondent argues that virtually all of the complained of tax assessments, and related enforcement measures and bankruptcy proceedings occurred before Claimant became the beneficial owner of the Yukos shares, however, even if *quod non* the court decisions regarding these acts were plainly wrong, they would still not provide a basis for an expropriation under Article 5(1) of the IPPA.

476. Imposition and enforcement of taxes does not generally constitute expropriation. Taxation measures are intrinsically lawful from a public international law perspective. Respondent cites a variety of commentary to support this argument. It also argues that even severe appropriations under taxation may be justified without incurring international responsibility. The burden is thus on Claimant to establish that there has been an abusive exercise of the taxing power, and that this abuse produced consequences tantamount to expropriation. States have a wide margin of discretion in exercising their sovereign right to tax and in particular to enforce tax laws. (¶¶316 – 323 R-I)

477. In particular, when taxation is within the bounds of internationally recognised tax policies, a taxation measure will not be considered to be expropriation. In this case, nothing in the record suggests that the Russian authorities ever acted in a way that offended any internationally recognised norm, or that was incompatible with the practices of other countries. (¶¶324 – 325 R-I)

478. The assessments made by Russian tax authorities, and the penalties they levied against Yukos, were consistent with the practices of tax authorities in a number of Western countries. (§§326 R-I and pp. 1 – 34 Annex A to R-I, RSlide, 19/01/10, McGurn, pp. 36-49)
479. The accusation that the tax assessments were retroactive is without merit. The Konnov Report sets out that the tax minimisation regimes employed by Yukos were being fought by the tax authorities both before and after the Yukos matter. Yukos itself was aware of the illegality of its practices, proven by the degree and number of subterfuges it employed to misrepresent its affairs and that it warned its shareholders of a risk of reassessment of its taxes. Furthermore, Yukos engaged in far more aggressive tax evasion practices than its competitors. (pp. 11 – 14 Annex A to R-I)
480. Even if the tax assessments complained of by Claimant were the result of a “change of position” by the tax authorities, this would be permissible under Russian law and routine in international practice. Tax authorities worldwide are generally not estopped from changing their position. (RSlide 19/01/10 McGurn pp. 79-88)
481. Even if, quod non, Claimant could establish that it did receive particularly severe treatment at the hands of the tax authorities, Russian law Russian tax law and practice confer a certain degree of discretion upon the tax authorities as to whom they prosecute, and how aggressively. This discretion is recognised under Russian tax practice, and it was therefore readily foreseeable that the courts would reject Yukos’ attempts to avoid liability for taxes that were otherwise clearly due on the grounds that the tax assessments of such taxes were somehow discriminatory. (pp. 15 – 16 Annex A to R-I)
482. A review of the specific allegations Claimant makes also proves that its arguments are unsupported: Yukos’ use of tax regions was not consistent with the legal bases for these tax regions and the related court cases confirming the assessments were also consistent with Russian tax law and practice which are required to examine the substance of commercial relationships. When the tax authorities investigated the “actual business relationships” of Yukos and the

trading shells they found that the control and ownership of oil was held by Yukos and that the trading shells had been specifically established to evade taxes. The finding on that basis that Yukos was a "bad faith taxpayer" led to conclusions of the authorities and courts that were entirely consistent with Russian law and practice. (pp. 18 – 22 Annex A to R-I)

483. The non-payment by Yukos itself of VAT (and instead having the trading shells apply for VAT exemption certificates) was also illegal under Russian law. Respondent argues, citing the Konnov Report, that the imposition of tax by the tax authorities was in compliance with Russian law and practice. (pp. 23 – 26 Annex A to R-I)

Court cases following tax assessments

484. Respondent argues that the question to be determined by the Tribunal is not whether the alleged procedural irregularities of the Russian court proceedings, or the alleged substantive defects of the Russian court decisions, resulted in damages per se, or even whether they amount to a breach of municipal or international law. Rather, the test is whether the outcome of the Russian court proceedings amounts to a measure tantamount to expropriation, i.e., an abuse of the State's power to tax that totally or substantially deprived Claimant of its economic interest in the Yukos shares. (§§313 R-I)
485. Respondent submits that the post-investment court decisions did not result in a total or substantial deprivation of shareholding. Claimant has not identified any decisions that resulted in a total or substantial deprivation of Claimant's shareholding. Even assuming Claimant is deemed to be a protected investor after 19 November 2004, it has still failed to establish that court decisions after that date resulted in a total or substantial deprivation of the economic value of Claimant's Yukos shares. As tax assessments and tax enforcement measures generally cannot be expropriatory, it follows that court decisions upholding them likewise cannot generally be expropriatory. (§§314 – 316 R-I)

486. Respondent's Konnov Report I sets out in detail that the courts upholding the tax assessments were acting in accordance with Russian law and practice.
487. Claimant's objections to Respondent's alleged breach of law and procedure is based on propaganda. Claimant frequently refers to 66,000 pages of documents that Yukos allegedly had only two days to review prior to the judicial review of the authorities' tax claim for 2000. Yukos, in fact, had several months to review those papers, many of which consisted of routine accounting documents, yet it chose only to review them on two days. (¶¶108 – 110 RPHB-I)

Federal Law 163-Z

488. Claimant erroneously points to the passing of Federal Law 163-Z to demonstrate that Respondent abolished the Low-Tax Region program and therefore that the treatment of Yukos was retroactive. That law, as also established by Prof. Maggs, simply capped tax benefits at 4%. It also did not address the "good faith", "proportionality", "economic substance" and "substance over form" tests which were left with the courts which was the case both before and after 1 January 2004. (¶107, RPHB-I)

3. Tribunal

489. Also in the context of the disputed tax assessments, the Tribunal recalls that, having to consider only Respondent's alleged liability under the IPPA, it is neither an appeal body for the assessments based on Russian tax law nor does it claim to have expert knowledge of that law. The Tribunal takes into account the parties' submissions in this regard the most relevant aspects of which are summarized above as well as the expert reports the parties have submitted from Prof. Maggs and Mr. Konnov.
490. Again, hereafter, the Tribunal, without repeating the extensive arguments presented by the parties regarding the various disputed

issues, presents its conclusions therefrom in so far as they may be relevant for Respondent's responsibility under the IPPA in so far as they might be seen as one of several aspects relevant for the consideration of the cumulative effect of the totality of Respondent's conduct which the Tribunal will examine later in this Award.

491. Though some of Respondent's explanations and arguments seem justified or at least plausible, the Tribunal is inclined to find them not persuasive particularly regarding the following aspects:
492. First of all, the Tribunal refers to its considerations and conclusions above regarding the applicable taxation law which overlap with the assessment issue and also apply in this context.
493. Regarding the assessments themselves, the Tribunal comes to the following additional conclusions:
494. As argued by Claimant, indeed, the objectivity of Respondent's three week supervisory re-audit of Yukos in December 2003 lacks credibility: The specialised top level division of the tax ministry instituted for large oil companies, had, only eight months earlier completed a six month audit on Yukos which only minor tax liabilities had been found. The same division, in its audit of Yukos' trading companies incorporated in Mordavia had expressed no concern regarding their role and Yukos' control. The Tribunal does not find in the file any convincing evidence that the three week re-audit, or actually other audits, discovered new facts not known before which would justify the tax fraud amounting to some US\$ 24 billion by Russia's largest private tax payer at the time.
495. Further, comparing the expert reports by Prof. Maggs and Mr. Konnov and the respective evidence on file, the Tribunal finds those of Prof. Maggs more persuasive to the effect that:

(1) The assessment of profits tax (and related penalty interest and fines) was inconsistent with established Russian tax law and previous practice governing the use of trading companies in low tax zones. (particularly Maggs I, p.29)

(2) The formalistic interpretations of the tax law used by the tax authorities to disregard separate legal entities and deny Yukos refunds of VAT on oil actually and undisputedly exported were equally inconsistent with established Russian tax law and previous practice, as interpreted by the Constitutional Court. (particularly Maggs I p. 48)

(3) Regarding the tax charges for 2000, the courts accepted new interpretations in the Yukos case that allowed the tax authorities to escape the effect of the limitation period. (particularly Maggs I p. 51)

496. The Tribunal agrees with Respondent that, as in other jurisdictions, the Russian tax authorities may change their positions regarding the interpretation and application of the tax law and that they have a certain discretion in this respect. However, if such changes and the use of discretion occur in so many respects and regarding a particular tax payer as compared with the treatment accorded to comparable other tax payers, doubts remain regarding the objectivity and fairness of the process.

497. Therefore, the Tribunal, again recalling that it is not an appeal body for Russian tax law, concludes that, even though some of Respondent's explanations and arguments seem plausible, the tax assessments on Yukos must be seen as a treatment which can hardly be accepted as a bona fide treatment.

498. Again, whether this, by itself, would be sufficient to find a breach of Article 5 IPPA in spite of the high threshold mentioned above particularly regarding a denial of justice by the Russian courts, must not be decided here by the Tribunal. However, in any case, these doubts in respect to the tax assessments on Yukos must be taken into account in the context of the examination later in this award regarding the question whether the cumulative affect of the totality of Respondent's conduct is a breach of the IPPA.

(C) Auction Process in Respect of YNG

1. Claimant

499. Respondent expropriated and effectively nationalised Yukos' assets when its Government auctioned all of Yukos' assets to satisfy a series of specious tax claims that it had assessed against Yukos. The first of these auctions was the auction of YNG on 19 December 2004. The Russian Government transferred virtually all of Yukos' assets to state-controlled Rosneft. This deprivation of Yukos' control over its assets, accomplished by the transfer of those assets to the possession of a state-owned company, falls squarely within the definition of an expropriation. The auction of YNG was unlawful and conducted with sole purpose of expropriating Yukos' assets and re-nationalising them. (¶186 C-I)

500. On 19 November 2004, while Yukos' challenges to the tax assessments were still pending before the Russian courts, Respondent announced that it would auction Yukos' common shares in YNG, Yukos' main production asset, in order to satisfy the newly assessed 2001-2003 tax liabilities. Respondent fixed the opening auction price pursuant to a special resolution that derogated from normal auction procedures and allowed the starting price to be fixed without reference to the appraised value of the assets to be auctioned.

501. At the auction, the only bidder for the YNG shares was BFG (CM-163), a completely unknown company. Notwithstanding the attempts at the time to project the illusion that BFG was an independent bidder, and the Respondent's continuation of that effort, it can now be shown that Rosneft owned at least twenty percent of BFG's shares prior to the auction. It has further been reported that Rosneft furnished BFG with the entirety of the US\$ 1.7 billion deposit that was needed to participate in the auction, and that it arranged a complex scheme of financing to pay the balance of the purchase price bid by BFG (CM-179, CM-372). And, of course, Rosneft acquired BFG, and with it control of YNG, immediately after the auction. (¶13(h) C-II)

502. Even though the Russian Federation seeks to characterize the YNG auction as competitive and designed to achieve the highest price for the auctioned assets, the facts are hardly such as to support either conclusion. The only bidders were two state-owned companies run by the same people. Rosneft (the controlling force behind BFG) and Gazpromneft (a subsidiary of state-owned Gazprom and the other, silent, bidder) shared the same chief executive (Sergey Bogdanchikov, who was simultaneously President of Rosneft and General Director of Gazpromneft). Only one of the bidders – BFG – actually bid (CM-161). And that bidder was merged into Rosneft as soon as it was successful. (§13(i) C-II)

503. Immediately following the auction, Rosneft described its purchase of YNG as “the most monumental bargain in Russia’s modern history.” (CM-8) In its 2003-2004 consolidated financial statements, Rosneft effectively elaborated on this statement when it recognised more than US\$ 7 billion in negative goodwill (CM-257). (§13(j) C-II)

504. Respondent does not dispute that, as a result of its forced auctions of Yukos’ assets, virtually all of Yukos assets were transferred to state-controlled entities, principally Rosneft. Nor does it dispute that any compensation was paid. (§13(k) C-II)

505. Maggs I sets out that “the auction of the voting shares of YNG was not carried out in accordance with normal Russian practice, which would have: (a) applied published ground rules requiring independent appraisal, (b) starting the auction in accordance with these rules at the appraised price, (c) conducted the auction so as to achieve the highest possible price, (d) forbidden collusion among auction participants.” (§165 Maggs I)

506. Maggs I also states that the auction appears to have been a case where the Russian state controlled both prospective bidders. One of the two qualified bidders was Gazpromneft, which was owned by Gazprom, in which the state had a controlling interest. The other was a mysterious company called Baikalfinansgrup (BFG), which appeared just before the auction, won the auction, assigned its

interest to the Russian-state-owned Rosneft, and disappeared. After the auction, reporters found only a convenience store, dram shop, and cell phone dealer at the registered address of BFG. Amazingly this company was able instantly to raise almost US\$2 billion for the required pre-auction deposit. (§167 CM-I)

507. Respondent's auctions of Yukos' assets, which deprived Yukos of all of its assets, were not made for a proper public purpose, that Respondent's targeting of Yukos was discriminatory, and that no compensation was ever paid. Accordingly, Respondent's auctions of Yukos' assets constitute an expropriation and, with regard to those assets that ended up in the hands of Russian state-owned companies, a nationalisation of Yukos' assets. Respondent should be required to pay adequate and effective compensation to RosInvestCo pursuant to Article 5 of the IPPA. (§19 C-II)

2. Respondent

508. Respondent's contends that action taken by Yukos itself in the media (advertisements warning potential bidders off) and in the Houston bankruptcy court enjoining banks from funding prospective bids prevented the auction process from having more bidders. Yukos effectively sabotaged an auction which was for its own benefit. The price gained at auction on 19 December 2004 was 5.6% higher than the starting bid price and was consistent with the DKW valuation. The auction fully complied with Russian law and followed parameters set by the Ministry of Justice, the bailiffs and the RFFI. (Annex B to C-II pp. 7-10)

509. Were it not for the concerted public effort of Yukos to warn off potential purchasers, the number of participants in the auction would probably have been much higher based on the number of Western and other international energy and oil companies which expressed an interest in the auction (RM-429, RM-431 and RM-115). (Annex B to R-I p. 9)

510. Respondent also points to Annex B of R-I and the Borisova Report which both explain the legality of the seizure of all of the YNG shares and the auctions that followed under Russian law and their compliance with parameters set by the Ministry of Justice, bailiffs and the RFFI.
511. The DKW valuation (CM-22) in respect of the shares was actually lower than the starting price for the auction, once one adjusted the price to take into account the 76.79% of shares actually sold. Furthermore, the price actually gained at auction exceeded the adjusted DKW valuation. (Annex B to R-I pp.17 & 24)
512. Claimant has failed to show that the auctions were a sham. The standard to prove a sham is high. The modalities of the YNG auction were entirely consistent with international practice. Claimant fails in establishing a sham by pointing to Western court decisions relating to individuals associated with Yukos. In its Annex E to R-II Respondent sets out how Claimant's evidence in this regard is deficient.
513. Claimant has failed to show in the hearings that the YNG auction was a sham, that it could or should have been conducted otherwise, or that it could have produced higher proceeds. The record shows that the YNG auction was in all respects conducted in good faith, consistently with Russian law and international practice, and that it was in no way unfair to Yukos. (§126, RPHB-I)
514. As conceded by Prof. Maggs, "the bailiffs had discretion whether to accept or reject Yukos' offers of assets as alternatives to the YNG shares." Likewise, Respondent's showing that Yukos' offers were not bona fide (because they related to encumbered Sibneft shares and/or were subject to an absurd 24-hour deadline) and/or were unreasonable stands unrebutted. It is not disputed that, under Russian law, there was no legal requirement that the YNG shares be sold at auction, a circumstance that fatally undermines Claimant's central hypothesis that the authorities' secret purpose was to "reassert state control over" Yukos. If this had been the case, why would the authorities have run the risk that an auction would be won by a Russian private sector bidder or even a foreign company, given that

they were free to sell the YNG shares directly to Rosneft or another State-controlled company. (§§126 – 130 RPHB-I)

515. The auction was conducted in accordance with international practice. At the hearing, Prof. Maggs retracted an earlier claim that the auction rules were not public, and he also conceded they were lawful and lawfully adopted. (pp. 439-439 Tr.)

516. Prof. Maggs also confirmed that, if the YNG Auction did not achieve an even better result, the only reason was the US bankruptcy (with which Prof. Maggs was personally familiar, having been one of Yukos' witnesses in those proceedings), and conceded that he had no basis for contradicting the evidence that a number of bidders (including foreign companies expressed an interest in participating in the auction, but had refrained from doing so out of fear of risks created by the US bankruptcy proceedings (and for no other reason). (§131, RPHB-I)

517. Claimant has never questioned the international precedents showing that, in similar circumstances, most countries would not have been more favourable to the debtor, and that some countries would have allowed starting prices as low as 50% - 60% of fair market value. (§133, RPHB-I)

3. Tribunal

518. Also in the context of the disputed auction process, the Tribunal recalls that, having to consider only Respondent's alleged liability under the IPPA, it is neither an appeal body for the determination of Russian domestic law nor does it claim to have expert knowledge of that law. The Tribunal takes into account the parties' submissions in this regard the most relevant aspects of which are summarized above as well as the expert reports the parties have submitted from Prof. Maggs and Mr. Konnov.

519. Hereafter, the Tribunal, without repeating the extensive arguments presented by the parties regarding the various disputed issues,

presents its conclusions therefrom in so far as they may be relevant for Respondent's responsibility under the IPPA in so far as whether they might be seen as one of several aspects relevant for the consideration of the cumulative effect of the totality of Respondent's conduct which the Tribunal will examine later in this Award.

520. Though some of Respondent's explanations and arguments seem justified or at least plausible, the Tribunal is inclined to find them not persuasive particularly regarding the following aspects:

521. First, the Tribunal refers to its considerations and conclusions above regarding the applicable taxation law and regarding the tax assessments which are relevant also in the present context because they lead to the auctions and thus overlap with the auction issue to some extent.

522. Regarding the auction process itself, in spite of the doubts expressed by Prof. Maggs (particularly Maggs I p.62 et seq.), the Tribunal accepts Respondent's argument that, had Claimant not discouraged international bidders and without the bankruptcy proceedings in the United States, more bidders might have participated, and that the process seems to have been conducted within the limits of discretion awarded by Russian law.

523. However, on the other hand, it must be noted that the two bidders actually participating were not only under Respondent's control but that the winning bidder was a completely unknown company just created before the auction and disappearing right after the auction and assigning its interests to Russian state-owned Rosneft. The circumstances that this bidder was further found to have no real offices and nevertheless was able to raise the deposit in the range of US\$ 1.7 billion and then the purchase price with the apparent help of Rosneft further contribute to the impression that the scheme was set up under the control of respondent to bring Yukos' assets under Respondent's control.

524. Therefore, the Tribunal, again recalling that it is not an appeal body for Russian law, concludes that, even though most of Respondent's

explanations and arguments seem plausible, there remain doubts whether the YNG auction can be seen as bona fide and non-discriminatory or as an expropriation for the public interest.

525. Again, whether this, by itself, would be sufficient to find a breach of Article 5 IPPA in spite of the high threshold mentioned above particularly regarding a denial of justice by the Russian courts, must not be decided here by the Tribunal. However, in any case, these doubts in respect of the YNG auction must be taken into account in the context of the examination later in this award regarding the question whether the cumulative affect of the totality of Respondent's conduct is a breach of the IPPA.

(D) Bankruptcy Auctions in Respect of Remaining Yukos Assets

1. Claimant

526. The second expropriatory measure after the YNG auction, took place with the disposition of all of Yukos' remaining assets at bankruptcy auctions concluding on 15 August 2007. Respondent again transferred virtually all of Yukos' assets to state-controlled Rosneft. This deprivation of Yukos' control over its assets, accomplished by the transfer of those assets to the possession of a state-owned company, falls squarely within the definition of an expropriation. (§186 C-I)

527. Maggs I sets out that the auctions were conducted under state pressure to keep bidding down and ensure low number of participants. Maggs I also sets out the irregularities of the Russian court's recognition of the judgment the SocGen Group won in the High Court in London which in turn enabled the claim to be bought in Russia.

2. Respondent

528. In addition to its contention that Claimant has not established that the auctions were a sham (cf. ¶179 R-II), Respondent argues that the bankruptcy auctions cannot be considered expropriatory. The bankruptcy auctions by themselves thus do not even begin to meet the standard necessary to establish an expropriation. In its Annex CC to R-II, Respondent sets out that the results of the bankruptcy auctions were not unfavourable to the debtor as the amounts realised corresponded favourably to market values. (¶182 R-I)

529. Furthermore, the bankruptcy auctions were fully in accord with international practice. As is the case in the United Kingdom and other States, a majority of bankruptcy liquidations are ordered by courts at the request of the local tax authorities. The Russian rules applicable to bankruptcy auctions show a strong concern for the safeguard of the interests of the debtor and its equity holders, and are significantly more rigorous than the corresponding rules in many other jurisdictions, which tend to prioritize the rapid sale of the debtor's assets in the interest of the creditors. In particular, in many other jurisdictions, auction sales are not mandated, and receivers are free to sell off the assets belonging to the bankruptcy estate on a negotiated, one-on-one basis – with all the attendant risks. Even when auctions are used, specific requirements seldom limit the receivers' broad discretion in setting the applicable parameters (including whether or not to set a minimum starting price for the auctioned assets). In many other countries, receivers are instead simply encouraged to seek the best price reasonably achievable under the circumstances. (¶183 R-II)

530. At the hearing, Prof. Maggs – who had previously opined that the auction “prices” were “low” – readily conceded that he is “not an oil industry appraisal expert.” Even though the Elliott Group is in the business of valuing assets, Claimant has never denied that the auction results exceeded both the appraisals of the expert appointed by the bankruptcy receiver and contemporaneous fair market value estimates produced by Claimant itself. Prof. Maggs also admitted that his prior claim that the Bankruptcy Auctions had been “conducted

under State pressure” in reality “had nothing to do with what happened actually at the auctions.” (¶¶138 – 139 RPHB-I)

531. Claimant’s contention that Rosneft won “virtually all” the assets of Yukos is demonstrably wrong. Other bidders won 8 out of 17 auctions, notably including the foreign entities ENI/Enel, which acquired gas assets for US\$ 5.8 billion. Prof. Maggs – who never disputed that Yukos’ liabilities exceeded its assets – suggested that those liabilities should actually have been US\$ 500 million higher – totaling at least US\$ 9.7 billion – if, as he appeared to advocate, the claim of Moravel had been allowed to the bankruptcy. As a result, taking into account the tax effect above, the hypothetical additional proceeds required in order for equity holders such as Claimant to receive anything at all would rise even further – from US\$ 12.1 billion to US\$ 12.8 billion. (¶¶140 – 141, RPHB-I)

532. Claimant has never questioned Respondent’s showing that the bankruptcy proceedings and bankruptcy auctions were fully consistent with international practice. (¶142, RPHB-I)

3. Tribunal

533. Again, hereafter, the Tribunal, without repeating the arguments presented by the parties, presents its conclusions therefrom in so far as they may be relevant for Respondent’s responsibility under the IPPA in two ways: (1) whether these submissions can be seen as showing a breach of the IPPA by themselves, or, if not, (2) whether they might be seen as one of several aspects relevant for the consideration of the cumulative effect of the totality of Respondent’s conduct which the Tribunal will examine later in this Award.

534. Regarding the bankruptcy auctions, the Tribunal notes that most of the doubts expressed by Prof. Maggs in his reports (particularly Maggs I ¶¶ 71, 153 et seq., 213 as well as Maggs III ¶ 10) were either withdrawn or put into a more relative perspective during his oral testimony (particularly Tr. 440 et seq.).

535. Indeed, taking into account the wide discretion available in this regard, the Tribunal cannot find any evidence on file sufficiently showing that these auctions were either breaching Russian law or even breaching the higher standards to be applied under the IPPA.

(E) Whether the Alleged Expropriatory Acts Were Discriminatory

1. Claimant

536. To be entitled to respect under international law, a state's exercise of its power to tax must be non-discriminatory. Claimant argues that the tax assessments, which were the pre-cursor to the auctions which expropriated the assets of Yukos, were discriminatory. Claimant cites *LG&E v. Argentina* (CLA-23) to support its contention that a measure is discriminatory if the intent is to discriminate or if the measure has a discriminatory effect. Claimant contends that Respondent chose to reinterpret its tax laws in respect of Yukos alone, and not in respect of any other oil companies. (¶¶215 – 216 C-I)

537. Respondent intended to discriminate against Yukos as compared to other oil companies, however Claimant need not prove intent. Whether intentional or not, the Russian Federation discriminated *de facto* against Yukos as compared to other Russian oil companies both by (i) levying taxes against Yukos far in excess of the amounts levied against other oil companies for the same tax planning strategies; and (ii) enforcing and collecting those assessments in a manner that resulted in the complete transfer of Yukos' assets to a state-owned enterprise, while permitting other Russian oil companies to settle the claims against them on comparatively reasonable terms. (¶217 C-I)

538. Yukos was treated differently to other oil companies. The amount of back taxes assessed against Yukos were far in excess of the amounts assessed against other Russian oil companies. Claimant sets out in a variety of tables at ¶¶218 – 223 C-I that for the years 2000 to 2003,

the gross discrepancies between reported tax savings prior to 2004, profit taxes, VAT, penalty interest and fines and total tax liabilities. Claimant submits that it is clear from the tables that Yukos was discriminated against.

539. Maggs I sets out at ¶173 that: “The treatment of Yukos by the Russian tax authorities was inconsistent with the treatment of other comparable taxpayers. The authorities developed, and secured court approval of totally new theories of tax liability for the Yukos case. Even though a number of other large oil companies had made extensive use of trading companies in low tax zones, these companies were not subjected to ruinous tax consequences.

540. Claimant argues that Respondent confuses the standard for a claim of unlawful discrimination against foreign investors under Article 2 of the IPPA with the standard for determining the lawfulness of a state’s expropriation of assets under Article 5 of the IPPA. While the nationality of the investor may be relevant for a claim brought under Article 2 of the IPPA, the nationality of the investor is not relevant in a claim for expropriation under Article 5. (fn 44 and ¶97 C-II)

541. Respondent does not provide any evidence to support its claim that Yukos was not discriminated against. It ignores the ample public evidence that Yukos was one of a number of Russian oil companies that also saved significant sums in profit taxes by using trading companies in the Low Tax Regions. Respondent’s attempts to argue that Yukos “always stood at the opposite end of the spectrum” and was “the most extreme” (both Annex A R-I p.13) in its tax practices fail because Respondent merely highlights the steps Yukos took to defend itself *after* the Tax Ministry unlawfully assessed it for billions of dollars of retroactive profit taxes and VAT. Respondent’s argument is Kafkaesque, Yukos is said to be guilty because it proclaimed its innocence and tried to defend itself. (¶¶85 – 91 C-II)

542. Respondent’s arguments used to justify discriminatory treatment of Yukos, by stating that Western courts would have reached the same result, ignore the fact that every Western court that has considered the events surrounding the destruction of Yukos has concluded that the

tax assessments were politically motivated and in bad faith. (§§92 – 93 C-II)

543. In respect of the VAT assessments in particular, Respondent has not pointed to a single instance where the Tax Ministry treated a taxpayer as differently as it treated Yukos. (§94 C-II)

544. The Russian courts' interpretation of Article 251 of the Tax Code (CM-242) differed depending on whether the case involved Yukos or Rosneft. As Maggs I points out, the courts applied one interpretation against Yukos but then took Article 251 on its plain meaning when dealing with a former Yukos subsidiary when it was controlled by Rosneft. (§95 C-II)

2. Respondent

545. Respondent argues that even if Claimant were able to demonstrate, which it cannot, that Yukos was the subject of discriminatory action, no claim of discriminatory conduct is cognizable in the absence of an allegation that the actions complained of targeted Yukos' foreign or British shareholders. It cites various authority (*ELSI case* – R-89; *Emanuel Too v. Greater Modesto Insurance Associates and the U.S.A.* – R-115) to support its claim that if Claimant is to substantiate a claim of discrimination, certainly in a tax context, it would have to allege that it was discriminated against on the basis of foreign or British nationality. It is not sufficient for Claimant to allege that Yukos was disfavoured as a result of selective tax enforcement. (§§288 – 290 R-I)

546. Differential treatment as a result of legitimate governmental policies or based on reasonable and objective justification is not discriminatory within the meaning of Article 5(1) of the IPPA. Discrimination necessarily implies an unreasonable distinction (*Amoco International Finance Group v. Iran* – CLA-5). Respondent argues that reasons specific to an expropriated enterprise may justify a different treatment. As Yukos was the largest and most blatant tax avoider of all Russian oil and gas companies, Yukos was a logical

candidate for tax assessments, penalties, and enforcement actions. (¶¶291 – 294 R-I)

547. Not every violation of tax law can be prosecuted and this is recognised (e.g. by the European Court of Human Rights - RLA-77). Yukos presented a highly visible target for tax enforcement. Not only was its conduct egregious in its misuse of domestic tax heavens, but the volume of taxes it evaded exceeded that of any other oil company operating in Russia by far. (¶¶294-295 R-I)

548. Respondent has not, as Claimant asserts (fn 44 to C-II), confused the standard for a claim based on the prohibition against discriminatory measures in Article 2(2) of the IPPA and a claim based on a discriminatory expropriation cognizable under Article 5(1). Claimant offers no explanation for the different interpretations of the term “*discriminatory*” in Article 2(2) and Article 5(1), and there is none. Article 2(2) prohibits discriminatory measures that impair the management, maintenance, use, enjoyment or disposal of investments. Article 5(1) extends the prohibition of discriminatory treatment in Article 2(2) to expropriatory measures, prohibiting expropriatory measures for a discriminatory “purpose.” To be for a discriminatory “purpose” within the meaning of Article 5(1) of the IPPA, an expropriation must target foreign investment. (¶¶155 – 157 R-II)

549. Claimant makes no attempt to show that the measures complained of were based on foreign ownership of Yukos’ shares. (¶154 R-II) Ample authority confirms the requirement that discriminatory conduct must target foreign investment in order to establish a claim under either Article 2(2) or 5(1) of the IPPA. Respondent relies on further authority for its interpretation of the term “*discriminatory*” in the case *Noble Ventures v. Romania* (R-308) which required that “the Claimant has to demonstrate that a certain measure was directed specifically against a certain investor by reason of his, her or its nationality”. (¶¶158 – 159 R-II)

550. It is not enough for Claimant to allege that the local company is the victim of discrimination. Claimant’s own submissions stress that

Yukos was singled out for domestic political reasons germane to its Russian majority shareholders, and not because of any foreign ownership of Yukos shares. Claimant merely relies on Western court decisions that it characterises as concluding “*that the tax assessments against Yukos were politically motivated*” and otherwise does not support its allegation with evidence. The Western court cases are irrelevant to this Tribunal, they involve distinct issues of fact and law, employed markedly low standards of proof, and have no precedent value even in their own domestic context. Claimant does not come close to meeting its heavy burden of proof with respect to its allegations of improper political motives on the part of the Russian Federation. (¶¶160 – 163 and Annex E R-II)

551. A claim of discrimination is factually unfounded. It is a matter of public record that Russian tax authorities also collected taxes from oil companies that had used and abused the special tax regimes. As a legal matter, “discrimination” is likewise another line of defense that tax authorities around the world would strongly resist, both because it would be incompatible with their legitimate interest in remaining free to treat taxpayers differently, when deemed appropriate, but also because, as a practical matter, the collection of revenues would be paralyzed if a taxpayer could, in contesting an assessment, demand – as Claimant does here – that the authorities demonstrate that they have treated no other taxpayer more favourably. (¶168 R-II)

552. The issue of discrimination is also addressed in Respondent’s answer to the Tribunal’s Question 3.3 set out *supra*.

3. Tribunal

553. With regard to the alleged discrimination, in addition to the parties’ submissions summarised above, the Tribunal takes into account what the parties have answered to the Tribunal’s question 3.3 in PO-5.

554. The term “discrimination” seems to have been used by the parties regarding two different standards which are not identical:

555. The IPPA uses the term in Article 2(2) regarding discriminatory measures and in Article 5(1) regarding discriminatory expropriations. In the view of the Tribunal, in both provisions, the term focuses on a discrimination between nationals and foreigners. In this regard, the Tribunal finds no evidence on file that Respondent's measures disputed in the present proceedings included such a discrimination. The focus of Respondent's measures was clearly on Yukos irrespective of its domestic or foreign shareholders.

556. The second kind of "discrimination" which the parties and particularly the Claimant refer to is whether Yukos was discriminated against in comparison to the Respondent's treatment of Yukos' competitors. In this respect, the Tribunal can refer to its above considerations which concluded that, indeed, in the application of the tax law, in the tax assessments and in the conduct of the YNG auction, Yukos was treated by Respondent quite different to the treatment accorded to its competitors and other comparable tax payers and no convincing reasons have been shown by Respondent for this differentiation.

557. And here again, the Tribunal concludes that, even though some of Respondent's explanations and arguments for the distinctions made seem plausible, there remain doubts whether they can be seen as a fair and equitable treatment. Again, whether this, by itself, would be sufficient to find a breach of Article 5 IPPA in spite of the high threshold mentioned above particularly regarding a denial of justice by the Russian courts, must not be decided here by the Tribunal. However, in any case, these doubts in respect to the distinctions perceived between Yukos and its competitors and comparable taxpayers must be taken into account in the context of the examination later in this award regarding the question whether the cumulative affect of the totality of Respondent's conduct is a breach of the IPPA.

(F) Whether Alleged Expropriatory Acts Were Bona Fide

1. Claimant

558. Claimant submits that a State's exercise of its police powers is not bona fide if the State's object and purpose in exercising those powers goes beyond its legitimate interest in enforcing its laws. The evidence in this case overwhelmingly demonstrates that the measures undertaken by the Respondent against Yukos were, at a minimum, grossly disproportionate to Respondent's legitimate interest in the enforcement of its tax laws. At best the tax proceedings against Yukos were a transparent attempt to legitimise the re-nationalisation of assets that had been transferred from state control to Yukos in the 1990's. (¶192 C-I)
559. Claimant argues that Respondent failed to satisfy the most basic requirements of due process. The measures taken against Yukos were not a bona fide exercise of police powers and the measures were "tantamount to expropriation" and demonstrate a concerted effort by Respondent to re-nationalise Russia's oil assets. President Putin set out to "liquidate the oligarchs as a class" and targeted Mr Khodorkovsky when he broke the truce requiring that the oligarchs stayed out of politics. The non-bona fide nature of the efforts taken by Respondent are highlighted in the auction of YNG, which President Putin's own adviser later described as the "swindle of the year" (CM-186). It is simply impossible to conclude that the destruction of Yukos arose out of a bona fide exercise of the Russian Federation's power to enforce its tax laws. (¶¶192 – 200 C-I)
560. In addition to the arguments set out above regarding the tax assessments in section (A) above, C-I Claimant sets out in C-II that the explanation offered by Respondent for the pursuit of Yukos for profit taxes and VAT as it contradicts Respondent's own position on those matters. (¶45 C-II)
561. Firstly, the profit tax assessments were not bona fide because Respondent had for a period before it undertook the extraordinary assessments tried to change the laws and had been aware of Yukos'

use of Low Tax Regions as Yukos publicly disclosed it in its audited accounts. The Russian Government did not effect change to the tax laws relating to Low Tax Regions until the beginning of 2004. Furthermore, the use of trading companies in the Low Tax Regions was legal. The Russian authorities and courts had to depart from well established law to find Yukos guilty (cf. Maggs Reports). The use of trading companies in the Low Tax Regions was legal as set out in the Maggs Reports. The only authority the Konnov Report cites to demonstrate “consistent” interpretation by the Russian courts is the judgments relating to Yukos. The lawfulness prior to 2004 of Yukos’ use of trading companies located in the Low Tax Regions is powerful evidence that the retroactive assessment of profit taxes against Yukos was not a bona fide exercise of the Russian Federation’s power to tax. (¶¶46 – 58 C-II)

562. The Russian Federation knew of Yukos’ tax structures as early as 1998, and Respondent’s argument that it became aware of Yukos’ tax structure only in 2003. Claimant cites various examples of the tax authorities knowledge of Yukos’ tax structures, in particular its own audits in respect of trading companies in the Low Tax Regions, well before the extraordinary assessments in 2004. Furthermore, the report compiled by PwC for 2002 (RM-47), which Respondent argues is relevant as it served as a warning to Yukos, does not identify any significant tax issues and particularly any profit tax issues, most likely because Yukos’ use of the trading companies was legal at the time the report was written in 2002. (¶¶59 – 74 C-II)

563. Secondly, the VAT assessments were not bona fide because no VAT was due on exported oil. There was no legal basis for the legal formalism used to impose the US\$ 13.5 billion VAT assessment. Respondent argues that that Yukos itself should have to pay the VAT because its trading companies filed the documents necessary to prove that the oil had been exported and to claim a VAT refund. This legal formalism is contradictory to the reasoning used for the profit tax assessment and is also contrary to the Russian Constitutional Court’s interpretation of the tax code in this regard (Decision No. 12-P – CM-39). The VAT assessments cannot be considered a bona fide collection of tax. (¶¶75 – 84 C-II)

2. Respondent

564. Respondent attacks Claimant's arguments that the Russian Federation's tax assessments were not bona fide. Claimant makes no attempt to show that the tax assessments were mala fide. At most, Claimant argues that Yukos' tax schemes were lawful under Russian law and that assessing taxes on lawful tax schemes is "powerful evidence" that the tax assessments were not a bona fide exercise of the Russian Federation's power to tax. In addition, Claimant alleges that since VAT is not due on exported oil, the VAT assessments were also not bona fide. (§151 R-II)

565. Claimant correctly states that "[t]he Russian Federation's actions must be judged by international standards, not by Russian domestic standards," but makes no attempt to evaluate the Russian Federation's actions under international standards. Even if it were shown that the the tax assessments did not comply with Russian law does not establish that they were mala fide. In any event, Respondent has demonstrated that the tax assessments were consistent with Russian law and, more importantly, comport with international standards. (§§152 – 153 R-II)

3. Tribunal

566. With regard to the parties arguments on the bona fide issue, in addition to the parties' submissions summarised above, the Tribunal takes into account what the parties have submitted and what has been summarized above regarding the application of the tax law, the tax assessments, and the auctions.

567. And with regard to its conclusions regarding the bona fide issue, the Tribunal can refer to its conclusions above on these respective issues to the effect that, even though some of Respondent's explanations and arguments seem plausible, the application of the tax law, the tax assessments on Yukos and the conduct of the auctions must be seen as a treatment which can hardly be accepted as bona fide.

568. And again, whether this, by itself, would be sufficient to find a breach of Article 5 IPPA in spite of the high threshold mentioned above particularly regarding a denial of justice by the Russian courts, must not be decided here by the Tribunal. However, in any case, these doubts must be taken into account in the context of the examination later in this award regarding the question whether the cumulative affect of the totality of Respondent's conduct is a breach of Article 5 of the IPPA.

(G) Whether Alleged Expropriatory Acts Were Confiscatory

1. Claimant

569. The auction of the entirety of Yukos' assets was by definition confiscatory: It was carried out in such an arbitrary and unreasonable manner as both to establish the bad faith of the process and to be itself tantamount to expropriation. The Respondent's actions thus cannot be considered a proper exercise of its power to tax. (¶191 C-I)

570. The total effect of the VAT tax assessment and the profit tax assessment against Yukos amounted to being confiscatory. The resultant effective tax rate for Yukos was 54%, vastly higher than the average corporate income tax rate of 30%. (¶98 C-II)

2. Respondent

571. Respondent argues that States have a wide latitude in imposing and enforcing taxation laws even if resulting in substantial deprivation. In the present case, Respondent's assessments were consistent with international practice. All tax authorities and courts that reviewed Yukos' case required or were authorised to review the case giving precedence to the economic substance over legal form. This is exactly what counterparts in other jurisdictions would have done. (¶¶164 – 167 R-II)

572. Claimant has not made any attempt to show that Respondent's tax measures were inconsistent with international practice. Indeed, strong support exists in international practice for the levying of penalties, assessment of VAT on improperly documented exports, tolling the statute of limitations for tax year 2000, conducting a repeat audit and rejecting Yukos' claims of "political persecution" and "confiscation". Furthermore, the effective tax rate of 80% is much lower than equivalent rates imposed by EU Member States, and in any case, much lower than the 1300% rate charged in the *Corn Products* (CLA-15) case Claimant cites as support for its argument on confiscation. (¶¶168 – 178 R-II)

3. Tribunal

573. Regarding the question disputed between the parties as to whether Respondent's actions were confiscatory, there is little to add by the Tribunal to its considerations above in this award.

574. It is undisputed that Respondent's measures resulted in the deprivation of Yukos' assets. It is also undisputed, as Respondent correctly argues, that States have a wide latitude in imposing and enforcing taxation laws even if resulting in substantial deprivation. The only question is whether Respondent's measures can be justified as falling within this latitude of discretion. In this regard, the Tribunal refers to its considerations above with respect to the application of Russian tax law, the tax assessment, and the auctions which resulted in the conclusion that Respondent's actions towards Yukos cannot be justified by its authority to apply and enforce its tax laws. Therefore, Respondent's measures were indeed confiscatory.

575. However, again, whether this, by itself, would be sufficient to find a breach of Article 5 IPPA in spite of the high threshold mentioned above particularly regarding a denial of justice by the Russian courts, must not be decided here by the Tribunal. However, in any case, this qualification must be taken into account in the context of the examination later in this award regarding the question whether the cumulative affect of the totality of Respondent's conduct is a breach of the IPPA.

(H) Compensation for Alleged Expropriation

1. Claimant

576. Although Article 5(1) of the IPPA recognises a Contracting Party's right under certain conditions to expropriate or nationalise property, the failure of a Contracting Party to respect the conditions under which that article permits such a measure renders an expropriation or nationalisation unlawful. (§187 C-I)

577. It is undisputed that Respondent has never paid any compensation whatsoever to Yukos or its shareholders. The facts demonstrate that the expropriation of Yukos' assets was discriminatory, and that the public purpose articulated by Respondent – “legitimate measure of taxation” – is simply unbelievable. Claimant is therefore entitled to be fully compensated by the Russian Federation for the unlawful expropriation of its investment and for the injury to that investment caused by the expropriation of the assets of the Russian company in which it invested, as set forth in Claimant's Argument on Quantum. (§188 C-I)

2. Respondent

578. Respondent does not make any submissions regarding compensation to Claimant for any alleged expropriation. It relies on its arguments, above, regarding Claimant's standing and that an expropriation has not been made out.

3. Tribunal

579. As in the previous chapter of this award, regarding the question of compensation, there is little to add by the Tribunal to its considerations above in this award.

580. It is undisputed that Respondent's did not offer or pay any compensation to Yukos or its shareholders for the measures which resulted in the deprivation of Yukos' assets. It again is also undisputed, as Respondent correctly argues, that States have a wide latitude in imposing and enforcing taxation laws even if resulting in substantial deprivation without compensation. The only question is whether Respondent's measures can be justified as falling within this discretion. In this regard, the Tribunal refers to its considerations above with respect to the application of Russian tax law, the tax assessment, and the auctions which resulted in the conclusion that Respondent's actions towards Yukos cannot be justified by its authority to apply and enforce its tax laws.

581. However, again, whether this, by itself, would be sufficient to find a breach of Article 5 IPPA by expropriation without compensation, in spite of the high threshold mentioned above particularly regarding a denial of justice by the Russian courts, must not be decided here by the Tribunal. However, in any case, this qualification must be taken into account in the context of the examination later in this award regarding the question whether the cumulative affect of the totality of Respondent's conduct is a breach of Article 5 of the IPPA.

(I) Whether, in any event, Claimant had no legitimate investment-backed expectations

1. Claimant

582. Apart from highlighting in its arguments on damages, at ¶¶196 C-II *et seq.*, that Claimant had a legitimate expectation that Respondent would follow its laws and not expropriate Yukos' assets, Claimant does not address Respondent's contention that a protected investment under an investment treaty requires a reasonable expectation of profit.

2. Respondent

583. Respondent argues that a protected investment depends upon a reasonable expectation of a profit. It cites *Consortium RFCC v. Morocco* (RLA-58) to support its claim that Government action must deprive the investor of a distinct, reasonable investment-backed expectation. Respondent also argues that even if Claimant qualified as an investor after 19 November 2004, Claimant must have accepted the tax regime as it existed at the time of the making of the investment and should have expected the enforcement measures that followed. Speculation that tax measures might not be enforced does not amount to a reasonable expectation. (¶¶252 – 257 R-I)

3. Tribunal

584. Regarding Respondent's arguments with respect to Claimant's alleged lack of legitimate expectations, the Tribunal recalls that, above in this award, it has already concluded that Claimant is an "investor" and has made an "investment" as provided for by the IPPA.

585. Further, this issue may be relevant for the determination and valuation of any possible damages to be awarded to Claimant in so far as Respondent is found to be liable under the IPPA. This matter will be examined below in this award.

(J) Whether Cumulative Effect of the Various Strands of Respondent's Actions Constituted a Breach of the IPPA

1. Claimant

586. Claimant argues that the Russian Federation seized Yukos' assets which may have been in hindsight "an effort to reassert control over strategic petroleum resources that had escaped from Government control during the privatisation process that had followed the collapse of the USSR and incidentally to suppress political opposition." (¶2-6 C-II)

587. The Russian Federation pursued a series of specious and retroactive tax enforcement measures against Yukos that culminated in the expropriation of Yukos' assets and the transfer of virtually all of its assets to state-owned companies. This was due in part to a change in treatment toward Yukos after Mr Khodorkovsky publicly challenged the Putin administration and after various projects proposed by Yukos seemed to threaten the Russian State's control of its petroleum resources. As a result, Mr Khodorkovsky was arrested and imprisoned on charges of tax fraud and other offences – one of many examples where Yukos' management and outside advisors would be targeted. Following the arrest of Mr Khodorkovsky, the tax authorities undertook a hasty “supervisory” audit of the Yukos group of companies, just in time to get under the statute of limitations for the tax year 2000 (Tr p. 26), followed by further audits for later tax years, leading ultimately to a US\$ 16.7 billion assessment in back taxes, penalties, and interest and VAT assessments. The Russian Federation then commenced expedited proceedings in 2004 to enforce the assessments while taking steps to prevent Yukos from paying or challenging the assessments. It then proceeded to auction Yukos' assets, commencing with the YNG auction where the “winning” company was set up by Respondent to provide an illusion of independence. YNG eventually ended up in the hands of state-owned Rosneft, which later described the purchase of YNG as the most monumental bargain in Russia's modern history. Respondent then went on to take further steps via Rosneft to liquidate Yukos by purchasing Yukos debt from the SocGen Group in exchange for the consortium filing for Yukos' bankruptcy. The bankruptcy involved auctions of Yukos' remaining assets which were then acquired by state-owned Gazprom and Rosneft. (§13 C-II)

588. The Russian Federation's auctions of Yukos assets constitute an expropriation and, with regard to those assets that ended up in the hands of Russian state-owned companies, a nationalisation of Yukos' assets. (§19 C-II)

2. Respondent

589. Respondent contends that the Claimant's characterisation of Respondent's actions in respect of Yukos is conspiratorial. The assertion that Yukos' collapse was the result of a coordinated and elaborate plot by the Russian Federation in order to "reassert state control over strategic petroleum assets, and incidentally to suppress political opposition" (C-II ¶5) is neither plausible nor proven. There is a heavy burden of proof of demonstrating the anti-Yukos conspiracy. Claimant relies mainly on circumstantial evidence including the report by the Special (CM-46) Rapporteur to the Council of Europe, who conducted a fundamentally flawed report based on press articles and Yukos' own high-powered lobbyists. It deliberately avoided an examination of the tax claim. This resulted in a non-binding political resolution of the Parliamentary Assembly of the Council of Europe (CM-48). Unfortunately, this resolution was relied on by the judiciary in non-Russian jurisdictions deciding cases concerning extradition of individuals connected with the Yukos case. Furthermore, the statements by Russian officials cited by Claimant are also of no relevance as they stemmed from extremist figures. The Russian judiciary are alleged by Claimant to have been strongly pressured to rule against Yukos. This claim is unfounded as Claimant has failed to address the rebuttals put by Respondent in Annex A to R-I setting out that Yukos had ample time to review documents, the removal of judges was proper and complied with Russian law and that there is no evidence to support an improper connection between service medals to judges and the Yukos case. (Annex E to R-II, pp.1-24)

590. Claimant's "conspiracy theory" fails to acknowledge the complicity of Yukos' own management and controlling shareholders in the company's collapse. Yukos continued to use the system of tax evasion in the Low Tax Regions long after its competitors had stopped, nor did Yukos attempt to file amended tax returns to minimise their liability. Furthermore, Yukos frightened away potential bidders from the YNG auction which had the effect of reducing the proceeds at auction. (Annex E to R-II, pp. 25-26)

591. Claimant's conspiracy theory also fails to address why parties unrelated to Yukos such as the SocGen Group were complicit in the alleged scheme of the Russian Federation when their reputation would be risked and they would risk the "lifetime of litigation" threatened by Yukos. Finally, Claimant has failed to demonstrate that if Respondent had indeed a malicious intent to "destroy Yukos", why it then had not pursued quicker and less uncertain taxation remedies. (Annex E to R-II, pp. 27-29)

3. Tribunal

592. The Tribunal recalls its findings in various sections above in this award that, without repeating the extensive arguments presented by the parties regarding the various disputed issues, it needs to and would discuss its conclusions therefrom only in so far as they may be relevant for Respondent's responsibility under the IPPA in so far as they might be seen as one of several aspects relevant for the consideration of the cumulative effect of the totality of Respondent's conduct which the Tribunal will examine later in this Award.

593. The Tribunal will deal with that latter aspect in section H.VIII "Conclusions of Tribunal on Liability" below.

H.VII. Exhaustion of Local Remedies

1. Claimant

594. Claimant is silent on local remedies except to the extent that it argues that Yukos was restricted from exercising its right to due process, and as highlighted above, Yukos was victim of a concerted effort by executive and judicial branches to re-nationalise its assets.

2. Respondent

595. The acts alleged by Claimant only give rise to an obligation on Respondent to make domestic legal remedies available for Claimant. To comply with Article 5(1), it is only necessary (and therefore sufficient) that relief could have been sought in Russian courts to remedy the alleged expropriatory conduct. There is no free-standing due process requirement in the IPPA that Claimant can invoke to redress the alleged violations of due process that Claimant contends constitute elements of an expropriation. There are numerous examples of investment treaties which require due process to be breached to allow an investment claim. In order to comply with such a requirement (of which Article 5(1) is an example) it is only necessary that relief could have been sought in Russian courts to remedy the alleged expropriatory conduct. Since Claimant has chosen not to avail itself of those remedies, no violation of Article 5(1) is possible. (¶¶266 – 272 R-I)

596. Respondent argues that the Russian monist legal system would have allowed Claimant to directly claim rights based on an international treaty such as the IPPA in the Russian courts. (¶¶273 – 282 R-I)

3. Tribunal

597. For the reasons outlined above in this award, the Tribunal is satisfied that Claimant has standing to bring a claim under the IPPA.

The IPPA contains no requirement that domestic legal remedies must be exhausted before a claim can be made.

Y

Y

Y

Y

H.VIII. Conclusions of Tribunal on Liability

598. Without repeating the contents, the Tribunal takes particular note of the following documents on file:

Party Submissions:

C-I ¶¶236 - 242
 R-I ¶¶134 - 142
 R-I Annex B pp. 19 - 23
 C-II ¶¶169 - 170
 R-II ¶¶147 - 178
 C Tr. pp. 57-58, pp. 756 - 757
 CPHB-I ¶¶60 - 115
 RPHB-I ¶¶76 - 77, 83, 101 - 102
 CPHB-II ¶¶49 - 52

Exhibits:

CM-60 Ministry of Taxation for the Russian Federation, Inspection Report No. 08-1/1, 29 December 2003

Legal Authority:

CLA-19 *GAMI Investments, Inc. V. Government of the United Mexican States*, Final Award, UNCITRAL Rules, 15 November 2004
 CLA-80 *CMS Gas Transmission Co. v. Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/01/8, 17 July 2003
 CLA-81 *Enron & Ponderosa Assets, L.P. v. Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/01/3, 14 January 2004
 RLA-16 *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Second Phase)* (Belgium v. Spain), International Court of Justice, Judgment of 5 February 1970, ICJ Reports 1970
 R-89 *Case Concerning Elettronica Sicula S.p.A. (ELSI) (US v. Italy)*, International Court of Justice, Judgment of July 20, 1989, ICJ Reports 1989

Witness Statements:

Maggs I	¶¶77 – 121, 150 - 152
Maggs II	¶¶43 – 47, 118,
Maggs Tr.	pp. 442 - 443
Konnov I	¶¶94 -102, 126 -134, 142 – 143 , 216
Konnov II	¶¶31 – 34, ¶¶72 - 82
Konnov Tr.	pp. 469, 568 – 569

599. Further, the Tribunal takes into account the submissions by the Parties regarding the various disputed measures and aspects summarized above, and notes in particular the submissions of the Parties on the cumulative effect of the various strands of Respondent's actions in respect of Yukos. And further, the Tribunal refers to its own considerations and conclusions above with respect to these individual measures and aspects. As mentioned above, the Tribunal considers that an assessment of whether Respondent breached the IPPA can only be effectively conducted if the conduct as a whole is reviewed, rather than isolated measures or aspects.

1. Scope of Jurisdiction

600. From its decisions in its Award on Jurisdiction, the Tribunal recalls section I.2:

The Tribunal has jurisdiction over the claims submitted by Claimant on the basis of the Most-Favoured Nation Clause in Article 3 UK-Soviet BIT in connection with Article 8 of the Denmark-Russia BIT.

601. Under the Denmark-Russia BIT, as there is no limiting language, it is quite clear that its arbitration clause in Article 8 provides jurisdiction regarding the protection granted in Article 4 of that BIT for expropriation. Therefore, via the MFN clause in Article 3 IPPA, the present Tribunal does have jurisdiction in that regard as well.

2. **Attributability**

602. The Tribunal notes that neither Party addressed the question whether the acts alleged by the tax ministry, courts, officials and other bodies were in fact acts of organs of the State and attributable to Respondent. As the Parties seem to do, the Tribunal regards the evidence for attributability for the alleged acts to the State for consideration of a possible responsibility under the IPPA and international law to be clear.
603. The courts are also organs of the Russian state. From its considerations above in this Award regarding the possible examination of decisions of the Russian courts, the Tribunal recalls its conclusion that on one hand, in addition to this Tribunal not acting as an appeal court on the decisions of the Russian courts, a high threshold must be applied in order to conclude that, the conduct of the Russian courts, by itself, would be a breach of the obligation of fair and equitable treatment in the form of a denial of justice, but that on the other hand however this does not exclude that the Tribunal, in the consideration of the totality of Respondent's measures in their cumulative effect which it finds to be appropriate, includes the examination of the conduct of the courts in that context.
604. The Tribunal has raised the question with the Parties whether there ought to be any distinction between the measures taken by Respondent toward Yukos during the period in which the Participation Agreements were in force and the measures taken thereafter. In view of the Tribunal's above conclusion that Claimant held an investment during that period, the Tribunal considers that Respondent must be held responsible for measures taken in respect of the investment during the period the Participation Agreements were in force.

3. **Applicable Provisions of IPPA for Claimant's Claim in respect of its shareholding**

605. Traditionally, under international law the starting point for considering what rights shareholders of a company have for measures taken by a state is the *Barcelona Traction* case decided by the ICJ. That case held that shareholders can only realise the rights which their shares entitle them to, not rights held by the company in which they own shares. However, it must be noted that this ruling was made long ago in a case on diplomatic protection in which two states were the parties and not a case in which investors could and did directly raise claims against a state as they can and do in modern BITs. As the Court pointed out in paragraph 90 of its Judgment, the matter is normally regulated by specific agreements, notably those for the protection of foreign investments, as indeed is the case here.

606. In this regard the Tribunal notes that the IPPA deals explicitly with the rights of shareholders in Article 5(2) stating that:

“Where a Contracting Party expropriates the assets of a company or enterprise which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party have a shareholding, the provisions of paragraph (1) of this Article shall apply.”

607. For the IPPA, it is therefore expressly clarified that also shareholders, be they majority or minority shareholders, also have a claim for protection under Article 5 if expropriatory measures falling under paragraph (1) are taken “only” against the company and not directly against the shareholders themselves.

608. In this context, the Tribunal notes that, even without express provisions such as Article 5(2), the recent jurisprudence from investment arbitration tribunals considering other investment treaties has confirmed the ability for shareholders to claim for measures taken against the company in which they hold shares and has been developed to the point accepting that minority shareholders have made claims for indirect damage. The Tribunal notes in this regard the cases *ELSI* (R-89), *GAMI* (CLA-19), *CMS Gas Transportation*

Company (CLA-80) and *Enron & Ponderosa* (CLA-81). These decisions confirm that modern investment treaty arbitration does not require that a shareholder can only claim protection in respect of measures that directly affect shares in their own right, but that the investor can also claim protection for the effect on its shares by measures of the host state taken against the company

609. In view of the above, the Tribunal comes to the **conclusion** that shareholders rights are expressly protected by Article 5 (2) IPPA against expropriatory measures falling under paragraph 1 of the same provision

4. **The alleged measures in breach of Article 5 of the IPPA**

610. It is recalled that Article 5 IPPA provides:

“Expropriation

(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a purpose which is in the public interest and is not discriminatory and against the payment, without delay, of adequate and effective compensation. Such compensation shall amount to the real value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall be made within two months of the date of expropriation, after which interest at a normal commercial rate shall accrue until the date of payment, and shall be effectively realizable and be freely transferable. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its

investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company or enterprise which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party have a shareholding, the provisions of paragraph (1) of this Article shall apply."

611. In its examination as to whether the totality of Respondent's measures in their cumulative effect must be considered as a breach of Article 5 IPPA, the Tribunal refers to its considerations above when examining the application of Russian tax law, the actual tax assessments, the conduct of the auctions, and later the parties arguments and the Tribunal's considerations with respect to bona fide. Without repeating the extensive arguments presented by the parties regarding these various disputed issues, it was already pointed out above that the Tribunal has to reach conclusions therefrom only in so far as they may be relevant for Respondent's responsibility under the IPPA as to whether they might be seen as one of several aspects relevant for the consideration of the cumulative effect of the totality of Respondent's conduct which the Tribunal will examine later in this Award.

612. Further, to avoid repetition, the Tribunal also recalls its conclusions that, even though some of Respondent's explanations and arguments for the justification of the measures taken seem persuasive or at least plausible, there remain doubts whether the measures can be seen as bona fide and non-discriminatory. It was also pointed out that the Tribunal did not have to decide whether any particular measures, by themselves, would be sufficient to find a breach of Article 5 IPPA, in spite of the high threshold mentioned above particularly regarding a denial of justice by the Russian courts, but that these doubts must be taken into account in the context of the examination later in this award regarding the question whether the cumulative affect of the totality of Respondent's conduct is a breach of Article 5 of the IPPA.

The Tribunal now turns to this latter examination of the totality of Respondent's measures and the respective application of Article 5 IPPA .

613. In this context, the Tribunal takes note of the parties' answers to the Tribunal's Question 3.9 of PO-5, and of particularly the following:
614. As Claimant points out, the treatment of Yukos and of Mr. Khodorkovsky changed dramatically after the latter had publicly criticized the Putin administration and after several projects suggested by Yukos seem to have been understood as threatening the government's control over the Russian petroleum resources. The Russian authorities arrested Mr. Khodorkovsky on 25 October 2003 on charges primarily stemming from the 1994 privatization of Apatit (a company unrelated to Yukos), even though the General Prosecutor's Office of the Russian Federation, in its letter to President Putin had, towards the end of the letter, concluded that there were "*no grounds for it to take action.*" (CM-423) (In this context, the Tribunal has taken note of the Decision of the European Court of Human Rights accepting the Application of Mr. Khodorkovsky complaining against his treatment (CM-381), but in view of the different criteria established by the European Convention of Human Rights this Tribunal does not consider this decision as relevant for the present case based on the IPPA.)
615. Six weeks later, in December 2003, the tax authorities commenced the re-audit of Yukos that reversed the findings of their earlier audit and assessed billions of dollars of tax claims. The Audit Report of the December 2003 re-audit expressly referred to the criminal prosecution of Yukos executives as a basis for rebutting the presumption of good faith to which Russian taxpayers are entitled. (CM-60 at 14)
616. The 6 April 2004 letter from the Deputy Minister of Taxes and Levies of the Russian Federation to Yukos (RM-1548) expressly connected the tax assessments against Yukos to Mr. Khodorkovsky, this time with reference to his political writings in a letter published end of March in the newspaper Vedomosti.

617. These facts suggest that measures taken were linked to the strategic objective of returning petroleum assets to the control of the Russian State and to an effort to suppress a political opponent.

618. This has to be seen together with the numerous departures from earlier application practice of Russian law which the Tribunal found above in its examination of the application of that law, of the actual tax assessments, of the auctions, and of the bona fide issue. In this context it should be pointed out that, even if taxation as such is excluded from qualifying as a breach by Article 11(3) of the Denmark-Russia BIT and thus also for the IPPA under its MFN clause, this does not exclude to take taxation measures into account, besides other measures of Respondent, in considering the cumulative effect of a general pattern of treatment in the examination whether that qualifies as "*measures having effect equivalent to nationalisation or expropriation*" and as "*discriminatory*" (Article 5(1) IPPA).

619. The Tribunal also recalls from its considerations above that it is able to review factual matters and legal steps that occurred prior to Claimant's purchase of Yukos shares such as the application of tax law in order to inform its investigation of the major alleged acts, namely the auctions, which, taking into account the Tribunal's conclusion on meeting the definition of "investor" and "investment", indisputably occurred when Claimant held Yukos shares.

620. On that basis, without repeating its above considerations of the individual measures of Respondent, the Tribunal comes to the following conclusions:

- a. **VAT:** The Tribunal is not satisfied that the enormous VAT assessment plus fines and interest was a bona fide measure of taxation on Yukos. The staggering scale in addition to the inconsistency of approach between the profit tax assessment and VAT assessment must be seen as evidence of intentions toward Yukos which go beyond mere application of the tax law

and cannot be considered as a bona fide and non-discriminatory treatment.

b. **Profit taxes:** The Tribunal considers that the legal landscape in effect during the period in which Yukos claimed the tax benefits from the Low Tax Regions was defined by ambiguous legislation which Yukos clearly used to its advantage. However, the subsequent re-application of amorphous principles of “good faith” and “proportionality” with fluid levels of investment to be made in the Low Tax Regions are a weak defence by Respondent given the scale of the tax assessed in the re-assessment audits beginning in December 2003 and Yukos’ openness in taking advantage of that tax regime when the initial audits were conducted and also were against bona fide and discriminatory in view of the treatment of other comparable companies using similar methods to avoid taxes.

c. **Repeat offender fines:** The US\$ 3.8 billion repeat offender fines on the basis of conduct pre-dating the tax audit again appears to the Tribunal as a departure from practice applied earlier and from that granted to other companies and thus to be one part of a cumulative effort to prevent Yukos’ ongoing existence.

d. **YNG auction:** The Tribunal recalls the circumstances described above when considering this auction. In particular, it has been noted that the two bidders actually participating were not only under Respondent’s control but that the winning bidder was a completely unknown company just created before the auction and disappearing right after the auction and assigning its interests to Russian state-owned Rosneft. The circumstances that this bidder was further found to have no real offices and nevertheless was able to raise the deposit in the range of US\$ 1.7 billion and then the purchase price with the apparent help of Rosneft further contribute to the impression that the scheme was set up under the control of Respondent to bring Yukos’ assets under Respondent’s control. Therefore, from the

evidence on file, the Tribunal concludes that the auction on 19 December 2004 in which Baikalfinansgroup company, a front for Rosneft, acquired Yukos' main asset, the YNG shares, was organised in a manner to ensure state control was ultimately asserted over the asset. In short the Tribunal is convinced that the auction of YNG was rigged.

e. **Bankruptcy Auctions:** The last measure to consider in the scope of a claim under the IPPA was the last bankruptcy auction on 15 August 2007. In that context, the Tribunal notes the *rationae temporis* jurisdiction contentions of Respondent regarding the relevance to the liability question of measures that predated Claimant's purchase of shares in late 2004. In this regard, the Tribunal considers, consistently with its jurisdictional conclusions above, that those measures which predated Claimant's purchase of shares as well as measures predating the final auction inform the legal evaluation of the totality of Respondent's measures. Though the Tribunal did not find the bankruptcy auctions to be conducted contrary to Russian law, this does not change the general impression from the evidence on file for the Tribunal, since the application for bankruptcy by the SocGen Group was also conducted by association with the State-controlled company, Rosneft, and that they fitted into the obvious general pattern and obvious intention of the totality of the scheme to deprive Yukos of its assets.

621. In **conclusion** therefore, the Tribunal considers that the totality of Respondent's measures were structured in such a way to remove Yukos' assets from the control of the company and the individuals associated with Yukos. They must be seen as elements in the cumulative treatment of Yukos for what seems to have been the intended purpose. The Tribunal, in reviewing the various alleged breaches of the IPPA, even if the justification of a certain individual

measure might be arguable as an admissible application of the relevant law, considers that this cumulative effect of those various measures taken by Respondent in respect of Yukos is relevant to its decision under the IPPA. An illustration is, as Claimant has pointed out, that despite having used nearly identical tax structures, no other Russian oil company was subjected to the same relentless and inflexible attacks as Yukos. In the view of the Tribunal, they can only be understood as steps under a common denominator in a pattern to destroy Yukos and gain control over its assets.

622. The Tribunal now turns to the examination of the criteria provided in Article 5 (1) IPPA. In this regard, the Tribunal, without repeating them, refers to the extensive arguments by both Parties summarized above in this Award on the various aspects of the alleged taking and the Tribunal's respective comments.

623. A measure constitutes an expropriation if it has the effect of a substantial deprivation of property forming all or a material part of the investment, and if the measure is attributable to Respondent. If it is an expropriation, it is lawful if the requirements set forth in Article 5 IPPA are complied with.

624. In this context, the Tribunal has taken note of the parties' answers to the Tribunal's Questions 3.4 and 3.6 of PO-5. The Tribunal shares Respondent's view that that the term "*measures having effect equivalent to nationalisation or expropriation*" covers indirect expropriation, but without dispensing with the requirement of a substantial or total deprivation of (i) the economic value of an investment (as Claimant articulated the standard at the hearing), (ii) fundamental ownership rights, in particular, control of an ongoing business, or (iii) deprivation of legitimate investment-backed expectations. However, in that regard Claimant's argument is indeed relevant that, in determining whether a measure (or set of measures) is "equivalent to" expropriation, the Tribunal should evaluate whether the "net effect" of the measure (or set of measures) is the same as an outright expropriation, *i.e.*, a substantial or total deprivation of the economic value of an asset (see also pp. 719-721 Tr.). The Tribunal agrees with Claimant's submission that the

Tribunal need not address this question, because it is confronted with a complete taking of all of the assets of Yukos that amounts to nationalisation or expropriation of RosInvestCo's investment.

625. Indeed, it is undisputed that Yukos, as a result of the various measures of Respondent described in the Parties submissions and summarised above in this award, was deprived of its assets and that this affected Claimant's shares in Yukos. The taking of Yukos' assets could be understood as constituting expropriation of RosInvestCo's "Investment" under Article 5(1) of the IPPA, because the expropriation of the assets of a company has the same effect as an expropriation of the shares in such company. But the application of paragraph (2) of Article 5 makes it unnecessary to rely on paragraph (1) directly.

626. Therefore, it needs no further explanation that a taking took place.

627. The only question is whether this taking was justified and thus there is no breach of Article 5.

628. It is undisputed, and in the present case confirmed by Article 11(3) of the Denmark-Russia BIT, that the normal application of domestic tax law in the host state cannot be seen as an expropriatory act. On the other hand, it is generally accepted that the mere fact that measures by a host state are taken in the form of application and enforcement of its tax law, does not prevent a tribunal from examining whether this conduct of the host state must be considered, under the applicable BIT or other international treaties on investment protection, as an abuse of tax law to in fact enact an expropriation.

629. The Tribunal in particular refers to the following sources (also cited by Claimant) in support of its conclusions:

- a. Restatement (Third) of Foreign Relations Law of the United States ¶ 712 (1987), cmt. (g) ("[A]n expropriation can be executed through 'taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or

unduly delays, effective enjoyment of an alien's property or its removal from the states' territory.”).

b. Occidental Exploration & Production Co. v. Republic of Ecuador, Final Award, 1 July 2004, at ¶ 85 (“Taxes can result in expropriation as can other types of regulatory measures.”).

c. B.A. Wortley, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW, at 106 (1977).

d. Too v. Greater Modesto Insurance Associates, Iran-US Claims Tribunal, Award No. 460-880-2, 29 December 1989, IUSCTR, vol. 23, 378, at 387.

e. Paul Guggenheim, Les Principes de Droit International Public, Recueil des cours, 1952-I, vol. 80, 1 (“[A]mong the measures that cause such a transfer [of acquired rights], taxation and criminal measures must still be excluded, which – as for example the confiscation of the private property of a foreigner by virtue of a criminal judgment – obviously do not give rise to compensation – on the condition, however, that they do not constitute an abuse of right, i.e. that they do not have a confiscatory character.”).

630. As seen above in the consideration of Respondent's measures, these measures in their totality, including but going beyond application of tax law, can only be understood to have had the aim to deprive Yukos from its assets. Such a taking would only be admissible under Article 5 if the conditions of that provision are fulfilled.

631. The first of these conditions according to Article 5(1) is that the taking must be *for a purpose which is in the public interest*. Even if it could be argued that, in the judgement of the Russian Government, it was indeed in the public interest to take Yukos' assets, the Tribunal notes that this has never been claimed or shown by Respondent in these proceedings as it does not concede that there was indeed an expropriation.

632. And even if this were so, according to Article 5 IPPA the taking would have to be “*not discriminatory and against the payment, without delay, of adequate and effective compensation*”. From the above considerations in this award it can be seen that these conditions were not fulfilled. Even if one interprets the term “discriminatory” only as dealing with discrimination between nationals and foreigners and not as dealing with discrimination between various domestic companies as here between Yukos and its competitors in Russia, it is clear that Respondent did not offer or pay any compensation to Claimant for the taking.

633. Therefore, the **Tribunal concludes** that Respondent’s measures, seen in their cumulative effect towards Yukos, were an unlawful expropriation under Article 5 IPPA.

5. Yukos’ Contributions to the Loss of its Assets

634. The Tribunal notes that Yukos did in some respects contribute to its own demise. The individuals associated with it acquired the company during a tumultuous time in Russia – acquiring the company’s shares “at discounted prices” (§31 C-I). Yukos was a strategic asset that was once state controlled. It would stretch the bounds of plausibility if the Tribunal had to accept that Yukos’ management expected its belligerent response to the tax assessments and enforcement measures to be successful in preserving the company as it was in late 2003. Furthermore, in the view of the Tribunal, Yukos took some ill-advised steps which affected its own fate. These included the bankruptcy proceedings in Houston, United States which were subsequently dismissed but which dissuaded a number of foreign bidders in the YNG auction. Furthermore, the Tribunal notes the evidence presented by Mr. Oleg Konnov that Yukos had a number of opportunities to pay the tax obligations assessed against it.

635. While these contributions of Yukos to its own demise do not change the conclusion that Respondent breached the IPPA with regard to Claimant’s shares, they may be relevant in the consideration later in this Award of the quantum of any damage due to Claimant which will be examined hereafter in this award.

H.IX. Damages

1. Claimant

Standard for Compensation

636. Claimant's claim is based on the proportionate ownership of Yukos' expropriated assets represented by its shareholding in Yukos. It points out that Article 5(1) of the IPPA requires that compensation be paid to the investor within two months of expropriation, in the case of a lawful expropriation. In this case the expropriation is unlawful, not in the public interest, discriminatory and without payment of compensation. (¶¶248 – 254 C-I)

637. The IPPA is silent as to the standard of compensation in the case of an unlawful expropriation. Thus, the standard of compensation for an unlawful expropriation is the standard under customary international law. Claimant argues it is entitled to compensation for the expropriation pursuant to the Chorzow Factory (CLA-08) standard: "[r]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." Claimant points out that the Chorzow Factory standard has been upheld in multiple tribunals and courts and the case articulates the general principle of the consequences of the commission of a wrongful act. (¶¶255 – 261C-I)

638. As the expropriation took place over a period of almost three years, from 19 December 2004 (the YNG auction) to 15 August 2007 (the last bankruptcy auction), the breach of Respondent's duty may be deemed to occur when the process is completed. The Chorzow Factory standard to "wipe out all the consequences of the illegal act

and re-establish the situation which could, in all probability, have existed if that act had not been committed” requires the Tribunal to look at what Yukos would be worth today if its assets had not been unlawfully expropriated. To fix the moment of valuation earlier, in these circumstances, would amount to compensating Claimant as if it had liquidated its investment in Yukos as of that earlier date and transferred its funds to a fixed-rate security. Yukos – and its underlying and valuable oil assets – are what Claimant invested in. In this proceeding, Claimant seeks compensation equal to its share of the real value of the assets that the Russian Federation expropriated from Yukos as of the date of the final award. Re-establishing the situation that would have existed but for the Respondent’s unlawful conduct requires an examination of what Yukos would be worth today. (¶¶262 – 265 C-I)

639. Claimant relies on the LECG Report to demonstrate that Claimant’s share of the real value of Yukos’ expropriated assets could conservatively be valued at US\$ 183.2 million, as at 31 August 2009. (¶¶266 C-I and 180 – 184 C-II)

Legitimate expectation of compensation

640. In response to Respondent’s argument that Claimant deserves no compensation because “by the time Claimant acquired beneficial ownership of the Yukos shares in 2007, virtually all of the allegedly wrongful acts complained of had already since long occurred” such that Claimant deserves no compensation. (¶309 R-I) The Respondent argues further that “[e]xpectations based on the assumption that the State will abdicate its responsibilities and relinquish the exercise of its duty to prevent unlawful business practices deserve no protection.” Neither of these arguments has merit. First, Claimant’s inter-group Participation Agreements have no bearing on its entitlement to compensation in these proceedings. The Respondent does not cite a single case to support the argument that Claimant’s temporary transfer of an economic interest in the shares in any way affects Claimant’s entitlement to compensation. Claimant, as the

legal owner of seven million Yukos shares since at the latest 1 December 2004, is entitled to claim compensation for its proportionate share of the expropriation of all of Yukos' assets. This is plain from Article 5(2) of the IPPA. The Participation Agreements did not assign Elliott International any direct rights vis-à-vis the Yukos shares. To the contrary, these agreements made clear that Claimant in the first instance retained all rights to collect and receive any cash, payments, or other property in respect of the shares. Accordingly, Claimant should be compensated for the expropriation of Yukos' assets. (¶¶186 – 188 C-II)

641. Furthermore, in any event, Respondent's acts of expropriation became final well after termination of the Participation Agreements in March 2007.

Claimant had obligation to sell its shares

642. Respondent argues that Claimant should be denied compensation because in its view, Claimant exercised "unreasonable business judgement" and failed to mitigate its damages by not selling its Yukos shares between 7 December 2005 and 9 March 2006. Respondent further argues that Claimant exercised unreasonable business judgement when it purchased its second lot of shares on 1 December 2004. Claimant submits neither of these arguments carries weight. Respondent is essentially asserting that Claimant should have abandoned its then-pending claim to compensation. Respondent's own submission in its 28 February 2006 Reply to the Request for Arbitration asserted that such a decision would not be good business judgement, and that the economic outcome of Yukos was not known at that stage and there was no way of knowing whether Claimant would eventually realise a loss or a profit. Even as late as the jurisdictional hearings on 25 July 2007, Respondent's counsel was expecting there to be a financial return from Yukos in the form of substantial surplus payouts to shareholders following the auctions. (¶¶191 – 196 C-II)

643. It was reasonable for Claimant to expect that the Russian Federation would follow the law and stop short of expropriating Yukos' assets by carrying out the announced auction of YNG. Furthermore, public announcements by senior Russian figures, including President Putin (CM-139, -140, -141, -142, -143, -144) and Finance Minister Kudrin (CM-145, -146, -147, -148) were made to the effect that the Russian Government had no intention to destroy Yukos. None of the statements were retracted by the time Claimant bought the Yukos shares. In addition, Yukos remained a viable company after the YNG auction, and SocGen group did not petition for Yukos' bankruptcy until March 2006, more than a year after Claimant bought the shares. In such circumstances, it was still reasonable to invest in Yukos on 1 December 2004. (¶¶197 – 201 C-II)

Respondent's criticisms of LECG Report on quantum are misplaced

644. Respondent's report on quantum provided in the Dow Report and its criticisms of Claimant's LECG Report fundamentally misunderstands Claimant's case. Claimant is entitled to claim compensation for its equity share of the damages that resulted from the illegal expropriation of Yukos' assets. Claimant purchased the shares when the price was depressed following the Russian Federation's attacks on Yukos and its management but before the YNG auction or any announcement of further auctions or that the complete destruction of Yukos would follow. If the Russian Federation had found a reasonable solution, and not resorted to action putting it among rogue states, the price would have recovered to a value closer to Yukos asset value. The LECG Report, therefore, correctly reflects the situation if the expropriatory auctions had not occurred. (¶¶202 – 206 C-II)

645. The Dow Report ignores the certainty that the value of Claimant's equity share would have substantially increased. Furthermore, it fails to assess the real value of Yukos in the absence of the expropriatory measures. The Dow Report methodology would simply reward Respondent for its unlawful actions. Under that approach Respondent

would retain more than 96% (US\$ 120.41 million) of Claimant's share of the value of Yukos assets that were expropriated and Claimant, the owner of the assets, would receive at most US\$ 3.89 million. (¶¶207 – 210 C-II)

646. Claimant dismisses Respondent's argument that RosInvestCo is not entitled to compensation because its investment was made for the purpose of speculation and awarding damages would amount to an unwarranted windfall. Claimant argues that it should be awarded just compensation for the loss of its investment while ensuring that the Russian Federation does not continue to profit from its illegal acts. (¶¶122 – 126 CPHB-I)

2. Respondent

647. Respondent relies on its arguments above setting out that Claimant did not become beneficial owner of the Yukos shares until 2007. Once Claimant became beneficial owner, all of the alleged wrongful acts Claimant complains of had occurred. On this basis, Claimant is not entitled to damages.

Claimant had no legitimate expectations and deserves no compensation

648. An investor obviously cannot have a general legitimate expectation of the non-enforcement of a host State's tax law, or of the reversal of tax and court decisions already taken. An investor's expectations as to such matters might be legitimate, if at all, only if they are based on clear and unambiguous representations given by the host State. Expectations based on the assumption that the State will abdicate its responsibilities and relinquish the exercise of its duty to prevent unlawful business practices deserve no protection. Claimant should have been aware at the time it became beneficial owner of the Yukos shares in 2007, that it was purchasing the shares of a company already in the advanced stages of receivership that would inevitably

lead to its liquidation. Claimant cannot be excused for its failure to properly assess the risks, of which it must have been aware, and should therefore bear all the negative consequences of its bad business judgment. (§§330 – 332 R-I and §§186 – 188 R-II)

649. Claimant is not entitled to select whatever date yields the highest value to determine the measure of damages. The time to assess the legitimacy of Claimant's expectations is the time of the making of the investment as the case *Duke Energy v. Ecuador* (RLA-159) established. (§190 R-II)

650. Claimant cannot assert it was ignorant of Yukos' dire circumstances and its statement of facts in the Statement of Claim (C-I) proves that it knew by late November 2004 that Yukos faced difficulty. Furthermore, the public statements of Russian Federation officials Claimant points to as placating an investment decision, should not be interpreted as an inducement to invest in Yukos as Claimant attempts to make out. (§192 – 193 R-II)

Claimant's losses are its business risk

651. Even if Claimant had acquired beneficial ownership of the first tranche of Yukos shares on 19 November 2004, the loss resulting from a measure tantamount to expropriation was in fact the direct consequence of unreasonable and risky business decisions for which Claimant is responsible. Claimant exercised unreasonable business judgment in both not selling the Yukos shares and purchasing additional shares in December 2004.

652. Tribunals have in the past recognised a foreign investor's obligation to "manage and operate its investment reasonably" and have reduced or excluded compensation where a loss was the result of the investor's own contributory negligence. Respondent cites *MTD v Chile* (C-48) which stood for the proposition that an investor that continues to invest despite clear signs that a project was in difficulties ought to have damages reduced because of that unreasonableness. (§§334 – 338 R-I)

Claimant had a duty to mitigate damages

653. Claimant is precluded from claiming damages due to the duty under public international law (Report of the International Law Commission – RLA-94), Russian law (Article 404, Russian Civil Code – RLA-510), English law (Golden Strait Corporation v. Nippon Yusen Kubishika Kaisha – RLA-104), under the law recognised in the investment treaty context (Middle East Shipping – CLA-20) and the jurisprudence constant of the Iran-US Claims Tribunal (RLA-107, -108, -109, -110) to mitigate damages it could have reasonably avoided. The facts demonstrate that Claimant has irresponsibly, or even intentionally, failed to avoid losses altogether or allowed its alleged losses to be greatly increased. (¶¶339 – 344 R-I)
654. The value of the shares declined before Claimant alleged purchased the shares on 19 November 2004 and 7 December 2004 and continued to decline thereafter with the exception of a five month period from end of September 2005 to February 2005. If Claimant had sold its shares during this period it could have reasonably realised an annualised profit of 20%. Any reasonable investor would have seized its opportunity to realise this substantial profit during this period. Claimant's failure to sell the shares is inconsistent with the basic principle of good faith. The only rational explanation for keeping the Yukos shares is that Claimant only had a view to bringing a treaty claim, an explanation consistent with the investment-by-way-of-litigation strategy long pursued by Elliott Group. (¶¶345 – 350 R-I)
655. Claimant does not deny its duty to mitigate damages under international law. The only contention Claimant makes in this regard is to argue that there is no "obligation for an investor to abandon its claim under the pretext of mitigation" (¶194 C-II). This amounts to an admission that the basis of Claimant's investment decision was the hope of creating a treaty claim. The alleged expropriatory acts had all occurred by the time Claimant purchased shares in March 2007 (when the termination agreements were terminated) and there were at least 11 trading days available for Claimant to sell those shares, which it should have done to meet its duty to mitigate damages. (¶¶196 – 200 R-II)

Claimant not entitled to a windfall

656. Any award in this proceeding beyond the amount set out in the Dow Report II would amount to a windfall. The Chorzow Factory (CLA-08) standard that Claimant attempts to rely on, is misplaced. The only authority Claimant can point to for its argument that this novel damages theory is an article by the authors of its own expert report (LECG Report). (¶¶201 – 205 R-II)
657. Claimant and LECG fundamentally misapply the but-for approach. This approach, if used properly should not yield windfalls. The error in the LECG Report is that rather than consistently assuming that none of the alleged violations had occurred, LECG instead assumed both that the tax assessments and announcement of the YNG auction had occurred (thus reducing the price of Yukos' shares and enabling Claimant to purchase seven million Yukos shares for US\$ 3.5 million), and that neither of those events had occurred (in calculating the amount of Claimant's damages at more than US\$ 275 million). LECG's methodology is both illogical and fundamentally inconsistent with the premise of a but-for analysis – to determine Claimant's position had none of the alleged violations in fact occurred. (¶¶206 – 207 R-II)
658. Claimant is not due compensation for the "Retroactive Tax Claims" as defined in R-II. Claimant's view of the damages calculation relies on an ex-post analysis of events. This approach has been criticised and disfavoured by economists. It leads to inconsistent outcomes and could even result in a claimant owing a payment to a respondent. This is illustrated by Claimant's adjustment downward of the damages claim in the LECG Report II on the basis of the decline of four Russian oil companies. Ex post analyses inevitably produce upwardly biased results as they necessarily assign greater weight to those shares that have risen the most. LECG acknowledges this problem, but states it is merely a minor trade off between an analytically sound method and one that utilises the most up to date

information. The Dow Report dismisses this reasoning as untenable. (¶¶211 – 216 R-II)

Claimant cannot claim damages for acts that occurred before it became an investor

659. The expert report provided by Respondent in the Dow Report explains that Claimant did not suffer any damages from the alleged expropriatory acts that occurred or were announced before Claimant acquired ownership of the Yukos shares because the effects of any such acts had already been incorporated into the Yukos share price. Claimant avoids addressing this issue by relying on the LECG Report which uses a “but for” estimation of value of Claimant’s interest. This, Respondent submits is internally inconsistent and suffers from a fundamental logical flaw that would result in windfall profits for Claimant. (¶¶351 – 353 R-I)

660. The reasoning in Claimant’s LECG Report lead to absurd results. It does not return Claimant to the position it would have been in had the alleged expropriatory acts not occurred, but a far better position – a windfall. If Claimant has a legitimate claim for damages, its claim would lie between zero and US\$ 3.5 million, plus interest. This is because the impact of virtually all the tax assessments and the YNG auction had already been incorporated into Yukos’ stock price prior to Claimant’s purchases, a claim for damages may not be based on either Yukos’ tax assessments or the YNG auction. Put simply, Claimant could not here have suffered damages based on a drop in Yukos’ share price that took place before it actually owned any shares. The most Claimant can claim, the US\$ 3.5million, is the price of its shareholding at the time it gained beneficial ownership in 2007, plus interest. It is not feasible to put Claimant in the position of a hypothetical Yukos investor who purchased shares in early 2003 and assume the shares would increase in value. To allow this would be to unfairly reward Claimant for damages it did not suffer. (¶¶354 – 360 R-I)

661. Claimant could not have suffered any economic injury before it acquired an economic interest in the Yukos shares, and this first occurred in March 2007. In the absence of any injury, Claimant is not entitled to any damages, and the Chorzow standard invoked by Claimant is simply irrelevant. Claimant's damages claim is also based on a faulty "but-for" analysis, in which Claimant seeks compensation for acts that occurred and had full economic effect well before Claimant acquired an economic interest in the Yukos shares and, in the case of publicly disclosed tax liens in the amount of US\$ 14.6 billion, even before the Elliott Group first purchased any Yukos shares. Although Claimant concedes that it is not entitled to damages based on any of the tax assessments or the initial steps taken to enforce those assessments, virtually all of the damages sought by Claimant are in fact attributable to what Claimant calls the "Retroactive Tax Assessments and the initial steps taken to enforce those assessments." These actions, however, were already reflected in the reduced price paid by Claimant for the Yukos shares in November and December 2004. Once this fundamental error is corrected, Claimant's potential damages, assuming damages are warranted at all, fall within a range bounded by zero and US\$ 3.5 million (plus interest). The US \$ 232.7 million sought by Claimant is pure fantasy, an unjustified windfall and not compensation for "the loss of its investment". (¶¶58 – 59 RPHB-II)

3. Tribunal

662. Without repeating the contents, the Tribunal takes particular note of the following documents on file:

Party Submissions:

R-I ¶¶105 – 132

R-II ¶¶201 - 217

CPHB-II ¶30

R Tr. pp. 930 - 931

Exhibits:

CM-91 Yukos Oil Company, *Statement by Yukos Oil Company Regarding Its Current Financial Situation*, 22 July 2004

CM-111 Notice of the Russian Federation's Federal Property Fund, 19 November 2004

RM-89 Yukos Oil Company, *Statement in connection with the court decision on collection of additional profit tax for the year 2000*, dated 27 May 2004

Legal Authority:

CLA-08 *Case Concerning the Factory at Chorzów* (Claim for Indemnity) (Merits), Germany v. Poland, P.C.I.J. Series A., No. 17 (1928)

Witness Statements:

Dow Report I ¶¶25 – 28, 49 – 50, 52

663. In its damages claim, Claimant has asked the Tribunal to apply the Chorzow Factory case standard and “wipe out all the consequences of the illegal act” and assess what the investment would be worth today. Claimant’s expert reports, the LECG Reports, assume that the value of Claimant’s investment would be the pro-rata value of Yukos had the tax assessments, enforcement measures, auction of YNG and the bankruptcy auctions not taken place. The Tribunal is asked to assess damages at an amount at which the shares in Yukos would be worth at the date of the award, if Respondent had not breached the IPPA.

664. Respondent, on the other hand, is primarily presenting its argument that Claimant was not an investor under the IPPA until, at the earliest, when the Participation Agreements were terminated in 2007. The Tribunal’s conclusion on the question whether Claimant was an investor have been answered in the affirmative above. Respondent also submits that Claimant had no legitimate expectation of a return of the quantum Claimant seeks. Respondent further points to the

nature of Claimant's investment, the business rationale behind it and an alleged duty to mitigate damages.

665. The Dow Report I submitted by Respondent persuasively identifies that the market knew of both the seizure of Yukos' YNG shares and the announcement of the Ministry of Justice's intention to sell those shares. The market was fully informed of Respondent's likely action in respect of Yukos from July 2004, well before Claimant's purchase of the shares on 16 November and 1 December 2004. Accordingly, at the two points in time when Claimant purchased the shares, the market had "priced in" the likelihood and effect of the Russian Federations actions in respect of Yukos.

666. By Claimant's own admission, it is a company which specialises in "purchasing shares at such moments of market distress, judging that the market has overreacted to transient events and has undervalued a company's underlying assets." (§16 C-I) The Tribunal finds it can accept Claimant's assertion that it made an investment at such a point in time when the market had in fact overreacted to transient events and the price of the shares was unjustifiably low, but that it cannot simply accept Claimant's alleged optimistic expectations regarding the future development of the value of the investment.

667. While it is difficult to make an assessment of the "true value" at the time of purchase, Respondent's contention that the market price of the shares reflected the likelihood of Yukos ceasing to exist as a viable company is plausible. Respondent has established, and Claimant's evidence supports that view, that the information available to the public and investors regarding the likely outcome of the bankruptcy proceedings, court proceedings and YNG auction was that Yukos would cease to exist as a viable company – irrespective of the legality or other aspects of those proceedings. Indeed, before Claimant's first and second purchases of shares, Yukos had itself announced it would likely enter bankruptcy before the end of 2004.

668. Claimant made a speculative investment in Yukos shares. The Tribunal must take this into account when awarding damages (if any).

669. Although the Tribunal might steer into dangerous territory by attempting to enter its own economic valuation into the findings of the respective economic experts' opinions contained in the Dow Reports and LECG Reports, nevertheless, the Tribunal finds that these Reports are detailed and clear enough to enable it to come to conclusions regarding the disputed valuation. The Tribunal finds Respondent's submissions regarding compensation to be more persuasive. The approach in the LECG Report (termed the "but-for" approach in that report) does not sufficiently take into account the nature of Claimant's investment and that Claimant made a speculative investment consistent with the modus operandi of Claimant and the Elliott Group.

670. Claimant admits that "some of [its] investments turn out to be profitable, and some do not, and the investor may be presumed to understand the market risks when it makes the investment." (§6 C-I) Having regard to this underlying nature of the investment, the Tribunal finds that any award of damages that rewards the speculation by Claimant with an amount based on an ex-post analysis would be unjust. The Tribunal cannot apply the most optimistic assessment of an investment and its return. Claimant is asking the Tribunal not only to realise and implement the Elliott Group's "buy low and sell high" strategy, but to go further and apply a best-case approximation of today's value. The Tribunal considers the Dow Report correctly identifies that at the point in time at which Claimant purchased the legal title to the shares, the market had already taken into account the effect of the Russian Federation's measures and any possibility Yukos would (profitably) endure beyond the enforcement of those measures.

671. An assessment of damages on the basis put forward by Claimant and in its LECG Report would reward Claimant's speculation in a manner only reflecting the small possibility of upside risk at the time of investment but disregarding the high likelihood of no return on investment and would be inconsistent with the aim of the IPPA, set out in its preamble. The LECG Report assumes that the taxes were imposed on Yukos, enforcement actions announced and expected by the markets and Claimant bought the shares at a price in which the

market had taken these events into account or had overestimated the impact of those events on the price. The LECG Report also then assumes that following Claimant's purchase of the shares, the taxes, enforcement measures and auctions would not have taken place. This approach is divorced from reality.

672. The Tribunal has concluded above that Claimant possessed an investment in terms of the IPPA starting from 16 November 2004 and from 1 December 2004 – the dates on which Claimant purchased its Yukos shares. While the Participation Agreements did not stop Claimant from being an investor under the wide definition of the IPPA, their effect was that any risks regarding the investment were transferred to Elliott during the validity of the Participation Agreements. Claimant had no real economic interest of its own in the Yukos shares during the period the Participation Agreements were in force and thus “had nothing to lose”. Therefore, for valuation purposes of damages, the date must be applied where that risk was taken over by Claimant at the time the Participation Agreements were terminated.

673. The Tribunal concluded above that the Participation Agreements were terminated on 24 January 2007. Accordingly, the Tribunal considers that the alternative in the Dow Report I paragraph 50 should be applied by which a purchase date for the shares on 24 January 2007 is made the basis of the calculation.

674. Therefore, the Tribunal concludes that the calculation of damages in the Dow Report I “all corrected” test shall be applied as from 24 January 2007.

675. On that basis, in section 50, the Dow Report I submits a present value of damages of US\$ 3.70 million as of 3 March 2009. However, as expressly mentioned at the beginning of section 50, that amount already includes interest up to 3 March 2009. The Tribunal considers that, after establishing the principle amount of the damages due, the interest should be considered and calculated separately in a following section of this Award. Therefore, while accepting the approach of the Dow Report, the Tribunal concludes that the best reflection of the

damages without interest is what the Claimant undisputedly paid to Elliott as the purchase price for the shares at the time the Participation Agreements were terminated, which was, as recalled in section 51 of the Dow Report, US\$ 3.5 million.

676. Therefore, the Tribunal concludes that the principal amount of damages due by Respondent to Claimant is US\$ 3.5 million.

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H.X. Interest

1. Claimant

677. Claimant requests interest, compounded, on all amounts awarded. Article 5(1) of the IPPA contemplates interest “at a normal commercial rate” for cases of expropriation. Claimant submits that the normal commercial rate should be compounded at some appropriate interval and take into account the element of risk associated with the investment. Claimant suggests that a standard commercial rate, such as LIBOR + 4 percent, compounded semi-annually, should be added to any award from the date of valuation to the date of the award. (¶¶270 – 271 C-I, ¶137 CPHB-I)

2. Respondent

678. Respondent argues that the interest rate should be a risk free rate, such as the US Treasury rate. (¶48 Dow Report II)

679. Respondent submits that if the Tribunal makes an award of compensation, the “normal commercial rate” referred to in Article 5(1) of the IPPA should be the normal commercial rates prevailing in Europe. Respondent considers the one-year LIBOR or EURIBOR rate, are appropriate interest rates that provide “adequate and effective compensation.” (¶143 RPHB-I)

680. Respondent submits further that it is not appropriate that the interest pursuant to Article 5(1) of the IPPA be awarded as compound interest. The tribunal in Vivendi II, (RLA-198) established that interest awarded must compensate for the damage resulting from the period of non-payment. An award of compound interest would not make Claimant whole for this alleged period of non-payment, but provide it with a windfall profit. (¶144 RPHB-I)

681. Respondent argues that due to the Participation Agreements, the economic interest in the Yukos shares was with Elliott International and therefore any compensation would have to have been passed on to Elliott International. While the Participation Agreements were in force, Claimant thus could not use or invest the amount of compensation due, nor could it have earned any income from the Yukos shares. Once Claimant acquired an economic interest in the shares in March 2007, it only acquired an interest in a parcel of shares in a bankrupt company which could not have been sold to a third party. Compound interest would not reflect economic reality or make Claimant whole but cause a disproportionate benefit to any possible loss. (¶¶145-146 RPHB-I)

682. Respondent points out that Claimant concedes that interest should be limited to a "normal commercial rate," but then it inexplicably attempts to rely on a much higher commercial rate, LIBOR +4%, compounded semi-annually. Respondent submits that the relevant interest rate, assuming quod non that damages are awarded, is the one-year LIBOR or EURIBOR rate (compounded, if at all, on an annual basis), commencing on March 27, 2007, the date Claimant first acquired an economic interest in the Yukos shares. (¶60 RPHB-II)

3. Tribunal

683. Without repeating the contents, the Tribunal takes particular note of the following documents on file:

Party Submissions:

C-I ¶¶270 – 271

CPHB-I ¶137, fn. 229

RPHB-I ¶¶143 – 146, fn. 337, 338

Exhibits:

RM-16, -19 Participation Agreements between Highberry Ltd and Elliott International of 17 November 2004

RLA-198 *Compañia de Aguas del Aconquija et al. v. Argentina*, (Vivendi II) Award of Aug. 20, 2007

684. The Tribunal takes into account the parties' answers to the Tribunal's Question 3.10 of PO-5 and particularly notes that the parties both refer to and agree that Article 5(1) of the IPPA requires that for an expropriation under Article 5(1), "interest at a normal commercial rate shall accrue until the date of payment" on the amount of "adequate and effective compensation. The Tribunal is aware that this ruling in Article 5 refers to a lawful expropriation and that, in the present case as seen above, the Tribunal considers the expropriation to be in breach of Article 5 and thus unlawful therefore requiring the standard of damages in international law also for the calculation of interest. However, the Tribunal notes that the parties have both referred to the interest provision of Article 5(1) also with regard to a finding of unlawful expropriation.
685. On the basis of the parties' similar submissions on this matter and in view of the IPPA providing guidance for that rate in Article 5, the Tribunal finds it acceptable that interest at a normal commercial rate is also due on the sum awarded as damages.
686. Regarding the question what is in fact the normal commercial rate, Claimant requests LIBOR + 4 percent, compounded semi-annually, while Respondent considers the one-year LIBOR or EURIBOR rate as applicable uncompounded. The Tribunal considers, that in view of the term "normal" in Article 5(1), the LIBOR rate should be applicable without any addition.
687. The question of whether the interest should be calculated on a simple or compound basis is one which the Tribunal has sought to answer by reviewing the conduct of Claimant and its ultimate owner, Elliott International.

688. The Tribunal considers that in the case of a damages award the payment of interest is necessary in order to ensure full reparation for the act which caused damage, but that the mode of calculation should be set so as to achieve a result of full reparation. The Tribunal considers that full reparation in this case must take into account the nature of Claimant's investment.
689. While recent investment treaty arbitrations have awarded compound interest to claimants, the Tribunal notes that this practice is by no means unanimous. If, as above, the Tribunal finds it should award interest at a normal commercial rate, this does not mean the Tribunal is bound to award compound interest. It must consider the damage done and nature of Claimant's investment in its assessment of the interest due.
690. The Tribunal considers that applying compound interest to the damages sum in this case at anything more frequent than an annual basis would be unjust in light of the speculative nature of the investment by Claimant and its parent Elliott International. The Tribunal therefore considers that interest ought to be applied to the damages award at a base commercial lending rate, namely LIBOR.
691. The point in time for the commencement of the interest calculation ought to reflect the economic reality of the relationship between Claimant and its parent Elliott International and accordingly the amount of any loss to Claimant. As seen above, the Tribunal considers that the Participation Agreements detracted from the value of the investment to Claimant. Noting again the requirement that the Tribunal award interest to compensate Claimant adequately and effectively for the deprivation of the use and disposition of the sum it would have otherwise had, the Tribunal considers that the date of the termination of the Participation Agreements, i.e. 24 January 2007, plus the two month grace period expressly provided in Article 5.1. IPPA, i.e. 24 March 2007, should be the starting point for the interest calculation

692. Therefore, the Tribunal concludes that, as from 24 March 2007, Respondent has to pay the actual London interbank overnight rates (LIBOR) on the amount of US\$ 3.5 million till the time of payment.

H.XI. Costs of Arbitration

1. Claimant

693. In its prayer for relief, Claimant has requested that Respondent be ordered to pay Claimant's cost of arbitration.

694. By its Cost Claim dated 14 May 2010, Claimant has requested that, accordingly, the Tribunal's final award include, pursuant to Articles 40 and 41 of the Rules, an order:

a. apportioning all of the Arbitration Costs to the Respondent and requiring Respondent to compensate Claimant for the US\$ 883,878.00 of those costs that Claimant has paid to date; and

b. awarding to Claimant the US\$ 11,000,762.09 in legal fees incurred by Claimant for its legal representation; and

c. awarding to Claimant the US\$ 2,398,002.73 of other expenses incurred by Claimant in presenting its case.

695. By its submission dated 21 May 2010, Respondent has commented on Claimant's cost claim.

2. Respondent

696. In its prayer for relief, Respondent has requested that Claimant be ordered to pay Respondent's cost of arbitration.

697. By its Cost Claim dated 14 May 2010, Respondent has requested that, accordingly, Claimant be ordered to pay all of the costs incurred by Respondent in connection with this arbitration. Respondent has submitted that its costs incurred are as set out below:

Advance on Arbitration Costs paid during the merits phase	EUR 370,500.00
Attorneys' Fees	US\$ 3.25 million
Expenses and Disbursements (including expert fees)	US\$ 796,469.86
Total Merits Costs	US\$ 4,064,469.86, plus EUR 370,500.00

698. By its submission dated 21 May 2010, Claimant has commented on respondent's cost claim.

3. Tribunal

699. The Tribunal has taken note of the relief sought by the parties regarding costs, of the cost claims submitted by the Parties, and of their respective comments submitted by the Parties.

700. The length and complexity of this arbitral procedure shows that neither of the Parties could have easily identified the procedural and substantive outcome of this dispute. Claimants have prevailed on jurisdiction and with regard to liability. Respondent has succeeded in so far as the quantum of damages claimed by Claimant, i.e. US\$ 232.7 million was reduced to a small portion of that amount, i.e. to US\$ 3.5 million. Thus, both sides have been partly successful and

partly unsuccessful in their arguments and claims raised in this proceeding.

701. Taking into account the circumstances of the case and using its discretion under Articles 32(6) and 39 to 41 of the SCC Arbitration Rules, the Tribunal considers it fair and concludes that

a. each Party bears its own costs of legal representation (Article 41 SCC Arbitration Rules),

b. the arbitration costs (Article 39 SCC Arbitration Rules) shall be borne in equal shares between the Claimant on one side and the Respondent on the other side.

702. The SCC has determined the Costs of Arbitration as follows:

Prof. Karl-Heinz Böckstiegel

Fee	EUR 425 000	plus any VAT
Expenses	EUR 10 337	plus any VAT
Per diem allowance	EUR 1 450	

The Rt Hon Lord Steyn

Fee	EUR 255 000	plus any VAT
Expenses	EUR 7 979	plus any VAT
Per diem allowance	EUR 1 800	

Sir Franklin Berman KCMG, QC

Fee	EUR 255 000	plus any VAT
Expenses	EUR 8 748	plus any VAT
Per diem allowance	EUR 1 500	

Stockholm Chamber of Commerce

Administrative fee	EUR 48 238	plus any VAT
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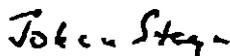
Administrative Secretary:

Fee	EUR 10 201
Costs	EUR 1 400
Per diem	Eur 1 050

(The Decisions and Signatures of the Tribunal appear on the following separate page of this Award)

I. Decisions

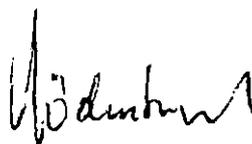
1. The Tribunal confirms its decision in its Award on Jurisdiction dated 5 October 2007 to the effect that it has jurisdiction over the claims for expropriation submitted by Claimant.
2. Respondent has breached Articles 5 of the IPPA and is liable for damages in this regard.
3. As the principal amount of damages, Respondent has to pay to Claimant US\$ 3.5 million.
4. On this amount of US\$ 3.5 million, as from 24 March 2007, Respondent has to pay the actual London interbank overnight rates (LIBOR) till the time of payment.
5. The arbitration costs (Article 39 SCC Arbitration Rules) shall be borne in equal shares between the Claimant on one side and the Respondent on the other side.
6. The Parties shall each bear their own costs of legal representation and other expenses in this arbitration (Article 41 SCC Arbitration Rules).
7. All other claims and counterclaims are dismissed.



The Rt. Hon. The Lord Steyn
(Co-Arbitrator)



Sir Franklin Berman KCMG, QC
(Co-Arbitrator)



Prof. Karl-Heinz Böckstiegel
(Chairman of Tribunal)