

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

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**Case no: Arbitration V 079 / 2005**

**Award on Jurisdiction**

<b>Claimant:</b>	RosInvestCo UK Ltd.
<b>Claimant's counsel:</b>	John M. Townsend Marc-Olivier Langlois James H. Boykin Hughes Hubbard & Reed, LLP  Prof. Dr. Kaj Hobér William McKechnie Mannheimer Swartling  V.V. Veeder, Q.C. Essex Court Chambers
<b>Respondent:</b>	The Russian Federation
<b>Respondent's counsel:</b>	Robert Greig Dr. Claudia Annacker Cleary Gottlieb Steen & Hamilton LLP
<b>Arbitral Tribunal:</b>	Prof. Dr. Böckstiegel, Chairman  The Rt. Hon. The Lord Steyn Essex Court Chambers  Sir Franklin Berman KCMG, QC Essex Court Chambers

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## ABBREVIATIONS

BIT	Bilateral Investment Treaty
C 0	Claimant's Letter to Respondent of June 2, 2005
C I	Claimant's Request for Arbitration of October 28, 2005
C II	Claimant's First Memorial on Jurisdictional Issues of February 28, 2007
C II-Annex	Annex to Claimant's First Memorial on Jurisdictional Issues of February 28, 2007
C-1 et seq.	Claimant's Exhibit (followed by the exhibit's number)
CB	Common Bundle (followed by the exhibit's number)
DK-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
UK-Soviet BIT/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
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
fn	Footnote
p	Page

para	Paragraph
PO	Procedural Order
pp	Pages
R I	Respondent's Reply of February 28, 2006 to the Request for Arbitration
R II	Respondent's First Memorial on Jurisdictional Issues of October 31, 2006
R III	Respondent's Second Memorial on Jurisdictional Issues of June 8, 2007
R-1 et seq.	Respondents' Exhibit (followed by the exhibit's number)
ROSINVEST	Claimant
Russian Federation	Respondent
VCLT	Vienna Convention on the Law of Treaties of May 23, 1969
Yugansk/YNG	Yuganskneftegaz
Yukos	Yukos Oil Corporation OJSC

## **A. The Parties**

### **The Claimant**

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## **B. The Tribunal**

Prof. Dr. Karl-Heinz Böckstiegel, Chairman

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**GERMANY**

The Rt. Hon. The Lord Steyn, Arbitrator

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**UNITED KINGDOM**

Sir Franklin Berman KCMG, QC, Arbitrator

Essex Court Chambers

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**UNITED KINGDOM**

## **C. Short Identification of the Case**

1. The short identification below is without prejudice to the full presentation of the factual and legal details of the case by the Parties and the Tribunal's considerations and conclusions.

### **C.I. The Claimant's Perspective**

2. The following quotation from the Claimant's Request for Arbitration summarizes the main aspects of the dispute as follows (C I, paras. 3.6 – 3.12, 5.1 – 5.8):

*“3.6 RosInvestCo is the owner of seven million (7,000,000) ordinary shares of Yukos. RosInvestCo was and is competent under U.K. laws to invest in such shares, which were purchased on the Russian stock market in November and December 2004. ...*

*3.7 Article Five of the Treaty [the UK-Soviet BIT] prohibits the Russian Federation from expropriating the investment of a U.K. investor, except for a purpose which is in the public interest and which is not discriminatory and against the payment of prompt, adequate and effective compensation. ...*

*3.8 The protections contained in Article Five also apply to instances in which the Russian Federation expropriates the assets of a company in which a U.K. investor has a shareholding. ...*

*3.9 The Russian Federation, through the discriminatory and unlawful expropriatory actions outlined below and to be described in more detail when Claimant files its Statement of Claim pursuant to Article 21 of the Rules, rendered RosInvestCo's investment in Yukos nearly valueless. To this date, RosInvestCo has not received compensation for the loss of its investment. As a result, there is currently a legal dispute between RosInvestCo and the Russian Federation.*

3.10 *Article Eight of the Treaty requires that an investor provide the Russian Federation with written notification of a dispute and foresees a three month period following such notification during the claim may be resolved amicably. ...*

3.11 *On June 2, 2005, RosInvestCo sent a letter to the Russian Federation notifying it of RosInvestCo's claim and inviting it to contact RosInvestCo, or its designated representatives for mediation purposes, for the purpose of resolving the dispute. RosInvestCo sent with the notice a courtesy translation into the Russian language. ...*

3.12 *The three-month period contemplated by the Treaty has expired and the Russian Federation has not contacted RosInvestCo or any of its legal representatives. RosInvestCo has therefore elected to exercise its right to submit its dispute with the Russian Federation to arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce in accordance with Article Eight of the Treaty ... .*

...

5.1 *Yukos was formed in 1993, by combining oil and gas enterprises formerly owned by the Russian state. From the time it was privatized in 1995-1996 until December 19, 2004, Yukos was the leading integrated international oil company based in the Russian Federation. Yukos published consolidated annual financial statements under international accounting standards, audited by PriceWaterhouseCoopers, beginning with its financials for the year 1997.*

5.2 *Yukos shares were traded on the Russian stock market. Yukos shares, or American Depositary Receipts ("ADRs") for those shares, were also traded over-the-counter in the United States, on the Stuttgart, Berlin, Frankfurt and Munich stock exchanges, and through the London Stock Exchange International Order Book. By December of 2004, approximately 1,935 million shares of Yukos stock were outstanding, exclusive of shares held by the company itself.*

5.3 *The most valuable asset of Yukos was its largest production subsidiary, Yuganskneftegaz ("YNG"). YNG represented 60% of Yukos' oil production and still produces one-tenth of Russia's total oil output. In October of 2004, YNG was valued by investment bankers to be worth as much as USD 22 billion.*

- 5.4 *In December of 2004, the Russian Government brought months of harassment of Yukos to a head by conducting a sham auction of YNG. The Russian Government justified the seizure and auction of YNG as needed to pay a series of arbitrary incremental tax assessments it had levied on Yukos. By December 2004, these assessments, including penalty interest, fines, surcharges, and the taxes Yukos had already paid, brought Yukos' assessed total tax expense for the years 2000-2003 to more than 90% of Yukos' annual consolidated gross revenues for those years. Measured as tax expense per ton of oil produced, that tax bill was triple the equivalent tax expense of other Russian oil companies.*
- 5.5 *Yukos was denied any reasonable means or opportunity to defend itself before the Russian courts against these tax assessments and the forced auction of YNG.*
- 5.6 *The bidder to which YNG was sold at the auction on December 19, 2004 was Baikal Finance Group ("Baikal"), an unknown company that listed its office address as that of a mail drop building in the Russian provincial town of Tver. Baikal made the only bid, for USD 9.37 billion. The auction lasted approximately ten minutes.*
- 5.7 *Four days after the auction, the Russian Federation's state oil company, Rosneft, purchased Baikal for an undisclosed amount in a secret sale. YNG thus passed into the possession of the Russian State for less than half of its real value, without payment even of that sum to Yukos or its shareholders.*
- 5.8 *As will be explained in more detail in RosInvestCo's Statement of Claim, these events constituted an expropriation by the Russian Federation of YNG, the principal asset of Yukos.*
- ...
- 6.2 *RosInvestCo will in its Statement of Claim seek an Award:*
- (a) *Ordering the Russian Federation to pay compensation for the injury to the value of RosInvestCo's shares of Yukos. RosInvestCo suggests that, for purposes of calculating the advance on costs in this arbitration, it should be assumed that the amount claimed will be no less than USD 75 million.*
  - (b) *...*
  - (c) *Ordering the Russian Federation to pay interest, compounded, on all sums awarded."*

## C.II. The Respondent's Perspective

3. Apart from the Respondent's objections to jurisdiction and admissibility which are described in a separate section below, the following quotation from the Respondent's Reply summarizes the main aspects of the dispute as follows (R I, paras. 23 – 35):

*23. Claimant alleges in the Request for Arbitration that it purchased shares in Yukos Oil Company ("Yukos") on the "Russian stock market" in November and December 2004. Claimant does not and cannot allege that its Yukos shares have been taken: at most the Request for Arbitration claims that the shares have suffered a decline in value.*

*24. The Request for Arbitration does not disclose that before November 2004 Yukos had already suffered adverse tax audits and tax re-assessments imposing large assessments for interest and penalties for the years 2000, 2001, and 2002, and the tax re-assessments for the years 2000 and 2001, including the assessments of interest and penalties, had already been upheld by Russian courts, thus confirming the illegality under Russian law of Yukos' tax schemes, and confirming the standards against which Yukos' later tax returns would be judged. The seizure of shares in Yuganskneftegaz ("Yugansk") to satisfy the tax deficiency for the year 2000 had already occurred in July 2004. Khodorkovsky and Lebedev were already being held in jail on related tax charges. All measures complained of that occurred prior to Claimant's purchase of Yukos shares cannot constitute an expropriation of Claimant's shares for the simple reason that there was no investment at the time these measures took place.*

*25. The Request for Arbitration does not disclose that the adverse tax audit and tax re-assessment for the year 2003 and the announcement of the auction of the Yugansk shares that had already been seized occurred on November 19, 2004, and the auction took place on December 20, 2004. Again, to the extent that Claimant purchased Yukos shares after November 19, 2004, or December 20, 2004, respectively, these measures cannot constitute an expropriation of such shares, respectively.*

*26. With respect to any measures that may have occurred after any shares were purchased, Claimant cannot establish that they caused the substantial and permanent economic loss necessary to constitute an expropriation. Claimant does not disclose the price or prices it paid for Yukos shares in November and December 2004, but the*

trading range of such shares during that period, between US\$0.42 – 4.32 per share on the Moscow Interbank Currency Exchange (“MICEX”) and US\$0.44 – 4.27 per share on the Russian Trading System (“RTS”), establishes the market value of Yukos shares during that period. Far from there being an expropriation, it is not possible to determine from the Request of Arbitration, apart from the request for relief itself, even whether Claimant stands to make a profit or loss on its purchase of shares because Yukos shares have traded substantially above the trading low for the November/December 2004 period on a regular basis. For example, the high price of Yukos shares on September 30, 2005 was US\$1.17 on MICEX and US\$1.16 on RTS, on November 30, 2005, US\$1.63 on MICEX and US\$2 on RTS, on December 30, 2005, US\$2.01 on MICEX, and the high for the year 2006 as of February 26 is US\$2.25 on MICEX and US\$2.22 on RTS, all well within the trading range for the October/December 2004 period.

27. The Request for Arbitration also fails to allege that claimant has realized any loss on its purchase of Yukos shares, as apparently Claimant has not sold any of the shares on which it bases its claim. Since Yukos, based on published reports, is very much in business extracting and marketing large volumes of oil and oil products, and buying and selling oil related assets, any paper loss on Claimant’s Yukos shares cannot be said to be permanent. Indeed, the economic outcome of Claimant’s investment is not yet known, even to the extent of knowing whether Claimant will eventually realize a loss or a profit.

28. It is rather extraordinary that Claimant even alleges an expropriation of its shares based on this set of facts. It is by no means clear what if any eligible expropriating measure is even alleged. Moreover, as the trading ranges set forth above show, Claimant cannot establish, based on published information, even a decline in such prices, much less that the investment represented by the Yukos shares has been rendered substantially and permanently valueless – the decisive element of an expropriation or any measure tantamount to expropriation.

29. An additional deficiency of the Request of Arbitration is that even if somehow eligible expropriating measures and a substantial and permanent loss of investment could be alleged, Claimant, as the investor, cannot establish a frustration of any reasonable and legitimate expectation with respect to the purchased Yukos shares. Prior to November 2004, the Russian and international press was literally full of articles relating to the 2000, 2001, and 2002 tax re-assessments on Yukos, including large amounts of interest and penalties, the upholding of the 2000 and 2001 tax re-assessments by Russian courts based on the illegality of Yukos’ tax fraud schemes, the seizure of Yugansk shares, the likely auction of Yugansk shares, and

*the arrest, prosecution, and jailing of Khodorkovsky and Lebedev. Depending on exactly which search terms, such as “tax assessment” “auction” “seizure” “Yukos,” and “Yugansk,” are entered, literally thousands of responsive news articles dated prior to November 2004 show up in a simple Google search, detailing these matters. Indeed, there were even news articles dated prior to November 1, 2004 discussing whether Yukos would be able to survive.*

30. *In short, prior to its purchase of Yukos shares, Claimant could not have been unaware, or at the very least was on notice, that Claimant should have conducted an inquiry as to the legality of Yukos’ tax reporting, the magnitude of the tax re-assessments, the likelihood that the tax re-assessments would be upheld by the Russian courts, the fact that Yugansk shares had already been seized, the likelihood that Yugansk shares would be auctioned for substantially less than valuations previously obtained, and Yukos’ owners and principals would be prosecuted and jailed for related tax crimes. This information was not lost on the financial community, which had caused Yukos stock to fall from its range of US\$9 – 15 per share for the period January 1, 2003 through April 30, 2004 to a range of US\$3 – 4 per share for the period August 1, 2004 through October 31, 2004.*

31. *Claimant’s purchase of shares of Yukos in November and December 2004 therefore could not have been made on reasonable and legitimate expectations that did not take these adverse circumstances and all of this negative public information and negative market experience into account. Indeed, it would not appear that any “expropriating” event is alleged in the Request for Arbitration that was not disclosed or foreshadowed in public documents prior to Claimant’s alleged purchases of Yukos shares. At the very least, Claimant’s purchase of Yukos shares in November and December 2004 involved a strong element of risk and speculation, thus precluding a determination of expropriation.*

32. *Although the Tribunal should not reach these issues on these facts, the Russian Federation specifically denies the allegations in the Request for Arbitration concerning the alleged expropriating events. Specifically, the Russian Federation denies that the auctions complained of, including the tax re-assessments on Yukos, the seizure of shares of Yugansk, and the sale of such shares at auction to satisfy outstanding tax liens, were anything other than the legitimate exercise of the Russian Federation’s power to tax and to take measure to enforce tax laws.*

33. *The tax schemes employed by Yukos included the misuse of special low tax zones in Russia through the setting up of sham companies and the use of such companies to engage in the sham purchase and sale of oil and oil products arranged by Yukos resulting*

*in the payment of taxes only on the basis of the nominal sale prices paid for such products by the sham companies, and accumulation of profits untaxed through the sale of oil and oil products offshore at much higher prices recorded on the books of the sham companies, but transferred to without the payment of any taxes and reported by Yukos in its consolidated financial statements. The tax schemes employed by Yukos constituted massive tax fraud, plainly violate Russian tax laws, and indeed would violate the laws of almost any State in which such transparent schemes might be attempted.*

*34. The question of the amount of compensation is not reached, and cannot even be addressed based on the allegations contained in the Request for Arbitration. The Russian Federation specifically denies that compensation in any amount may be determined or is due.*

*35. Except as specifically and expressly admitted in this Reply, the Russian Federation denies all of the allegations in the Request for Arbitration.”*

## **D. Procedural History**

4. On June 2, 2005 the Claimant sent a letter to the Respondent (C 0) notifying it of the Claimant's claim and inviting the Respondent to contact the Claimant or its designated representatives for mediation purposes according to Article 8(2) of the 1989 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments (UK-Soviet BIT). The letter contained a courtesy translation into the Russian language.
5. According to Article 5 and 8 SCC rules, arbitral Proceedings against the Respondent commenced with the Request for Arbitration sent by the Claimant to the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute) on October 28, 2005 (C I). The Claimant invoked the Russian Federation's consent to arbitration provided in Article 8 of the UK-Soviet BIT. The Claimant designated The Rt. Hon. The Lord Steyn as its appointed arbitrator and suggested Stockholm as the Place of Arbitration.
6. Pursuant to Article 10 SCC rules, the Respondent replied to the SCC Institute on February 28, 2006 (R I) raising in particular several objections to the Tribunal's jurisdiction and presenting its view of the dispute as quoted above (para. 3). The Respondent designated Sir Franklin Berman, KCMG, QC as its appointed arbitrator and agreed that the Place of Arbitration be Stockholm.
7. On May 9, 2006 the SCC Institute confirmed Prof. Böckstiegel as Chairman of the Tribunal.
8. By e-mail of June 6, 2006, the Parties were sent an annotated preliminary agenda for the First Procedural Meeting to be held on June 27, 2006 in Paris.

The Tribunal invited the Parties to try to agree in advance of the meeting on whether a bifurcation is deemed appropriate in view of the Respondent's jurisdictional objections and, if that was the case, to agree on a timetable.

9. On June 22, 2006 the Parties jointly proposed a timetable for the jurisdictional phase.
10. The First Procedural Meeting of the Tribunal with the Parties took place on June 27, 2006 at the Centre Regus in Paris. The venue was chosen without prejudice to the Place of Arbitration for reasons of convenience in accordance with Article 20(4) SCC rules. Present at the meeting were the members of the Tribunal as well as V.V. Veeder, Q.C., John M. Townsend, James H. Boykin, Marc-Olivier Langlois representing the Claimant, and Robert T. Greig, Dr. Claudia Annacker, Roland Ziadé representing the Respondent.
11. On July 8, 2006 Procedural Order (PO) No.1 regarding the further procedure was issued, confirming the established timetable and taking into account the agreements reached between the Parties at the First Procedural Meeting:

*“1. Meeting in Paris*

*This PO puts on record the results of the discussion and agreement between the Parties and the Tribunal at the 1st Procedural Meeting in Paris on 27 June 2006.*

*2. Communications*

- 2.1. The Tribunal shall address communications to Counsel of the Parties. E-mail and fax communications will be addressed to all counsel of the Parties. Courier mail will be addressed to the lead counsel indicated by each Party.*
- 2.2. Counsel of the Parties shall address communications directly to each member of the Tribunal with a copy to counsel for the other Party either by courier or by fax ( but fax communications shall not exceed 15 pages ) and always, in addition, by e- mail, to allow direct access during travels.*

- 2.3. *To facilitate word-processing and citations in the deliberations and later decisions of the Tribunal, the e-mail transmission of briefs and longer submissions shall be in Windows Word.*
- 2.4. *In view of the different law offices used by counsel of Claimant, the Parties shall agree as to which law office Respondent shall send its courier communications.*
- 2.5. *Deadlines for submissions shall be considered as complied with if the submission is received by the Tribunal and the other Party in electronic form or by courier on the respective date.*
- 2.6. *Longer submissions shall be preceded by a Table of Contents.*
- 2.7. *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 (C-1, C-2 etc. for Claimants; R-1, R-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 ).*

### *3. Particulars Regarding the Procedure*

- 3.1. *The Procedure shall be in accordance with the SCC Rules of Arbitration in force as from 1 April 1999.*
- 3.2. *The language of the arbitral procedure shall be English.*
- 3.3. *The place of arbitration is Stockholm, Sweden.*

### *4. Jurisdictional Phase*

- 4.1. *A first phase of the procedure will deal with the jurisdictional objections raised by Respondent in part I of its Reply dated February 28, 2006.*
- 4.2. *If those objections are resolved in favor of going forward, a second phase will deal with the other issues raised by Claimant's claim and Respondent's defense and a further timetable will be established for that purpose.*

### *5. Timetable for Jurisdictional Phase*

- 5.1. *July 27, 2006*

*Claimant to propound initial document request to Respondent based on Respondent's Reply of February 28, 2006*

5.2. *October 31, 2006:*

*Respondent's Principal Memorial on Jurisdictional Issues (Items I.A, I.B, and I.C of Reply), together with witness statements, documents, and expert reports (if any); and*

*Respondent to respond to Claimant's initial document request*

5.3. *November 24, 2006:*

*Claimant may propound second document request to Respondent*

5.4. *January 19, 2007*

*Respondent to respond to Claimant's second document request*

5.5. *February 28, 2007*

*Claimant's Principal Memorial on Jurisdictional Issues, together with witness statements, documents, and expert reports (if any)*

5.6. *Mar. 23, 2007*

*Respondent to propound document request to Claimant*

5.7. *April 3, 2007*

*Pre-Hearing Conference between the Parties and the Tribunal, if considered necessary by the Tribunal, either in Paris in person or by telephone.*

5.8. *As soon as possible thereafter, Tribunal issues a Procedural Order regarding details of the Hearing.*

5.9. *Apr. 20, 2007*

*Claimant to respond to Respondent's document request*

5.10. *June 8, 2007*

*Respondent's Reply Memorial on Jurisdictional Issues*

5.11. *June 22, 2006 (sic. Should be 2007)*

*Claimant may apply for authorization to submit further documents in reply to Respondent's Reply Memorial*

*Subject to the Tribunal's decision on such an application, thereafter, no new evidence may be submitted, unless agreed between the Parties or expressly authorized by the Tribunal.*

5.12. *June 29, 2007*

*Parties submit*

- \* notifications of the witnesses and experts presented by themselves or by the other Party they wish to examine at the Hearing,*
- \* and a chronological list of all exhibits with indications where the respective documents can be found in the file.*

5.13. *July 24-25, 2007*

*Hearing on Jurisdictional Issues.*

*After consultation with the Parties, the Tribunal may extend the Hearing to July 26 or 27, 2007. But in any case, the Parties and the members of the Tribunal will block all four days and book accommodation for the full period.*

5.14. *By dates set at the end of the Hearing after consultation with the Parties, Parties shall submit Post-Hearing Briefs (no new documents allowed).*

6. *Evidence*

6.1. *The Parties and the Tribunal may use, as a guideline, the "IBA Rules on the Taking of Evidence in International Commercial Arbitration", always subject to changes considered appropriate in this case by the Tribunal.*

6.2. *If or insofar as the Parties cannot agree on a document request, they may submit the matter to the Tribunal for decision in such a manner that the timetable up to the Hearing can be maintained.*

7. Documentary Evidence

- 7.1. *All documents ( including texts and translations into English of all substantive law provisions, cases and authorities) considered relevant by the Parties shall be submitted with their Briefs, or as otherwise established in the Timetable.*
- 7.2. *All documents shall be submitted in the form established above in the section on communications.*
- 7.3. *Subject to the provisions of section 5.11, new factual allegations or evidence shall not be any more permitted after the respective dates for the Rebuttal Briefs indicated in the above Timetable unless agreed between the Parties or expressly authorized by the Tribunal.*
- 7.4. *Documents in a language other than English shall be accompanied by a translation into English of all relevant sections.*

8. Witness Evidence

- 8.1. *Written Witness Statements of all witnesses shall be submitted together with the Briefs mentioned above by the time limits established in the Timetable.*
- 8.2. *In order to make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing, such witnesses are invited by the presenting Party or asked to attend at the request of the other Party, the available hearing time should mostly be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators.*

9. Expert Evidence

*Should the Parties wish to present expert testimony, the same procedure shall apply as for witnesses, but with some allowance for brief direct testimony of the expert on application of the presenting Party.*

10. Hearing

- 10.1. *As indicated in the timetable above, the Hearing shall be from July 24 to 25, 2007, but, after consultation with the Parties, the Tribunal may extend the Hearing to July 26 or 27, 2007.*

- 10.2. *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.*
- 10.3. *The Parties may present opening statements of up to three hours.*
- 10.4. *No new documents may be presented at the Hearing. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.*
- 10.5. *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.*
- 10.6. *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.*
- 10.7. *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 of the Pre-Hearing Conference.*
- 10.8. *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.*
- 10.9. *Further details regarding the Hearing will be given in the PO by the Tribunal under section 5.8 of the Timetable.*

11. Extensions of Deadlines and Other Procedural Decisions

- 11.1. *Short extensions may be agreed between the Parties as long as they do not affect later dates in the Timetable and the Tribunal is informed before the original date due.*
- 11.2. *Extensions of deadlines shall only be granted by the Tribunal on exceptional grounds and provided that a request is submitted immediately after an event has occurred which prevents a Party from complying with the deadline.*
- 11.3. *The Tribunal indicated to the Parties, and the Parties took note thereof, that in view of travels and other commitments of the Arbitrators, it might sometimes take a certain period for the Tribunal to respond to submissions of the Parties and decide on them.*
- 11.4. *Procedural decisions will be issued by the chairman of the Tribunal after consultation with his co-arbitrators or, in cases of urgency or if a co-arbitrator cannot be reached, by him alone.*

12. Administrative Secretary

*The Tribunal may appoint an Administrative Secretary at an appropriate time before the Hearing, probably in spring 2007. The respective costs shall be treated as expenses of the procedure.*

13. Results of the Procedural Meeting

*The Parties, within one week after receiving the Draft for this Order, were given an opportunity to submit any comments if they felt that a result of the Paris meeting was not correctly recorded. Taking into account the comments received, the Tribunal then issued this Order in its final form.”*

12. By e-mail sent to the SCC Institute, the Chairman of the Tribunal requested on August 22, 2007 an extension of the time for issuing the award on jurisdiction to December 31, 2007 (Article 33 SCC rules). In an e-mail sent to the Parties on August 24, 2006, the SCC Institute asked for comments on the request by August 29, 2007. By letter of August 30, 2006, the SCC extended the time for rendering the Award to December 31, 2007.

13. On October 31, 2006, the Respondent submitted its First Memorial on Jurisdictional Issues (R II) together with copies of the documents relied upon in the Memorial.
14. On February 28, 2007 the Claimant submitted its First Memorial on Jurisdictional Issues (C II) together with copies of the documents relied upon in the Memorial .The Claimant also submitted as annex to the Memorial (C II-Annex) a historical survey directed at the period from 1917 to 1991 on Russian state policy with respect to international arbitration.
15. On March 16, 2007 the Parties informed the Tribunal via e-mail that they had not identified any dispute that counsel would need to ask the Tribunal to resolve at that point in a pre-hearing conference pursuant to para. 5.7 of PO No.1, as had been scheduled for April 3, 2007.
16. After deliberation with the Members of the Tribunal, the Chairman replied to the Parties by e-mail on March 22, 2007 cancelling the pre-hearing conference until further notice.
17. On June 8, 2007 the Respondent submitted its Second Memorial on Jurisdictional Issues (R III) together with copies of the documents relied upon in the Memorial (R-103 to R-327).
18. After the Parties had contacted the Tribunal via e-mail on June 22, and June 25, 2007 respectively, the Tribunal addressed the Parties by the Chairman's letter of June 26, 2007 as follows:

*“Dear colleagues,*

*the Tribunal thanks the Parties for their e-mails of 22 and 25 June 2007 and hereby replies to the information and questions raised therein:*

1. *The Tribunal agrees that there is no need to submit a chronological list of exhibits. However, in view of the many*

*boxes of a great number of exhibits submitted by the Parties, to avoid that each member of the Tribunal has to bring all of them to Stockholm, the Parties are invited to bring to the Hearing, for the other Party and for each member of the Tribunal*

*either an agreed **Common Bundle** of Exhibits or parts thereof on which they intend to rely in their oral presentations at the hearing,*

*or, from each Party, **Hearing Binders** of those exhibits or parts thereof on which that Party intends to rely in its oral presentations at the hearing.*

2. *The hearing will take place only on 24 and 25 July, but, as a precaution, both days should be fully blocked.*
3. *Since Respondent has made the most recent submission, the **Agenda** should be as follows:*
  - 3.1. *Short Introduction by Chairman of Tribunal.*
  - 3.2. *Opening Statement by Claimant of up to 3 hours.*
  - 3.3. *Opening Statement by Respondent of up to 3 hours.*
  - 3.4. *Questions by the Tribunal,  
and suggestions regarding particular issues to be addressed in more detail in Parties' 2nd Round Presentations.*
  - 3.5. *2nd Round Presentation by Claimant of up to 2 hours.*
  - 3.6. *2nd Round Presentation by Respondent of up to 2 hours.*
  - 3.7. *Final questions by the Tribunal.*
  - 3.8. *Discussion on whether Post-Hearing Briefs are deemed necessary and of any other issues of the further procedure.*

*Members of the Tribunal may raise questions at any time considered appropriate, however intend to do so only exceptionally during the 1st Round Presentations of both Parties, but perhaps more during the 2nd Round Presentations of both Parties.*

4. ***Timing** (unless otherwise agreed at the beginning of or during the Hearing):*

***1st day:** Start at 9:00.*

*Depending on the actual time taken by the Parties for their Opening Statements, coffee breaks and the lunch break will be*

*taken at convenient times. If Claimant uses up its full three hours, it may be preferable that Respondent's Opening Statement starts only after an early lunch break.*

*In the afternoon, after a coffee break and short deliberations of the Tribunal, Agenda item 3.4. (Questions and suggestions by Tribunal)*

**2nd day:** Start at 9:00.

*Agenda items 3.5. to 3.8. with coffee breaks and a lunch break at a convenient time.*

5. *The Tribunal would be grateful for an information by the Parties according to § 10.7 of Procedural Order No.1 regarding the arrangements made for a **transcript** of the Hearing.*
  6. *The Parties are invited to submit, **by 16 July 2007**, a list of the names and functions of the persons who will attending the hearing from their respective sides."*
19. On July 24 and 25, 2007, a Hearing on Jurisdictional Issues was held in the Berns Salonger, Stockholm. In addition to the members of the Tribunal, the following persons attended the Hearing:
- For Claimant: John Townsend, James Boykin, Anton Skuratovskyy (Hughes, Hubbard & Reed, Washington D.C.); Marc-Olivier Langlois (Hughes, Hubbard & Reed, Paris); Prof. Dr. Kaj Hobér, William McKechnie (Mannheimer Swartling Advokatbyra, Stockholm).
- For Respondent: Robert Greig, Dr. Claudia Annacker, Roland Ziade, Lorenzo Melchionda, Maja Menard (Cleary Gottlieb Steen & Hamilton, Paris).
- Ms. Thelma Harries as court reporter from the firm European Court reporting.
20. The Agenda for the Hearing was as outlined in the Tribunal's letter dated June 26, 2007, as quoted above. At the end of the Hearing:-

- it was agreed that there was no need for the Parties to submit Post-Hearing Briefs,
  - in reply to a question to that effect by the Chairman, both Parties stated that they had no objections to the procedure as conducted by the Tribunal up to that time.
21. On August 7, 2007, the transcript of the Hearing was received from European Court Reporting.
22. Beginning immediately at the conclusion of the Hearing, the Tribunal conducted a number of deliberations by meetings in person and written communications and exchanges.

## **E. The Principal Relevant Legal Provisions**

### **E.I. Provisions of the UK-Soviet BIT**

23. The principal relevant provisions of the UK–Soviet BIT/IPPA are 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 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.*

#### **ARTICLE 7**

##### *Exceptions*

*The provisions of Articles 3 and 4 of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from*

- (a) any existing or future customs union, organisation for mutual economic assistance or similar international agreement, whether multilateral or bilateral, to which either of the Contracting Parties is or may become a party, or*
- (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.*

#### ARTICLE 8

##### *Disputes between an Investor and the Host Contracting Party*

(1) *This Article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement.*

(2) *Any such disputes which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.*

(3) *Where the dispute is referred to international arbitration, the investor concerned in the dispute shall have the right to refer the dispute either to:*

(a) *the Institute of Arbitration of the Chamber of Commerce of Stockholm; ....”*

The Russian text of Article 8(1) is translated unofficially by the Respondent in its First Memorial on Jurisdictional Issues as follows (R II, para. 21, fn. 15). The translation was acknowledged by the Claimant at least with respect to all relevant parts (C II, para. 58, fn. 55; para. 65). It was, however, emphasised by the Parties that the inclusion in the Common Bundle (CB) of an unofficial translation prepared by one party does not constitute acceptance by the other party of the accuracy of that translation.

*“The provisions of this Article shall apply to any disputes of a legal character between an investor of one Contracting Party and the other Contracting Party in relation to issues of the investor’s investment concerning either the amount and the procedure for the payment of compensation provided for in Articles 4 or 5 of this Agreement, or any other matters being the result of an act of expropriation in accordance with Article 5 of this Agreement, or regarding the consequences of the non-implementation, or of the incorrect implementation, of undertakings under Article 6 of this Agreement.”*

## **E.II. Provisions of other BITs of the Soviet Union or Russia**

24. The principal relevant provisions of the **Denmark-Russia BIT** are set out below:

*“ARTICLE 8*

*Disputes between an Investor of one Contracting Party and the other Contracting Party*

*(1) 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 that other Contracting Party shall be subject to negotiations [sic] [between the] parties in dispute.*

*(2) If the dispute cannot be settled in such a way within a period of six months from the date of written notification of the claim, the investor shall be entitled to submit the case either to:*

- (a) a sole arbitrator or an ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or*
- (b) the Institute of Arbitration of the Chamber of Commerce in Stockholm.”*

25. Article 10 of the **Belgium/Luxemburg-Soviet BIT** reads as follows:

*“Tout différend entre l’une des Parties contractantes et un investisseur de l’autre Partie contractante, relatif au montant ou au mode de paiement des indemnités dues en vertu de l’article 5 ...”*

The unofficial translation by the Respondent is quoted below (R II para. 28):

*“Any dispute between one of the Contracting Parties and an investor of the other Contracting Party, relating to the amount or to the modality of payment of compensation due by virtue of Article 5 ...”*

26. The relevant paragraphs of Article 7 of the **France-Soviet BIT** read as follows. Since Respondent and Claimant do not agree on a translation, both versions of the text are set out below:

*“Tout différend entre l’une des Parties contractantes et un investisseur de l’autre Partie contractante portant sur les effets d’une*

*mesure prise par la première Partie contractante et relative à la gestion, l'entretien, la jouissance ou la liquidation d'un investissement réalisé par cet investisseur, en particulier, mais non exclusivement, sur les effets d'une mesure relative au transport et à la vente des marchandises, à la dépossession ou aux transferts visés à l'article 5 du présent Accord est, autant que possible, réglé à l'amiable entre les deux Parties concernées.*

*Si un tel différend n'a pas pu être réglé à l'amiable dans un délai de six mois à partir du moment où il a été soulevé par l'une ou l'autre des parties au différend, il peut être soumis par écrit à l'arbitrage."*

[Translation by the Respondent, R II, para. 35, fn. 27]

*"Any dispute between one of the Contracting Parties and an investor of the other Contracting Party concerning the effects of a measure taken by the first Contracting Party relating to the management, maintenance, enjoyment or the liquidation of an investment made by this investor, particularly but not exclusively concerning the effects of a measure relating to the transport and to the sale of merchandise, to the dispossession or to the transfers provided for in Article 5 of the present Agreement is, to the extent possible, to be settled amicably between the concerned parties.*

*If such a dispute could not be settled amicably in a period of six months from the moment it was raised by one or the other party to the dispute, it can be submitted, in writing, to arbitration."*

[Translation by the Claimant, C II, para. 97]

*"Any dispute between one of the Contracting Parties and an investor of the other Contracting Party, concerning the consequences of a measure, taken by the former Contracting Party and that relates to the management, maintenance, use or disposal of an investment, made by this investor, and in particular, but not exclusively, concerning the consequences of a measure that relates to the transport and sale of goods, to deprivation of investment or to transfers, provided for by Article 5 of this Agreement..."*

### **E.III. Articles 31 and 32 Vienna Convention on the Law of Treaties**

27. Articles 31 and 32 of the Vienna Convention on the Law of Treaties of May 23, 1969 provide:

*“Article 31  
General rule of interpretation*

*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

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

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

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

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
- (c) any relevant rules of international law applicable in the relations between the parties.*

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

*Article 32  
Supplementary means of interpretation*

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

- (a) leaves the meaning ambiguous or obscure; or*
- (b) leads to a result which is manifestly absurd or unreasonable.”*

## **F. Relief Sought by the Parties regarding Jurisdiction**

### **F.I. Relief Sought by Respondent regarding Jurisdiction**

28. As identified in the First Memorial (R II, para. 62) and restated in the Second Memorial on Jurisdictional Issues (R III, para. 166) the Respondent requests the Tribunal to issue an award:

- “(a) Determining that it lacks jurisdiction to entertain the claim brought by Claimant;*
- (b) In the alternative, determining that the claim brought by Claimant is inadmissible;*
- (c) Ordering Claimant to pay all of the Russian Federation’s costs, expenses, and attorney’s fees;*
- (d) Granting any further relief against Claimant that the Tribunal deems fit and proper.”*

### **F.II. Relief Sought by Claimant regarding Jurisdiction**

29. The Claimant asks the Tribunal to award as follows (C II, p. 94):

*“For all of the foregoing reasons, the Tribunal should find that it has jurisdiction to adjudicate the Claimant’s claim and should convene a new procedural conference to establish a framework for addressing the merits of the present dispute.”*

## **G. Short Summary of Contentions regarding Jurisdiction**

### **G.I. Short Summary of Contentions by Respondent**

30. Subject to greater detail in later sections in regard to particular issues, the Respondent challenges the Tribunal's jurisdiction or, alternatively the admissibility of the claim, principally on three grounds, which are best summarized by quoting the Introduction of Respondent's First Memorial on Jurisdictional Issues (R II):

*“1. In its Request for Arbitration Claimant states that it became a shareholder of Yukos Oil Company in November and December 2004. By this time period, as set forth in the Statement of Defense, the alleged acts of expropriation had already occurred or were publicly disclosed.*

*2. This Memorial is submitted pursuant to Section 4 of Procedural Order No. 1 dated July 8, 2006 with respect to the jurisdiction and admissibility defenses raised in Part I of the Russian Federation's Reply dated February 28, 2006.*

*3. The UK-Soviet BIT does not contain an offer to an investor to arbitrate a dispute arising under the substantive protections of the treaty. The investor-State dispute resolution provision, Article 8 of the UK-Soviet BIT, requires a joint referral to international arbitration.*

*4. In addition, the UK-Soviet BIT limits any grant of jurisdiction to this Tribunal to issues of the amount and modality of compensation for expropriation or other matters consequential upon an act of expropriation. No jurisdiction exists over issues of the existence and legality of an alleged expropriation. Instead, the UK-Soviet BIT provides, in the absence of an acknowledgement, for the availability of an independent Russian body to determine such issues. No such acknowledgement or court determination is alleged.*

5. *Another arbitral tribunal has dismissed an investor claim on the basis set forth in ¶ 29 for lack of jurisdiction brought under a strictly analogous provision of the Belgium/Luxembourg-Soviet BIT. The determination and rationale of this award are fully on point.*

6. *Finally, Claimant has failed to exhaust local remedies, which is a fundamental requirement under customary international law. This requirement has not been dispensed with under the terms of the UK-Soviet BIT. Claimant does not allege any disability that would excuse it from satisfying this requirement.”*

## **G.II. Short Summary of Contentions by Claimant**

31. Subject to greater detail in later sections in regard to particular issues, the main arguments of Claimant can best be summarized by quoting sections 1 to 15 of the Introduction in Claimant’s First Memorial on Jurisdictional Issues (C II):

*“1. The Respondent challenges the Tribunal’s jurisdiction to hear and decide on its merits the Claimant’s claim against the Respondent under Article 5 of the 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 6th April 1989 (the “IPPA”). That jurisdictional challenge was first raised in the Respondent’s Reply dated 28th February 2006 (the “Reply”), submitted in answer to the Claimant’s Request for Arbitration dated 28th October 2005 (the “Request for Arbitration”). The Respondent had earlier failed to make any response, let alone any jurisdictional protest or challenge, to the Claimant’s letter dated 2nd June 2005 containing the written notification of the Claimant’s claim against the Respondent required by Article 8(2) of the IPPA.*

*2. It is common ground that the IPPA came into force on 3rd July 1991, pursuant to an exchange of notes between the United Kingdom and the USSR. It is also common ground that the Respondent was at all material times and remains a state party to the IPPA as the USSR’s successor under international law, as confirmed by the letter dated 13th January 1992 from the Respondent’s Ministry of Foreign Affairs to (inter alios) the United Kingdom’s Ambassador in Moscow, and the joint declaration dated 30th January 1992 issued by the United Kingdom and the Respondent.*

A. THE CLAIMANT'S CLAIM UNDER THE IPPA

3. The Claimant seeks compensation from the Respondent for the loss of the value of its investment in Yukos Oil Corporation OJSC ("Yukos") as a result of Respondent's expropriation of Yukos assets. Article 5 of the IPPA protects such an investment from "expropriation," as there defined, by requiring the host state to pay adequate and effective compensation without delay.

4. In its Reply, the Respondent confirmed its refusal to pay any such compensation to the Claimant. Accordingly, under any objective standard, this is a dispute about whether or not the Respondent should pay compensation to the Claimant.

5. It is at present both unnecessary and inappropriate for either Party to make submissions as to the merits of the Claimant's claim or the Respondent's defences. At this jurisdictional stage, it is to be presumed that the Claimant's claim can be made good on the facts and matters pleaded by the Claimant in its Request for Arbitration.

6. If the Respondent's jurisdictional challenge were to be upheld by this Tribunal, the Claimant would be left without any practical remedy for the injury that it has suffered as a result of the Respondent's expropriation of Yukos assets. The notion, as advanced by the Respondent, that in this case the Claimant should sue the Respondent in its own courts would inevitably give rise to a claim under international law for denial of justice.

B. THE RESPONDENT'S THREE JURISDICTIONAL ISSUES

7. The Respondent's challenge to this Tribunal's jurisdiction over the Claimant's present claim raises three separate issues:

*First Issue:* The Respondent asserts that the wording of Article 8 of the IPPA requires the prior consent of the Respondent to any reference by the Claimant of a dispute to arbitration, and that such consent has not been given. This issue is addressed in Part I, below.

*Second Issue:* The Respondent asserts that the wording of Article 8(1) of the IPPA materially limits its scope to preclude the Tribunal from deciding upon any issue other than "the amount of compensation and the modality of payment," and only after an expropriation is acknowledged or determined elsewhere. This issue is addressed in Part II, below.

*Third Issue:* The Respondent asserts a general rule under customary international law imposing on the Claimant an ostensible duty to exhaust first, prior to any reference of its dispute to arbitration under Article 8 of the IPPA, all local remedies before the Respondent's own

*courts in the Russian Federation. This issue is addressed in Part III, below.*

8. *It is necessary to demonstrate in turn that Respondent is mistaken as to each of these three Issues; but collectively they raise overlapping threshold questions. We therefore first set out certain preliminary submissions concerning investor-state arbitration generally and under this IPPA specifically.*

#### C. THE VIENNA CONVENTION ON THE LAW OF TREATIES

9. *All three Issues turn (in whole or in part) on the interpretation of the IPPA, particularly Article 8. It is common ground that the IPPA, as a treaty between two sovereign states, falls to be interpreted in accordance with the customary rules of international law codified in the 1969 Vienna Convention on the Law of Treaties. Both the United Kingdom and the Respondent are parties to the Vienna Convention.*

10. *It is also common ground that the Tribunal should look to Article 31 of the Vienna Convention. Article 31 provides (inter alia) that a treaty, such as the IPPA, “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”*

11. *The Respondent also invokes “supplementary means of interpretation” under Article 32 of the Vienna Convention. It is not common ground that the Respondent has properly brought Article 32 into play in the present case. It will therefore be necessary to address these submissions of Respondent more fully below.*

#### D. THE CONTEXT OF THE IPPA: THE USSR'S TRANSITIONAL PERIOD (1989-1991)

12. *This Tribunal may take judicial notice of the fact that, during the period between 1989 and 1991, when the IPPA was agreed and ratified, respectively, the USSR was rapidly transforming itself, its economy, and its foreign trade relations with other countries, particularly the Member states of the European Union, including the United Kingdom.*

13. *By 1989, the USSR's economy, based on state foreign trade monopoly and centralised economic state planning, was moving away from a closed socialist economy towards an open-market economy, significantly increasing the need for inward foreign investment. This transition took place more quickly than could have been imagined.*

14. *Between 1989 and the end of 1990, the USSR agreed to fourteen BITs, including the IPPA. The USSR ratified all fourteen simultaneously on 29 May 1991.*

*E. THE JURIDICAL NATURE OF INVESTOR-STATE ARBITRATION*

15. *These arbitration proceedings are brought by a private investor against the host state under Article 8 of the IPPA (“Disputes between an Investor and the Host Contracting Party”). These are not proceedings between two states brought under the quite separate provision for inter-state arbitration under Article 9 of the IPPA (“Disputes between the Contracting Parties”). The Claimant’s claim against the Respondent is brought independently of the United Kingdom as its home state; so this is not a claim made or supported by the United Kingdom espousing the Claimant’s claim as its national. This distinction, much elided in the Respondent’s First Memorial, cuts across all three Issues.”*

## **H. Considerations and Conclusions of the Tribunal regarding Jurisdiction**

32. The Tribunal has carefully examined all of the many and extensive arguments of the Parties as well as the more than 500 exhibits submitted with their memorials. What follows deals with those aspects that the Tribunal considers to be the most relevant in their respective contexts.

### **H.I. Preliminary Considerations**

#### **1. Applicable Law**

33. In reply to a question to the Parties during the oral hearing, the Tribunal sought confirmation that the law applicable to the jurisdictional question was public international law; both Parties confirmed that this was their position [Transcript, 25 July, p.5 (Claimant); p.58 (Respondent)].

#### **2. Competence of the Tribunal to decide on its Jurisdiction**

34. As recorded in sections 4 and 5 of Procedural Order No.1, the Parties and the Tribunal agreed that there would first be a Jurisdictional Phase of the Proceedings, at the end of which the Tribunal was to decide on its jurisdiction.
35. This is in conformity with the generally accepted principle in international arbitration, as well as national arbitration laws, including Swedish arbitration law, that the arbitrators have what is most often called “Kompetenz-

Kompetenz”, namely that they have the inherent authority to decide on their own jurisdiction.

36. Article 34 SCC Rules provides that, at the request of a Party, a separate issue may be decided in a Separate Award. In view of the Parties’ abovementioned agreement that there should be a separate jurisdictional phase, the Tribunal therefore has the authority to issue this Award on Jurisdiction.

### **3. Principles of Interpretation**

37. The Claimant, in its written and oral arguments, has urged the Tribunal to adopt a ‘dynamic’ approach to the interpretation of the IPPA. By this, the Claimant appears to mean that the Tribunal should not be confined by the circumstances against which the Contracting Parties reached agreement on the IPPA at the time, but should instead give full weight, for the purposes of giving meaning to its terms, to events and attitudes as they have developed since then, notably the dissolution of the USSR, the emergence of the Russian Federation as its legal continuation, and the radically different economic, trading and investment policies adopted by the Russian Federation as that period went on. In support of this, the Claimant drew the Tribunal’s attention to the second and third paragraphs of the preamble to the IPPA, which refer to ‘favourable conditions for greater investment’ and to ‘the development of economic relations between the two States’. Pressed to specify the basis in the Vienna Convention on the Law of Treaties (the Vienna Convention) for this interpretative technique, Counsel explained that the Claimant was not relying on the provisions of Articles 31 and 32 of that Convention in a formal sense, but rather as general indications that the philosophy of the Vienna Convention is to look at what happens after the conclusion of the treaty [Transcript 25 July, pp 21-2].
38. The Tribunal is unable to agree. It begins by observing that the present is one of those cases – surprisingly rare in practice – in which the Vienna

Convention is more than just a convenient reference point for the rules of general international law, but is in fact a treaty in force between the Russian Federation and the United Kingdom, and which entered into force before the IPPA itself was negotiated and concluded. The consequence is that, under the terms of its Article 4, the Vienna Convention applies as a matter of legal obligation to the interpretation and application of the IPPA. The Tribunal does not find that the Articles of the Vienna Convention cited can reasonably bear the weight which the Claimant seeks to rest on them; without exception, insofar as these Articles look toward subsequent events, the subsequent events take the form, not merely of joint or coincident practice by the treaty parties, but of such practice in respect of the implementation of their treaty. Hence both subparagraphs (a) and (b) of Article 31(3) look towards something equivalent to an agreement between the Parties (express or implicit) on what they regard their specific treaty obligations to be, and it is hardly to be wondered at that the Vienna Convention requires this obviously significant material to be “taken into account, together with the context”.

39. When it comes to Article 31(3)(c), the position may be different. Here the reference is to “any relevant rules of international law applicable in the relations between the parties”. ‘Applicable in the relations between the parties’ must be taken as a reference to rules of international law that condition the performance of the specific rights and obligations stipulated in the treaty – or else it would amount to a general licence to override the treaty terms that would be quite incompatible with the general spirit of the Vienna Convention as a whole. The cases cited by the Claimant relate almost in their entirety to human rights treaties and to the constituent instruments of international organizations. It is however plain that both of these are special cases: the former (human rights) because they represent the very archetype of treaty instruments in which the Contracting Parties must have intended that the principles and concepts which they employed should be understood and applied in the light of developing social attitudes (as has repeatedly been held by national as well as international judicial bodies); the latter (international

organizations) because it is generally understood that, given the changing nature of the problems and circumstances international organizations have to confront, a degree of evolutionary adaptation is the only realistic approach to realizing the underlying purposes of the organization as laid down in its constituent instrument. It is difficult to see what bearing any of this might have on the jurisdiction of an arbitral tribunal, which remains, as it always has been, a matter of specific consent by the parties.

40. It is open to serious question, moreover, whether these special kinds of multilateral treaty are at all analogous to bilateral engagements regulating a particular area of the relations between one Party and the other. Here a bargain is a (reciprocal) bargain and the Parties must be held to what they agreed to, but not more, or less. The common thread among the multilateral examples just referred to is that their nature or circumstances provide evidence that the Parties themselves intended or understood that an evolutionary approach was appropriate to the interpretation and application of what they had agreed upon, and exactly the same common thread is to be found in the two bilateral cases the Claimant invokes (the *Gabcikovo/Nagymaros case* in the International Court and the *Iron Rhine* arbitration). No such evidence is available here; the preambular references mentioned above offer nothing of the kind. The Tribunal inclines to the opposite view, namely that, so far as the treaty parties foresaw and wished to admit an evolutionary development at all, the MFN clause in Article 3 was their chosen vehicle for doing so – as the Claimant has itself argued.
  
41. Moreover, while the doctrine advanced before the Tribunal by the Claimant may at first sight have an appearance of progressiveness since (in present circumstances) it would expand the protection offered to investors, it would in other circumstances have an utterly pernicious effect if it allowed a Respondent State, under the excuse of having adopted in the meanwhile more restrictive or nationalistic economic policies, to claim to escape from the guarantees it had bound itself to in earlier bilateral treaties, and the Tribunal

can see no way in which it could devise a legal ratchet under which changes of circumstance could be admitted in one direction only but not the other.

42. The Tribunal recognizes that this argument by the Claimant may have developed as a reaction against the Respondent's argument that certain aspects of the national policy of the former Soviet Union should be taken as determinants of what it would or would not have agreed to in particular bilateral treaties. The Tribunal does not however consider this of more than incidental descriptive interest, given that the main focus of its attention has to be not the policies which either one or the other Contracting Party brought to the negotiating table (and which might of course have been widely different from one another) but what they agreed on, as embodied in the terms of their treaty. To that extent, therefore, the Tribunal considers that neither the argument nor the counter-argument is of any pertinence to the task before it. That said, the Tribunal merely observes that it cannot conceive of any circumstances in which it would be proper for it to substitute for the treaty actually concluded by the former Soviet Union (and which both Parties to it continue to regard as binding on them) another treaty which might have been concluded by the Russian Federation had it then been in existence and pursuing different economic policies.
43. The Claimant also maintains that what it refers to as a 'fundamental change of circumstances' must obviously be taken into account in the process of interpretation [Transcript 24 July, p. 70; 25 July, pp. 19-21]. The argument is, however, questionable. The Vienna Convention does indeed employ the phrase, but in the wholly different context of a claim that such a 'fundamental change of circumstances' constitutes grounds for terminating a treaty (or suspending its operation) – a possibility which the Convention understandably subjects to onerous and highly restrictive conditions. The invocation of the concept of in the present context is therefore misplaced and, in the Tribunal's view, entirely without merit.

44. The Tribunal rests therefore with the conclusion that the correct approach is to interpret the BIT even-handedly and objectively, on its terms, under the rules laid down in the Vienna Convention, and without any presumption either in favour of or against the Tribunal's own jurisdiction.

#### **4. Decision on Act of Expropriation to be joined to the merits**

45. The issues as to whether, in the present case, there has been an act of expropriation and, if so, its relevance for the jurisdiction of the Tribunal has been discussed extensively by the Parties.

46. Later sections of this Award will deal in detail with the core issue in this jurisdictional phase, i.e. whether either Article 8 or Article 3 of the UK-Soviet BIT provide jurisdiction not only to determine any compensation that may be due, but also over the prior issue of whether the acts imputed to the Respondent are to be classed as an expropriation.

47. However, in so far as such a jurisdiction is found to exist, the Tribunal is satisfied that the issue whether in fact the acts of Respondent are to be classed as an expropriation cannot be properly addressed in the context of this jurisdictional phase, because they are too closely connected to the merits of the case, and will have to be fully argued by the Parties before the Tribunal can come to a decision on the matter.

48. Therefore, as has often been done in arbitrations in similar circumstances, if the Tribunal decides that it has jurisdiction, the issue as to whether there has been an expropriation or not will be joined to the proceedings on the merits.

#### **5. Relevance of Decisions of other Tribunals**

49. Both Parties have cited in argument various Decisions and Awards by arbitral tribunals for their relevance to the issues presently before this Tribunal,

notably in relation to the jurisdictional provisions in Article 8 of the IPPA), and in relation to the most-favoured-nation (MFN) provisions in Article 3 of the IPPA). The Tribunal deems it useful to make clear from the outset that it regards its task in these proceedings as the very specific one of arriving at the proper meaning to be given to those particular provisions in the context of the particular bilateral investment treaty in which they appear. That being so, it is not obviously clear how far arbitral decisions on other jurisdictional or MFN clauses in other treaties are of relevance to the Tribunal's task. It is at all events plain that the decisions of other tribunals are not binding on this Tribunal, and the Tribunal refers in this connection to paragraphs 73-76 of the Decision on Jurisdiction in *Bayindir Insaat Turizm Ticaret v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29). This does not however preclude the Tribunal from considering other arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they throw any useful light on the issues that arise for decision in this case

## **6. Procedural Objections to Most-Favoured-Nation Issue**

50. The Tribunal has carefully examined the memorials and exhibits submitted, as well as the presentations at the Hearing by each of the Parties on this issue. It is not necessary to recall these arguments in detail here, but the Tribunal has taken them fully into account in reaching the following findings and conclusions.
51. Respondent (R III, para. 101) has raised procedural objections against Claimant's argument that the MFN provisions of Article 3 of the UK-Soviet BIT, taken together with the Denmark-Russia BIT, provide a ground for this Tribunal's jurisdiction. In particular, Respondent argues that this second ground was not mentioned in the Claimant's Request for Arbitration, but only later in Claimant's First Memorial dated 28 February 2007.
52. In turn, Claimant argues that Respondent had raised this objection too late.

53. The Tribunal does not encounter any procedural difficulty in dealing with the MFN issue. First, if one were to conclude that, under Article 21 SCC Rules, the MFN argument had to be included in the Claimant's Statement of Claim, such a requirement would be complied with. As can be seen from the introductory sentence of Article 21(1), normally the Tribunal has to be constituted and sets a date for the Claimant's Statement of Claim. The proviso contained in the Rule, "*unless previously provided in the case*", cannot, at least in the present context, be interpreted so as to require that Claimant's Request for Arbitration, which had already been submitted (on 28 October 2005) as the opening step in the arbitration proceedings, had to include the MFN issue. For at that time Respondent had not yet raised its objection to jurisdiction. It was that objection which determined the later procedure, and particularly provided the reason why, with the agreement of both Parties, it was decided that (as recorded in Procedural Order No.1) for the jurisdictional phase of the proceedings, Respondent was to be the first to submit a Principal Memorial, after which Claimant was to submit its Principal Memorial. It follows that it was not until that latter Memorial that Claimant was required to raise the MFN argument, as indeed it did.
54. But even had Article 21 to be seen as raising an obstacle, Article 22 SCC Rules would still have granted the opportunity for Claimant to add the MFN issue as an amendment to its claim or to its defence against Respondent's objection to jurisdiction. In fact, Claimant's submission that the MFN issue should be included in the proceedings on jurisdiction, could, if necessary, be interpreted as a request for such an amendment. The Tribunal has no hesitation over using its discretion under Article 22 to decide that it is appropriate to include the MFN issue in the proceedings on jurisdiction, not least because this issue could be – and was in fact – fully argued by both Parties both in their written submissions and at the Hearing.

55. In view of the above conclusions, the Tribunal does not have to decide whether, as argued by Claimant, Respondent was in turn too late to raise its procedural objection, in the light of Article 29 SCC Rules.

## **H.II. The Issue of Consent to International Arbitration**

### **1. Arguments by Respondent**

56. The Respondent contends that the fundamental principles of sovereignty and equality of States in public international law require an *unequivocal indication of voluntary and indisputable acceptance* by a State of an international tribunal's jurisdiction over the State. Therefore, the State's consent to arbitrate some or all investment disputes given in advance in the framework of a bilateral or multilateral investment treaty must be *clear and unambiguous*. In contrast, to presuppose the existence of a right in an investor to direct investor-State arbitration and to require express and unambiguous wording to "destroy" that right, as the Claimant seems to argue, is considered by the Respondent to be devoid of any basis (R I, paras. 4, 5; R II, para. 7; R III, paras. 93, 95 ).

57. Respondent asserts that the UK-Soviet BIT (R-1) contains neither an express nor an unequivocal and indisputable implied consent to investor-State arbitration. Interpreted in accordance with the basic rule of interpretation expressed in Article 31 VCLT (R-9), Article 8 UK-Soviet BIT merely *obligates the Parties to agree to submit certain disputes to arbitration, but does not constitute a consent to arbitrate*. Thus the Parties are under an obligation to cooperate to refer a dispute to arbitration, failing which the issue would be resolved inter-State. In the present context, where there is no determination or acknowledgement of the required predicate act of expropriation, the Respondent argues that even this obligation to consent to arbitration does not arise (R I, paras. 6 and 7; R II, para. 8; R III, paras. 96 and 97).

58. As regards the ordinary meaning of the equally authentic English and Russian language versions of Article 8 UK-Soviet BIT, the Respondent translates the Russian text into English as follows (R II, para. 11):

*“(2) Any of such disputes that has not been amicably settled will, after expiration of a period of three months from the moment of written notification of such dispute, be referred to international arbitration if either party to the dispute so wishes.*

*(3) Where the dispute is referred to international arbitration, the investor participating in the dispute shall have the right to refer the dispute either to: ... [emphases added].*

59. The Respondent maintains that *expressions such as “shall consent”, “shall assent,” “shall be referred or submitted to arbitration,” or “will be submitted or referred to international arbitration” impose an obligation on the State to consent to arbitrate, but do not, without more, constitute an offer to arbitrate* (R II, para. 12). It is further contended that the express “hereby consent” formulation is not equivalent to “shall be submitted” clauses (R III, para. 96). Although the Respondent acknowledges that there are authorities that support the proposition that the phrase “shall be submitted” constitute consent, the Respondent emphasises that these authorities do not address limited grants of jurisdiction (R III, para. 99).
60. Invoking the *Encyclopaedia of Public International Law* (R-14), the Respondent relies further on the context of Article 8(2) UK-Soviet BIT. A phrase such as “a dispute shall be submitted to an arbitral tribunal by either party” *may constitute an offer to arbitrate or it may not, depending upon the related arbitration provisions*. The contrast between Article 8(2) UK-Soviet BIT and the explicit language of the Netherlands-Venezuela BIT (R-15), supports its view that no clear and unequivocal offer to arbitrate is contained in the UK-Soviet BIT (R II, paras. 13-15).
61. In addition, it is stated that the key phrase of Article 8(3) UK-Soviet BIT, “[w]here the dispute is referred to international arbitration,” would be

deprived of any meaning, if Article 8(2) was interpreted to contain an offer to investor-state arbitration. Such an interpretation would be inconsistent with the ordinary meaning and with the *principle of effectiveness* (R II, para. 16).

62. The language of Article 8(2), “if either party so wishes”, is said to avail the State and the investor equally. However, the Respondent takes the view that Claimant and investors generally *cannot be held to have unilaterally offered, in an instrument to which they were not a party, jurisdiction over a claim by the host State against Claimant or such an investor*. To the extent that the phrase *cannot be interpreted as constituting an offer by the investor*, there would as a result equally be no – at least no clear and unambiguous – offer of the State to international arbitration (R II, para. 17).
63. As to the object and purpose of Article 8 UK-Soviet BIT, the Respondent also considers why the requirement of a joint referral to arbitration was established. First, the requirement is said to reflect a strong Soviet policy against submission of so-called “diagonal” or “asymmetrical” disputes to international arbitration and, second, to be consistent with the limited subject-matter jurisdiction as reflected in the 1987 Soviet Model BIT which lacks any provision for investor-State arbitration. Further, in view of the general policy of the communist block to limit arbitration to the amount or other matters consequential to an expropriation, and not accept arbitration as to determining whether an act of expropriation has occurred, it is considered *appropriate and well motivated* that the Contracting Parties did not actually consent to arbitration (R II, paras. 18 – 19; R III, paras. 94, 97).

## **2. Arguments by Claimant**

64. First, the Claimant points out that the Respondent, prior to its Reply dated February 28, 2006 (R I), failed to make any response, let alone any jurisdictional protest or challenge, to the Claimant’s letter (C 0) dated June 2, 2005 (C II, para. 1).

65. In response to Respondent's objections, the Claimant contends that the necessary consent to arbitration on the part of the Respondent is expressly and unambiguously provided in Article 8 UK-Soviet BIT (C II, paras. 27 *et seq.*).
66. To support its view, the Claimant maintains that the language employed in Article 8(2) and (3) is clear in both the English and Russian versions. The word "shall" in the English language version *imports an essential element of compulsion, inconsistent with a further requirement for the state party's consent* (C II, para. 30). The use of "shall" in Article 9(2) for state-state arbitration is said to confirm this interpretation, whereas the use of "should" in Article 9(1) is believed to mark *the Contracting Parties' distinction between compulsion and mere recommendation* (C II, para. 30). The phrase "if either party to the dispute so wishes" in Article 8(2) leaves no room for interpretation and means that either the state party or the investor party has the right to submit a dispute to arbitration. The Claimant further argues that this interpretation is reinforced by Article 8(3), which provides specifically for the benefit of "the investor concerned" an *express and unconditional right to refer the dispute to arbitration under the SCC Rules* (C II, para. 32).
67. The Claimant rejects the notion that Article 8(2) contains a limited "shall consent" or "shall assent" clause, that only imposes an obligation on the State to consent, such that a failure to do so might constitute a breach of the BIT, but does not constitute in itself an offer to arbitrate. Instead of supporting the Respondent's view, the legal material cited by the Respondent (R-11) contradicts it (C II, para. 35 *et seq.*) and the reliance on the *Encyclopaedia of Public International Law* (R-14), being general in nature and often criticised as outdated, is asserted to be misplaced (C II, para. 39 *et seq.*). In favour of its own position, that no further consent on the part of the Respondent is needed, the Claimant relies on the distinction between limited "shall assent" clauses and unlimited "shall be submitted" clauses citing Professor Schreuer's

*Commentary on the ICSID Convention* (C-16). Whereas the Respondent refers to no jurisprudence in support of its interpretation that Articles 8(2) and (3) require prior consent to arbitration by the host state, the Claimant sees its view confirmed by numerous cases (C II, para. 44).

68. As regards the principle of effectiveness invoked by the Respondent, the Claimant contends that the key phrase of Article 8(3), “[w]here the dispute is referred to international arbitration”, is not deprived of all meaning by interpreting it as merely linking the right of either party to submit a dispute to arbitration if it so wishes under Article 8(2) and the particular right of the investor to refer the dispute to arbitration before the Stockholm Institute or under UNCITRAL Arbitration Rules under Article 8(3) (C II, para. 46). Furthermore, it is argued that one cannot derive from the phrase a requirement that there must first be joint reference to arbitration, stating that *it would take express and unambiguous wording to achieve such a result under Article 31 of the Vienna Convention because such a reading would effectively destroy an investor’s independent “right” to refer any dispute to investor-state arbitration under Article 8* (CII, para. 47).
69. The Respondent’s reliance on a strong Soviet policy is held by the Claimant to be historically incorrect and to be irrelevant for interpretation purposes under Article 31 VCLT as being at most a unilateral policy by one state. The Claimant finds it significant that the Respondent has not previously raised this point in its defence of claims previously brought by foreign investors. Moreover, the Claimant deems it to be inconsistent that the Respondent, on the one hand, insists upon limitations to the scope of disputes that could be submitted to arbitration by the investor, and, on the other hand, alleges Article 8 to require joint and specific consent to any reference to arbitration. (C II, para. 48 *et seq.*)

### **3. The Tribunal**

70. The Tribunal has carefully examined the memorials and exhibits submitted, as well as the presentations at the Hearing by each of the Parties on this issue. It is not necessary to recall these arguments in detail here, but the Tribunal has taken them fully into account in reaching the following findings and conclusions.
71. In the present context, to avoid misunderstanding, one has to distinguish two different questions:
- 1) Is there a binding consent to arbitration with the effect that a prospective party to the arbitration proceedings does not need the agreement of the other prospective party to start arbitration proceedings?
  - 2) If there is such a consent, what is its scope, in other words, which issues can be submitted to such arbitration proceedings?

The second question will be discussed later in this Award with regard both to Article 8 and to Article 3. It is only the first of these questions which will be discussed here. And since Claimant argues that the UK-Soviet BIT provides a consent both under Article 8 and under Article 3, this first question has to be examined with regard to both of these provisions.

#### **3.1. Consent under Article 8 UK-Soviet BIT**

72. The Tribunal does not see great difficulty in interpreting Article 8 in this context. That provision, irrespective of its material scope which will be discussed later in this Award, contains express and unambiguous language in its 2<sup>nd</sup> paragraph: first, by using the word “*shall*”, which makes clear that it is mandatory; and second, by adding the words “*if either party to the dispute wishes*”, which clearly indicates that the initiation of the arbitration proceedings depend solely on the unilateral decision by either party and that

the other party does not have to agree again in order to permit the arbitration to start. This interpretation is confirmed by the third paragraph of Article 8 which authorizes the investor to choose between various arbitration rules; that provision would not make sense if the investor had first to obtain once again the agreement of the Host State to start the arbitration proceedings. Finally, the Tribunal notes that the wording of Article 8, again irrespective of its scope, uses language which is found often in BITs, of both the UK and the Soviet Union, and of many other States, and which has generally been interpreted as a binding consent to arbitration.

### **3.2. Consent by Article 3 UK-Soviet BIT in connection with Article 8 Denmark-Russia BIT**

73. The question whether the MFN clauses in Article 3 UK-Soviet BIT can attract the application of arbitration clauses in other BITs will be discussed later in this Award. Here, the only question to be examined is whether, if Article 8 of the Denmark-Russia BIT can be resorted to, it provides a binding consent to arbitration authorizing the investor to start arbitration proceedings without the need to obtain afresh the agreement of the Host State.

74. Taking into account the analysis above of Article 8 of the UK-Soviet BIT, the Tribunal concludes that there can also be no doubt that Article 8 of the Denmark-Russia BIT provides such a binding consent to arbitration. The language in its second paragraph, under which “*the investor shall be entitled to submit the case either to*”, and which then once again offers several options for the applicable arbitration rules, leaves no room for any interpretation other than that the investor can initiate the arbitration, without the need for further agreement by the Host State,.

### **3.3. Conclusion**

75. In view of the above considerations, the Tribunal concludes that Respondent has submitted in a binding way to arbitration and that Respondent’s renewed

prior consent was not needed when Claimant initiated this arbitral procedure. This is without prejudice to the question whether this Tribunal also has jurisdiction over the claims, which will be discussed hereafter in this Award.

### **H.III. Subject-matter Jurisdiction – *Ratione Materiae***

#### **1. Arguments by Respondent**

76. The Respondent contends that the Tribunal lacks jurisdiction *ratione materiae* to hear and decide Claimant's claim (R I, paras. 9, 13). The subject-matter jurisdiction under Article 8 UK-Soviet BIT *would not encompass the power to determine whether there was an expropriation and if so, its legality* (R II, para. 20). The Respondent further refuses to accept Article 3 UK-Soviet BIT in conjunction with Article 8 DK-Russia BIT as a valid basis for jurisdiction (R III, paras. 100 *et seq.*).
77. As regards Article 8(1) UK-Soviet BIT, the Respondent holds that any grant of jurisdiction is limited to legal disputes "concerning the amount or [procedure for] payment of compensation under Articles 4 or 5 of this Agreement" (the so-called 'First Jurisdictional Clause'), or "concerning any other matter consequential upon an act of expropriation" (the so-called 'Second Jurisdictional Clause') (R III, para. 2; C II, para. 58).
78. Against the background of this limited subject-matter jurisdiction, it is asserted that the Tribunal only has jurisdiction when the alleged expropriation is acknowledged, in particular through an agreement to refer a dispute concerning the amount of compensation to arbitration, or determined otherwise, for example by a Russian court or an act of legislature (R I, para. 13; R II, paras. 21, 44 *et seq.*). It is, however, the firm position of the Respondent that no expropriation has occurred and that the acts complained of are *legitimate exercises of the powers of the Russian Federation to levy and collect taxes and to enforce its tax assessments* (R II, para. 45). The

Respondent therefore strongly opposes the *Claimant's assertion that "an act of expropriation" is established or admitted by "the fact that Respondent seized assets of Yukos and sold them at auction"* (R III, para. 13). Tax measures are said by the Respondent to be *intrinsically lawful* (R I, para. 15; R III, para. 7). But far from having to establish the absence of a direct or indirect expropriation, the Respondent regards it as sufficient to show that there is an issue as to whether an expropriation occurred (R III, para. 6). The Respondent characterizes Claimant's argument as an *attempt to skip over the issue of whether there is an act of expropriation, factually and legally* (R III, para. 2), and concludes that in the *absence of an acknowledgement or determination of expropriation, the Tribunal lacks jurisdiction ratione materiae to determine an amount of and award compensation* (R II, para. 47).

79. The Respondent asserts that the Claimant, after having mischaracterized the language of Article 8 UK-Soviet BIT in its Request for Arbitration (R II, para. 22), *has very little to say* about the First Jurisdictional Clause and even *expressly accepts* that it requires an established or acknowledged act of expropriation as a predicate to jurisdiction (R III, para. 15). Although the Claimant might in its First Memorial (C II) focus on the Second Jurisdictional Clause, this clause is believed to be even more clearly insufficient than the First to establish jurisdiction (R III, para. 2). The Claimant, in contrast, is said to be alleging in its own Memorial only a *"possible"* grant of jurisdiction over the existence of an expropriation, offering no textual analysis or support leading to such a result (R III, para. 19).
80. The Respondent primarily relies upon the ordinary meaning to support its view that both the First and Second Jurisdictional Clause unambiguously require a predicate act of expropriation. Contrasting the language of Article 8(1) against other bilateral investment treaties the United Kingdom concluded namely with Hungary, Bulgaria, Poland and Albania, and in which the phrases *"arisen under," "relates to," "arising under,"* or *"concerning obligations of"* are followed directly by the relevant substantive provision, the

Respondent maintains that under the UK-Soviet BIT *jurisdiction is limited to the matters in question following upon an act of expropriation and do not extend jurisdiction to a dispute concerning Articles 4 and 5* (R II, paras. 23 *et seq.*). Further support with respect to the Second Jurisdictional Clause is said to be lent by the dictionary definition of “consequence” as “[a] thing or circumstance which follows as an effect or results from something preceding” or “[t]he action or condition of following as a result upon something antecedent; the relation of a result of effect to its cause of antecedent”(R III, para. 16). It is stressed that the plain language of the Second Jurisdictional Clause sets forth the antecedent: “an act of expropriation.” *The phrase “any other matter,” coming before the phrase “consequential upon” does give the Tribunal jurisdiction to address the consequences of an expropriation, but cannot be read to provide jurisdiction to determine the existence of an expropriation* (R III, para. 17). Considering the basic structure of the sentence that constitutes Article 8(1), the Respondent contemplates that instead of actually employing *additional clauses* to expand the scope of jurisdiction, the Contracting Parties would have set it forth in a *single phrase*, if they had intended to grant to the Tribunal jurisdiction over the existence and legality of an expropriation (R III, para. 18).

81. Additionally, the Respondent relies upon the award in the *Berschader* case (R-33), where the arbitral tribunal is deemed to have resolved precisely the same subject-matter jurisdictional issue in favour of the Respondent’s position. The arbitral tribunal had to determine the scope of jurisdiction under Article 10 of the Belgium/Luxembourg-Soviet BIT (see above section E) which, the Respondent asserts, contains language that *closely tracks* the language of the UK-Soviet BIT (R II, paras. 28 *et seq.*). Although the Belgium/Luxembourg-Soviet BIT does not contain a clause comparable to the Second Jurisdictional Clause, the Respondent contends that the tribunal’s plain meaning analysis in the *Berschader* case *applies equally to the Second Clause as well as the First* (R III, para. 20). The *Sedelmayer* Case (C-23), however, cannot serve as a determination on which Claimant can rely, for the

simple reason that the jurisdictional issue in question was not raised (R III, para. 15).

82. As regards the context of Article 8, the Respondent argues that it is entirely consistent with the narrowly defined scope of jurisdiction under Article 8(1) that Article 5(1) guarantees the investor in broad terms the availability of an independent Russian body to determine such issues as the existence and legality of an expropriation instead (R II, paras. 4, 31 *et seq.*). This structure of the UK-Soviet BIT is deemed to represent an obvious compromise from the perspective of both the United Kingdom and the Soviet Union. In response to Claimant's reliance on the references in Article 8(1) to Articles 4, 5, and 6 in order to confirm its view that the Tribunal is competent to hear the claim that the Respondent has breached its treaty obligation under Article 5, the Respondent explains that the *references in the First Jurisdictional Clause to Articles 4 and 5 are references to the amount of compensation due under these Articles and the modalities of payment of such compensation set forth therein*, whereas *references to Articles 5 and 6 in the Second Jurisdictional Clause merely specify the jurisdictional predicate, that is an act of expropriation within the meaning of Article 5 and a violation of Article 6* (R III, paras. 21 *et seq.*). To reinforce its position, the Respondent says that Claimant's proposed reading of the reference to Article 5 would involve *radical changes and additions to Article 8(1) - formulations [which] simply do not appear.*
83. Furthermore, the Respondent denies that its reading of Article 8(1) would render the substantive guarantees of the UK-Soviet BIT "illusory" on the grounds advanced by Claimant, namely that investors would be left without a forum to claim compensation. Although some of the treaty obligations are not necessarily supplemented by the grant to an investor of a right to enforce them at an international level, it is emphasised that they are nonetheless binding treaty obligations imposed on the Contracting Parties (R III, para. 26). It is contended with respect to the object and purpose of the UK-

Soviet BIT that the *arbitration agreement is a very specific agreement, which largely stands on its own* and therefore has to be considered carefully by the Tribunal on the basis of the *specific object and purpose that the Contracting Parties had in mind when they negotiated the arbitration agreement* as is said to be confirmed by the International Court of Justice (R III, para. 27). The Respondent asserts that in accordance with an advisory opinion of the Permanent Court of International Justice and scholarly writings the interpretation based on the object and purpose of the treaty has to *find its limits in the terms of the treaty itself* (R III, para. 28). As derived from the fact that the protection and promotion of foreign investment is not the sole aim of investment treaties, particular emphasis is further placed on the need for a *balanced interpretation rather than an interpretation in favour of the investor* (R III, para. 31). Especially against the background that preambles usually contain broadly worded object and purpose clauses to protect and promote foreign investments even in case of investment treaties which do not contain any right to international arbitration, the interpretative exercise should not be diverted from the *actual wording of Article 8(1)* or lead to a *rewrite of a narrow jurisdictional clause* (R III, para. 32).

84. The Respondent rejects the Claimant's allegation that there is subsequent state practice within the meaning of Article 31(3)(b) VCLT that would lend support to the Claimant's theory that the Tribunal has jurisdiction to determine the existence and legality of an expropriation. The failure of the Respondent to raise a jurisdictional objection with respect to the scope of the arbitration clause in Article 8 in the *Sedelmayer* case and the *Nomura* case, invoked by the Claimant, is deemed to be at most an *isolated omission* or as *not reflecting a common understanding of the Contracting Parties*. The *Berschader* case shows that the state practice of the Russian Federation at least cannot be regarded as consistent (R III, para. 33 *et seq.*).
85. Moreover, the Respondent rebuts Claimant's call for a dynamic interpretation of Article 8 in the light of present day practice and attitude of the Russian

Federation. On the contrary, it is stressed that *in principle the terms of a treaty must be given the meaning that they had at the time of its conclusion pursuant to the intentions of the Contracting Parties at that time* (R III, para. 51). Even though the Respondent acknowledges that the Vienna Convention on the Law of Treaties takes into account possible dynamic or progressive developments, it is asserted that there is neither any subsequent agreement, nor any subsequent practice, nor any relevant rules of international law as required pursuant to Article 31(3) VCLT. The domestic law of the Russian Federation and the economic, political, treaty, and legislative developments are considered irrelevant in this context (R III, paras. 42 *et seq.*). Far from being a general rule, dynamic interpretation is contended to be limited to terms that are inherently evolutionary and also to be not applicable in circumstances where the Tribunal as in the present case would have to revise the actual terms of the treaty (R III, paras 56 *et seq.*). The Respondent argues that the terms of Article 8(1) *do not lend themselves to an evolutive interpretation and certainly do not contain words that evidence that the Contracting Parties had any such intent*. In addition, it is the Respondent's view that an investment treaty cannot be equated to a human rights treaty or a constituent instrument of an international organization, which require a more dynamic approach to interpretation, and on which the Claimant so heavily relies (R III, paras. 58 *et seq.*).

86. The Respondent asserts that *the UK-Soviet BIT represents a compromise between the position of the United Kingdom and the Soviet Union at the time the Treaty was negotiated*: the UK Model BIT, on the one hand, providing for a broad grant of investor-state arbitration and on the other hand, the Soviet Model BIT ruling out investor-State arbitration as a matter of principle (R I, para. 12). As supplementary means of interpretation to confirm the limitations on subject-matter jurisdiction, the Respondent therefore submits that *the UK-Soviet BIT follows the pattern of restrictive BITs entered into by the Soviet Union in that era. A strongly held position of the Soviet Union was that the sovereign act of expropriation is not subject to international review.*

*Consistent with this position, asymmetrical or diagonal arbitration was not permitted with respect to the sovereign act of expropriation. Disputes over the amount of compensation or the modality of payment, in contrast were considered to be civil law in nature and thus could be the subject of international arbitration* (R II, para. 34). To reinforce its position, the Respondent considers the BITs the Soviet Union negotiated in 1989 and 1990, and relies upon the *Berschader* case as well as upon materials documenting the German and Dutch experience in negotiating the respective BITs (R II, paras. 35 *et seq.*; R III, paras. 66 *et seq.*) The United Kingdom, on the other hand, is supposed to *have repeatedly demonstrated its willingness to compromise if necessary to conclude bilateral investment treaties that either contain no investor-State arbitration clause or contain restrictive investor-State arbitration clauses* (R II, para. 41; R III, paras. 86 *et seq.*).

87. As indicated above, the Respondent also rejects the Claimant's assertion that the Tribunal has jurisdiction by virtue of Article 3 UK-Soviet BIT in conjunction with Article 8 DK-Russia BIT.
  
88. According to the Respondent *Article 3 of the UK-Soviet BIT, a narrow most-favoured-nation clause, cannot displace the deliberately chosen narrow grant of jurisdiction in Article 8 with a broad grant of jurisdiction such as the one that Claimant would import from the Denmark-Russia BIT* (R III, para. 102). Invoking the *ejusdem generis* principle, the Respondent claims that Article 3 of the UK-Soviet BIT does not serve to incorporate into a basic treaty an arbitration clause from a third State treaty because it only addresses substantive standards, with Article 7 of the UK-Soviet BIT addressing exceptions to these substantive standards. At least, Article 3 would not *clearly and unambiguously* cover jurisdiction and procedural remedies as said to be required under Articles 31 and 32 VCLT (R III, paras. 104 *et seq.*). Regarding the plain meaning of Article 3, the Respondent notes that each of the terms "management," "use," "enjoyment," "maintenance," and "disposal" expressly relates to the substantive protection of an investment and none of

these terms relate to remedies for or jurisdiction over claims that an investor has suffered an expropriation (R III, para. 110). On the basis of an analysis of arbitral awards, the Respondent holds that, far from there being a majority of arbitral tribunals in support of the Claimant, *every single tribunal that has considered the question of expanding international tribunals' jurisdiction on the basis of a most-favoured-nation clause has rejected the Claimant's position* (R III, paras.127 *et seq.*, 141). The Respondent further concludes that *in the face of the strong Soviet policy against diagonal arbitration and international review of the sovereign act itself, the narrow scope of the most-favoured-nation clause and the absence of any common intention of the Contracting Parties to extend the scope of jurisdiction in Article 8(1) by operation of the most-favoured-nation clause in Article 3, Claimant's belated attempt to rely on Article 8 of the Denmark-Russia BIT ... fails* (R III, para. 126).

## **2. Arguments by Claimant**

89. The Claimant contends that the Tribunal has jurisdiction *ratione materiae* primarily under Article 8 of the UK-Soviet BIT, and in the alternative under Article 8 of the DK-Russia BIT, which is deemed to be incorporated into the UK-Soviet BIT by virtue of the most-favoured-nation clause contained in Article 3 of the UK-Soviet BIT.
90. In the Request for Arbitration (C I), the Claimant asserts in general that Article 8 of the UK-Soviet BIT *commits the Russian Federation to arbitrate legal disputes with U.K. investors relating to expropriation of investments* (C I, para. 3.3). As specified in the Claimant's First Memorial on Jurisdictional Issues (C II), the *dispute* is considered to be, under any objective standard, *about whether or not the Respondent should pay compensation* (C II, para. 4). The Claimant further analyses the juridical nature of investor-state arbitration (C II, paras. 15 *et seq.*) and criticises the Respondent's overall attempt to push the Claimant's claim away from

investor-state arbitration under Article 8 towards state-to-state arbitration under Article 9 of the UK-Soviet BIT (C II, para. 23).

91. Article 8(1) is divided by the Claimant into three jurisdictional clauses as mentioned above. Although Claimant alleges that it has previously been determined in the *Sedelmayer* case that the language of the First Jurisdictional Clause, “concerning the amount or [procedure for the] payment of compensation under Articles 4 or 5”, gives a tribunal jurisdiction to rule on the merits of an investor’s demand for compensation for an expropriation, the contentions of the Claimant focus almost exclusively on the Second Jurisdictional Clause which refers to disputes “concerning any other matter consequential upon an act of expropriation in accordance with Article 5” (C II, para. 60).
  
92. The ordinary meaning of the Second Jurisdictional Clause is alleged to include the present dispute *as to whether the Russian Federation’s seizure and sale of Yukos’s assets obliges the Russian Federation to pay compensation to Claimant pursuant to Article 5* (C II, para. 54). The Claimant breaks the clause down into three parts: “any other matter,” “consequential upon” and “an act of expropriation in accordance with Article 5”. It is argued that the phrase “any other matter” *must necessarily give the Tribunal jurisdiction over disputes that are in addition to those covered by the First Jurisdictional Clause*. In contrast, Respondent’s interpretation of the Second Clause would limit the jurisdictional grant to the same disputes already encompassed by the First Jurisdictional Clause and would therefore deprive the clause of any meaning whatsoever. A matter is “consequential upon” an act when the matter results from, is caused by, or is triggered by that act. The third phrase is said to cover all acts defined in Article 5, which, in turn, broadly defines “expropriation” to include indirect expropriations as well. To demonstrate that the broad grant of jurisdiction encompasses the present dispute, the dispute is subsumed as follows: *The present dispute over whether the Russian Federation is legally obliged to pay compensation to*

*Claimant (“any other matter”) arises out of (is “consequential upon”) the seizure and sale of Yukos’s assets (“an act of expropriation in accordance with Article 5”).* The Claimant points out that there is no dispute that the Respondent seized assets of Yukos and sold them at auction and that at this jurisdictional stage, it is to be presumed that the facts are as Claimant has pleaded them. Any defence to liability that the Respondent may have necessarily would have to be reserved for the merits and cannot deprive a tribunal of jurisdiction (C II, paras. 62 *et seq.*).

93. By considering the structure and context of Article 8(1), Claimant seeks to confirm its interpretation of the Second Jurisdictional Clause. The First Jurisdictional Clause is said to *address those situations in which a dispute arises only over the amount or procedure for payment of compensation*, while the Second Jurisdictional Clause, which is introduced by a *disjunctive “or”*, gives the tribunal jurisdiction over something more and *addresses situations where the State’s justification for the taking, whether compensation will be paid, and possibly even the existence of an expropriation itself is disputed between the State and the investor* (C II, para. 76). The Second Jurisdictional Clause is characterized by the Claimant as the vehicle for the enforcement of Article 5’s substantive guarantee that compensation will follow any expropriation and therefore necessarily encompasses jurisdiction to resolve the question of whether or not an act of expropriation has in fact occurred (C II, para. 77). To support this view, the Claimant further invokes the Third Jurisdictional Clause which gives a tribunal jurisdiction to resolve disputes “concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement”. The clause, which is deemed to *mirror* the Second Jurisdictional Clause and gives rise to an equal interpretation of the two clauses, would necessarily grant the tribunal jurisdiction to determine the *antecedent question* of whether Article 6 has been correctly implemented or not been implemented at all (C II, para. 78).

94. Claimant also relies upon the object and purpose of the UK-Soviet BIT to confirm its interpretation of the Second Jurisdictional Clause. Against the background of the Contracting Parties' intention to "create favourable conditions for greater investment by investors of one State in the territory of the State" as derived from the preamble, Claimant identifies both investor-state arbitration and the principle of customary international law that compensation must follow an expropriation of a foreign investors' property as the fundamental elements of protection offered under the UK-Soviet BIT (C II, para. 80). The notion of limited subject-matter jurisdiction as advanced by the Respondent, however, would render *any decision to pay compensation entirely within the discretion of the Russian authorities* and, ultimately, would render the guarantees of the UK-Soviet BIT to investors *illusory* (C II, paras. 81, 188). In any event, investors would have to commence *two sets of proceedings* – a situation deemed *absurd and unreasonable* (C II, paras. 188 *et seq.*).
95. The Claimant holds that Respondent has failed to satisfy the pre-requisites in Article 32 VCLT for the use of supplementary means of interpretation because it *has offered no meaning capable of confirmation by reference to supplemental sources of interpretation, nor has it demonstrated that Claimant's proffered interpretation of Article 8 would be ambiguous, obscure, or lead to a result that is "manifestly absurd or unreasonable"* (C II, para. 85). Therefore the Claimant does not believe that it is necessary or even appropriate to consider the supplementary means of treaty interpretation including in particular other tribunals' decisions, the Soviet policy regarding international arbitration and United Kingdom's own treaty practice (C II, paras. 86, 93).
96. Against the eventuality that the Tribunal chooses to consider the *Berschader* case relied upon by the Respondent throughout its submissions, the Claimant asserts that Article 10 of the Belgium/Luxembourg-Soviet BIT in question lacks any language equivalent to that found in the Second Jurisdictional

Clause and thus has no bearing on the present case (C II, para. 89 *et seq.*). On the contrary, the Claimant derives from the *Sedelmayer* case that even the narrow First Jurisdictional Clause is sufficient to grant the Tribunal jurisdiction to determine the antecedent question of the existence of an expropriation (C II, para. 92). In addition, Claimant relies upon the *Telenor* tribunal (C-21) which had to consider a provision in the Norway-Hungary BIT which is identical to Article 8(1) of the UK-Soviet BIT, and which did not express any doubt that it had jurisdiction to determine whether an expropriation had occurred (C II, para. 93).

97. As regards the Respondent's allegations with respect to the so-called "strong Soviet policy", Claimant, though acknowledging that *it is partly correct that the Soviet Union sought to limit access to arbitration in some of the bilateral investment treaties that it signed during the late 1980s and early 1990s*, stresses that the Respondent *entered into a number of bilateral investment treaties that offered investors far greater access to international arbitration* (C II, para. 94). Claimant contends that of the fourteen BITs Respondent negotiated between 1989 and 1990, at least four, namely those with the United Kingdom, France, Canada and South Korea, and arguably a fifth with Germany, contain broad grants of jurisdiction. The text of the relevant provision of the France-Soviet BIT which was made subject to closer examination is quoted above. The Claimant further draws attention to the *rapid pace of changes in the USSR between 1986 and 1991* and refers to another forty-five BITs the Respondent signed *while transforming itself into a market economy* (C II, paras. 95, 181). As detailed in the annex (C II-Annex), Claimant concludes that the *Soviet Union had a long history of favouring the resolution of disputes through international arbitration* (C II, para. 103). Claimant also points to the fact, that Respondent failed to raise this jurisdictional defence in both the *Sedelmayer* arbitration and in a subsequent arbitration brought under the UK-Soviet BIT resulting from the financial crisis in Russia. These past actions are deemed also to contradict the

Respondent's assertions regarding a strongly held and principled position (C II, paras. 100 *et seq.*, 183 *et seq.*)

98. In addition to exaggerating the Soviet Union's supposed categorical opposition to broad grants of jurisdiction to international arbitral tribunals, the Respondent is said to also misinterpret the United Kingdom's practice. The Claimant asserts that *the United Kingdom may have failed to insist upon compulsory investor-state arbitration of all claims of expropriation in only five out of a total of 102 treaties, all of which predate the IPPA* and concludes that the United Kingdom's practice *does not demonstrate the claimed willingness to compromise as to the inclusion of effective investor-state arbitration provisions*, but shows a *persistent commitment to the protection of investors through the use of investor-state arbitration* instead (C II, paras. 104 *et seq.*, 108).
99. In the event that the Tribunal were to find that it did not have jurisdiction under Article 8 UK-Soviet BIT, it is contended by the Claimant that the Tribunal has jurisdiction under Article 8 of the DK-Russia BIT which is deemed to be incorporated into the UK-Soviet BIT by operation of the Most-Favoured-Nation clause contained in Article 3 UK-Soviet BIT (C II, paras. 55, 109 *et seq.*). The relevant treaty provisions are quoted above in section E. The Claimant holds that according to Article 3 UK-Soviet BIT it shall not receive treatment less favourable than that afforded by the Russian Federation to investors of any third state. If Article 8 UK-Soviet BIT were found not to grant jurisdiction, then Article 8 of the DK-Russia BIT would be viewed as more favourable treatment of investors, with the present dispute being well within the scope of the broad jurisdiction granted by Article 8 of the DK-Russia BIT (C II, paras. 111 *et seq.*). To establish that the MFN standard includes the dispute resolution provisions of the treaty, Claimant relies upon a *majority of arbitral awards* (C II, paras. 114 *et seq.*, 146 *et seq.*), the *ordinary meaning* of the terms used in the Articles 3(1) and 3(2) of the UK-Soviet BIT, "treatment", "management, use, enjoyment or disposal" (C II, paras. 120 *et*

*seq.*), as well as upon the *object and purpose* of the UK-Soviet BIT as derived from the preamble (C II, paras. 125 *et seq.*). Dispute resolution is further considered to be an integral part of the protection offered to foreign investors under BITs *satisfying the requirements of ejusdem generis* (C II, paras. 129 *et seq.*, 135). The Claimant also points to Article 7 of the UK-Soviet BIT which contains the exceptions the Contracting Parties agreed to exclude from the operation of the MFN clause. Although the Contracting Parties specifically addressed the scope of the MFN standard, they apparently did not list dispute resolution amongst these exceptions. Applying the principle of *expressio unius est exclusio alterius*, Claimant therefore interprets Article 7 to the effect that *all matters within the scope of the IPPA not expressly excluded from Article 3 are included* (C II, para. 137). Additional evidence is said to be provided by the state practice of the Contracting Parties. The United Kingdom is deemed to have a *consistent practice* of including dispute resolution provisions within the scope of the MFN, while the USSR is believed to have been *well aware of the widespread application of the MFN standard in international law and the standard's importance in ensuring sovereign equality of treatment amongst states* at the time of concluding the UK-Soviet BIT (C II, paras. 142 *et seq.*).

100. As a subsidiary argument in support of the view that the Tribunal has jurisdiction under Article 8 of the UK-Soviet BIT and Article 8 of the DK-Russia BIT the Claimant advances the need for a dynamic interpretation of Article 8 UK-Soviet BIT in the light of present day circumstances (C II, paras. 158 *et seq.*). As treaties are considered not to be *static documents rooted eternally to the context in which they were concluded*, Article 8 should be interpreted to include jurisdiction to decide the merits of the present dispute (C II, paras. 56, 161). The present-day practice and attitude of the Russian Federation, *i.e.* its promotion and encouragement of foreign investment and acceptance of international arbitration as the dispute resolution mechanism of choice under BITs, is deemed to be of *greater relevance to the interpretation of the IPPA than any view allegedly held by*

*the USSR in 1989* (C II, para. 182). In order to support its dynamic approach to treaty interpretation Claimant invokes Articles 31(1), (3) and 32 VCLT and the fact that the original intention of the authors of a treaty is not ascribed central importance in the Vienna Convention (C II, paras. 162 *et seq.*). After showing that this approach is often applied to multilateral and bilateral treaties, Claimant concludes with respect to BITs that they are *evolutionary bilateral treaties that are generally intended to create sustainable and durable economic ties between the contracting states* (C II, paras. 168 *et seq.*, 174). The Contracting Parties' intention to interpret the UK-Soviet BIT as a *living document* is derived by the Claimant from the preamble and the inclusion of the MFN standard in Article 3 (C II, paras. 175 *et seq.*).

### **3. The Tribunal**

101. The Tribunal has carefully examined the memorials and exhibits submitted, as well as the presentations at the Hearing by each of the Parties on this issue. It is not necessary to recall these arguments in detail here, but the Tribunal has taken them fully into account in reaching the following findings and conclusions.
102. The Tribunal, having already found that Respondent has indeed consented to arbitration, both in Article 8 of the UK-Soviet BIT and Article 8 of the Denmark-Russia BIT, now turns in this section to the scope of the submission to arbitration and in particular whether the submission also covers a jurisdiction of the Tribunal to decide on whether an expropriation occurred and, if so, its legality.
103. To avoid misunderstanding, it may be recalled here again that the examination of the Tribunal in the present section only deals with its jurisdiction over this issue, and that, should jurisdiction be found to exist, the examination of whether the Respondent's actions have indeed to be

considered as an expropriation will be joined to the merits phase of this arbitration.

104. Since Claimant bases its contention that the Tribunal does have jurisdiction alternatively on Article 8 and on Article 3, and both have been extensively discussed by the Parties, the Tribunal will take up each issue separately.

### **3.1. Jurisdiction based on Article 8 UK-Soviet BIT**

105. The text of Article 8 is quoted above in section E of this Award. Nevertheless, that part of its wording which is relevant in the present context may be recalled:

*“ARTICLE 8*

*Disputes between an Investor and the Host Contracting Party*

*(1) This Article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement.*

*(2) Any such disputes which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.*

*(3) Where the dispute is referred to international arbitration, the investor concerned in the dispute shall have the right to refer the dispute either to:*

*(a) the Institute of Arbitration of the Chamber of Commerce of Stockholm; ....”*

106. The Russian text of Article 8(1) is translated unofficially by the Respondent in its First Memorial on Jurisdictional Issues as follows (R II, para. 21, fn. 15). The translation was acknowledged by the Claimant at least with respect to all relevant parts (C II, para. 58, fn. 55; para. 65). It was, however, emphasised by the Parties that the inclusion in the Common Bundle (CB) of

an unofficial translation prepared by one party does not constitute acceptance by the other party of the accuracy of that translation.

*“The provisions of this Article shall apply to any disputes of a legal character between an investor of one Contracting Party and the other Contracting Party in relation to issues of the investor’s investment concerning either the amount and the procedure for the payment of compensation provided for in Articles 4 or 5 of this Agreement, or any other matters being the result of an act of expropriation in accordance with Article 5 of this Agreement, or regarding the consequences of the non-implementation, or of the incorrect implementation, of undertakings under Article 6 of this Agreement.”*

107. In the view of the Tribunal the slight variations in the translation by the Respondent do not contain anything of relevance for the issue to be examined in the present section of this Award. The Tribunal will therefore focus on the official English text as quoted above.

108. Paragraph (1) of the provision, after its introductory wording ending with the words *“either concerning”*, continues with what has been called, by the Parties and the Tribunal, three **“jurisdictional clauses”**, namely:

1. *“the amount or payment of compensation under Articles 4 or 5 of this Agreement,*
2. *or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement*
3. *or concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement.”*

109. While the third jurisdictional clause is obviously not relevant in the present context, the Parties have widely debated whether the first or second jurisdictional clauses provide jurisdiction for this Tribunal.

110. In interpreting these Articles, the Tribunal is primarily guided by the provisions of Article 31.1. of the Vienna Convention on the Law of Treaties (VCLT) according to which a

*Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose.*

To start with the **first jurisdictional clause**, rather than referring generally to Articles 4 and 5, it expressly contains a qualification by the words “*concerning the amount or payment of compensation under*”. In order to give an ordinary meaning to that qualification, it can only be understood as a limitation of the jurisdiction conferred by that clause. Though no documents from the negotiation of the BIT have been produced, the Parties including the Claimant agree that the rather complicated wording in Article 8 presented a compromise between the UK’s intention to have a wide arbitration clause and the Soviet intention to have a limited one. If that is so, it is hard to arrive at an interpretation all the same that the clause is so wide as to include all aspects of an expropriation.

111. If one further considers the wording of Article 5 to which this first jurisdictional clause refers, it can be seen that that provision first determines that, in principle, an investment shall not be expropriated, and then adds exceptions to that principle by the word “*except*”. Of the exceptions mentioned thereafter, payment of compensation is “only” the third. And the following sentence in Article 5 then gives a number of concrete requirements regarding the compensation.
  
112. In view of this order in Article 5, the Tribunal cannot see how the reference in the first jurisdictional clause expressly to *the amount or payment of compensation under Articles 4 or 5* only can nevertheless be interpreted as a reference also to the earlier sections of Article 5 which deal with expropriation in general and the first two exceptions mentioned in that provision.

113. This limiting interpretation is confirmed by a comparison with arbitration clauses in BITs concluded by the UK, the Soviet Union, Russia and other states in which a general reference to expropriation or the article dealing with expropriation makes it clear that every aspect of expropriation is under the jurisdiction of the arbitral tribunal. An example from the Russian practice is Article 8 of the Denmark-Russia BIT quoted in Section E above. An example from the practice of the UK is Article 9(2) of the 1988 UK Model BIT (CB-9 = R-34). These examples may suffice to illustrate the obvious, namely how easily it can be and is in practice indicated in clear and unambiguous terms that every aspect of expropriation shall be under the jurisdiction of an arbitral tribunal.
114. Therefore, the Tribunal concludes that the wording of the first jurisdictional clause does not include jurisdiction over the questions whether an expropriation occurred and was legal.
115. The Tribunal now turns to the **second jurisdictional clause** in Article 8. Again, one must first recall the wording by which that clause expressly qualifies the jurisdiction, namely “*or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement*”. In a potential analogy with the issue of Kompetenz-Kompetenz, it may be argued that, in order to exercise its undoubted competence to decide a disputed issue consequential on an expropriation, a tribunal must (implicitly) be endowed with the power to determine whether the issue is “consequential upon an act of expropriation”, and that from that it is only a short step to saying that it has therefore the power to determine whether there was an expropriation or not. However, at least in the present context of the wording of Article 8 (1), such an interpretation would deprive the wording “*or concerning any other matter consequential upon*” in the above-mentioned qualification of any substantive meaning and turn this jurisdictional clause into an arbitration clause with a general reference to Article 5. For similar reasons as discussed above regarding the first

jurisdictional clause, this qualification can only be understood to the effect that not all aspects of Article 5 and particularly of expropriation are included, but that jurisdiction is only granted over the specific aspects mentioned in the clause. In particular, the words *any other matter* are not placed on their own, but are combined with the words “*consequential upon an act of expropriation in accordance with Article 5 of this Agreement*”. This can only be interpreted to mean that not all other matters are included but only those falling under this further qualification.

116. Now, regarding that qualification, the Tribunal considers that the ordinary meaning in the sense of Article 31 VCLT of the word “consequential” can not be interpreted to include, in addition to the consequences of an expropriation according to Article 5, also the preconditions laid down in Article 5, i.e. that an act of expropriation occurred and within the conditions specified for a lawful expropriation.
117. If these preconditions were to be considered as also included, the qualification would be meaningless - as would the qualification stated in the first jurisdictional clause – because not only the issues mentioned in these qualifications, but all other aspects of expropriation would be included.
118. Therefore the Tribunal concludes that the second jurisdictional clause does equally not confer jurisdiction on this Tribunal over the occurrence or the validity of an expropriation.
119. Since the Tribunal has come to the above conclusions on the basis of the ordinary meaning of Article 8 in the context of the object and purpose of the BIT in accordance with paragraph (1) of Article 31 VCLT, there is no need to go into the additional criteria for interpretation mentioned in the further paragraphs of that Article. In this context, the Tribunal notes that none of the various agreements, instruments, practice or rules of international law to which paragraphs (2) or (3) of Article 31 refer can be found to be of

relevance for the interpretation of Article 8. All of these subsections (a) and (b) of Article 31(2) and (a) to (c) of Article 31(3) require some relation or connection to the treaty to be interpreted, a requirement not fulfilled by earlier or later BITs or other agreements or other practice either of the UK or the Soviet Union or Russia.

120. Even less applicable are the supplementary means of interpretation identified in Article 32 VCLT. It needs no further explanation that the meaning of Article 8 found above is neither *ambiguous or obscure* nor *manifestly absurd or unreasonable*.
121. The above considerations, in the view of the Tribunal, also do not permit in particular the *dynamic interpretation* which Claimant has proposed to be applied in this regard. In this regard, the Tribunal refers to its separate section above containing a more general analysis of the principles of interpretation. At least in the present context it cannot be justified under Articles 31 and 32 VCLT that later developments can be found to change the ordinary and unambiguous meaning of a treaty provision like Article 8 of the BIT. Since the present context is that of a bilateral treaty, the Tribunal does not have to take up the questions whether other considerations may justify such an interpretation in the context of a long term multilateral convention or human rights.
122. The Tribunal has taken note of the references the Parties have submitted to other treaties and decisions of arbitral tribunals regarding dispute settlement clauses in other treaties. Indeed, there are clauses which contain limiting language similar to that of Article 8 such as Article 10 of the Belgium/Luxemburg-Soviet BIT quoted above in section E, as well as clauses which provide a wider language such as Article 7 of the France-Soviet BIT (“*concerning the effects of a measure taken*” and “*particularly but not exclusively concerning ...*”) also quoted above. However, the Tribunal feels there is no need to enter into a discussion of these or other treaties or

decisions concerning them, because the combined wording of the three jurisdictional clauses in Article 8 is unique and not identical to that in any of such other treaties and thus must be interpreted by itself as has been done above.

123. As a final conclusion, therefore, the Tribunal determines that it has no jurisdiction as to the occurrence and validity of an expropriation on the basis of Article 8. In addition to this negative conclusion, there is no need for the Tribunal to determine in detail at this stage by a positive conclusion what extent of jurisdiction is indeed covered by Art.8, because the Tribunal will now have to examine whether it has jurisdiction on the aspects not covered by Art.8 by application of the MFN-clause in Art.3.

(Co-Arbitrator Sir Franklin Berman wishes to add the following declaration:

*I am in full agreement with my colleagues that Article 8 of the BIT does not suffice to confer jurisdiction on the Tribunal to pronounce on the claims advanced by the Claimant in this Arbitration. I note only that Article 8 is quite plainly, and on its very face, a difficult compromise between opening positions on the part of the two Contracting States which must have been far apart from one another (as indeed the Parties have argued at length before us). In a circumstance of that kind – which one encounters from time to time in treaty practice – it will seldom if ever be justified for the interpreter to arrive at a conclusion that corresponds to all intents and purposes with the position of either the one Contracting State or that of the other. In other words, I would not want our common conclusion that Article 8 does not confer jurisdiction in this case to be taken in any way as an expression of opinion on how that article or other similar treaty clauses relates to other claims that might be brought forward in other cases based on an allegation of expropriation. )*

**3.2. Jurisdiction based on the MFN-Clauses in Article 3 UK-Soviet BIT in connection with the Denmark-Russia BIT.**

124. The Parties have extensively engaged on the question whether the MFN-provisions in Articles 3(1) and (2) of the UK-Soviet BIT are effective to import the wide wording of Article 8 of the Denmark-Russia BIT so as to submit expropriations to arbitration under the UK-Soviet BIT. The provisions in question are quoted above in section E of this Award. But, for the present context, the relevant wording may be recalled here. The Denmark-Russia BIT provides:

*“ARTICLE 8*

*Disputes between an Investor of one Contracting Party and the other Contracting Party*

*(1) 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 that other Contracting Party shall be subject to negotiations [sic] [between the] parties in dispute.*

*(2) If the dispute cannot be settled in such a way within a period of six months from the date of written notification of the claim, the investor shall be entitled to submit the case either to:*

- (a) a sole arbitrator or an ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or*
- (b) the Institute of Arbitration of the Chamber of Commerce in Stockholm.”*

125. There is no dispute between the Parties, and the Tribunal agrees, that that provision, by its wording “*Any dispute ... in connection with an investment*” confers jurisdiction on the arbitral tribunal on issues such as those at stake in the present context, i.e. whether an act of the host state was an expropriation and was legal under the BIT.

126. It may also be recalled that the relevant paragraphs of Article 3 of the UK-Soviet BIT provide:

*“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.”*

127. As can be seen, the 1<sup>st</sup> paragraph deals with *investments* and the 2<sup>nd</sup> with the *investors*. The two paragraphs provide MFN protection by quite different wordings and thus with a different scope. Therefore the Tribunal will consider them separately hereafter.
128. **Paragraph (1) of Article 3** grants MFN protection for investments to the effect that they shall not be subject to *treatment less favourable than that which it accords to investments ... of any third State*. Can the term *treatment* include the protection by an arbitration clause? The Tribunal feels that, for the purposes of this Award, it does not have to answer that question in general, but only regarding the sub-question whether it includes an arbitration clause covering expropriation. In that latter regard, it is difficult to doubt that, first, an expropriation is indeed a “treatment” of the investment by the Host State. However, secondly, while the protection by an arbitration clause covering expropriation is a highly relevant aspect of that “treatment”, if compared with the alternative that the expropriation of an investment can only be challenged before the national courts of the Host State, it does not directly affect the “investment”, but rather the procedural rights of the “investor” for whom paragraph (2) of Article 3 provides a separate rule.
129. Therefore, without entering into the much more general question whether MFN-clauses can be used to transfer arbitration clauses from one treaty to another, the Tribunal concludes that, for the specific wording of Article 3 (1) of the UK-Soviet BIT, and for the specific purpose of arbitration with regard

to expropriation, the wide wording of Article 8 of the Denmark-Russia BIT is not applicable.

130. In view of the above conclusion regarding paragraph (1) of Article 3, the Tribunal now has to consider whether it has jurisdiction based on **Paragraph (2) of Article 3**. As seen above, the provision grants MFN-protection for “investors” by a wording which is quite different to paragraph (1), namely regarding “*their management, maintenance, use, enjoyment or disposal of their investments*”. Again limiting its considerations to the possible application of the MFN-clause to arbitration regarding expropriation, the terms “*use*” and “*enjoyment*” in paragraph (2) lead the Tribunal to different conclusions from those reached with regard to paragraph (1). For it is difficult to doubt that an expropriation interferes with the investor’s use and enjoyment of the investment, and that the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his “*use*” and “*enjoyment*”, procedural options of obvious and great significance compared to the sole option of challenging such interference before the domestic courts of the host state.
131. Does that conclusion have to be changed in view of the further conclusion reached above that Article 8 of the UK-Soviet BIT expressly limits the jurisdiction of the Tribunal and does not give jurisdiction in respect of other aspects of expropriation? In the Tribunal’s view, that is not so. While indeed the application of the MFN clause of Article 3 widens the scope of Article 8 and thus is in conflict to its limitation, this is a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty.
132. If this effect is generally accepted in the context of substantive protection, the Tribunal sees no reason not to accept it in the context of procedural clauses

such as arbitration clauses. Quite the contrary, it could be argued that, if it applies to substantive protection, then it should apply even more to “only” procedural protection. However, the Tribunal feels that this latter argument cannot be considered as decisive, but that rather, as argued further above, an arbitration clause, at least in the context of expropriation, is of the same protective value as any substantive protection afforded by applicable provisions such as Article 5 of the BIT.

133. In view of these considerations, the Tribunal concludes that, on the basis of the MFN Clause in Article 3(2) of the UK-Soviet BIT taken together with Article 8 of the Denmark-Russia BIT, , it has jurisdiction beyond that granted by Article 8 of the UK-Soviet BIT and which extends to the issues whether Respondent’s actions have to be considered as expropriations and were valid.
134. The above interpretations by the Tribunal of the MFN-clauses in Article 3 (1) and (2) are confirmed by a consideration of **Article 7 of the same BIT**. Though quoted above in section E, its relevant parts may be recalled here:

*“ARTICLE 7*

*Exceptions*

*The provisions of Articles 3 and 4 of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from*

- (a) any existing or future customs union, organisation for mutual economic assistance or similar international agreement, whether multilateral or bilateral, to which either of the Contracting Parties is or may become a party, or*
- (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.”*

135. As can be seen, Article 7 contains certain exceptions, in particular regarding the application of Article 3 which, as we know, contains the MFN clauses. Article 7 expressly excludes the transfer of MFN-protection from other

treaties with regard to the fields mentioned in its subjections (a) and (b). While it can be argued that the multilateral commitments mentioned in (a) are of quite different character and are obvious exceptions in order to avoid that the states concluding the BIT receive the benefits of such multilateral arrangements without joining them, the exception in (b) regarding taxation does not contain such an obvious background. It presents a clear decision of the two States when concluding the BIT that the MFN clauses shall not apply to such taxation issues. It shows that the two States considered the question, which issues should not benefit from the MFN protection. Now, it needs no further explanation that, just as taxation is a highly important matter for an investor, so is the submission to arbitration which “protects” the investor, should a dispute arise with the Host State, from having to depend on the national courts of the same Host State. In view of the careful drafting of Article 8 and the limiting language therein, it can certainly not be presumed that the Parties “forgot” arbitration when drafting and agreeing on Article 7. Had the Parties intended that the MFN-clauses should also not apply to arbitration, it would indeed have been easy to add a sub-section (c) to that effect in Article 7. The fact that this was not done, in the view of the Tribunal, is further confirmation that the MFN-clauses in Article 3 are also applicable to submissions to arbitration in other Treaties.

136. The Tribunal has taken note of the references the Parties have submitted to other treaties and decisions of arbitral tribunals regarding MFN-clauses and arbitration submissions in other treaties. In particular, the Tribunal has taken note of the decisions in the following cases:

- *Telenor v Hungary*, ICSID Award of 13 September 2006 (CB-48 = C-21)
- *Suez and Vivendi v Argentina*, ICSID decision on Jurisdiction of 3 August 2006 (CB-47 = C-15)

- *National Grid v Argentina*, UNCITRAL/BIT arbitration, Decision on Jurisdiction of 20 June 2006 (CB-52 = C-41)
- *Suez and InterAguas v Argentina*, ICSID decision on Jurisdiction of 16 May 2006 (CB-53 = C-42)
- *Berschader v The Russian Federation*, SCC Award of 21 April 2006 (CB-37 = R-33). In this context see also the dissenting opinion of *Weiler* regarding the MFN-clause (CB-55 = C-49)
- *Gas Natural SDG v Argentina*, ICSID decision on Jurisdiction of 17 June 2005 (CB-51 = C-40)
- *Plama v Bulgaria*, ICSID decision on Jurisdiction of 8 February 2005, ICSID Review - Foreign Investment Law Journal Vol.20 No.1 issue 2005 (CB-35 = R-6)
- *Siemens v Argentina*, ICSID decision on Jurisdiction of 3 August 2004 (CB-45 = C-9)
- *MTD Equity v Chile*, ICSID Award of 25 May 2004 (CB-54 = C-48)
- *Salini v Jordan*, ICSID decision on Jurisdiction of 23 July 2001 (CB-44 = C-5)
- *Maffezini v Spain*, ICSID decision on Jurisdiction of 25 January 2000 (CB-50 = C-39)

137. After having examined them, the Tribunal feels there is no need to enter into a detailed discussion of these decisions. The Tribunal agrees with the Parties that different conclusions can indeed be drawn from them depending on how one evaluates their various wordings both of the arbitration clauses and the

MFN-clauses and their similarities in allowing generalisations. However, since it is the primary function of this Tribunal to decide the case before it rather than developing further the general discussion on the applicability of MFN clauses to dispute-settlement-provisions, the Tribunal notes that the combined wording in Article 3 and 7 of the UK-Soviet BIT is not identical to that in any of such other treaties considered in these other decisions. Therefore, they must be interpreted by themselves as was done above and, in the view of this Tribunal, these other decisions do not mandate a change of the interpretation found above.

138. The same is true for the extensive UNCTAD Report (2007) on *Bilateral Investment Treaties 1995-2006 – Trends in Investment Rulemaking* which Respondent submitted just before the Hearing (CB-75) and which both Parties have referred to during the Hearing. Its section on *The MFN-Standard in Relation to Dispute Resolution (p.39 seq.)* is indeed interesting as a piece of research which demonstrates the great variety of solutions to be found in BITs. But the research, though different readers may draw different conclusions regarding what can be considered the modern “trend”, certainly does not provide any basis to interpret a specific MFN-clause in a BIT in one way rather than another. Therefore this Report provides no reason to change the interpretation this Tribunal has given above to Article 3.
  
139. Thus, at the end of its analysis of the relevant factors, the Tribunal concludes, on the basis of the MFN clause in Article 3(2) of the UK-Soviet BIT in conjunction with Article 8 of the Denmark-Russia BIT, that it has jurisdiction extending beyond that granted by Article 8 of the UK-Soviet BIT and covering the issues whether Respondent’s actions have to be considered as expropriations and were valid.

## H.IV. Exhaustion of Local Remedies: Admissibility of Claim

### 1. Arguments by Respondent

140. The objection that Claimant has failed to exhaust local remedies is treated by the Respondent as one either of jurisdiction or admissibility. As confirmed by paras. 4.1 and 5.2 of PO No.1, the first phase of the arbitral proceeding is to address all issues raised in Part I of Respondent's Reply (R I) which includes the question of exhaustion of local remedies. It is asserted that for present purposes the distinction between jurisdiction and admissibility is one without relevance and should only be addressed if the question of whether the requirement may be waived by the Respondent becomes acute (R I, para. 22; R II, para. 61; R III, para. 142).
141. The requirement of exhaustion of local remedies is considered by the Respondent to be a fundamental principle of customary international law. The Respondent purports to gain support from overwhelming authority for its position that *private persons must exhaust local remedies before seeking diplomatic protection or espousal of their claims, or reference to an international court or tribunal* (R I, para. 20; R II, paras. 6, 48 *et seq.*; R III, para. 145). The Respondent rejects Claimant's contention that inter-State authority would be irrelevant for the local remedies rule by stating that human rights cases as well as investment treaty awards *routinely rely* on inter-State cases for authority (R III, para. 151).
142. As regards the applicable rules of treaty interpretation, the Respondent takes the view that treaty provisions must be interpreted by reference to, and in conformity with, the governing rules of general international law. It is further to be *assumed that the Contracting Parties intended a treaty provision to produce effects in accordance with existing law rather than in violation of it*. Relying primarily upon the International Court of Justice (R-89), the Respondent contends that *in the absence of explicit treaty provisions*

*expressing the Contracting Parties' clear intention to derogate from a fundamental principle of customary international law, the Contracting Parties cannot be deemed to have tacitly dispensed with such principle* (R I, paras. 18 *et seq.*; R II, paras. 50 *et seq.*). The Respondent, however, acknowledges that if the present case were a *contractual* one in which the Russian Federation had entered into an agreement with a private party and that agreement had contained an arbitration clause, there would be no applicable rule of customary international law and the exhaustion of local remedies rule would not apply. Yet, it is emphasised that the present dispute deals with a quite distinguishable *treaty obligation* to arbitrate, where an express waiver is required (R III, paras. 155 *et seq.*).

143. The UK-Soviet BIT not only is *not explicit* as to whether the requirement to exhaust local remedies is waived, it even *impliedly embraces the principle* as alleged by the Respondent. This derives especially from Article 5(1) last sentence which provides for an independent authority of the State making the expropriation to review the case of the investor, *i.e.* the expropriation itself and the value of its investment. The Respondent further seeks to establish that an arbitration under the UK-Soviet BIT *cannot be analogized* to cases arising under the ICSID Convention, nor to an ICC, UNCITRAL or SCC arbitration arising under the myriad of bilateral investment treaty that contain an express waiver of exhaustion of local remedies (R I, para. 20; R II, paras. 53 *et seq.*; R III, para. 158).
  
144. Finally, the Respondent contends that Claimant is under no disability in seeking redress in the Russian courts. It is stated that Russian law does contain a remedy for expropriation. As regards Claimant's allegations that the Russian courts are not independent and that it would be wholly without a remedy if this Tribunal does not accord it jurisdiction, the Respondent refers to the UK High Court which rejected this argument raised by Yukos itself in 2006 when challenging the Financial Services Authority's decision to admit Rosneft GDRs to listing on the London Stock Exchange. In conclusion, the

Respondent points out that Claimant as *independent shareholder* does not even allege that it is personally subject to any disability or hostility, but *simply decided not to pursue its remedies in the Russian courts* (R II, para. 60; R III, paras. 164 *et seq.*).

## 2. Arguments by Claimant

145. The Claimant considers the rule on exhaustion of local remedies to be a procedural objection to the admissibility of the claim, relying upon *the Interhandel* case (C-205). The Respondent is deemed to have acknowledged this qualification by accepting that the rule may be waived because the concept of waiver is asserted to be the distinguishing element between objections as to admissibility and objections as to jurisdiction. The Respondent, however, is said to be not permitted to advance an objection as to admissibility as a challenge to this Tribunal's jurisdiction pursuant to SCC rules (C II, paras. 196 *et seq.*).
  
146. From the Claimant's point of view the Respondent *appears to assume that an investor-state arbitration is brought by way of diplomatic protection, as would be a home state's espousal of an investor's claim*. Although the Claimant acknowledges that the local remedies rule may apply in the context of diplomatic protection or state espousal by a home state against a host state, and therefore making the "overwhelming authority" cited by the Respondent irrelevant, it is stressed that due to the juridical nature of investor-state arbitration, the local remedies rule does not apply at all in the present case. This position is said to be reinforced by the award in *Elf Aquitaine v. NIOC* (C-88) and the *ILC Draft Articles on Diplomatic Protection* (C-89). Invoking Professor Schreuer (C-91), the Respondent asserts that *the requirement to exhaust local remedies is "dispensed with" by international investment arbitration* (C II, paras. 201 *et seq.*).

147. Even if the local remedies rule were to be applied, Claimant submits that Respondent's consent to investor-state arbitration in the UK-Soviet BIT would constitute an implied waiver of the rule. Referring not only to authorities such as Dr. Amerasinghe (C-85) and Judge Schwebel (C-93) for support, the Claimant also draws upon the historical development and purpose of arbitration to provide "*one-stop adjudication*" for investor-state disputes. As regards Respondent's allegation that an express provision waiving the local remedies would be necessary, it is noted that Claimant submits its Memorial based on the assumption that the Claimant has duly exercised a legal right to refer its dispute to arbitration in accordance with Article 8 of the UK-Soviet BIT. Against this background, it is deemed to be more significant that the UK-Soviet BIT does not contain an express provision requiring the exhaustion of local remedies. With reference to Prof. Paulsson (R-27), it is suggested that *if the text of the BIT gave a right of access to international arbitration in "simple, declarative, unqualified sentences," then it would be "astonishing" to read a requirement to exhaust local remedies into the text as an implied condition* (C II, para. 217). The Respondent's attempt to contrive a requirement out of the last sentence of Article 5(1) is also considered not to avail. An implied requirement at most, it is submitted that the provision gives the investor a *right* to review by domestic authorities which cannot be equated to an *obligation* to exhaust that recourse prior to investor-state arbitration. (C II, paras. 209 *et seq.*)
148. Objections by the Claimant to the application of the local remedies rule are furthermore based upon the allegation that no adequate local remedies exist for the Claimant at present and in the foreseeable future (C II, para. 220). The notion of suing the Respondent in its own courts would *inevitably give rise to a claim under international law for denial of justice* (C II, paras. 6, 25). Apart from the assertion that the Respondent *has failed to carry its burden of showing that local remedies even exist and are available to the Claimant* (C II, para. 221), the Claimant mainly relies upon the Respondent's statement that Russian courts have repeatedly and consistently rejected the objections of

Yukos to the seizure and sale of its core assets, in order to come to the conclusion that *assuming that Claimant could in fact bring a claim before the Russian courts, there is no reason to imagine that it would obtain results any better than those obtained by Yukos* (C II, para. 223). The Claimant further believes the Respondent's overt hostility to Yukos's management, its employees, and its outside advisors to be amply documented in the international press.

149. Acknowledging that the submission may raise factual issues between the Parties, Claimant suggests that the Tribunal should reserve any final decision as to its own jurisdiction, if necessary, until it has heard the merits of the claim (C II, paras. 5, 224).

### **3. The Tribunal**

150. The Tribunal has carefully examined the memorials and exhibits submitted, as well as the presentations at the Hearing by each of the Parties on this issue. It is not necessary to recall these arguments in detail here, but the Tribunal has taken them fully into account in reaching the following findings and conclusions.
151. Above, the Tribunal has ruled against the Respondents on issues of jurisdiction, viz by ruling that (1) the Respondents consented to arbitration in Article 8 of the Soviet-UK BIT and (2) that the Tribunal has jurisdiction based on Article 8 of the Denmark-Russian Federation BIT by operation of the MFN clause in Article 3 of the Soviet-UK BIT. In the latter respect it will be recalled that the Tribunal reached this conclusion on the contingent basis that jurisdiction is rolled into the merits in respect of expropriation. That leaves one question to be determined, namely the issue of the exhaustion of local remedies under public international law.

152. The Respondents advance their case about exhaustion of local remedies on a jurisdictional basis or on the basis of the lack of admissibility of the claim. The jurisdictional argument must be rejected. The very fact that the local remedies rule may be waived, as is undoubtedly the case, demonstrates that one is not dealing with a jurisdictional issue.
153. The alternative argument is based on a principle of customary international law. It is unnecessary to examine the width of the principle of customary international law involved. The context in which the question arises is investor-state arbitration under Article 8 of the Soviet-UK BIT and the MFN clause under Article 8 of the Denmark-Russian Federation BIT. The objective purpose of such treaty provisions, which confer independent third party rights on investors, tellingly demonstrate that the principle of customary international law is inapplicable. So far as it is necessary to do so the consent to investor-state arbitration, as explained, amounts to a waiver of the principle of exhaustion of local remedies. By choosing international arbitration to settle third party investment arbitration disputes the principle of exhaustion of national legal remedies is excluded.
154. To the extent that the Respondent relies on the last sentence of Article 5(1) of the Soviet-UK BIT the Tribunal is satisfied that the plain meaning of the provision confers a right on the investor and not a duty. The Claimant has not exercised this right. It is not germane to the issues.
155. The special regime established for investor-state arbitration, determinable by an international arbitration tribunal, conclusively establishes that the principle of customary international law invoked by the Respondent is excluded by Article 8 of the Soviet-UK BIT and by the MFN clause contained in Article 3 of the same treaty read with Article 8 of the Denmark-Russian Federation BIT. This conclusion gives primacy to the text of the treaty provisions and provides an interpretation in good faith in accordance with Article 31 of the Vienna Convention on the Law of Treaties.

156. Therefore, no exhaustion of local remedies is required in the present context and the claims are admissible.

## **H.V. Considerations regarding Costs at this Stage**

### **1. Relief Sought by Respondent**

157. The Respondent requests the Tribunal to issue an award (RII, para. 62; R III, para. 166):

*“(c) Ordering Claimant to pay all of the Russian Federation’s costs, expenses, and attorney’s fees; ....”*

### **2. Relief Sought by Claimant**

158. The Claimant stated in the Request for Arbitration (C I, para. 6.2) that:

*“6.2 RosInvestCo will in its Statement of Claim seek an Award:*

*(a) ...*

*(b) Ordering the Russian Federation to pay Claimant’s costs in these arbitration proceedings, including all attorney’s fees and expert fees.*

*(c) ....*

### **3. The Tribunal**

159. Since the Tribunal comes to the conclusion that it does have jurisdiction and thus the procedure now continues on the merits, the Tribunal considers that a separate decision on the costs of arbitration up to this stage would be inappropriate. The decision on costs will rather be taken at the end of the

merits phase taking into account the procedure and results of the jurisdictional phase as well as those of the merits phase.

**(The section with the decisions and signatures of the Tribunal follows on a separate page of this Award.)**

## **I. Decisions**

Taking into account its above considerations, at the end of this jurisdictional phase of the proceedings, the Tribunal decides as follows:

- 1. The Tribunal does not have jurisdiction over the claims submitted by Claimant on the basis of 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.**

Place of arbitration: Stockholm, Sweden

Date of this Award: October 2007

The Rt. Hon. The Lord Steyn  
(Co-Arbitrator)

Sir Franklin Berman KCMG, QC  
(Co-Arbitrator)

Prof. Dr. Böckstiegel  
(Chairman of Tribunal)