

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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HULLEY ENTRPRISES LTD.,)	
YUKOS UNIVERSAL LTD., and)	
VETERAN PETROLEUM LTD.,)	
)	
<i>Petitioners,</i>)	
)	Case No. 1:14-cv-01996-ABJ
v.)	
)	
THE RUSSIAN FEDERATION,)	
)	
<i>Respondent.</i>)	
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EXPERT OPINION OF PROFESSOR RUDOLF DOLZER

Pursuant to 28 U.S.C. § 1746, I, Rudolf Dolzer, depose and say that:

- Respondent in this case has asked me to submit a legal opinion on certain questions of international law relating to the issue of whether this Court should confirm the Interim Awards on Jurisdiction and Admissibility dated 30 November 2009 and the Final Awards dated 18 July 2014 (together, the “**Awards**”) that were rendered by an arbitral tribunal sitting in The Hague (the “**Yukos Tribunal**”) in the dispute between Petitioners and Respondent.
- I believe that I am qualified to submit this Opinion. I am a member of McNair Chambers in London and Professor Emeritus of International Law at the University of Bonn, Germany, where I was the Director of the Institute of International Law for thirteen years. Over the past thirty years, I have taught international law also at the University of Heidelberg, the University of Michigan Law School, Cornell Law School, the University of Mannheim, the Massachusetts Institute of Technology, Yale Law School, the University of Paris I (Sorbonne), Southern Methodist University, the Instituto de Madrid, and the Hague Academy of International Law. I hold a Bachelor of Arts from Gonzaga

University, Spokane, Washington, which I attended as a Fulbright Scholar. I hold a Doctorate of Law from the University of Heidelberg. I also hold a Master of Laws and a Doctorate of Law from Harvard Law School.

3. I have studied international investment law over the past decades, and I have published extensively in this field. Among my publications is the first monograph on investment treaties (*Bilateral Investment Treaties*, 1995, with Margrete Stevens) and also a leading treatise on current international investment law (*Principles of Foreign Investment Law*, 1st edition 2008, 2nd edition 2012, with Christoph Schreuer).
4. In my practice of international investment arbitration, I have testified as an expert witness, acted as counsel, and served as an arbitrator in numerous proceedings.
5. My *Curriculum Vitae* and a list of my publications are attached hereto as Annexes 1 and 2, respectively.
6. I have no independent knowledge of the facts of the underlying case. All factual statements and assumptions found in my Opinion are taken from documents provided to me by Respondent's Counsel.
7. I have received the following documents from Respondent's Counsel:
 - The Interim Award on Jurisdiction and Admissibility dated 30 November 2009 in *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226 (the "**Hulley Interim Award**"), which I understand is substantially identical to the Interim Awards issued on the same date by the same arbitral tribunal in the two parallel cases, *Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA 227, and *Veteran Petroleum Limited v. The Russian Federation*, PCA Case No. AA 228;
 - The Final Award dated 18 July 2014 in *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226 (the "**Hulley Final Award**"), which I understand is substantially identical to the Final Awards issued on the same date by the same arbitral tribunal in the two parallel cases, *Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA 227, and *Veteran Petroleum Limited v. The Russian Federation*, PCA Case No. AA 228;
 - The Claimants' Post-Hearing Brief dated 21 December 2012, which was submitted by Petitioners to the arbitral tribunal in the three arbitrations;
 - The Respondent's Post-Hearing Brief dated 21 December 2012, which was submitted to the arbitral tribunal in the three arbitrations;

- The following expert opinions submitted by Respondent in the three arbitrations:
 - Professor S.A. Avakiyan, dated 21 February 2006;
 - Professor M.V. Baglay, dated 26 February 2006
 - David Berman, dated 22 January 2007;
 - Sydney Fremantle, dated 21 January 2007;
 - Professor Gerhard Hafner, dated 30 December 2006;
 - Stephen Knipler, dated 22 January 2007;
 - Professor Martti Koskenniemi, dated 27 October 2006;
 - Anatoly Martynov, dated 14 December 2006;
 - Professor Myron Nordquist, dated 24 January 2007;
 - Professor Georg Nolte, dated 31 October 2006;
 - Professor Alain Pellet, dated 13 December 2006;

- The following expert opinions submitted by Petitioners/Claimants in the three arbitrations:
 - Professor James Crawford, dated 22 June 2006;
 - Professor James Crawford, dated 3 May 2007;
 - Professor Vladimir Gladyshev, dated 29 June 2006;
 - Professor Vladimir Gladyshev, dated 2 May 2007;
 - Professor W. Michael Reisman, dated 28 June 2006;

- The following papers that were filed in the proceedings pending in the District Court of The Hague to set aside the Awards:
 - An English translation of the Russian Federation's Writ of Summons, dated 10 November 2014;
 - An English translation of the Petitioners' Statement of Defense, dated 20 May 2015;
 - An English translation of the Russian Federation's Statement of Reply, dated 16 September 2015;

- An English translation of the expert opinion of Professor Anton Asoskov dated 30 October 2014;
 - The expert report of Professor James Dow dated 8 November 2014;
 - The First Witness Statement of David Goldberg, dated 25 September 2015, which was filed by the Russian Federation in the enforcement proceedings pending in the Commercial Court in London.
8. I shall answer the questions posed to me in the order presented by Respondent's Counsel.

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TOPIC 1 EXISTENCE OF A VALID AGREEMENT TO ARBITRATE

Question 1 Did the Russian Federation’s signature of the ECT constitute an offer to arbitrate under Article 26, given that: (i) the Russian Federation never ratified the ECT; (ii) the arbitration of public-law disputes is contrary to Russian law; and (iii) under Article 45(1), each signatory agreed to apply the ECT provisionally pending its entry into force for such signatory only “to the extent that such provisional application is not inconsistent with its constitution, laws, or regulations”?

9. The ECT establishes a special regime on provisional application in its Article 45:
 1. Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.
 2. (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.
 - (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).
 - (c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.
 3. (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory’s written notification is received by the Depository.

- (b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).
 - (c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor.
 - 4. Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in Article 38.
 - 5. The functions of the Secretariat shall be carried out on an interim basis by a provisional Secretariat until the entry into force of this Treaty pursuant to Article 44 and the establishment of a Secretariat.
 - 6. The signatories shall, in accordance with and subject to the provisions of paragraph (1) or subparagraph (2)(c) as appropriate, contribute to the costs of the provisional Secretariat as if the signatories were Contracting Parties under Article 37(3). Any modifications made to Annex B by the signatories shall terminate upon the entry into force of this Treaty.
 - 7. A state or Regional Economic Integration Organization which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article.
10. It will be noted initially that the scheme and text of Article 45 is not identical with the provision in Article 25 of the Vienna Convention on the Law of Treaties which reads:
- 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
 - (a) the treaty itself so provides; or

- (b) the negotiating States have in some other manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.
11. The essential difference between Article 45 of the ECT and Article 25 of the Vienna Convention is that only the ECT's text ("to the extent that such provisional application is not inconsistent with its constitution, laws or regulations") gives special emphasis to the role of domestic rules of law and their conformity with international law as a condition for provisional application. For convenience, I will refer to this "to the extent ..." clause as the "Limitation Clause."
 12. Any reference to Article 25 of the Vienna Convention in this case which fails to take into account this difference is misplaced.
 13. A second initial point here is that the ECT subjects its provisional application to principles and rules germane to provisional application, which are separate and different from the ECT's rules on ratification and entry into force of the treaty as such. Analogies and cross-references from one area to the other will be inappropriate unless especially justified.
 14. There is no doubt that the issue under consideration is a matter of treaty interpretation. The rules to be applied are found in Articles 31 and 32 of the Vienna Convention:

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.
15. Each regime for provisional application of a treaty has to be considered, interpreted and applied on its own, and no cross-reference or analogy to another text will be appropriate. Thus, Article 45 has to be considered on its own.
 16. Article 45 refers to consistency with the “constitution, laws or regulations.” Thus, the entire legal order of the host State is covered, not just the rules of the constitution. This approach covering the entire legal order, rather than just constitutional norms, is in line with many clauses in investment agreements which refer only to the “laws of State”; moreover, it corresponds to the special emphasis of the sovereignty of the host State laid down in Article 18 of the ECT:
 1. The Contracting Parties recognize state sovereignty and sovereign rights over energy resources. They reaffirm that

these must be exercised in accordance with and subject to the rules of international law.

2. Without affecting the objectives of promoting access to energy resources, and exploration and development thereof on a commercial basis, the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources.
 3. Each state continues to hold in particular the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, the optimalization of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and reclamation within its Area, and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises.
 4. The Contracting Parties undertake to facilitate access to energy resources, inter alia, by allocating in a non-discriminatory manner on the basis of published criteria authorizations, licences, concessions and contracts to prospect and explore for or to exploit or extract energy resources.
-
17. To start with, the Yukos Tribunal properly points to the elements of Article 31 and, also properly, begins with an examination of the text of Article 45 ECT.¹
 18. The Yukos Tribunal examines the wording of Article 45 and concludes that the text shows that this provision establishes an “all-or-nothing” approach, depending upon whether the domestic law allows in principle for provisional application of a treaty.²
 19. In support, the Yukos Tribunal points to the word “such” in Article 45(1),³ and to a single previous decision of a tribunal, whose President was also the Chairman of the Yukos Tribunal.⁴

¹ Hulley Interim Award, paras. 301 *et seq.* (R-62).

² Hulley Interim Award, para. 301 (R-62).

³ Hulley Interim Award, para. 304 (R-62).

⁴ *See Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007) (President of the Tribunal: L. Yves Fortier, C.C., Q.C.) (RLA-68); *see also* Hulley Interim Award, para. 309 (quoting extensively from *Kardassopoulos*) (R-62).

20. I disagree, in particular because the word “such” in Article 45(1) does not lead me to the same reasoning.
21. Additionally, the Yukos Tribunal failed to even attempt a proper interpretation of the words “to the extent”.
22. The ordinary meaning of those terms commonly refers to the “range (as of inclusiveness or application) over which something extends: scope ..., the limit to which something extends.”⁵ Accordingly, the ordinary meaning of the Limitation Clause is to designate the scope of each signatory’s provisional application of the treaty by reference to the consistency of the ECT’s various provisions with the signatory’s domestic law.
23. The Yukos Tribunal, however, apparently just assumed that those words had the same meaning as the words “if” or “where”. In doing so, the Yukos Tribunal improperly deprived the words “to the extent” of any independent meaning, which later was criticized by Professor Reisman, who was one of the Petitioners’ own expert witnesses on the interpretation of Article 45 in the proceedings before the Yukos Tribunal:

If Article 45(1) had been intended to refer to the notion of the permissibility of the provisional application of a treaty as such, it would not have been necessary to introduce the phrase “*to the extent*”. Domestic law either permits or does not permit provisional application of treaties; there would be no function for the words “*to the extent*”. If the intention in Article 45(1) had been to refer to permissibility of provisional application of a treaty as such, the phrase, “to the extent”, would have been replaced with words such as “if” or “where”. The phrase, “to the extent”, is meaningful only if it refers to the various obligations in the ECT.⁶

24. Interpreting the words “to the extent” in their context, it should be noted that various other provisions of the ECT contain the same terms. These provisions illustrate that these terms, as used in the ECT, refer to scope of application rather than a binary “all or nothing” outcome:

⁵ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 805 (1961).

⁶ Mahnoush H. Arsanjani & W. Michael Reisman, *Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards*, in THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 86, 92 (Enzo Cannizzaro ed. 2011) (emphasis in original) (RLA-491).

- Article 6(5): “... The notified Contracting Party shall inform the notifying Contracting Party of its decision or the decision of the relevant competition authorities and may if it wishes inform the notifying Contracting Party of the grounds for the decision. If enforcement action is initiated, the notified Contracting Party shall advise the notifying Contracting Party of its outcome and, *to the extent possible*, of any significant interim development.” (Emphasis added).
- Article 21(1): “Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail *to the extent* of the inconsistency.” (Emphasis added).
- Article 21(5)(b): “Whenever an issue arises under Article 13, *to the extent* it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply: ...” (Emphasis added).
- Article 27(3)(f): “In the absence of an agreement to the contrary between the Contracting Parties, the Arbitration Rules of UNCITRAL shall govern, except *to the extent* modified by the Contracting Parties parties to the dispute or by the arbitrators. ...” (Emphasis added).

25. Also, given the dearth of authorities cited and the discrepancy between the view of the Yukos Tribunal and the positions explained at length by both Parties in their pleadings, I fail to see on what basis the Yukos Tribunal arrived at the conclusion that its interpretation of Article 45 was unambiguous, thereby excluding consideration of the ECT’s negotiating history.⁷

26. From a constitutional viewpoint, provisional application bears the mark of an anomaly as it sidesteps the ordinary constitutional process of ratification, for the period of time between signature and ratification.⁸

⁷ Hulley Interim Award, para. 328 (R-62).

⁸ See Renée Lefebvre, *The Provisional Application of Treaties*, in *ESSAYS ON THE LAW OF TREATIES, A COLLECTION OF ESSAYS IN HONOUR OF BERT VIERDAG* 81, 82 (Jan Klabbbers & René Lefebvre, eds. 1997) (“There is a certain anomaly, from the point of view of constitutional law, in dealing with ‘provisional entry into force’ as an ordinary case of ‘entry into force under the terms of a treaty’ which for constitutional reasons has been made subject to ratification or approval.”) (quoting Sir Humphrey Waldoock, *Fourth Report on the Law of Treaties*, Y.B. INT’L L. COMM’N 1965, Vol. II, at 58) (RLA-482).

27. In this respect, Article 45(1) with its reference to the domestic legal order reflects the sensibility inherent in provisional application from the vantage point of constitutional order.
28. There is no basis to assume that the concern of the States for their respective domestic orders will be limited to the narrow issue of admissibility of provisional application as such; the more basic underlying concern lies with the preservation of the values embodied in the individual constitutional provisions.
29. It would be surprising if a State addressed the legality (or illegality) of provisional application in an instrument below its laws on the level of regulation; indeed, I am not aware of such a regulation. In this regard, the Yukos Tribunal's "all-or-nothing" approach ignores the text of the Limitation Clause, which refers to "regulations" in addition to constitution and laws.⁹
30. Under ordinary circumstances, the urgency of a public matter may speed up the process of decision-making, but not the derogation of individual constitutional provisions.
31. It bears emphasis that the United States of America, having itself proposed the Limitation Clause, explained that its motivation was to allow itself to be exempt from provisional application of specific ECT clauses, not from the ECT as a whole:

As I noted during the last plenary, we do not have any legal difficulty with provisional application *per se*, so long as it is carefully qualified to ensure that no party is obliged to do, or to refrain from doing, anything for which that party's constitution or law requires an appropriately ratified treaty. Our law, for example, generally speaking prohibits expenditure [*sic*] of funds to pay the U.S. share of the expenses of an international organization absent the express approval of the Congress. For such reasons language along the lines of "to the extent permitted by its constitution or laws" is essential to any provisional application obligation; such language is conspicuously absent from the draft text.¹⁰

⁹ Mahnoush H. Arsanjani & W. Michael Reisman, *Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 86, 93 (Enzo Cannizzaro ed. 2011) (emphasis in original) (R-491).

¹⁰ U.S. Department of State, Fax to Energy Charter Secretariat, 24 February 1994, at 1 (emphasis in original) (R-480).

32. Looking beyond the wording of Article 45(1), I also disagree with the Yukos Tribunal's assessment of the context of Article 45(1), required under accepted rules of interpretation.
33. Article 45(2)(c) provides relevant context because it also contains a limitation clause, with the same wording as the one in Article 45(1); it does not address provisional application of the treaty as such, but to provisional application of Part VII of the ECT in the event a signatory makes a declaration that it is not able to accept provisional application under Article 45(2)(a). In that context, Article 45(2)(c) refers to inconsistencies between domestic laws and regulations with Part VII:

Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, *to the extent that such provisional application is not inconsistent with its laws or regulations.*¹¹

34. In my opinion, the meaning of the words “to the extent that ...” in both provisions is the same, in the sense that I understand Article 45. I disagree with the Yukos Tribunal which interpreted the two provisions in a different manner.¹²
35. The Yukos Tribunal considered that its result was supported by a general observation to the effect that international law must be considered to be independent of domestic law.
36. A generally phrased argument that international law tends to require the separation of international and domestic law simply cannot be upheld in the face of the text of Article 45(1) with its recognition of domestic law in the process of signing the Charter and in its provisional application.
37. Petitioners' expert in the underlying arbitrations, Professor Crawford, apparently sought to interpret the Limitation Clause contained in Article 45(1) of the ECT by referring to Article 27 of the Vienna Convention, which provides that “[a] party may not invoke the

¹¹ ECT, Art. 45(2)(c) (emphasis added) (R-481).

¹² Hulley Interim Award, para. 306 (R-62).

provisions of its internal law as justification for its failure to perform a treaty,” and stating that this provision was “routinely cited across a range of contexts.”¹³

38. I do not agree that Article 27 of the Vienna Convention will assist in interpreting Article 45(1). As explained earlier, Article 45(1) is drafted as a special regime, derogating from the general rules of the Vienna Convention, as a *lex specialis* within the ECT. As such, it has to be interpreted on its own terms, without broad presumptions and assumptions as elements of interpretation, as Professor Crawford conceded in the next paragraph of his Opinion: “presumptions of interpretation are beside the point in relation to a provisional application clause which is as explicit as Article 45.”¹⁴
39. In the same context, Professor Crawford also spoke of a “strong underlying value against self-judgement and a strong presumption of the separation of international laws from national law.”¹⁵
40. But these remarks are not helpful when it comes to interpreting the special terms of Article 45. The regard and respect for existing rules of domestic law enshrined in Article 45 has nothing to do with self-judgment.
41. An international tribunal (and not the host State) will act as the ultimate authority to address Article 45, including the application of the Limitation Clause and its reference to domestic law. Thus, self-judgment is not an issue under Article 45. And recognition of the existence of domestic law is not an issue of self-judgment either; it is the object and purpose of the Limitation Clause.
42. Also, the alleged “strong presumption” of the separation of international law and domestic law cannot serve as the guidepost to interpret Article 45(1), which was drafted as a special regime expressly referring to domestic law. Again, an abstract presumption arising on the level of general international law cannot serve to influence the content of a special rule deviating from the general rule of international law.

¹³ Further Opinion of Professor James Crawford, 3 May 2007, para. 15 (R-454).

¹⁴ Further Opinion of Professor James Crawford, 3 May 2007, para. 16 (R-454).

¹⁵ Further Opinion of Professor James Crawford, 3 May 2007, para. 15 (R-454).

43. Moreover, it is not correct to assume generally, as “a strong presumption,” that national law is separated from international law. In many respects, the two legal orders are interrelated, not separate. For instance, the tribunal in *Fraport v. Philippines* correctly observed that a *renvoi* by international law to domestic law is “hardly unusual in treaties”, referring in particular to rules in investment treaties stating that the treaty will only grant protection to investments made “in accordance with national law.”¹⁶
44. Other areas of interaction between domestic laws and international law speak against the idea of the “strong presumption” proposed by Professor Crawford. In the context of State responsibility, for example, rules on attribution of acts to the State depend upon an understanding of domestic law, even though the rules as such operate on the level of international law. The same is true for the operation of the rules on sovereign immunity.
45. On the whole, the Yukos Tribunal accepted Professor Crawford’s thesis of “a strong presumption” of a separation between international law and domestic law, even though that presumption has no relevance to the interpretation of the special terms of Article 45(1) and, moreover, cannot be established on the basis of a full review of the interaction of the two legal orders.
46. Professor Crawford sought to argue that Article 45(1) was not designed to take considerations respecting domestic law into account.¹⁷ His thesis, however, simply serves to divert attention away from the clear text agreed upon by the ECT’s Contracting Parties: in contrast to Article 25 of the Vienna Convention, the ECT was written so as to recognize the domestic law difficulties of signatories and to allow their consent to provisional application.
47. In my view, Professor Crawford’s position is untenable, in particular in view of the specific terms of Article 45(1), and also in view of the many linkages between international law and domestic law, both in the ECT (*see, e.g.*, Article 32, addressing transitional arrangements) and otherwise, as discussed above (*see paras.* 43-44).

¹⁶ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 August 2007), para 394 (annulled on other grounds) (RLA-69).

¹⁷ Further Opinion of Professor James Crawford, 3 May 2007, para. 22 (R-454).

48. In addition, it will be noted initially that, as regards the “extent clause” in Article 45(1), the dispute between the Parties concerns the scope of the obligations accepted under Article 45(1). This means that any reference to existing obligations independent of domestic law (Article 27 of the Vienna Convention) will be of no avail; whereas Article 27 determines consequences of existing commitment in regard to domestic law, the dispute before the Tribunal concerns the determination of the scope of obligations attached to acceptance of Article 45. The regime of binding ratified treaties is not applicable to this dispute.
49. The Tribunal reaches its conclusion, in favor of an all-or-nothing approach, also by way of highlighting that the result to be reached must ensure that a State bound to apply a treaty in a provisional manner must not have the possibility to evade its obligations or to single out provisions which it considers as burdensome. In my view, this approach finds no support in a proper interpretation of Article 45, as it unduly assumes bad faith on the part of the State.
50. International law is based on the position that a State fulfills its obligations in good faith.
51. The Yukos Tribunal relied on the opposite viewpoint and assumed that States will evade their obligations when discussing the understanding of Article 45 and Russia’s obligations.
52. In my view, the Yukos Tribunal’s approach is misguided because it disregards a basic tenet of international treaty law. Article 31 of the Vienna Convention itself requires that any interpretation must recognize good faith.
53. The Tribunal’s reading of Article 45 in the light of its assumption of a general lack of good faith finds no support in the rules on treaty interpretation or the rules of treaty law.
54. Additionally, the principle *pacta sunt servanda* does not apply in the same way to provisional application as it does to a ratified binding treaty; the provision on termination of provisional application is one example to be listed here.¹⁸

¹⁸ See ECT, Art. 45(3)(a) (“Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory’s written notification is received by the Depository.”) (R-481).

55. Another point of interpretation by the Tribunal to be raised here as problematic concerns its strict emphasis on clarity and transparency of obligations under Article 45. While I agree that clarity is one aim, I consider that other goals are equally relevant, in particular the respect for the domestic legal order (supported by Article 18 of the ECT) and also the aim to allow as many states as possible to apply the ECT in a provisional manner.
56. In his treatise on Modern Treaty Laws and Practice, Anthony Aust points out that in provisional application clauses, States often include “the phrase ‘in accordance with their legal system and to the extent practicable’ or something similar.”¹⁹
57. Obviously, the formula “to the extent practicable” will entirely contradict the view that legal clarity and security must be the primary goal of a scheme for provisional application. To the contrary, flexibility for States potentially adhering to such a scheme may prevail over clarity and related goals.
58. Urgency of a matter prompting provisional application will, as a rule, be accompanied by the objective to “cast the net” as wide as possible, *i.e.*, to allow and prompt as many States to participate in the regime. It can be reasonably assumed that this was also the case when the ECT with its Article 45 was drafted.
59. The Yukos Tribunal acknowledged that Article 45 was intended to provide flexibility and thereby encourage as many States as possible to sign the ECT and apply it provisionally:
- The evidence, particularly the testimony of Mr. Fremantle, which it accepts on this point, demonstrates that the negotiating parties were driven by their objective to have as many signatories as possible apply the ECT provisionally from the very beginning. The relative flexibility of Article 45(1), interpreted in accordance with its terms as not requiring any notification or declaration, certainly serves this purpose.²⁰
60. The Yukos Tribunal’s “all-or-nothing” approach, however, negates that purpose.
61. States have highlighted the importance of their domestic legal order for the provisional application of treaties, for example during discussions in the Legal Committee of the

¹⁹ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 174 (2nd ed. 2007) (R-485).

²⁰ Hulley Interim Award, para. 285 (R-62).

United Nations General Assembly in 2012 and 2013.²¹ For example, the representative of the Federal Republic of Germany stated:

In many countries, including his own, domestic law determined the extent to which provisional application of a treaty could be agreed or implemented. If the implementation of a treaty required the amendment or adoption of a negotiating State's domestic law, provisional application by that State was impossible, at least until the relevant legislation had been changed or adopted. The same might apply if the funding demanded by the treaty required parliamentary approval. Therefore, States would often limit a treaty's provisional application to the framework of their applicable domestic law, making it clear that they might not be in a position to meet its obligations completely. Alternatively, they might agree to the provisional application of a treaty as from notification of completion of the necessary internal procedures.²²

62. The position of the United States, as a leader in the negotiations on the ECT, deserves special attention here. In the context of the GATT, the U.S. agreed to a protocol on provisional application by which it agreed to apply provisionally a specific part of the GATT "to the fullest extent not inconsistent with existing legislation" and other parts without such a qualification.²³

²¹ See United Nations, General Assembly, Statement by the Hellenic Republic during meeting of the Sixth Committee (4 Nov. 2013), para. 40 ("Some States might be reluctant to provisionally apply international treaties, both for policy reasons and because of constitutional constraints relating to procedural requirements for accession to treaties."); United Nations, General Assembly, Statement by the United Kingdom of Great Britain and Northern Ireland during meeting of the Sixth Committee (6 Nov. 2012), para. 34 ("Turning to the topic 'Provisional application of treaties', she noted that it could be of genuine practical importance to States, though in practice it could also conflict with the constitutional and other laws of States."); United Nations, General Assembly, Statement by New Zealand during meeting of the Sixth Committee (4 Nov. 2013), para. 100 ("Provisional application could be a legitimate tool, but domestic procedures for entering into binding international obligations and accepting provisional application were of the utmost importance and were a matter for individual States to determine in the context of their constitutional framework. Provisional application should not be used to circumvent domestic constitutional processes.").

²² United Nations, General Assembly, Statement by the Federal Republic of Germany during meeting of the Sixth Committee (5 Nov. 2012), para. 6; see also United Nations, General Assembly, Written Statement by the Kingdom of the Netherlands during meeting of the Sixth Committee (5 Nov. 2012), para. 14 ("We consider provisional application an important instrument of international treaty practice. However, we would like to draw attention to the importance of domestic law in this respect. It is after all for individual States to determine whether or not their legal system allows for provisional application and, if so, on what conditions and to what extent. It may be difficult to draw any general rules from this diversity.") (Emphasis added).

²³ Protocol of Provisional Application of the General Agreement on Tariffs and Trade, done at Geneva on 30 October 1947, 55 U.N.T.S. 308 (RLA-271).

63. While this position concerned the GATT and not the ECT, it clarifies that the United States has not assumed that an “all-or-nothing approach” is required in a scheme of provisional application. As noted above (*see* para. 31), the United States expressly took the same position during the negotiation of the ECT.
64. In his expert opinion submitted to the Yukos Tribunal, Professor Reisman identified the following six goals of the ECT:
- Protection of investment in the energy sector;
 - Enhancement of trade in energy and energy-related products in conformity with the rules of the World Trade Organization (“WTO”);
 - Freedom of energy transit;
 - Enhanced energy efficiency; establishment of international dispute resolution for both investor-State and interstate disputes; and
 - Enhanced legal transparency.²⁴
65. These goals could be achieved in the short term if a maximum number of States were to accept provisional application. At the time of the negotiation of the ECT, the state of the energy infrastructure within the former Soviet Union and the instability of oil-exporting countries in the Middle East caused concerns about continuity of energy supply in the importing countries in the short term.²⁵
66. These goals do not necessarily militate in the same direction, and a one-sided emphasis on clarity does not do justice to the diverse purposes of Article 45(1). The Yukos Tribunal failed to understand this complexity of Article 45(1).
67. The Yukos Tribunal considered that the practice of ECT member States in regard to Article 45(1) was in line with its “all-or-nothing” approach. My own reading of that practice is different, and I see no support in that practice for the Yukos Tribunal’s conclusion.

²⁴ Reisman Opinion, 28 June 2006, para. 8 (citing ECT Secretariat, *The Energy Charter Treaty – A Reader’s Guide* at 9) (R-449).

²⁵ Fremantle Opinion, 21 January 2007, para 16 (R-453).

68. As regards subsequent practice and *travaux préparatoires* relating to Article 45(1) ECT,²⁶ I have reviewed the documents cited by Petitioners in the underlying proceedings in favor of their “all-or-nothing” thesis.
69. In view of the central importance for the operation of Article 45 as a whole, and of the distinct character of Petitioners’ thesis, one would expect – if the thesis were correct – to find a reference to its existence or its recognition in the various statements made by the participating States during or after the negotiations.
70. I have not found any statement which would point me to the assumption that the relevant States supported or accepted the “all-or-nothing” approach.
71. To the contrary, several statements clearly point in the direction of the piecemeal approach.
72. I refer in particular to the six statements by Austria, Italy, Luxemburg, Portugal and Romania and Turkey,²⁷ the joint statement of Council and Commission of the European

²⁶ See Vienna Convention, Art. 31(3)(b) (directing that treaty interpretation take account, together with the context, the subsequent practice of the parties to the treaty in its application); *id.*, Art. 32 (referring to the preparatory work (or *travaux préparatoires*) of a treaty as a supplementary means of interpretation).

²⁷ See Austria, National Assembly, Government Bill No. 56, Committee Report, at 143 (“This far reaching constitutional and legal reservation allowed Austria, Italy, Luxembourg, Portugal, Romania, and Turkey to declare that in accordance with Art. 45(1) ECT they are not in a position for constitutional reasons to apply the Treaty on a provisional basis. Austria made a declaration to that effect upon signing the Energy Charter Treaty. This has the effect that so far the Treaty has not been applied on a provisional basis in Austria”) (unofficial translation); Luxembourg, *Projet de Loi portant approbation de l’Acte final de la Conférence sur la Charte Européenne de l’Energie et de ses Annexes*, signés à Lisbonne, le 17 décembre 1994, N° 4130, *Chambre de Députés*, 1995-1996, at 3 (“The Treaty includes a clause providing that meanwhile it will be provisionally applied as from the date of its signature (17 December 1994) insofar as authorized by the Constitution, laws or regulations of the signatory parties. The adoption of this Treaty being based on Article 37 of the Constitution of the Grand Duchy of Luxembourg, there will be no provisional application of this Treaty in Luxembourg up until its due and proper ratification.”) (Unofficial translation).

Communities and its (then) 12 Member States (“**Joint EC Statement**”),²⁸ and the statement of the EC Commission (“**1994 Commission Communication**”).²⁹

73. These statements do not reflect recognition of the “all-or-nothing” approach, but they are clearly in line with the piecemeal approach. This is so because they all indicate that, under certain circumstances, provisional application may extend only to a part of the ECT, thus contradicting the “all-or-nothing” approach.
74. It is conspicuous that none of the documents explicitly articulate the “all-or-nothing” theory or the piecemeal approach.
75. In my view, the explanation for this peculiar situation lies in the fact that all parties were of the view that the “piecemeal approach” is correct, that this view was shared by the parties, and that there was no occasion or need to articulate any theory; the States considered and presupposed that the “piecemeal approach” was correct.
76. Also, I have considered the legal situation in Austria, Germany and France as discussed in three expert opinions submitted by Respondent in the arbitrations.³⁰
77. According to the expert opinions, these three States indicated that they would apply the ECT on the basis of Article 45(1). It seems also clear, however, that certain provisions of the ECT were not consistent with the domestic legal order of these States.
78. This setting raises the question of whether these States intended to apply the ECT as a whole on a provisional basis, even though their domestic orders contained rules that were inconsistent with provisions found in the ECT.

²⁸ “A” Item Note from the Permanent Representatives Committee to the Council of the European Union, Doc. 12165/94, Annex 1 (14 December 1994), at 3 (“The Council, the Commission and the Member States agree on the following declaration: Article 45(1) of the European Energy Charter Treaty should be interpreted as defining the conditions and limits for the provisional application of the ECT by the Signatories: (a) it does not create any commitment beyond what is compatible with the existing internal legal order of the Signatories; (b) on the basis of this interpretation of Article 45(1) to the ECT, a Signatory is not bound to enter a declaration of non-application, as is provided for in Article 45(2) ECT; (c) this interpretation allows the Community to limit provisional application to the matters which fall under its competence.”).

²⁹ European Commission, Communication from the Commission to the Council and the European Parliament on the signing and provisional application by the European Communities of the European Energy Charter Treaty (21 September 1994), Annex, 6 (“The Treaty shall enter into force when thirty signatories will have ratified it. In the meantime, a provision on provisional application of the Treaty by the signatories is provided for *insofar as allowed by their constitution, laws or regulations.*”) (Emphasis added).

³⁰ Expert Opinion of Professor Gerhard Hafner, 30 December 2006 (R-452); Expert Opinion of Professor Georg Nolte, 31 October 2006 (R-450); Expert Opinion of Professor Alain Pellet, 13 December 2006 (R-451).

79. It would be most difficult to assume that the executive branch of these three States with their firmly entrenched constitutional systems overlooked the relevant constitutional provisions or were aware of them and decided to ignore them.
80. Having myself served in the Office of the German Federal Chancellor, I cannot imagine that constitutional imperatives were overlooked or ignored.
81. The Yukos Tribunal was in a position to have recourse to the ECT's *travaux préparatoires*, as the Parties had laid them out in their arbitration pleadings. I do not share the Yukos Tribunal's assumption that the principal mode of interpretation of Article 45 made recourse to the *travaux préparatoires* inappropriate.
82. The Tribunal should have examined the *travaux préparatoires* which shed light on the manner in which the Parties understood Article 45 when they negotiated and drafted the ECT. These *travaux préparatoires* do not support the "all-or-nothing" approach of the Tribunal.
83. In the underlying proceedings, Petitioners, as far as I could detect, did not point to a single statement by a signatory State adopting the "all-or-nothing" approach.
84. To the contrary, various statements made during the negotiations point the understanding that Article 45(1) embodies a piecemeal approach:

- In a letter to the Energy Charter Secretariat in January 1994, the Japanese delegation stated:

According to the present draft, provisional application means to "apply provisionally to the extent that such provisional application is not inconsistent with laws and constitutional requirements." This, in other words, means that the extent to which this Treaty applies will differ from country to country according to their constitutions and legislations.³¹

- In February 1994, the U.S. Department of State stated in a letter to the Energy Charter Secretariat (already quoted above, *see* para. 31).

As I noted during the last plenary, we do not have any legal difficulty with provisional application *per se*, so long as it is carefully qualified to ensure that no party is obliged to do, or to refrain from doing, anything for which that party's constitution or

³¹ Letter from Japanese Mission to the Energy Charter Secretariat (20 January 1994) (emphasis added) (R-479).

law requires an appropriately ratified treaty. Our law, for example, generally speaking prohibits expediture [*sic*] of funds to pay the U.S. share of the expenses of an international organization absent the express approval of the Congress. For such reasons language along the lines of “to the extent permitted by its constitution or laws” is essential to any provisional application obligation; such language is conspicuously absent from the draft text.³²

- In March 1994, the Chairman of the Plenary stated:

[W]e are not seeking to ask countries to commit themselves to provisional application to the point where they have to change their laws during that period. They may have to change once the Treaty comes into force. That is another question. But the question of changing their regulations is of course easier since they would not have to go to their parliament presumably.³³

85. As noted above (para. 55), legal security in the sense of continuity of provisional application is not found in the ECT, as a State remains free to terminate its obligation.

86. I agree on this point with the position of Claimants’ Expert Professor Crawford that general assumptions have no role to play in the presence of a specific rule such as Article 45(1):

In any event presumptions of interpretation are beside the point in relation to a provisional application clause which is as explicit as Article 45, and which so obviously provides for its own legal effect, extending even for 20 years after the termination of provisional application.³⁴

87. In particular, a State having accepted provisional application under Article 45(1) may at any time withdraw this acceptance; thus, third States cannot rely upon the State being bound for any time, contrary to the situation after ratification of a treaty. Provisional application is voluntary, under the rules of the ECT, before and after a declaration of acceptance.

³² U.S. Department of State, Fax to Energy Charter Secretariat, 24 February 1994, at 1 (emphasis in original) (R-480).

³³ Session of 7 March 1994 (Chairman Jones), at 12.

³⁴ Further Opinion of Professor James Crawford, 3 May 2007, para. 16 (R-454).

88. For all these reasons, the Yukos Tribunal’s conclusion in favor of its “all-or-nothing” approach is without legal support. The proper conclusion would have been that the provisional application of each provision of the ECT depends upon its conformity with the domestic law of the host State.
89. I note that Professor Asoskov, in his Expert Report dated 30 October 2014, concluded that the dispute before the Yukos Tribunal was a public law dispute the arbitration of which was contrary to Russian law, in particular certain legislation of the Russian Federation.
90. In this connection, it is worth noting that investment treaty arbitration, such as under Article 26 of the ECT, as a dispute resolution mechanism between a sovereign State, on the one hand, and a private investor, created for the resolution of disputes resulting from sovereign measures taken by the State in the exercise of its sovereign authority or “*puissance publique*.”³⁵ While similarities exist in terms of procedures between treaty-based investor-State arbitration and contract-based commercial arbitration, the nature of the underlying arbitration agreements is different. In treaty-based investor-State arbitration, the arbitration agreement is not based on privity. As explained earlier (*see paras. 97-105, above*) the host State typically makes a standing offer of consent in a treaty concluded among sovereigns, such as the ECT. The offer of consent is directed not at known counterparties but rather at a class of investors that is defined by certain characteristics but whose individual members are not necessarily known to the host State before a dispute arises. Based on these considerations, investor-State arbitration based on the ECT, while subject to international law, is essentially a mechanism to resolve public law disputes.
91. In their Expert Opinions dated 21 February 2006 and 26 February 2006, respectively, Professor Avakiyan and Professor Baglay explain that under Russian law, including the Constitution of the Russian Federation, a treaty may override contrary Russian legislation only if and when it is approved (or ratified) by the legislature of the Russian Federation, *i.e.*, the State Duma and the Federation Council. Even where a treaty provides for its

³⁵ *See* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 45 (2007) (discussing this issue in greater detail) (R-486).

provisional application, it cannot be applied to the extent its application would require amendments or additions to Russian law.³⁶

92. I further understand that the State Duma of the Russian Federation declined to approve the ECT and, accordingly, the Russian Federation has not ratified the ECT.
93. Accordingly, and against the background of my considerations above, I conclude that the Russian Federation's signature and subsequent provisional application of the ECT could not give rise to an offer to arbitrate under Article 26 because any such offer would have related to a public law dispute, in particular a dispute concerning sovereign measures of the Russian Federation, taken in the exercise of its governmental authority.
94. I note further that, in the absence of an offer to arbitrate by the Russian Federation, it follows necessarily that the Petitioners' purported consent to arbitrate with the Russian Federation could not constitute an acceptance or otherwise lead to the formation of an arbitration agreement between Petitioners and Respondent.
95. It also follows necessarily that all other provisions of Article 26 relating to international arbitration do not apply, including Article 26(5)(b), according to which "[c]laims submitted to arbitration shall be considered to arise out of a commercial relationship for the purposes of article I of th[e New York] Convention."

Question 2 In the alternative, should the Court conclude that by provisionally applying the ECT, the Russian Federation did extend an offer to arbitrate to Investors: As a matter of international law, can the standing offer to arbitrate contained in Article 26 of the Energy Charter Treaty be validly accepted by alleged "Investors" who, only purported to bring themselves within this class of offerees on the basis of fraudulent or otherwise seriously unlawful acts?

96. In order to place my answer to this question into its proper context, I first address the nature of a standing offer to arbitrate contained in a multilateral investment treaty. I then address the issue of whether the offer to arbitrate in Article 26 of the Energy Charter

³⁶ Opinion of Professor Baglay, at 5 (R-317); Expert Opinion of Professor Avakiyan, paras. 5-6 (R-311).

Treaty (“ECT”) contains, as a tacit condition, a requirement that the investment must have been made lawfully, as well as the consequences of an investor’s failure to meet that requirement.

A. The Nature of a Standing Offer to Arbitrate in an Investment Treaty

97. The ECT is a multilateral treaty among certain States and international organizations.³⁷ Corporations established under national law, such as Petitioners, however, cannot be parties to the ECT.³⁸
98. Given that Petitioners are not parties to the ECT, its Article 26, by itself, cannot be an agreement to arbitrate between Petitioners and the Russian Federation. Article 26 contains only the Contracting Parties’ standing offer of consent to arbitrate disputes with an “Investor” relating to an “Investment” (both terms as defined in the ECT), subject to certain terms and conditions, but not a perfected arbitration agreement, as I explain further below.
99. Article 26 of the ECT provides as follows:
1. Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
 2. If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
 - (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
 - (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
 - (c) in accordance with the following paragraphs of this Article.

³⁷ The Energy Charter Treaty, done at Lisbon, 17 December 1994, 2080 U.N.T.S. 95, Reg. No. 36116 (R-481).

³⁸ See ECT, Art. 38 (“This Treaty shall be open for signature at Lisbon from 17 December 1994 to 16 June 1995 by the states and Regional Economic Integration Organizations which have signed the Charter.”); *id.*, Art. 41 (“This Treaty shall be open for accession, from the date on which the Treaty is closed for signature, by states and Regional Economic Integration Organizations which have signed the Charter, on terms to be approved by the Charter Conference. ...”) (R-481).

3. (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
 - (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).
 - (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.
 - (c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).
4. In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:
 - (a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the “ICSID Convention”), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or
 - (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the “Additional Facility Rules”), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

- (b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as “UNCITRAL”); or
 - (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.
5. (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:
- (i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;
 - (ii) an “agreement in writing” for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the “New York Convention”); and
 - (iii) “the parties to a contract [to] have agreed in writing” for the purposes of article 1 of the UNCITRAL Arbitration Rules.
- (b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.
6. A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.
7. An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a “national of another Contracting State” and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a “national of another State”.
8. The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing

Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

100. The same manner of offer and consent to arbitration is found in most investment treaties.³⁹
101. Paragraph 3 of Article 26 provides that “each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration,” but this does not include the Investor’s consent. Rather, a further consent of the Investor is required to perfect the arbitration agreement.
102. Article 26 contemplates that the Investor gives its consent only once a dispute has arisen. Its Paragraph 4 thus provides that “[i]n the event that an Investor chooses to submit the dispute [to international arbitration], the Investor shall further provide its consent in writing”
103. Scholarly commentary supports this analysis of the nature of a unilateral, standing offer of consent made by States in investment treaties to arbitrate disputes with foreign investors, such as in Article 26 of the ECT.⁴⁰ As expressed aptly by Professor Salacuse:

Unlike the arbitration clauses used in contracts, these treaty provisions could not be considered an arbitration agreement with the investor because the investor, while a national of a contracting

³⁹ RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 257-258 (2nd ed. 2012) (R-493).

⁴⁰ See, e.g., JESWALD SALACUSE, THE LAW OF INVESTMENT TREATIES 422 (2nd ed. 2015) (“Through the treaty, each contracting state provided the essential jurisdictional element of consent to arbitration but left the decision as to whether or not to arbitrate to the investor.”) (R-496); CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 220-221 (2008) (“Expression of consent by a State [in a treaty], however, is insufficient to bestow jurisdiction on a tribunal; the investor must perform some reciprocal act to perfect the consent. Consent of a government in ... a treaty is merely an offer to agree to arbitration, rather than a full contractual compromise as one would find in an investment contract. The government’s unilateral offer is consummated as a binding obligation to arbitrate only with the investor’s acceptance of that offer.”) (internal quotation marks and references omitted) (R-487); Christoph Schreuer, *Consent to Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 830, 836–837 (P. Muchlinski, F. Ortino & C. Schreuer eds. 2008) (“A provision on consent to arbitration in a BIT is merely an offer by the respective State that requires acceptance by the other party. That offer may be accepted by a national of the other State to the BIT. It is established practice that an investor may accept an offer of consent contained in a BIT by instituting ICSID proceedings.”) (R-488).

state, was not a party to the treaty. Conceptually, such a provision constitutes an irrevocable offer to arbitrate disputes concerning the interpretation and application of the treaty. An investor may accept that offer in different ways, including the submission of a request for arbitration or some other mechanism offered in the treaty.⁴¹

104. I note that the U.S. Courts of Appeals for the District of Columbia Circuit and the Second Circuit appear to agree with this analysis.⁴²
105. Professor Salacuse further explains that, “[t]he offer includes the various terms and conditions contained in the applicable investment treaty.”⁴³ The tribunal in *Metal-Tech v. Uzbekistan* similarly emphasized that a host State’s consent in a bilateral investment treaty (or “**BIT**”) is given only on the condition that certain requirements, as contained in the treaty, are met:

Whether the Respondent’s consent covers the present dispute depends on the content of the BIT and in particular on Article 8(1) thereof. If the requirements set in Article 8(1) are not met, then the Respondent has not consented⁴⁴

106. According to the Awards, the Petitioners here purported to accept the Russian Federation’s offer of consent by delivering Notifications of Claim to the President of the Russian Federation on 2 November 2004.⁴⁵

⁴¹ JESWALD SALACUSE, *THE LAW OF INVESTMENT TREATIES* 422-423 (2d ed. 2015) (R-496).

⁴² See *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, 795 F.3d 200, 206 (D.C. Cir. 2015) (“The BIT includes a standing offer to all potential U.S. investors to arbitrate investment disputes, which Chevron accepted in the manner required by the treaty.”); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 392 (2d Cir. 2011) (“Unlike the more typical scenario where the agreement to arbitrate is contained in an agreement between the parties to the arbitration, here the BIT merely creates a framework through which foreign investors, such as Chevron, can initiate arbitration against parties to the Treaty.”).

⁴³ JESWALD SALACUSE, *THE LAW OF INVESTMENT TREATIES* 423 (2d ed. 2015) (R-496).

⁴⁴ *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013), para. 129 (RLA-84).

⁴⁵ Hulley Final Award, para. 9 (R-63); Hulley Interim Award, para. 3 (R-62); see also Notifications of Claim dated 22, 26 and 27 October 2004.

B. Whether, in the event the Russian Federation’s provisional application included the offer to arbitrate in Article 26 of the ECT, it could extend only to an investment that was made lawfully.

107. A number of investment treaties contain express provisions requiring that a foreign investor make its investment “in accordance with the laws of the host State.” One approach has been to include that requirement in the definition of an “investment” that is protected by the treaty. Another approach has been to provide that the treaty applies (only) to investments made in accordance with the laws of the host State.
108. Interpreting such “conformity clauses”, international arbitral tribunals have not hesitated to rule that investments made in violation of host State law were not protected by the investment treaty at issue, and that they had no jurisdiction in respect to claims based on such treaties.
109. These tribunals found that the respective host States had not consented to submit such claims to international arbitration, and that therefore no valid arbitration agreement was concluded.⁴⁶
110. Not all investment treaties contain “conformity clauses”, however, and the ECT is a prominent example of a treaty without such a clause. International arbitral tribunals also have been confronted with claims based on such treaties, where the investment was made in violation of host State law.
111. Not surprisingly, these tribunals were not inclined to accept such claims, the silence of the treaty text notwithstanding. Rewarding an unlawful act by way of granting jurisdiction before an international arbitral tribunal has been considered to be incompatible with the implicit terms of the host State’s offer of consent to arbitrate.
112. Thus, the tribunal in *SAUR v. Argentina* held that the offer of consent in an investment treaty contained the implied limitation that, in making the investment, the investor acted in compliance with the law of the host State:

The condition of not committing a serious violation of the legal order is a tacit condition, inherent to any BIT as, in any event, it is

⁴⁶ See RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 92 *et seq.* (2nd ed. 2012) (R-493).

incomprehensible that a State offer the benefit of protection through arbitration if the investor, in order to obtain such protection, has acted contrary to the law.⁴⁷

113. The tribunal in *Phoenix Action v. Czech Republic* held, in more general terms, that:

States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. ... And it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT.⁴⁸

114. Quoting *SAUR*, the Yukos Tribunal acknowledged:

An investor who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host state, has brought itself within the scope of application of the ECT through wrongful acts. Such an investor should not be allowed to benefit from the Treaty.⁴⁹

115. The Yukos Tribunal confirmed that this applied “even where the applicable investment treaty does not contain an express requirement of compliance with host State laws (as is the case with the ECT).”⁵⁰

116. Conceptually, these tribunals have anchored their decisions in the object and purpose of an investment treaty, general principles of law,⁵¹ and in the requirements of international public policy.

⁴⁷ *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012), para. 308 (English translation from French original, as quoted in Final Award, n. 1773. French original: “La condition de ne pas commettre de violation grave de l’ordre juridique est une condition tacite, propre à tout APRI, car en tout état de cause, il est incompréhensible qu’un État offre le bénéfice de la protection par un arbitrage d’investissement si l’investisseur, pour obtenir cette protection, a agit [*sic*] à l’encontre du droit.”) (RLA-79).

⁴⁸ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), para. 101 (RLA-74); see also *Gustav FW Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010), paras. 123-124 (quoting *Phoenix Action* with approval) (RLA-77).

⁴⁹ Hulley Final Award, para. 1352 (emphasis added); *id.*, n. 1773 (quoting *SAUR*) (R-63).

⁵⁰ Hulley Final Award, para. 1349 (R-63).

⁵¹ General principles of law constitute a primary source of international law, alongside treaties and customary international law. See Statute of the International Court of Justice, done at San Francisco on 26 June 1945, 59

117. The object and purpose of a treaty is an essential component of treaty interpretation. The Vienna Convention on the Law of Treaties codifies the general rule of interpreting treaties as follows: “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.”⁵² It is generally accepted that this rule of interpretation reflects customary international law.⁵³
118. This rule of interpretation focuses first on the “ordinary” meaning of the terms used in the treaty but also refers to the context of the terms to be interpreted, and the treaty’s object and purpose, thus directing the interpreter to apply all three elements together to derive the proper meaning of those terms, without privileging any one of these elements.⁵⁴
119. As regards the object and purpose of an investment treaty, it is accepted that the promotion and protection of investments of nationals of one contracting party in the territory of the other party is the key motif to conclude treaties of this kind.⁵⁵ Indeed, the ECT expressly states its purpose as follows: “This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on

Stat. 1055, T.S. No. 993, 3 Bevens 1179, Art. 38(1) (“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations”) (R-459).

⁵² Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, 1155 U.N.T.S. 331, Art. 31(1) (“Vienna Convention”).

⁵³ See, e.g., *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction (21 October 2005), para. 88 (“the provisions of the Vienna Convention relating to the interpretation of treaties reflect customary international law.”) (RLA-65).

⁵⁴ *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction (21 October 2005), para. 91 (“the Vienna Convention does not privilege any one of these three aspects of the interpretation method. The meaning of a word or phrase is not solely a matter of dictionaries and linguistics. ... Rather, the interpretation of a word or phrase involves a complex task of considering the ordinary meaning of a word or phrase in the context in which that word or phrase is found and in light of the object and purpose of the document.”) (RLA-65).

⁵⁵ See KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 3 (2010) (“Capital exporting states created the BITs to protect their investment abroad and, to a lesser degree, to facilitate the establishment of additional such investments. The protection and facilitation of investment abroad, according to liberal economic theory, will promote economic prosperity. Capital importing states have agreed to conclude BITs in order to attract foreign investment that will promote economic development. Both states see in an embrace of liberal legalism and liberal economics a means to achieve these purposes.”) (R-490).

complementarities and mutual benefits, in accordance with the objectives and principles of the [European Energy] Charter.”⁵⁶

120. In concluding investment treaties, however, States do not consider all types of investment to be desirable. In particular, it is a sovereign prerogative of each host State to determine which investments will be admitted, promoted and protected.
121. In this context, the rule of law serves to underline and reinforce the decisions laid down in the laws of the host State. Investments that are made in violation of the host State’s laws governing foreign investments fall outside the scope of protection afforded by the host State and by international arbitral tribunals.
122. Accordingly, investment tribunals have relied on the principle of the rule of law as fundamental to determining whether an investment will be granted their protection and, in particular, whether an investor may access international arbitration with respect to its investment.
123. In simple terms, as the tribunal in *Salini v. Morocco* stated, the purpose of conformity clauses is that they seek “to prevent the [investment treaty] from protecting investments that should not be protected, particularly because they would be illegal.”⁵⁷
124. In *Inceysa v. El Salvador*, the tribunal found that the claimant had procured a concession contract through fraud in the bidding process. The tribunal declined jurisdiction:

[B]ecause Inceysa’s investment was made in a manner that was clearly illegal, it is not included within the scope of consent expressed by Spain and the Republic of El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre. Therefore, this Arbitral Tribunal declares itself incompetent to hear the dispute brought before it.⁵⁸

⁵⁶ ECT, Art. 2 (R-481).

⁵⁷ *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001), para. 46 (RLA-60); see also *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 April 2004), para. 84 (quoting *Salini* with approval) (RLA-65); *Railroad Development Corp. (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction (18 May 2010), para. 140 & n. 99 (same) (RLA-75).

⁵⁸ *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), para. 257 (RLA-22).

125. The tribunal in *Kardassopoulos v. Georgia* linked the same principle to the control of foreign investment by the sovereign:

“Protection of investments” under a BIT is obviously not without some limits. It does not extend, for instance, to an investor making an investment in breach of the local laws of the host State. A State thus retains a degree of control over foreign investments by denying BIT protection to those investments that do not comply with its laws. As noted by one scholar, “no State has taken its fervour for foreign investment to the extent of removing any controls on the flow of foreign investment into the host State.”⁵⁹

126. The sovereign right of control of foreign investment was also underlined in *Anderson v. Costa Rica*. The claimants in that case had invested funds into a Ponzi scheme in violation of domestic law. The tribunal ruled:

[P]rudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal. An important element of such due diligence is for investors to assure themselves that their investments comply with the law. Such due diligence obligation is neither overly onerous nor unreasonable. Based on the evidence presented to the Tribunal, it is clear that the Claimants did not exercise the kind of due diligence that reasonable investors would have undertaken to assure themselves that their deposits with the Villalobos scheme were in accordance with the laws of Costa Rica.⁶⁰

127. The tribunal added that it was irrelevant whether the claimants knew the host State’s law or had the intention to act in conformity with the law.⁶¹
128. In *Yaung Chi Oo Trading v. Myanmar*, the tribunal applied the 1987 ASEAN Agreement for the Promotion and Protection of Investments, which required that each investment be specifically approved in writing and registered by the host State. In its award, the

⁵⁹ *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007), para. 182 (quoting M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 106 (2nd ed. 2004)) (RLA-68).

⁶⁰ *Alasdair Ross Anderson v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award (19 May 2010), para. 58 (RLA-76).

⁶¹ *Alasdair Ross Anderson v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award (19 May 2010), para. 52 (RLA-76).

tribunal viewed this requirement as going “beyond the general rule that for a foreign investment to enjoy treaty protection it must be lawful under the law of the host State.”⁶²

129. In *Phoenix Action v. Czech Republic*, the tribunal reasoned:

The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and *bona fide* investments.⁶³

130. In *Plama v. Bulgaria*, the tribunal had to apply the ECT which is also at stake in the present case.

131. The tribunal found fraud by the investor, in violation of Bulgarian law and international law.⁶⁴ The absence from the ECT of a conformity clause was noted, but had no effect on the ruling:

The investment in Nova Plama was, therefore, the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capacities required to resume operation of the Refinery. While the Arbitral Tribunal considers that this situation does not involve the “straw-man” provision set out in the Bulgarian Privatization Law, the Tribunal is of the view that this behavior is contrary to other provisions of Bulgarian law and to international law and that it, therefore, precludes the application of the protections of the ECT.⁶⁵

⁶² *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, Award (31 March 2003), para. 58 (RLA-61).

⁶³ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), para. 100 (RLA-74).

⁶⁴ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 135 (RLA-73).

⁶⁵ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 135 (RLA-73).

132. The *Plama* tribunal explained the ECT’s object and purpose, underlining that the rule of law is a fundamental aim of the ECT:

Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law. As noted by the Chairman’s statement at the adoption session of the ECT on 17 December 1994:

[...] the Treaty shall be applied and interpreted in accordance with generally recognized rules and principles of observance, application and interpretation of treaties as reflected in Part III of the Vienna Convention on the Law of Treaties of 25 May 1969. [...] The Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose.

In accordance with the introductory note to the ECT “[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues [...]”. Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.⁶⁶

133. In addition to relying on the object and purpose of the ECT, the *Plama* tribunal found that it would be contrary to the general principle of law that “no one can benefit from his own wrong,” “the basic notion of international public policy,” and the principle of good faith to grant the ECT’s protections to an investor with respect to an investment tainted with fraud or other illegality in its establishment.⁶⁷

⁶⁶ *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), paras. 138-139 (quoting, respectively, Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*, Chairman’s Statement at Adoption Session on 17 December 1994, at 158, and Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*, An Introduction to the Energy Charter Treaty, at 14) (RLA-73).

⁶⁷ *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), paras. 143-144 (RLA-73).

134. The tribunal in *Inceysa v. El Salvador* also relied on the general principle of law that “nobody can benefit from his own wrong” and also applied it to fraud:

[T]he foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, ‘nobody can benefit from his own fraud.’⁶⁸

135. The *Inceysa* tribunal found that the claimant had committed fraud in the bidding process leading to the award of the concession on which the claimant based its investment:

In the dispute brought to this Arbitral Tribunal, there are clear facts and reasons that match the aforementioned supposition, since Inceysa acted improperly in order to be awarded the bid that made its investment possible and, therefore, it cannot be given the protection granted by the BIT. Sustaining the contrary would be to violate the aforementioned general principles of law which, as indicated, are part of Salvadoran law.

The clear and obvious evidence of the violations committed by Inceysa during the bidding process lead this Tribunal to decide that Inceysa’s investment cannot, under any circumstances, enjoy the protection of the BIT. Allowing Inceysa to benefit from an investment made clearly in violation of the rules of the bid in which it originated would be a serious failure of the justice that this Tribunal is obligated to render. No legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them.⁶⁹

136. Concluding that El Salvador had not consented to submit the dispute at issue to arbitration because the investment was made through fraud in violation of El Salvador’s laws, the tribunal dismissed Inceysa’s claims for lack of jurisdiction.⁷⁰

137. The tribunal in *Phoenix Action v. Czech Republic* agreed:

⁶⁸ *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), para. 242 (emphasis added) (RLA-22).

⁶⁹ *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), paras. 243-244 (RLA-22).

⁷⁰ *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), para. 257 (RLA-22).

The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and *bona fide* investments.⁷¹

138. The tribunal *Hamester v. Ghana* also agreed and elaborated:

The Tribunal considers, as was stated for example in *Phoenix v. Czech Republic*, that:

“States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith.”

An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State’s law (as elaborated, *e.g.* by the tribunal in *Phoenix*).

These are general principles that exist independently of specific language to this effect in the Treaty.⁷²

139. As already mentioned above, the tribunal in *SAUR v. Argentina* stated that it cannot be assumed “that a state offers the benefit of protection by way of investment arbitration when the investor has acted in an unlawful manner to obtain that protection.”⁷³

140. The tribunal in *Fraport v. Philippines* likewise found:

The illegality of the investment at the time it is made goes to the root of the host State’s offer of arbitration under the treaty. As it has been held, “States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in

⁷¹ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), para. 100 (footnote omitted) (RLA-74).

⁷² *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010), paras. 123-124 (RLA-77).

⁷³ *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012), para. 308 (RLA-79).

violation of their own law.” Lack of jurisdiction is founded in this case on the absence of consent to arbitration by the State for failure to satisfy an essential condition of its offer of this method of dispute settlement.⁷⁴

141. In a recent award, the tribunal in *Minnotte v. Poland* concluded from its analysis of prior decisions of other arbitral tribunals that “dismissal of claims *in limine* for want of jurisdiction” is warranted “where fraud is ... manifest, and ... closely connected to facts (such as the making of an investment) which form the basis of a tribunal’s jurisdiction.”⁷⁵
142. The Yukos Tribunal explicitly confirmed that the principle enunciated earlier by other tribunals “that an investment ‘will not be protected if it has been created in violation of national or international principles of good faith’ or ‘of the host State’s law’ is a ‘general principle[...] that exist[s] independently of specific language’ in an investment treaty.”⁷⁶
143. The above analysis reveals that tribunals have pointed to three legal concepts against which an arbitral tribunal will run afoul if it supports fraudulent or otherwise unlawful conduct in the making of an investment by allowing an investor whose investment is tainted with such conduct to access international jurisdiction.
144. Good faith, as the tribunal in *Sempra v. Argentina* highlighted, is a basic concept of international investment law: “The principle of good faith is ... relied on as the common guiding beacon that will orient the understanding and interpretation of obligations, just as happens under civil codes.”⁷⁷

⁷⁴ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award (10 December 2014), para. 467 (quoting *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), para. 101) (RLA-86).

⁷⁵ *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award (16 May 2014), para. 132 (RLA-85).

⁷⁶ *Hulley Final Award*, paras. 1351-1352 (quoting *Gustav FW Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010), paras. 123-124) (R-63).

⁷⁷ *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007) (annulled on other grounds), para. 297 (quoting Rudolf Dolzer, *Fair and Equitable Treatment: a Key Standard in Investment Treaties*, 39 INT’L LAW. 87, 90 (2005)) (RLA-71).

145. The principle *nemo auditur propriam turpitudinem allegans* has long been recognized as a general principle of law, and is applicable as such to international investment arbitration.⁷⁸
146. As stated by the tribunal in *Inceysa v. El Salvador*, “[i]nternational public policy consists of a series of fundamental principles that constitute the very essence of the State, and its essential function is to preserve the values of the international legal system against actions contrary to it.”⁷⁹
147. It is not surprising that fraudulent or otherwise unlawful conduct in the establishment of an investment falls within the ambit of these different legal principles; no legal system and no rule of law will extend treaty protection to conduct of this nature.

C. Conclusion

148. A review of the jurisprudence establishes that fraudulent conduct by an investor in the making of an investment will preclude that such an investor successfully presents a claim before an international tribunal, because the host State could not be deemed to have offered its consent to purported investors who made their investments in violation of the host State’s law.
149. This line of jurisprudence is established throughout the case law, and I am not aware of any decision reaching a different conclusion ignoring the illegal conduct in the form of a fraud.
150. This jurisprudence also applies to cases brought under the ECT. Tribunals have underlined – in line with a common sense of legally cognizable set of moral rules – that this jurisprudence applies to all agreements on investment arbitration, with or without a conformity clause.
151. Thus, even though the ECT contains no explicit conformity clause, an international tribunal will not support a claim by a fraudulent investor.

⁷⁸ See, e.g., *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 Award (29 July 2008), paras. 310, 323 (RLA-72).

⁷⁹ *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), para. 245 (footnotes omitted) (RLA-22).

152. More than one legal concept embraces the imperative for a negative response to a claim tainted by fraudulent conduct; tribunals have properly referred to good faith, to the maxim that no one can benefit from his own unlawful conduct, and to the exigencies of an international public policy. All these principles support the constant jurisprudence of investment tribunals outlined above.

Question 3 Does international law recognize the doctrine of “lifting the corporate veil” or “disregarding the legal entity” in cases of fraud or other serious illegality, as discussed in such cases as *Barcelona Traction*?

153. The International Court of Justice (“ICJ”) recognized that the principle of the legal separation of a corporation and its shareholders was valid in principle, but subject to exceptions. Those exceptions concerned the abuse of their separateness, in particular also the case of fraud. The seminal case is the *Barcelona Traction Case*.⁸⁰
154. In its judgment, the Court ruled that “the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law.”⁸¹
155. In particular, the Court explained that “the wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements of obligations.”⁸²
156. In his Separate Opinion, Judge Jessup explained this further:

I would paraphrase and adapt a dictum from a recent decision of the Supreme Court of the United States in an anti-trust case: the International Court of Justice in the instant case is “not bound by formal conceptions of” corporation law. “We must look at the

⁸⁰ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Judgment (Second Phase), [1970] I.C.J. Rep. 3 (R-473).

⁸¹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Judgment (Second Phase), [1970] I.C.J. Rep. 3, 39, para. 58 (R-473).

⁸² *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Judgment (Second Phase), [1970] I.C.J. Rep. 3, 39, para. 56 (R-473).

economic reality of the relevant transactions” and identify “the overwhelmingly dominant feature.” The overwhelmingly dominant feature in the affairs of Barcelona Traction was not the fact of incorporation in Canada, but the controlling influence of far-flung international financial interests manifested in the Sofina grouping.⁸³

157. Judge Sir Gerald Fitzmaurice further observed that when “an international tribunal ... ‘pierces the corporate veil,’ as it is said, ... it would be more accurate to say that it registers the absence of all effective personality, of any effectual intermediary between the shareholders and the rights infringed.”⁸⁴
158. Investment tribunals also have recognized that the corporate veil will be disregarded in cases of fraud.
159. In *Tokios Tokeles v. Ukraine*, the tribunal found, generally, that the corporate veil will be lifted when “the Claimant used its formal legal nationality for an improper purpose.”⁸⁵ The tribunal based its formulation of the standard on the ICJ ruling in the *Barcelona Traction* case.⁸⁶
160. In *Saluka v. Czech Republic*, the tribunal observed that “it might in some circumstances be permissible for a tribunal to look behind the corporate structures of companies involved in proceedings before it ... where corporate structures had been utilized to perpetrate fraud or other malfeasance.”⁸⁷

⁸³ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Judgment (Second Phase), [1970] I.C.J. Rep. 161, 169-170 (sep. op. Jessup) (quoting Justice Marshall delivering the opinion of the Court in *U.S. v. Concentrated Phosphate Export Ass’n*, 89 S.Ct. 361, 366-367 (1968)) (R-474).

⁸⁴ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Judgment (Second Phase), [1970] I.C.J. Rep. 64, 75 (sep. op. Fitzmaurice) (quoting Paul De Visscher, *La Protection Diplomatique des Personnes Morales* [Diplomatic Protection of Corporate Entities], COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, 1961, Vol. 1, at 465, 477) (R-475).

⁸⁵ *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 April 2004), para. 56 (RLA-63).

⁸⁶ *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 April 2004), paras. 54-56 (RLA-63).

⁸⁷ *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006), para. 230 (RLA-66).

161. The tribunal in *Aguas del Tunari v. Bolivia* “acknowledge[d] that the corporate form may be abused and that form may be set aside for fraud or on other grounds.”⁸⁸
162. In *ADC v. Hungary*, the Tribunal similarly stated that the principle of “piercing the corporate veil” is cautiously applied, but does operate “where the real beneficiary of the business misused corporate formalities in order to disguise its true identity and therefore to avoid liability.”⁸⁹
163. The tribunal in *Rumeli v. Kazakhstan* agreed with that test.⁹⁰
164. The common focal point of the jurisprudence of the ICJ and the investment tribunals cited is the need to prevent the abuse of separate legal identities. The doctrine of abuse itself is firmly grounded in international arbitration law, as the tribunal in *Phoenix Action v. Czech Republic* explained:

The principle of good faith has long been recognized in public international law, as it is also in all national legal systems. This principle requires parties “to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage” This principle governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused. This is stated for example by Hersch Lauterpacht:

“There is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused.”⁹¹

⁸⁸ *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction (21 October 2005), para. 245.

⁸⁹ *ADC Affiliate Limited et al. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), para. 358.

⁹⁰ *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008), para. 328.

⁹¹ See *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), para. 107 (quoting A. D’Amato, *Good Faith*, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. 7, at 107 (R. Bernhardt, ed. 1984) and HERSCH LAUTERPACHT, DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 164 (1958), respectively).

165. The *Phoenix Action* tribunal concluded, in the context of a conformity clause:

The Tribunal is concerned here with the international principle of good faith as applied to the international arbitration mechanism of ICSID. The Tribunal has to prevent an abuse of the system of international investment protection under the ICSID Convention.

[...]

The conclusion of the Tribunal is therefore that the Claimant's initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration. If it were accepted that the Tribunal has jurisdiction to decide Phoenix's claim, then any pre-existing national dispute could be brought to an ICSID tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT. Such transfer from the domestic arena to the international scene would *ipso facto* constitute a "protected investment" – and the jurisdiction of BIT and ICSID tribunals would be virtually unlimited. It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs. It is indeed the Tribunal's view that to accept jurisdiction in this case would go against the basic objectives underlying the ICSID Convention as well as those of bilateral investment treaties. The Tribunal has to ensure that the ICSID mechanism does not protect investments that it was not designed for to protect, because they are in essence domestic investments disguised as international investments for the sole purpose of access to this mechanism.⁹²

166. I conclude that international law recognizes that the corporate veil may be pierced in the event it is abused, in particular in cases of fraud or other serious illegality.

Question 4 Does the Contracting Parties' standing offer to arbitrate with "Investor[s] of another Contracting Party" under Article 26 of the ECT contemplate arbitration with shell companies which are exclusively owned and controlled by their own nationals?

167. To answer this question, it is necessary to consider initially Article 1(7) of the ECT which defines an "Investor". According to Article 1(7)(a)(ii), "Investor" means: "a company or

⁹² *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), paras. 113, 144.

other organization organized in accordance with the laws applicable in that Contracting Party.”

168. While the language of this provision will form the starting point of its interpretation, the rule of treaty interpretation under international law (as noted above, para. 14) requires that the provision be interpreted also in its context and in light of the object and purpose of the treaty.⁹³
169. When issues of jurisdiction are under consideration, Article 26 (“Settlement of Disputes Between an Investor and a Contracting Party”) will naturally form part of the context to be consulted.
170. According to Article 26(3)(a), each host State “gives its unconditional consent to the submission of a dispute to international arbitration ...”
171. In line with the heading of Article 26, its Section 1 addresses disputes “between a Contracting Party and an Investor *of another Contracting Party* relating to an Investment of the latter in the area of the former ...” (emphasis added).
172. The requirement of a national of “the other Contracting Party” as a condition for protection by the BIT is also found in other provisions of the BIT. It runs through other parts of the ECT, and is found in Articles 10(1), 10(2), 10(3), 10(7) and 13(1) of the Treaty.
173. Thus, it is obvious that the phrase is not included by accident. The requirement was chosen as a matter of common concern by the Contracting Parties, seeking to exclude nationals of the State concerned and nationals of third States.
174. Any effort to read this requirement out of the ECT would be inconsistent with the context of Article 1(7) ECT and also incompatible with the object and purpose of the ECT to promote cross-border investment on the ground, not on the paper.
175. The ECT must not be read as a paper with illusory requirements; it was meant to operate in good faith in accordance with reality. The State’s own nationals were not

⁹³ See Vienna Convention, Art. 31(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.”).

contemplated to be the beneficiaries of the ECT, whether they operated in an open and direct or in a disguised and indirect manner.

176. The tribunal in *Venoklim v. Venezuela* confirmed this position with respect to investment treaties in general:

To suggest that the investment made by Venoklim should be considered a foreign one by the mere fact of being a company incorporated in the Netherlands, although the investment that is the object of the dispute is ultimately owned by Venezuelan legal persons, would allow formalism to prevail over reality and betray the object and purpose of the ICSID Convention.⁹⁴

177. For purposes of the ECT, this means that investments of companies from other ECT States made in Russia will fall under its Article 1 and are covered by its Article 26.

178. The ECT contains a special (but not unique) provision on a class of companies which in a formal sense will fall under Article 1 but nevertheless do not enjoy the protection of the ECT; Article 17 reads:

Each Contracting Party reserves the right to deny the advantages of this Part to: ... a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized.

179. Given that Article 17 addresses the circle of companies to be covered by the ECT, this rule also forms part of the context of Article 1, and Article 17 cannot be ignored in the reading and understanding of the definition of “investor” laid down in Article 1.

180. A simple application of Article 17 would, for instance, require that if a company with no business in the Netherlands were incorporated in the Netherlands and invested in Russia, it would not be covered by the Treaty under the conditions set forth in Article 17.

⁹⁴ *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award (3 April 2015), para. 156 (unofficial translation from the original Spanish: “Pretender que se considere como una inversión extranjera la efectuada por Venoklim por el solo hecho de ser esta una compañía incorporada en los Países Bajos, aunque la inversión objeto de la disputa sea en definitiva propiedad de personas jurídicas venezolanas, sería permitir que prevalezca el formalismo sobre la realidad y traicionar el objeto y el fin del Convenio CIADI.”).

181. As regards the context of Article 1, the law applicable to the dispute must be taken into account. Under Article 26(6), the rules of international law are applicable and thus form part of the context: a tribunal established under the ECT “shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.”
182. In view of this plurality of rules and principles relevant for the determination of investors eligible for protection under the ECT, the answer to be given to a question pertaining to this issue must encompass consideration of all these relevant norms, and the rationale of each norm must be taken into account and respected.
183. An interpretative approach which looked only to one relevant provision would fall short of the requirement under Article 31 of the Vienna Convention to examine the context of a norm in the process of its interpretation.
184. Turning to the specific question posed against this general background, the following details of the purported investors concerned (*i.e.*, the Petitioners in this case), which I understand are uncontested, will be noted:
- a. Each of the purported investors is a shell company, with no business in its respective State of incorporation, and
 - b. Each of the purported investors is owned and controlled by nationals of the State in whose territory the investment is located.⁹⁵
185. At this point it will be useful to examine whether any previous tribunal has addressed a case brought by an investor with these characteristics.
186. In the Interim Awards, the Yukos Tribunal cites three cases which it considers to be relevant as precedent: *Saluka v. Czech Republic*, *Plama v. Bulgaria* and *Petrobart v. Kyrgyz Republic*.⁹⁶

⁹⁵ See the Russian Federation’s Writ of Summons dated 10 November 2014, para. 257 (“Claimants concede that they were all relevant times mere shell companies created solely to hold the oligarchs’ Yukos shares, and that they had no business activities in Cyprus or the Isle of Man, their countries of incorporation.”) (with further references to the arbitration record).

187. Having examined the awards in these cases, however, it turns out that none of them was concerned with investors controlled and owned by nationals of the host State; all the claimants in the cases cited were controlled by nationals of third States. Given the rules pertaining to international arbitration in respect to nationals of the host State (*see* below, paras. 197-199), this difference between the three cases cited and the present case cannot be overlooked.
188. The Yukos Tribunal also points to *Tokios Tokeles v. Ukraine* in support of its reasoning. In that case, indeed, the claimant company was controlled by nationals of the host State (Ukraine). Nevertheless, the facts in the *Tokios Tokeles* award also differ from those in the present case. This is so because in the present case the Petitioners have no business activities in the States in which they are incorporated, whereas the claimant in *Tokios Tokeles* had significant business in the State of its incorporation (Lithuania).⁹⁷
189. In view of the rule set out in Article 17 of the ECT (*see* above, paras. 178-180), it is difficult to treat claimants with business in the state of incorporation in the same way as claimants without business. Article 17 of the ECT is based upon the rationale that a difference is made between such claimants.
190. These considerations show that the three awards cited by the Yukos Tribunal do not identify a single precedent in which claimants were in a setting comparable to the one under consideration by the Tribunal. The effort by the Yukos Tribunal to identify analogous awards has failed, and the Tribunal's approach therefore cannot be considered persuasive.

⁹⁶ Hulley Interim Award, para. 433.

⁹⁷ *See Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 April 2004), para. 1 (“The Claimant, Tokios Tokelès, is a business enterprise established under the laws of Lithuania. It was founded as a cooperative in 1989, and, since 1991, has been registered as a ‘closed joint-stock company.’ The Claimant is engaged primarily in the business of advertising, publishing and printing in Lithuania and outside its borders.”).

191. It will also be noted that the decisions cited by the three awards are themselves considered controversial. The *Tokios Tokeles* award was accompanied by a forceful dissent of the tribunal's president⁹⁸ and has subsequently met with critical comments.⁹⁹
192. Given that, contrary to the Yukos Tribunal's position, no analogous award exists for the factual setting of the present case, it is necessary to turn to the accepted modes of treaty interpretation (*see above*, para. 14) and to apply them to the case at hand.
193. A literal construction of the definition of "Investor" in Article 1(7)(a)(ii) of the ECT points only to the place of incorporation without regard to the nationality of the investors who own and control the investment, and also with no mention of the origin of the funds invested or of whether there has even been a transborder flow of capital.
194. In contrast, Article 26(1), which must be taken into account in interpreting Article 1 as part of its context, speaks of nationals of another Contracting Party as being eligible for the protection of the ECT.
195. Article 17 of the ECT, which provides further context, makes a distinction between those doing business in the State of incorporation and a mere shell company, albeit under specific conditions.
196. In view of Article 26(6) of the ECT, as noted above (*see above*, para. 181), general rules of international law also must be taken into account in interpreting Article 1(7), as part of its context. Under general international law, a dispute between a national and its own State will not fall under the rules of responsibility obligating a State; thus, for instance, the rules on diplomatic protection do not operate between a national and its State.

⁹⁸ *See Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion of Prosper Weil (29 April 2004), para. 20 ("Contrary to what the Decision maintains, when it comes to ascertaining the *international* character of an investment, the origin of the capital is relevant, and even decisive.") (emphasis in original).

⁹⁹ *See, e.g., TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award (19 December 2008), paras. 145-146 ("This text may be interpreted in a strict constructionist manner to mean that a tribunal has to go always by the formal nationality. On the other hand, such a strict literal interpretation may appear to go against common sense in some circumstances, especially when the formal nationality covers a corporate entity controlled directly or indirectly by persons of the same nationality as the host State. In the two cases of *Tokios Tokelés v. Ukraine* and *Rompetrol Group N.V. v. Romania*, the Tribunals adopted the strict constructionist interpretation in spite of the control of the foreign companies by nationals of the host States. However, this interpretation has not been generally accepted and was also criticised by the dissenting President of the *Tokios Tokelés* Tribunal.").

197. Where treaties are intended to confer international legal rights opposable against States by their own nationals, such as human rights treaties do, such treaties generally expressly state so.¹⁰⁰
198. The arbitral tribunal (composed of Sir Anthony Mason, Judge Abner J. Mikva and Lord Mustill) in *Loewen v. United States* explained these rules of international law as they relate to the investment chapter of another multilateral treaty that was concluded only two years prior to the ECT, the North American Free Trade Agreement (“NAFTA”):

NAFTA is a treaty intending to promote trade and investment between Canada, Mexico and the United States. Since most international investment occurs in the private sector, investment treaties frequently seek to provide some kind of protection for persons engaging in such investment. Until fairly recently, such protection was implemented and pursued by the States themselves. When Mexico expropriated the investment of some American oil companies many years ago, the claims of the American companies were pursued by American diplomatic authorities. When the United States seized the assets of Iranian nationals during the hostage crisis of the 1970s, Iran and the United States worked out a settlement as sovereign nations.

Chapter Eleven of NAFTA represents a progressive development in international law whereby the individual investor may make a claim on its own behalf and submit the claim to international arbitration, as TLGI has done in the instant case. The format of NAFTA is clearly intended to protect the investors of one Contracting Party against unfair practices occurring in one of the other Contracting Parties. It was not intended to and could not affect the rights of American investors in relation to practices of the United States that adversely affect such American investors. Claims of that nature can only be pursued under domestic law and it is inconceivable that sovereign nations would negotiate treaties to supplement or modify domestic law as it applies to their own residents. Such a collateral effect on the domestic laws of the NAFTA Parties was clearly not within their contemplation when the treaty was negotiated.

If NAFTA could be used to assert the rights of an American investor in the instant case, it would in effect create a collateral appeal from the decision of the Mississippi courts, by definition a

¹⁰⁰ See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, Art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”).

unit of the United States government. As was pointed out earlier, the object of NAFTA is to protect outsiders who do not have access to the political or other avenues by which to seek relief from nefarious practices of governmental units.¹⁰¹

199. More recently, the tribunal in *ST-AD v. Bulgaria*, which was established on the basis of a bilateral investment treaty and the UNCITRAL Arbitration Rules, again emphasized that investment treaties were not intended to protect national investments that did not involve transborder capital flows:

A parallel may be drawn here with the ICSID system. It is common knowledge that the purpose of the ICSID system is not to protect nationals of a contracting State against their own State. Rather, the system was clearly “designed to facilitate the settlement of disputes between States and foreign investors” with a view to “stimulating a larger flow of private international capital into those countries which wish to attract it.” It is settled jurisprudence that a national investment cannot give rise to an ICSID arbitration, which is reserved to international investments. More generally, a national of a State, whether a natural or a legal person, cannot, in principle, sue its own State in an international arbitration.¹⁰²

200. As regards to the object and purpose of the ECT, there is no doubt that it was intended to promote cross-border investments and not to protect intra-State investments.
201. As noted above (*see* para. 119), the ECT itself specifies its purpose, in its Article 2 entitled “Purpose of the Treaty:” “This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [European Energy] Charter.”¹⁰³
202. The Final Act of the European Energy Charter Conference, which was adopted on the date on which the ECT was opened for signature, and to which the text of the ECT was

¹⁰¹ *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID-AF Case No. ARB(AF)/98/3, Award (26 June 2003), paras. 222-24.

¹⁰² *ST-AD GmbH (Germany) v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction (18 July 2013), para. 408 (internal reference omitted).

¹⁰³ ECT, Art. 2.

appended, similarly states that the ECT was “designed to promote East-West industrial co-operation by providing legal safeguards in areas such as investment, transit and trade.”¹⁰⁴

203. The Yukos Tribunal also acknowledged that the object and purpose of the ECT was to promote foreign-sourced investment:

The Tribunal accepts that the ECT is directed towards the promotion of foreign investment, especially of investment by Western sources in the energy resources of the Russian Federation and other successor States of the USSR. The Treaty is meant, as specified in the Secretariat’s Introduction, to ensure ‘the protection of foreign energy investments.’¹⁰⁵

204. The Secretariat’s Introduction referenced by the Yukos Tribunal states the following:

The fundamental objective of the Energy Charter Treaty’s provisions on investment issues is to ensure the creation of a “level playing field” for energy sector investments throughout the Charter’s constituency, with the aim of reducing to a minimum the non-commercial risks associated with energy-sector investments.

The Treaty ensures the protection of foreign energy investments based on the principle of non-discrimination. By accepting the Treaty, a state takes on the obligation to extend national treatment, or most-favoured nation treatment (whichever is more favourable), to nationals and legal entities of other Signatory states who have invested in its energy sector. The Treaty thus carries the equivalent legal force of a unified network of bilateral investment protection treaties.¹⁰⁶

205. It cannot be presumed that the ECT’s member States intended to promote and protect the flow of domestic funds which were recycled to another member State, without any value added or any form of investment in that State, only to be retransferred to the investor’s home State. Common sense indicates that the drafters of the ECT did not have such a special setting in mind when they negotiated the treaty.

¹⁰⁴ Final Act of the European Energy Charter Conference, adopted in Lisbon on 17 December 1994, at 5.

¹⁰⁵ Hulley Interim Award, para. 433 (emphasis added).

¹⁰⁶ Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation* 14 (2004).

206. The Yukos Tribunal even accepted this conclusion, but failed to give it any weight:

If the States that took part in the drafting of the ECT had been asked in the course of that process whether the ECT was designed to protect—and should be interpreted and applied to protect—investments in a Contracting State by nationals of that same Contracting State whose capital derived from the energy resources of that State, it may well be that the answer would have been in the negative, not only from the representatives of the Russian Federation but from the generality of the delegates. The ultimate source of the investments at issue in the instant cases may be Russian. The fortunes of the “oligarchs”—a term constantly employed in the pleadings of Respondent which the Tribunal for its part repeats without pejorative intent—may derive from investments by Russians in Russian resources.¹⁰⁷

207. The Yukos Tribunal also ignored the development of States’ investment treaty practice over time. It is safe to say that in 1994, the States participating in the negotiation of the ECT not only did not intend the ECT to protect so-called “round trip” investments, *i.e.*, investments by a State’s own nationals whose sole foreign element is that they are routed through one or more foreign shell companies.

208. Reviewing the investment treaty practice of the United States, for example, it bears noting that the United States introduced a mechanism to block claims against itself based on such “round trip” investments only beginning in 2003. The United States-Singapore Free Trade Agreement contained an expanded denial of benefits clause, which allowed the host State of the investment to deny the treaty’s benefits to an investor of the other Party that has no substantial business activities in that State and is owned or controlled by a national of the host State.¹⁰⁸

209. Despite this change, however, the United States continues to have investment treaties in force with more than 30 States that would allow for the kind of round-tripping the Yukos

¹⁰⁷ Hulley Interim Award, para. 433.

¹⁰⁸ *See* U.S.-Singapore FTA, Art. 15.11(b) (“A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if: ... the enterprise has no substantial business activities in the territory of the other Party, and investors of a non-Party, or of the denying Party, own or control the enterprise.”).

Tribunal condoned, provided their provisions are interpreted as literally—and in my view, wrongly—as the Yukos Tribunal interpreted the ECT.¹⁰⁹

210. By selectively and exclusively focusing on a literal interpretation of Article 1(7)(a)(ii) of the ECT, the Yukos Tribunal failed to consider the context and object and purpose as required by the rule of treaty interpretation. A proper application of the rule of interpretation should have led the Yukos Tribunal to a different conclusion, consistent with the following reasoning of the tribunal in *Alapli v. Turkey*, which also interpreted Article 1(7)(a)(ii) of the ECT:

In construing the jurisdictional provisions of the Netherlands-Turkey BIT and the ECT, as well as the ICSID Convention to the extent relevant, the Tribunal begins with the interpretative principles in Article 31 of the 1969 Vienna Convention on the Law of Treaties. These provisions instruct the Tribunal to look to the “ordinary meaning” of the terms in their context and in the light of their object and purpose. In examining the Treaties’ object and purpose, the Tribunal has been mindful of competing concerns. On the one hand, a conscientious arbitrator will not set jurisdictional barriers at unreasonable levels which deny investors’ legitimate expectations. Neither, however, should a tribunal facilitate use of treaties by persons not intended to receive their benefits. In signing the Netherlands-Turkey BIT and the ECT, Turkey could not have expected that treaty benefits would extend to just any Dutch company, regardless of its relationship to a Turkish investment. Nor could Turkey have expected that benefits

¹⁰⁹ See U.S.-Cameroon BIT, 26 Feb. 1986, Art. I(1)(a) and Art. I(3); U.S.-Grenada BIT, 2 May 1986, Art. I(1)(a) and Art. I(2); U.S.-Congo BIT, 12 February 1990, Art. I(1)(a) and Art. I(2); U.S.-Poland BIT, 21 March 1990, Art. I(1)(a) and Art. I(2); U.S.-Tunisia BIT, 15 May 1990, Art. I(1)(c) and Art. I(2); U.S.-Sri Lanka BIT, 20 September 1991, Art. I(1)(a) and Art. I(2); U.S.-Czech Republic BIT, 22 October 1991, Art. I(1)(a) and Art. I(2); U.S.-Slovakia BIT, 22 October 1991, Art. I(1)(b) and Art. I(2); U.S.-Argentina BIT, 14 November 1991, Art. I(1)(b) and Art. I(2); U.S.-Kazakhstan BIT, 19 May 1992, Art. I(1)(b) and Art. I(2); U.S.-Romania BIT, 28 May 1992, Art. I(1)(b) and Art. I(2); U.S.-Bulgaria BIT, 23 September 1992, Art. I(1)(b) and Art. I(2); U.S.-Armenia BIT, 23 September 1992, Art. I(1)(b) and Art. I(2); NAFTA, 17 December 1992, Art. 201(1) and Art. 1005; U.S.-Kyrgyzstan BIT, 19 January 1993, Art. I(1)(b) and Art. I(2); U.S.-Moldova BIT, 21 April 1993, Art. I(1)(b) and Art. I(2); U.S.-Ecuador BIT, 27 November 1993, Art. I(1)(b) and Art. I(2); U.S.-Jamaica BIT, 4 February 1994, Art. I(1)(b) and Art. I(2); U.S.-Ukraine BIT, 4 March 1994, Art. I(1)(b) and Art. I(2); U.S.-Georgia BIT, 7 March 1994, Art. I(b) and Art. XII; U.S.-Estonia BIT, 19 April 1994, Art. I(1)(b) and Art. I(2); U.S.-Trinidad and Tobago BIT, 26 September 1994, Art. I(b) and Art. XII; U.S.-Mongolia BIT, 6 October 1994, Art. I(1)(b) and Art. I(2); U.S.-Albania BIT, 11 January 1995, Art. I(b) and Art. XII; U.S.-Latvia BIT, 13 January 1995, Art. I(b) and Art. I(2); U.S.-Honduras BIT, 13 July 1996, Art. I(b) and Art. XII; U.S.-Jordan BIT, 2 July 1997, Art. I(b) and Art. XII; U.S.-Azerbaijan BIT, 1 August 1997, Art. I(b) and Art. XII; U.S.-Lithuania BIT, 14 January 1998, Art. I(1)(b) and Art. I(2); U.S.-Bolivia BIT, 17 April 1998, Art. I(b) and Art. XII; U.S.-Mozambique BIT, 1 December 1998, Art. I(b) and Art. XII(2); U.S.-Bahrain BIT, 29 September 1999, Art. I(b) and Art. XII.

would accrue to enterprises from the United States. Rather, Turkey agreed to arbitrate with Dutch entities that had actually made investments in Turkey. That jurisdictional principle must serve as the foundation in construing the notions of “investor” and “investment” in both Treaties, as well as the analogous provisions in the ICSID Convention.¹¹⁰

211. Looking at the ECT as a whole, the conclusion cannot be escaped that the question posed here is potentially subject to different interpretations, depending upon the specific provisions considered. In this sense, the ECT will be considered as unusually complex on this point, lacking clarity and consistency.
212. In such a setting, the interpreter needs to give considerable weight to the totality of the rules and principles embodied in the text including, in particular, the purpose of the treaty as a whole, given that its text is silent as regards the special circumstances under consideration.
213. As was shown above, neither the text nor the object and purpose of the ECT support the view that a mere shell company established by nationals outside their country may be considered as an “Investor” in case that shell company serves merely as a conduit to channel the investors’ funds in the territory of its home State.
214. For these reasons, I conclude that the Petitioners cannot be recognized as “Investors” eligible for protection under the ECT and the Russian Federation’s offer to arbitrate – if any – did not extend to them.

Question 5 Given that the Petitioners/Claimants failed to refer this dispute to the Competent Tax Authorities of Cyprus, the UK, and the Russian Federation under Article 21(5)(b)(i) of the ECT, did the Petitioners/Claimants validly accept any purported offer to arbitrate under Article 26?

215. Under Article 21(5)(b)(i) of the ECT, an Investor alleging that a tax is expropriatory or discriminatory must first refer that issue to the relevant Competent Tax Authorities before commencing international arbitration. In the event the Investor fails to make that referral

¹¹⁰ *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Award (16 July 2012), paras. 333-336.

and instead commences arbitration, the arbitral tribunal instead “shall make a referral to the relevant Competent Tax Authorities” of that issue.

216. Article 21(5)(b) reads:

Whenever an issue arises under Article 13, to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply:

- (i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) shall make a referral to the relevant Competent Tax Authorities;
- (ii) The Competent Tax Authorities shall, within a period of six months of such referral, strive to resolve the issues so referred. Where non-discrimination issues are concerned, the Competent Tax Authorities shall apply the non-discrimination provisions of the relevant tax convention or, if there is no non-discrimination provision in the relevant tax convention applicable to the tax or no such tax convention is in force between the Contracting Parties concerned, they shall apply the non-discrimination principles under the Model Tax Convention on Income and Capital of the Organisation for Economic Co-operation and Development;
- (iii) Bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) may take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the tax is an expropriation. Such bodies shall take into account any conclusions arrived at within the six-month period prescribed in subparagraph (b)(ii) by the Competent Tax Authorities regarding whether the tax is discriminatory. Such bodies may also take into account any conclusions arrived at by the Competent Tax Authorities after the expiry of the six-month period;
- (iv) Under no circumstances shall involvement of the Competent Tax Authorities, beyond the end of the six-month period referred to in subparagraph (b)(ii), lead to a delay of proceedings under Articles 26 and 27.

217. Similar referral mechanisms are common in investment treaties, including many such treaties concluded by the United States and the 2012 U.S. Model BIT.
218. As Lee Caplan and Jeremy Sharpe, current and former State Department lawyers experienced with U.S. investment treaties, explain, such referral mechanisms are necessary to ensure that the arbitral tribunal as the ultimate decision-maker “has appropriate expertise to resolve the specialized matter before it.”¹¹¹
219. In the specific context of the ECT, the mechanism was designed to assist tribunals “to distinguish normal and abusive taxes.”¹¹² The Parties considered that examination of the tax issues covered may require the special expertise of tax authorities from which the arbitral Tribunal may benefit in its decision on the tax issue.¹¹³
220. The text of the provision is clear and leaves no space for speculation or interpretation. The duty of the Investor is mandatory, as is evident from the word “shall,” not “should.”
221. Also, the text of the provision is written without qualification, with no reference to any exception for special circumstances.
222. The provision specifically excludes a major delay beyond six months. In other words, time to be allocated to the process of referral would only have been a small part of the proceedings as a whole, too insignificant to warrant non-application of a rule phrased in clear terms.
223. Lack of trust in one particular tax authority among the three concerned also was not a legitimate reason for non-application. This is so because the authorities of three countries were to be asked, and the Investor decided to refer the dispute to none of the three.
224. The duty of referral lies on two levels, as mentioned. At the first stage, it is a duty of the Investor (“shall”), at the second stage (“[f]ailing such referral by the Investor ...”) a duty of the arbitral tribunal.

¹¹¹ Lee Caplan & Jeremy Sharpe, *United States*, in COMMENTARIES ON SELECT MODEL INVESTMENT TREATIES 848 (Chester Brown, ed. 2013).

¹¹² William Park, *Tax Arbitration and Investor Protection*, in INVESTMENT PROTECTION AND THE ENERGY CHARTER 115, 131 (Graham Coop & Clarisse Ribeiro, eds. 2008).

¹¹³ William Park, *Tax Arbitration and Investor Protection*, in INVESTMENT PROTECTION AND THE ENERGY CHARTER 115, 131 (Graham Coop & Clarisse Ribeiro, eds. 2008).

225. Additionally, any conclusions arrived at by the Competent Tax Authorities within the six-month period regarding whether the tax is discriminatory are binding upon the arbitral tribunal.¹¹⁴
226. This decision to introduce a double-duty, together with the binding nature of Competent Tax Authority determinations on discrimination, underlines the importance attached to the referral in the scheme of Article 26, as a mandatory pre-condition of the host State's offer of consent to arbitrate.
227. If the Investor violates the referral obligation, it fails to fulfill a mandatory condition of the host State's consent. In that scenario, any purported acceptance by the Investor of the host State's offer of consent cannot by itself result in the formation of an arbitration agreement, because the acceptance failed to match the offer.
228. The addressee of the second-level referral obligation, the arbitral tribunal, then must act as the gatekeeper to cause the lacking referral to occur before accepting jurisdiction over the Investor's claim. The arbitral tribunal has no discretion in that regard. The purpose of such second-level referral, and the subsequent run of the six-month period, effectively is to cure the defect and thereby to perfect the arbitration agreement.
229. By refusing to refer the dispute to the Competent Tax Authorities, the Yukos Tribunal purported to assert jurisdiction over the Petitioners' claims, but in fact prevented Petitioners from reaching a perfected arbitration agreement with Respondent.
230. For these reasons, I conclude that the Petitioners could not validly accept the Russian Federation's offer to arbitrate.
231. For the sake of completeness, I will now address the Yukos Tribunal's reasoning, relying on good faith for its decision not to apply the mandatory referral provision.¹¹⁵
232. In my view, a mandatory duty imposed upon the Tribunal by the law applicable cannot be re-interpreted in a manner which *de facto* pretends that the duty does not exist.
233. As such, the Yukos Tribunal's reasoning and further considerations in this regard are irrelevant. In any event, they also are illogical and inapposite.

¹¹⁴ ECT, Art. 21(5)(b)(iii).

¹¹⁵ Hulley Final Award, para. 1424.

234. In essence, the Yukos Tribunal assumed that the Competent Tax Authorities would not have been able to cope with the mass of relevant documents¹¹⁶ and would not have been able to assist the Tribunal.¹¹⁷
235. In this context, the Tribunal seeks to justify its decision with the surprising observation that the Competent Tax Authorities would have focused only on issues related to taxes, and not on other evidence.¹¹⁸
236. It is difficult to follow the logic of this reasoning in the context of the referral provision, even independent of its mandatory nature. The Competent Tax Authorities were expected to address relevant tax issues, whatever the context. But the Tribunal refused to submit the tax issues.
237. The Tribunal was overconfident in its own assessment of the tax issues presented by the case. It is worth recalling here that the European Court of Human Rights (consisting of experienced judges) found, after a careful review of the facts, that the tax measures bore all of the marks of a taxation measure and had a legitimate purpose.¹¹⁹ Given the expertise and experience of the judges on the European Court, it is not clear on what basis the Yukos Tribunal assumed that there was no need to receive the advice of the Competent Tax Authorities.
238. Another attempt by the Yukos Tribunal to justify its decision assumes an analogy to the legal setting on diplomatic protection and the provisions in a treaty on the submission of disputes to general local courts with no specialized mandate.
239. However, these analogies are not opposite. The ECT referral provision addresses a setting in which an arbitral tribunal with a mandate covering investment issues in general is required to submit an issue to specialized authorities focused only on their mandate, which pertains to a special area of relevant domestic laws.

¹¹⁶ Hulley Final Award, para. 1422.

¹¹⁷ Hulley Final Award, para. 1423.

¹¹⁸ Hulley Final Award, para. 1423.

¹¹⁹ *Case of OAO Naftyanaya Kompaniya Yukos v. Russia*, Application No. 14902/04, ECtHR Judgment (20 September 2011), paras. 588-606, 663-666.

240. The Yukos Tribunal assumed that no possibility existed that the legal opinion of such specialized tax authorities would assist the Tribunal: “The Tribunal finds, for the reasons stated above, that no such possibility exists or existed in this case.”¹²⁰
241. In my view, this reasoning is not in conformity with the Yukos Tribunal’s task as laid down in the referral provision. It was not the task of the tribunal to speculate whether or not an opinion by the Competent Tax Authorities may have been helpful or not. The decision to require the referral was made by the Parties to the ECT, not subject to reconsideration by an arbitral tribunal. The Russian Federation’s offer to arbitrate was not made to any investor who failed to comply with this mandatory provision.

TOPIC 2 DUE PROCESS, RIGHT TO BE HEARD, AND DAMAGES DETERMINATION

Question 1 Please explain the relevance of the principles of due process and of the right to be heard in investment treaty arbitration.

242. The basic guarantees of due process are firmly anchored in international investment arbitration. These guarantees are properly considered to ensure the integrity and the legitimacy of the arbitral process. In essence, procedural due process is based on the same notions of justice as are “fundamental rules of procedure.”
243. Due process encompasses “principles of natural justice,” including the right to be heard, and may also be seen as emanations of general principles of law.¹²¹
244. Issues of due process are often discussed in the context of the International Centre for Settlement of Investment Disputes (“ICSID”), being the forum in which most international investment arbitrations have been heard.
245. Among the five grounds for annulment listed in the ICSID Convention is “serious departure from a fundamental rule of procedure” (Article 52(1)(c)):

¹²⁰ Hulley Final Award, para. 1426.

¹²¹ See *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment (23 December 2010), paras. 186-187; on the use of the terms “international public policy,” “transnational public policy,” and “domestic public policy,” see also *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006), para. 139.

Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.¹²²

246. Another set of rules relevant for other fora consists of the arbitral rules adopted in 1976, revised in 2010 and 2013, by a body of the United Nations named UNCITRAL (United National Commission on International Trade Law). Article 17 of these Rules requires that “parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.”
247. A Model Law issued by UNCITRAL and adopted widely by States in their national law provides in Article 18: “The parties shall be treated with equality and each party shall be given full opportunity of presenting its case.”
248. Article 34(2)(a)(iii) of this Model Law provides that an award may be annulled if an applicant “was otherwise unable to present his case.”
249. This provision was drafted closely in line with Article V(1)(b) of the New York Convention, with the same wording on this point.¹²³
250. It is noteworthy here that relevant rules of international commercial arbitration follow the same principles; thus, Article 22(4) of the Arbitration Rules of the International Chamber

¹²² Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, 18 March 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270, TIAS 6090 (“**ICSID Convention**”), Art. 52(1).

¹²³ See Gerold Herrmann, *UNCITRAL’s Work Towards a Model Law on International Commercial Arbitration*, 4 Pace L. Rev. 537, 561 (1984) (explaining that the list of grounds in Article 34 for setting aside an award “is essentially taken from Article V of the 1958 New York Convention”).

of Commerce states that a tribunal “shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.”

251. Thus, the formulations found in ICSID, as the main investment arbitration forum, and in the UNCITRAL documents are inspired by the same concept of procedural fairness emanating from principles of natural justice.
252. As emphasized in the *Fraport* Annulment Decision, as regards the fundamental rules of procedure here discussed, each arbitral tribunal must function in the manner of a judicial body, and only adherence to these rules will justify the binding effect of an arbitral decision.¹²⁴
253. It will be concluded that due process is recognized, in substance, on all levels of international arbitration, including investment arbitration and also by the New York Convention at the stages of recognition and enforcement.
254. Key elements of due process in these systems are the right to be treated equally and the right of a party to present its case. It is not surprising that no substantial difference exists in this respect between investment arbitration and the New York Convention.
255. An important feature of the right to be heard exists even if a tribunal does not accord the right to either of the parties; in this case, either party may have the right to seek annulment.¹²⁵
256. When appropriate, ICSID *ad hoc* committees acting on annulment applications have not hesitated to apply the duty of an arbitral tribunal to observe fundamental rules of procedure.
257. In *Amco Asia v. Indonesia*, the *ad hoc* committee annulled the rectification of an award; the reason was that the tribunal had rendered the rectification decision at the request of

¹²⁴ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Annulment Decision, paras. 182 *et seq.* (quoting International Law Commission, *Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its Fiftieth Session*, prepared by the Secretariat of the United Nations, U.N. Doc. A/CN.4/92, at 105).

¹²⁵ *See Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Annulment Decision, para. 202 (“It is no answer to a failure to accord such a right that both parties were equally disadvantaged.”).

one party without giving the other party an opportunity to file a submission on the application for rectification:

The fact that the decision to be taken seemed apparent cannot be considered as a justification for dispensation with a mandatory rule of procedure designed to guarantee equality of opportunity for the Parties to have their views heard on the issues to be addressed and decided by the Tribunal, nor is the matter merely *de minimis*. The Committee therefore concludes that the Tribunal, by omitting to fix a time limit to enable Indonesia to file its observations on Amco's request, seriously departed from a fundamental rule of procedure.¹²⁶

258. The seminal decision was rendered by the *Fraport ad hoc* Committee. In that case, the tribunal accepted evidence of relevant new developments presented by the respondent after the oral hearing. Although the tribunal continued to ask the parties for additional documents, it “pre-emptively, and before it had even received the additional factual material, directed by letter dated 14 February 2007 that ‘the Tribunal does not wish to receive any submissions with respect to this material from either party.’”¹²⁷
259. The *ad hoc* Committee unanimously found that this step by the Tribunal violated the right to be heard, and annulled the Tribunal's award: “Given the central importance” of these factual materials for the Tribunal's ultimate analysis, “[t]he Tribunal ought not to have proceeded to analyse and consider this evidence itself in its deliberations without having afforded the parties the opportunity to make submissions on it, and availed itself of the benefit of those submissions.”¹²⁸

¹²⁶ *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment (3 December 1992), 9 ICSID Rep. 9, 56, para. 9.10.

¹²⁷ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Annulment Decision, para. 228.

¹²⁸ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Annulment Decision, para. 230.

Question 2 In light of these principles, is an investment tribunal free to depart from the parties' submissions on damages and develop its own damages methodology?

260. The determination of damages is based on certain facts, but consideration and identification of the methodological framework in which the facts are to be understood and applied goes beyond factual matters into the domain of legal reasoning.
261. There is no clear consensus in international arbitration law as to the freedom of a tribunal to determine the law to be applied in relation to the arguments submitted by the parties.
262. I do not assume that a tribunal is limited to making a choice, in the determination of the law, between the two positions submitted by the parties. The tribunal may find that the law is more complex or nuanced, or it may find that both parties have stated the law to their own advantage and that the law actually lies in between the two positions. A number of situations may arise in this respect in practice.
263. In my view, no single rule or principle will be applicable to all conceivable settings.
264. A starting point is that the parties must have been able to anticipate, in general terms, the law which a tribunal applies. In case this law is beyond the contemplation of the parties, the tribunal must give the parties the opportunity to comment.
265. As regards the facts, the same is true in principle: if the facts found by the tribunal are generally inconsistent with the submissions of both parties and not presented or discussed by them, the tribunal should also give the parties the opportunity to comment on its viewpoint.
266. I do not consider that the right to be heard is violated in case the law as determined by the tribunal still allows it to apply the facts as submitted by the parties.
267. The situation is different if the tribunal departs from the legal positions of the parties in a manner which entails that the discussion of the facts as presented by the parties is no longer suitable to explain how the facts apply to the law applied by the tribunal. In such a case, the tribunal has identified the law in a manner, independent of the parties, and the tribunal also applies the facts in its own manner to the law, without the benefit of the views by the parties.

268. In such circumstances, the parties' right to be heard has not been observed as the tribunal decided the case in the absence of a meaningful opportunity of the parties to comment on the case as decided.
269. I understand that the identification of the law and the application of the facts by the Tribunal coincide with the tenets of the situation described in the previous paragraph and that therefore the Respondent's right to be heard has not been observed.

Question 3 In the circumstances of this case, should the Yukos Tribunal have invited the parties to comment on its damages methodology? In this respect, was it relevant that (a) a sovereign State was involved and (b) the Yukos Tribunal's methodology resulted in the largest arbitration award ever?

270. Even though the proceedings were formally closed when the Yukos Tribunal deliberated and decided on its method to calculate damages, it had the power to reopen the proceedings. Rules of procedure do not stand in the way of such an order.
271. The Yukos Tribunal could then have informed the parties about the methodology which it deemed appropriate and asked for the parties' comments on this method and on its application to the facts of the case.
272. It is true that the proceedings would have been prolonged by such a re-opening. However, the paramount requirement of a fair procedure complying with the right to be heard would have justified the ensuing delay.
273. These considerations had a special weight in the special circumstances of the issue before the Tribunal.
274. Respect for the sovereignty of the Respondent and awareness of the consequences of the damages methodology are relevant here. The size of the Awards being the largest ever in the history of arbitration, with its serious effects on the budget of the State concerned, had called for a calculation of the damage which was to be as accurate and appropriate as possible, to be rendered with the benefit of the observations of both parties.

TOPIC 3 PUBLIC POLICY

Question 1 As a matter of transnational public policy, was the Yukos Tribunal free to disregard the evidence of fraud and serious illegality adduced by the Russian Federation regarding the establishment of the Petitioners' investment?

275. I understand the term “transnational public policy” to refer to the need to respect basic notions of justice and morality, in line with general usage.
276. In international investment arbitration, arbitral tribunals have relied on the term “international public policy”.¹²⁹
277. While the terminology is not entirely uniform, I consider that the idea and the substance of these concepts do not differ.
278. Even though these concepts escape a precise definition, it will be agreed that certain types of detrimental societal conduct will clearly be inconsistent with these standards, among them being fraud. Indeed, it would be difficult to disagree with this position.
279. The circumstances of three investment cases will illustrate the internationally accepted approach.
280. These cases illustrate the confluence and affinity of international public policy, the concept of good faith and the respect for the rule of law.
281. In *SIREXM v. Burkina Faso*, the tribunal had to address the consequences of fraudulent misrepresentation in a contractual context. The respondent agreed that the contract violated public policy, given the fraudulent conduct of the investor. The tribunal found that the agreement was indeed null and void in view of the violation of policy and denied jurisdiction, pointing to principles beyond the internal order of the host state.¹³⁰

¹²⁹ See *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), para. 249; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 143; *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006), para. 157; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (8 December 2000), para. 111 (relying on the phrase “international bones [sic] mores”).

¹³⁰ *Société d'Investigation de Recherche et d'Exploitation Minière v. Burkina Faso*, ICSID Case No. ARB/97/1, Award (19 January 2000), para. 5.29.

282. In *Inceysa v. El Salvador*, the investor had procured its concession contract by way of carrying out a fraud in the public bidding process. In the words of the tribunal:

Among Inceysa's violations of the principle of good faith, as demonstrated in chapter IV of this award, the Tribunal emphasizes the following: (i) Inceysa's presentation of false financial information as part of the tender made by it to participate in the bid; (ii) false representations during the bidding process, in connection with the experience and capacity necessary to comply with the terms of the Contract, particularly concerning its alleged strategic partner; (iii) falsity of the documents by which Inceysa sought to prove the professionalism of Mr. Antonio Felipe Martinez Lavado, on whose career in large measure it based its alleged aptness to perform the functions entrusted to it when winning the bid; and (iv) the fact that it had hidden the existing relationship between Inceysa and ICASUR, in clear violation of one of the fundamental pillars of the bidding rules.¹³¹

283. The tribunal ruled that these acts were not compatible with good faith (equated with the "absence of deceit and artifice");¹³² the tribunal would not allow the investor to "benefit from an investment effectuated by means of one or several illegal acts."¹³³

284. The award also concludes that "it was not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which is a principle of international public policy."¹³⁴

285. *Plama v. Bulgaria* also concerned the consequence of fraudulent misrepresentation and deceit.

286. Bulgaria was deliberately deceived by the claimant as to ownership and control of the investment. The tribunal found that the person ostensibly representing the claimant consortium led the respondent to believe that the consortium was being backed by major

¹³¹ *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), para. 236.

¹³² *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), para. 231.

¹³³ *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), para. 242.

¹³⁴ *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), para. 249.

companies with substantial assets, whereas in reality those companies had backed out of the consortium, which left the individual, who did not have substantial financial assets, “acting alone as the sole investor in the guise of that ‘consortium.’”¹³⁵ The tribunal concluded:

The investment in Nova Plama was, therefore, the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capacities required to resume operation of the Refinery. While the Arbitral Tribunal considers that this situation does not involve the “straw-man” provision set out in the Bulgarian Privatization Law, the Tribunal is of the view that this behavior is contrary to other provisions of Bulgarian law and to international law and that it, therefore, precludes the application of the protections of the ECT.¹³⁶

287. The tribunal pointed out that Bulgaria would not have consented had it been aware that the claimant acted with its limited resources:

The Tribunal finds that Claimant’s conduct is contrary to the principle of good faith which is part not only of Bulgarian law ... but also of international law - as noted by the tribunal in the *Inceysa* case. The principle of good faith encompasses, inter alia, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the State's approval of the investment.

Claimant contended that it had no obligation to disclose to Respondent who its real shareholders were. This may be acceptable in some cases but not under the present circumstances in which the State’s approval of the investment was required as a matter of law and dependant [*sic*] on the financial and technical qualifications of the investor. If a material change occurred in the investor’s shareholding that could have an effect on the host State’s approval, the investor was, by virtue of the principle of good faith, obliged to inform the host State of such change.

¹³⁵ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 133.

¹³⁶ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 135.

Intentional withholding of this information is therefore contrary to the principle of good faith.¹³⁷

288. Under the circumstances, the claimant had a duty to provide accurate updated information to the State, whether or not such information was requested by the State:

Claimant contends that it acted in good faith, that Respondent never asked who the shareholders of PCL were and that Claimant had no obligation to volunteer this information. The Arbitral Tribunal does not consider that, in the circumstances of the present case, this contention can be accepted. Claimant represented to the Bulgarian Government that the investor was a consortium – which was true during the early stages of negotiations. It then failed, deliberately, to inform Respondent of the change in circumstances, which the Tribunal considers would have been material to Respondent’s decision to accept the investment. On the basis of the evidence in the record, Bulgaria had no reason to suspect that the original composition of the consortium, consisting of two major experienced companies, had changed to an individual investor acting in the guise of that “consortium”, and no duty to ask. It was Claimant, knowing the facts, which had an obligation to inform Respondent.¹³⁸

289. In accordance with the official Introduction to the ECT, the tribunal underlined that “the fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues.”¹³⁹
290. In refusing to protect the claimant’s investment, the tribunal supported the argument based on international public policy by way of linking it to the principle “*nemo auditur propriam turpitudinem allegans*”¹⁴⁰ and also the concept of good faith.¹⁴¹

¹³⁷ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), paras. 144-145.

¹³⁸ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 134.

¹³⁹ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 139.

¹⁴⁰ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 143.

¹⁴¹ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 144.

291. The above-described cases establish that the commission of fraud and other serious illegality in the making of an establishment will run afoul of the standards embodied in the duty not to violate international public policy.

Question 2 Please explain the nature of the “unclean hands” doctrine in international law. Is the Tribunal’s conclusion that international law does not recognize the “unclean hands” doctrine correct? Is the doctrine implicated by illegal acts committed subsequent to the establishment of an investment?

292. The “clean hands” doctrine has been characterized as “an important principle of international law that ha[s] to be taken into account whenever there [i]s evidence that an applicant State ha[s] not acted in good faith and that it ha[s] come to court with unclean hands.”¹⁴²

293. In the context of contemporary investment law, the principle has been expressed, without naming it, in an international investment case in 2010, *Hamester v. Ghana*, in these terms:

An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection of the ICSID Convention. It will also not be protected if it is made in violation of the host state’s law.¹⁴³

294. The long history of the principle, and early cases of its application, have been traced in a well-known monograph by Bin Cheng, “General Principles of Law as Applied by International Courts and Tribunals”.¹⁴⁴

295. The author concludes that the Roman maxim “*nullus commodum capere de sua inuria*” (“no one may be allowed by benefit from his own wrong”) has become part of

¹⁴² Report of the International Law Commission, 57th Session (2005), UN Doc. A/60/10, para. 236 (concluding remarks of the Special Rapporteur on Diplomatic Protection).

¹⁴³ *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010), para. 123.

¹⁴⁴ BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 155 (1953).

international law, and that the requirement of clean hands is a pre-condition to filing a claim before an international tribunal.¹⁴⁵

296. The author adds, in light of the case law discussed in his study that the clean hands doctrine “... is of such fundamental character that where an award disregarded it a State ... would hesitate to insist upon [the award’s] enforcement.”¹⁴⁶
297. A thorough study of modern investment jurisprudence shows that tribunals have frequently not named the doctrine, but have applied it by way of introducing concepts with the same rationale; in particular, we find, in this context, recent cases relying on the principles of good faith, international public policy, and the duty to honor local laws, discussed above.
298. In *Inceysa v. El Salvador*, for example, the principle (again not named as such) is expressed in these terms: “[N]o legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them.”¹⁴⁷
299. Other investment tribunals have accepted the same reasoning and applied the rationale of the good faith doctrine.¹⁴⁸
300. In *Guyana v. Surinam*, the tribunal accepted the principle and applied it, in an unduly narrow manner, by way of extrapolating its content in the light of factual scenarios

¹⁴⁵ BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 157 (1953).

¹⁴⁶ BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 123 *et seq.* (1953); *see also* Rahim Molloo, *A Comment on the Clean Hands Doctrine in International Law*, *Transnational Dispute Management* Vol. 8(1), 2012; Dunberry/Dumas-Aubin, *The Doctrine of “Clean Hands” and the Inadmissibility of Claims by Investors Breaching International Human Rights*, *Transnational Dispute Management* Vol. 10(1), 2013.

¹⁴⁷ *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), para. 244.

¹⁴⁸ *See Société d’Investigation de Recherche et d’Exploitation Minière v. Burkina Faso*, ICSID Case No. ARB/97/1, Award (19 January 2000), para. 6.33; *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award (27 November 2000), para. 26; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 August 2007), paras. 396 *et seq.* (annulled on other grounds); *see also World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006), para. 179.

discussed in previous cases.¹⁴⁹ The tribunal in *Niko Resources v. Bangladesh* relied on *Guyana v. Surinam*.¹⁵⁰

301. As is true for all principles, their scope of application is indicated, but not exhausted, by the accidental circumstances submitted to earlier tribunals.
302. The Yukos Tribunal decided not to examine the clean hands doctrine on its own and restricted itself to rule on the basis of Respondent's pleading in the case:

[D]espite what appears to have been an extensive review of jurisprudence, Respondent has been unable to cite a single majority decision where an international court or arbitral tribunal has applied the principle of "unclean hands" in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim. The Tribunal therefore concludes that "unclean hands" does not exist as a general principle of international law which would bar a claim by an investor, such as Claimants in this case.¹⁵¹

303. The passage fails to reference any authority for the position taken, and no case law is discussed.
304. I reject the view that the principle of clean hands has not been recognized and applied by international investment tribunals. The tribunal in *SIREXM v Burkina Faso* (*see above*, para. 281), clearly applied the substance of the doctrine (without naming it) and underlined that "it would be somewhat shocking to see the Claimant, whose conduct is tainted by fraud, obtain a compensation for any injury it has itself sustained."¹⁵²
305. In a recent decision, a tribunal proceeding under the UNCITRAL Arbitration Rules applied the doctrine and also designated it as "the doctrine of 'clean hands'". I refer here to the award in *Al-Warraq v. Indonesia*.¹⁵³

¹⁴⁹ *Guyana v. Surinam*, UNCLOS Annex VII, Award (17 September 2007), paras. 417-422.

¹⁵⁰ *Niko Resources Ltd. v. People's Republic of Bangladesh et al.*, ICSID Cases Nos. ARB/10/11 and ARB/10/18, Decision on Jurisdiction (19 August 2013), paras. 477, 481-485.

¹⁵¹ Hulley Final Award, paras. 1362-1363.

¹⁵² *Société d'Investigation de Recherche et d'Exploitation Minière v. Burkina Faso*, ICSID Case No. ARB/97/1, Award (19 January 2000), para. 6.33.

¹⁵³ *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014), para. 646.

306. The tribunal stated that it was “of the view that the doctrine of ‘clean hands’ renders the claim inadmissible,” adding “that the Claimant’s conduct falls within the scope of application of the ‘clean hands’ doctrine, and therefore cannot benefit from the protection afforded by the OIC Agreement.”¹⁵⁴
307. The reasoning of the Yukos Tribunal fails to notice that the rationale behind the doctrine continues to be valid, but has mostly been subsumed by the concepts applied (*see above*, paras. 297-300) which lead to the same results which the traditional doctrine would have reached.
308. The doctrine has, in these decisions, been reformulated and developed in other concepts, but the substance has been preserved. The recent *Al-Warraq* ruling has continued this development and has done so by way of restating the doctrine as such.
309. Therefore, in my view, the proper position today is:
- that the doctrine has long been recognized,
 - that its place has in part been taken over with other doctrines based on the same rationale, and
 - that the doctrine remains valid today and applicable to areas and settings not clearly covered by the doctrines applied in recent investment awards.

Conclusion on Topic 3

310. A Tribunal which would entertain a claim submitted by a party with unclean hands would become an instrument to an investor who does not deserve the support from an international tribunal promoting the rule of law.
311. As confirmed in *Awdi v. Romania*, investment tribunals are “endowed with the inherent power and corresponding duty to preserve the integrity of the arbitral process.”¹⁵⁵
312. From a broader perspective, it will not be overlooked that the ‘clean hands’ doctrine has the potential of a powerful tool to foster a healthy climate for international business. In a

¹⁵⁴ *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014), paras. 646-647.

¹⁵⁵ *Hassan Awdi et al. v. Romania*, ICSID Case No. ARB/10/13, Decision on the Admissibility of the Respondent’s Third Objection to Jurisdiction and Admissibility of Claimant’s Claims (26 July 2013), para. 81.

globalized world with transactions among business parties unknown to each other, this is not a small item.

TOPIC 4 DUTY OF CANDOR

Question 1 Would it be contrary to trans-national public policy to enforce an arbitral award procured by a claimant's material misrepresentation in breach of its duty of candor to the tribunal?

313. I note that in the underlying arbitrations the Petitioners/Claimants asserted that they first purchased their shares starting in 1999. The Yukos Tribunal concluded without any discussion that there was not a sufficient link between these purchases and the illegality perpetrated by Mr. Khodorkovsky and his associates in obtaining the Yukos shares.¹⁵⁶
314. I understand from Respondent's counsel that it is now apparent that Petitioners/Claimant's purchase of Yukos shares was merely the continuation in a succession of transactions that at all times were controlled by Mr. Khodorkovsky and his associates through certain shell corporations. These entities and transactions lacked substance or legitimate purpose, and were deliberately structured to legitimize the holdings by obscuring their illegal origins in fraudulently manipulated auctions.
315. In this context, the issue arises as to whether the Petitioners/Claimants complied with their duty of good faith in the conduct of the proceedings.
316. The principle of good faith, as the tribunal explained in *Phoenix Action v. Czech Republic*,

...requires parties to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage. This principle governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty.¹⁵⁷

¹⁵⁶ Hulley Final Award para. 1370.

¹⁵⁷ *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/05, Award (15 April 2009), para. 107 (quotation marks and citation omitted).

317. Judge Schwebel has explained that the candor of parties is essential to the integrity of the tribunal's function to establish the truth, and on that basis, carry out its function to render an enforceable award:

The foundation of judicial decision is the establishment of the truth. Deliberate misrepresentations by the representatives of a ... party to a case before this Court cannot be accepted because they undermine the essence of the judicial function. This is particularly true where, as here, such misrepresentations are of facts that arguably are essential, and incontestably are material, to the Court's Judgment.¹⁵⁸

318. I understand that Petitioners/Claimants hid from the Tribunal that their alleged investment was continuously controlled through multiple entities by Mr. Khodorkovsky and his associates from the moment of its initial procurement by fraud. The Petitioners'/Claimants' failure to correct the Tribunal's misimpression that there was no link between the transactions misled the Tribunal to conclude that their alleged investment was not tainted with the same serious illegality as its initial procurement.
319. While the Tribunal recognized the relevance of illegality in the procurement of the Yukos shares,¹⁵⁹ it was prevented from rendering an award based on the truth because it did not have the factual information in evidence before it to link this illegality to Petitioners'/Claimants' interest in the shares.
320. The *Phoenix Action* tribunal was unequivocal: "The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance."¹⁶⁰ The tribunal emphasized that the international principle of good faith "applied to the international arbitration mechanism" and that "[t]he Tribunal has to

¹⁵⁸ *Military and Paramilitary Activities (Nicaragua v. United States)*, 1986 I.C.J. Rep. 259, 277, para. 27 (27 June 1986) (dissenting opinion of Judge Schwebel).

¹⁵⁹ Hulley Final Award, paras. 1369-1370.

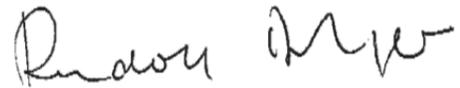
¹⁶⁰ *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/05, Award (15 April 2009), para. 106.

prevent an abuse of the system of international investment protection” by ensuring that attempts to misuse the system are not protected.¹⁶¹

321. To enforce awards resulting from a party’s deceit would run counter to the international principle of good faith and trans-national public policy because it would condone abusive conduct that is seriously prejudicial to the integrity of the international arbitral system.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is a true statement of my independent professional opinion.

Executed on this 20th day of October 2015 in Heidelberg, Germany.



Rudolf Dolzer

¹⁶¹ *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/05, Award (15 April 2009), para. 113.

Curriculum Vitae

- 1944 Born in Asang, Germany
- 1963-65 Studies in sociology, political science and law, University of Tübingen
- 1965/66 Fulbright Scholarship; studies at Gonzaga University; Bachelor of Arts
- 1966-71 Law School, University of Heidelberg, Doctor of Law
- 1971/72 Harvard Law School, emphasis on international law; Master of Laws
- 1972-75 Legal internship in Germany
- 1975-77 Harvard Law School
- 1977-89 Research Fellow, Max-Planck-Institute of Comparative Public Law and International Law, Heidelberg
- 1982-85 Elected representative, Supervisory Board of Max-Planck-Society
- 1984 Habilitation, University of Heidelberg
- 1984-1985 Visiting Professor, University of Michigan Law School
- 1986 Appointed as Professor of Law, University of Heidelberg
- 1987 Visiting Professor, Cornell Law School, Ithaca, N.Y.
- 1989 Professor at University of Mannheim and elected Vice Rector (1990-1992)
- 1990-91 Member, German Parliament, Commission of Enquiry "Protection of Atmosphere"; reappointed 1992-1994
- 1991-94 Member, Scientific and Technical Advisory Panel, Global Environment Facility, Washington/USA
- March 1992-
March 1996 Director General, Office of the Federal Chancellor, Bonn
- Fall Term 1995 Visiting Professor, Massachusetts Institute of Technology
- March 1996 Professor, University of Bonn
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Since July 1996	Member of Directorate, German Society for Foreign Policy
Since October 1996	Member, International Board, Instituto de Empresa, Madrid
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Fall Term 2000	Visiting Professor, Massachusetts Institute of Technology, Boston, USA
2000-2002	Member, German Parliament, Commission of Enquiry „Globalisation“
Fall Term 2004	Yale Law School, Myres S. McDougal Distinguished Visiting Scholar
Since 2004	Member, Argentinean Academy for Social Sciences and Law
Spring Term 2005	Visiting Professor, University of Paris 1 (Sorbonne)
Fall Term 2006	Distinguished Visiting Professor, Southern Methodist University, Dallas Texas
Fall 2007	Visiting Professor; Instituto de Madrid, Spain
Since 2008	Member, Steering Group, German-Russian-Forum on Raw Materials
August 2010	Lectures, Hague Academy of International Law
September 2010	Cross of the Order of Merit of the Federal Republic of Germany (Federal Cross of Merit)
Since 2011	Member, Association of International Petroleum Negotiators, Advisory Board

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

HULLEY ENTERPRISES LTD.,
YUKOS UNIVERSAL LTD., and
VETERAN PETROLEUM LTD.,

Petitioners,

v.

THE RUSSIAN FEDERATION,

Respondent.

Case No. 1:14-cv-01996-ABJ

**DOCUMENTS CITED IN THE EXPERT OPINION OF
PROFESSOR RUDOLF DOLZER**

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61.	<i>Sempra Energy International v. Argentine Republic</i> , ICSID Case No. ARB/02/16, Award (28 September 2007)	28 Sept. 2007	RLA-71
62.	<i>Rumeli Telekom A.S. et al. v. Republic of Kazakhstan</i> , ICSID Case No. ARB/05/16 Award (29 July 2008)	29 Jul. 2008	RLA-72
63.	<i>Plama Consortium Limited v. Republic of Bulgaria</i> , ICSID Case No. ARB/03/24, Award (27 August 2008)	27 Aug. 2008	RLA-73
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EXHIBIT	DOCUMENT	DATE	R – EXHIBIT No.
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