

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

*Petitioners,*

v.

THE RUSSIAN FEDERATION,

*Respondent.*

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

**EXPERT OPINION OF PROFESSOR GEORGE A. BERMAN**

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**EXPERT OPINION OF GEORGE A. BERMAN**

**I. INTRODUCTION**

**A. PROFESSIONAL BACKGROUND**

1. I am a professor of law at Columbia Law School in New York, where I have taught for the past forty years in the fields, among others, of International Commercial and Investment Arbitration as well as Transnational Litigation and Comparative Law.
2. At Columbia, I direct the Center for International Commercial and Investment Arbitration (CICIA) and hold both the Jean Monnet Professorship in European Union Law and the Walter Gellhorn Professorship of Law. I am also an affiliated faculty member of the School of Law of the *Institut des Sciences Politiques* (Sciences Po) in Paris, France.
3. I am the Chief Reporter of the ALI Restatement of the U.S. Law of International Commercial Arbitration. I am co-Editor-in-Chief of the *American Review of International Arbitration*. I have published widely – in books, articles and chapters in edited books – on the subjects of international arbitration, transnational litigation and other topics, and participate actively in conferences and speaking engagements worldwide.
4. I am an active international commercial and investment arbitrator, having acted as chairperson, co-arbitrator or sole arbitrator in a very large number of cases. I am the Chair of the Global Board of Advisors of the New York International Arbitration Center (NYIAC), a founding member of the Governing Board of the International Chamber of Commerce International Court of Arbitration (Paris), and a member of the roster of arbitrators of most leading international arbitral institutions.

5. I am a frequent expert on the law and practice of international arbitration, before both courts and international arbitral tribunals, and have testified orally in U.S. federal court as expert witness in over a dozen cases.
6. My scholarship has been cited by, among other courts and tribunals, the U.S. Supreme Court,<sup>1</sup> the U.S. Courts of Appeal for the First,<sup>2</sup> Seventh,<sup>3</sup> Ninth,<sup>4</sup> and Eleventh<sup>5</sup> Circuits as well as the U.S. District Courts for the Central District of California,<sup>6</sup> the Eastern District of New York<sup>7</sup> and the District of Columbia.<sup>8</sup>
7. I am past president of both the American Society of Comparative Law and the International Academy of Comparative Law.
8. I am a graduate of Yale College and Yale Law School, and hold honorary degrees from the University of Fribourg (Switzerland) and the University of Versailles-St. Quentin (France). A copy of my curriculum vitae, including a list of publications, is attached to this opinion as Appendix A.

## **B. STATEMENT OF REQUEST FOR OPINION**

9. I have been asked by the law firm of White & Case LLP to express an Opinion on various aspects of the Awards that are the subject of the enforcement proceeding in this Court. The precise questions asked of me are expressly set out below, in each case along with a series of sub-questions. My Opinion accordingly addresses the following questions:
  - (A) Whether the circumstances of this case, insofar as I understand them, call into question the formation of an agreement between the parties to arbitrate the underlying dispute, within the meaning of Article V(1)(a) of the New York Convention, and what is the level of judicial inquiry to be made into this question.
  - (B) Whether the manner in which the Tribunal determined and applied its methodology for calculating damages in this case was so prejudicial to the parties' due process

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<sup>1</sup> *United States v. Morrison*, 529 U.S. 598 (2000) (comparative law).

<sup>2</sup> *Quaak v. Klynveld Peat Marwick Gaoerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004) (international litigation).

<sup>3</sup> *Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021 (7th Cir. 2013) (arbitration).

<sup>4</sup> *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984 (9th Cir. 2006) (international litigation).

<sup>5</sup> *Canon Latin Am. v. Lantech (CR), S.A.*, 508 F.3d 597 (11th Cir. 2007) (international litigation).

<sup>6</sup> *BioMagic, Inc. v. Dutch Brothers Enters. LLC*, 729 F. Supp. 2d 1140 (C.D. Cal. 2010) (arbitration).

<sup>7</sup> *United States v. Weisberg*, Civ. No. 08-CR-347, 2012 U.S. Dist. LEXIS 62433 (E.D.N.Y. May 3, 2012) (international litigation).

<sup>8</sup> *Oveissi v. Iran*, 768 F. Supp. 2d 1 (D.D.C. 2010) (comparative law).

right to be heard that the resulting Awards are subject to a denial of enforcement under New York Convention Article V(1)(b).

- (C) Whether the Tribunal's appointment and, more important, its use of what it called an "assistant" to the Tribunal so disappointed the parties' entitlement to have their dispute decided in all relevant respects entirely by the arbitrators whom they had chosen that the resulting Awards should be denied enforcement under Article V(1)(d) of the New York Convention as a violation of the arbitral mandate.
- (D) Whether, in their handling of the Russian Federation's serious allegations of fraudulent misconduct and illegality, the Awards offend public policy and whether their enforcement would therefore offend public policy and be denied enforcement under New York Convention Article V(2)(b).

### C. DOCUMENTS CONSULTED

10. I have received the following documents from Counsel for the Russian Federation:

- a) 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") and 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 (the "YUL Interim Award"), and *Veteran Petroleum Limited v. The Russian Federation*, PCA Case No. AA 228 (the "VPL Interim Award");
- b) The Final Award dated 18 July 2014 in *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226 and 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 "Final Awards");
- c) The following documents from the record in the three arbitrations:
  - a. Terms of Appointment dated October 31, 2005;
  - b. Transcript of the Procedural Hearing held on October 31, 2005;
  - c. Letter from Secretariat to Parties enclosing Statement of Account dated January 29, 2008 for the period through December 31, 2007;
  - d. Letter from Secretariat to Parties dated June 2, 2009, enclosing Statement of Account dated February 4, 2009 for the period through December 31, 2008;
  - e. Letter from Secretariat to Parties enclosing Statement of Account dated October 6, 2014 for the period through the end of the arbitrations;

- d) The following expert opinions submitted by Respondent in the three arbitrations:
    - a. Professor S.A. Avakiyan, dated February 21, 2006;
    - b. Professor M.V. Baglay, dated February 26, 2006;
  - e) The following pleadings and documents that were filed in the proceedings pending in the District Court of The Hague to set aside the Awards:
    - a. An English translation of the Russian Federation's Writ of Summons, dated November 10, 2014;
    - b. An English translation of the Petitioners' Statement of Defense, dated May 20, 2015;
    - c. An English translation of the Russian Federation's Statement of Reply, dated September 16, 2015;
    - d. Expert Report of Carole Chaski dated September 11, 2015 regarding Authorship of the Final Awards submitted before the District Court of The Hague;
    - e. An English translation of the expert opinion of Professor Anton Asoskov dated October 30, 2014;
    - f. The expert report of Professor James Dow dated November 8, 2014.
11. Attached to this Opinion as Appendix B is a list of the authorities and documents referenced herein.

#### **D. SUMMARY OF CONCLUSIONS**

12. On the basis of the analysis set out in this Opinion, I conclude, first, that there is a serious question – on several grounds – as to whether an agreement between the parties to arbitrate the underlying dispute in this case was ever formed. On that basis, the Awards may be subject to denial of enforcement under Article V(1)(a) of the New York Convention. I further conclude that the Court should address these various contract formation questions on a *de novo* basis.
13. I further conclude that the resulting Awards in this case are, on several grounds, undeserving of enforcement under the New York Convention. I find that the Russian Federation was denied its fundamental right to be heard when the Tribunal disregarded the damage calculation methodologies that the parties had advanced, and substituted a methodology of its own of which the parties were not made aware and cannot be expected to have been aware. This is an especially momentous failing in the context of

Awards imposing damages against a sovereign State in the mammoth amount of in excess of \$50 billion. It constitutes a violation of a party's fundamental right to be heard, thus warranting denial of enforcement under New York Convention Article V(1)(b).

14. In addition, the Tribunal conducted the proceeding in violation of the parties' agreement on composition of the tribunal by apparently ceding to another individual the essential substantive adjudicatory tasks entrusted to it by party agreement in the exercise of party autonomy. A key feature of international arbitration, as distinct from national court litigation, is the prerogative of parties to select their adjudicators as a function of their individual and personal characteristics. That intention is thwarted when, without fully informing the parties or obtaining their assent, the arbitrators reassign their core substantive responsibilities to someone else of their own choosing. From all appearances, the substantive involvement of the Tribunal's "assistant" in this case was truly exaggerated, to the point of justifying a court in refusing to give effect to the Awards under Article V(1)(d) of the New York Convention.
15. Finally, I find that the Tribunal's treatment of the Russian Federation's serious allegations of fraudulent misconduct and illegality in connection with the underlying transactions falls short of the requirements of public policy. Both U.S. public policy and a consensus in the international community, as reflected in the decisions of foreign courts, international arbitral tribunals and commentators (a consensus sometimes referred to as "transnational public policy" and which United States courts may properly consider under the New York Convention) place both fraud and illegal conduct within the category of offenses whose seriousness requires condemnation in international arbitration. In my view, the Tribunal so failed to take those charges as seriously as it should have that enforcement of the resulting Awards would produce a violation of public policy within the meaning of New York Convention Article V(2)(b), and should therefore be refused.

## II. OPINION

16. My Opinion on the four broad questions asked of me, as well as on the sub-questions that underlie my answer to those questions, is as follows:
  - A. **WAS AN AGREEMENT TO ARBITRATE VALIDLY FORMED? (NY Conv. Art. V(1)(a))**
17. Article V(1)(a) of the New York Convention provides that a foreign arbitral award may be denied recognition or enforcement if "the [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." In this Section, I address various



circumstances that may have prevented an agreement to arbitrate between Claimants and the Russian Federation from ever validly being formed. The question whether an agreement to arbitrate was ever validly formed is an essential one because a tribunal's arbitral jurisdiction depends precisely on the formation of an agreement to that effect.

18. Accordingly, a court before which an award is brought for recognition or enforcement must, if it is called upon at that stage to do so, examine the validity of the arbitration agreement and thus the tribunal's own jurisdiction.
19. It is axiomatic that arbitration is a matter of consent and that parties are not bound to arbitrate unless and to the extent they have agreed to.<sup>9</sup> Therefore, a court that is asked to deny recognition or enforcement of an award under Article V(1)(a) determines the existence and validity of the arbitration agreement on a *de novo* basis, that is, without deference to jurisdictional findings made by the tribunal itself.
20. It is well established in U.S. law that the fact that arbitrators generally have authority under the *Kompetenz-Kompetenz* doctrine to determine the existence of their own jurisdiction – including the question of whether an agreement to arbitrate exists or is valid – does not lessen a reviewing court's authority and obligation to determine independently the existence and validity of arbitral jurisdiction.<sup>10</sup> A court's review of arbitral jurisdiction, if challenged at the time of enforcement of an award, is *de novo*. This is emphatically the position taken by the U.S. courts,<sup>11</sup> as well as by the Restatement of the U.S. Law of International Commercial Arbitration.<sup>12</sup> The U.K. Supreme Court has taken that same position.<sup>13</sup> According to Lord Mance, writing in the *Dallah* case, “[u]nder ... the 1996 Act/ Art V(1)(a) [New York Convention], when the issue is initial consent to arbitration, the Court must determine for itself whether or not the objecting party actually consented.”<sup>14</sup> Lord Saville further explained that, in these circumstances, the court must

<sup>9</sup> See *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648-49 (1986).

<sup>10</sup> George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 13-14 (2012); Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing?*, 13 AM. REV. INT'L ARB. 19, 25-28 (2002); William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT'L ARB. 133, 140 (1997).

<sup>11</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). See also *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287, 296-297 (2010) (“It is ... well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide.”).

<sup>12</sup> RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-12(b), Tentative Draft no. 2, Reporters' notes, at 168 (Apr. 16, 2012).

<sup>13</sup> See *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46, ¶¶ 31, 104, 160 (arbitrator's decision on its jurisdiction, including on whether a party had agreed to arbitrate, is not entitled to deference under Article V(1)(a) of the New York Convention).

<sup>14</sup> *Id.*

perform a *de novo* review of arbitral jurisdiction without deference to the arbitrators' findings:

The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself.<sup>15</sup>

21. The approach of the French Cour de Cassation is similar.<sup>16</sup> Indeed, as stated in a leading U.S. decision,

it appears that every country adhering to the competence-competence principle allows some form of judicial review of the arbitrator's jurisdictional decision where the party seeking to avoid enforcement of an award argues that no valid arbitration agreement ever existed.<sup>17</sup>

22. While the determination of certain issues of arbitral jurisdiction may – by clear and unmistakable agreement of the parties – be delegated to the arbitrators, the initial question of whether an agreement to arbitrate was ever formed cannot. This question involves a party's very consent to arbitrate and must be considered by the court *de novo*, i.e., without deference to the arbitrators' findings. As the Restatement of the U.S. Law of International Commercial Arbitration explains, “[t]he rationale behind this position is that, if no arbitration agreement exists, the question of its existence cannot logically be placed in the hands of a body that owes its own very existence to the arbitration agreement being challenged.”<sup>18</sup>
23. Therefore, insofar as the Russian Federation questions the jurisdiction of the Tribunal on the ground that no valid agreement to arbitrate was ever formed, this Court properly addresses the challenge on a *de novo* basis.
24. In this connection, I have been asked to consider the following three questions:

- *Question 1: Is the formation and existence of a valid agreement to arbitrate implicated by the Russian Federation's position that it never agreed to apply*

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<sup>15</sup> *Id.* ¶ 160.

<sup>16</sup> See Cass. 1er civ. Jan. 6, 1987, *Southern Pac. Props. Ltd. v. République Arabe d’Egypte*, 26 I.L.M. 1004 (1987), XIII Y.B. Com. Arb 152, 153-54 (1988); FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 925 (Emmanuel Gaillard & John Savage eds., 1999) (“The nature of the review performed by the courts implies that they should be entirely free to examine the circumstances of the case, both legal and factual. That is the necessary corollary of the liberalism of the courts as regards the arbitrability of the dispute in particular.”).

<sup>17</sup> *China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003).

<sup>18</sup> RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 2-8(b), Tentative Draft no. 4, Reporters' notes, at 70 (Apr. 17, 2015).

*provisionally Article 26 of the ECT, due to the fact that Article 45(1) of the ECT excludes application of treaty provisions inconsistent with Russian law?*

- *Question 2: Is the formation and existence of a valid agreement to arbitrate implicated by the Russian Federation's position that the Petitioners are not "Investor[s] of another Contracting Party" and thus cannot be regarded as offerees of the offer to arbitrate in Article 26 of the ECT?*
- *Question 3: Is the formation and existence of a valid agreement to arbitrate implicated by the Russian Federation's position that the Petitioners obtained their investment fraudulently and thus cannot be regarded as offerees of the offer to arbitrate in Article 26 of the ECT?*

As noted below, since these three questions bear directly on whether an agreement to arbitrate between the Petitioners and the Russian Federation was ever formed, this Court therefore properly addresses them on a *de novo* basis.

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***Question 1: Is the formation and existence of a valid agreement to arbitrate implicated by the Russian Federation's position that it never agreed to apply provisionally Article 26 of the ECT, due to the fact that Article 45(1) of the ECT excludes application of treaty provisions inconsistent with Russian law?***

25. Article 26 of the ECT ("Settlement of Disputes between an Investor and a Contracting Party") provides in relevant part:
- (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
  - (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
    - (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
    - (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
    - (c) in accordance with the following paragraphs of this Article.

- (3) 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.
26. In essence, Article 26 establishes a standing offer by the Contracting Parties to arbitrate “[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter...” A party that qualifies as an “Investor of another Contracting Party,” as defined in the treaty, may subsequently accept that offer, in the manner prescribed by the treaty, so as to form a binding agreement to arbitrate with the State.<sup>19</sup>
27. The Russian Federation signed but never ratified the ECT. There is therefore a question whether the Russian Federation was ever bound by Article 26 and ever extended an offer to arbitrate to “Investor[s] of another Contracting Party.” Because no agreement to arbitrate may have been formed if no offer was extended by the Russian Federation, that question is among the questions requiring *de novo* consideration by the court where enforcement of the resulting award is sought.
28. The ECT provides in Article 45(1) as follows:
- 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.
29. Notwithstanding the ECT’s express limitation in Article 45(1) that it would be provisionally applicable only to the extent consistent with “its constitution, laws or regulations,” the Tribunal opined that:
- by signing the ECT, the Russian Federation agreed that the Treaty *as a whole* would be applied provisionally pending its entry into force unless *the principle* of provisional application itself were inconsistent “with its constitutions, laws or regulations.”<sup>20</sup>
30. The Russian Federation maintains that, as a matter of treaty interpretation and Russian law, Article 45(1) neither states nor implies that what needs to be consistent with Russian law is the abstract idea of “provisional application.” Rather, what needs to be consistent

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<sup>19</sup> See, e.g., *Chevron Corp. et al. 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.”).

<sup>20</sup> Interim Award in *Hulley Enterprises Ltd v. The Russian Federation* (PCA Case No. AA 226, 2009) (“Hulley Interim Award”), ¶ 301 (emphasis in original); Interim Award in *Yukos Universal Ltd v. The Russian Federation* (PCA Case No. AA 227, 2009) (“YUL Interim Award”), ¶ 301 (emphasis in original); Interim Award in *Veteran Petroleum Ltd v. The Russian Federation* (PCA Case No. AA 228, 2009) (“VPL Interim Award”), ¶ 301 (emphasis in original).

with Russian law is the provision of the ECT that would be receiving provisional application under Article 45(1); in other words, Article 45(1) does not establish an “all-or-nothing” proposition. I note in this respect that several Russian law experts explained in the arbitrations that, absent ratification by the State Duma, a treaty cannot under Russian law override contrary provisions of Russian legislation.<sup>21</sup> Thus, as long as the ECT is being applied provisionally, its provisions are applicable only to the extent they are consistent with Russian law.

31. The inquiry in this situation would be whether there are any prohibitions in Russian law preventing arbitration of disputes under the ECT so that Article 26 is not subject to provisional application (and, therefore, no offer to arbitrate was ever extended by the Russian Federation). That question is again among the questions requiring *de novo* consideration by the court where enforcement of the resulting award is sought.
32. In this respect, I understand that the Russian Federation maintains that its law prohibits the arbitration of public law disputes, that is, most disputes involving the government, including disputes arising out of the imposition of tax penalties (pursuant to the police power of the State) and procurement and government contracts. Under this view, Article 45(1) excludes provisional application of the dispute resolution provisions of Article 26 because arbitration under Article 26 necessarily contemplates the arbitration of public law matters, such as taxation and expropriation – matters that under Russian law cannot be arbitrated. I note that Professor Asoskov, a Russian law expert, has concluded that the dispute before the Tribunal was a public law dispute the arbitration of which was contrary to Russian law, in particular certain legislation of the Russian Federation.<sup>22</sup>

### *Conclusion*

33. The Russian Federation’s argumentation calls into question whether it ever held out an offer to arbitrate to the Petitioners and therefore whether an agreement to arbitrate was ever formed between it and the Petitioners. The Russian Federation offered to apply provisionally the ECT only to the extent that its law permitted it to do so. To the extent that Russian law did not allow the Russian Federation to submit provisionally to Article 26 of the ECT, no offer to arbitrate was ever extended to “Investor[s] of another Contracting Party” and Petitioners were not in a position to enter into a valid agreement to arbitrate with the Russian Federation. If the Russian Federation never extended an offer to arbitrate the dispute in the present case, no such offer could have been accepted and no such agreement could have been formed. As the Russian Federation’s challenge

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<sup>21</sup> Opinion of Professor Baglay dated February 26, 2006, at 5; Expert Opinion of Professor Avakiyan dated February 21, 2006, ¶¶ 5-6.

<sup>22</sup> Expert Report of Professor Asoskov dated October 30, 2014.

relates to the very existence of the agreement to arbitrate between the Russian Federation and the Petitioners, it is one that this Court properly addresses on a *de novo* basis.

***Question 2: Is the formation and existence of a valid agreement to arbitrate implicated by the Russian Federation's position that the Petitioners are not "Investor[s] of another Contracting Party" within the meaning of Article 26 of the ECT?***

34. Article 26 of the ECT contemplates the arbitration of "[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former..." By its terms, the Russian Federation's standing offer to arbitrate is thus addressed exclusively to an "Investor" who is "(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law; [or] (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party."
35. As I understand it, the Russian Federation maintains that, under a proper interpretation of the ECT, a shell company owned by a Contracting State's own nationals (such as Petitioners vis-à-vis the Russian Federation) cannot be regarded as an "Investor from another Contracting State," within the meaning of Article 26. Whether this is so is a question of treaty interpretation on which I proffer no opinion here.
36. I note, however, that the Russian Federation's position seems reasonable on its face as well as in light of the ECT's underlying purpose. As the Tribunal itself observed, (a) "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," (b) "[t]he Treaty is meant, as specified in the Secretariat's Introduction, to ensure 'the protection of foreign energy investments'" and (c) "[i]f 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."<sup>23</sup>
37. If the Petitioners do not qualify as "Investor[s] of another Contracting Party," within the meaning of Article 26, they could not by purporting to initiate arbitration have formed a valid agreement to arbitrate with the Russian Federation. Because the very formation of a contract between the parties is implicated, here too the matter calls for *de novo* judicial determination.

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<sup>23</sup> Hulley Interim Award, ¶ 433; YUL Interim Award, ¶ 434; VPL Interim Award, ¶ 490.

*Conclusion*

38. The Russian Federation's argumentation again calls into question whether an agreement to arbitrate was ever formed between it and the Petitioners. Insofar as the Petitioners are not "Investor[s] from another Contracting Party", the Russian Federation's standing offer to arbitrate in Article 26 was never extended to them and they could not accept that offer and produce a binding arbitration agreement by their initiation of arbitration.

***Question 3: Is the formation and existence of a valid agreement to arbitrate implicated by the Russian Federation's position that the Petitioners obtained their investment fraudulently and thus cannot be regarded as offerees of the offer to arbitrate in Article 26 of the ECT?***

39. It is the Russian Federation's contention that the offer to arbitrate embedded in Article 26 of the ECT is further subject to an implied condition that a party purporting to initiate arbitration did not bring itself within the ambit of eligible claimants fraudulently or illegally.
40. Whether that is so is again a question of treaty interpretation on which I proffer no opinion here. However, I again note that, on its face, the Russian Federation's position does not appear unreasonable. In *SAUR International S.A. v. Argentina*, a case which the Tribunal itself quoted, the arbitral tribunal ruled that a State's standing offer in an investment treaty to arbitrate an investor-State dispute does not extend to a party that acted contrary to law:

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 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.<sup>24</sup>

41. In this respect, I understand that the Russian Federation has proffered evidence that the Petitioners (and the individuals controlling them) acquired Yukos through systematic deceit, bid-rigging and collusion during certain auctions in the 1990s. That fraud was, I understand, so extensive that any purported rights acquired during that process must be

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<sup>24</sup> *SAUR International S.A. v. Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability ¶ 308 (June 6, 2012). The quoted passage, in its original French, reads:

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, agit à l'encontre du droit.

regarded as void *ab initio* under Russian law so that the Petitioners never held any right and investment in Yukos.

42. In my opinion, the Russian Federation's challenge again implicates the question whether an agreement to arbitrate was ever formed between the Petitioners and the Russian Federation. If the Petitioners do not qualify as "Investors" within the meaning of Article 26 because they attained that status and acquired their investment through fraudulent means, they may not be regarded as parties to whom the Russian Federation extended its offer to arbitrate, and they are therefore not capable, by purporting to accept that offer, of forming an agreement to arbitrate. The issue is again one that is properly determined by this Court on a *de novo* basis.

### ***Conclusion***

43. In this case, the Petitioners sought to form an arbitration agreement with the Russian Federation pursuant to the ECT by purporting to accept a standing offer by the Federation to arbitrate a dispute. But by the very terms of the ECT itself, the Federation's obligation to arbitrate was effective only to the extent the Russian constitution, laws or regulations so permit. Whether they do so permit, thus allowing an arbitration agreement to be formed, is a matter for *de novo* judicial determination. Similarly, an offer to arbitrate under the ECT cannot be accepted unless the party purporting to accept it qualifies as an "Investor of another Contracting Party." *De novo* inquiry into these matters is called for. This is understandable, since the existence of such an agreement is essential to the existence of the arbitral tribunal's very authority to adjudicate.
44. Further, in order to benefit from the Russian Federation's offer to arbitrate, the Petitioners must not have achieved investor status and obtained their investment fraudulently. Whether the Petitioners conducted themselves in such a manner, and thus failed to accept the offer made by the Russian Federation or to otherwise bring an arbitration agreement into existence, is another matter for *de novo* determination by this Court.

### **B. DID THE CONDUCT OF THIS ARBITRATION OFFEND PRINCIPLES OF PROCEDURAL DUE PROCESS? (N.Y. Conv. Art. V(1)(b))**

In this Section, I consider whether aspects of the conduct of this arbitration violated the Russian Federation's due process rights, thereby justifying denying enforcement of the resulting Awards. The questions thereby raised and addressed here are the following:

- *Question 1: What is the relevance of the principles of due process and of the right to be heard in international arbitration proceedings?*



- *Question 2: In light of these principles, is an international arbitral tribunal free to depart from the parties' submissions on damages and develop its own damages methodology?*
- *Question 3: In the circumstances of this case, should the Tribunal have invited the parties to comment on its damages methodology?*

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***Question 1: What is the relevance of the principles of due process and of the right to be heard in international arbitration proceedings?***

45. Because arbitrators are vested with jurisdictional power and the authority to render decisions binding on the parties, procedural fairness is essential to the legitimacy of the arbitral process and the resulting award.
46. A failure of due process is accordingly a ground justifying denial of recognition or enforcement of a foreign award. The New York Convention expresses the requirement of procedural fairness in Article V(1)(b), according to which a court may decline to recognize or enforce a foreign award when “[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.” The right to be heard in international arbitration is deemed so fundamental that its violation justifies declining recognition and enforcement not only under Article V(1)(b) of the New York Convention, but also as a matter of public policy under Article V(2)(b) of the Convention.<sup>25</sup>
47. The U.S. courts have accordingly held that due process rights are “entitled to full force under the [New York] Convention as a defense to enforcement.”<sup>26</sup> When called upon to recognize or enforce foreign awards under the New York Convention, U.S. courts have thus emphasized the importance of the right to be heard and have interpreted Article V(1)(b) of the Convention as “essentially sanction[ing] the application of the forum state’s standards of due process.”<sup>27</sup> Under those standards, “[t]he fundamental

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<sup>25</sup> See, e.g., *Judgment of 8 December 2003*, XXIX Y.B. Comm. Arb. 834, 839-840 (Swiss Federal Tribunal 2004): “A foreign decision can be incompatible with the Swiss legal system not only because of its substantive content, but also because of the procedures that lead to it. In this respect, Swiss public policy requires compliance with the fundamental principles of procedure, as deduced from the Constitution, such as the right to a fair process and the right to be heard.”

<sup>26</sup> *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 975-976 (2d Cir. 1974).

<sup>27</sup> *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 298-299 (5th Cir. 2004); see also *First State Ins. Co. v. Banco de Seguros Del Estado*, 254 F.3d 354, 357 (1st Cir. 2001);

requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”<sup>28</sup> Thus, enforcement of a foreign award was refused under Article V(1)(b) of the New York Convention where a party “was denied the opportunity to be heard in a meaningful time or in a meaningful manner.”<sup>29</sup>

48. The right to be heard during conduct of the arbitral proceeding is universally recognized as a fundamental procedural principle applicable to international arbitral proceedings generally. This right is enshrined in virtually all instruments governing arbitral procedure:

- UNCITRAL Model Law 1985, as revised in 2006, art. 18 (*Equal treatment of parties*): “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”
- UNCITRAL Arbitration Rules 2010, art. 17: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the 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.”
- ICC Arbitration Rules 2012, art. 22(4): “In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.”
- LCIA Rules, art. 14.4(i): “Under the Arbitration Agreement, the Arbitral Tribunal’s general duties at all times during the arbitration shall include: (i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s).”
- ICDR Rules, art. 20(1): “Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”

49. International tribunals have themselves long acknowledged and underscored the importance of the right to be heard, whether as a matter of sound adjudicatory policy or

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*Generica Ltd. v. Pharmaceutical Basics, Inc.*, 125 F.3d 1123, 1129-1130 (7th Cir. 1997); *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA)*, 508 F.2d 969, 975-976 (2d Cir. 1974); *Telenor Mobile Commc’ns AS v. Storm, L.L.C.*, 524 F. Supp. 2d 332, 368 (S.D.N.Y. 2007); *Biotronik Mess-und Therapiegeraete GmbH v. Medford Med. Instrument Co.*, 415 F. Supp. 133, 140 (D. N.J. 1976).

<sup>28</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

<sup>29</sup> *Iran Aircraft v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992) (refusing to enforce the award under Article V(1)(b) upon finding that the arbitral tribunal had “denied Avco the opportunity to present its claim in a meaningful manner”).

as a means of ensuring the validity and enforceability of the eventual award. Thus, in his seminal study on general principles of law as applied by international courts and tribunals, Bin Cheng observes that “whenever there is such new evidence, alteration of the legal basis of the claim, or amendment of the original submission, the other party is always assured of an opportunity to reply thereto, or comment thereon.”<sup>30</sup> The same concern is made expressly apparent in the context of ICSID arbitration where annulment committees have consistently held under Article 52(1)(d) of the ICSID Convention that the parties’ right to be heard is a “fundamental” rule of procedure whose disrespect justifies annulment of an award. For example, the annulment committee in *Wena Hotels Limited v. Arab Republic of Egypt* found that:

It is fundamental, as a matter of procedure that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other.<sup>31</sup>

50. What constitutes a sufficient or “meaningful” opportunity to be heard and to present one’s case depends on the facts and circumstances of the particular case. What is certain is that the right to be heard takes on even greater importance in investor-State arbitrations, since such cases implicate the sovereign State’s duty to protect the public interest.
51. A special preoccupation in international practice is the requirement that arbitral tribunals refrain from rendering a decision that comes as a “surprise” to the parties because it is based upon considerations that were extraneous to their submissions and debate or upon reasoning that they could not reasonably have anticipated. Viewed in this light, the right to be heard takes on special importance in international arbitration because parties enjoy little or no judicial review of an arbitral tribunal’s legal and factual determinations.
52. An especially prominent example of this disapproval of surprise arbitral decision-making is the case of *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines* in which the ICSID annulment committee stated:

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<sup>30</sup> BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 295 (1952), citing *inter alia* *Legal Status of Eastern Greenland Case (Denmark v. Norway)* (1933) PCIJ Rep, Ser A/B No 53, at 25-6; *Chorzów Factory Case (Germany v. Poland)* (1928) PCIJ Rep, Ser A No 17, at 7.

<sup>31</sup> *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceedings, Decision, ¶ 57 (Feb. 5, 2002). See also a series of other ICSID cases: *Maritime International Nominees Establishment (MINE) v. Guinea*, ICSID Case No. ARB/84/4, Decision, ¶ 5.06 (Jan. 6, 1988); *CDC Group Plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Annulment Proceedings, Decision, ¶ 49 (June 29, 2005) (quoting *Wena Hotels*); *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/02/14, Annulment Proceedings, Decision, ¶ 49 (Mar. 21, 2007) (quoting *Wena Hotels*).

This [due process] principle requires both equality of arms and the proper participation of the contending parties in the procedure, these being separate but related fundamental elements of a fair trial. *The principle will require the tribunal to afford both parties the opportunity to make submissions where new evidence is received and considered by the tribunal to be relevant to its final deliberations. It is no answer to a failure to accord such a right that both parties were equally disadvantaged.*<sup>32</sup>

53. A similar preoccupation is reflected in judicial decisions in actions to set aside arbitral awards for violation of the right to be heard. Thus, in *Rotoaira Forest Trust v. Attorney-General*, the Auckland High Court confirmed that the *reasoning* on which an arbitrator bases his or her decision is subject to the same “surprise” standard:

e) In the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.

(f) *The last principle extends to the arbitrator’s own opinions and ideas if these were not reasonably foreseeable as potential corollaries of those opinions and ideas which were expressly traversed during the hearing.*

(g) On the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other. It will usually be no cause for surprise that arbitrators make their own assessments of evidentiary weight and credibility, pick and choose between different aspects of an expert’s evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented, and exercise reasonable latitude in drawing their own conclusions from the material presented.

(h) Nor is an arbitrator under any general obligation to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he finally commits himself.

(i) It follows from these principles that when it comes to ideas rather than facts, *the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award*, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result.

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<sup>32</sup> *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Annulment Proceedings, Decision, ¶ 202 (Dec. 23, 2010) (emphasis added).

(j) *Once it is shown that there was significant surprise it will usually be reasonable to assume procedural prejudice in the absence of indications to the contrary.*<sup>33</sup>

54. Legal scholarship in international arbitration and international law clearly endorses the notion that due process requires that parties be put in a position to address the considerations and reasoning on which a tribunal bases its decisions.
55. According to a leading scholar:

From the notion of equality follows a right to be heard. This broad principle must accordingly inform or permeate all stages of the arbitral process, from the constitution of the arbitral tribunal to the deliberations of the tribunal and the making of an award. Thus:

(a) each party must be given an effective opportunity to be heard on all aspects of the arbitral process (not already agreed upon in the form of arbitration rules), on all arguments of its opponent, *and on all the crucial points of the reasoning that the tribunal intends to adopt.*<sup>34</sup>

Still another scholar writes:

An essential element of the opportunity to be heard is the opportunity to comment on evidence introduced in the arbitral proceedings or on arguments advanced by a counter-party (*or the arbitral tribunal*). Failure to permit a party the opportunity to comment on evidence or argument will in principle constitute grounds for denying recognition of the resulting award.

...

An award may be denied recognition if the tribunal rests its decision on facts not presented or argued by the parties and, in some legal systems, on legal arguments not made by the parties. *Where a tribunal relies on facts not presented by the parties (for example, in the public domain...), without giving the parties an opportunity to address those facts, it violates their procedural rights.* If the facts in questions are central or necessary to the tribunal's decision, its award may be denied recognition.

More difficult questions are presented by an arbitrator's reliance on a legal argument not advanced by either party. In these circumstances, some national courts hold that this constitutes unfair surprise, denying the parties an opportunity

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<sup>33</sup> *Rotoaira Forest Trust v. Attorney-General*, [1999] 2 NZLR 452, 463 (Comm) (Auckland High Ct.) (emphasis added).

<sup>34</sup> GEORGIOS PETROCHILOS, *PROCEDURAL LAW IN INTERNATIONAL ARBITRATION* 145 (Oxford University Press 2004) (emphasis added).

to be heard... [O]ther courts appear to regard the tribunal's analysis of the law to be a largely *ex officio* function... The former view... is more consistent with the parties' right to be heard, particularly in an international context where little or no review of legal determinations is available.<sup>35</sup>

56. The current Restatement of the U.S. Law of International Commercial Arbitration is to the same effect:

In appropriate circumstances, an award may be denied recognition or enforcement if the tribunal's decision is based on facts or legal issues that were not presented or argued by the parties. If a party is denied an opportunity to address or rebut factual or legal issues, it may effectively be denied an opportunity to present its case, at least when the issues are material to the final disposition. An arbitral tribunal is not precluded from raising factual or legal issues sua sponte during the proceedings. However, the tribunal must then afford the parties an opportunity to address and respond to those issues.<sup>36</sup>

#### *Conclusion*

57. As indicated by New York Convention Article V(1)(b) and as consistently stated by courts and arbitral tribunals, as well as by international arbitration scholars, the right to be heard is fundamental to the legitimacy of international arbitration. This right entails a right to know sufficiently in advance the grounds on which a tribunal proposes to base its decision and to be able to address them. This principle takes on special importance in international arbitration because parties enjoy little or no judicial review of an arbitral tribunal's determinations.

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

58. The requirements of due process, and notably the right to be heard, apply with as much force to questions of damages as to questions of liability. There is no principled reason to treat remedial issues any differently in this regard than any other merits issues.
59. The mere fact that an arbitral tribunal does not adopt the valuation proffered by either party, but instead adopts its own position, is ordinarily unobjectionable. But to the extent that a tribunal's valuation method departs from the methods advanced or otherwise

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<sup>35</sup> GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3514-17 (2d ed. 2014) (Emphasis added).

<sup>36</sup> RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-13, Tentative Draft no. 2, Reporters' notes, at 186 (Apr. 16, 2012).

contemplated by the parties, and could not reasonably have been anticipated by them, the tribunal must give the parties an opportunity to comment.

60. Thus, in the *Rotoaira Trust* case, cited earlier,<sup>37</sup> the court announced and applied a “surprise” standard with respect to the tribunal’s damages determination. It ultimately rejected the challenge to the tribunal’s damages calculation on the ground that it should have been reasonably expected that the arbitrator might use the pricing model that it did. The Tribunal’s model was fairly common in the industry as a method of assessing rent, had been referenced by the parties, and had a real nexus to the other models proposed by the parties.
61. The reported cases reveal the lengths to which arbitral tribunals will go to ensure that parties are not surprised by a tribunal’s decision on damages and are given a fair opportunity to be heard on the tribunal’s reasoning in this regard. Many of these cases, like the present one, entail claims against sovereign States and very substantial sums of money. Notable examples include:

- *Amoco International Finance Corporation v. The Islamic Republic of Iran*. Here, the Iran-United States Claims Tribunal rejected the two valuation methods advanced and discussed by the parties, namely, discounted cash flow and net book value. The Tribunal held that damages should be assessed by reference to the going concern value of the asset, but noted that it “[was] not in possession of the data necessary to take a meaningful decision, and such data as has been provided has not been properly discussed by either of the Parties outside of the context of its favorite theory. In any event, therefore, *it would not be fair for the Tribunal to use that data in another context without asking the Parties to present their comments.*”<sup>38</sup> The Tribunal accordingly invited the claimant to provide the required data,

as well as its views on the most appropriate method, or methods, to be used in order to calculate the value of these components and of the concern as a whole, taking into consideration the findings of the Tribunal contained in this award.

The respondent was then given an opportunity to comment and submit any complementary data and evidence.<sup>39</sup>

- *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*. In this case, the Tribunal awarded close to US\$ 800 million in damages against the Bolivarian Republic of

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<sup>37</sup> See para. 53 *supra*.

<sup>38</sup> *Amoco Int’l Fin. Corp. v. The Islamic Republic of Iran*, No. 310-56-3, Partial Award of July 14, 1987, 15 IRAN-U.S. C.T.R. 189, ¶¶ 266-68 (Annex (Merits) C 939 (emphasis added)).

<sup>39</sup> *Id.*

Venezuela. Having heard the parties on both liability and damages in February 2012, in July 2012 the Tribunal invited the parties and their experts to consider certain new assumptions in their damages calculations. To that end, the Tribunal gave the parties a full opportunity to be heard, including through initial and reply expert reports, written observation, an oral hearing, and post-hearing submissions.<sup>40</sup>

- *Occidental Petroleum Corporation & Occidental Exploration and Production Company v. Republic of Ecuador*. In this case, the Tribunal awarded in excess of US\$ 1.7 billion in damages against the Republic of Ecuador. The proceedings had been bifurcated into liability and quantum phases. Following the liability phase, the Tribunal held two hearings on quantum and, during its subsequent deliberations, sought the assistance of the parties' damages experts "in order to help the Tribunal assess the proper calculations of damages."<sup>41</sup> The Tribunal required that the parties' experts provide a joint report on certain issues and established a procedure for the parties to comment on that joint report.<sup>42</sup> It then held a further hearing, invited further submissions by the parties and their experts on specific issues and held a final hearing, before finally declaring the proceedings closed.<sup>43</sup>
62. It is due to these basic fairness considerations that tribunals are expected to submit to the parties for comment the opinions of any experts whom the tribunal itself appoints to guide it in its assessment of damages. The tribunal did precisely this in the case of *National Grid Plc. v. Argentine Republic*.<sup>44</sup> Particularly illustrative is the case of *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*.<sup>45</sup> There, the Tribunal issued a decision on liability and set up a separate procedural phase to address the question of damages, in connection with which it appointed an independent expert. It then expressly invited the parties to comment on the

<sup>40</sup> *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, ¶¶ 126; 128-212; 682; 691 (Sept. 22, 2014).

<sup>41</sup> *Occidental Petroleum Corp. & Occidental Exploration and Prod. Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, ¶¶ 78, 67, 74 (Oct. 5, 2012).

<sup>42</sup> *Id.*, ¶¶ 78-82.

<sup>43</sup> *Id.*, ¶¶ 83-100.

<sup>44</sup> *National Grid Plc. v. Argentine Republic*, Award, ¶¶ 44-50 (UNCITRAL Nov. 3, 2008). In that case, the Tribunal awarded US\$ 53.5 million in damages against the Republic of Argentina. The merits hearing was held in July 2007, and the parties were heard on issues of both liability and damages. In November 2007, the Tribunal advised the parties that it would appoint an independent expert to review the submissions of the parties' damages expert. The Tribunal sought the parties' comments observations on both the draft and final reports of the independent expert.

<sup>45</sup> *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (Apr. 9, 2015). See also *AWG Grp. Ltd. v. The Argentine Republic*, Award, ¶ 7 (UNCITRAL Apr. 9, 2015).



expert's reports on damages, both preliminary and final, to make further submissions. It thereafter even held a separate additional hearing on damages.<sup>46</sup>

63. Whether or not a tribunal engages its own expert, the proper practice, when a tribunal anticipates relying on a method for assessing damages distinct from the methodology advanced by the parties, is to inform the parties of the tribunal's independent analysis and accord them an adequate opportunity to comment on that approach and suggest how, if adopted, it should be applied. In the case of *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, the tribunal rejected the valuation methods advanced by the parties and communicated its proposed methodology through the issuance of procedural orders and invited the parties to comment.<sup>47</sup>
64. The decision of an arbitral tribunal that does not invite the parties to comment on its own proposed methodology is liable to be refused recognition and enforcement under Article V(1)(b) of the New York Convention in much the same way as the decision of a tribunal that appoints an expert, but does not invite the parties to comment on that expert's methodology and findings. The decision of the Supreme Court of Hong Kong in *Paklito Investment Limited v. Klockner East Asia, Limited* provides an apt illustration.<sup>48</sup> In that case, the arbitral tribunal had appointed experts and based its award on those experts' appraisal, without giving the parties an opportunity to comment. The Court denied enforcement under the local ordinance incorporating the New York Convention on the basis that the defendants were thus prevented from presenting their case.

### *Conclusion*

65. Procedural due process requires that parties have a reasonable opportunity to know and comment upon the basis on which a tribunal proposes to found its decisions. Surprise decisions on remedial issues, such as damages and their calculation, are as offensive to the right to be heard as surprise decisions on issues of liability.

### ***Question 3: In the circumstances of this case, should the Tribunal have invited the parties to comment on its damages methodology?***

66. In the arbitrations, the Petitioners sought in excess of US\$ 114 billion as compensation for (a) the value of their equity interest (shares) in Yukos, and (b) the value of the dividends they would have received but for the expropriation, plus pre-award interest, all

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<sup>46</sup> *Id* at ¶ 7.

<sup>47</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E Int'l Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, ¶¶ 8-9 (July 25, 2007).

<sup>48</sup> *Paklito Investment Ltd. v. Klockner East Asia, Limited* (Jan. 15, 1993), XIX Y.B. Comm. Arb. 664 (HK Supreme Court 1993).

valued as at November 21, 2007 (which they contended was the date of the expropriation).<sup>49</sup>

67. In my experience, valuation exercises of this nature are extremely complex and based on many variables that, in large part, depend on the actual factual findings of the arbitrators. The date of the expropriation, which was at issue here, is a case in point. An expropriation is often the result of a series of actions by a state, sometimes over a period of years, and several dates can be chosen along that continuum, with a dramatic impact on the valuation exercise. As a result, it is common, especially in large-scale arbitrations, for arbitral tribunals to bifurcate proceedings into separate liability and damages phases. The *Occidental* arbitration, referenced above,<sup>50</sup> is an example of such a bifurcated approach.
68. In its Final Awards, the Tribunal rejected the notion that the Petitioners had effectively been expropriated on November 21, 2007 and held instead that damages had to be valued as of December 19, 2004 (the date on which Yukos's main production unit was auctioned off) or June 30, 2014 (used as proxy for the date of the Final Awards).<sup>51</sup>
69. In similar circumstances, where a key factual premise of the parties' valuations is modified, it is standard practice for an arbitral tribunal to require further submissions. The Tribunal did not, and instead elaborated its own methodology to assess both Yukos's equity value and Yukos's dividends as of December 19, 2004 and June 30, 2014.
70. I understand that the Tribunal adopted the following approach to calculate Yukos's equity value and dividends:
  - To calculate Yukos's equity value as of 2004 and 2014, the Tribunal relied on an estimate of Yukos's equity value as of 2007 and moved that value backward and forward to 2004 and 2014 on the basis of a price index of other Russian oil and gas companies, the "RTS Index."
  - To calculate Yukos's dividends through 2014, the Tribunal did not rely on the dividend yield of the RTS Index, but instead calculated Yukos's dividends separately on the basis of certain cash flows derived from the Petitioners' DCF model (with adjustments).
71. I also understand from Professor Dow, who submitted a report in the Dutch set aside proceedings and whom, I understand, is submitting a report in the present proceedings,

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<sup>49</sup> Final Award in *Hulley Enterprises Ltd v. The Russian Federation* (PCA Case No. AA 226, 2014); Final Award in *Yukos Universal Ltd v. The Russian Federation* (PCA Case No. AA 227, 2014); Final Award in *Veteran Petroleum Ltd v. The Russian Federation* (PCA Case No. AA 228, 2014) (collectively, the "Final Awards"), ¶¶ 1695-96; 1712-24.

<sup>50</sup> See para. 61 *supra*.

<sup>51</sup> Final Awards, ¶¶ 1759-69.

that the methodology developed by the Tribunal is not standard, not taught in business school or used by valuation practitioners, and as such could not have been reasonably foreseen by the parties' experts.<sup>52</sup>

72. I further understand from Professor Dow's Report that the Tribunal's methodology resulted in massive double-counting and in awarding in excess of US\$ 21 billion of unwarranted damages.<sup>53</sup>

### *Conclusion*

73. It is incontrovertible that parties in international arbitration are entitled to know and have an opportunity to address the basis on which a tribunal proposes to develop its award on the merits. It appears that the Tribunal in this case predicated its decision on damages on an analysis that was not made known to the parties in advance and whose application they had no reason to anticipate. The Tribunal, in keeping with sound arbitral practice, should have brought its damages methodology to the parties' attention and enabled them to consider and comment on it.
74. I personally regard this as among my responsibilities as arbitrator and I have consistently acted on that basis. In that capacity, I have on several occasions found in the course of deliberations that neither party's valuation method was satisfactory and felt obliged to undertake an independent damages analysis. On those occasions, I have felt it incumbent on me to reopen the proceedings so as to inform the parties of the methodology I favored and proposed to apply, and to permit the parties to comment on that methodology and its application. Similarly, in circumstances where a key factual premise of the parties' valuations, such as the date as of when a loss is to be valued, is modified, it is standard practice for an arbitral tribunal to require further submissions (and, if necessary, reopen the proceedings). This is especially so where substantial claims are presented against a sovereign State.
75. Given the unprecedented magnitude of the claim presented against the Russian Federation (US\$ 114 billion – to my knowledge, by far the largest amount ever claimed in international arbitral proceedings), the fact that the Tribunal did not see fit to do seek further submissions is troubling. Even more troubling in this context is the Tribunal's subsequent attempt to assemble its own new valuation method, without seeking the views of the parties or their experts, a perilous exercise under any circumstances and, especially, in the unique circumstances of this mammoth case.

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<sup>52</sup> See Expert Report of James Dow dated November 8, 2014.

<sup>53</sup> *Id.*

76. In my opinion, insofar as the method developed by the Tribunal – using a price index to move a company’s equity value over an extended period of time and calculating separately that company’s dividends on the basis of an unrelated source – was not one that the parties’ experts had considered and, not being a standard method, not one that they could have reasonably anticipated, the Russian Federation rightly complains that, in violation of basic due process and the fundamental right of defense, the Tribunal rendered a “surprise” decision.
77. On that basis, enforcement of the Awards may properly be denied by this Court under Articles V(1)(b) of the New York Convention.

**C. DID THE TRIBUNAL VIOLATE THE PARTIES’ AGREEMENT ON COMPOSITION OF THE PANEL? (N.Y. Conv. Art. V(1)(d))**

78. In this Section, I consider whether the Tribunal failed in this case to respect the parties’ agreement concerning the composition of the arbitral tribunal. The questions thereby raised and addressed here are the following:

- *Question 1: What is the nature of the arbitrator’s mandate in international arbitral practice?*
- *Question 2: Is the use of arbitral secretaries and assistants accepted in international arbitral practice and, if so, what are the limits on their use in international arbitral practice?*
- *Question 3: In the circumstances of the case, did Mr. Valasek overstep the accepted role in international arbitral practice of an arbitral assistant?*

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***Question 1: What is the nature of the arbitrator’s mandate in international arbitral practice?***

79. Importantly, a defining feature of international arbitration proceedings is the right of the parties, in an exercise of party autonomy, to select the arbitrators and define their mandate. In practice, parties select arbitrators on account of such factors as their knowledge, experience, judgment, reputation, and character, as well as their availability to serve. The importance of party autonomy in the selection of the arbitrators is reflected in Article V(1)(d) of the New York Convention which authorizes courts to deny

recognition or enforcement of a foreign award if “[t]he composition of the arbitral authority ... was not in accordance with the agreement of the parties.”<sup>54</sup>

80. As a corollary of this principle, the mandate of an arbitrator is a personal one and cannot be delegated to a third party. The AAA/ABA Code of Ethics, Canon V(C), accordingly expressly provides that “[an] arbitrator should not delegate the duty to decide to any other person.” Legal scholars unanimously and uniformly subscribe to the view that, as one authority has expressed it, “[in] accepting appointment, an arbitrator necessarily accepts a duty not to delegate that mandate.”<sup>55</sup>
81. The core responsibilities of an arbitrator include not only organizing and participating in the hearings, but also evaluating the parties’ submissions and evidence, and deciding the legal and factual issues in the case. It is especially in light of the latter decision-making functions that parties will have made their selection of arbitrators – a choice determined by the kind of highly individualized factors identified immediately above.<sup>56</sup> That reality renders it impermissible in my view for an international arbitral tribunal to delegate its assigned professional responsibilities to others.

### *Conclusion*

82. A cardinal feature of international arbitration – and one that is notably distinct from national court adjudication – is recognition of and respect for party autonomy in designation of the individuals to whom the adjudicatory function is entrusted. Parties are entitled to have all essential aspects of the adjudicatory function performed exclusively by the person or persons designated in accordance with their arbitration agreement, and by no other. It is a violation of Article V(1)(d) for the anticipated composition of an arbitral tribunal to be effectively altered by delegation of those functions without the informed consent of the parties.

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<sup>54</sup> *Encyclopaedia Universalis SA v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 91 (2d Cir. 2005) (stating that “Article V(1)(d) of the New York Convention itself suggests the importance of arbitral composition” and refusing to enforce an award because the tribunal did not “comport with [the] agreement’s requirements for how arbitrators are selected”).

<sup>55</sup> Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 *ARB. INT’L* 147, 147 (2002); see also Eric Schwartz, *The Rights and Duties of ICC Arbitrators*, in ICC, *THE STATUS OF THE ARBITRATOR* 67, 86 (ICC Ct. Bull. Spec. Supp. 1995) (noting the “[b]road international consensus that the arbitrator’s mandate is a personal one and is not to be delegated to another person”).

<sup>56</sup> See para. 79 *supra*.

***Question 2: Is the use of arbitral secretaries and assistants accepted in international arbitral practice and, if so, what are the limits on their use in international arbitral practice?***

83. It is common arbitral practice around the world, especially in investor-State arbitration, for tribunals to employ secretaries to assist them in administering the arbitral proceedings. As the term “secretary” suggests, such an individual is meant to perform tasks of an essentially administrative character, and it is so understood. By contrast, the term “assistant,” which has surfaced in this case is of no certain meaning. It is difficult to tell precisely from this term alone which functions that person can be expected to perform.
84. The personal nature of the arbitrator’s mandate, as described above, necessarily imposes limits on a tribunal’s use of arbitral secretaries or, to the extent that they may also be employed, arbitral assistants.
85. First, a tribunal that intends to employ any such person is duty-bound to inform the parties of that intention, to disclose the role and involvement he or she is expected to have, and to obtain the parties’ express consent. According to a Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association:

The proper use of arbitral secretaries in large and complex international arbitrations increases the efficiency of arbitration, thereby benefiting both arbitrators and parties. The arbitral secretary, by assuming administrative and in some instances more substantive duties, can reduce the workload of the arbitral tribunal allowing it to focus on the substantive issues in the case. *There is concern that a secretary permitted substantial involvement may exercise undue influence over the arbitral tribunal and, as a result, affect the disposition.* This concern is best addressed by disclosure, transparency and informed consent of the parties.”<sup>57</sup>

86. Second, while the exact scope of permissible involvement of secretaries in arbitral proceedings varies among jurisdictions,<sup>58</sup> the prevailing international practice dictates that secretaries should neither participate in nor influence the arbitral tribunal’s core functions, and thus not participate at all in evaluating the parties’ submissions and evidence or deciding the legal and factual issues in the case. As Gary Born has put the matter, “a central premise of the role of the secretary is that he or she may not assume the

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<sup>57</sup> Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitration Tribunals*, 17 AM. REV. INT’L ARB. 575, 589, 591-592 (2006) (emphasis added).

<sup>58</sup> See the Russian Federation’s Statement of Reply before the District Court of The Hague, September 16, 2015, p. 229.

tribunal's or (an arbitrator's) functions and may not influence the tribunal's decision."<sup>59</sup> The limited function of arbitral secretaries is captured by the notion that their functions are strictly "administrative."

87. The strictness of these limitations is made explicit in the rules and guidance of the leading arbitral institutions. Among the most prominent institutional formulations of the principles are the following:

- UNCITRAL, Notes on Organizing Arbitral Proceedings 1996, ¶ 27:

"To the extent the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate *or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal*" (emphasis added).

- ICC, Note on the Appointment, Duties and Remuneration of Administrative Secretaries, ¶ 2:

"An Administrative Secretary may perform organizational and administrative tasks such as: transmitting documents and communications on behalf of the Arbitral Tribunal; organizing and maintaining the Arbitral Tribunal's file and locating documents; organizing hearings and meetings; attending hearings, meetings and deliberations; taking notes or minutes or keeping time; conducting legal or similar research; and proofreading and checking citations, dates and cross-references in procedural orders and awards as well as correcting typographical, grammatical or calculation errors.

*Under no circumstances may the Arbitral Tribunal delegate decision-making functions to an Administrative Secretary. Nor should the Arbitral Tribunal rely on the Administrative Secretary to perform any essential duties of an arbitrator.*

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<sup>59</sup> GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1999 (2d ed. 2014).

...

*A request by an Arbitral Tribunal to an Administrative Secretary to prepare written notes or memoranda shall in no circumstances release the Arbitral Tribunal from its duty personally to review the file and/or to draft any decision of the Arbitral Tribunal (emphasis added).*

- LCIA, Frequently Asked Questions, “What is the LCIA’s position on the appointment of Secretaries to Tribunals”:

“The duties of the administrative secretary should neither conflict with those for which the parties are paying the LCIA Secretariat, nor constitute any delegation of the Tribunal’s authority....

*Administrative secretaries should, therefore, confine their activities to such matters as organising papers for the Tribunal, highlighting relevant authorities, maintaining factual chronologies, keeping the Tribunal’s time sheets and so on” (emphasis added).*<sup>60</sup>

- HKIAC, Guidelines on the Use of a Secretary to the Arbitral Tribunal (June 1, 2014), arts. 3.4, 3.6: “Unless the parties agree or the arbitral tribunal directs otherwise, a tribunal secretary may provide the following assistance to the arbitral tribunal, provided that the arbitral tribunal ensures that the secretary does not perform any decision-making function or otherwise influence the arbitral tribunal’s decisions in any manner:

(a) conducting legal or similar research; collecting case law or published commentaries on legal issues defined by the arbitral tribunal; checking on legal authorities cited by the parties to ensure that they are the latest authorities on the subject matter of the parties’ submissions;

(b) researching discrete questions relating to factual evidence and witness testimony;

(c) preparing summaries from case law and publications as well as producing memoranda summarising the parties’ respective submissions and evidence;

(d) locating and assembling relevant factual materials from the records as instructed by the arbitral tribunal;

(e) attending the arbitral tribunal’s deliberations and taking notes; and

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<sup>60</sup> LCIA Website, Frequently Asked Questions, “What is the LCIA’s position on the appointment of Secretaries to Tribunals”, available at [http://www.lcia.org/frequently\\_asked\\_questions.aspx](http://www.lcia.org/frequently_asked_questions.aspx) (emphasis added).



*(f) preparing drafts of non-substantive letters for the arbitral tribunal and non-substantive parts of the tribunal's orders, decisions and awards (such as procedural histories and chronologies of events).*

...

*A request by the arbitral tribunal to a tribunal secretary to prepare notes, memoranda or drafts shall in no circumstances release the arbitral tribunal from its duty personally to review the relevant files and materials, and to draft any substantive parts of its orders, decisions and awards” (emphasis added).*

88. The policies set out in these institutional rules and recommendations have gained a powerful consensus within the international arbitral community, resulting in arbitral secretaries being assigned the drastically circumscribed role in the arbitral proceedings described earlier.
89. An aspect of the arbitral process that figures importantly in any discussion of the proper role of arbitral secretaries is drafting of the award. Many tribunals categorically exclude secretaries from taking any part whatsoever in the drafting of an award. For example, leading French academic and practitioner, Professor Thomas Clay, expressed his opposition to allowing arbitral secretaries to participate in the drafting of the award to any degree:

It does not seem to me acceptable that the arbitral secretary participates in the deliberations or is entrusted with the task of drafting a procedural order or award, even a partial award. For example, Fernando Mantilla-Serrano writes in this regard: “No reason can justify the secretary in participating in the deliberations about the award as if he were arbitrator, and he must not, in principle, participate in the drafting of arbitral decisions.”... The arbitral secretary should refrain from exercising any influence whatsoever over the resolution of the dispute...the award is the product of the arbitrators and no one else.<sup>61</sup>

90. The ICC guidelines, referenced above, also make clear that arbitrators are under a “duty personally to review the file and/or to draft any decision of the Arbitral Tribunal.” The HKIAC guidelines are to the same effect.
91. Other tribunals, however, task secretaries with producing first drafts of certain portions of awards, but only those typically early portions of an award that identify, among other things, the parties and counsel (and other factual items such as applicable law or language of the arbitration), or recite the basic procedural history of the case, or even possibly (though even this is controversial) a summary of the parties’ positions. The reason why

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<sup>61</sup> Thomas Clay, *Le secrétaire arbitral*, REVUE DE L'ARBITRAGE 953-955 (Issue 4 2005) (my translation from the French original).

secretarial drafting of these portions is commonly allowed is that it is viewed as a largely ministerial task. As chair, I myself studiously avoid assigning arbitral secretaries any greater drafting role than that (and I do not in fact allow them to summarize, even in draft form, the positions of the parties).

92. What seems clear to me is that arbitral secretaries must not – absent clear and unmistakable evidence of party agreement to the contrary – perform any function that entails an assessment of any aspect of the case relevant to drafting substantive portions of an award.
93. Among leading arbitrators who have spoken emphatically to the matter is Michael Hwang, who, by his account, allows secretaries to do no more than:
- (1) handle all secretarial and administrative matters in the absence of an institution.
  - (2) communicate with the parties under the supervision of the Tribunal (through its Chairman).
  - (3) proof-read procedural orders and award(s) that may be rendered by the Tribunal.
  - (4) check on legal authorities cited by Counsel to ensure that they are up to date and most relevant to the subject matter of Counsel's submissions (any new cases unearthed by the Legal Assistant will be referred to the Parties for their comments).
  - (5) assemble or locate relevant factual materials from the record as instructed by the Tribunal.
  - (6) prepare a first draft of the formal or uncontroversial parts of any decision or award that may be rendered by the Tribunal (e.g., procedural history and chronology of events).<sup>62</sup>

He summarizes as follows: "In terms of substance, while [arbitral secretaries] will provide substantial assistance to me in the preparation of the award in drafting the non-contentious sections, the discussion section is invariably my own product and the conclusions my own after careful review of all the arguments and evidence."<sup>63</sup>

94. It is generally viewed as impermissible for arbitral secretaries to produce even a preliminary draft of substantive portions of an award. This is so, irrespective of the degree of care a tribunal brings to its subsequent review of the draft:

Even a careful review by an arbitrator of a secretary's first draft does not entirely remove the scope given to the secretary to make judgements as to what to

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<sup>62</sup> MICHAEL HWANG, *Introduction: Musings on International Arbitration*, in *SELECTED ESSAYS ON INTERNATIONAL ARBITRATION* 16 (SIAC 2013).

<sup>63</sup> *Id.*

emphasize and what to omit, judgements that the arbitrator reviewing the draft may not even be able to identify never mind control. *The act of writing is the ultimate safeguard of intellectual control. An arbitrator should be reluctant to relinquish it.*<sup>64</sup>

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As a general rule, the drafting of the substantive parts of the final award, which include its operative part, must be reserved for the arbitral tribunal. *It is particularly in this substantive section where writing one's own text instead of reading the text prepared by someone else remains the ultimate means of intellectual control of the tribunal's decision of the dispute* as the essential tool for safeguarding the proper performance of the arbitrators' personal decision-making duty owed to the parties that have appointed them, thereby preserving the integrity of the arbitral process as such.<sup>65</sup>

95. There thus exists in international arbitration a powerful consensus that for arbitral secretaries to draft substantive portions of the awards is off limits. The consensus in this respect is especially clear and overwhelming. According to a 2015 survey of international arbitrators and practitioners conducted by Queen Mary University of London (in conjunction with White & Case LLP) and based on 763 questionnaire responses and 105 in-person interviews, over 87% of survey respondents opposed having arbitral secretaries prepare drafts of substantive parts of the awards or even discuss the merits of the dispute with the arbitrators.<sup>66</sup> Similar surveys of international arbitrators decidedly reflect that same consensus.<sup>67</sup>

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<sup>64</sup> Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARB. INT'L 147, 163 (2002) (emphasis added).

<sup>65</sup> KLAUS PETER BERGER, Part III, 27<sup>th</sup> Scenario: *Deliberation of the Tribunal and Rendering of the Award*, in PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS NEGOTIATION, MEDIATION AND ARBITRATION 613-642, at ¶ 27-19 (3d rev. ed. 2015) (emphasis added).

<sup>66</sup> 2015 Queen Mary/White & Case International Arbitration Survey, pp. 42-44.

<sup>67</sup> See 2012 Queen Mary/White & Case International Arbitration Survey, p. 12; Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association which found in a survey of a small number of highly prominent international arbitrator that:

(a) 14 respondents considered it proper to use secretaries only for "organization of the documents in the file, the drafting of letters regarding scheduling and procedural matters, and the preparation and minutes of hearings,"

(b) 11 respondents considered it proper to use secretaries for drafting purposes only in connection with "non-substantive" portions of the award, such as "the procedural history of the arbitration, the description of the parties, and sometimes also the summary of the parties' contentions," and

(c) two respondents would "refuse to assign any drafting responsibilities to the secretary," while

(d) only three Respondents would permit secretaries to prepare a first draft of the award.

*Conclusion*

96. It clearly emerges from the above that arbitral secretaries may not participate in any aspect of arbitral proceedings that might entail any form of influence over substantive arbitral decision-making, such as preparing drafts of substantive portions of the award. Should a tribunal contemplate vesting any such exercise of influence in a secretary, it is duty bound to inform the parties clearly of that intention and seek and obtain their express consent.

***Question 3: In the circumstances of the case, did Mr. Valasek overstep the accepted role in international arbitral practice of an arbitral assistant?***

97. I understand that the Russian Federation questions the role played in the arbitrations by Mr. Martin Valasek, a partner with the law firm of Norton Rose Fulbright LLP in Montreal. I have reviewed the record relating to the appointment and role of Mr. Valasek as “assistant” to the Tribunal and summarize below the key facts as I understand them.

***a. Mr. Valasek’s Appointment as Tribunal “Assistant”***

98. As is the norm in arbitrations administered by the Permanent Court of Arbitration (PCA), the PCA Secretariat in The Hague provided administrative and logistical support to the Tribunal. During the initial procedural conference, the Tribunal thus appointed Mr. Brooks Daly of the PCA as Administrative Secretary to the Tribunal.<sup>68</sup>
99. The Tribunal’s Terms of Appointment, which were executed by the parties and the arbitrators during the initial procedural conference on October 31, 2005, set out the role of the Administrative Secretary in the following terms:<sup>69</sup>

The Tribunal may appoint a member of the Registry to act as Administrative Secretary. The Administrative Secretary and other members of the International Bureau [of the PCA] shall carry out *administrative* tasks on behalf of the Tribunal (emphasis added).

100. Toward the end of the initial procedural conference, the Chairman of the Tribunal simply told the parties that he had asked Mr. Martin Valasek, then an associate at his firm, to “assist” him in the conduct of the case. The Chairman advised the parties as follows:

I would like to bring to the attention of the parties that I have asked one of my colleagues in my office in Montreal to *assist* me in the conduct of this case.

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Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitration Tribunals*, 17 AM. REV. INT’L ARB. 575 (2006).

<sup>68</sup> Final Awards, p. 10.

<sup>69</sup> Terms of Appointment (Oct. 31, 2005) ¶ 7(c).

Because, like all of us, I travel a lot, if at any time I am unreachable, you could always contact him. He has been about eight or nine years at the bar. His name is Martin Valasek. ... It may come to pass that you wish to find out something with respect to the tribunal that Brooks Daly might not be aware of. Martin at my office in Montreal could be reached and hopefully will have the answer for you (emphasis added).<sup>70</sup>

101. As described, the role of Mr. Valasek was limited to responding to counsel in the event that the chair of the Tribunal happened at any given time to be out of town or otherwise unreachable
102. I understand that this is the only record of Mr. Valasek's appointment. The Terms of Appointment, finalized on the same day, make no mention of Mr. Valasek's role as assistant to the Tribunal.<sup>71</sup>

**b. Mr. Valasek's Background and Involvement in the Issues**

103. Mr. Martin Valasek became a partner of his law firm Ogilvy Renault LLP (now Norton Rose Fulbright LLP) in Montreal in Montreal in 2006, and is now the firm's Head of International Arbitration, Canada. He is a member of the Panel of International Commercial Arbitrators maintained by the Canadian Chamber of Commerce and regularly sits as an international arbitrator.<sup>72</sup>
104. In 2011, while he was serving as assistant to the Tribunal, Mr. Valasek was named one of 45 leading international arbitration practitioners around the world under the age of 45.<sup>73</sup> In the same year, he was recognized in the "International Who's Who" of Arbitration Lawyers.<sup>74</sup>
105. I also note that Mr. Valasek was involved as counsel with, and published about, matters of significance to the proceedings. Mr. Valasek was counsel to the claimants in the first investment arbitration in which damages for unlawful expropriation were valued as of the date of the award (*ADC v. Hungary*).<sup>75</sup> He published on that topic during the pendency

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<sup>70</sup> Transcript of the Procedural Hearing held on October 31, 2005, 93:21-93:8 (emphasis added).

<sup>71</sup> Terms of Appointment (Oct. 31, 2005).

<sup>72</sup> Profile of Martin Valasek, Norton Rose Fulbright Webpage, available at <http://www.nortonrosefulbright.com/people/42426/martinjvalasek>.

<sup>73</sup> Global Arbitration Review, 45 Under 45 (2011), available at <http://globalarbitrationreview.com/surveys/article/29699/gar-45-under-45-2011-introduction/>.

<sup>74</sup> Profile of Martin Valasek, Norton Rose Fulbright Webpage, available at <http://www.nortonrosefulbright.com/people/42426/martinjvalasek>.

<sup>75</sup> *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006).

of the *Yukos* arbitrations.<sup>76</sup> The same issue was before the *Yukos* Tribunal, which adopted the *ADC v. Hungary* approach.<sup>77</sup>

106. In my experience, in contrast to the circumstances of the present case, tribunal secretaries tend to be relatively young jurists with limited direct experience in international arbitral proceedings. In addition, they certainly have no prior involvement whatsoever in the dispute or with the issues likely to be of moment in it.

**c. Evidence of Mr. Valasek's Involvement in the Drafting of the Awards**

107. So far as I know, there is no direct information in the record as to the exact range of functions performed by Mr. Valasek for this Tribunal or as to the amount of time he devoted to each of them. I imagine that information is known only to him and the Tribunal members. However, there are in this case some highly troubling indications.
108. So far as the billing of hours is concerned, the Final Awards show that Mr. Valasek billed in excess of USD 1 million (EUR 970,562.50) in connection with his role as assistant to the Tribunal.<sup>78</sup>
109. I have seen copies of the three PCA Statements of Account dated January 29, 2008, February 4, 2009 and 6 October 2014.<sup>79</sup> The first two Statements present the hours billed by the arbitrators and Mr. Valasek up to the end of 2008, that is, up until the end of the hearing on jurisdiction and admissibility (on 1 December 2008). The hours are as follows:

Name	Hours Through December 31, 2008
Chairman Fortier	490.5
Arbitrator Price	138.05
Arbitrator Poncet (replaced Price)	349

<sup>76</sup> Pierre Bienvenu & Martin Valasek, *Compensation for Unlawful Expropriation, and Other Recent Manifestation of the Principle of Full Reparation in International Investment Law, in 50 YEARS OF THE NEW YORK CONVENTION 231* (2009).

<sup>77</sup> Final Awards, ¶ 1769.

<sup>78</sup> Final Awards, ¶ 1863.

<sup>79</sup> Letter from Secretariat to Parties enclosing Statement of Account dated January 29, 2008 for the period through December 31, 2007; Letter from Secretariat to Parties dated June 2, 2009, enclosing Statement of Account dated February 4, 2009 for the period through December 31, 2008; Letter from Secretariat to Parties enclosing Statement of Account dated October 6, 2014 for the period through the end of the arbitrations.

Arbitrator Schwebel	564.6
<b>Assistant Valasek</b>	<b>381</b>

110. This table shows that, up until the close of the hearing on jurisdiction and admissibility, the arbitrators had spent significantly more time on the case than had Mr. Valasek.
111. After the Final Awards, the PCA provided a third Statement of Account, dated October 6, 2014, providing the total number of hours from the start of the arbitral proceedings until issuance of the Final Awards on July 18, 2014.<sup>80</sup> The following table shows these numbers:

Name	Hours Through Final Awards
Chairman Fortier	2082.75
Arbitrator Price	138.05
Arbitrator Poncet (replaced Price)	1889
Arbitrator Schwebel	2417.2
<b>Assistant Valasek</b>	<b>3006.2</b>

As is clear, Mr. Valasek reported hours over the life of the arbitration considerably in excess of the hours reported by any of the tribunal members.

112. In order to determine the number of hours spent on the case by the arbitrators and Mr. Valasek in the period following the hearing on jurisdiction and admissibility, I have subtracted from the third Statement of Account the combined hours from the first two Statements. The table below sets out this simple calculation:

Name	Total Hours	Hours Through December 31, 2008	Hours from January 1, 2009 to Final Awards

<sup>80</sup> Since the Interim Awards on jurisdiction and admissibility were rendered on November 30, 2009, it is not clear how much time was spent by the arbitrators and Mr. Valasek in the preparation of the Interim Awards.

Chairman Fortier	2082.75	490.5	1592.25
Arbitrator Price	138.05	138.05	0
Arbitrator Poncet (replaced Price)	1889	349	1540
Arbitrator Schwebel	2417.2	564.6	1852.6
<b>Assistant Valasek</b>	<b>3006.2</b>	<b>381</b>	<b>2625.2</b>

113. When we thus isolate the period from 2009 until the end of the arbitrations, the gap in hours between those reported by Mr. Valasek and those reported by the individual Tribunal members becomes even more pronounced. During this period, Mr. Valasek worked 1,033 hours (or 65%) more than Mr. Fortier, 773 hours (or 40%) more than Mr. Schwebel and 1,085 hours (or 70%) more than Mr. Poncet. Significantly, throughout this period the PCA Secretariat itself, as contemplated, provided significant logistical and administrative assistance to the Tribunal. Thus, Mr. Valasek's time in performing administrative tasks by way of assistance to the Tribunal also comes on top of very substantial PCA Secretariat support.
114. I also find it striking that the proportion of hours billed by the arbitrators and Mr. Valasek reverses dramatically after the hearing on jurisdiction and admissibility, which was the more substantive phase of the Arbitrations during which the drafting of the Interim Awards on Jurisdiction and Admissibility, the assessment of the arguments and evidence on the merits, and the drafting of the Final Awards would have taken place.
115. The exact tasks performed by Mr. Valasek are not apparent on the face of the PCA Statements of Account. Even so, based on my experience as an international arbitrator, I am unable to think of a situation in which an arbitral secretary or other person tasked with administrative responsibilities in an arbitral proceeding charged more time than each of the arbitrators. On the tribunals on which I have served as arbitrator, the arbitral secretary has invariably spent markedly less time than each of the arbitrators.
116. Taken together, these circumstances suggest that the Tribunal allowed Mr. Valasek to play an unusually heavy role in the substantive aspects of the arbitral proceedings. It also suggests that that role, given the number and timing of hours spent, in all probability