PCA Case No 2013-31

IN THE MATTER OF
AN ARBITRATION PURSUANT TO
ARTICLE 26 OF THE ENERGY CHARTER TREATY

BEFORE
A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH
THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW OF 1976

- between –

YUKOS CAPITAL LIMITED
(formerly YUKOS CAPITAL S.À R.L.)

(the Claimant)

- and-

THE RUSSIAN FEDERATION

(the Respondent and, together with the Claimant, the Parties)

DISSENTING OPINION OF PROFESSOR BRIGITTE STERN

Arbitral Tribunal

Professor Campbell McLachlan QC (Chairman)
Mr J William Rowley QC
Professor Brigitte Stern

Mr Jack L W Wass, Assistant to the Tribunal

Ms Helen F Brown, Assistant Secretary to the Tribunal

Claimant's Counsel

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Ms Svetlana Portman
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I. INTRODUCTION

1. I am in agreement with large parts of the Award, as indicated in its operative part. My main disagreement with my esteemed colleagues concerns the way in which the majority has considered the loss incurred by Yukos Capital, as a consequence of the violation by the Russian State of its international obligations under the ECT. In my view, the decision of the majority results in an **unjust enrichment of Yukos Capital**. It is quite striking for me that the majority of the Tribunal has decided to award Yukos Capital significant amounts of money which would never have been in its possession for more than a few hours if the course of events had been 'business as usual', *i.e.*, if the Respondent had not violated the ECT.

2. This unfortunate outcome results, in my view, from the fact that the majority has not properly applied international law to the real economic facts of the case, but has instead created a fiction by relying on accounting valuation exercises that it bases on an incomplete and inaccurate picture of the economic business into which Yukos Capital had entered.

3. In other words, Yukos Capital is now, with the Award adopted by the majority, in a much better position than the one it would have been without the illegal acts of the Respondent State: I do not think that this should be the goal of international arbitration.

* * *

4. I will only examine here the loss incurred by Yukos Capital as a consequence of the fact that, under the December 2003 Loan, Yukos Capital did not receive some of the interest due on its Loan to Yukos Oil and that the Loan to Yukos Oil was not reimbursed by the latter. I will not deal with the August 2004 Loan, as I agree that it was made by the Claimant at a time when it was foreseeable that it would not be reimbursed and that the loss was therefore due to the deliberate decision of the Claimant to grant the Loan and was not a consequence of any action of the Respondent.

5. I start from the premise that the December 2003 Loan[1] is an **investment of Yukos Capital**, as was decided by the majority in the Interim Award, and that the question is what, if anything, Yukos Capital has lost because of the actions of Russia. To be clear, I remain of the view that this premise – as framed by the majority – is wrong, as explained in my Dissenting Opinion annexed to the Interim Award. However, I want to explain here that even if it is considered that there is an investment made by Yukos Capital, the loss is very different from the one found by the majority.

6. This Opinion will therefore concentrate on the following question: What is the loss of Yukos Capital?

7. In order to answer this crucial question for the decision on quantum, I will proceed in four steps. First, the facts of the case and the law to be applied have to be clearly ascertained. As far as the facts are concerned, I consider it unavoidable to look at the December 2003 Loan from Yukos Capital to Yukos Oil, not in isolation, as has been done by the majority, but as an element of a global economic endeavour. As far as the law is concerned, it is useful to restate the well-known general principles of international law concerning compensation in case of a violation of international law by a State. Second, I will analyse what would have been the situation if there had been no violation of international law, to understand what was the potential profit derived by Yukos Capital from its investment operation. Third, I will examine thoroughly what is the situation of Yukos Capital after the violations committed by Russia, to understand what was its true loss. Fourth, I will indicate what are, in my view, the main flaws, both factual and legal, of the majority's approach.

II. THE FACTUAL AND LEGAL FRAMEWORK

A. THE DESCRIPTION OF THE GLOBAL INVESTMENT OPERATION

8. As a point of departure of my analysis, I insist that in order to evaluate the entitlements of Yukos Capital, **a holistic approach is necessary**, analysing the Loan to Yukos Oil, in

[1] Loan Agreement between Yukos Oil Company and Yukos Capital S.à r.l. (2 December 2003) **(December 2003 Loan Agreement) (C-9)**.

the general contractual framework of the other legal commitments with which they were intrinsically linked.[2]

9. I indicate at the outset that this is a completely different situation from a loan made by one company to another after having itself borrowed money from a bank, the two operations being entirely distinct. A bank does not predetermine the use of the money by its borrower, and, even more importantly, a bank will never accept not to be repaid if the borrower is not repaid by the entity to which it happened to lend the money.

10. In fact, in what are called back-to-back loans, the **Loan TO Yukos Capital** preceded the Loan to Yukos Oil and **entirely predetermined** all the conditions of the global deal, and specifically all the parameters of the **Loan FROM Yukos Capital** to Yukos Oil.

11. **The purpose** of the overall contractual scheme put in place in 2003 must not be overlooked: it was for Brittany, a BVI company, to lend money to Yukos Oil, a Russian company, through the intermediary of Yukos Capital, a Luxembourg company at the time of the events at issue in this case.

12. If we now look at the role of Yukos Capital in the back-to-back Agreements forming the investment operation, we see that Yukos Capital undertook to grant a Loan to Yukos Oil: this was the purpose of the December 2003 Loan Agreement.[3] Since Yukos Capital had no money of its own for this operation, it used money borrowed from Brittany: this was the purpose of the Brittany Loan Agreement, dated a few days before on 20 November 2003.[4] This first Agreement already identified the final recipient of the funds, and it was indicated in the Brittany Loan Agreement that the subsequent Loan from Yukos Capital to Yukos Oil was going to be performed by what was called 'Sub-Lending' for the same amount as the Brittany Loan:

> (a) Borrower intends to provide a loan facility to OAO "NK "YUKOS" [**Yukos Oil**], a company duly organized and validly existing under the laws of the Russian Federation (hereinafter referred to as "Sub-Borrower"), such loan

[2] Loan Facility Agreement between Brittany Assets Ltd and Yukos Capital S.à r.l. (20 November 2003) (**Brittany Loan Agreement**) (**C-130**).

[3] December 2003 Loan Agreement.

[4] Brittany Loan Agreement.

> facility to be granted shall not exceed 80'000'000'000-00 (Eighty billion) Russian Rubles, shall bear interest at the rate of 9% per annum and shall mature not later than 31st December 2008 …[5]

13. Yukos Capital, in turn, was under the obligation to transmit the money received from Brittany to Yukos Oil:

> 1. Definitions
>
> …
>
> Advance
>
> Shall mean any advance made or to be made by Lender hereunder which Borrower undertakes to use for Sub-Lending.
>
> …
>
> **2. Commitments**
>
> Lender agrees on the terms and conditions herein, to make available to Borrower a loan facility equal to the Facility amount … in order to make feasible Sub-Lending by Borrower …[6]

14. The interest to be paid by Yukos Capital to Brittany was '8,9375% per annum payable quarterly and on the Final Repayment date.'[7]

15. **The interest to be paid by Yukos Oil to Yukos Capital** under what would become the December 2003 Loan was also predetermined in the Brittany Loan Agreement, and was set at 9%.[8] In other words, the money was going to flow from the Lender (Brittany) to the Borrower (Yukos Capital) and then from Yukos Capital (now the Sub-Lender) to Yukos Oil (now the Sub-Borrower).

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[5] Brittany Loan Agreement, preamble. *See also* id., clause 1: 'Facility amount: Means 80'000'000'000-00 (Eighty billion) Russian Rubles'.

[6] Brittany Loan Agreement, clauses 1, 2.

[7] Brittany Loan Agreement, clause 1.

[8] *See* Brittany Loan Agreement, preamble; December 2003 Loan Agreement, clause 1.1.

16. **The drawdown dates and the repayment dates of the December 2003 Loan** were also predetermined in the Brittany Loan Agreement:

> **Drawdown Date**
>
> Means the day when Borrower transfers funds to Sub-Borrower at the request of the latter under Sub-Lending Agreement.
>
> ...
>
> **Final Repayment date**
>
> 2nd January 2009, which date may be either accelerated or postponed by mutual agreement in writing by the Parties hereto. Such Final Repayment date will not be later than one Business Day after the date on which the Sub-Lending is redeemed.[9]

17. This indicates without the slightest possible doubt that the two legal instruments are to be construed as a single legal operation. Indeed, the drawdown date of the Brittany Loan is not the date when the funds are transferred from Brittany to Yukos Capital, as it should be if it were an independent loan, but the date when the funds reach Yukos Oil through the December 2003 Loan. Therefore, the interest to be paid on the Brittany Loan only starts to accrue from the date when the December 2003 Loan is performed, which is another way of saying that the money from Brittany accrued interest only when it reached the final intended recipient, *i.e.*, Yukos Oil.

18. In other words, the two Agreements are highly interlinked, as **all the conditions of the second Agreement were already determined in the first Agreement**. In fact and law, all the parameters of the obligation to dispose of the Brittany Loan to Yukos Capital in order to transfer it to Yukos Oil were pre-determined in the Brittany Loan: the identical amounts to be loaned, the rate of interest, the maturity date of the December 2003 Loan to Yukos Oil (31 December 2008) and the linked maturity date of the Brittany Loan to Yukos Capital (2 January 2009).

19. Therefore, it will be necessary to analyse these global contractual arrangements which predetermine the economics of the loan transactions for the different actors involved, and

[9] Brittany Loan Agreement, clause 1.

in particular to examine what economic interest Yukos Capital could draw from the investment operation in order to ascertain what its possible loss could be.

20. However, before entering into this inquiry, it is appropriate to recall the international rules on compensation in the event of a violation of international law.

B. THE UNCONTESTED PRINCIPLES OF INTERNATIONAL LAW

21. I hesitate to restate the well-known approach to **the standard of reparation** in case of damage caused by a violation of international law, which has been elaborated in the most quoted *Chorzów Factory* case, as reproduced in the Award in [760]:

> The essential principle contained in the actual notion of an illegal act … is that reparation must, as far as possible, wipe out all the consequences of the illegal act and **re-establish the situation which would, in all probability, have existed** if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[10]

22. Of course, this theoretical approach has to be translated into figures; in other words, the damages have to be quantified. This is why the PCIJ had decided to ask experts to value the loss of the Oberschlesische, the company to which the Chorzów Factory belonged:

> [I]n order to obtain further enlightenment in the matter, the Court, before giving any decision as to the compensation to be paid by the Polish Government to the German Government, will arrange for the holding of an expert enquiry … [11]

23. Unfortunately, the PCIJ never had to deal with the results of the expert enquiry, as the parties entered into a settlement and the case did not go to the quantum phase.

24. As will be elaborated upon later, I consider that the majority has not properly applied these principles and has not granted compensation that could, as far as possible, 'wipe out

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[10] *Case Concerning the Factory at Chorzów (Germany v Poland)* [1928] PCIJ Series A, No. 17, Judgement No. 13 (13 September 1928), p. 47 **(CL-86)**.

[11] *Case Concerning the Factory at Chorzów (Germany v Poland)* [1928] PCIJ Series A, No. 17, Judgement No. 13 (13 September 1928), p. 51 **(CL-86)**.

all the consequences of the illegal act and **re-establish the situation which would, in all probability, have existed'** if the illegal act had not been performed.

25. In order to ascertain the reparation that can 're-establish the situation which would, in all probability, have existed' if the illegal act had not been performed, it is necessary to develop but-for scenarios, which is now common practice in investment arbitrations.

26. The questions therefore are: first, what would have been the economic situation of Yukos Capital, without the breach that the Tribunal did find (the but-for scenario), and second, what is the economic situation of Yukos Capital, with the breach that the Tribunal did find (the actual scenario). If there is a difference, this will be the damage supported by Yukos Capital, all other circumstances being equal.

III. THE BUT-FOR SCENARIO: WHAT WAS GOING TO BE THE PROFIT OF YUKOS CAPITAL?

27. In order to fully understand what Yukos Capital might have **lost**, it is necessary to understand what it would have **gained**, in a situation in which there was no illegal act performed by the Respondent.

A. THE POSITIONS OF THE PARTIES

28. The Claimant has argued that the Tribunal should apply a but-for approach when dealing with the compensation to be granted to Yukos Capital. Its position is summarised in the Award, in [745], in the following way:

> **The Claimant advocates for a 'but-for' approach to reparation.** While acknowledging that Article 13 of the ECT provides for a specific rule of compensation for expropriation, the Claimant contends that such rule does not cover reparation in case of a breach of Article 13, in which event it submits that **customary international law requires that the Claimant be placed in the same position it would have been in had the wrongful acts not occurred.** (Emphasis added)

29. While the Respondent preferred to base its analysis of compensation on the FMV, it clearly acknowledged that, if the Tribunal were to apply a but-for analysis, the only entitlement of the Claimant would be the interest spread:

> Yukos Capital's claim for damages is simply not met out on the "but for" or "Counter Factual", i.e., the situation that in all probability would have existed absent Respondent's alleged breach of the ECT. **Yukos Capital would never have been entitled to the value of the Loans in their entirety**, but merely the interest rate "spread" between … the December 2003 Loan and the Brittany Loan … [12]

> … Even Claimant's preferred Chorzów Factory standard is of little avail to it because the but-for scenario only affords Claimant the spread between … the December 2003 Loan and the Brittany Loan … [13]

30. I will now analyse what would have been the situation without any breach by the Respondent State.

B. THE REPAYMENT OF THE LOAN BY YUKOS OIL TO YUKOS CAPITAL

31. Here, two different scenarios were considered in the contractual scheme.

1. Main scenario: Yukos Oil pays the interest and repays the capital of the Loan from Yukos Capital

32. As soon as Yukos Capital received the capital back from Yukos Oil, it undertook to immediately transmit it back to Brittany:

> **3. Repayment**
>
> Borrower shall repay the amount outstanding **within one Business Day** upon redemption of any part of Sub-Lending.[14]

33. **This is the scenario that would, in all probability, have occurred** in the normal course of events, without a breach by the Respondent.

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[12] Counter-Memorial, [425], emphasis added.

[13] Rejoinder, [505].

[14] Brittany Loan Agreement, clause 3, emphasis added.

2. Alternative scenario: Yukos Oil does not pay the interest nor repay the capital of the Loan from Yukos Capital

34. The Agreements however also envisioned a less probable, but possible scenario. The situation in which Yukos Oil would not fulfil its obligation to repay the December 2003 Loan was also foreseen in the Brittany Loan Agreement:

> **5. Hedge**
>
> Notwithstanding the foregoing and for the avoidance of doubt Lender shall bear **all risks** associated with Sub-Lending, **including, but not limited to the following**:
>
> (a) **Failure to pay**, which means the failure by Sub-Borrower to make, when and where due, any payments under Sub-Lending Agreement;
>
> (b) **Sovereign risk**, …
>
> …
>
> (c) **Foreign exchange risk**, …
>
> (d) **Tax risk**, …[15]

35. This indicates that **all risks, even if not mentioned in clause 5, were assumed by Brittany**.

36. As a consequence, if Yukos Oil did not reimburse the December 2003 Loan, it committed a failure to pay, and the risk was not assumed by Yukos Capital, but by Brittany. This means that, if the obligation of Yukos Oil to reimburse its debt to Yukos Capital was not respected, the concomitant obligation of Yukos Capital to reimburse its debt to Brittany was automatically cancelled.

37. In other words, the obligation of Yukos Capital to transfer the money back to Brittany was without a sanction in circumstances where the obligation was not fulfilled due to the non-fulfilment of its own obligation by Yukos Oil. This was indeed acknowledged in the Interim Award:

[15] Brittany Loan Agreement, clause 5, emphasis added.

> Undoubtedly, Yukos Capital's obligation to repay Brittany only arose if and to the extent that Yukos Oil repaid its debt to Yukos Capital. As between Brittany and Yukos Capital, **it is Brittany that bears the risk of default** associated with Yukos Capital's loan to Yukos Oil, in terms of Yukos Oil's failure to pay … [16]

38. The same understanding was reiterated by the President during the Hearing:

> CHAIRMAN McLACHLAN: … my understanding … is that the effect of these Agreements was that Yukos Capital was under no obligation to make a repayment to Hedgerow and Brittany unless and until a repayment was made by Yukos Oil to Yukos Capital, and that's reflected in Clauses 3 and 5 of the Agreement. Is that your commercial understanding of the structure here?
>
> MR. GODFREY: Broadly speaking, yes.[17]

C. HOW WAS THIS GOING TO WORK CONCRETELY?

39. In practical terms, what would have happened if the Agreements would have been performed in the absence of a violation?

40. First step: Yukos Capital receives the money from Brittany under the Brittany Loan Agreement. The interest rate for this Loan was 8,9375%. The second step was already foreseen in this Agreement, including the interest rate at which Yukos Capital was going to loan the money to Yukos Oil, which was 9%.

41. Second step: Yukos Capital has the obligation to transmit the money received from Brittany to Yukos Oil.

42. Third step **in the most probable main scenario**: If Yukos Oil repays 9% interest to Yukos Capital, the latter has to pay 8,9375% interest to Brittany, this operation being made quarterly. In that case, Yukos Capital has earned the difference between the interest rate in the December 2003 Loan Agreement and in the Brittany Loan Agreement: 9% - 8,9375% = 0.0625%, called the 'spread'. If Yukos Oil was going to reimburse its December 2003 Loan to Yukos Capital, the latter had to transmit the equivalent amount of money within one business day to Brittany, which means that in the but-for scenario Yukos Capital was not entitled to keep the property of the money lent.

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[16] Interim Award, [504], emphasis added, internal references omitted.

[17] T2/370/25-371/10 (Godfrey).

43. Third step in **a possible alternative scenario**: If Yukos Oil, for one reason or another, does not pay the interest to Yukos Capital, the latter is not obliged to pay the interest to Brittany, but has lost what it was entitled to receive as a profit resulting from its role in the overall economic operation, *i.e.*, the spread. If Yukos Oil, for one reason or another, does not repay the amount of the December 2003 Loan to Yukos Capital, the latter is not obliged to repay the amount of the Brittany Loan to Brittany, which means that in this situation, Yukos Capital does not lose anything.

44. From the above, it is crystal clear that, in the but-for scenario, Yukos Capital was never going to be able to obtain and retain the amount of the Loan for itself, as this situation was not envisioned in the contractual scheme.

45. **In conclusion, it is quite clear that, in the main and most likely but-for scenario, what Yukos Capital would have received is the spread, all the spread, but only the spread.**

IV. THE ACTUAL SCENARIO: WHAT IS THE LOSS OF YUKOS CAPITAL?

46. What did Yukos Capital lose because of the partial implementation of the global contractual scheme, due to Russia's actions?

A. THE LOSS AS PRESENTED BY THE CLAIMANT

47. The Award summarises the loss as presented by the Claimant, in [709], in the following way:

> With reference to the non-recourse or hedging arrangements in the Brittany and Hedgerow Loans, the Claimant argues that those arrangements 'restrict the manner in which the liability to those lenders is to be discharged', but do not extinguish Yukos Capital's liability. The Claimant applies the same analysis to the Respondent's arguments regarding 'interest spread', submitting that Yukos Capital's funding arrangements can have no impact on its right to recover the value of the Loans.

B. THE LOSS AS PRESENTED BY THE RESPONDENT

48. The Award summarises the loss as presented by the Respondent, in [715], in the following way:

Following its argument relating to the back-to-back nature of the Loans, the Respondent submits that the maximum extent of Yukos Capital's loss must be limited to the 'interest spread' between the December 2003 Loan and the Brittany Loan. It argues that such damages have been claimed and awarded in cases involving non-recourse project financing, based on the net cashflows of the project after non-recourse project financing obligations have been discharged. The Respondent calculates the interest spread to be 0.0625%, submitting that the Brittany Loan required Yukos Capital to pay Brittany the principal under the December 2003 Loan as well as 99.9375% of the interest. It contends that 0.0625% of the interest under the December 2003 Loan is equivalent to USD 9.4 million.

C. THE LOSS OF YUKOS CAPITAL IN THE ACTUAL SCENARIO, AS I ANALYSE IT

49. Since the only thing that Yukos Capital would have gained – if the global contractual scheme had been implemented according to its requirements and without any act of Respondent in violation of international law – is the spread, this is potentially also what it was susceptible to lose.

50. In the actual scenario, the contractual scheme was implemented normally, without any interference until 29 June 2004, which was the date of the last interest payment by Yukos Oil to Yukos Capital.

51. Therefore, the spread was lost starting with the payment of interest which was due quarterly between 29 June 2004 (the first missing spread being the one resulting from the absence of the quarterly payment on 30 September 2004) and 2 January 2009 (the Final Repayment Date of the Brittany Loan). In accordance with the conclusion as to causation and contribution in the Award at [685], the amount of interest (and therefore of the spread) is to be calculated on 100% of the sums drawn down before 26 May 2004, and 50% of the sums drawn down after that date (namely the sums drawn down on 16 June 2004, 22 June 2004 and 28 June 2004).

52. **Yukos Capital has therefore lost the difference between the interest rates on the sums which have not been paid**, *i.e.*, it has lost part of the spread.

53. The next question is whether in the actual scenario, Yukos Capital has also lost the amount of the December 2003 Loan itself, as concluded by the majority. In the actual scenario, as indeed in the but-for scenario, the role of Yukos Capital was to transmit the reimbursement by Yukos Oil of the December 2003 Loan to Brittany. The fact that Yukos

Capital did not receive the reimbursement means only that it had nothing to transmit – and thus lost the spread which was the price for the service rendered – but it lost nothing else, and particularly not the amount of the December 2003 Loan, which it was not entitled to keep.

54. In conclusion, if no other events had occurred in the actual scenario, the Tribunal should have granted Yukos Capital part of the lost spread after 29 June 2004, and nothing more.

55. My analysis is confirmed by the relevant observation that Yukos Capital has, before this arbitration, consistently acknowledged that it has suffered no loss. This is evidenced by reference to two documents mentioned on Slide 115 of the Respondent's Opening Argument:

(i) The first document is Yukos Capital's financial statements for the period ending on 31 December 2004:

> **Contingent Waiver of loans payable, interest payable and interest expenses.** The loans payable have a limited recourse and **any losses on the loans receivable are born by the lenders.**[18]

(ii) The second document is an email from Fred van Rouwendal to John Douglass and others:

> The loans you are referring to are back to back loans. From the relevant loan agreements granted to YC Sarl, it becomes clear that the loans payable have limited recourse on the related loans receivable. **Any losses on the loans receivable would not result in a loss for the company.**[19]

56. The same position was expressed even during the arbitration. Indeed, on 5 February 2019, Gibson Dunn, counsel for the Claimant, wrote to the Tribunal that **it no longer had any claim under the Brittany or Hedgerow Loans:**

> Further to Claimant's submission dated 1 February 2019, please be advised following the judgment of the Dutch Supreme Court rendered on 18 January 2019 in

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[18] Yukos Capital Financial Statements for the year ended 31 December 2004 (**PH-44**), *quoted in* Respondent's Opening Slides. 115, emphasis added by Respondent.

[19] Email from Fred van Rouwendal to John Douglass and others (26 April 2005) (**R-621**), *quoted in* Respondent's Opening Slides. 115, emphasis added by Respondent.

> *Promnefstroy et al. v Godfrey et al.*, (in which the Dutch Supreme Court confirmed that the sham Yukos Oil bankruptcy could not be recognized as contrary to Dutch public policy), Yukos Capital Ltd has redeemed the Brittany and Hedgerow Loans from Yukos Hydrocarbons International Ltd. Thereby, Brittany and Hedgerow Loans were terminated and **Claimant is released and discharged from all obligations, claims, and demands under these loans.**[20]

57. This is stated by the Claimant, not the Respondent.

58. All these elements of the record tend to the conclusion, also reached by the experts of the Respondent, that the loss of Yukos Capital, due to the non-reimbursement by Yukos Oil of some of the interest and of the capital due under the December 2003 Loan, is equal to zero.

59. This is corroborated also in Respondent's Rejoinder on the Merits, [514][21], in which the Respondent emphasises the fact that the Claimant itself does not have a clear view of its loss and attributes a zero value to the December 2003 Loan in its financial statements of 2005, 2006 and 2007:

> The Loans lack of economic substance and therefore value is reflected by the fact that Claimant has been incapable of advancing a consistent basis to estimate either the value of the Loans or, in turn, the value of its loss. Claimant has variously valued the Loans or its loss between $0 and $13.07 billion:
>
> (a) $0, as the value attributed to the Loans in Claimant's financial statements including for 2005, 2006 and 2007;
>
> (b) $4.3 billion and $4.8 billion (in April 2006 and October 2006 respectively), in the bankruptcy proceedings of Yukos Oil;
>
> (c) $13.07 billion (to 31 January 2013) in Claimant's Notice of Arbitration;
>
> (d) $5.957 billion (to 27 October 2017) in Claimant's Memorial on the Merits;
>
> (e) $11.214 billion (as at 31 December 2017) based on the Loans "*aggregated gross value*", while simultaneously valuing them with a book value of $1; and

[20] Letter from the Claimant to the Tribunal, 5 February 2019 (SFC-49), emphasis added.

[21] Internal references omitted.

(f) $625 million, as the value that Claimant ascribed to the Hedgerow and Brittany Loans when it discharged these in January 2019. (Which are the near mirror images of the December 2003 and August 2004 Loans).

60. In sum, I consider that the most convincing conclusion is that the Claimant's loss is close to zero, in view of all the circumstances of the case, but that in any case, **Yukos Capital's loss cannot be more than a part of the lost spread**. I consider therefore that the conclusion reached by the majority is utterly wrong.

V. THE MAIN FLAWS IN THE MAJORITY'S APPROACH

61. In my view, the majority has disregarded both the factual situation and the applicable legal principles.

A. THE MAJORITY HAS DISREGARDED THE FACTS IN RESPECT OF YUKOS' GLOBAL ECONOMIC OPERATION

62. I think that the main flaw in the majority's approach comes from its continued analysis of the back-to-back loans as if they were separate instruments, instead of taking into consideration their evident linkage. The majority looks at only half of the picture, and turns a blind eye to the other half.

63. It is because the majority refused to analyse the two contracts as **a single legal operation** that they concluded that Yukos Capital has made an investment in Yukos Oil. Admitting this, for the sake of reasoning, I consider that it is for the same reason – because the majority refused to analyse the two contracts as **a single economic operation** – that the majority concludes that Yukos Capital is entitled to receive the capital which it lent to Yukos Oil, even though: (i) if it received the capital back from Yukos Oil, it was not entitled to benefit from it for more than one day; and (ii) if it did not receive the capital back from Yukos Oil, it was under no obligation to transmit the capital back to Brittany.

64. I need to answer here what looks like a common-sense remark by the majority, but is in fact a complete fallacy in view of the situation of Yukos Capital. In order to justify that the loss of Yukos Capital was not only its profit (the spread), the majority writes the following in [737]:

> The valuation of *property*, which is the thing that is to be valued in determining loss for the purpose of a claim of expropriation, is not limited to any profit that may be expected to be earned on that property. The value of income flows may (depending upon the valuation methodology adopted) be an input to the capital value of the property, but it is not *the* value. To take a simple example, the value of a house is determined by its market valuation as a capital investment. If the house were in use for a commercial purpose, the income derived from that activity may be relevant to the value of the undertaking as a whole. It would not make the capital value of the house legally irrelevant. In the event that the house were expropriated, the victim's loss for which the respondent would be liable would include its loss of capital represented by the value of the house itself.

65. What is missing here is that Yukos Capital had no right to keep the 'house' after the maturity date of 2 January 2009.

66. Because the majority persists in analysing the two Agreements as if they were independent of one another, it adopts some conclusions which I find fundamentally wrong. This results in clearly inaccurate statements. For example, in [734], the majority writes:

> Conversely, Brittany's Loan Agreement is only with Yukos Capital and not with Yukos Oil.

67. Although this is formally correct if one looks only at the signatories of this Agreement, I consider this statement substantially incorrect since the Brittany Loan Agreement contains numerous references to Yukos Oil on its face. To be more precise, the Brittany Loan Agreement includes within its four pages one reference to OAO "NK "YUKOS" **[this being Yukos Oil]**, as well as four references to the term 'Sub-Borrower', which is defined as Yukos Oil. Furthermore, as was developed in the analysis of the factual situation earlier in this Opinion, the terms and conditions of the Loan facility from Yukos Capital to Yukos Oil are fully defined in the Brittany Loan Agreement, where it appears under the term 'Sub-Lending', used 16 times. **This means that there are 21 direct or indirect mentions of the Loan from Yukos Capital to Yukos Oil in the Brittany Loan Agreement, which, in my view, mandates reading the two Agreements together.** Thus, in fact (as well as in law), the December 2003 Loan from Yukos Capital to Yukos Oil is actually governed by the Brittany Loan Agreement.

68. As will be seen later, this factual error has overwhelming consequences, as it is the first pebble that paved the way to a flawed interpretation of the applicable law, by carving out

a right governed by two concomitant and entangled Agreements and treating it in an independent manner so as to assign to it a value incommensurate with its expected earnings.

69. As another example of an inaccurate statement, the majority considers that the Claimant is entitled to pre-award interest on the sums granted, to take into account the profit it could have made in using this money on the market, and grants therefore to Yukos Capital a commercial rate of interest.

70. Such a decision brings into the light the flawed approach of the majority, as it grants to Yukos Capital interest on a sum that it was only entitled to keep for one day (and that in any case it would no longer possess from 2 January 2009), for a period stretching over more than 12 years. This is an easy way to make unjustified profit and benefit from an unjust enrichment.

B. THE MAJORITY DISREGARDED THE UNCONTESTED PRINCIPLES OF INTERNATIONAL LAW

71. I consider that the majority, while purporting to apply the *Chorzów Factory* principles, manifestly applies its own interpretation of these principles. More precisely, the majority deliberately ignores the situation that would have existed in all probability without the breach even though it refers to *Chorzów*, which clearly indicates that the reparation has to reinstate the situation that would have existed without the breach. Once again, I quote the basic principle stated by *Chorzów*, already quoted above:

> The essential principle contained in the actual notion of an illegal act … is that reparation must, as far as possible, wipe out all the consequences of the illegal act and **re-establish the situation which would, in all probability, have existed** if that act had not been committed.

72. It should be noted that this sets out a very general principle, which has to be given higher standing than the consequences it may have in terms of accounting practice, these being dependent on the particular circumstances of a case.

73. In the present case, by considering the December 2003 Loan from Yukos Capital to Yukos Oil as an asset of its own, and not as a part of a set of two entangled Agreements, **the majority creates a situation that could never have happened**, not even with the

slightest probability, in the normal course of events. Indeed, the Brittany Loan Agreement provides that:

> Borrower shall repay the amount outstanding within one Business Day upon redemption of any part of Sub-Lending.[22]

74. Thus, the majority's approach amounts to a pure fiction, in which Yukos Capital is awarded the amount of the December 2003 Loan to Yukos Oil, while its obligation to repay its own debt is extinguished, or at least remains unsettled. This is inconsistent with the obligations of Yukos Capital, and is exactly where the issue of unjust enrichment arises.

75. As was explained above in my analysis of the but-for scenario, the overall value of Yukos Capital cannot exceed the potential gain that this company could expect from its business, *i.e.*, the spread, possibly updated by some discounting formula following modern valuation theory. In other words, if Yukos Capital had been on sale, a willing buyer would have offered a sum of an order of magnitude close to the value of the spread.

76. To support what I view as a fiction, the majority, unable to root its decision in general principles of international law, relies extensively on accounting practice rather than law, using valuation rules and discussing whether the FMV and the full compensation principle of *Chorzów* are equivalent. It gives a positive answer to this question, finally concluding in [786]:

> In light of all the evidence, the Tribunal therefore holds that the FMV of the December 2003 Loan for purposes of compensating the Claimant for the loss of its property is equivalent to the amount of principal actually advanced, together with the interest thereon, that was contractually due and remains unpaid.

77. The actual issue – blurred in the reasoning of the majority – is not whether an accounting technique such as FMV correctly translates the legal principles of *Chorzów*, but whether *Chorzów* can dictate, in the circumstances of the present case, an amount of compensation that is several orders of magnitude higher than the actual value of Yukos Capital, based on its potential earnings. As explained in this Opinion, the answer is no.

[22] Brittany Loan Agreement, clause 3.

* * *

78. **In conclusion**, I continue to consider that Yukos Capital was not an investor whose investment was the Loans, as developed in my Dissenting Opinion annexed to the Interim Decision on Jurisdiction. However, even assuming the majority were right and accepting, for the sake of legal discussion, that Yukos Capital was an investor engaged in an investment activity, I consider that, at the stage of quantum, the majority has completely disregarded the reality and the true nature of Yukos Capital, whose role as an investor was to render a financial service, *i.e.*, to pass through sums of money from one company of the Yukos Group to another, for a profit consisting only of the spread. Moreover, as explained above, it has not applied the proper law to these distorted facts, engaging in accounting exercises of valuation foreign to the relevant international law principles. With the Award rendered by the majority, Yukos Capital will now receive the amount of a loan which it was never entitled to keep, and be able to reap interest at a commercial rate for 12 years, meaning, as mentioned at the outset of this Opinion, that Yukos Capital will benefit from an unjust enrichment.

Geneva, Switzerland

Date: 23 July 2021

Brigitte Stern.

Professor Brigitte Stern