UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HULLEY ENTERPRISES LTD., YUKOS UNIVERSAL LTD., AND VETERAN PETROLEUM LTD.,	)	
Petitioners,	)	
v.	)	Case No. 1:14-cv-01996-BAH
THE RUSSIAN FEDERATION,	)	
Respondent.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE RUSSIAN FEDERATION'S SUPPLEMENTAL MOTION TO DISMISS THE PETITION TO CONFIRM ARBITRATION AWARDS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE NEW YORK CONVENTION

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INTRODUCTION

The Russian Federation has maintained throughout these proceedings that this Court lacks jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, to recognize the arbitration awards rendered in July 2014 in favor of Petitioners Hulley Enterprises Ltd. ("HEL"), Yukos Universal Ltd. ("YUL"), and Veteran Petroleum Ltd. ("VPL") (collectively, "Petitioners").[1] Even if this Court possessed jurisdiction, however, it would be obligated to deny recognition to Petitioners' arbitration awards under Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 10, 1958, 21 U.S.T. 2517, as implemented under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 201-208.[2] Each of these grounds independently requires this Court to dismiss Petitioners' action.

The subject matter of this Supplemental Motion to Dismiss consists of new and newly discovered evidence and new rulings from related foreign proceedings during the seven months since the Russian Federation filed its initial Motion to Dismiss and Motion to Deny Recognition on October 20, 2015. The new evidence and new rulings validate the Russian Federation's challenges based on the absence of any agreement to arbitrate, and the absence of any award arising from a "commercial" relationship. Each of these individual challenges entails dismissal with prejudice for lack of jurisdiction under the FSIA and must be considered by this Court as a matter of priority. In addition, because Petitioners' awards have been set aside "by a competent authority of the country in which . . . th[ose] award[s] w[ere] made," Petitioners' action is also

[1] Resp't's Mot. To Dismiss For Lack Of Subject Matter Jurisdiction, Oct. 20, 2015 ("Resp't's Mot. to Dismiss") at 25 (ECF No. 24); Resp't's Reply, Dec. 11, 2015, at 3 (ECF No. 64).

[2] Resp't's Mot. To Deny Confirmation Of Arbitration Awards Pursuant To New York Convention, Oct. 20, 2015 ("Resp't's Mot. to Deny Recognition") at 12 (ECF No. 23).

subject to dismissal (without prejudice) on non-jurisdictional grounds under Article V(1)(e) of the New York Convention.[3]

First, on April 20, 2016, the District Court of The Hague (the "Hague Court") issued a judgment (the "Hague Judgment") setting aside Petitioners' arbitration awards.[4] As the Hague Court concluded, the Russian Federation had never offered to arbitrate with Petitioners (or any other persons) in public-law disputes arising under Article 26 of the Energy Charter Treaty ("ECT"), such that no arbitration agreement was ever formed between the parties.[5] Accordingly, the exception to the FSIA set forth at 28 U.S.C. § 1605(a)(6) is inapplicable, such that "the District Court lacks jurisdiction over the foreign state and the action must be dismissed."[6]

Second, the District Court of Amsterdam (the "Amsterdam Court") issued a judgment on November 5, 2015 (the "Amsterdam Judgment"),[7] further revealing Petitioners' ineligibility to accept any purported offer to arbitrate under the ECT, because Petitioners are not actually "foreign investors" for the purposes of the ECT, and thus were not offerees.[8] Rather, as reflected in documents identified by the Amsterdam Court, Petitioners are merely shell companies, owned and controlled by Russian nationals—the six Oligarchs.[9] The Amsterdam Judgment describes a

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[3] *See TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007).

[4] The Russian Federation hereby submits a sworn, certified English translation of the Hague Judgment by a registered translator. This sworn translation clarifies the earlier, unofficial translation issued on April 20, 2016 (ECF No. 102-2). Hague Dist. Ct. (*Russian Federation v. VPL, YUL, & HEL*) (Apr. 20, 2016) ("Hague J.") (R-722); Decl. of Professor Albert Jan van den Berg, May 31, 2016 ("van den Berg Decl. II") ¶ 4.

[5] Hague J. ¶¶ 5.95-5.98, 6.1-6.9 (R-722) ("The findings in this judgment lead to the final conclusion that from Article 45(1) ECT it follows that the Russian Federation had not bound itself to the provisional application of (the arbitration regulations of) Article 26 ECT by the mere signature of the ECT. The Russian Federation consequently never made an unconditional offer for arbitration, in the sense of Article 26 ECT. As a result, the defendants' '*notice of arbitration*' did not form a valid arbitration agreement.").

[6] *See Chevron Corp. v. Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015).

[7] Amsterdam Dist. Ct. 5 Nov. 2015 (*Promneftstroy v. GML, HEL, YUL & VPL*) ("Amsterdam J.") (R-717).

[8] *See* Resp't's Mot. to Dismiss at 34-36 (ECF No. 24); Resp't's Reply at 20-21 (ECF No. 64); Expert Op. of Professor Rudolf Dolzer, Oct. 20, 2015 ("Dolzer Op. I") ¶¶ 167-214 (ECF No. 24-8); Suppl. Expert Op. of Professor Rudolf Dolzer executed Dec. 11, 2015 ("Dolzer Op. II") ¶¶ 4-30 (ECF No. 65-2).

[9] *See infra*, Part I-C-1; Resp't's Mot. to Dismiss at 1 (ECF No. 24) (identifying the six Oligarchs as Mikhail

series of written communications between the Oligarchs and their co-conspirators, which reveal that only the Russian Oligarchs exercise "control in fact"[10] with respect to Petitioners and their parent company, Group Menatep Ltd. ("GML").[11] Importantly, Petitioners *intentionally concealed* the Oligarchs' ownership and control from the arbitrators throughout the arbitration by withholding documents, as demonstrated below.[12] The Oligarchs' Russian nationality therefore disqualifies Petitioners as eligible offerees under the ECT, and prevented any arbitration agreement from being formed between Petitioners and the Russian Federation, which entails dismissal under the FSIA for lack of jurisdiction.

Third, new documents were filed with the Higher Regional Court of Berlin on April 20, 2016 (the "Berlin Documents"),[13] which further confirm that Petitioners were ineligible to accept any purported offer to arbitrate under the veil-piercing doctrine and other fundamental principles of international law.[14] Specifically, Petitioners were used by the six Oligarchs to perpetuate and conceal a series of massive frauds on the Russian people involving not only blatant deception, collusive bid-rigging, and tax evasion, but also the bribery of Russian public officials during the acquisition of OAO Yukos Oil Company ("Yukos") in 1995.[15] This

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Khodorkovsky, Platon Lebedev, Leonid Nevzlin, Mikhail Brudno, Vladimir Dubov, and Vassily Shakhnovsky).

[10] *See* Final Act of the European Energy Charter Conference ("ECT Final Act"), Understandings IV.3, Art. 1(6), Dec. 17, 1994 (ECF No. 51-9).

[11] *See infra*, Part I-C-1; Amsterdam J. ¶¶ 2.25-2.31, 4.15, 4.21 (R-717) (discussing payments made under GML's 2011 Agreement with Bruce Misamore ("GML 2011 Agreement" (R-672)), concluded pursuant to negotiations with one of the Oligarchs, Mr. "Michael" Brudno); Eric Wolf Email Copying Leonid Nevzlin, Aug. 28, 2015 (R-712); Eric Wolf Email to Tim Osborne, July 10, 2015 (R-713); *see also Yukos Capital SàRL v. Feldman*, No. 15-cv-4964, Tr. of Eric Wolf Deposition, Oct. 5, 2015,122:2-10, *filed* May 3, 2016 ("Wolf Dep. Tr.") (R-724) (reflecting Mr. Wolf's admission that he was ***directly*** authorized to conduct settlement negotiations by the "***[b]eneficiaries*** of the trust that are shareholders of GML," rather than by the purported trustee, Mr. Kelvin Hudson (emphasis added)).

[12] *See infra*, Part I-C-1; Third Decl. of Francis A. Vasquez, Jr., June 1, 2016 ("Vasquez Decl. III"), Table A-1.

[13] *See* Cover Page to German Brief & Courier Receipt, April 20, 2016 (R-729).

[14] *See* Resp't's Mot. to Dismiss at 31-34 (ECF No. 24); Resp't's Reply at 18-20 (ECF No. 64); Dolzer Op. I ¶¶ 96-166 (ECF No. 24-8).

[15] *See infra*, Part I-C-2; *see also* Resp't's Mot. to Dismiss at 1-22 (ECF No. 24).

evidence demonstrates that the Oligarchs acquired Petitioners' investment unlawfully (as is further confirmed in the expert opinion of Professor S.P. Kothari, who traced the Oligarchs' Yukos shares through the share registry and a myriad of shell companies until, finally, the illegally-acquired Yukos shares were transferred to Petitioners).[16] The Berlin Documents also confirm that Petitioners were used directly in furtherance of a fundamentally unlawful purpose, giving rise to consequences under the veil-piercing doctrine and international law, and thus preventing any arbitration agreement from forming as required under the FSIA.

Fourth, the Hague Judgment also gives rise to an additional, non-jurisdictional basis for dismissal without prejudice under Article V(1)(e) of the New York Convention. Because Petitioners' arbitration awards have "been set aside . . . by a competent authority of the country [*i.e.*, the Netherlands] in which . . . th[ose] award[s] w[ere] made,"[17] Petitioners' arbitration awards have no legal effect and cannot be enforced. As Petitioners have correctly observed,[18] however, Article V(1)(e) of the New York Convention presents a non-jurisdictional issue, which cannot be resolved until after this Court has addressed its jurisdiction under the FSIA based on the grounds set forth above as a matter of priority.

Remarkably, rather than permitting this Court to rule on their own Petition, Petitioners have now requested a stay[19] of these proceedings—which, by Petitioners' own calculation, could last ***between six and nine years***.[20] As the Russian Federation will elaborate in its Opposition to the Motion to Stay, this result would be manifestly intolerable under the FSIA and fundamental

[16] Expert Report of S.P. Kothari, Oct. 20, 2015 ("Kothari Report") (ECF No. 24-4).

[17] New York Convention, Art. V(1)(e), June 10, 1958, 21 U.S.T. 2517; *see also* 9 U.S.C. § 207.

[18] Pet'rs' Resp. to the Notice of Suppl. Authority ¶ 3 (ECF No. 104).

[19] Pet'rs' Mot. to Stay (ECF No. 105).

[20] Pet'rs' Suppl. Br., First Instance Court of Brussels, Jan. 29, 2016, ¶ 129 (R-716) ("Considering the normal rhythm of the processing of appeals in the Netherlands, it is likely that no final decision that is no longer subject to appeal will be made *before six to nine years.*") (emphasis added).

principles of sovereign immunity, and would only aggravate the significant economic harm that Petitioners have already caused and continue to cause[21] to the Russian people.

Indeed, the Russian people have already lived ***for eleven years***[22] under the looming threat posed by Petitioners' illegitimate, multibillion-dollar demands—which is more than long enough. As is well established, the FSIA entitles foreign States not only to "a defense to liability on the merits," but also to statutory immunity "from suit" in a U.S. court.[23] Accordingly, "[i]n order to preserve the full scope of that immunity, the district court must make the 'critical preliminary determination' of its own jurisdiction ***as early in the litigation as possible***; to defer the question is to 'frustrate the significance and benefit of entitlement to immunity from suit.'"[24] The FSIA thus obligates this Court to pursue "swifter routes to dismissal" of U.S. litigation wherever such avenues exist,[25] such as by ruling on this Supplemental Motion to Dismiss and rejecting the Petition with prejudice. Moreover, Petitioners' arbitration awards pose a "significant contingent liability" which has caused (and continues to cause) a grave injury to the Russian people's economic security,[26] which strongly militates against delaying this Court's ultimate decision with respect to its jurisdiction under the FSIA.

Continuing to exercise jurisdiction over the Russian Federation for ***yet another decade***—where no such jurisdiction lawfully exists—would thus cause serious harm to the sovereign immunity and economic security of the Russian Federation. In accordance with the FSIA, the

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[21] *See* Moody's Investors Service, *Yukos Ruling Is Credit Negative for Russia*, July 29, 2014 (R-725) ("We consider this event as credit negative for Russia as it poses a significant contingent liability for the sovereign.").

[22] *See* Pet'rs' Notice of Arbitration and Statement of Claim, Feb. 3, 2005 (ECF No. 63-3).

[23] *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990).

[24] *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000) (emphasis added).

[25] *See Papandreou*, 139 F.3d at 254-55.

[26] *See* Moody's Investors Service, *Yukos Ruling Is Credit Negative for Russia*, July 29, 2014 (R-725)

Russian people are entitled to finality in this matter, and it is the duty of this Court to end this protracted travesty by dismissing Petitioners' action with prejudice.

ARGUMENT

Petitioners allege that this Court may exercise jurisdiction over the Russian Federation based on the "arbitration exception" to sovereign immunity under 28 U.S.C. § 1605(a)(6).[27] The factual basis for any FSIA exception must be evaluated by looking to evidence "beyond the pleadings."[28] This Court, "if necessary, may proceed to a trial" to verify the factual predicates of its jurisdiction under the FSIA.[29] Any party alleging jurisdiction under 28 U.S.C. § 1605(a)(6) must demonstrate the existence of "an agreement to arbitrate" and an arbitration award falling under "a treaty . . . in force for the United States."[30] Where the New York Convention is relied upon for this purpose, the award must "aris[e] out of a legal relationship . . . which is considered as commercial" under Article I(3) of the New York Convention and 9 U.S.C. § 202.[31]

I. This Court Lacks Subject Matter Jurisdiction Under the FSIA Because the Russian Federation Never Agreed to Arbitrate with Petitioners

The Hague Judgment, the Amsterdam Judgment, and the Berlin Documents demonstrate conclusively that this Court lacks subject matter jurisdiction on the grounds identified in the Russian Federation's original Motion to Dismiss—no arbitration agreement was ever concluded

[27] In a footnote, Petitioners also have argued that "the Russian Federation's agreement to arbitrate constitutes an implied waiver of immunity." Pet'rs' Mem. of Law in Opp'n to Resp't's Mot. to Dismiss ("Opp'n to Mot. to Dismiss") at 10 n.4 (ECF No. 63). Because the Russian Federation never entered into an "agreement to arbitrate," however, the Russian Federation also never waived its immunity under the FSIA. *See* Resp't's Mot. to Dismiss 39-42 (ECF No. 24).

[28] *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000).

[29] *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1019 (2d Cir. 1993).

[30] *Chevron*, 795 F.3d at 203-04 (quoting 28 U.S.C. § 1605(a)(6)). The FSIA provides for other alternative grounds for exercising jurisdiction under 28 U.S.C. § 1605(a)(6), none of which is present here.

[31] *See* 9 U.S.C. § 202; Optional Decl. Regarding the United States' Accession to the New York Convention, Sept. 30, 1970, 21 U.S.T. 2517, 2560 ("U.S. Optional Decl.").

between the parties.[32] Under 28 U.S.C. 1605(a)(6), in the absence of an arbitration agreement "the District Court lacks jurisdiction over the foreign state and the action must be dismissed" with prejudice.[33]

A. The Hague Judgment Confirms that the Russian Federation Never Agreed to Delegate Challenges to the Existence of an Arbitration Agreement Exclusively to the Arbitrators

In accordance with binding precedent, "if the parties disagree as to whether they ever entered into any arbitration agreement at all, *the court* must resolve that dispute."[34] Under ordinary circumstances, as the D.C. Circuit has held, the Court "*may not afford any deference at all* to the arbitrator's view on that issue."[35]

Although parties to arbitration may agree to delegate questions of arbitrability exclusively to the arbitrators,[36] this is an extraordinary circumstance that runs contrary to the presumption applied in typical cases. As the Supreme Court held in *First Options v. Kaplan*, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is *clear*

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[32] Resp't's Mot. to Dismiss at 28-31 (ECF No. 24); Resp't's Reply at 12-16 (ECF No. 64); *see also* Expert Op. of Professor George A. Bermann, Oct. 20, 2015 ("Bermann Op. I") ¶¶ 25-44 (ECF No. 24-7); Suppl. Expert Op. of Professor George A. Bermann, Dec. 10, 2015 ("Bermann Op. II") ¶¶ 3-11 (ECF No. 65-1); Dolzer Op. I ¶¶ 9-95 (ECF No. 24-8) ("[I]n the absence of an offer to arbitrate by the Russian Federation, it follows necessarily that the Petitioners' purported consent to arbitrate with the Russian Federation could not constitute an acceptance or otherwise lead to the formation of an arbitration agreement between Petitioners and Respondent."); Expert Op. of Professor Anton V. Asoskov, Oct. 30, 2014 ("Asoskov Hague Op.") ¶¶ 6-107 (ECF No 41-13).

[33] *Chevron*, 795 F.3d at 204.

[34] *KenAmerican Res., Inc. v. Int'l Union, United Mine Workers of Am.*, 99 F.3d 1161, 1163 (D.C. Cir. 1996) (emphasis added) (quoting *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 761 (D.C. Cir. 1988)); *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) ("[C]ourts assume that the parties intended courts, not arbitrators, to decide . . . whether the parties have a valid arbitration agreement at all . . . .").

[35] *KenAmerican*, 99 F.3d at 1163 (emphasis added).

[36] Notably, unlike other so-called "arbitrability" challenges, the parties *cannot* delegate resolution of challenges to the *existence* of an arbitration agreement under the FSIA exclusively to the arbitrators, because this is a jurisdictional question that the Court must answer for itself. *See Chevron*, 795 F.3d at 205-06 & n.3 (emphasizing that the FSIA "requires the District Court *to satisfy itself*" as to the existence of an arbitration agreement and that to "eschew[] making this determination as part of [the] jurisdictional analysis" is "error") (emphasis added); Resp't's Reply at 7-8 (ECF No. 64); Expert Op. of Prof. Sean D. Murphy, Dec. 11, 2015 ¶ 22 (ECF No. 65-6); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (observing that courts possess "an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party").

and unmistakable evidence that they did so."[37] Moreover, based on "the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration," courts must "hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."[38]

As carefully explained by Professor Bermann,[39] the Russian Federation did not agree[40] to delegate *any* "arbitrability" challenges—such as the question of whether an arbitration agreement was ever formed between Petitioners and the Russian Federation—exclusively to the arbitrators. Indeed, none of the three documents cited by Petitioners as purportedly establishing "the Russian Federation's independent agreement to arbitrate arbitrability"[41] actually constitutes an exclusive-delegation agreement.

First, the Russian Federation's letter dated July 29, 2005, is not an exclusive-delegation agreement, but merely an acknowledgment of the principle of Competence-Competence—which authorizes arbitrators "to determine [their] own jurisdiction" *at the outset of arbitration*, but does not limit judicial review of arbitrability challenges *after the award has been rendered*.[42] *Second*,

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[37] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995) (citing *AT&T Techs. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) (emphasis added, internal quotation marks and alterations omitted)).

[38] *First Options*, 514 U.S. at 945.

[39] Bermann Op. II ¶¶ 3-11 (ECF No. 65-1).

[40] Nor could the Russian Federation have done so for the purposes of the FSIA, as demonstrated in the *Chevron* decision. Resp't's Reply at 7-8 (ECF No. 64) In that case, the D.C. Circuit concluded that a purported exclusive-delegation agreement was relevant to the question of the arbitration agreement's *scope* (discussed in Part III of its opinion), but was not relevant with respect to the arbitration agreement's *existence* under the FSIA (discussed in Part II of its opinion). *See Chevron*, 795 F.3d at 205-08 & n.3 (emphasizing that the FSIA "requires the District Court *to satisfy itself*" regarding the existence of an arbitration agreement and that to "eschew[] making this determination as part of [the] jurisdictional analysis" is "error") (emphasis added); *see also Arbaugh*, 546 U.S. at 514.

[41] Pet'rs' Resp. to RF Suppl. Notice ¶ 1 n.2 (ECF No. 104); Pet'rs' Resp. To Notice of Suppl. Authority ¶ 1 (ECF No. 99); Opp'n to Mot. to Dismiss at 15-21 (ECF No. 63).

[42] Bermann Op. II ¶¶ 14-30 (ECF No. 65-1) (analyzing Letter dated July 29, 2005 (ECF No. 63-5)); Resp't's Reply at 9 (ECF No. 64); *see also China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 288-89 (3d Cir. 2003).

the reference to the UNCITRAL Arbitration Rules in Article 26(4)(b) of the ECT does not constitute an exclusive-delegation agreement with respect to the Russian Federation, because (as elaborated below) the Russian Federation never offered to abide by Article 26(4)(b) in the first place and, in any event, Petitioners were not eligible to accept any purported offer under Article 26(4)(b).[43] *Third*, the Terms of Appointment expressly applied only to the then-ongoing arbitration proceedings, did not purport to have any effect with respect to post-arbitration proceedings and, in any event, have no legal effect apart from or in addition to Article 26(4)(b) of the ECT (which, as explained below, was not binding on the Russian Federation).[44] Indeed, as noted by Professor van den Berg, interpreting any of these documents as an exclusive-delegation agreement is unsustainable in the context of an arbitration conducted in the Netherlands, given that Dutch law does not permit such agreements.[45] Accordingly, none of these documents meets the U.S. Supreme Court's high standard of "clear and unmistakable evidence" required to demonstrate a purported exclusive-delegation agreement.[46]

The Hague Judgment further clarifies that no purported exclusive-delegation agreement[47] was ever concluded between the Russian Federation and Petitioners.

First, it is particularly telling that the Hague Judgment does not mention any purported exclusive-delegation agreement, and that Petitioners did not reference any purported exclusive-

[43] Bermann Op. II ¶¶ 31-48 (ECF No. 65-1); Resp't's Reply at 9-10 (ECF No. 64); *see also Neb. Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737, 741 n.2 (8th Cir. 2014); *DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 317 (5th Cir. 2011); *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 777 n.1, 780 (10th Cir. 1998).

[44] Bermann Op. II ¶¶ 57-62 (ECF No. 65-1); Resp't's Reply at 10-11 (ECF No. 64); Terms of Appointment § 4 (ECF No. 63-7).

[45] *See* van den Berg Decl. II ¶¶ 11-12.

[46] The documents relied upon by Petitioners as purported exclusive-delegation agreements plainly fall far short of the contractual language considered by the U.S. Supreme Court in *Rent-A-Center*, which explicitly vested the arbitrators with "exclusive authority" and excluded "any federal, state, or local court" from conducting subsequent review. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 66 (2010); *see* Resp't's Reply 11 (ECF No. 64). Not one of the documents cited by Petitioners purport to vest the arbitrators' with any such "exclusive authority" or even reference the level of post-arbitration judicial review to be exercised by "any federal, state, or local court."

[47] *See* Pet'rs' Resp. to Suppl. Notice ¶ 1 n.2 (ECF No. 104); Pet'rs' Resp. to Suppl. Notice ¶ 1 (ECF No. 99).

delegation agreement in their pleadings before the Hague Court.[48] In fact, Petitioners have *never* asserted this argument in *any* of the ongoing proceedings against the Russian Federation in Belgium, France, Germany, or the United Kingdom, or indeed in *any* jurisdiction other than the United States.[49] Further, the published writings of Petitioners' own arbitration counsel confirm that none of these documents was contemporaneously understood by Petitioners or the Russian Federation to constitute an actual exclusive-delegation agreement.[50]

Second, the provisions of Dutch procedural law applied in the Hague Judgment demonstrate exactly how the Russian Federation's letter dated July 29, 2005, was actually understood during the arbitration proceedings in The Hague. As stated in the letter, the Russian Federation acknowledged "the jurisdiction of th[e] Arbitral Tribunal to determine its own jurisdiction."[51] This language closely tracks the language of Article 1052(1) of the DCCP, which provides as follows: "The arbitral tribunal shall have the power to decide on its own jurisdiction."[52] As detailed in Professor Bermann's Second Expert Opinion, and confirmed in the Third Circuit's decision in *China Minmetals Materials v. Chi Mei* (joined by then-Judge Samuel A. Alito), these are merely references to the principle of Competence-Competence, according to which arbitrators inherently possess jurisdiction to determine their own jurisdiction *at the outset of arbitration*.[53]

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[48] *See generally* Hague J. (R-722); Hague Dist. Ct. 9 Feb. 2016 (*Russian Federation v. Veteran Petroleum Ltd., Yukos Universal Ltd., Hulley Enters. Ltd.*), Hr'g Tr. ("Hague Ct. Tr.") (R-718).

[49] *See* van den Berg Decl. II ¶ 8.

[50] *See* Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS 257, 258-61 (E. Gaillard & D. Di Pietro eds., 2008) (R-726); Bermann Op. II ¶¶ 28-29 (ECF No. 65-1).

[51] Letter dated July 29, 2005 at 2 (ECF No. 63-5).

[52] Dutch Code of Civil Procedure ("DCCP"), art. 1052(1) (R-727).

[53] Bermann Op. II ¶¶ 14-30 (ECF No. 65-1); *China Minmetals*, 334 F.3d at 289.

The principle of Competence-Competence does not by any means, however, limit the authority and responsibility of a court to review the existence of an arbitration agreement *after the arbitration has concluded.*[54] This is evidenced, *inter alia*, by Article 1065(1)(a) of the DCCP, which provides that a national court must set aside an arbitration award in the "absence of a valid arbitration agreement."[55] The fact that Article 1052(1) of the DCCP (acknowledging arbitrators' jurisdiction to decide their own jurisdiction) coexists with Article 1065(1) of the DCCP (authorizing judicial review of arbitration awards on certain grounds after arbitration is complete) demonstrates conclusively that the two concepts are mutually compatible. This compatibility is made even more explicit in the relevant legislative history, and in a recent decision by the Supreme Court of the Netherlands.[56] Indeed, roughly identical provisions are also found under Articles 16(1), 34, and 36 of the UNCITRAL Model Law, which "show[s] irrefutably that the doctrine of Competence-Competence and full post-award review of substantive arbitrability questions are entirely consistent."[57]

It is therefore unsurprising that the Hague Judgment never refers to any purported exclusive-delegation agreement—no such agreement was ever concluded. This Court must therefore apply the presumption "that the parties intended *courts, not arbitrators*, to decide . . . whether the parties have a valid arbitration agreement at all."[58]

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[54] Bermann Op. II ¶¶ 14-30 (ECF No. 65-1); *China Minmetals*, 334 F.3d at 289; *Dallah v. Pakistan* [2010] UKSC 46 ¶¶ 25, 84 (Op. of Lord Mance, Op. of Lord Collins) (ECF No. 55-12); Cour d'appel [CA] [Court of Appeal] Paris, July 12, 1984, *The Arab Republic of Egypt v. SPP Ltd.*, *in* 10 Y.B. COM. ARB. 113 (Pieter Sanders ed., 1985) (ECF No. 68-3).

[55] DCCP, art. 1065(1)(a) (R-727).

[56] van den Berg Decl. II ¶ 9; HR (Neth. Supr. Ct.) 24 Sept. 2014, First Chamber No. 13/04679 EV/LZ (Republic of Ecuador/Chevron Corp.) (ECF No. 68-26); *see also* Bermann Op. II ¶ 26 (ECF No. 65-1).

[57] Bermann II ¶ 48 (ECF No. 65-1); U.N. Comm'n on Int'l Trade Law, 1985 UNCITRAL Model Law on Int'l Commercial Arbitration (June 21, 1985), arts. 16(1), 34, 36 (R-728); *see also* van den Berg Decl. II ¶ 10.

[58] *Green Tree Fin. Corp.*, 539 U.S. at 452 (emphasis added); *see also KenAmerican*, 99 F.3d at 1163; *Nat'l R.R.*, 850 F.2d at 761.

B. The Hague Judgment Confirms that the Russian Federation Never Offered to Arbitrate Under Articles 26 and 45(1) of the ECT

As explained by the D.C. Circuit in *Chevron Corp. v. Republic of Ecuador*,[59] by numerous investor-State tribunals,[60] and by each of the Supreme Court's three opinions in *BG Group v. Republic of Argentina*, an investment treaty such as the ECT does not contain an arbitration agreement between the host State and the foreign investor, but may potentially contain the "nation state's standing offer to arbitrate."[61]

The Hague Court concluded that the Russian Federation never made any offer to arbitrate under Article 45(1) and Article 26 of the ECT, such that no arbitration agreement was ever formed between Petitioners and the Russian Federation.[62] As detailed below, the Hague Court's reasoning thus entirely confirms the analysis provided by Professor Dolzer and Professor Asoskov in their expert opinions in the present proceedings.

1. Article 45(1) of the ECT Does Not Obligate the Russian Federation to Provisionally Apply Individual Treaty Provisions in a Manner Inconsistent with Russian Law

Under Article 45(1) of the ECT, "[e]ach 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

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[59] *See Chevron*, 795 F.3d at 206.

[60] *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award ¶¶ 775, 866 (Dec. 7, 2011) (R-760); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award ¶ 409 (Oct. 4, 2013) (ECF No. 56-9); *Al-Warraq v. Republic of Indonesia*, UNCITRAL, Decision on Jurisdiction ¶ 81 (June 21, 2012) (R-759).

[61] *BG Group v Republic of Argentina*, 134 S. Ct. 1198, 1213-14 (2014) (Sotomayor, J., concurring) ("[A] bilateral investment treaty . . . is not an already agreed-upon arbitration provision between known parties, but rather a nation state's standing offer to arbitrate with an amorphous class of private investors."); *see also id.* at 1211 (holding for the majority that "an offer to arbitrate in an investment treaty can be accepted . . . through an investor's filing of a notice of arbitration"); *id.* at 1216 (Roberts, C.J., dissenting) (observing that an investment treaty "constitutes in effect a unilateral *offer* to arbitrate, which an investor may accept by complying with its terms").

[62] Hague J. ¶ 5.95 (R-722).

regulations."[63] Petitioners do not dispute that the Federal Assembly of the Russian Federation never ratified the ECT, such that the signature of the Deputy Prime Minister, Oleg Davydov, could only render the ECT provisionally applicable to the Russian Federation within the limits of Article 45(1).

Critically, the Hague Judgment confirms (as Professor Dolzer has previously explained) that the correct interpretation of Article 45(1) reflects a "piecemeal" approach, requiring an individualized analysis of the relationship between each provision of the ECT and any conflicting provisions of Russian law: "[T]he option of provisional application . . . depends on the compatibility *of separate treaty provisions with national laws*."[64] The Hague Court correctly rejected the notion that Article 45(1) turns on an all-or-nothing inquiry into whether Russian law recognizes *the principle* of the provisional application of treaties *in general*.[65]

First, with respect to the "ordinary meaning" of the words used in Article 45(1),[66] it would make no sense for the ECT drafters to use the phrase, "*to the extent*," where what they really meant was the all-or-nothing concept, "*if*."[67] The phrase, "to the extent," indicates a sliding scale of applicability—indeed, the word "extent" is synonymous with "degree, scale,

[63] ECT art. 45(1) (ECF No. 51-10).

[64] Hague J. ¶ 5.18 (R-722) (emphasis added); Dolzer Op. I ¶ 22 (ECF No. 24-8).

[65] This was the arbitrators' critical error, as reflected in the interim awards. *See, e.g.*, Hulley Interim Award ¶ 301 (ECF No. 2-4).

[66] The Hague Judgment notably confirms Professor Dolzer's interpretive approach—that the ECT should be analyzed in accordance with the rules of interpretation set forth in the Vienna Convention on the Law of Treaties ("VCLT") (ECF No. 53-8). Dolzer Op. I ¶ 14 (ECF No. 24-8); Hague J. ¶ 5.9 (R-722). Indeed, Petitioners have also cited frequently to the VCLT rules throughout this case. *See* Opp. 22 (ECF No. 63); Hulley Counter-Memorial on Jurisdiction ¶ 136 (ECF No. 71-10); Hulley Rejoinder on Jurisdiction ¶ 108 (ECF No. 71-16).

[67] Hague J. ¶ 5.12 (R-722). Moreover, because "[d]omestic law either *permits* or *does not permit* provisional application of treaties," applying an all-or-nothing approach to this provision (as the arbitrators incorrectly did) would deprive the phrase, "to the extent," of any meaning. Dolzer Op. I ¶ 23 ((ECF No. 24-8) (quoting Mahnoush H. Arsanjani & W. Michael Reisman, *Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 86, 92 (Enzo Cannizzaro ed. 2011) (emphasis added) (ECF No. 31-2)).

level, magnitude, [or] scope."[68] The phrase, "to the extent," thus does not indicate an all-or-nothing proposition.[69] This interpretation is confirmed by the other authentic-language versions of the ECT, including the Spanish, German, Italian, Russian, and French texts, as is further elaborated by Professor Dolzer's analysis under Article 33(3) of the Vienna Convention on the Law of Treaties.[70] The Hague Court thus properly concluded that the text of Article 45(1) cannot be interpreted to refer to an all-or-nothing "form of irreconcilability with national law, namely a ban on provisional application itself."[71]

Second, with respect to the "context" of the phrase, "to the extent," set forth in Article 45(1), the Hague Judgment confirms Professor Dolzer's observation that an all-or-nothing approach is incompatible with the ECT's reference to the signatory State's "constitution, laws or regulations."[72] Where States apply or refuse to apply the international legal principle of provisional application, such bans "usually result[] from constitutional requirements [or] may be enshrined in a formal act."[73] It would be highly surprising, therefore, if "a State addressed the legality (or illegality) of provisional application in an instrument below its laws *on the level of regulation*."[74] As the Hague Judgment further explained, it is possible and indeed probable that certain *individual provisions* of the detailed ECT might conflict with signatory States' *individual regulations* regarding various issues relating to transboundary cooperation in energy sector.[75]

[68] Hague J. ¶ 5.10 (R-722) (citing Oxford Thesaurus of English); Dolzer Op. I ¶ 22 (ECF No. 24-8) (citing Webster's Third New International Dictionary).

[69] Hague J. ¶ 5.12 (R-722); Dolzer Op. I ¶ 23 (ECF No. 24-8).

[70] Hague J. ¶ 5.11 (R-722); *see generally* Third Expert Op. of Professor Dolzer, June 5, 2016.

[71] Hague J. ¶ 5.12 (R-722).

[72] ECT art. 45(1) (ECF No. 51-10); Hague J. ¶ 5.13 (R-722); Dolzer Op. I ¶ 29 (ECF No. 24-8).

[73] Hague J. ¶ 5.13 (R-722); Dolzer Op. I ¶ 29 (ECF No. 24-8).

[74] Dolzer Op. I ¶ 29 (ECF No. 24-8) (emphasis added); Hague J. ¶ 5.13 (R-722).

[75] Hague J. ¶ 5.13 (R-722); Dolzer Op. I ¶ 29 (ECF No. 24-8).

The Hague Court thus concluded that the textual context surrounding the phrase "to the extent" provides strong support to the piecemeal approach.

Third, with respect to the drafting history of Article 45(1), the Hague Judgment acknowledged that statements made during the negotiation of the ECT confirm the correctness of the piecemeal approach. For instance, as stated by Mr. Craig Bamberger, the Chairman of the Legal Advisory Committee to the Conference on the ECT, the effect of Article 45(1) was that even "*relatively minor impediments* in the form of regulations, no matter how insignificant they may be, can be the occasion for failing to apply the Treaty provisionally" with respect to those individual areas of conflict.[76] As recounted by Professor Dolzer, numerous other statements reflecting this understanding may also be found elsewhere in the drafting history, including statements by the Japanese Mission, U.S. Department of State, and Chairman of the Plenary.[77]

Fourth, with respect to the object and purpose of the ECT, the Hague Court agreed with the Russian Federation's position that the ECT's purpose of "promot[ing] long-term cooperation in the area of energy"[78] is not undermined by the Russian Federation's interpretation of Article 45(1), but rather is enhanced.[79] Indeed, the Russian Federation's interpretation provides a mechanism "for the solution of conflicts between states' national laws and international obligations that [result] from the provisional application of treaties."[80] Such a mechanism was intended to ensure that a broad coalition of States could promptly adopt the ECT, thus helping to facilitate the ECT's goal of transboundary cooperation in the energy sector, while ensuring that

[76] Hague J. ¶ 5.22 (R-722) (emphasis added).

[77] Dolzer Op. I ¶ 84 (ECF No. 24-8) (citing Letter from Japanese Mission to the Energy Charter Secretariat (Jan. 20, 1994) (emphasis added) (ECF No. 52-8); Fax from U.S. Dept. of State to Energy Charter Secretariat (Feb. 24, 1994) at 1 (ECF No. 52-9); Plenary Session, Mar. 7, 1994 (Chairman Jones), at 12 (ECF No. 53-6).

[78] ECT, art. 2 (ECF No. 51-10).

[79] Hague J. ¶ 5.19 (R-722).

[80] Hague J. ¶ 5.19 (R-722).

these States' transition into the ECT's cooperative framework could be performed smoothly and gradually as each State sought ratification from its respective domestic legislature.[81] As the Chairman of the Plenary stated during the ECT Conference, it was neither necessary nor advisable "to ask countries to commit themselves to provisional application to the point where they have to change their laws during th[e] period" of provisional application.[82] The Hague Judgment thus confirms that the Russian Federation's interpretation of Article 45(1) fully comports with the ECT drafters' rational objective—to ensure the ECT's prompt adoption by a broad coalition of States on a provisional basis, while permitting individual States to gradually update the necessary provisions of their domestic law during the provisional-application period prior to ratification.[83]

Fifth, the Hague Judgment criticized the arbitrators' illogical application of the maxim, *pacta sunt servanda* (*i.e.*, that agreements must be respected).[84] According to the arbitrators, "this cardinal principle of international law strongly militates against an interpretation of Article 45(1) that would open the door to a signatory, whose domestic regime recognizes the concept of provisional application, to avoid the provisional application of a treaty . . . on the basis that one or more provisions of the treaty is contrary to its internal law."[85] As more rationally and correctly concluded by the Hague Court, and as confirmed by Professor Dolzer, if the ECT *itself* provides for an exception to provisional application in the event of a conflict, then the principle of *pacta sunt servanda* actually requires that such exception be respected in

[81] Dolzer Op. I ¶ 84 (ECF No. 24-8) (citing Plenary Session of Mar. 7, 1994 (Chairman Jones), at 12 (ECF No. 53-6)).

[82] Dolzer Op. I ¶ 84 (ECF No. 24-8).

[83] Dolzer Op. I ¶ 65 (ECF No. 24-8) (noting that the ECT's goals "could be achieved in the short term if a maximum number of States were to accept provisional application").

[84] Hague J. ¶ 5.19 (R-722).

[85] Hulley Interim Award ¶ 313 (Nov. 30, 2009) (ECF No. 30-7).

accordance with the ECT signatories' expressed intentions.[86] Accordingly, where there arises "a conflict between a treaty provision and national law," such that the State's national law will prevail under Article 45(1), this is not "contrary to the *pacta sunt servanda* principle" but rather is an "inherent" component of the ECT signatories' agreement under Article 45(1).[87]

Sixth, it is worth noting that Petitioners' *own* expert witness on public international law during the arbitration, Professor W. Michael Reisman, has also strongly criticized the arbitrators' decision and, in fact, agrees with the "piecemeal" approach to Article 45(1). As Professor Reisman wrote in a 2011 article:

> If Article 45(1) had been intended to refer to the notion of the permissibility of the provisional application of a treaty as such, it would not have been necessary to introduce the phrase 'to the extent'. Domestic law either permits or does not permit provisional application of treaties; there would be no function for the words 'to the extent'. If the intention in Article 45(1) had been to refer to permissibility of provisional application of a treaty as such, the phrase, 'to the extent', would have been replaced with words such as 'if' or 'where'. The phrase, 'to the extent', is meaningful only if it refers to the various obligations in the ECT.[88]

As revealed by this passage, therefore, Professor Reisman's interpretation of Article 45(1) strongly confirms the reasoning of the Hague Court, as do the conclusions of Professor Dolzer[89] and other experts on international law.[90]

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[86] As the Hague Court explained, "while it is possible that provisions of national law stand in the way of exercising one or more provisions of the ECT, the basis for doing so is encased in the ECT itself – i.e., at treaty level." Hague J. ¶ 5.19 (R-722); *see also* Dolzer Op. I ¶¶ 35-48, 54 (ECF No. 24-8).

[87] Hague J. ¶ 5.19 (R-722); *see also* Dolzer Op. I ¶¶ 35-48, 54 (ECF No. 24-8).

[88] Arsanjani & Reisman at 92 (ECF No. 31-2).

[89] Dolzer Op. I ¶¶ 35-48, 54 (ECF No. 24-8).

[90] *See, e.g.*, Op. of Professor Georg Nolte, Oct. 31, 2006 ¶¶ 21-23 (ECF No. 73-5) ("It is true that 'international law is very reluctant to allow States to rely on constitutional or other internal limitations to derogate from treaty obligations which they have accepted' . . . . But this statement begs the question if it is applied to the present case. The real question is which treaty obligations the States have accepted. . . . [I]t is more appropriate to rely on a careful interpretation of the treaty itself rather than on a general principle taken out of context.").

2. The Russian Federation Was Not Obligated to Provisionally Apply Article 26 of the ECT Under Article 45(1) Because Public-Law Disputes Are Non-Arbitrable Under Russian Law

As explained above, because the Federal Assembly of the Russian Federation never ratified the ECT, the ECT became binding upon the Russian Federation only within the limits of Article 45(1). Properly interpreted, Article 45(1) thus prevented any provision of the ECT from coming into effect where such provision conflicted with Russian law.

As the Hague Judgment further demonstrates, because Article 26 of the ECT provides only for the arbitration of public-law disputes (such as the dispute between Petitioners and the Russian Federation in the present case, which focuses on questions of Russian tax law, bankruptcy law, public procurement law, and antimonopoly law), Article 26 thus never came into effect for the Russian Federation. This is because, as the Hague Court explained, such disputes are not subject to arbitration under Russian law in the absence of a treaty ratified by the Federal Assembly, in accordance with the principle of Separation of Powers under the 1993 Constitution of the Russian Federation.

The Hague Court based its reasoning on a meticulous review of the expert opinions on Russian law authored by Professor Anton Asoskov, Professor Alexey Kostin, Professor V. Gladyshev, Dr. Marat V. Baglay, Professor Suren A. Avakiyan, and Professor Angelika Nussberger.[91] As explained below, and further elaborated in the Hague Judgment, both the expert opinions and published commentaries strongly support the interpretation of Russian law applied by the Hague Court.

[91] Asoskov Hague Op. (ECF No. 41-13); Expert Op. of Professor Alexey Kostin, Feb. 21, 2006 ("Kostin Op.") (ECF No. 72-22); Expert Op. of Vladimir Gladyshev, June 29, 2006 ("Gladyshev Op.") (ECF No. 73-3); Expert Op. of Professor M.V. Baglay, Feb. 26, 2006 ("Baglay Op.") (ECF No. 72-25); Expert Op. of Professor Suren Adibekovich Avakiyan, Feb. 21, 2006 ("Avakiyan Op.") (ECF No. 72-21); Expert Op. of Professor Angelika Nussberger, Jan. 17, 2007 ("Nussberger Op.") (ECF No. 73-9).

First, as explained in the Hague Judgment, the only types of disputes that may be arbitrated under Article 26 of the ECT are classified as "public law" disputes under Russian law, because "an assessment of such a claim inevitably involves an assessment of the underlying exercise of public-law powers by Russian authorities."[92] Such claims are to be contrasted, under Russian law, with so-called "civil law" disputes between solely private parties. As the Hague Judgment concludes, based on a careful review of the 1993 International Arbitration Law, the 1992 Arbitrazh Procedure Code, the 1992 Provisional Regulation on Arbitral Tribunals, the 1995 Arbitrazh Procedure Code, the 1995 Russian Civil Code, and the 2002 Civil Procedure Code, only a dispute "that arises out of civil law relations" may presumptively be subjected to arbitration under Russian law.[93] By contrast, when inherently governmental acts are challenged, Russian law generally does not allow for the arbitration of such disputes.[94]

Second, the Hague Judgment considered and rejected the arbitrators' erroneous conclusion that public-law disputes were rendered susceptible to arbitration in the Russian Federation under Article 9, paragraph 2, of the Russian Soviet Federative Socialist Republic's ("RSFSR") 1991 Law on Foreign Investments (the "1991 Law"), or Article 10 of the Russian Federation's 1999 Law on Foreign Investments (the "1999 Law").[95] In relevant part, the 1991 Law provides as follows: "Disputes of foreign investors . . . are subject to settlement in courts of

[92] Hague J. ¶¶ 5.36-5.41 (R-722); *see also* Asoskov Hague Op. ¶¶ 64-68 (ECF No. 41-13).

[93] Hague J. ¶¶ 5.36-5.41 (R-722) (analyzing Law of the Russian Federation No. 5338-1 on International Commercial Arbitration, July 7, 1993, art. 1(2) (R-758); Arbitrazh Procedure Code of the Russian Federation, Mar. 5, 1992, art. 21 (R-748); Provisional Regulation on Arbitral Tribunal for Resolving Economic Disputes, art. 1(1) *approved by* Resolution of the Supreme Council of the Russian Federation No. 3115-1, June 24, 1992 (R-749); Article 23 of the Arbitrazh Procedure Code of 1995 (R-750); Article 11 of the Civil Code of the Russian Federation (R-752); Article 3 of the 2002 Civil Procedure Code (R-751)); *see also* Asoskov Hague Op. ¶¶ 13-22, 36-42 (ECF No. 41-13); Kostin Op. at 3-4 (ECF No. 72-22).

[94] Hague J. ¶¶ 5.36-5.41 (R-722); Asoskov Hague Op. ¶¶ 36-42 (ECF No. 41-13).

[95] Hague J. ¶¶ 5.42-5.64 (R-722).

the Russian Federation or, on agreement between sides, in a Court of Arbitration."[96] The 1999 Law also provides that "[a]ny dispute involving a foreign investor and related to the investment . . . shall be settled in compliance with the international treaties of the Russian Federation and federal laws in a court, an arbitration court or international arbitration (arbitration tribunal)."[97]

As the Hague Court explained, these provisions can only be understood when analyzed together with Article 43 of the Russian Federation's Fundamentals of Legislation.[98] Properly interpreted, paragraph 2 of Article 9 of the 1991 Law merely authorizes foreign investors to pursue arbitration of *civil-law disputes*,[99] while paragraph 1 of Article 9 of the 1991 Law requires that foreign investors' *public-law disputes against the Government* must be resolved only "by the Supreme Court of the RSFSR or the Supreme Arbitrazh Court of the RSFSR, unless another procedure is established by an international treaty in force in the territory of the RSFSR."[100] As for Article 10 of the 1999 Law, the Hague Court concluded that this provision did not authorize arbitration of public-law disputes against the Government, but merely reflected that such authorization could be provided for in a treaty that was duly ratified by the Federal Assembly under the 1993 Constitution of the Russian Federation.[101] Basing these conclusions

[96] Law of the RSFSR No. 1545-1 on Foreign Investments in the RSFSR, July 4, 1991, art. 9(2) ("1991 Law") (R-755).

[97] Federal Law of the Russian Federation No. 160-FZ on Foreign Investments in the Russian Federation, July 9, 1999, art. 10 ("1999 Law") (R-756).

[98] Hague J. ¶¶ 5.43-5.48 (R-722) (analyzing Fundamentals of Legislation on Foreign Investments in the USSR, *adopted by* the Supreme Soviet of the USSR No. 2302-1, July 5, 1991, art. 43 (the "Fundamentals of Legislation") (R-753)); *see also* Asoskov Hague Op. ¶¶ 69-80 (ECF No. 41-13).

[99] Hague J. ¶¶ 5.46-5.48 (R-722) (analyzing Article 9, paragraph 2 of the 1991 Law (R-755)); *see also* Asoskov Hague Op. ¶¶ 75-80 (ECF No. 41-13).

[100] Hague J. ¶¶ 5.46-5.48 (R-722) (analyzing Article 9, paragraph 1 of the 1991 Law (R-755)); *see also* Asoskov Hague Op. ¶¶ 75-80 (ECF No. 41-13).

[101] Hague J. ¶¶ 5.52-5.58 (R-722) (analyzing Article 10 of the 1999 Law (R-756)); *see also* Asoskov Hague Op. ¶¶ 81-95 (ECF No. 41-13).

upon the expert opinion of Professor Asoskov, as well as numerous published commentaries on Russian law,[102] the Hague Court held that the arbitrators had been wrong to rely upon either the 1991 Law or the 1999 Law to conclude that Russian law permitted arbitration of investor-State disputes on the basis of an *unratified* treaty, such as the ECT.

Third, the Hague Judgment emphasized the central importance of the principle of Separation of Powers under the 1993 Constitution of the Russian Federation.[103] This principle permits the President of the Russian Federation and other members of the executive branch to negotiate and sign international treaties under Articles 86 and 114 of the Constitution, but authorizes only the legislative branch—the Federal Assembly—to ratify and thereby implement treaties which "supplement or amend Russian law" under Article 94 of the Constitution.[104] The Hague Judgment also noted the provisions of Article 15 of the Russian Federation's Federal Law on International Treaties ("FLIT"), which provides that "international treaties whose implementation requires amendment of existing legislation or enactment of new federal laws, or that set out rules different from those provided for by law," are subject to ratification.[105]

After carefully reviewing these authorities, as well as the reasoning of numerous experts and commentators on Russian constitutional law and the FLIT,[106] the Hague Court further explained that investor-State arbitration ("a new form of dispute resolution") represented a

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[102] Hague J. ¶¶ 5.52-5.58 (R-722) (analyzing Article 10 of the 1999 Law (R-756)); Asoskov Hague Op. ¶¶ 81-95 (ECF No. 41-13).

[103] *See* Hague J. ¶¶ 5.73-5.93 (R-722) (citing Constitution of the Russian Federation, 1993 (R-757)); Baglay Op. at 2-5 (ECF No. 72-25); Avakiyan Op. at 4-9 (ECF No. 72-21); Nussberger Op. at 15-24 (ECF No. 73-9).

[104] Hague J. ¶¶ 5.74-5.93 (R-722); Baglay Op. at 3 (ECF No. 72-25); Avakiyan Op. at 5-6 (ECF No. 72-21); Nussberger Op. at 18-19 (ECF No. 73-9).

[105] Hague J. ¶¶ 5.85-5.86 (R-722) (analyzing Federal Law of the Russian Federation No. 101-FL on International Treaties of the Russian Federation, July 15, 1995, art. 15 (R-754)); *see also* Nussberger Op. at 31 (ECF No. 73-9) (noting that the FLIT "stipulates that international treaties necessitating changes in existing laws require ratification").

[106] Hague J. ¶¶ 5.79-5.82, 5.86-5.91 (R-722).

profound departure from the Russian legal order prior to 1994.[107] This fundamental change could only be incorporated into existing Russian law—as required by Article 45(1) of the ECT—after legislative ratification by the Federal Assembly. As explained in the Hague Judgment:

> Relative to existing Russian legislation, Article 26 ECT constitutes a new form of dispute resolution, namely a form which limits the sovereignty of the Russian Federation in the settlement of international public-law disputes to such an extent that an international tribunal would be competent to rule on the exercise of public-law governmental actions rather than a national court. The Constitution and the principle of the separation of powers enshrined therein preclude a representative of the executive from being able to bind the Russian Federation to Article 26 ECT. This means . . . that provisional application of Article 26 ECT is contrary to the constitutional separation of the executive, legislative and judiciary powers.[108]

Applying this reasoning under Article 45(1) of the ECT, the Hague Court concluded ultimately that "[t]he Russian Federation . . . never made an unconditional offer for arbitration, in the sense of Article 26 ECT," and therefore no "valid arbitration agreement" was ever formed.[109]

The reasoning of the Hague Court with respect to the background presumptions underlying Russian law during the early 1990s is cogent and sound—particularly given that no treaty-based investor-State arbitration had ever taken place anywhere in the world prior to 1987.[110] In accordance with the Hague Court's reasoning, this Court must also conclude that the Russian Federation never offered to arbitrate and thus never agreed to arbitration under Article 26 of the ECT. In the absence of any arbitration agreement, therefore, this Court must dismiss this action with prejudice for lack of jurisdiction under the FSIA.

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[107] Hague J. ¶ 5.93 (R-722).

[108] Hague J. ¶ 5.93 (R-722); *see also* Baglay Op. at 5 (ECF No. 72-25); Avakiyan Op. at 8-9 (ECF No. 72-21).

[109] Hague J. ¶ 5.95 (R-722).

[110] CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES § 1.07 (2008) (R-742) (observing that the first arbitration under a bilateral investment treaty was registered in 1987).

C. The Amsterdam Judgment and the Berlin Documents Demonstrate that Petitioners Were Not Eligible to Accept Any Purported Offer of Arbitration Under Article 26 of the ECT

The Russian Federation has also demonstrated that Petitioners were not eligible offerees (*i.e.*, foreign investors) under Article 26 of the ECT by virtue of their Russian nationality and fraudulent conduct, and thus could not accept any purported offer of arbitration.[111] Over the past seven months, the Russian Federation's arguments on this point have been powerfully corroborated by additional documentary evidence described by the Amsterdam Court in its judgment on November 5, 2015, the documents submitted to the Higher Regional Court of Berlin on April 20, 2016, and Mr. Dmitry Gololobov's Declaration dated July 26, 2016. Based on the facts revealed by these materials, Petitioners do not fall within the class of offerees contemplated by Article 26 of the ECT, such that no agreement to arbitrate was ever formed between Petitioners and the Russian Federation, as required by the FSIA.

1. The Amsterdam Judgment Demonstrates that "Control in Fact" Is Exercised with Respect to Petitioners and Their Yukos Shares by Six Russian Oligarchs—Not by Cypriot or U.K. Nationals

The Russian Federation has demonstrated that the fundamental purpose of investor-State arbitration "is *not* to provide an additional protection to *all* investors generally, but to offer *foreign* investors an additional protection that they would not otherwise enjoy."[112] As recognized by the arbitrators in *Loewen v. United States*, including former Chief Judge Abner J. Mikva of the D.C. Circuit, "it is inconceivable that sovereign nations would negotiate treaties to

[111] Resp't's Mot. to Dismiss at 31-36 (ECF No. 24); Resp't's Reply at 17-21 (ECF No. 64); Dolzer Op. I ¶¶ 96-214 (ECF No. 24-8); Dolzer Op. II ¶¶ 4-30 (ECF No. 65-2).

[112] *Société Immobilière de Gaëta v. Republic of Guinea*, ICSID Case No. ARB/12/36, Award ¶ 181 (Dec. 21, 2015) (emphasis added) (ECF No. 97-3); *see also* CHRISTOPHER DUGAN ET AL., INVESTOR-STATE ARBITRATION 1-4 (2008) (R-739) (describing how the rise of international investments has led to the evolution of new legal frameworks that set forth the obligations of "host states toward *foreign investors*" (emphasis added)); R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES §§ 1.01-1.05 (2d ed. 2014) (R-740); Resp't's Reply to Pet'rs' Resp. to Notice of Supp. Authorities at 3 (ECF No. 100).

supplement or modify domestic law as it applies to their own residents"[113] without a clear and express statement of such intent.[114] Treaties providing for investor-State arbitration are "clearly intended to protect the investors of one Contracting Party against unfair practices occurring in one of the other Contracting Parties,"[115] rather than to provide additional remedies to domestic investors against their own State's government.

The ECT's arbitration provisions have precisely this function, as is evident from the plain language of Articles 10(1), 13, and 17(1), which provide protections only to "Investors of *other* Contracting Parties," thus excluding domestic investors from any protections against the actions of their own State's government.[116] This is also confirmed by the Energy Charter Secretariat's Introduction, which emphasizes that the ECT "ensures the protection of *foreign energy investments*."[117] Indeed, both the arbitrators and Petitioners have conceded that the ECT's fundamental purpose is to protect "*foreign investment*, especially [] investment *by Western sources* in the energy resources of the Russian Federation."[118] Accordingly, even if the Russian Federation had offered to arbitrate (which it did not), the purported offer of arbitration under Article 26 of the ECT would extend only to foreign investors—not Russian nationals.

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[113] *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award, ¶¶ 222-24 (June 26, 2003) (ECF No. 68-32). Notably, interpreting investment treaties as Petitioners do would subject the United States to claims under more than thirty investment treaties by U.S. nationals routing their investments through shell companies in Grenada, Trinidad and Tobago, Jamaica, or many other offshore jurisdictions. *See* Dolzer Op. I ¶ 209 & n.109 (ECF No. 24-8) (analyzing thirty U.S. treaties concluded between 1986 and 1999).

[114] *See* Dolzer Op. I ¶ 197 & n.197 (ECF No. 24-8) ("Where treaties are intended to confer international legal rights opposable against States by their own nationals, such as human rights treaties do, such treaties generally expressly state so.").

[115] *See Loewen* ¶ 223 (ECF No. 68-32).

[116] *See* ECT, arts. 10(1), 13, and 17(1) (ECF No. 51-10).

[117] *An Introduction To The Energy Charter: Why An Energy Charter?*, *in* Energy Charter Secretariat, The Energy Charter Treaty and Related Documents 14 (ECF No. 51-10) (emphasis added).

[118] Hulley Interim Award ¶ 433 (Nov. 30, 2009) (ECF No. 30-7) (emphasis added); Hulley Statement of Defense ¶ 57, Hague Dist. Ct. (May 20, 2015) (ECF No. 43-11).

Importantly, numerous investor-State tribunals have concluded that offshore shell companies such as Petitioners (which admittedly do "not engage in any substantial business activity in [their] place of organization (or elsewhere)")[119] are not eligible to pursue investor-State arbitration against their principals' own State of nationality.[120] As the arbitrators concluded in *TSA Spectrum v. Argentina*, for example, "a corporate entity controlled directly or indirectly by persons of the same nationality as the host State" does not qualify as a foreign investor for the purposes of investor-State arbitration.[121] Similarly, in *Société Immobilière de Gaëta v. Republic of Guinea*, the arbitrators declined jurisdiction over a purportedly French company's claims against the Republic of Guinea because the company's actual seat of management and control was Guinea itself.[122] In *Occidental v. Ecuador*, the annulment committee likewise agreed that "the dominant position in international law grants standing and relief to the owner of the beneficial interest – not to the nominee."[123] In *Loewen*, the tribunal concluded that treaties providing for investor-State arbitration are "not intended to and could not affect the rights of American investors in relation to practices of the United States," *i.e.*, by permitting them to bring arbitration against their own State's government.[124]

The ECT must be interpreted and applied in accordance with this well-established line of authority. As concluded by Professor Dolzer, "neither the text nor the object and purpose of the ECT support the view that a mere shell company established by nationals outside their country

[119] Letter from Petitioners to Tribunal at 2, Nov. 3, 2006 (ECF No. 48-19).

[120] *See TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, ¶¶ 145-46 (Dec. 19, 2008) (ECF No. 33-16); *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, ¶ 136 (Apr. 3, 2014) (ECF No. 33-15); *Société Immobilière de Gaëta* ¶ 181 (ECF No. 97-3).

[121] *TSA Spectrum* ¶¶ 145-46 (ECF No. 33-16).

[122] *Société Immobilière de Gaëta* ¶¶ 181-83 (ECF No. 97-3).

[123] *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment ¶¶ 259-62 (Nov. 2, 2015) (ECF No. 68-28) (quoting David J. Bederman, *Beneficial Ownership of International Claims*, 38 INT'L & COMP. L.Q. 935, 936 (1989)); Dolzer Op. II ¶¶ 13-16 (ECF No. 65-2).

[124] *See Loewen Group*, ¶¶ 222-24 (ECF No. 68-32).

may be considered as an 'Investor' in case that shell company serves merely as a conduit to channel the investors' funds in the territory of its home State."[125] This interpretation is confirmed by the signatory States' authoritative interpretation of the ECT, set forth in the Final Act of the European Energy Charter Conference.[126] As stated therein, when determining whether an entity actually qualifies as an offeree (*i.e.*, as "an investor of any other Contracting Party"), the relevant nationality is that of the party who exercises "*control in fact*" with respect to the investment.[127] A determination of "*control in fact*" must be reached "after an examination of *the actual circumstances in each situation*," including "the investor's . . . ability to exercise substantial influence over the management and operation of the investment."[128]

In the present case, however, Petitioners have carefully and intentionally concealed the true facts regarding the identity of the parties who actually exercise "control in fact" with respect to Petitioners and Petitioners' Yukos shares. Since the beginning of the arbitration, and as recently as the hearing before the Hague Court on February 9, 2016, Petitioners have consistently represented that control over their management and operation is exercised *exclusively by U.K. nationals*—a group of purported trustees based in Guernsey and Jersey. According to their repeated contentions, Petitioners are "not indirectly owned and controlled by Russian individuals but (ultimately) *by the respective trustees*. These trustees are *nationals of the United Kingdom, not of Russia* . . . . [Accordingly,] the trustees, rather than the [Russian] beneficiaries, are the owners of and control the assets of the trusts."[129] Indeed, Petitioners have painstakingly

[125] Dolzer Op. I ¶ 213 (ECF No. 24-8).

[126] ECT Final Act, Understanding IV.3, Art. 1(6), Dec. 17, 1994 (ECF No. 51-9).

[127] *Id.* (emphasis added).

[128] *Id*. (emphasis added).

[129] Hague Ct. Tr., Leijten Opening ¶ 16 & Ynzonides Rebuttal ¶ 79 (R-718) (emphasis added); *see also Hulley Enters. Ltd. (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Claimant's Rejoinder on Jurisdiction and Admissibility, ¶ 384 (June 1, 2007) ("Hulley Rejoinder on Jurisdiction") (ECF No. 48-17) ("[B]oth 'ownership' and

maintained this position in press conferences, proclaiming to the media and to the public that their "very supportive shareholders" are actually "the trustees in Guernsey."[130]

Petitioners' numerous statements on this issue to the arbitrators, to national courts, to the media, and to the public have been uniformly false, however, as revealed by the documents referenced in the Amsterdam Judgment and Mr. Gololobov's Declaration. These materials also reflect that *Petitioners consciously withheld documents* responsive to the arbitrators' Procedural Order No. 12 (ECF No. 75-19) in their concerted effort to conceal the truth—that "control in fact" is not exercised by the Guernsey trustees, but by the Russian Oligarchs.

As described in the Amsterdam Judgment and Mr. Gololobov's Declaration, and as illustrated below in ***Figure 1*** and ***Figure 2***, Petitioners' parent entity (Group Menatep Limited or "GML") entered into an agreement in 2011 with two Dutch foundations (also known as "*Stichtings*").[131] Since 2005, these two Dutch foundations have maintained claims with respect to certain assets that formerly belonged to Yukos (*e.g*, stakes in the Lithuanian company, Mazeikiu Nafta, and Slovakian company, Transpetrol).[132] GML's 2011 agreement with the Dutch foundations governs the distribution of proceeds from the eventual liquidation of these Yukos assets.[133] Title to the Yukos assets has been a matter of dispute for many years between the Dutch foundations and two Russian entities known as OAO Rosneft ("Rosneft") and

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'control' of the GML shares lie not with the settlors or beneficiaries of the Guernsey Trusts (i.e. not with Russian individuals) but with the Trustees of the Guernsey Trusts."); *see also* Vasquez Decl. III, Table A-1.

[130] *Historic Award in the Yukos Majority Shareholders Arbitration: USD 50 billion*, YOUTUBE (July 29, 2014), https://www.youtube.com/watch?v=n87Ts53X3v0, at 3:58 (Tim Osborne, CEO of Group Menatep Limited).

[131] Amsterdam J. ¶¶ 2.25-2.31, 4.15, 4.21 (R-717); Gololobov Decl. ¶¶ 62-69.

[132] *See* Amsterdam J. ¶¶ 2.3-2.15 (R-717); Gololobov Decl. ¶ 62.

[133] Amsterdam J. ¶¶ 2.25-2.31, 4.15, 4.21 (R-717) (discussing payments made under GML's 2011 Agreement) (R-672); *see also In re Application of OOO Promneftstroy*, Misc. No. M 19-99, Pet. for Deposition of Eric Wolf dated Sept. 9, 2015 ("Promneftstroy Pet. to Depose Eric Wolf"), at 8 (R-723); *In re Application of OOO Promneftstroy for Order to Conduct Discovery for Use in Foreign Proceeding*, Misc. No. M 19-99 (RJS), Tr. of Feldman Dep. ("Feldman Dep. Tr."), Dec. 16, 2015, 118:13-25 (R-720); *Yukos Capital SàRL v. Feldman*, No. 15-cv-4964-LAK, Am. Compl., Mar. 15, 2016, ¶ 73 (R-673); *Yukos Capital SàRL v. Feldman*, No. 15-cv-4964-LAK, Second Am. Countercls. & Third-Party Compl., Mar. 24, 2016 ("Feldman's SDNY Ans. & Countercls."), ¶ 75 (R-674).

OOO Promneftstroy ("Promneftstroy"). While these disputes have gradually proceeded toward resolution, certain Yukos assets have been liquidated, and the Dutch foundations have agreed to make a disbursement of the proceeds to GML based on GML's ownership (through Petitioners) of "70% of the shares in Yukos Oil."[134] In exchange, "as per an agreement made with GML, the Foundations' directors will receive 10% of any distribution made to GML" through Petitioners, which amounted to approximately US$ 242 million in distributions to GML in 2015.[135] The Amsterdam Judgment also describes an extended series of emails between GML and Promneftstroy relating to the Dutch foundations' dispute over title to the Yukos assets.[136]

Remarkably, copies of GML's 2011 agreement with the Dutch foundations and GML's email exchange with Promneftstroy have now been publicly docketed in the U.S. District Court for the Southern District of New York during collateral litigation related to the Amsterdam proceedings, along with numerous related documents.[137] These materials confirm what the Russian Federation has always contended, and what Petitioners intentionally concealed from the arbitrators. As illustrated below in ***Figure 1*** and ***Figure 2***, actual control over GML (and therefore actual control of Petitioners and Petitioners' Yukos shares) is exercised by the Russian Oligarchs, and the Guernsey "trustees" play no role whatsoever in directing GML's affairs.

First, GML's 2011 agreement to pay the Dutch foundations' directors a fee worth 10% of the proceeds received from liquidating Yukos assets, amounting to approximately US$ 242 million in 2015, was expressly concluded after the Dutch foundations' directors held

[134] Amsterdam J. ¶ 4.21 (R-717); Gololobov Decl. ¶ 68.

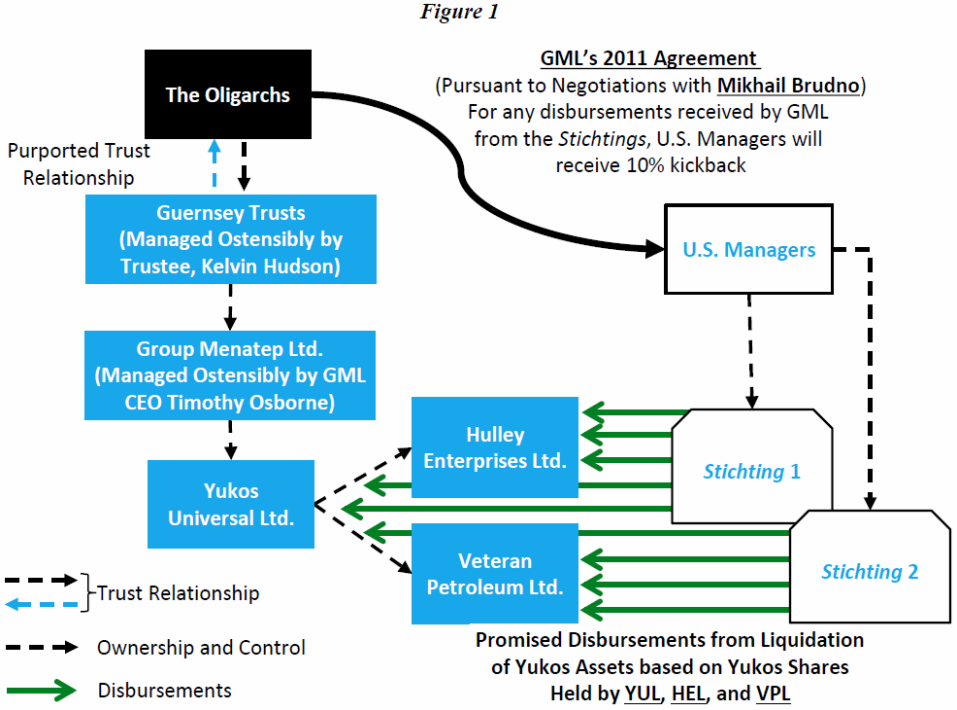
[135] Amsterdam J. ¶ 4.15 (R-717); *see also id.* ¶ 2.31 (R-717); Gololobov Decl. ¶ 68.

[136] Amsterdam J. ¶¶ 2.25-2.31 (R-717).

[137] GML 2011 Agreement (R-672); Eric Wolf Email Copying Leonid Nevzlin, Aug. 28, 2015 (R-712); Eric Wolf Email to Tim Osborne, July 10, 2015 (R-713)); *see also* Wolf Dep. Tr. 122:2-10 (R-724); Feldman Dep. Tr. 118:13-25 (R-720); Gololobov Decl. ¶ 65.

"various discussions with Michael Brudno."[138] This statement is plainly a reference to *Mikhail* Brudno, one of the original Russian Oligarchs who managed Bank Menatep in the 1990s, became an executive at OAO Yukos Oil Company (specifically the director of Refining and Marketing) after it was fraudulently acquired from the Russian people, and is now a purported "beneficiary" of one of the Guernsey trusts (*i.e.*, the Auriga Trust)[139] that holds the shares of GML. Strikingly, the Guernsey trustee who supposedly manages the Oligarchs' GML shares (and Petitioners' Yukos shares) on the Oligarchs' behalf—Mr. Kelvin Hudson[140]—is never mentioned in GML's 2011 agreement, or any related correspondence. As ***Figure 1*** illustrates, therefore, the Oligarchs have completely circumvented the Guernsey trustee, Mr. Hudson, with respect to their multimillion-dollar transaction with the Dutch *Stichtings*:

Figure 1



[138] GML 2011 Agreement (R-672).

[139] Hulley Interim Award ¶ 462, App. at 218 (ECF No. 2-4); Gololobov Decl. ¶ 68.

[140] Letter from Kelvin Hudson to Shearman & Sterling LLP, Dec. 19, 2006 (R-744); Nevzlin Testimony, Merits H'rg Tr. 189:9-190:5 (ECF No. 76-23).

Notably, GML's 2011 agreement expressly governed all disbursements to GML by the Dutch foundations "*via Yukos Universal Ltd*" and "*via Veteran*,"[141] the Petitioners in the present action.

Second, GML's email exchange with Promneftstroy also reveals that the Oligarchs' involvement in GML's management (and the Oligarchs' circumvention of the Guernsey trustees) is part of a pervasive and consistent pattern. Specifically, during the settlement negotiations between the Dutch foundations and Promneftstroy, an individual named Eric Wolf communicated to Promneftstroy that he was authorized to act on behalf of the Oligarchs and thus represented the "principals whose money is actually on the line."[142] Other emails confirm that Eric Wolf was involved in "several months of negotiations" regarding the dispute with Promneftstroy.[143] Indeed, as Eric Wolf stated explicitly—he was authorized to "speak on behalf of the beneficiaries. Talking to [him is the] same as talking to Leonid and his former partners. They gave [Eric Wolf] the mandate."[144] The "Leonid" referenced by Mr. Wolf, who also was copied on the same email, was Mr. Leonid Nevzlin. Like Mr. Brudno, Mr. Nevzlin was also an executive at both Bank Menatep and Yukos during the 1990s, and is currently a purported "beneficiary" of three of the Guernsey trusts (*i.e.*, the Palmus Trust, the Pictor Trust, and the Southern Cross Trust)[145] that hold the shares of GML.

The fact that Mr. Nevzlin and his fellow Oligarchs gave "the mandate" for negotiation with Promneftstroy to Mr. Wolf demonstrates that the Oligarchs—and not the Guernsey trustee, Mr. Kelvin Michael Hudson—exercise actual "control in fact" over GML, as well as over

[141] GML 2011 Agreement (R-672); *see also* Stichtings' SDNY Compl. ¶¶ 73-75 (R-673); Feldman's SDNY Ans. & Countercls. ¶ 75 (R-674).

[142] Wolf Email Copying Leonid Nevzlin, Aug. 28, 2015 (R-712); Wolf Email to Tim Osborne, July 10, 2015 (R-713)); *see also* Wolf Dep. Tr. 122:2-10 (R-724); Gololobov Decl. ¶ 68.

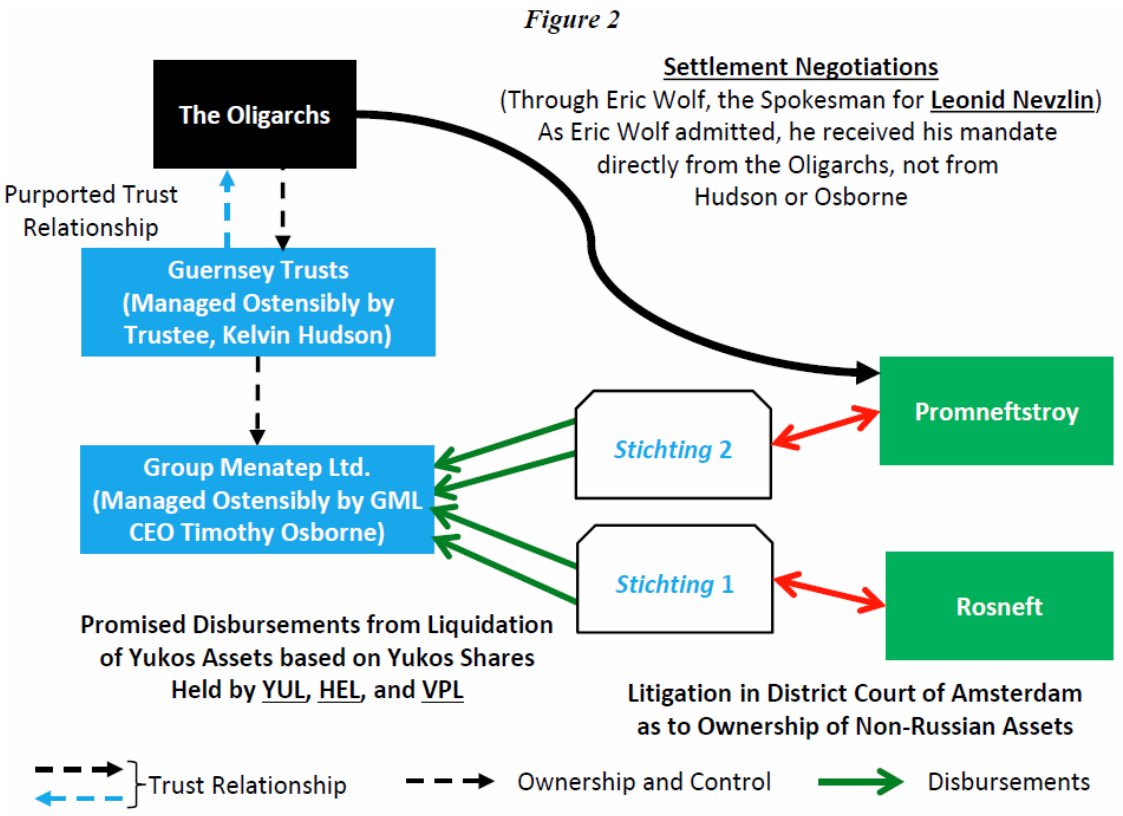
[143] Wolf Email to Tim Osborne, July 10, 2015 (R-713); Gololobov Decl. ¶ 68.

[144] Wolf Email Copying Leonid Nevzlin, Aug. 28, 2015 (R-712).

[145] Hulley Interim Award ¶¶ 462, 481, App. at 218 (ECF No. 2-4); Gololobov Decl. ¶ 68.

Petitioners, which are owned and controlled by GML. Accordingly, only the Russian Oligarchs have any genuine "ability to exercise substantial influence over the management and operation of the investment."[146] Indeed, just as in GML's 2011 agreement with the Dutch foundations, it is striking that neither Mr. Kelvin Hudson nor the Guernsey trusts are ever mentioned in any of the emails between GML and Promneftstroy. As ***Figure 2*** illustrates, therefore, the Oligarchs have completely circumvented the Guernsey trustee with respect to the most important business affairs of GML and Petitioners, and thus exercise actual control in fact:

Figure 2



Third, Petitioners evidently deceived the arbitrators regarding the Oligarchs' "control in fact" by withholding GML's 2011 agreement and all related communications from disclosure—even though these documents were subject to mandatory disclosure under the arbitrators'

[146] ECT Final Act, Understanding IV.3, Art. 1(6), Dec. 17, 1994 (ECF No. 51-9).

Procedural Order No. 12. In this Procedural Order, the arbitrators ordered Petitioners to disclose all "[d]ocuments concerning any transaction or contemplated transaction related to Yukos shares" entailing "the disbursement, payment, or receipt of dividends, loans or other sums" involving "Stichting Administratiekantoor Financial Performance Holdings" or "Stichting Administratiekantoor Yukos International," which are the names of the two Dutch foundations.[147] Procedural Order No. 12 also obligated Petitioners to disclose all "written communications to [Petitioners], the Oligarchs, PwC, Yukos, or its affiliated entities concerning" any such transactions or contemplated transactions.[148] Petitioners, however, never produced GML's 2011 agreement or any communications regarding this agreement, despite being under a "continuing" obligation[149] to disclose such documents during the arbitration. But for Petitioners' intentional violation of the arbitrators' document-production orders, the arbitrators never would have erroneously concluded that "Bank Menatep and the Oligarchs," who acquired the shares of Yukos through fraudulent and corrupt means, were actually "an entity and persons *separate from* [Petitioners]."[150]

As the Amsterdam Judgment and Mr. Gololobov's Declaration reveal, therefore, neither Petitioners, nor GML, nor the Guernsey trustees exercise actual "control in fact" with respect to their Yukos shares, such that these entities' Cypriot and U.K. nationalities have no relevance whatsoever under the ECT. On the contrary, actual "control in fact" is exercised by the Oligarchs—including Mr. Brudno and Mr. Nevzlin—whose Russian nationality disqualifies them (and thus Petitioners) as potential offerees with respect to any purported offer of arbitration

[147] *See* Procedural Order No. 12 ("PO No. 12") ¶ 211 (Sept. 16, 2011) (ECF No. 75-19); Respondent's First Merits Request For Documents, Request No. 7.5 (June 17, 2011) (ECF No. 87-15).

[148] PO No. 12 ¶ 211 (ECF No. 75-19); Respondent's Merits Request No. 7.5 (June 17, 2011) (ECF No. 87-15).

[149] PO 12 ¶¶ 91-93 (ECF No. 75-19).

[150] Hulley Final Award ¶¶ 1369-70 (ECF No. 2-1).

under Article 26 of the ECT. The fact that Petitioners concealed GML's 2011 agreement from the arbitrators, in violation of Procedural Order No. 12, illustrates their flagrant efforts to deceive the arbitrators as to the true facts and deprives the arbitrators' awards of any legitimacy.

2. The Berlin Documents Demonstrate that the Oligarchs Used Petitioners Not Only to Conceal and Perpetuate Fraud, Bid-Rigging, and Tax Evasion, But Also the Bribery of Public Officials

Petitioners' ineligibility to accept any offer of arbitration under Article 26 of the ECT is further demonstrated by the Berlin Documents, which were filed with the Higher Regional Court of Berlin on April 20, 2016, and Mr. Gololobov's Declaration dated July 26, 2016. In addition to the reasons set forth above with respect to the Oligarchs' "control in fact," these materials reveal that Petitioners were not eligible to accept any purported offer to arbitrate because they were used by the Oligarchs to perpetuate and conceal a series of massive frauds on the Russian people, including not only collusive bid-rigging, violation of antimonopoly laws, and tax evasion,[151] but also bribery of the Government-appointed managers of Yukos prior to its privatization. As further elaborated by Professor Dolzer, the Oligarchs' illegal activity is relevant to Petitioners' status as purported offerees in the following two respects.[152]

First, under the veil-piercing principle (which, as the U.S. Supreme Court and the International Court of Justice have explained, is a recognized principle of customary international law),[153] the Oligarchs' use of Petitioners for illegal and fraudulent purposes renders Petitioners' purported corporate nationality (*i.e.*, U.K. nationality or Cyprus nationality)

[151] Expert Op. of Professor Anton V. Asoskov, Oct. 20, 2015 ¶¶ 35-52 (ECF No. 24-6); Decl. of Arkady Vitalyevich Zakharov, Oct. 14, 2015 ("Zakharov Decl.") ¶¶ 7-15 (ECF No. 24-2); Decl. of Gitas Povilo Anilionis, Oct. 16, 2015 ("Anilionis Decl.") ¶¶ 16-33 (ECF No. 24-1); Kothari Report ¶¶ 22-45 (ECF No. 24-4); Hulley Final Award ¶ 1620 (July 18, 2014) (ECF No. 2-1).

[152] Dolzer Op. I ¶¶ 96-166 (ECF No. 24-8).

[153] *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628 n.20 (1983); *Barcelona Traction, Light And Power Co., Ltd.*, 1970 I.C.J. Rep. 3, 39 ¶¶ 56-58 (Feb. 5) (ECF No. 49-12).

irrelevant under the ECT. Rather, as numerous investor-State tribunals have recognized, the nationality of a corporate entity used for illegal or fraudulent purposes must be disregarded, such that only the nationality of the corporate entity's principals becomes relevant to the entity's status as an eligible offeree under an investment treaty.[154] Because Petitioners' principals are the Russian Oligarchs, Petitioners' illegal activities thus disqualify them as potential foreign investors in any dispute against the Russian Federation, such that they were unable to accept any purported offer to arbitrate under Article 26 of the ECT.

Second, the Oligarchs' illegal acquisition of the shares of OAO Yukos Oil Company during the Loans-for-Shares auctions in 1995 and 1996 likewise renders Petitioners ineligible as potential offerees under the well-established principle of international law recognized by the arbitrators themselves: "An investor who has obtained an investment in the host State . . . in violation of the laws of the host state . . . should not be allowed to benefit from the Treaty."[155] As explained by the tribunal in *SAUR v. Argentina*, which the arbitrators quoted with approval, "[t]he condition of not committing a serious violation of the legal order is a tacit condition, inherent to any [investment treaty] 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."[156] Indeed, in paragraph 1370 of the arbitrators' awards, the arbitrators recognized that the illegalities committed during the Loans-for-Shares auctions in

[154] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction ¶¶ 54-56 (Apr. 29, 2004) (ECF No. 57-23); *Saluka Invs. BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award ¶ 230 (Mar. 17, 2006) (ECF No. 58-1); *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction ¶ 245 (Oct. 21, 2005) (ECF No. 57-25); *Rumeli Telekom A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award ¶ 328 (July 29, 2008) (ECF No. 58-7); *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award ¶ 358 (Oct. 2, 2006) (ECF No. 57-15).

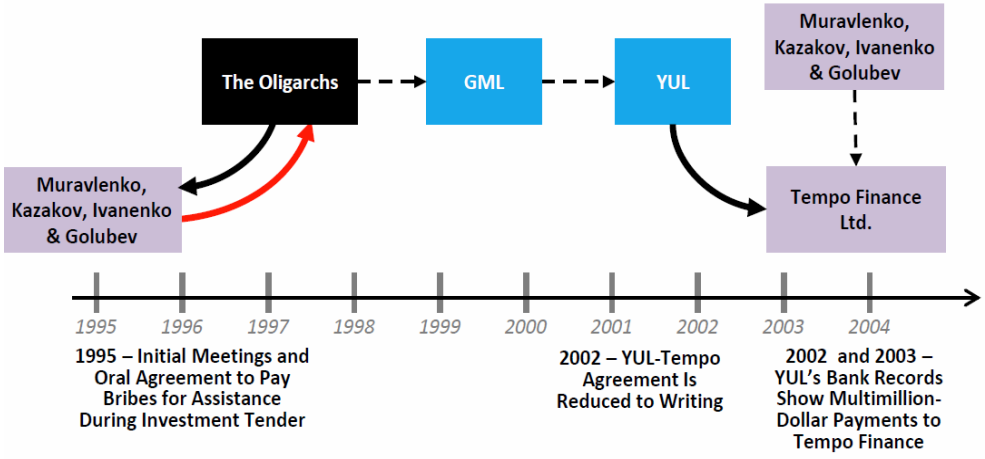
[155] Hulley Final Award ¶ 1352 (ECF No. 2-1).

[156] *SAUR Int'l S.A. v. Argentine Republic*, ICISD Case No. ARB/04/4, Décision sur la Compétence et sur la Responsabilité ¶ 308 (June 6, 2012) (ECF No. 57-1); *see also* Hulley Final Award ¶ 1351 n. 1773 (ECF No. 2-1) (providing translation of *SAUR* ¶ 308).

1995 and 1996 would have precluded any offer of arbitration from being accepted, but for the arbitrators' mistaken belief that "Bank Menatep and the Oligarchs" were "an entity and persons *separate from [Petitioners]*."[157] In light of Petitioners' misrepresentations to the arbitrators and concealment of documents relating to the facts revealed by the Amsterdam Judgment, discussed above, as well as the proper application of the veil-piercing doctrine, it is clear that the arbitrators' finding under paragraph 1370 is unsustainable. In reality, Petitioners are legally and practically indistinguishable from the Oligarchs.

The Berlin Documents and Mr. Gololobov's Declaration provide further corroboration for both of these arguments, demonstrating that the Oligarchs channeled illegal payments directly through one of the Petitioners (specifically, YUL) in order to pay bribes to the Government officials who originally helped the Oligarchs to obtain their Yukos shares in 1995 and 1996, thus defrauding the Russian people.[158] As illustrated below in ***Figure 3***, the Oligarchs paid these Government officials bribes for many years, and also promised them a 15% interest in Yukos, after they illegally helped the Oligarchs to win the investment tender:

Figure 3



[157] Hulley Final Award ¶ 1370 (ECF No. 2-1).

[158] *See* Gololobov Decl. ¶¶ 15-22.

One of these critical documents is a set of bank statements from the years 2002 and 2003, which reflect multimillion-dollar payments from YUL to a company in the British Virgin Islands called Tempo Finance Ltd. ("Tempo Finance") under an "Agreement dated 26.03.2002."[159] This 2002 agreement (as well as a second, revised version of that agreement) reflects that Tempo Finance was a shell company for four Russian public officials, Mr. Sergey V. Muravlenko, Mr. Youry A. Golubev, Mr. Viktor A. Kazakov, and Mr. Viktor V. Ivanenko,[160] who had been the Government-appointed managers of Yukos prior to its privatization.[161] This 2002 agreement also reflects that the Oligarchs promised to pay these four men 15% of the proceeds of any sale of Petitioners' Yukos shares.[162] Based on the price of Yukos shares at the time of the agreement, this could have amounted to ***between one and two billion U.S. dollars***.[163]

As Mr. Gololobov explains,[164] the Oligarchs promised these enormous bribes to Mr. Muravlenko, Mr. Golubev, Mr. Kazakov, and Mr. Ivanenko in 1995, in order to induce them to use their responsibilities as Government-appointed managers to ensure that the Oligarchs successfully gained ownership and control of Yukos during the privatization process. This was later uncovered in 2002 by an accountant at PricewaterhouseCoopers, Mr. Doug Miller.[165] As

[159] Bank Statements of Yukos Universal Ltd. from 2002-2003 (R-687).

[160] Original Agreement between Yukos Universal Ltd. and Tempo Finance, Mar. 26, 2002 ("Original YUL-Tempo Agreement") (R-699); Restated Agreement between Yukos Universal Ltd. and Tempo Finance, Nov. 1, 2002 ("Restated YUL-Tempo Agreement") (R-621).

[161] *See generally* Tr. of Interview with Sergey Muravlenko (R-705).

[162] Original YUL-Tempo Agreement § 2.4 (R-699); Restated YUL-Tempo Agreement § 2.4 (R-621).

[163] *See* Email from Bruce Bean to Andrei Dontsov regarding Original YUL-Tempo Agreement, Aug. 15, 2002 (R-691) ("No one gives away $1B without a reason, not even someone who already has $8B"); Email from Doug Miller, Apr. 29, 2003 (R-697) ("[T]otal compensation expense related to the agreement would have totaled approximately USD 2.4 billion . . . .").

[164] *See* Gololobov Decl. ¶¶ 15-22 ("In exchange for providing secret assistance to the Oligarchs in connection with the Investment Tender and Investment Program, these Government appointees and employees received extraordinarily large payments funneled through offshore companies under sham agreements concluded with the Oligarchs.").

[165] Tr. of Interview with Doug Miller (May 10, 2007) at 8 (R-627); Tr. of Investigative Interview with Doug Miller (May 8, 2007) at 6 (Ex. R-626); *In re Application of Mikhail B. Khodorkovsky*, No. 09-cv-2185, Dep. of Doug

Mr. Miller explained, he became deeply suspicious about the purpose of the multibillion-dollar payments to Mr. Muravlenko and his associates, because he had "never seen a company compensate management that, for lack of a better term, generously."[166] Mr. Miller's suspicions were even further heightened when he was informed by the Oligarchs that the decision to pay Mr. Muravlenko and his associates in this way "was discussed and agreed in principle during the period of YUKOS' privatization, in 1995 and 1996, *prior* to the core shareholders' winning of the privatization tender."[167] Finally, one of the Oligarchs, Mr. Khodorkovsky, made the following admission to Mr. Miller: "[I]f he told me the true reasons why [Mr. Muravlenko and his associates] were receiving this money, [Mr. Khodorkovsky] could be imprisoned."[168]

Indeed, as Mr. Miller suspected, Mr. Muravlenko and his associates were well-situated to assist the Oligarchs in obtaining ownership and control of Yukos, which they agreed to do in exchange for illegal bribe payments after meeting with the Oligarchs during the autumn of 1995.[169] As Government-appointed managers of Yukos, these four men had a role in determining which private bidder would be selected as the winner of the investment competition.[170] As Mr. Muravlenko himself stated, "[i]n order to win, [the Oligarchs] needed the support from the team of managers of 'YUKOS,' i.e. our team."[171] The four Government-appointed managers of Yukos also had responsibility for drafting the Government's investment program, which obligated the private bidder to invest certain funds into Yukos after being

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Miller dated Dec. 18, 2009 ("2009 Dep. of Doug Miller") (R-688).

[166] 2009 Deposition of Doug Miller, 235:6-8 (R-688).

[167] Memo from Doug Miller to Bruce Misamore, Aug. 14, 2002 (R-624).

[168] Tr. of Interview with Doug Miller (May 10, 2007) at 8 (R-627)

[169] Note by A.D. Golubovich, Nov. 2, 1995 (R-685) (discussing "negotiations" with Yukos Managers in October 1995); Tr. of Interview with Sergey Muravlenko at 5, 9 (R-705) (noting that "Khodorkovsky came to me" during the period "before the competition" and "verbally promised that our material interests, i.e. mine, as well as those of Ivanenko, Kazakov and Golubev will be taken into consideration").

[170] Regulation on Investment Tenders for the Sale of Shares of the Yukos Oil Co. OJSC §§ 1.2, 2.4-2.5 (R-714).

[171] Tr. of Interview with Sergey Muravlenko at 5 (R-705).

selected as the winner of the investment tender,[172] as well as for certifying that the private bidder had complied with its obligations to invest these funds.[173] Notably, in 1998, Mr. Muravlenko's associate, Mr. Kazakov, signed a certification stating that the Oligarchs' shell company (ZAO Yukos Universal, operated by the Oligarchs' agent, Mr. Kobzar of Russian Trust & Trade) had complied with its obligation to invest additional funds into Yukos under the investment program,[174] even though Mr. Muravlenko himself later stated that this certification was false—that the Oligarchs never actually "put any funds into the company" at all.[175]

Accordingly, as the Berlin Documents demonstrate, and as further explained by Mr. Gololobov,[176] the Oligarchs obtained their Yukos shares illegally, in violation of the Criminal Code of the Russian Federation, which prohibits the payment of bribes. This explains why the Oligarchs concealed the origin of their Yukos shares from the public,[177] from their own legal advisors,[178] and from the arbitrators.[179] As Professor Kothari has now demonstrated, the

[172] Tr. of Interview with Sergey Muravlenko at 5, 9 (R-705); Order 1547-R of the State Property Committee, Oct. 25, 1995 (approving the Investment Program based on Mr. Muravalenko's recommendation) (R-684).

[173] Certification of Fulfilment of Investment Program by Viktor Kazakov, Dec. 16, 1998 (R-700).

[174] Certification of Fulfilment of Investment Program by Viktor Kazakov, Dec. 16, 1998 (R-700). The status of "investor" under the investment program was reassigned several times during 1996, until finally it was obtained by Yukos-Trust, which then changed its name to Yukos-Universal. *See* Investment Agreement between Mr. Muravlenko and ZAO Laguna, Jan. 12, 1996 (R-686); Supplemental Investment Agreement with ZAO Astarta, June 18, 1996 (R-702); Supplemental Investment Agreement with ZAO Yukos-Trust, June 18, 1996 (R-703).

[175] Tr. of Interview with Sergey Muravlenko at 6 (R-705).

[176] *See* Gololobov Decl. ¶ 22 ("Since, as described above, Mr. Muravlenko and his colleagues provided concrete benefits to Mr. Khodorkovsky and the other Oligarchs, the Oligarchs' multimillion-dollar payments and 2002 agreement to pay Mr. Muravlenko (and the other top managers) 15% of the proceeds from the sale of their Yukos shares resulted from an arrangement that was illegal in my view and that was designed to circumvent the Government's Investment Program.").

[177] Sergey Lukianov, *'Managed' Yukos Sale Fetches $160M*, MOSCOW TIMES, Dec. 24, 1996 (R-617) (recording Mr. Konstantin Kagalovsky's deceitful public statement as deputy chairman of Menatep that "[t]here is no connection between Monblan and Menatep. They are different organizations.").

[178] *See* Memo from P.N. Malyi to Oleg Sheyko, July 30, 2002 at 2 (noting Lebedev's false assertion to attorneys at Akin Gump that his shares were acquired "on the market from independent parties" such as Standard Bank) (R-660); Clifford Chance Memo No. 1-90646-06, Undated at 4-5 (R-631).

[179] Vasquez Decl. III, Table A-2.

illegally-obtained Yukos shares are precisely the same shares upon which Petitioners based their claims before the arbitrators in this case.[180]

As the investor-State tribunal explained in *Metal-Tech v. Uzbekistan* with respect to the relationship between bribery and investor-State arbitration: "[T]he rights of the investor against the host State, including the right of access to arbitration, [will] not be protected [where] the investment was tainted by illegal activities, specifically corruption. The law is clear – and rightly so – that in such a situation the investor is deprived of protection and, consequently, the host State avoids any potential liability."[181] Likewise, as concluded in *Insceysa v. El Salvador*, "the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes . . . ."[182] Accordingly, because the Oligarchs' bribery of Mr. Muravlenko with payments made through YUL renders Petitioners ineligible to qualify as potential offerees under the ECT, no agreement to arbitrate was ever formed between the Russian Federation and Petitioners. This Court must therefore dismiss Petitioners' action with prejudice for lack of jurisdiction under the FSIA.[183]

II. The Hague Judgment Demonstrates that Petitioners' Arbitration Awards Do Not "Aris[e] Out of a Legal Relationship . . . Which Is Considered as Commercial," as Required by the FSIA

As the Russian Federation has previously explained, this Court possesses jurisdiction to enforce a foreign arbitration award under the FSIA only[184] where such award falls under "a

[180] Kothari Report ¶¶ 22-45 (ECF No. 24-4).

[181] *Metal-Tech*, Award ¶ 422 (ECF No. 56-9).

[182] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (August 2, 2006) ¶ 242 (ECF No. 56-2).

[183] *Chevron Corp. v. Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015).

[184] The FSIA provides for other alternative grounds for exercising jurisdiction under 28 U.S.C. § 1605(a)(6), none of which is present here.

treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards."[185] Petitioners have invoked the New York Convention for this purpose.[186] However, prior to the United States' ratification of the New York Convention in 1970, it issued an optional declaration under Article I(3) of this treaty, which was then codified at 9 U.S.C. § 202: "The United States of America will apply the Convention only to differences *arising out of legal relationships*, whether contractual or not, *which are considered as commercial* under the national law of the United States."[187]

The reasoning of the Hague Judgment shows that Petitioners' dispute with the Russian Federation—a dispute over the legitimacy of the Russian Federation's exercise of its sovereign powers to enforce its tax laws, bankruptcy laws, antimonopoly laws, and public procurement laws—does not arise out of a *commercial* relationship, but out of a *regulatory* relationship: "Article 26 ECT constitutes a new form of dispute resolution, namely a form which limits the sovereignty of the [States parties] in *the settlement of international public-law disputes* to such an extent that an international tribunal would be *competent to rule on the exercise of public-law governmental actions* rather than a national court."[188]

The Hague Judgment thus provides judicial confirmation to the consensus of the international legal community that investor-State arbitration is "more akin to *administrative or constitutional judicial review* than to commercial arbitration, even though investment law makes use of the arbitral process to settle disputes."[189] The particular claim upon which the arbitrators

[185] 28 U.S.C. § 1605(a)(6).

[186] Pet'rs' Pet. to Confirm Arbitration Awards ¶ 3 (ECF No. 4).

[187] U.S. Optional Decl., 21 U.S.T. at 2560 (emphasis added); 9 U.S.C. § 202.

[188] Hague J. ¶ 5.93 (R-722).

[189] STEPHAN W. SCHILL, INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 4 (2010) (emphasis added) (R-747); SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION 373 (2009) (R-746); Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53:2 HARV. INT'L L. J. 391, 397 (2012)

ruled in favor of Petitioners, a claim for "expropriation" under Article 10(1) of the ECT, is conceptually similar to a constitutional claim for a "taking" under the U.S. Constitution: "Expropriation is the taking by a government of privately owned property, also known in the common law as *eminent domain*."[190] Indeed, Petitioners themselves have repeatedly characterized the applicable body of law as "*public* international law" in their submissions to this Court.[191] It is highly significant that, at the time of the United States' optional declaration under Article I(3) and the enactment of 9 U.S.C. § 202 in 1970, no treaty-based investor-State arbitration under public international law *had ever taken place*—nor would any such treaty-based investor-State arbitration occur until two decades later.[192] In this regard, the Hague Judgment's description of investor-State arbitration under the ECT as "a new form of dispute resolution" in 1994 is particularly telling. It is inconceivable that, in 1970, the types of claims considered in investor-State arbitration would have been properly characterized as "commercial" under U.S. law and the United States' optional declaration under Article I(3).[193]

Petitioners have argued that this dispute is conclusively rendered "commercial" for the purposes of the New York Convention, Article I(3), by Article 26(5)(b) of the ECT, which

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(R-743); William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 285 (2010) (R-741).

[190] CHRISTOPHER DUGAN ET AL., INVESTOR-STATE ARBITRATION 429 (2008) (R-739); *see also Stop the Beach Renourishment, Inc. v. Fla. Dep't. of Envt'l. Prot.*, 560 U.S. 702, 713-14 (2010).

[191] Pet'rs' Resp. to Russian Federation's Suppl. Notice at 3-4 (ECF No. 104); Pet'rs' Mem. of Law in Supp. of Mot. to Stay at 2, 10 (ECF No. 105-1) (admitting that the Hague Judgment was, like the arbitral awards, based on public international law).

[192] CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES § 1.07 (2008) (R-742) (observing that the first arbitration under a bilateral investment treaty was registered in 1987).

[193] This case stands in stark contrast to the facts considered by the D.C. Circuit in any of its previous case law on this jurisdictional issue under the FSIA. In *Diag Human*, the relationship in question was based on a bilateral agreement between the parties for "[t]he provision of healthcare technology and medical services," which "detailed the obligations of each side." *Diag Human, S.E. v. Czech Republic-Ministry of Health*, No. 14-7142, Slip Op. (D.C. Cir. May 31, 2016). Similarly, in Belize Social Development, the relationship in question was defined by a "contract[] to purchase properties from Belize." *Belize Soc. Dev., Ltd. v. Gov't of Belize*, 794 F.3d 99 (D.C. Cir. 2015). These commercial relationships, defined in both cases by bilateral contracts between the parties, bear no resemblance to the inherently public-law dispute in the present case.

provides that "[c]laims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention."[194] This contention, however, is plainly wrong. The United States is not bound by Article 26(5)(b) of the ECT, because it is not a party to the ECT. The provisions of Article 26(5)(b), therefore, can have no bearing on whether Petitioners' claims arise out of a commercial relationship under "the national law of the State"[195] where enforcement is sought, which is U.S. law and which is the only law relevant to this question under Article I(3) of the New York Convention. Indeed, the very fact that the ECT drafters included an express proviso such as Article 26(5)(b) demonstrates their serious doubts that claims under public international law[196] actually arise out of a "commercial relationship," as this concept is ordinarily understood.

Moreover, Article 26(5)(b) must be read in conjunction with Article 21 of the ECT, which expressly exempts any disputes "with respect to Taxation Measures of the Contracting Parties" from the ambit of the ECT.[197] Accordingly, even if Article 26(5)(b) were in any respect relevant to an action brought in U.S. court and subject to the United States' optional declaration under Article I(3),[198] the present case (which indeed relates to Taxation Measures) would be exempted from the effects of Article 26(5)(b) by the carve-out set forth in Article 21.

Accordingly, because Petitioners' arbitration awards do not arise out of a commercial relationship under 9 U.S.C. § 202 and the United States' optional declaration under Article I(3) of the New York Convention, this Court must dismiss this action with prejudice under the FSIA.

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[194] Pet'rs' Resp. to Russian Federation's Suppl. Notice at 3-4 (ECF No. 104); Opp'n to Mot. to Dismiss at 38-41 (ECF No. 63).

[195] *Bautista v. Star Cruises*, 396 F.3d 1289, 1296 n. 10 (11th Cir. 2005); *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1153 (9th Cir. 2008).

[196] Pet'rs' Resp. to Russian Federation's Suppl. Notice at 3-4 (ECF No. 104); Pet'rs' Mem. of Law in Supp. Mot. to Stay 2, 10 (ECF No. 105-1).

[197] ECT, art. 21(1) (ECF No. 51-10).

[198] U.S. Optional Decl., 21 U.S.T. at 2560; 9 U.S.C. § 202.

III. The Petition Should Be Dismissed Under Article V(1)(e) of the New York Convention Because the Arbitration Awards Have Been Set Aside

Finally, even if this Court did possess jurisdiction (which it does not),[199] Article V(1)(e) of the New York Convention provides that "[r]ecognition and enforcement of [an] award may be refused, at the request of the party against whom it is invoked, . . . if that party furnishes . . . proof that . . . [t]he award . . . has been set aside . . . by a competent authority of the country in which . . . that award was made."[200] The framework established by the New York Convention thus contemplates that "a court in a country with primary jurisdiction over an arbitral award may annul that award" by setting it aside,[201] and courts in secondary jurisdictions (*i.e.*, countries where the arbitration award was not made, where recognition of the arbitration award may also be sought) are "obliged to respect" a set-aside judgment rendered in the primary jurisdiction.[202] As the D.C. Circuit held in *TermoRio S.A. E.S.P. v. Electranta S.P.*, it is "a principal precept of the New York Convention" that an arbitration award cannot be enforced "if it has been lawfully 'set aside' by a competent authority in the State in which the award was made."[203]

The Hague Court, which is the court of the "primary jurisdiction"[204] wherein Petitioners' arbitration awards were rendered, set aside Petitioners' arbitration awards on April 20, 2016, under Section 1065(1)(a) of the Dutch Code of Civil Procedure ("DCCP").[205] The Hague Court stated expressly that it was competent (*bevoegd*) to set aside Petitioners' arbitration awards based

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[199] As Petitioners have correctly observed, Article V(1)(e) does not give rise to a jurisdictional issue under the FSIA. Pet'rs' Resp. to the Notice of Suppl. Authority ¶ 3 (ECF No. 104).

[200] *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 934-35 (D.C. Cir. 2007).

[201] *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004).

[202] *See TermoRio*, 487 F.3d at 930 (citing *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999)).

[203] *TermoRio*, 487 F.3d at 936.

[204] *See TermoRio*, 487 F.3d at 935; *Karaha Bodas*, 364 F.3d at 287.

[205] Hague J. ¶¶ 5.95-5.98, 6.1-6.9 (R-722).

on Sections 1064(2) and 1073(1) of the DCCP, and that its annulment of the arbitration awards was "immediately enforceable."[206]

Article V(1)(e) of the New York Convention thus requires dismissal even though the Hague Judgment is "a lower court decision,"[207] rather than a decision by the Court of Appeal for The Hague or the Supreme Court of the Netherlands. In *TermoRio*, the D.C. Circuit explained that Article V(1)(e) requires dismissal wherever an arbitration award has been set aside by any "competent authority in the State in which the award was made."[208] The D.C. Circuit gave no indication that a "competent authority" must necessarily qualify as the highest court or an intermediate appellate court in the primary jurisdiction. In *Zeiler v. Deitsch*, moreover, the Second Circuit expressly recognized that a first-instance court (specifically, the U.S. District Court for the Eastern District of New York) qualified as a "competent authority" under Article V(1)(e).[209] Similarly, in *Baker Marine v. Chevron*, the Second Circuit affirmed dismissal of a petition to enforce an arbitration award under Article V(1)(e) based on a judgment of the Federal High Court in Nigeria,[210] which, like the Hague Court, is a trial court of first instance.[211]

Moreover, the high quality of the Dutch courts is well established, as is the Netherlands' commitment both to public international law and to foreign investment. In numerous decisions, U.S. courts have found that litigants "will be treated fairly" by the courts of the Netherlands.[212] As the Fifth Circuit concluded in *Veba-Chemie A.G. v. M/V Getafix*, "biased treatment of foreign

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[206] Hague J. ¶¶ 5.3, 6.1-6.9.

[207] Pet'rs' Resp. To The Russian Federation's Notice of Suppl. Authority, Apr. 27, 2016, at 6 (ECF No. 104); Pet'rs' Mem. of Law Supp. Mot. to Stay at 3 (ECF No. 105-1).

[208] *TermoRio*, 487 F.3d at 936.

[209] *Zeiler v. Deitsch*, 500 F.3d 157, 164, 165 & n.6 (2d Cir. 2007).

[210] *Baker Marine*, 191 F.3d at 196.

[211] *See, e.g., BFI Grp. Divino Corp. v. JSC Russian Aluminum*, 481 F. Supp. 2d 274, 279, 283 (S.D.N.Y. 2007).

[212] *Cliffs-Neddrill Turnkey Int'l—Oranjestad v. M/T Rich Duke*, 734 F. Supp. 142, 146 (D. Del. 1990).

parties has not proved to be a major concern" within the Netherlands' judicial system.[213] Other courts have acknowledged "the fairness of the Dutch court procedures"[214] and observed that the Netherlands is a "country whose expertise in the area of commercial relations is something that any school boy knows."[215] As recognized by the U.N. Secretary General and many others, The Hague is known as "the world capital of international law,"[216] and the Netherlands has one of the largest networks of treaties for the protection of foreign investment in the world.[217] The Hague Court's fundamental fairness and expertise in the subject matter are thus beyond doubt.

The Hague Court therefore unquestionably qualifies as a "competent authority" for purposes of Article V(1)(e). As a consequence of the Hague Judgment, Petitioners' arbitration awards thus cannot be enforced under the New York Convention.[218] Accordingly, if this Court did possess subject matter jurisdiction under the FSIA (which it does not), this Court must dismiss Petitioners' action without prejudice under Article V(1)(e) of the New York Convention.

CONCLUSION

For the reasons stated above, the Petition should be dismissed under the FSIA and Article V of the New York Convention.

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[213] *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1250 (5th Cir. 1983).

[214] *Diallo v. Bekemeyer*, 2007 WL 4593502, at *8 (E.D. Mo. Dec. 28, 2007); *In-Tech Marketing Inc. v. Hasbro, Inc* , 719 F. Supp. 312, 316-17 (D.N.J. 1989); *Sea Dragon v. Gebr. Van Weelde Scheepvaarkantoor*, 574 F. Supp. 367, 372 (S.D.N.Y. 1983).

[215] *Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 508 n.8 (2d Cir. 1998).

[216] B. Shifman, *The Permanent Court of Arbitration: Current Developments*, 8 LEIDEN J. INT'L L. 433 (1995); *see also* P. VAN KRIEKEN & D. MCKAY, THE HAGUE: LEGAL CAPITAL OF THE WORLD 25 (2005).

[217] N. Shrijver & V. Prislan, *The Netherlands*, *in* C. BROWN, COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 535, 536 (2013).

[218] *TermoRio*, 487 F.3d at 936.

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