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.	)	

THE RUSSIAN FEDERATION'S REPLY TO PETITIONERS' RESPONSE TO THE NOTICE OF SUPPLEMENTAL AUTHORITIES

The Russian Federation respectfully submits this Reply to Petitioners' Response (ECF No. 99) to the Notice of Supplemental Authorities (ECF No. 97).

First, with respect to the Swedish appellate decision against Petitioners' fellow (purported) investors in OAO Yukos Oil Company (ECF No. 97-1), Petitioners erroneously accuse the Russian Federation of "attempt[ing] to substitute foreign law for binding U.S. precedent." Resp. ¶ 1 & n.1 (ECF No. 99). By mischaracterizing the Russian Federation's position in this way, Petitioners transparently seek to lure this Court into ignoring its responsibility under U.S. law to determine—independently and *de novo*—whether the Russian Federation ever offered to arbitrate with Petitioners at all.[1]

The standard under U.S. law is well established: "Courts should not assume that the parties agreed to arbitrate arbitrability *unless there is 'clea[r] and unmistakabl[e]' evidence that*

[1] *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 204-06 & n.3 (D.C. Cir. 2015) ("If there is no arbitration agreement . . . , the District Court lacks jurisdiction over the foreign state and the action must be dismissed."); *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296-97 (2010) (characterizing the question of "whether an arbitration agreement was 'ever concluded'" as a "generally nonarbitral question").

they did so."[2] Petitioners argue that such clear and unmistakable evidence is found in the Russian Federation's letter dated July 29, 2005, which acknowledged the arbitrators' Competence-Competence—their inherent "jurisdiction . . . to determine [their] own jurisdiction" at the outset of arbitral proceedings.[3] It is plain, however, that neither Petitioners nor the Russian Federation actually understood this letter's reference to the Competence-Competence principle as an exclusive-delegation agreement, as is evident from the Third Circuit's decision in *China Minmetals*,[4] the numerous authorities summarized by Professor Bermann,[5] and the published views of *Petitioners' own arbitration lawyers*.[6] The decisions of foreign courts, such as the Swedish appellate court, provide further evidence as to how the Competence-Competence principle is actually understood, and how the letter dated July 29, 2005, would necessarily have been interpreted by its authors and recipients.[7]

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[2] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) (emphasis added)).

[3] *See* Opp. 16-17 (ECF No. 63); Letter to the Tribunal, July 29, 2005 (ECF No. 63-5).

[4] *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003) ("Competence-competence is applied in slightly different ways around the world. The one element common to all nations is the conferral of the power to decide jurisdiction on the arbitrators themselves. It is important to note, however, that *this principle says nothing about the role of judicial review*." (emphasis added)).

[5] Second Bermann Op. ¶¶ 14-30 (ECF No. 65-1); *Dallah Real Estate v. Pakistan*, U.K. Supreme Court, Judgment ¶¶ 25, 84-86 (2010) (ECF No. 55-12); *Egypt v. SPP*, Paris Court of Appeals, Judgment ¶ 10 (1984) (ECF No. 68-3); *Ecuador v. Chevron Corp.*, Supreme Court of the Netherlands, Judgment ¶ 4.2 (2014) (ECF No. 68-26); Pieter Sanders, *Commentary on UNCITRAL Arbitration Rules*, 2 Y. B. COMM. ARB. 172 § 12.2 (1977) (ECF No. 68-2) ("[T]he final word on the competence of arbitrators still remains with the Court.").

[6] 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 (Emmanuel Gaillard & Domenico Di Pietro, eds. 2008) (ECF No. 68-13) ("[A]llowing the arbitrators to make a first determination on their own jurisdiction . . . by no means suggests that domestic courts relinquish their power to review the existence and validity of an arbitration agreement.").

[7] Moreover, contrary to Petitioners' erroneous assertions, the references to the UNCITRAL Arbitration Rules in the Energy Charter Treaty have no binding effect in this case, given that the Russian Federation never offered to arbitrate with Petitioners under the ECT, Petitioners were not eligible to accept any purported offer, and Petitioners failed to accept any purported offer in accordance with its terms. *See China Minmetals*, 334 F.3d at 288-90 ("After all, a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction, if the parties never entered into it."); *see also* Reply 9-11 (ECF No. 64); Second Bermann Op. ¶¶ 31-62 (ECF No. 65-1); *Oehme, van Sweden & Assocs., Inc. v. Maypaul Trading & Servs. Ltd.*, 902 F. Supp. 2d 87, 97 (D.D.C. 2012); *Nebraska Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737, 740-41 & n.2 (8th Cir. 2014); *DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 317 & n.7 (5th Cir. 2011).

Second, with respect to the ICSID award in favor of the Republic of Guinea (ECF No. 97-3), Petitioners argue that this decision is irrelevant because it (i) was not decided under the Energy Charter Treaty ("ECT") and (ii) applied French law, rather than the laws of Cyprus or the United Kingdom (Isle of Man), wherein Petitioners are organized. Resp. ¶ 2 (ECF No. 99). Contrary to Petitioners' assertions, however, the ICSID tribunal's reasoning is highly instructive in the present case. The decision demonstrates the importance of the Court's careful assessment of the specific, purported offer to arbitrate, as Respondent has urged the Court in the present case.

First, the ICSID tribunal's statement regarding the fundamental purpose of investor-State arbitration is directly applicable: "the idea 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. . . ."[8] The ECT has precisely the same function, which is evident from the plain text of Articles 10(1), 13, and 17(1), as well as the Energy Charter Secretariat's Introduction and the signatory States' authoritative interpretation of Article 1(6).[9] Indeed, both the arbitrators and Petitioners have conceded that the ECT's purpose is to protect "*foreign investment*, especially . . . investment by *Western sources* in the energy resources of the Russian Federation."[10] As Professor Dolzer explains, it is thus impossible to conclude that Articles 26 and 1(7) of the ECT contain the Russian Federation's standing offer to arbitrate with Petitioners, which are owned and controlled not by foreign investors, but exclusively by Russian nationals.[11]

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[8] *See Société Immobilière de Gaëta v. Republic of Guinea*, ICSID Case No. ARB/12/36, Award (Dec. 21, 2015) ¶ 181 (emphasis added) (ECF No. 97-3).

[9] Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents* 14 (ECF No. 51-10); Final Act of the European Energy Charter Conference, Dec. 17, 1994, Understanding IV.3, Art. 1(6) (ECF No. 51-9).

[10] Hulley Interim Award ¶ 433 (ECF No. 30-7) (emphasis added); Statement of Defense by Veteran, Hulley, and Yukos Universal Limited, Case No. 477160 2015/1 ¶ 57 (ECF No. 43-11).

[11] First Dolzer Op. ¶¶ 167-214 (ECF No. 24-8).

Second, Petitioners' attempt to distinguish the ICSID award based on the applicable domestic law ("this award concerned an application of French law")[12] is entirely unavailing. As explained by the Russian Federation's legal experts, the laws of Cyprus and the United Kingdom fully recognize the principle of lifting the corporate veil in cases of fraud or malfeasance.[13] The same principle applies under international law, as both the U.S. Supreme Court and the International Court of Justice have recognized.[14] Investor-State tribunals also have uniformly acknowledged that the veil-piercing doctrine should be applied to determine whether shell companies are eligible offerees under an investment treaty, or whether the nationality of such shell companies' shareholders and parent entities should be controlling.[15]

The veil-piercing principle thus excludes Petitioners, which were established by the Russian Oligarchs to perpetuate egregious fraud and massive tax evasion,[16] from any alleged offer by the Russian Federation to arbitrate with foreign investors under the ECT. Like all of Petitioners' submissions to date, however, Petitioners' Response fails even to acknowledge this fundamental principle of international law, Cypriot law, and U.K. law, let alone to explain why it does not apply. Accordingly, the ICSID award in favor of the Republic of Guinea points directly to the proper result in the present case—where an investor is not an eligible offeree, no agreement to arbitrate exists, and no resulting award can be enforced.

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[12] Resp. ¶ 2 (ECF No. 99).

[13] *Prest v. Petrodel Resources Ltd* [2013] UKSC 34 ¶¶ 16-36 (ECF No. 66-16); *Apostolou v. Ioannou* (2012) 1 CLR 604 (citing *Ben Hashem v. Al Shayif & Anor* [2008] EWHC 2380) (ECF No. 66-32); Michaelides Op. ¶¶ 12-24 (ECF No. 65-3); Santos-Costa Op. ¶¶ 62-68 (ECF No. 65-4); Hay Op. ¶¶ 5.5-5.13 (ECF No. 65-5).

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

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

[16] Asoskov Op. ¶¶ 35-52 (ECF No. 24-6); Zakharov Decl. ¶¶ 7-15 (ECF No. 24-2); Anilionis Decl. ¶¶ 16-33 (ECF No. 24-1); Kothari Rep. ¶¶ 22-45 (ECF No. 24-4); Hulley Final Award ¶ 1620 (ECF No. 2-1).

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Respectfully submitted,

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