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The assessment of "good faith" in the the yukos saga - Institutional overlap in times of political uncertainty

Andreas R. Ziegler*

The political and legal issues relating to the tax and criminal proceedings against Yukos – a major petroleum company - and its owners and mangers in Russia since 2003 have led to many debates. This paper is using the example of the various legal proceedings before international courts and arbitral bodies in order to study the question of institutional or legal overlap. I analyses the various proceedings to this stage tries to answer the question whether the various institutions involved have engaged in judicial dialogue or other mechanisms to create coherence within a fragmented international system in the application and interpretation of international law. In order to do so it does leave aside purely procedural questions (like the use of MFN clauses in BITs) and focuses on the factual and legal findings as to whether the tax assessment of Yukos as well as the insolvency and liquidation proceedings in Russia constituted an unlawful expropriation: as it will be shown this involves the more detailed questions as to whether in these proceedings the due process of law and the principle of non-discrimination were observed. While it may be too early to answer these questions in view of the fact that so far only one arbitral tribunal has handed down its final award with at least three other instances being currently treating the matter one can certainly conclude that the existence of various venues increases the debate and analysis regarding certain legal questions and thereby reduces the risk that potentially dangerous developments go unnoticed. It comes to the conclusion that investor-State arbitral tribunals have developed a strong tendency in recent years to make use of similar awards in the field although not always doing full justice to each other and certainly being far from completely coherent. This is seen as the lesser problem in comparison to a perceived lack of judicial dialogue between human rights tribunals, such as the ECHR and investor-State arbitral tribunals when it comes to questions involving the taking of property where a better integration of the two fields may be wanted. As an example it is shown that the issue of "good faith" regarding the Yukos by the Russian authorities in the first final investor-State award (RosInvestCo UK Ltd. v. The Russian Federation, Stockholm Chamber of Commerce Case No. Arb. V079/2005, Final Award, 12 September 2010) had absolutely no effect on the judgement of the European Court of Human Rights, Khodorkovskiy v. Russia, Application No. 5829/04, Judgement of 31 May 2011.

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THE ASSESSMENT OF "GOOD FAITH" IN THE THE YUKOS SAGA -

INSTITUTIONAL OVERLAP IN TIMES OF POLITICAL UNCERTAINTY

(SIMULTANEOUSLY A DISCUSSION OF EUROPEAN COURT OF HUMAN RIGHTS, *KHODORKOVSKIY* V. *RUSSIA*, APPLICATION NO. 5829/04, JUDGEMENT OF 31 MAY 2011 AND THE ARBITRAL AWARD IN *ROSINVESTCO UK LTD. v. THE RUSSIAN FEDERATION*, STOCKHOLM CHAMBER OF COMMERCE CASE NO. ARB. V079/2005, *FINAL AWARD, 12 SEPTEMBER 2010).*

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Abstract

The political and legal issues relating to the tax and criminal proceedings against Yukos – a major petroleum company - and its owners and mangers in Russia since 2003 have led to many debates. This paper is using the example of the various legal proceedings before international courts and arbitral bodies in order to study the question of institutional or legal overlap. I analyses the various proceedings to this stage tries to answer the question whether the various institutions involved have engaged in judicial dialogue or other mechanisms to create coherence within a fragmented international system in the application and interpretation of international law. In order to do so it does leave aside purely procedural questions (like the use of MFN clauses in BITs) and focuses on the factual and legal findings as to whether the tax assessment of Yukos as well as the insolvency and liquidation proceedings in Russia constituted an unlawful expropriation: as it will be shown this involves the more detailed questions as to whether in these proceedings the due process of law and the principle of non-discrimination were observed.

While it may be too early to answer these questions in view of the fact that so far only one arbitral tribunal has handed down its final award with at least three other instances being currently treating the matter one can certainly conclude that the existence of various venues increases the debate and analysis regarding certain legal questions and thereby reduces the risk that potentially dangerous developments go unnoticed. It comes to the conclusion that investor-State arbitral tribunals have

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developed a strong tendency in recent years to make use of similar awards in the field although not always doing full justice to each other and certainly being far from completely coherent. This is seen as the lesser problem in comparison to a perceived lack of judicial dialogue between human rights tribunals, such as the ECHR and investor-State arbitral tribunals when it comes to questions involving the taking of property where a better integration of the two fields may be wanted. As an example it is shown that the issue of "good faith" regarding the Yukos by the Russian authorities in the first final investor-State award (*RosInvestCo UK Ltd.* v. *The Russian Federation*, Stockholm Chamber of Commerce Case No. Arb. V079/2005, Final Award, 12 September 2010) had absolutely no effect on the judgement of the European Court of Human Rights, *Khodorkovskiy* v. *Russia*, Application No. 5829/04, Judgement of 31 May 2011.

Key words: International law, foreign investment, expropriation, regional integration, investor-State arbitration, overlapping jurisdictions, forum shopping, Russia, Yukos, ECHR, Energy Charter Treaty

Introduction

The legal and political questions concerning the measures taken by the Russian Government since 2003 with regard to the Yukos Oil Company since 2003 have everything to make it the subject of newspaper articles and conspiracy tales.[1] At the same time, the legal issues and the various for a where have been treated in the last eight years are of high interest for the current discussion of the fragmentation and the overlap of legal systems. While the domestic criminal proceedings (in particular against *Mikhail Khodorkovsky*)[2] are regularly covered by news programs on television around the world, the more abstract questions regarding the alleged unlawful expropriation and treatment contrary to guarantees for international investors are regularly treated by investment law specialists in practice and academia.

The Yukos Oil Company, a joint-stock company active in the petroleum business was constituted on 15 April 1993 under Russian law[3] in the process of the transformation of the Former Soviet economy. It was privatized in the late 1996 and until 2003 considered to be basically under the

1 See for details Richard Sakwa, The Quality of Freedom: Khodorkovsky, Putin, and the Yukos Affair, Oxford, Oxford University Press, 2009.

2 See below on the relationship between the criminal proceedings against him and the investment claims.

3 Resolution no. 354 of the Russian Government of 15 April 1993.

control of *Mikhail Khodorkovsky*[4] and a number of other Russian citizens, all rather prominent in Russia due their important personal wealth and the questions relating to its creation in the years after the collapse of the former Soviet Union.[5] Generally it was held that the company was one of the biggest and most prosperous in the period immediately before 2003, with headquarters in Moscow and operations throughout Russia.

In 2003, following a tax reassessment, the Russian tax authorities claimed payment of approximately 27 billion USD, and proceeded to freezing the company's assets once it was clear that such a sum could not be paid within the period granted. The mount of taxes claimed were in excess of the total revenues of the company in 2002 and 2003. On 1 August 2006, the competent local bankruptcy court in Moscow proceeded to declaring the company officially bankrupt and ordered its liquidation. Russia – in an effort to collect the taxes and associated penalties - began by auctioning a key part of Yukos' business on 19 December 2004. Yukos' remaining assets were then liquidated in a series of auctions, with the final auction held on 15 August 2007. Most assets were sold to oil companies owned or controlled by the Russian State. The prices were considered reactively low.

In addition, it was criticized that the judges in the court proceedings against the company and its owners and managers had been exposed to undue political influence. In particular the case of Mr. Khodorkovsky himself - a major shareholder of Yukos who was convicted by Russian courts for fraud and tax evasion - has since been treated in the media and politics. At the time of the events at issue he was detained in Moscow on various charges, namely fraudulent acquisition of shares, misappropriation of proceeds and assets, corporate and personal tax evasion. He was later sentenced by the Russian courts for fraud and tax evasion.

Political Debate

On the political level, with regard to both the Yukos company as such and the former owners and managers, in particular Mr. Khodorkovsky, several bodies took action. The the Parliamentary Assembly of the Council of Europe condemned Russia's behaviour on 25 January 2005 as a political campaign against the former owners of the company in order to weaken private ownership

4 *Mikhail Borisovich Khodorkovsky or Khodorkovskyi* (several transcriptions exist).

5 See, for example, Bruce Kapferer, Oligarchs and oligopolies: new formations of global power, Berghahn Books, 2005.

and get rid of political opponents.[6] Similarly, the USA Senate passed a resolution stating that "the criminal cases against Khodorkovsky, Lebedev, and their associates are politically motivated." It continued to suggest that "the trial, sentencing, and imprisonment of Mikhail Khodorkovsky and *Platon Lebedev* have raised troubling questions about the impartiality and integrity of the judicial system in Russia," and that their imprisonment represents "a violation of the norms and practices of Russian law."[7] Later the US House of Representatives adopted a similar resolution.[8] Similar motions were voted by Parliament in Germany[9], Italy[10], Spain[11] and others.

Legal Action in Domestic Courts

When it comes to legal actions, the case led not only to tax, bankruptcy and criminal proceedings in Russia but also abroad. Most notably, the company owners and management tried to introduce proceedings in the United States. On two occasions in 2004 and 2005 Yukos filed for bankruptcy

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6 § 6 of the Resolution. In § 14 of the Resolution it was held that "the circumstances of the arrest and prosecution of leading Yukos executives suggest that the interest of the state's action in these cases goes beyond the mere pursuit of criminal justice, and includes elements such as the weakening of an outspoken political opponent, the intimidation of other wealthy individuals and the regaining of control of strategic economic assets."

7 U.S. Senate Resolution 322, 18 November 2005. Text available at http://www.govtrack.us/congress/bill.xpd?bill=sr109-322&tab=summary.

8 On 26 June 2006 the House of Representatives put forward House Resolution 588, introduced by James McGovern (D-Mass.), chairman of the Tom Lantos Human Rights Commission, and Robert Wexler (D-Fla.), chairman of the Foreign Affairs Subcommittee on Europe. The Resolution states that the state-led castigation of Khodorkovsky constitutes "a politically-motivated case of selective arrest and prosecution that serves as a test of the rule of law and independence of Russia's judicial system." Text available at: http://thomas.loc.gov/cgi-bin/query/z?c111:H.+Res.+588.

9 The German Bundestag passed a resolution entitled ""Rechtsstaatlichkeit in Russland stärken" (Strengthening the Rule of Law in Russia) on 2 July 2009. Text available at: http://dip21.bundestag.de/dip21/btd/16/136/1613613.pdf

10 The Italian Parliament voted on 24 September 2009 in favour of a motion urging the Italian Government "to activate all diplomatic channels, together with other European partners, to guarantee the respect for human rights and the right of defense for Mikhail Khodorkovsky and Platon Lebedev and for all Russian citizens". See Mozioni Casini ed altri n. 1-00224 e Evangelisti ed altri n. 1-00231 concernenti iniziative per il rispetto dei diritti umani e del diritto di difesa in Russia, available at: http://www.camera.it.

11 On 1 March 2005 the Committee of Foreign Affairs of the Spanish Congress of Deputies passes a motion supporting the release of Mikhail Khodorkovsky (file number 161/1408), published in the "BOCG. Congreso de los Diputados" Series D, Volume 325 1st February 2006, that calls upon Russian authorities to respect Resolutions 1418 (2005) and 1692 (2005) of the Parliamentary Assembly of Council of Europe in relation to Khodorkovsky and other Yukos executives, in reference to infringements of the rule of law; and to request the immediate transfer of Khodorkovsky to a detention centre with conditions of incarceration to which he is legally entitled as is any prisoner, and which is in proximity to his immediate family.

protection in the Houston, estimating its assets at $12.3 billion and its debts at $30.8 billion, including "alleged taxes owed to the Russian government". Ultimately, however, the Houston District Court declared itself not being competent as the company was not domiciled in the United States.[12]

At the same time, the Russian insolvency proceedings against Yukos and the related actions taken by Yukos subsidiaries worldwide as well as the criminal proceedings against the various persons involved led to a number of judgments and decisions of foreign courts. In the Netherlands, Armenia and the United States various judgement related to the seizure of assets. A particularly noteworthy episode involved the sale an oil refinery in Lithuania for US$1.492 billion whose proceeds were placed in a bank account in the Netherlands, in the name of Yukos International. Furthermore, following an arbitration between Rosneft and Yukos Capital S.a.r.l. before a Russian Arbitration Court, an arbitral award had been handed down allowing the latter the right to seize Rosneft assets in the Netherlands and elsewhere, e.g. the United Kingdom and the United States. To make the Yukos saga even more complicated, various domestic courts were involved in requests for legal assistance by the Russian authorities, e.g. in Spain[13], Switzerland[14], the United Kingdom[15] and

12 See United States Bankruptcy Court, Southern District of Texas. Houston Division, Yukos Oil Company, Case No. 04-47742; See on these proceedings Matteo M. Winkler, Arbitration Without Privity and Russian Oil: The Yukos Case Before the Houston Court, Spring, 2006, vol. 27, University of Pennsylvania Journal of International Economic Law, 115. See also Dmitry Gololobov and Joseph Tanega, Practitioner Note: YUKOS Risk: The Double-Edged Sword - - A Case Note on International Bankruptcy Litigation and the Transnational Limits of Corporate Governance, New York University Journal of Law and Business, Spring, 2007, vol. 3, 557.

13 On 6 August 2009 the Spanish authorities refused to extradite Antonio Valdes Garcia, whom the Russian Prosecutor General's Office has sought in connection with the case against former Yukos officials. Valdes Garcia, a Russian-born Spanish national, is the former head of Fargoil, a former Yukos oil trading subsidiary that plays a central role in the second trial against Khodorkovsky. See http://www.khodorkovskycenter.com/history-background/other-key-individuals.

14 Swiss Federal Tribunal, Case 1A.29/2007/col, Decision of 13 August 2007, Mikhail Khodorkovsky, currently in detention,v. Swiss Federal Public Prosecutor's Office: The Swiss Federal Tribunal forbade the Swiss authorities from cooperating with Russian prosecutors on Moscow's requests for legal assistance related to the allegations against Khodorkovsky. The Tribunal noted that such assistance must be refused when a case is "a subterfuge to pursue a person for his political opinion".

15 Following Russia's petition to Britain for the extradition of Yukos employees, the Bow Street Magistrates' Court refused in March 2005 the extradition of both Dmitry Maruev and Natalya Chernysheva. The court deems that the charges against Khodorkovsky and other Yukos employees are "politically motivated". See http://www.doughtystreet.co.uk/news/news_detail.cfm?iNewsID=108.

Cyprus[16]. All these proceedings shall not be further analysed in this contribution, however although they show the complexity of the matter in view of the complicated corporate structure of Yukos as a truly multinational enterprise (MNE).

International Legal Proceedings

So far the Yukos saga has led to four international proceedings regarding the measures taken by Russia from 2003 onwards:

1. A first arbitral award in a Case known as *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005 was handed down 12 September 2010 by a tribunal established by the Stockholm Chamber of Commerce; a challenge brought before the Supreme Court of Sweden (Challenge to Jurisdiction), 12 November 2010 was rejected – it is the only international award so far in which the measures by Russia are considered an act of unlawful expropriation and were accordingly damages were awarded;
2. A second investor-State arbitration case is pending before by another tribunal equally established by the Stockholm Chamber of Commerce in Case … Renta4;
3. A third arbitration case is pending before an arbitration tribunal constituted under the auspices of the Permanent Court of Arbitration (PCA) – is is very likely economically the most important as the amount in damages requested is close to 100 billion USD.
4. In parallel an application has been lodged on behalf of Yukos International before the European Court of Human Rights (ECHR).
5. When it comes to the criminal proceedings in Russia, several of the former owners, mangers and persons associated with Yukos have lodged applications before the European Court of justice regarding their personal treatment by the Russian related to the Yukos case. Mr *Khodorkovskiy* filed fist an application with the European Court of Human Rights in 2004 regarding his trial and detention by the Russian authorities.[17] The Court decided on 31

16 See the New York Times, 21 May 2008: "Cypriot Judge Alecos Panayiotou denies Russia's request for the extradition of Vladislav Kartashov, a former manager of Yukos." Judge Panayiotou rules that "there is a real risk that his right to a fair trial may be flagrantly violated." He further states that the charges against Yukos and Khodorkovsky were "tainted with political motive."

17 European Court of Human Rights, *Khodorkovskiy* v. *Russia*, Application no. 5829/04, Judgement of 31 May 2011. On 20 May 2009 the ECHR had issued its Admissibility Decision (…..). Mr. Khodorkovsky's allegations of the breaches of the European Convention on Human Rights under Article 3 (Inhuman and degrading treatment), Article

May 2011 that Mr. Khodorkovsky did not prove his conviction for tax evasion and fraud were politically motivated (Article 18 ECHR) but that his trial and detention violated Articles 3 and 5 ECHR.[18] Another application has not yet been treated (*Khodorkovskiy v. Russia* [no. 2], Application no. 11082/06). While the violations of Article 3 and 5 are of a more technical nature, the treatment of the Court regarding Article 18 is certainly interesting in view of the Yukos case as such and the findings of other tribunals and shall thus be treated in more detail below.

6. In parallel, *Platon Lebedev*, one of the top managers of the company who was equally convicted by Russian Courts in the aftermath of the tax proceedings against Yukos had lodged an application before the European Court of Human Rights (ECHR) lading to a judgement in which the Court found that Mr. Lebedev's had been detained illegally and was denied access to counsel, that hearings were conducted on his case without his attorneys present, that proceedings had been unlawfully delayed, and that the appeal process had been continually obstructed.[19] A second application[20] has been partly admitted by the Court. Apart from several issues relating to his treatment during trial and detention this application is interesting in view of the allegedly unforeseeable application of the tax law (Article 7 of the Convention) and the allegedly improper reasons for his criminal prosecution (Article 18

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5 (Unlawful arrest and subsequent detention) and Article 18 (Political motivation of his arrest, detention and prosecution) were all admissible.

18 In particular, the Court found two violations of Article 3 as regards the conditions in which he was kept in court and in the remand prison after 8 August 2005; one violation of Article 5 § 1 (b) (lawfulness of detention for non-compliance with a lawful order) as regards his apprehension on 25 October 2003; one violation of Article 5 § 3 (length of detention) as regards the length of his continuous detention pending investigation and trial; and four violations of Article 5 § 4 (judicial review of the lawfulness of pre-conviction detention) as regards procedural flaws related to his detention.

19 See European Court of Human Rights, Case of *Lebedev* v. *Russia* (no. 1), Application no. 4493/04, Judgement of 25 October 2007. The Court found a number of procedural mistakes committed by the Russian courts, i.e. a violation of Article 5 § 1 (c) of the Convention on account of the applicant's unauthorised detention between 31 March and 6 April 2004; a violation of Article 5 § 4 of the Convention as regards the delays in the review of the detention order of 26 December 2003 by the Moscow City Court; a violation of Article 5 § 4 of the Convention on account of the delays in the review of the detention order of 6 April 2004 by the Moscow City Court; and a violation of Article 5 § 4 of the Convention on account of the absence of the applicant from the detention hearing on 8 June 2004.

20 European Court of Human Rights, Case of *Lebedev* v. *Russia* (no. 2), Application 13772/05.

of the Convention).[21] At the time of the writing of this contribution no decision had been issued.

7. Furthermore, Mr *Vasiliy Georgiyevich Aleksanyan*, a former practising member of the Moscow Bar who had represented Mr Khodorkovskiy and Mr Lebedev, as one of their lawyers, in criminal proceedings before the ECHR launched himself an application before the ECHR in respect to his own treatment and conviction by Russian courts. He had also provided legal services to the oil company Yukos ("the company") in matters related to that company's application before this Court. His case was not yet treated due to missing documents in order to decide whether it is admissible.[22]

8. Finally, *Alexei Pichugin*, one of Yukos security managers, had been convicted by Russian Courts of of having organized murders; he was reported to have also challenged these convictions as being part of a political conspiracy and lodged a respective application with the ECHR, although no documents in this respect can be found on the Court's portal.

RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. Arb. V079/2005

The first known award relating to the Yukos case was launched in October 2005 under the Bilateral Investment Treaty concluded between the United Kingdom and the former Soviet Union[23]. The case had led to the issuance of an award on jurisdiction in October 2007[24] and then led to a final award on 12 September 2010 under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce.[25]

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21 The latter point is of particular importance in view of the findings in the Case ECHR, *Khodorkovskiy* v. *Russia* (Applications no. 5829/04), Judgement of 31 May 2011.

22 See ECHR, Partial Decision as to the Admissibility of Application no. 46468/06 by *Vasiliy Georgiyevich Aleksanyan* against Russia, 24 January 2008.

23 The USSR had ratified this Agreement by the Ordinance N 2199-I of the Supreme Soviet of the USSR of 29 May 1991.

24 *RosInvestCo UK Ltd.* v. *The Russian Federation*, SCC Case No. Arb. V079/2005 (UK/Soviet BIT), Award on Jurisdiction, October 2007, available at:.http://ita.law.uvic.ca.

25 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005 (UK/Soviet BIT), Final Award, 12 September 2010, available at:.http://ita.law.uvic.ca. For a full report see e.g. Lise Johnson, UK firm victorious in dispute with Russia, but damages much less than claimed, RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. Arb. V079/2005, Investment Treaty News, 7 April 2011, online at: http://www.iisd.org/itn/2011/04/07/awards-and-decisions-2/

The Case involved several procedurally interesting questions regarding the scope and definitions found in BITs26. Russia tried without success to challenge the arbitral decision regarding jurisdiction of October 2007 first before the Svea Court of Appeal27 and finally before the Supreme Court of Sweden, as the responsible appellate courts under Swedish law. Interestingly Russia had filed also a motion requiring the Swedish courts to ask the European Court of Justice for a preliminary ruling – which was however equally rejected.28

With regard to the substantive questions as to whether Russia's behaviour in the proceedings against Yukos constituted a violation of the BIT, the awards war relatively clear and uncontroversial. RosInvestCo UK Ltd, a corporation established under English law brought a claim because the actions taken by Russia against Yukos had let to the share price of Yukos plummeting in 2005. The company had purchased a total of seven million shares in the company in late 2004, allegedly on the basis that the market had overestimated the risks to Yukos.

RosInvestCo UK Ltd basically argued that the tax assessments, penalties, and enforcement actions against Yukos led an expropriation of RosInvestCo UK Ltd's property. Russia held, that the measures were legitimate exercised as part of its police and taxation powers. With regard to this substantive question which is at the very heart of the Yukos saga and also at stake before other tribunals (and therefore the only interest of this contribution) the arbitral tribunal in the RosInvestCo UK Ltd case addressed the three issues whether the measures were (1) bona fide, (2) non-discriminatory, and (3) non-confiscatory.

In principle, the tribunal found in its award of 12 September 2010 that "some of Respondent's explanations and arguments [justifying its tax assessments and enforcement actions] seemed plausible,"[29] that the 19 December 2004 auction appeared "to have been conducted within the limits

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26 In particular with regard to the use of MFN clauses and the import of more generous dispute settlement provisions in other treaties -potentially- including limitations found therein. See on this issue in general, Andreas R. Ziegler, Most-Favoured Nation (MFN) Treatment, in: August Reinisch (ed.), Standards of Investment Protection, Oxford University Press, Oxford, 2008, 29-86 and Andreas R. Ziegler, The Nascent International Law on Most-Favoured-Nation (MFN) Clauses in Bilateral Investment Treaties (BITs), in: Christoph Herrmann and Jörg Philipp Terhechte (eds), European Yearbook of International Economic Law 2010, 77-102.

27 Decision of the Svea Court of Appeal dated 16 April 2009 in case No. Ö 9773-08.

28 Decision of the Supreme Court of Sweden (Challenge to Jurisdiction), RosInvestCo *UK Ltd* v. *The Russian Federation* (Case No. Ö 2301-0912) of 12 November 2010, text in Swedish and an unofficial English translation available at: http://ita.law.uvic.ca.

29 §§ 97, 520, 524, 557, 567, 612.

of discretion awarded by Russian law,"[30] and that the subsequent bankruptcy auctions seemed consistent with Russian law and even "the higher standards to be applied under the [BIT]."[31] Despite this finding the tribunal came to the conclusion that "Respondent's measures, seen in their *cumulative effect* towards Yukos" did not pass the test of being *bona fide,* non-discriminatory, and non-confiscatory, and therefore constituted an expropriation under the BIT.[32] In particular, "the application of the tax law, the tax assessment on Yukos and the conduct of the auctions must be seen as a treatment which can hardly be accepted as bona fide".[33] Here it was in particular the sudden change of attitude in the tax assessment which were considered as singling out Yukos and hardly objective and fair in view of their discriminatory character.[34] As a result the tribunal found that in the absence of compensation, the Russian Federation had unlawfully expropriated RosInvestCo UK Ltd's property. The tribunal awarded the claimant 3.5 million USD in damages - a sum much lower than the 232.7 million USD asked for by the claimants.

When it comes to judicial dialogue is should be noted that the arbitrators in *RosInvestCo UK Ltd* cited the decision in parallel arbitration proceedings (*Renta 4 S.V.S.A. v. The Russian Federation)* on jurisdictional issues only – as those proceedings had not yet reached the state of the analysis of the merits when the RosInvestCo UK Ltd case was to be decided.35

On the merits the following statements are of particular notice and may influence the finding of other courts:

- On several instances the Tribunal expressed serious doubts as to the nature of the measures (taxation, auctions etc.), taken by Russia (§§ 498, 525, 557, 575 and 633).

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30 § 522.

31 § 535.

32 §. 633; see also §§ 498, 525, 557, 575.

33 § 567.

34 §§ 492 ff, especially § 496.

35 In *Renta 4 S.V.S.A. v. Russian Federation, Award on Preliminary Objections, 20 March 2009,* Russia had asserted essentially the same argument as in the RosInvestCo case regarding the impact of the Article 11 "taxation" exception *on the jurisdiction of the tribunal*. However, the *Renta* tribunal rejected it in no uncertain terms, declaring that "[t]o think that ten words appearing in a miscellany of incidental provisions near the end of the Danish BIT would provide a loophole to escape the central undertakings of investor protection would be absurd." (§ *74*) while the *RosInvestCo UK Ltd.* tribunal considered the question ultimately irrelevant and used another approach to find an expropriation irrespective of the carve out of tax measures. See § 271 of the award.

- The tribunal held "even though some of Respondent's explanations and arguments for the justification of the measures seem persuasive or at least plausible, there remain doubts whether the measures can be seen as *bona fide* and non-discriminatory."(§ 612)
- The tribunal held "despite having used nearly identical tax structure, no other Russian oil company was subjected to the same relentless and inflexible attacks as Yukos. In the view of the Tribunal they can only be understood as steps under a common denominator in a pattern to destroy Yukos and gain control over the assets." (§ 621)

***Renta 4 S.V.S.A et al. v. Russian Federation*, SCC No. 24/2007**

Equally before the Arbitration Institute in Stockholm another foreign investor brought a request for investor-State arbitration relating to YUKOS- this time under the BIT between Spain and and the Soviet Union, entered into force on 28 November 1991. Seven Spanish investment funds – holders of Yukos' American Depositary Receipts, whose interests are represented by Renta 4 S.V.S.A. Managed to establish an arbitral tribunal through a respective request of 25 March 2007.[36]

In its award on jurisdiction this tribunal referred to an important number of international decision – including the award on jurisdiction in *RosInvestCo UK Ltd*.[37] As in the *RosInvestCo UK Ltd* Case at this stage the main issue was the use of the MFN clause and possible carve outs from jurisdiction[38] – any questions relating to the treatment as such ans whether an unlawful expropriation had taken place were left for the merits phase. The Tribunal in its award on jurisdiction of 20 March 2009 came to the conclusion that "it has subject matter jurisdiction under Article 10 of the Spanish BIT to

36 See for the procedural aspects and the time-line of the dispute until that date *Renta 4 S.V.S.A et al. v. Russian Federation*, SCC No. 24/2007 (Spain/Russia BIT), Award on Preliminary Objections, 20 March 2009. See also Timothy G. Nelson, Paul Mitchard QC, Karyl Nairn and David Kavanagh, New Arbitral Ruling in Yukos Case Exposes Possible Gaps in Bilateral Investment Treaty (BIT) Coverage for Managed Investment Funds - Important Lessons for Funds Investing in Emerging Markets or Volatile Countries, in: Russia/Eurasia Executive Guide 2009, 2010, available online at: http://www.skadden.com/content/Publications/Publications1841_0.pdf.

37 *Renta 4 S.V.S.A et al. v. Russian Federation*, SCC No. 24/2007 (Spain/Russia BIT), Award on Preliminary Objections, 20 March 2009 § 48 of the Award.

38 On this issue see Andreas R. Ziegler, The Nascent International Law on Most-Favoured-Nation (MFN) Clauses in Bilateral Investment Treaties (BITs), in: Christoph Herrmann und Terhechte, Jörg Philipp (eds.), European Yearbook of International Economic Law 2010, 77-102 and most recently August Reinisch, How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties ? Journal of International Dispute Settlement, vol. 2, no. 1, 2011, 115-174.

decide whether compensation is due by virtue of claims of expropriation raised in this arbitration".[39] The awards on the merits is still outstanding.

PCA, Yukos Universal Ltd. [Isle of Man] v. Russian Federation ["Yukos Universal"(pending)

In parallel, a third arbitral tribunal was constituted under UNCITRAL Arbitration Rules before the Permanent Court of Arbitration (Yukos Universal Ltd. [Isle of Man] v. Russian Federation ["Yukos Universal"], as foreseen in Article 26 of the Energy Charter Treaty (ECT) following a request by claimants of 3 February 2005.[40] This tribunal released an interim award on jurisdiction and admissibility on 20 November 2009.[41] The arbitrators came to the conclusion that the tribunal had jurisdiction.[42] Apart from the highly controversial question of general international law, as to whether Russia was bound by the ECT despite never having ratified it[43] - the main point before the

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39 *Renta 4 S.V.S.A et al. v. Russian Federation*, SCC No. 24/2007 (Spain/Russia BIT), Award on Preliminary Objections, 20 March 2009 § 155 of the Award.

40 See PCA Case No. AA 227, In the Matter of an Arbitration before a Tribunal Constituted In accordance with Article 26 of the Energy Charter Treaty and the UNCITRAL Arbitration Rules 1976, between Yukos Universal Limited (Isle of Man and the Russian Federation, Interim Award on Jurisdiction and Admissibility, 30 November 2009. On the same day the PCA issued other two decisions in a triplet case: PCA Case No. AA 226, In the Matter of an Arbitration before a Tribunal Constituted In accordance with Article 26 of the Energy Charter Treaty and the UNCITRAL Arbitration Rules 1976, between Hulley Enterprises Limited (Cyprus) and the Russian Federation, Interim Award on Jurisdiction and Admissibility, 30 November 2009 and PCA Case No. AA 228, In the Matter of an Arbitration before a Tribunal Constituted In accordance with Article 26 of the Energy Charter Treaty and the UNCITRAL Arbitration Rules 1976, between Veteran Petroleum Limited (Cyprus) and the Russian Federation, Interim Award on Jurisdiction and Admissibility, 30 November 2009. All three decisions were published in the beginning of February 2010 and are available at the ECT website: http://www.encharter.org/index.php?id=213&L=1%2F%2F%2F%5C%5C%5C.

41 See on this award Chiara Giorgetti, The Yukos Interim Awards on Jurisdiction and Admissibility Confirms Provisional Application of Energy Charter Treaty, ASIL Insights, vol. 14, issue 23, 3 August 2010; Paul M. Blyschak, Yukos Universal v. Russia: Shell Companies and Treaty Shopping in International Energy Disputes, Spring, 2011, 10 Rich. J. Global L. & Bus. 179; and Piotr Szwedo, Case Comment: (Former) Yukos v. Russian Federation before the Permanent Court of Arbitration , available at:http://www.research.kobe-u.ac.jp/gsics-publication/jics/szwedo_18-2.pdf and Brenden Marino Carbonell, Concerning the Kremlin: Defending Yukos and TNK-BP from Strategic Expropriation by the Russian State, University of Pennsylvania Journal of Business Law, vol. 12, 2010, 257.

42 In its Award of 30 November 2009, the Arbitral Tribunal constituted under the PCA ruled that the Russian Federation was bound by the Energy Charter Treaty (ECT) despite the fact that the Treaty had not been ratified by the Russian Duma. The Tribunal also held that the Yukos majority shareholders were entitled to the Treaty's protection.

43 On this issue, among others Alex M. Niebruegge, Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law, Chicago Journal of International Law, vol. 8, 2007, 355.

tribunal will be again the question whether Yukos Universal has been the victim of an unlawful expropriation. Technically the proceedings before the PCA relate to three different disputes brought by three different claimants. Accordingly the tribunal published three decisions. However, the texts of the awards differ only in the parts concerning the ownership and control of investment by three claiming enterprises (parts VIII.B. and C.3.) and in the rest are identical.[44] The Claimants, are two GML subsidiaries (Hulley Enterprises and Yukos Universal), and Veteran Petroleum, the pension fund for the benefit of former Yukos employees.

ECHR: ***OAO Neftyanaya Kompaniya Yukos* v. *Russia (Application 14092/04)***

On 23 April 2004, shortly after the company had received the revised tax assessments the management of the Yukos Oil Company submitted an application to the European Court of Human Rights claiming in particular a violation of Article 6 ECHR (right to a fair trial) and Article 1 of Protocol No. 1 (protection of property). The management questioned on behalf of the company the lawfulness and proportionality of the 2000-2003 tax assessments and their subsequent enforcement, including the forced sales of its assets.[45] Only on 29 January 2009 the European Court of Human Rights court declared the Yukos application admissible[46] The hearing on merits in these proceedings took place on 4 March 2010. The decision on this case was expected for late in 2010 but has not yet been handed down.

The ECHR declared on 29 January 200 that the Yukos case was admissible for further examination regarding complaints that:

- the company was taxed unlawfully in respect of liabilities asserted against no other taxpayer in Russia and which were wholly unknown to Russian law before the Yukos case;
- that this taxation and its enforcement amounted to the disguised expropriation of the company and its assets;

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44 See also Piotr Szwedo, Case Comment: (Former)Yukos v. Russian Federation before the Permanent Court of Arbitration , available at: http://www.research.kobe-u.ac.jp/gsics-publication/jics/szwedo_18-2.pdf, note 1.

45 In addition violations of Articles 1 (obligation to respect human rights), Article 7 (no punishment without law), 13 (right to an effective remedy), 14 (prohibition of discrimination) and 18 (limitation on use of restrictions on rights) of the European Convention of Human Rights were submitted. See the Press release issued by the Registrar (of the European Court of Human Rights), Chamber Hearing in OAO Neftyanaya Kompaniya Yukos v. Russia, 4 March 2010, available at: http://cmiskp.echr.coe.int.

46 See European Court of Human Rights, Decision as to the Admissibility of Application no. 14902/04 by OAO Neftyanaya Kompaniya Yukos against Russia, of 29 January 2009 available online at: http://cmiskp.echr.coe.int.

- and that these measures singled the company out for special treatment in a discriminatory and abusive way.

ECHR: *Khodorkovskiy* v. *Russia* (Applications no. 5829/04*)*

Among all the applications lodged before European Court of Human Rights relating to the treatment of natural persons by Russia in the Yukos case, only one of them lodged by Mr Khodorkovskiy has led to a statement by the Court regarding question whether the criminal proceedings base on the tax assessments were politically motivated. While the question is certainly not identical with the one relating to the expropriation allegations regarding Yukos as such, it may still be interesting to compare this decision and the statements made so far in the arbitral proceedings. This is also underlined by the argument brought forwards in the case by the applicant that "the entire criminal prosecution of Yukos managers, including himself, had been politically and economically motivated."[47] He had invited the Court

> "to consider the facts surrounding his business and political activities, as well as the major policy lines adopted by the President's administration at the relevant time. Indeed, those facts cannot be ignored. In particular, the Court acknowledges that the applicant had political ambitions which admittedly went counter to the mainstream line of the administration, that the applicant, as a rich and influential man, could become a serious political player and was already supporting opposition parties, and that it was a State-owned company which benefited most from the dismantlement of the applicant's industrial empire."[48]

Procedurally the violation of Article 18 – as it is the case with certain other guarantees can only be invoked with regard to the violation of the specific guarantees of the ECHR. In this respect the question for the ECHR was whether the political and economic foundations of the Yukos proceedings in Russia had led to a violation of Article 5 (right to a fair criminal trial) of the applicant.[49] Nevertheless, this analysis allows, in principle for an assessment of the arbitrariness and/or the real motives behind the violation of an applicants rights.

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47 § 254 of the Judgement.

48 § 257.

49 See e.g. *Gusinskiy v. Russia*, no. 70276/01, § 75, ECHR 2004-IV.

It seems from the part of the judgement related to this analysis that the Court was highly aware of this connection – and of the political repercussions the respective finding would have. In particular, the Court underlined the high threshold under the Convention that an applicant has to meet to prove a violation of Article 18:

> "The Court reiterates that the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. Indeed, any public policy or an individual measure may have a 'hidden agenda', and the presumption of good faith is rebuttable. However, an applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context). A mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove that Article18 was breached. […] When an allegation under Article18 is made the Court applies a very exacting standard of proof; as a consequence, there are only few cases where the breach of that Convention provision has been found. […] Particularly, the Court notes that there is nothing in the Court's case-law to support the applicant's suggestion that, where a *prima facie* case of improper motive is established, the burden of proof shifts to the respondent Government. The Court considers that the burden of proof in such a context should rest with the applicant."[50]

The assumption of good faith on behalf of the State parties seems particularly interesting when compared to the "*bona fide*" assessment made by the *Renta 4* Arbitral Tribunal and deserves certainly closer scrutiny.[51] The ECHR did not refer to the Renta 4 judgement itself and from the Judgement it is not even clear whether the Court found that this and other investor-State arbitration procedures were relevant for its own decision. It should be noted that the application at stake in these proceedings related only to the detention and treatment of the accused during the period prior to the convictions for fraud and tax evasion. It was therefore not possible for the applicant to prove in detail while the accusations and the conviction relating to the tax proceedings as such could have been a contrary to "bona fide" as it was the case in the Renta 4 case.

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50 §§ 255 and 256.

51 See above.

The Court did however refer to the domestic decisions regarding several extradition and injunction procedures:

> "[..]the Court turns to the findings of several European courts in the proceedings involving former Yukos managers and Yukos assets. Those findings are probably the strongest argument in favour of the applicant's complaint under Article 18 of the Convention. However, the evidence and legal arguments before those courts might have been different from those in the case under examination. More importantly, assuming, that all courts had the same evidence and arguments before them, the Court reiterates that its own standard of proof applied in Article 18 cases is very high and may be different from those applied domestically. The Court admits that the applicant's case may raise a certain suspicion as to the real intent of the authorities, and that this state of suspicion might be sufficient for the domestic courts to refuse extradition, deny legal assistance, issue injunctions against the Russian Government, make pecuniary awards, etc. However, it is not sufficient for this Court to conclude that the whole legal machinery of the respondent State in the present case was *ab intio* |sic] misused, that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention."[52]

Conclusion

It may be too early to to draw conclusions from the *Yukos* saga for the fragmentation debate of international law. Apart from the fact that the decentralized system of investor-State arbitration may lead to parallel proceedings, forum shopping and incoherence[53], the overlap of various sub-system like trade, investment, human rights and others has become an issue of legal debate.

Several awards relating to the behaviour of Russia between 2003 and 2007 are still outstanding. Several of them will have to answer – in one way or another - the questions as to whether the the company was taxed lawfully and in a non-discriminatory way, whether the ultimate goal was

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52 § 260.

53 See e.g. among the many publications most recently Paul Michael Blyschak, Access and advantage expanded: *Mobil Corporation v Venezuela* and other recent arbitration awards on treaty shopping, Journal of World Energy Law and Business, vol. 4, no.1,2011, 32-39 and Franck, Susan D., The ICSID Effect? Considering Potential Variations in Arbitration Awards (May 15, 2011). Virginia Journal of International Law, Vol. 51, No. 4, 2011; Washington & Lee Legal Studies Paper No. 2011-9. Available at SSRN: http://ssrn.com/abstract=1842164 and

economic and political. The two final awards presented here as overlapping may not be the most appropriate for comparison and answering this question. While in *RosInvestCo UK Ltd.* the expropriation of a UK-investor as a result of the liquidation of Yukos was at stake, in the Khodorkovskiy case the treatment of the applicant as such had to be analysed. While there is an assumption that the two decisions should not be completely unrelated, both tribunals made it quite clear that they were operating under very specific assumptions that may justify the result.

The ECHR with regard to Article 18 underlined that the European Convention on Human Rights operates under the assumption that public authorities in the member States act in good faith and – implicitly- that it may not be possible with regard to specific acts (here the violations of Articles 3 and 5 ECHR) towards and individual to show that the "legal machinery"of a State "was *ab initio* misused".

In the arbitral award handed down in *RosInvestCo UK Ltd.* Is also rather peculiar. The tribunal reiterates several times that each action taken separately seems plausible and as within the limits of discretion grated to the Contracting Parties of the BIT. At the same time the "Respondent's measures, seen in their *cumulative effect* towards Yukos" do not pass the test of being *bona fide,* non-discriminatory, and non-confiscatory, and therefore constituted an expropriation under the BIT. Here the Tribunal assesses the measures taken by Russia as a whole and as to whether they may constitute an expropriation.

And yet, it is is not self-evident that the Tribunals come to the mentioned conclusions in view of the background and the underlying facts. This is not to say that they are not at ease with each other or even contradictory. As mentioned, the context is different, and maybe most importantly the legal threshold to assume that the behaviour is arbitrary or politically or economically motivated may be to different. One could thus not easily call the two in these proceedings 'competing' international mechanisms for the settlement of disputes originating from the same factual background.[54] However, one may certainly notice that the ECHR has not referred to the arbitral award in *RosInvestCo UK Ltd*. v. *The Russian Federation*. This can be explained by the different characters

54 Such as more commonly discussed with regard to different trade mechanisms, different investment mechanisms or even overlaps between trade and investment; see most recently, among many others, Leonila Guglya, The Interplay of International Dispute Resolution Mechanisms: the Softwood Lumber Controversy, Journal of International Dispute Settlement, vol. 2, no.1, 2011, 175-207 and Andreas R. Ziegler, Do the Existing Overlaps and Potential Incoherences Between the Dispute Settlement Procedures in BITs, RTAs and the WTO Threaten the Integrity of International Economic Law ? NCCR Trade Regulations Working Paper, forthcoming.

of the legal analysis and maybe even in a more convincing manner by the general absence to related decisions in that part of the judgement which must be considered as highly political and sensitive.

At least when it comes to the first issue, the outstanding decision by the European Court of Human Rights in *Khodorkovskiy v. Russia* (no. 2) (Application no. 11082/06) and even more so in *OAO Neftyanaya Kompaniya Yukos* v. *Russia* (Application 14092/04) may operate as the missing link. Here the European Court of Human Rights will have to assess some measures which at least partially overlap with the decision handed down in *Khodorkovskiy* v. *Russia* no. 1 (Applications no. 5829/04*)* – in particular Russia's application and interpretation of its tax law leading to the fraud and tax evasion conviction of Mr *Khodorkovskiy* and the tax assessments at the outset of Yukos' insolvency. *T*his time it will not only be Article 18 of the European ECHR but Article 1 of the Protocol which of course prohibits unlawful expropriations.[55] In this respect it will be interesting to observe whether at that time the ECHR will refer to R*osInvestCo UK Ltd*. v. *The Russian Federation* and potentially any of the other awards related to the Yukos saga (*Renta 4, Yukos Universal Ltd.*) – provided they are public by then – and *vice versa*.

55 Article 1"Protection of property" reads: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."