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The Yukos Cases. A Comparative Case Note on the ECtHR's Decisions and the PCA Tribunal's Awards

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The decisions on the Yukos cases delivered by the European Court of Human Rights (ECtHR) in 2009/2011/2014 and by an international arbitral tribunal administered by the Permanent Court of Arbitration (PCA Tribunal) in 2009/2014 call for a comparative analysis. The two judicial bodies arrived at highly divergent conclusions, in particular with regard to the amount of damages to be paid by Russia: according to the Tribunal, Russia had to pay compensation amounting to roughly 50 billion USD, whereas the Court ordered Russia to pay about 2 billion EUR only. The general factual background to the ECtHR's decisions and the PCA Tribunal's awards was the same, though. Russian authorities had subjected Yukos to tax reassessments and related enforcement measures upheld by domestic courts. At the end of the day, Yukos was declared bankrupt and liquidated. The significant differences between the decisions can be attributed, at least to a certain extent, to the differing legal bases underlying the decisions. The ECtHR had to apply the European Convention on Human Rights (ECHR) and related additional protocols (ECHR-Prot.), i.e. human rights instruments, whereas the PCA Tribunal was bound to apply the investment protection provisions of the Energy Charter Treaty (ECT). The Tribunal classified the tax reassessments and related enforcement measures as a 'creeping' de facto expropriation (Article 13 ECT) whereas the Court held that these measures solely amounted to unlawful and disproportionate interferences with the right to property (Article 1 ECHR-Prot. 1). Accordingly, from the Tribunal's perspective, Russia had to compensate the value of Yukos as a multi-billion stock company. In contrast, according to the Court, Russia was obliged to refund unwarranted tax and enforcement fee payments only. The ECtHR also declared that Russia had violated the right to a fair trial (Article 6 ECHR). In contrast, the PCA Tribunal did not deal separately with due process violations even though it could have done so, e.g., under the 'fair and equitable treatment' clause (Article 10(1)(2) ECT). A distinctive feature of the PCA Tribunal's reasoning was the arbitrators' 'credo' that Russia had intended mala fide to extinguish Yukos for political reasons. The Tribunal arrived at this conclusion on the basis of extensive testimony of fact witnesses called by the claimants. In contrast, the ECtHR abstained from any hypothesizing about political motives behind the taxation and related enforcement measures taken by the Russian authorities and affirmed by the Russian courts.

Keywords: Yukos, international investment arbitration, Energy, Charter Treaty, Permanent Court of Arbitration, international human rights protection, European Convention of Human Rights, European Court of Human Rights, de facto-expropriation, damages.

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I. Introduction

Yukos is still haunting Russia. According to media reports[1], Belgium and France seized Russian bank accounts in mid-June 2015. The purpose of that seizure was to enforce final awards delivered by a PCA[2] Tribunal in July 2014[3]. According to these three arbitral awards[4], Russia has to pay about 50 billion USD to the claimants.

Another *Yukos* case[5] was pending in parallel before the ECtHR[6]. The ECtHR also decided in favour of the applicant and held that Russia had to pay damages. However, the sum awarded to the applicant amounted to almost 2 billion EUR only.

This marked difference between the decisions, *i.e.* the PCA Tribunal's final awards and the ECtHR's judgments[7], is striking because the general factual background was the same[8]. The significantly divergent outcome of the proceedings before the PCA Tribunal on the one side and the ECtHR on the other side calls for a comparative analysis of these cases. The astonishing discrepancies may be owing to the differing legal bases upon which the awards and the judgments rest.

In respect of the applicable substantive law, the ECtHR had to base its judgment on the European Convention on Human Rights (ECHR)[9] which is a regional human rights instrument. In contrast, the PCA Tribunal had to apply primarily the Energy Charter Treaty (ECT)[10] which is, in part[11], an international investment law instrument.

Accordingly, the *Yukos* cases are quite illustrative with regard to investment protection through different fields of public international law, *i.e.* international human rights law on the one side and international investment law on the other side[12]. Both fields of law may be applicable to the same set of facts. Still, both fields of law may yield remarkably differing results[13].

II. The facts of the *Yukos* cases

On the 3rd and 14th of February 2005 respectively, *Hulley Enterprises Limited* (*Hulley*), *Yukos Universal Limited* (YUL) and *Veteran Petroleum Limited* (VPL) initiated arbitration proceedings against Russia. The claimants, *i.e. Hulley*, YUL and VPL, were controlling shareholders of *OAO Yukos Oil Company* (*Yukos*)[14]. Russia and the three claimants agreed that the arbitral Tribunal was to be administered by the PCA and that its seat should be in The Hague[15]. The proceedings before the ECtHR were not initiated by these three companies, *Hulley*, YUL and VPL, or any other former shareholder of *Yukos*. Rather the applicant was the stock company itself, *i.e. Yukos* or in full *OAO Neftyanaya Kompaniya Yukos*[16].

The PCA Tribunal rightly noted that '[t]he factual matrix of this case is complex'[17]. Nevertheless, the facts of the *Yukos* cases may be summarized as follows:

Shortly after the dissolution of the Soviet Union, the Russian government launched extensive privatization programmes. During these high years of massive privatizations of former state-owned companies in the 1990ies, *Yukos* was sold to private investors and finally emerged as the largest Russian oil company[18].

Yukos adopted and applied a 'tax optimization' scheme on the basis of the Russian 'low-tax region programme' the purpose of which was to promote economic development in rural areas[19]. A 'Field Tax Audit Report' for 2000-2003 issued by the Russian Tax Ministry did not find fault with *Yukos'* 'tax optimization scheme'[20]. However, only a few months later, Russian tax authorities started to suspect *Yukos* of abusing the 'low-tax region programme'[21]. Accordingly, between 2003 and 2006, the Tax Ministry issued five tax reassessments for the years 2000-2004 which added up to about 24 billion USD of tax debts (including interest and fines)[22].

These tax reassessments were closely followed by a variety of enforcement measures. Shares, bank accounts and other assets belonging to *Yukos* and related companies were seized[23]. In addition, Russian authorities imposed surcharges for delayed payment of tax debts[24]. In 2004, Russia auctioned off *Yugansneftegaz* (YNG), *i.e. Yukos'* core production subsidiary[25], at the amount of 9.37 billion USD although YNG had been valued at 15.7 and 18.3 USD by *Dresdner Bank* and at 16 and 22 billion USD by *JP Morgan* respectively[26]. The sole bidder was *Baikal Finance Group* which had been established shortly before the auction and which was swallowed by *Rosneft*, a Russian state-owned oil company, only within a few days after the auction[27].

In 2006, a foreign bank syndicate initiated bankruptcy proceedings against *Yukos* in the course of which *Yukos* was declared bankrupt[28]. *Yukos*' remaining assets were sold off in public auctions[29] and acquired by *Rosneft* and *Gazprom*[30] which is another Russian state-owned corporation in the energy sector. At the end of the day, *Yukos* was liquidated[31] and, henceforth, ceased to exist.

The aforementioned facts can be retrieved consonantly from the decisions delivered by the ECtHR and the PCA Tribunal. Nevertheless, the decisions differ quite remarkably with regard to the account of certain factual details. Apparently, both the ECtHR and the PCA Tribunal reported in-depth those additional factual details which were, from their respective point of view, relevant for the persuasiveness of the reasoning and the conclusiveness of the holding. In particular, the PCA Tribunal put special emphasis on those facts which were important for establishing that Russia had intended to destroy *Yukos* for primarily political motives.

III. The law

1. Procedural Law

The arbitration before the PCA Tribunal was initiated on the basis of Article 26 ECT, which is the ECT's dispute settlement clause concerning disputes between an investor and a party to the ECT. According to Article 26(2)(c), (3)(a), (4)(b), (5)(a)(iii) ECT, *Hulley*, YUL and VPL filed a request for arbitration under the UNCITRAL[32] Arbitration Rules[33]. Thus, the procedural law applicable to the dispute before the PCA Tribunal were Article 26 ECT and the UNCITRAL Arbitration Rules[34]. In addition, since the PCA Tribunal was seated in The Hague, the arbitrators had to take into account the mandatory rules of Dutch arbitration law as well[35]. In fact, the Tribunal rendered its final awards pursuant to Article 1049 of the Netherlands Arbitration Act of 1986[36].

In the *Yukos* case before the ECtHR, the applicant brought its application under Article 34 ECHR. Accordingly, Articles 34 to 46 ECHR provided for the procedural rules. In addition, the Court had to adhere to the Rules of Court[37].

2. Substantive Law

Pursuant to Article 26(6) ECT, the PCA arbitral Tribunal had to decide the dispute in accordance with the ECT and 'applicable rules and principles of international law'. Among these 'rules and principles' to be applied by the Tribunal were treaty rules, in particular the VCLT[38], as well as customary rules, in particular the law on state responsibility as reflected in the ILC[39] Articles on State Responsibility[40].[41] The ECT is a multilateral treaty ensuring energy cooperation between European and Central Asian states on the basis of five pillars: free trade, free transit, investment protection, energy efficiency and dispute settlement[42]. Hence, the ECT combines familiar regulatory approaches of modern

Free Trade Agreements (FTAs)[43]. The pivotal provision of the ECT in the *Yukos* cases was Article 13 ECT on expropriations. Article 13(1) ECT reads in relevant part:

> 'Investments … shall not be ... expropriated or subjected to a measure or measures having effect equivalent to … expropriation … except where such [e]xpropriation is:
>
> (a) for a purpose which is in the public interest;
> (b) not discriminatory;
> (c) carried out under due process of law; and
> (d) accompanied by the payment of prompt, adequate and effective compensation.
>
> Such compensation shall amount to the fair market value … at the time immediately before the Expropriation … became known … (hereinafter referred to as the "Valuation Date").
>
> … Compensation shall also include interest at a commercial rate … .'

This provision sets forth an individual right of foreign investors which can be enforced by investors themselves through arbitration proceedings against the host state as provided for under Article 26 ECT.

Pursuant to Article 34(1) ECHR, the substantive law to be applied by the ECtHR are the ECHR and its protocols. The ECHR is a multilateral human rights treaty. It sets forth the 'classic' civil and political rights with the exception of the right to property which is laid down in Article 1 of the first additional Protocol to the ECHR[44] (ECHR-Prot. 1). In fact, Article 1 ECHR-Prot. 1 played a central role for the ECtHR's decision at hand. Article 1 ECHR-Prot. 1 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.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

In addition, the Court based its judgment on Article 6 ECHR which provides for the right to a fair trial. The ECT does not contain a provision similar to Article 6 ECHR. Nevertheless, the guarantee of due process and related guarantees are implied in general investment protection standards such as 'fair and equitable treatment' (Article 10(1)(2) ECT)[45]. However, for reasons of 'judicial economy' the PCA Tribunal refrained from deciding on whether Russia also violated Article 10(1) ECT[46].

IV. Procedural Issues

1. Issues specific to the ECtHR's jurisdiction

In cases of disputes before international courts or arbitral tribunals, it is common for respondents to challenge the court's or tribunal's jurisdiction. However, parties to the ECHR will rarely be able to evade the ECtHR's jurisdiction. According to Articles 32(1), 34 ECHR, individuals may bring claims against any party to the ECHR for alleged violations of Convention rights.

Nevertheless, in the *Yukos* case before the ECtHR, a peculiar jurisdictional problem arose whether the applicant, *i.e. Yukos*, was still existent as a 'person' claiming to be a 'victim' within the meaning of Article 34 ECHR. In fact, *Yukos* had filed its application in 2004. In the meantime, in November 2007, however, *Yukos* had been liquidated and removed from the register of companies[47]. Hence, *Yukos* had ceased to exist as a (legal) 'person' prompting Russia to contest the Court's continuous jurisdiction *ratione personae*[48]. Indeed, 'the primary purpose of the Convention system is to provide individual relief'[49]. This 'subjective function' of individual applications pursuant to Article 34 ECHR seems to imply that a pending case should be removed from the list if the applicant has 'passed away'. However, the ECtHR correctly held that '[s]triking the application out of the list under such circumstances would undermine the very essence of the right of individual applications by legal persons, as it would encourage governments to deprive such entities of the possibility to pursue an application lodged at a time when they enjoyed legal personality'[50]. The Court also referred to the 'objective function' of the application procedure under Articles 34 *et seq.* ECHR, *i.e.* to the Convention system's 'mission to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States'[51]. To put it more generally, the ECtHR continues to have jurisdiction in order to elucidate human rights issues which transcend the individual gravamen in the given case even if the applicant has ceased to exist.

2. Issues specific to the PCA Tribunal's jurisdiction

The liquidation of *Yukos* entailing its 'death' as a legal person did not become a jurisdictional problem before the PCA arbitral Tribunal because the claimants who had initiated the arbitration proceedings before the PCA Tribunal, *i.e. Hulley*, YUL and PVL, were controlling shareholders of *Yukos* and still 'alive'. Nevertheless, Russia as respondent state in the *Yukos* cases before the PCA Tribunal raised several objections to the Tribunal's jurisdiction.

Russia had never ratified but only signed the ECT.[52] Thus, it had to apply the ECT provisionally pursuant to Article 45(1) ECT[53]. Although Russia terminated the provisional application of the ECT in accordance with Article 45(3)(a) ECT[54] by notification of 20 August 2009[55] during the pendency of the arbitration proceedings, the ECT's investment protection and dispute settlement chapters were, and are, still applicable until 18 October 2029 inclusive (see Article 45(3) (a) and (b) ECT)[56].

Accordingly, Russia did not, and could not reasonably, deny that the ECT was applicable in principle and, accordingly, that the dispute settlement clause of Article 26 ECT might apply as a jurisdictional basis. However, Russia invoked the so-called 'Limitation Clause' of Article 45(1) ECT according to which[57] the ECT provisionally applied 'only to the extent that such provisional application is not inconsistent with [the Russian Federation's] constitution, laws or regulations'. Russia maintained that, according to Article 45(1) ECT and its Limitation Clause, a provision of the ECT was applicable on a provisional basis only if the respective provision was in conformity with Russian law[58]. According to Russia, the dispute settlement clause of Article 26 ECT was inapplicable, and Russia, therefore, not subject to the PCA Tribunal's jurisdiction, because '[t]he Russian Federation's Civil Procedure Code, Arbitrazh Procedure Code and Tax Code confirm the exclusive jurisdiction of Russian courts over these issues, and prohibit their arbitration'[59]. In short, Russia argued that Russian (procedural)

law trumped Article 26 ECT making Article 26 ECT inapplicable. However, the Tribunal held that 'Article 45(1) requires an analysis and determination of whether the principle of provisional application *per se* is inconsistent with the Constitution, laws or regulations of the Russian Federation'[60] and, finally, concluded 'that the principle of provisional application [*per se*] is perfectly consistent with the Constitution, laws and regulations of the Russian Federation'[61]. Thus, the ECT was provisionally applicable. Accordingly, the PCA Tribunal had jurisdiction to decide the *Yukos* cases on the basis of Article 26 ECT.

Typical jurisdictional issues of investment arbitrations are whether the claimants are 'investors' and whether the disputes arise from an 'investment'. In fact, Article 26(1), (3)(a) ECT lays down that only '[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter' may be submitted to international arbitration. Thus, the PCA Tribunal had jurisdiction pursuant to Article 26 ECT only if the claimants, i.e. *Hulley*, YUL and PVL, were 'investors' within the meaning of Article 26(1) in conjunction with Article 1(7) ECT, and if the dispute related to an 'investment' within the meaning of Article 26(1) in connection with Article 1(6) ECT. In line with well-established investment arbitration case law, the PCA Tribunal relied on a formal textual approach to answer these questions.

Russia questioned whether the claimants were 'investors' within the meaning of said provisions because the three companies, albeit established in another contracting state, were still controlled by Russian nationals[62]. However, the PCA Tribunal correctly pointed to the wording of Article 1(7)(a)(ii) ECT according to which the sole decisive criterion was that the claimants were companies 'organized in accordance with the law applicable in [a] Contracting Party' other than Russia[63]. Article 1(7)(a)(ii) ECT is based on the so-called 'incorporation theory' and the PCA Tribunal rightly stated 'that the reference to the State of incorporation is the most common method of defining the nationality of a company'[64]. Accordingly, the PCA Tribunal rejected to apply the 'control theory'[65] and rightfully referred to investment arbitration precedents[66]. Its reasoning is, moreover, also in line with the ICJ's jurisprudence on nationality of corporations[67] although it did not mention the leading *Barcelona Traction* case.

The PCA Tribunal also sided with the claimants as regards the question whether the dispute arose out of an 'investment' within the meaning of Article 26(1) in connection with Article 1(6) ECT. The claimants, *i.e.* the three companies *Hulley*, YUL and PVL, simply owned shares of *Yukos*[68]. According to Article 1(6)(c) ECT, 'every kind of asset', especially 'shares' constitute an 'investment' within the meaning of Article 1(6) ECT. Again, the PCA Tribunal rightly referred to the wording which 'does not include any additional requirement with regard to the origin of capital or the necessity of an injection of foreign capital'[69]. So, contrary to the argument proposed by Russia, the PCA Tribunal considered the fact that the 'ultimate source' of the shares was Russian capital to be irrelevant[70].

The PCA Tribunal also rejected Russia's argument that the (alleged) illegality of the claimants' investment deprived the Tribunal of jurisdiction[71]. It accepted, however, that '[a]n investor who has obtained [*sic*!] an investment in the host State only by acting in bad faith or in violation of the laws of the host state … should not be allowed to benefit from the [ECT]'[72]. Illegality not 'in the *making* of the investment but … in its *performance*', *i.e.* illegality only 'in the course of [the] investment', does not bar the investor form invoking the ECT, though[73]. In the Tribunal's opinion, Russia was simply not able

to demonstrate that the making of the claimants' investment, *i.e.* the purchase of *Yukos* shares, was unlawful[74].

3. Related issues of jurisdiction or admissibility respectively

a) Local remedies

According to Article 35(1) ECHR, the exhaustion of local remedies is a criterion for the admissibility of applications under Article 34 ECHR. The ECtHR reiterated that 'there is no obligation to have recourse to remedies which are inadequate or ineffective'[75]. Obviously, with regard to certain enforcement measures, the applicant, *i.e. Yukos*, had not exhausted all domestic remedies available under Russian law[76]. However, the ECtHR held that remedies lodged by the applicant would not have had 'any [additional] prospects of success'[77].

The PCA Tribunal also referred to the so-called 'local remedies rule' albeit in another and somewhat complicated context. A complex jurisdictional issue in the *Yukos* cases before the PCA Tribunal was that, pursuant to Article 26(1) ECT, disputes must 'concern an alleged breach of an obligation … under Part III' of the ECT. In fact, the claimants contended that Russia had breached Article 13 ECT. Russia, however, asserted that claimants challenged taxation measures which were not covered by the ECT pursuant to the 'carve-out' provision of Article 21(1) ECT. 'Carve-outs' are generally defined as '[a]n explicit exception to a broad rule'.[78] According to Article 21(1) ECT, 'nothing in [the ECT] shall create rights or impose obligations with respect to Taxation Measures'. Nevertheless, the PCA Tribunal held that it had jurisdiction over claims under Article 13 ECT. From the Tribunal's point of view, Article 21(1) ECT was inapplicable in the present case because it 'appl[ied] only to *bona fide* taxation actions'[79]. However, according to the PCA Tribunal, '[t]he tax assessments levied against Yukos by the Russian Federation … were essentially aimed at paralyzing Yukos rather than collecting taxes'[80]. In the alternative, assuming that Article 21(1) ECT was applicable, the PCA Tribunal referred to the 'claw-back' clause of Article 21(5) ECT. The legal effect of a 'claw-back' clause within a 'carve-out' clause is to exclude certain aspects from the scope of application of the 'carve-out'. According to Article 21(5)(a) ECT, 'Article 13 shall apply to taxes'[81].

In addition, the PCA Tribunal also opined that the claimants were not obliged to follow Article 21(5)(b) ECT, *i.e.* to refer the issue of whether the taxation measures constituted an expropriation to the competent Russian tax authorities. Since any such referral 'would clearly have been futile'[82]. This finding is closely related to considerations which may be made in the context of the 'local remedies rule'[83]. In fact, in its reasoning concerning Article 21(5)(b) ECT, the PCA Tribunal explicitly referred 'to the exhaustion of local remedies requirement' and explained that '[i]t has long been recognized … that following a prescribed procedure may be dispensed with under circumstances where doing so clearly would not produce the result that the procedure seeks to achieve'[84].

b) Parallel submissions

Another criterion concerning the admissibility of applications submitted under Article 34 ECHR is that, pursuant to Article 35(2)(b) ECHR, any such application must not be 'substantially the same as a matter that … has already been submitted to another procedure of international … settlement'[85]. The purpose of this provision is 'to avoid the situation where several international bodies would be simultaneously dealing with applications which are substantially [*sic*!] the same'[86]. Applying its well-established 'similarity' test[87], the Court had no difficulties with concluding 'that the cases are not "substantially

the same"'[88]. Since the claimants before the PCA Tribunal and the applicant before the ECtHR were separate and, thus, different legal entities[89].

The problem of parallel submissions of claims also arose before the PCA Tribunal under the so-called 'fork-in-the-road' clause of Article 26(3)(b)(i) ECT. On the basis of the 'triple identity' test the PCA Tribunal concluded that Article 26(3)(b)(i) ECT was not triggered by proceedings initiated by *Yukos* before the ECtHR[90].

4. Evidence

A marked difference between the PCA Tribunal's awards and the ECtHR's decisions concerns the gathering and analysis of evidence. The ECtHR operates rather like a constitutional court[91]. In general, proceedings are in writing only[92]. Just occasionally, the Court holds public hearings pursuant to Article 40(1) ECHR[93]. In the *Yukos* case, a public hearing on the merits took place in accordance with Rule 59(3) of the Rules of Court[94]. In addition, also in the merits phase, the Court invited the parties to submit additional written observations according to Rule 59(1) of the Rules of Court[95]. However, the Court apparently did neither ask the parties to file further 'evidence' in accordance with Rule 59(1) of the Rules of Court nor entered into an investigation within the meaning of Article 38 ECHR in conjunction with Rules A1 *et seq.* of the Rules of Court.

In contrast, on the basis of the UNCITRAL Arbitration Rules, the PCA Tribunal in the *Yukos* cases acted more like a civil court of first instance. Pursuant to Article 27(1) UNCITRAL Arbitration Rules, parties to the dispute have to prove the facts relied upon to support their claims or defence. Consequently, in accordance with Article 27(2)(1) UNCITRAL Arbitration Rules, parties may present witnesses. According to Article 27(4) UNCITRAL Arbitration Rules, it will be the arbitrators' task to 'determine the admissibility, relevance, materiality and weight of the evidence offered'. As set out in Article 28(1), (2) UNCITRAL Arbitration Rules, the witnesses may be heard in an oral hearing.

Hence, the PCA Tribunal reports elaborately on witness testimony[96]. It stresses explicitly that its award on the merits is based on a 'vast evidentiary foundation'[97] and carefully notes that it had to study 'over 1,400 pages of written testimony' and to inspect 'thousands of exhibits'[98].

In the merits phase, both claimants and Russia submitted statements from a total of 22 witnesses[99]. Among these witnesses were fact witnesses and experts[100]. Most of the witnesses also appeared before the Tribunal for cross-examination[101]. The majority of claimants' witnesses were former senior or high level employees of *Yukos*.[102] Claimants' list of witnesses also included a former chief economic advisor to the Russian president[103], a damages expert[104], an international tax law expert[105], the defence lawyer of Mr. Khodorkovsky, the former CEO of *Yukos*,[106] and a human rights activist and former State Duma Deputy[107]. Russia's witnesses were international experts only, some of them working at leading foreign research institutions of worldwide reputation. They provided expertise in the field of valuation of companies[108], tax law[109], corporate law[110], accounting[111], audit[112], Cypriote law[113] and Dutch law[114].

The witnesses' testimonies focused on *Yukos'* compliance with, or abuse of, Russian law, in particular with regard to the 'tax optimization' scheme, the question of whether the tax reassessments and the related enforcement measures were politically motivated with the intention to destruct *Yukos*, the valuation of the damage and the reasons for PricewaterhouseCoopers' withdrawal of its audits.

The PCA Tribunal uses 300 pages[115], *i.e.* half of the arbitral award on the merits, for analysing

the evidentiary record and determining the facts of the case many of which were highly contested between the parties[116]. It arrived at the following determination of facts:

- 'in using the available tax benefit legislation in the Russian Federation, the Yukos group principally availed itself of facilities under the [Russian] laws'[117],
- 'the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets'[118],
- 'intimidation and harassment not only disrupted the operations of Yukos but also contributed to its demise and thereby damaged Claimants' investment'[119],
- 'Sibneft wanted out of the merger after the arrest of Mr. Khodorkovsky'; '[t]he Tribunal does not see the fingerprints of [Russia] in Sibneft's decision … or in Sibneft's subsequent announcement that it would not proceed with the merger'[120], though,
- '[Russia's] total failure to engage with any of Yukos' settlement proposals raises significant doubts in the Tribunal's mind as to whether [Russia's] true and sole concern in its dealings with Yukos after the tax assessments were issued was the collection of taxes'[121],
- 'the auction of YNG was not driven by motives of tax collection but by the desire of the State to acquire Yukos' most valuable asset and bankrupt Yukos. In short, it was in effect a devious and calculated expropriation by [Russia] of YNG'[122],
- '[i]t was "rather obvious" to the ECtHR that the choice of YNG as the first Yukos asset to be auctioned to satisfy Yukos' tax debts was "capable of dealing a fatal blow to its ability to survive the tax claims and to continue its existence."'[123],
- 'initiating bankruptcy was not a goal of the Western Banks, but rather the objective of Rosneft, in the interests of its owner, the Russian Federation. The Tribunal concludes that in the end the bankruptcy was initiated by the Russian Federation'[124],
- 'the totality of the bankruptcy proceedings … were not part of a process for the collection of taxes but rather, as submitted by Claimants, indeed the "final act of the destruction of the Company by the Russian Federation and the expropriation of its assets for the sole benefit of the Russian State and State-owned companies Rosneft and Gazprom."'[125],
- 'PwC was clearly pressed by the Russian authorities to find grounds for withdrawing its audits of Yukos'[126]
- 'Yukos was the object of a series of politically-motivated attacks by the Russian authorities that eventually led to its destruction'[127].

It is practically impossible from the outside to establish whether the Tribunal ascertained the factual events correctly. In any case, the Tribunal tried to substantiate why it found witnesses and other evidence to be credible and submissions by the parties convincing. Interestingly enough, the PCA Tribunal also referred to, and agreed to, findings by the ECtHR as well as by other investment arbitral tribunals[128]. Obviously, the Tribunal cited those authorities in order to augment the persuasiveness of its reasoning.

It should be noted, however, that the ECtHR drew a completely divergent conclusion with regard to *Yukos*' allegation that the taxation measures and enforcement proceedings were conducted abusively and with the malicious intention to destroy *Yukos* for political reasons.

The Court was well aware that 'the case attracted massive public attention and that comments of different sorts were made by various bodies and individuals in this connection'[129]. However, in the end, it emphasized that 'those statements were made within their respective context and that as such they are of little evidentiary value [*sic*!] for the purposes of Article 18 of the Convention'[130]. That provision restrains parties to the ECHR from applying 'restrictions permitted under this Convention to the said rights and freedoms … for any purpose other than those for which they have been prescribed'.

The marked difference between the ECtHR's factual findings on the one side and the PCA Tribunal's factual findings on the other side (especially with regard to the question whether Russia intended to exterminate *Yukos* for political reasons) seem to be attributable to the differing procedures followed by the two judicial bodies. The extensive testimony of fact witnesses called by the claimants certainly had a decisive influence on the arbitrators' one-sided view of the facts. The Tribunal noted not just once 'that the Russian Federation called no fact witnesses of their own to contradict or weaken the testimony of Claimants' fact witnesses'[131].

The aforementioned findings by the PCA Tribunal were highly unfavourable to Russia. Summarily, as a rule, the PCA Tribunal inclined to side with claimants' view of the facts, especially with regard to the allegation that Russia's sole intention was the politically motivated extermination of *Yukos*.

V. Substantive issues

The core substantive issue in the *Yukos* cases was whether the measures taken by Russian authorities, *i.e.* the tax reassessments and the subsequent enforcement measures, amounted individually or in combination to an expropriation. In line with general public international law[132], neither the ECHR (including ECHR-Prot. 1) nor the ECT prohibit expropriations. However, under both the ECHR and the ECT, expropriations must meet certain requirements. In particular, any expropriation, be it a *de iure* (or: direct) expropriation, be it a *de facto* (or: indirect) expropriation[133], requires the payment of due compensation.

1. Property

a) The PCA Tribunal's holding: unlawful de facto expropriation

The PCA Tribunal held that Russia had breached Article 13 ECT[134]. In a nutshell, the PCA Tribunal's 'theory' is that Russia intended to destroy *Yukos* for political reasons through a series of unlawful mistreatment at the end of which *Yukos* was declared bankrupt and, finally, was liquidated. Accordingly, from the Tribunal's point of view, depriving the company of all its assets gradually was an essential means to extinguish *Yukos*. This article will not engage in an assessment whether this 'theory' is correct. Rather, we would like to review the PCA Tribunal's reasoning which, occasionally, from a doctrinal perspective seems to be somewhat weak.

aa) Problems surrounding the finding of a de facto expropriation

Firstly, the PCA Arbitral Tribunal conceded that Russia 'has not explicitly expropriated Yukos or the holdings of its shareholders'[135]. Obviously, the PCA Tribunal was not aware of any *de iure* expropriation. However, in the Tribunal's view, the measures taken by Russian authorities in respect of Yukos 'had an effect "equivalent to nationalization or expropriation"'[136]. Thus, *Yukos* had incurred a *de facto* expropriation. However, at this point of the award, the PCA Tribunal does not provide any reasons supporting its conclusion. Rather, the Tribunal simply refers

to 'the measures that Respondent has taken in respect of *Yukos*, set forth in detail in Part VIII'"[137]. Apparently, the Tribunal followed the claimants' argument that the measures tantamount to an expropriation consisted of 'a series of "coordinated and mutually reinforcing actions"'[138]. These actions included, according to the PCA Tribunal's findings, in particular the seizure of claimants' shares, the harassment of *Yukos*' employees (which contributed to *Yukos*' inability to pay its tax debts), the sale by auction of YNG, the bankruptcy proceedings resulting in the acquisition of *Yukos'* remaining assets by *Rosneft* and *Gazprom* and the liquidation of *Yukos*.[139].

Secondly, the PCA Tribunal is very short on whether the *de facto* expropriation was for a purpose in the public interest as required by Article 13(1)(1)(a) ECT. It held that the 'destruction' of *Yukos* 'was in the interest of the largest State-owned oil company, Rosneft, which took over the principal assets of Yukos …, but that is not the same as saying that it was in the public interest … of the Russian Federation'[140]. On the other hand, transferring ownership to a private entity, even more to a state-owned enterprise, does not rule out *per se* that the expropriation may well be for some legitimate public policy objective[141].

Thirdly, the Tribunal does not set out the legal standards for an 'expropriation' within the meaning of Article 13 ECT. Obviously, the parties agreed that the investor's 'legitimate expectations' is a decisive criterion to establish expropriation[142]. Accordingly, the PCA Tribunal applied the 'legitimate expectations' test. However, it did not explicate the elements of that test in abstract terms. Rather, the Tribunal explained what the expectations of the claimants may, and should, have been and that the measures taken by the Russian authorities went far beyond those expectations: 'the expectations of Claimants may have been, and certainly should have been, that Yukos' tax avoidance operations risked adverse reaction from Russian authorities. … They could not have been expected to anticipate that they risked the evisceration of their investments and the destruction of Yukos', though[143].

This application of the 'legitimate expectations'-test is somewhat peculiar. With regard to the concept of *de facto* expropriations, the 'legitimate expectations'-test concerns the frustration of the investor's expectation that the legal framework relating to its investment will not be changed to the investor's detriment, making its investment become an empty shell devoid of any meaningful attributes of property[144]. According to the PCA Tribunal, the claimants could expect that the Russian authorities would not overreact in the face of *Yukos*' tax evasion scheme. From the Tribunal's point of view, by driving Yukos into bankruptcy and liquidation, the Russian authorities did not meet that expectation. The Tribunal, however, did not ask the question whether expectations were 'legitimate' at all. Are an investor's expectations 'legitimate' if the investor makes use of tax relief rules in such a dubious way that the investor, purposely or negligently, takes the risk of being brought to justice or even criminally prosecuted? In fact, the PCA Tribunal itself noted that there were 'indications in the record that Yukos itself had doubts, or at least apprehensions, about the legality of aspects of its *modus operandi*'[145] and that 'the absence of a prior legal opinion supporting the propriety of Yukos' arrangements in the low-tax jurisdictions is striking and may be suggestive'[146]. The PCA Tribunal did also not ask the question whether there was conduct by Russia which 'create[d] reasonable and justifiable expectations on the part of [*Yukos*] to act in reliance on said conduct, such that a failure by [Russia] to honour those expectations could cause [*Yukos*] to suffer damages'[147].

Of course, any lawbreaker, even the most evil criminal, may (also in the absence of explicit representations made by the state) legitimately expect to get a fair trial and to enjoy the due process of law. Nevertheless, the fact that, in the view of the Tribunal, the bankruptcy and liquidation of *Yukos* was, after all, brought about by a 'train of mistreatment'[148] indicates that the core problem might have been rather a lack of due process than an expropriation.

bb) Problems concerning the finding of attribution

The PCA Tribunal had to ascertain that all those actions, which added up to a *de facto* expropriation, were attributable to Russia. In this regard, the Tribunal's analysis seems not to be beyond any doubt. In particular, according to the PCA Tribunal, *Rosneft's* purchase of YNG was attributable to Russia because 'the Russian Federation, speaking through its President, accepted responsibility for *Rosneft's* acquisition of YNG and for the auction that underlay it'[149]. In fact, the Tribunal inferred solely from a press statement made by the Russian President that 'the State, then 100 percent shareholder of Rosneft, the most senior officers of which were members of President Putin's entourage, directed that purchase in the interest of the State'[150]. The PCA Tribunal did not disclose the provision of the ILC Articles on State Responsibility[151] (hereinafter: ILC Articles) on which it based this conclusion.

Perhaps, the Tribunal applied Article 8 ILC Articles. In this case, the PCA Tribunal should have employed the 'effective control' test as developed by the ICJ[152], which the Tribunal did not mention at all, though. Establishing 'effective control' of Russian public officials over operations by *Rosneft* would have required evidence that 'the State was using its ownership interest in or control of [*Rosneft*] specifically in order to achieve a particular result'[153]. The Tribunal was well aware that the Russian Federation's ownership of *Rosneft* in combination with the close relationship of some of *Rosneft*'s senior officials to the Russian President 'does not suffice to attribute to the Russian State the actions' of *Rosneft*[154]. It was only the 'remarkable fortuity'[155] of the said press statement made by the Russian President prompting the Tribunal to conclude that *Rosneft's* conduct (*i.e.* the acquisition of YNG) was attributable to the Russian Federation. Indeed, with regard to the fact that 'Rosneft, a 100% state owned company, has bought the well-known asset of [YNG]', the Russian President stated that 'the state … is looking after its own interests'[156]. But this is simply an *indication* that Russia used its control of *Rosneft* specifically in order to acquire YNG (and, by doing so, to reverse the results of the privatization era at least in part[157]). In light of the ICJ's jurisprudence[158], the 'effective control' test would have required to show that Russian officials gave concrete instructions in respect of the acquisition of YNG.

Perhaps, the Tribunal's intention was to avail itself of Article 11 ILC Articles according to which conduct is attributable to a state if that state 'acknowledges and adopts the conduct in question as its own'. In fact, 'where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State'[159]. Indeed, the PCA Tribunal stated that Russia had 'accepted responsibility' for *Rosneft's* conduct[160]. However, the wording of 'article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own'[161]. The Russian President's press statement[162] does not seem to be as 'clear and unequivocal' as required under Article 11 of the ILC Articles[163]. Hence, acknowledgement and adoption of *Rosneft's* conduct by Russia within

the meaning of Article 11 of the ILC Articles is questionable.

Finally, the PCA Tribunal's award is almost mute on attribution problems with regard to the *Baikal Finance Group* which was the sole and winning bidder in the auction of *YNG* and which was taken over by *Rosneft* within only a few days after the auction. The *Baikal Finance Group*'s purchase of YNG was one important step in depriving *Yukos* of its core asset which might have secured *Yukos'* survival in view of the immense tax debts. Apparently, the Tribunal was merely able to voice the 'suspicion that Baikal was created by instruments of [Russia] in order to facilitate the acquisition of YNG by State-owned Rosneft'[164]. However, the PCA Tribunal seemed to have been incapable of concluding firmly that also the creation of, and conduct by, the *Baikal Finance Group* was undoubtedly attributable to Russia. The Tribunal was content with sweepingly stating that not only *Rosneft's* conduct, but also 'the auction of YNG shares that underlay it' was attributable to Russia[165]. The attribution of 'the auction of YNG shares' to Russia might imply that also the *Baikal Finance Group*'s conduct was attributable to Russia because part of the 'auction of YNG shares' was their acquisition by the *Baikal Finance Group.*

b) The ECtHR's holding: unlawful and disproportionate interference

In light of the right to property under Article 1 ECHR-Prot. 1, the ECtHR reviewed both the tax assessment proceedings and the enforcement measures taken to collect *Yukos'* debts arising out these proceedings. Whereas the ECtHR considered the imposition of penalties with regard to the tax assessments 2000-2001 an *unlawful* interference with the right to property, it denounced the enforcement measures to be a *disproportionate* interference with Article 1 ECHR-Prot. 1. Hence, although the ECtHR is well aware of the concept of *de facto* expropriations it refrained from classifying the taxation and enforcement measures as such[166].

aa) The tax assessments 2000-2003

Concerning the tax assessments 2000-2003, the Court emphasizes that 'it was not in dispute between the parties that [they] represented an interference with the applicant company's property rights'[167]. The ECtHR reiterates that, in accordance with Article (1)(1)(2) ECHR-Prot. 1, any such interference must be lawful, *i.e.* 'the interference should be in compliance with the domestic law and … the law itself be of sufficient quality to enable an applicant to foresee the consequence of his or her conduct'[168]. Concerning the law's quality, 'the applicable provisions of domestic law [must be] sufficiently accessible, precise and foreseeable'.

Regarding the tax assessment 2000, the only problem at hand was whether the imposition of penalties constituted an unlawful interference with *Yukos'* right to property[169]. Under Russian tax law, a taxpayer could be held liable only for a three year period starting at the end of the tax term[170]. In the present case, the Tax Ministry decided on 14 April 2004 that Yukos had an outstanding tax liability for the year 2000[171]. This decision 'was clearly outside the above-mentioned three year time-limit'[172], and, hence, *prima facie* unlawful.

However, the Russian Constitutional Court delivered a decision on 14 July 2005 which provided for an unwritten, by then unknown exception to the three year time-limit: 'where the taxpayer impedes tax supervision and the conduct of tax inspections, the court may excuse the tax authorities' failure to bring the proceedings in time'[173]. In such a case, the tax audit report revealing the tax offences would 'stop the clock', *i.e.* suspend the three year time-limit[174]. This 'change in the interpretation of the relevant rules on the statutory time-limits of the proceedings'

raised the question 'whether such a change was compatible with the requirement of lawfulness of Article 1 of Protocol No. 1'[175].

The ECtHR started its analysis by pointing out that 'the 2000 Tax Assessment proceedings were criminal in character'[176]. It admitted that the 'requirement of lawfulness' as laid down in Article 1(1)(2) ECHR-Prot. 1 'cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case'[177]. Concerning the Constitutional Court's decision of 14 July 2005, however, the ECtHR '[was] not persuaded that the change in question could have been reasonably foreseen'[178]. Since the Constitutional Court 'had changed the rules applicable at the relevant time by creating an exception from a rule which had had no previous exceptions'[179]. This violation of Article 1(1)(2) ECHR-Prot. 1 also infected the 2001 tax assessment proceedings because *Yukos'* 'conviction in the 2000 Tax Assessment proceedings laid the basis for finding [it] liable for a repeated offence … in the 2001 Tax Assessment proceedings'[180].

In contrast, concerning the tax reassessments for the years 2000-2003 as such, the ECtHR acknowledged 'that the findings of the [Russian] courts that [*Yukos*'] tax arrangements were unlawful at the time when [it] had used them, were neither arbitrary nor manifestly unreasonable'[181]. In particular, the Court accepted the Russian courts' findings that *Yukos*' 'tax optimization' scheme 'consisted of switching the tax burden from the applicant company and its production and service units to letter-box companies in domestic tax havens in Russia'[182]. Accordingly, in the opinion of the ECtHR, *Yukos* being 'a large business holding which at the relevant time could have been expected to have recourse to professional auditors and consultants'[183] was not taken by surprise when Russian tax authorities started to reassess *Yukos'* tax liabilities for the years 2000-2003[184]. Consequently, as regards the tax reassessments 2000-2003 as such, the Court held that the interpretation and application of the Russian tax law by Russian authorities was neither unreasonable nor unforeseeable and, thus, not in violation of Article 1 ECHR-Prot. 1[185].

The ECtHR also dismissed *Yukos'* claim to have been treated in a discriminatory way incompatible with Article 14 ECHR in conjunction with Article 1 ECHR-Prot. 1[186]. Since *Yukos* had 'failed to demonstrate that any other companies were in a relevantly similar position'[187]. In this regard, the Court pointed once more to the specificities and peculiarities of *Yukos'* tax evasion scheme as *Yukos* 'was found to have employed a tax arrangement of considerable complexity, involving, among other things, the fraudulent use of trading companies registered in domestic tax havens'[188].

bb) The enforcement measures

From the ECtHR's point of view, also the enforcement measures taken by the Russian authorities to recover *Yukos'* tax debts, 'such as the attachment and freezing orders, the seizure orders, the orders to pay enforcement fees and the compulsory auction procedure', interfered with *Yukos'* right to property as guaranteed under Article 1(1) ECHR-Prot. 1[189]. Quite similar to the PCA Tribunal's approach[190], the ECtHR did not review the several measures separately but rather chose 'to examine the enforcement proceedings in their entirety as one continuous event'[191].

But here is where analogies end. Contrary to the PCA Tribunal, the ECtHR did not develop the 'theory' that Russia intended to break up *Yukos* for political reasons by depriving it of its property and assets causing *Yukos*' being declared bankrupt and, finally, liquidated. Rather, the ECtHR explicitly held that there was no violation of the ECHR 'on account of the alleged disguised expropriation of the company's

property and the alleged intentional destruction of the company itself'[192]. Thus, the Court overcame the temptation to blame Russia for overly harsh conduct committed in bad faith.

The Court applied Article 1(1)(2) ECHR-Prot. 1 according to which '[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law'. In addition, the ECtHR referred to Article 1(2) ECHR-Prot. 1 which stipulates that the right to property 'shall not … in any way impair the right of a State to enforce such laws as it deems necessary … to secure the payment of taxes'. Consequently, the Court had to examine, first, 'whether the State authorities complied with the Convention requirement of lawfulness' and, second, 'if so, whether they struck a fair balance between the legitimate state interest in enforcing the tax debt in question and the protection of the applicant company's rights set forth in Article 1 of Protocol No. 1'[193].

Unlike the PCA Tribunal, the ECtHR did not question that the enforcement measures taken by the Russian authorities were, in principle, lawful. In particular, 'throughout the proceedings the actions of various authorities had a lawful basis and … the legal provisions in question were sufficiently precise and clear to meet the Convention standards concerning the quality of law'[194]. In addition, the Court did not cast the Russian courts' role into doubt which constantly upheld all these measures[195]. In contrast, the PCA Tribunal found strong indications 'that Russian courts bent to the will of Russian executive authorities to bankrupt Yukos [and] assign its assets to a State-controlled company'[196]. Thus, the PCA Tribunal accused the Russian courts of not having acted independently and impartially.

Furthermore, the ECtHR held that Russia did not violate Article 18 ECHR which prohibits the abuse of the power of Convention parties to restrict the Convention rights and freedoms[197]. In contrast, the PCA Tribunal apparently opined that the Russian authorities abused the Russian tax and enforcement rules by holding that 'the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets'[198].

As opposed to the PCA Tribunal, the ECtHR did not discuss whether the enforcement measures adopted by the Russian authorities amounted to a *de facto* expropriation. Rather, from the Court's perspective, the remaining and decisive question was 'whether the enforcement measures were proportionate to the legitimate aim pursued'[199]. The ECtHR acknowledges 'that in the tax sphere the Contracting States should enjoy a wide margin of appreciation in order to implement their policies'[200]. This does not imply, of course, that the Court should refrain from judicial review altogether. To the contrary, the Court has to determine 'whether the requisite [*sc.* fair] balance was maintained in a manner consonant with [*Yukos'*] right to "the peaceful enjoyment of [its] possessions", within the meaning of the first sentence of Article 1 of Protocol No. 1'[201].

In the end, the ECtHR made a persuasive case that the 'domestic authorities failed to strike a fair balance between the legitimate aims sought and the measures employed'[202]. The Court accepted without any qualification that the Russian authorities pursued a legitimate public policy objective namely the collection of taxes, in particular of tax debts[203]. However, the ECtHR was not satisfied with the measures employed for achieving that goal. In the opinion of the Court, both the tax authorities and the judicial organs overlooked certain material factors which should have been taken into due account in favour of *Yukos*. The Court identified especially three such factors. It criticized, first, that by auctioning YNG the Russian authorities chose the deadliest option instead of seriously considering whether other less fatal options were available[204]. Second,

the Court deemed the enforcement fee, a flat-rate fee of 7 % amounting to over 1.16 billion Euro, to be 'by its nature unrelated to the actual amount of the enforcement expenses' and to be 'completely out of proportion to the amount of the enforcement expenses … borne by the bailiffs'[205]. Third, the ECtHR was not convinced that the Russian authorities really had to act as inflexible, rigid and apace as they did during the enforcement proceedings without leaving *Yukos* the possibility to take a breather.[206] Thus, the enforcement measures as a whole exercised a suffocating impact on *Yukos*.

Consequently, the ECtHR found that Russia had violated the right to property under Article 1 ECHR-Prot. 1. Unlike the PCA Tribunal, the ECtHR did not hold that an unlawful *de facto* expropriation had occurred[207]. Rather, the Court only concluded that Russia had exercised its 'right … to enforce … laws as it deems necessary … to secure the payment of taxes' within the meaning of Article 1(2) ECHR-Prot. 1 in a disproportionate way. This finding, of course, has significant implications for the question of compensation. If there was no *de iure* or *de facto* expropriation, any damages to be paid to *Yukos* did not need to encompass the whole value of *Yukos'* complete assets and the value of *Yukos* as such, *i.e.* as an enterprise.

2. Fair trial

The PCA Tribunal did not decide on fair trial issues separately from property issues. According to the Tribunal's reasoning, Russia frustrated *Yukos'* legitimate expectations to be treated pursuant to accepted due process standards, especially without unwarranted arrests of senior employees and undue impediment of the work of *Yukos*' legal counsel[208]. This finding was decisive for the Tribunal's conclusion that *Yukos* was the victim of a *de facto* expropriation[209]. In addition, the PCA Tribunal held that the 'effective expropriation' of *Yukos* was not 'carried out under due process of law' within the meaning of Article 13(1)(1)(c) ECT[210]. In its reasoning, the Tribunal explained that, *e.g.*, the 'harsh treatment' accorded to *Yukos'* top managers, 'the mistreatment of counsel of Yukos' and 'the very pace of the legal proceedings' did 'not comport with the due process of law'[211].

Hence, based, at least in part, on the same set of events, the PCA Tribunal made use twice of the fact that violations of due process had occurred. From a doctrinal point of view, 'carrying out' an expropriation in violation of due process of law within the meaning of Article 13(1)(1)(c) ECT should be distinguished from the 'effecting' of a *de facto* expropriation through violations of due process of law. From the Tribunal's perspective, the *de facto* expropriation of *Yukos'* assets was the result of a series of infringements of due process principles, *i.e.* from the Tribunal's perspective, the expropriation would not have occurred but by the Russian authorities' disregard of due process. Accordingly, in light of the PCA Tribunal's reasoning, the violation of due process is a constitutive element of the *de facto* expropriation. In contrast, violations of due process within the meaning of Article 13(1)(1)(c) ECT form a constitutive element of the *lawfulness* of an expropriation. In short, the Tribunal relied on more or less the same violations of due process in order to establish, first, that a *de facto* expropriation had occurred and, second, that this expropriation was unlawful.

Taking into account the PCA Tribunal's own 'theory' of events as well as the Tribunal's reasoning underlying its finding of an unlawful *de facto* expropriation, the Tribunal should have preferred to apply the 'fair and equitable treatment' clause (hereinafter: FET clause) laid down in Article 10(1)(2) ECT. Since, from the Tribunal's point of view, the core legal issue apparently was that Russian tax authorities and courts

subjected *Yukos* to tax measures and enforcement proceedings which were not in conformity with due process principles and fair trial standards. The application of the FET clause would have been also in line with certain investment arbitration precedents construing the concept of *de facto* expropriation narrowly and shifting legal problems to the FET clause[212]. Actually, according to current case law, the concept of FET relates to, *e.g.*, 'legitimate expectations', 'due process' or 'freedom of coercion and harassment'[213]. Instead, the Tribunal preferred to engage in an expropriation analysis under Article 13 ECT and, for reasons of judicial economy, refrained from considering breaches of Article 10(1) ECT[214].

In contrast to the PCA tribunal, the ECtHR examined whether the Russian courts adhered to the right to a fair trial under Article 6 ECHR and, in the end, found Russia in violation of Article 6(1) and (3)(b) ECHR[215]. The ECtHR reiterated that 'the principle of equality of arms is one feature of the wider concept of a fair trial'. Article 6(3)(b) ECHR is a specification of this principle. It provides that parties to a dispute must 'have adequate time and facilities for the preparation of [their] defence'. The Court admitted that 'it is no doubt important to conduct proceedings at good speed'[216]. However, 'this should not be done at the expense of the procedural rights of one of the parties'[217]. In light of the specific circumstances of the case, especially with regard to its 'magnitude and complexity'[218], the Russian trial court failed 'to ensure that [*Yukos*] had a sufficiently long period of time during which it could study [the] voluminous case file and prepare for the trial hearings'[219]. This deficiency was neither acknowledged nor remedied by the appeal court which, for its part, did not comply with Article 6(3)(b) ECHR 'on account of the restricted time for preparation of the appeal hearing'[220]. The Court stated that 'the early beginning of the appeal hearing impeded [*Yukos'*] ability to prepare and present properly its case on appeal'[221]. Likewise, the cassation court did not take any corrective action[222]. It seems noteworthy that the Court, however, also rejected some of *Yukos'* complaints because of their being 'vague and unspecific' or 'unsubstantiated'[223].

VI. Damages

It has already been pointed out at the very beginning of this article that the most striking difference between the PCA Tribunal's awards and the ECtHR's judgments concerns the damages adjudged to the claimants or the applicant respectively.

1. The PCA Tribunal's approach

First of all, the PCA Tribunal outlined the normative bases for the claimants' entitlement to damages. Having found Russia in breach of Article 13(1)(1) ECT and, thus, liable for an internationally wrongful act, the Tribunal correctly referred to the ILC Articles to decide on the legal consequences arising out of Russia's international responsibility[224]. Pursuant to Article 31(1) of the ILC Articles, Russia was 'under an obligation to make full reparation for the injury caused by the internationally wrongful act'. However, according to Article 39 of the ILC Articles, '[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of … any person or entity in relation to whom reparation is sought'.

Accordingly, the Tribunal entered into the analysis whether there was any 'contributory fault' on the side of claimants, *i.e.* fault that contributed materially to *Yukos*' destruction[225]. From the Tribunal's perspective, there was at least a 'sufficient causal link' between *Yukos'* 'tax optimization' scheme abusing the 'low-tax region programme' (the abuse being enlarged by Yukos' 'questionable use of the Cyprus-

Russia DTA'[226]), and *Yukos'* demise[227]. Hence, the Tribunal took the view that claimants 'should pay a price for Yukos' abuse'[228]. Stressing 'its wide discretion', balancing Russia's and the claimants' responsibilities for *Yukos'* destruction, the PCA Tribunal assessed the claimants' contributory fault to amount to '25 percent'[229]. This estimate of contributory fault on the part of the claimants seems to be somewhat arbitrary. Since the reasoning does not offer a comprehensible rationale except for a very vague reference to 'all the evidence'[230] and 'all the arguments the Parties have presented … in respect of this issue'[231]. Of course, admittedly, contributory fault is 'only with difficulty commensurable'[232].

On the basis of this finding, 'full reparation' within the meaning of Article 31(1) of the ILC Articles had to be reduced by 25 percent. Pursuant to Article 34 of the ILC Articles, 'reparation' may take three different forms: restitution, compensation and satisfaction. According to Article 13(1)(2) ECT, 'compensation shall amount to the … value of the [i]nvestment … at the … "[v]aluation [d]ate"'. Article 13(1)(2) ECT defines the term 'valuation date' as meaning the 'time immediately before the [e]xpropriation or impending [e]xpropriation became known in such a way as to affect the value of the [i]nvestment'. In the present case of a 'creeping expropriation'[233], the date of expropriation is typically difficult to establish. With regard to a 'creeping expropriation', *i.e.* a *de facto* expropriation 'through a series of actions'[234], the expropriation date is to be determined by the date on which the series of incriminating acts crosses the threshold beyond which the acts get tantamount to an expropriation[235]. From the Tribunal's point of view, this threshold was the auction of YNG on 19 December 2004. Since 'YNG was Yukos' main production asset and its loss … marked a substantial and irreversible diminution of Claimants' investment'[236], *i.e.* of claimant's shares in *Yukos*.

The PCA Tribunal, however, also held that the date of expropriation was not the only possible valuation date[237]. It derived from the wording of Article 13(1)(2) ECT ('*such* compensation'[238]) that the valuation date as legally defined in Article 13(1)(2) ECT applied only to lawful expropriations (*i.e.* such expropriations which conform to the legality requirements of Article 13(1)(1) ECT one of them being 'prompt, adequate and effective compensation'[239], *i.e.* the so-called '*Hull* formula'[240]). In the present case of an unlawful *de facto* expropriation committed in breach of the ECT, *i.e.* of a treaty of public international law, the law on state responsibility as reflected in the ILC Articles had to be applied[241]. According to the law on state responsibility, from the Tribunal's point of view, the claimants were entitled 'to choose between a valuation as of the expropriation date and as of the date of the award'[242].

However, the Tribunal's application of the law on state responsibility, namely of Article 35 of the ILC Articles, was questionable. The Tribunal opined that 'restitution' within the meaning of Article 35 of the ILC Articles means 'putting the injured party into the position that it *would be in* if the wrongful act had not taken place'[243]. This is neither in compliance with the wording of Article 35 of the ILC Articles ('re-establish the situation which existed before [*sic*!] the wrongful act was committed') nor with the ILC's own interpretation of this clause. According to the ILC's commentary, 'restitution consists in re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act' but not in the 'reestablishment of the situation that would have existed if the wrongful act had not been committed'[244]. Thus, contrary to the PCA Tribunal's view, Article 35 of the ILC Articles does not require 'a hypothetical

inquiry into what the situation would have been if the wrongful act had not been committed'[245].

However, 'restitution' within the meaning of Article 35 of the ILC Articles 'may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear'[246]. According to Article 36(1) of the ILC Articles, Russia had to compensate for all damages caused by the wrongful *de facto* expropriation 'insofar as such damage [was] not made good by restitution'. Obviously, re-establishing *Yukos* as a stock company as it had existed before the auction of YNG on 19 December 2004 had become materially impossible[247] at the point of time when the Tribunal delivered its award. For valuation purposes only, the Tribunal referred to 30 June 2014 as the date of the award[248]. Even if such reestablishment of *Yukos* had been possible, the value of the claimants' investment, *i.e.* their shares in *Yukos*, might have been worth less on the date of the award (30 June 2014) compared to the date of expropriation (19 December 2004). Any such loss in value would have had to be considered financially assessable material damage within the meaning of Articles 31(2), 36(2) of the ILC Articles and, therefore, would have had to be compensated for under Article 36(1) of the ILC Articles. The reason is not 'that in the absence of the expropriation the [claimants] could have sold [their shares] at an earlier date at its previous higher value'[249], but simply that Russia had to restore the *status quo ante* which included the value of the shares in *Yukos* as of the earlier date of expropriation. However, in case the reestablishment of *Yukos* had been possible, the value of the claimants' shares in *Yukos* also might have been higher as of the date of the award (30 June 2014) compared to the date of expropriation (19 December 2004). Thus, restoring the *status quo ante*, *i.e.* re-establishing *Yukos* as a stock company as it had existed just before the auction of YNG on 19 December 2004, might have implied an accidental enrichment of the claimants as of the date of the award. This justified, from the Tribunal's point of view, also 'compensation in the amount of the asset's higher value' 'where the asset cannot be returned'[250] like in the present case. Hence, the Tribunal concluded that the claimants had the right 'to choose between a valuation [of their shares in *Yukos*] as of the expropriation date and as of the date of the award'[251].

Among the several valuation methods proposed by the claimants[252], the PCA Tribunal chose to apply the 'comparable companies method'[253]. On the basis of this method, the Tribunal estimated that the equity value of *Yukos* amounted to approximately 61.076 billion USD as of 27 November 2007[254], *i.e.* the day on which *Yukos* was struck off the Russian companies' register[255]. *Yukos*' value on the valuation dates (*i.e.* on 19 December 2004 and on 30 June 2014 respectively) was calculated by the use of a multiplier reflecting the development of the RTS Oil & Gas index[256].

Besides the value of the claimants' shares in *Yukos* (on the date, both, of the expropriation and of the award), the PCA Tribunal also took into account the value of the 'lost' dividends which would have been paid to the claimants by *Yukos* in the absence of the *de facto* expropriation[257]. Based on the valuation expertise provided by two experts designated by the parties to the dispute, the PCA Tribunal, stressing once more its 'discretion', fixed the dividend payments which *Yukos* would have presumably paid to its shareholders for each year from 2004 to the first half of 2014[258]. According to the Tribunal's determination, the dividends would have amounted to 2.5 billion in 2004 and would have added up to 45 billion USD for the whole period between 2004 and 2014 (first half)[259]. This sum was even less than the amount calculated by Russia's valuation expert (not to

mention the amount figured up by the claimants' valuation expert)[260].

In addition, and in line with Article 38 of the ILC Articles, the damages awarded by the Tribunal had to include (pre-award) interest as well[261]. Based on the 'average yield of ten-year U.S. Treasury bonds over the period from 1 January 2005 to 30 May 2014', the PCA Tribunal determined that the applicable rate of interest was 3.389 percent[262].

All in all, the results of the PCA Tribunal's calculation were that '[t]he total amount of Claimants' damages based on a valuation date of 19 December 2004 is USD 21.988 billion, whereas the total amount of their damages based on a valuation date of 30 June 2014 is USD 66.694 billion'[263]. As the claimants were entitled to choose the valuation date and, thus, the higher amount of damages, the higher sum of 66.694 billion USD had to be reduced by 25 percent in accordance with claimants' contributory fault[264]. As a result, the Tribunal awarded claimants the tremendous amount of 50.021 billion USD[265].

2. The ECtHR's approach

The legal basis for ordering the respondent state to pay compensation to the applicant is Article 41 ECHR pursuant to which the Court has the power 'to afford just satisfaction to the injured party'. However, according to the ECtHR, for lack of a 'causal link between the violation found and the pecuniary damage allegedly sustained by [*Yukos*]', the violation of Article 6(1), (3)(b) ECHR did not entail an obligation of Russia to pay damages to *Yukos*[266].

In contrast, the penalties imposed on *Yukos* with regard to the 2000-2001 tax assessments in violation of Article 1(1)(2) ECHR-Prot.1 resulted in effective payments by *Yukos*[267]. Accordingly, the Court ordered Russia to reimburse *Yukos* for these sums under Article 41 ECHR[268]. The same had to apply to the 7 % enforcement fee which Yukos was ordered to pay, and effectively paid[269], on top of those penalties. Since the unlawfulness of the penalties under Article 1(1)(2) ECHR-Prot. 1 extended to the 7 % enforcement fee imposed with respect to the aforementioned penalties for the years 2000-2001[270]. The retroactively imposed penalties amounted to approximately 1.078 billion EUR[271] and the 7 % enforcement fees to about 75.477 million EUR[272]. For the purpose of calculating the compensation due, the Court also took into account the inflation rate of 12.62 % for the euro. Thus, all in all, the damage sustained by *Yukos* amounted to about 1.277 billion EUR[273].

The decisive question, however, was how the ECtHR would deal with damages caused by the enforcement proceedings at the very end of which *Yukos* was liquidated and which the Court had held to have been exercised in violation of Article 1(2) ECHR-Prot. 1. In fact, the ECtHR recognized that the defects of the enforcement measures 'very seriously contributed to [*Yukos'*] demise'[274]. In its own judgment, the choice of YNG 'as the first item to be auctioned in satisfaction of [*Yukos*'] liability'[275] decisively accounted for the disproportionality and, thus, for the wrongfulness of the enforcement proceedings[276]. Accordingly, the Court could have held that the damage resulting from the wrongfulness of the enforcement proceedings comprised any damage *Yukos* suffered from the deprivation of YNG. Nevertheless, the Court refrained from taking into account whether and to what extent the auctioning of YNG caused pecuniary damage to *Yukos*.

The Court only considered the disproportionate 7 % enforcement fee for the years 2000-2003 which totalled about 1.253 billion EUR[277]. By deducting the 7 % enforcement fees for the years 2000-2001 of about 75.477 million EUR mentioned above[278] the Court arrived at the figure of approximately 1.177 billion EUR[279].

In line with Russia's submissions, the Court considered an enforcement fee of 4 % to be proportionate[280]. Accordingly, the pecuniary loss of *Yukos* amounted to the difference between the 4 % enforcement fee and the amount of 1.177 billion EUR, *i.e.* to about 503.268 million EUR[281]. Taking into account the said inflation rate of 12.62 %, Yukos' damage added up to approximately 566.780 million EUR[282].

Contrary to the PCA Tribunal, the Court rejected to enter into any further speculations about *Yukos'* prospects to survive the enforcement proceedings and its value after all those events.[283] Therefore, the ECtHR held that the pecuniary damage suffered by *Yukos* was limited to about 1.866 billion EUR[284] and 'rejected the remainder of [*Yukos*'] claim … as unsubstantiated'[285]. Since *Yukos* had ceased to exist, the ECtHR decided that the beneficiaries of Russia's liability ought to be *Yukos*' former shareholders or their legal successors respectively.[286]

Interestingly, unlike the PCA Tribunal, the ECtHR did not take into account contributory fault on the part of *Yukos* because it 'ha[d] already been held liable … in the various tax and enforcement proceedings'[287]. The Court also declined to take into account any outstanding liabilities of *Yukos* or the final arbitral awards delivered in two *Yukos* cases before the Arbitration Institute of the Stockholm Chamber of Commerce[288]. Hence, at least 'in the context of the present judgment and at this stage of the proceedings'[289], the ECtHR did not deal with Russia's submissions concerning the 'risk of double compensation'[290].

VII. Concluding remarks

This comparative case note on the *Yukos* cases is based on an analysis of two arbitral awards issued by the PCA Tribunal (one interim award on jurisdiction and admissibility as well as one final award)[291] and three decisions by the ECtHR (one decision on jurisdiction and admissibility, one judgment primarily on the merits and one judgment on just satisfaction). All those decisions taken together amount to more than an incredible 1,100 pages. Thus, this article did not intend to provide an in-depth review of any and every aspect dealt with in the decisions. Rather, the objective of this contribution was to focus on some of those aspects which may shed light on the different approaches of the ECtHR on the one hand and of the PCA Tribunal on the other hand.

To a certain extent, the strikingly different outcomes of the *Yukos* cases before the ECtHR and the PCA Tribunal can be explained by the different fields of law applied by the two bodies. The PCA Tribunal availed itself of the concept of *de facto* expropriation, *i.e.* a concept which is well-established in international investment law. In contrast, the ECtHR refrained from assuming that *Yukos* was the victim of a *de facto* expropriation and, rather, held that Russia was liable for unlawful and disproportionate infringements of the human right to property. This difference concerning the classification of Russia's interference with *Yukos'* (or its shareholders') property almost necessarily results in significant discrepancies with respect to the amount of damages. Since, in the present case, the calculation of compensation for a *de facto* expropriation of shareholders necessitated, *inter alia*, the valuation of a multi-billion stock company whereas the calculation of damages arising from an unlawful and disproportionate interference with property rights only required to reimburse those sums of money which had been collected by public authorities unlawfully.

From a procedural perspective, the gathering of evidence, especially the hearing of fact witnesses, led the PCA Tribunal to frame its 'theory' that Russia intended to smash *Yukos* for political reason thereby abusing its tax law and related enforcement proceedings. In contrast, the

ECtHR abstained from such severe allegations and, thus, from taking sides in intricate political battles. In particular, the ECtHR repeatedly respected Russia's wide margin of discretion in the complex and sensitive field of taxation and widely (albeit not fully) accepted both Russian tax law and enforcement rules and their application by public authorities and domestic courts.

To a certain extent, these remarkable differences are related to the differing procedures before the ECtHR and the PCA Tribunal respectively as well as to the diverging roles of the two bodies. The ECtHR functions more like a constitutional court exercising, as the case may be, judicial self-restraint vis-à-vis the respondent state. The PCA Tribunal rather acted like a civil court of first instance by hearing fact witnesses called by the claimants and reproaching Russia with not having called 'fact witnesses of their own to contradict or weaken the testimony of Claimants'[292]. Accordingly, in investor-state dispute settlements before international arbitral tribunals, host states have to take a very active role in establishing the facts of the case. Since fact-finding predetermines the application of the law and, thus, the tribunal's holding.

Of course, pragmatically speaking, the ECtHR must treat the parties to the ECHR more respectfully than an international arbitral tribunal the parties to an international investment agreement. The ECtHR's mission is to ensure perpetual compliance with the ECHR by the Convention parties. Therefore, its judgments must meet with continuous acceptance by the states. On the other hand, also arbitrators should not 'slap' investors' host states without overwhelmingly persuasive cause. Since, in the long run, states may get disgusted with investment arbitration and, in the end, bury investor-state dispute settlement all together.

In the future, we may well encounter further cases like the *Yukos* cases. According to latest UNCTAD[293] reports, foreign investors increasingly tend to file claims against developed states.[294] Such states usually possess a sophisticated legal framework for the protection of individual rights, or are embedded in an international human rights regime such as the ECHR. At the same time, such states are parties to ever closer networks of international investment agreements including regional free trade agreements. Germany may serve as an example: Germany's law on the phasing-out of nuclear power plants has been challenged both before the Federal Constitutional Court (for violations of individual rights under the German constitution[295]) and before an international ICSID[296] arbitral Tribunal[297] established on the basis of Article 26 ECT. If the Federal Constitutional Court does not nullify the law, the applicants may subsequently file an individual complaint with the ECtHR. Thus, the same legislative measure and its impacts will be scrutinized by different judicial bodies on the basis of different rules, *i.e.* national fundamental rights laid down in the constitution, international human rights set forth in the ECHR and international investors' rights arising from the ECT.

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1 See e.g. http://www.bbc.com/news/world-europe-33197782 (last visited 23 July 2015).

2 Permanent Court of Arbitration (PCA), The Hague. The PCA was established in 1899. It is not a 'court' sensu stricto but rather a service provider for various forms of international dispute settlement. For the PCA, see e.g. (Reinisch and Malintoppi, 2008, pp. 709–710).

[3] Hulley Enterprises Limited (Cyprus) v. The Russian Federation, Final Award, 18 July 2014, PCA Case No. AA 226; Yukos Universal Limited (Isle of Man) v. The Russian Federation, Final Award, 18 July 2014, PCA Case No. 227; Veteran Petroleum Limited (Cyprus) v. The Russian Federation, Final Award, 18 July 2014, PCA Case No. 228.

[4] All references to awards rendered by the PCA Tribunal concern the awards in the case Hulley Enterprises Limited (Cyprus) v. The Russian Federation, Interim Award on Jurisdiction and Admissibility, 30 November 2009, Final Award, 18 July 2014, PCA Case No. AA 226. Apart from minor deviations, the wording of the three interim awards and the three final awards is essentially congruent.

[5] OAO Neftyanaya Kompaniya Yukos v. Russia, Application No. 14902/04.

[6] European Court of Human Rights (ECtHR), Strasbourg. The ECtHR is a treaty body established by Article 19 of the European Convention on Human Rights (ECHR) "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto".

[7] OAO Neftyanaya Kompaniya Yukos v. Russia, Application No. 14902/04, Judgment, 20 September 2011, and Judgment (just satisfaction), 31 July 2014. The ECtHR also rendered a decision on jurisdiction and admissibility on 29 January 2009.

[8] See (European Court of Human Rights, 2011, 524).

[9] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, CETS No. 005.

[10] Energy Charter Treaty of 17 December 1994 (available at: http://www.encharter.org/fileadmin/user_upload/document/EN.pdf) (last visited 23 July 2015).

[11] See below in and at endnote 47.

[12] Obviously, several minority shareholders of Yukos had initiated international arbitral proceedings on the basis of bilateral investment treaties as well (see also (European Court of Human Rights, 2011, 524)): RosInvestCo UK Ltd. v. The Russian Federation, SCC Arbitration V (079/2005), Final Award, 12 September 2010; Quasar et al v. The Russian Federation, SCC Arbitration, Award, 20 July 2012.

[13] See also (Schreuer and Kriebaum, 2007, pp. 761–762). For an in-depth analysis of differences and similarities between human rights protection by the ECtHR and investors' rights protection through international arbitral proceedings see (Kriebaum, 2009, p. 219).

[14] (Permanent Court of Arbitration, 2014, 1).

[15] (Permanent Court of Arbitration, 2014, 13).

[16] (European Court of Human Rights, 2011, 6 et seq.).

[17] (Permanent Court of Arbitration, 2014, 64).

[18] (Permanent Court of Arbitration, 2014, 63); (Permanent Court of Arbitration, 2014, 71); (Permanent Court of Arbitration, 2014, 72).

[19] (Permanent Court of Arbitration, 2014, 74).

[20] (Permanent Court of Arbitration, 2014, 90).

[21] (Permanent Court of Arbitration, 2014, 78); (Permanent Court of Arbitration, 2014, 91).

[22] (Permanent Court of Arbitration, 2014, 92).

[23] See (Permanent Court of Arbitration, 2014, 94–96).

[24] (Permanent Court of Arbitration, 2014, 94).

[25] (Permanent Court of Arbitration, 2014, 165).

[26] (Permanent Court of Arbitration, 2014, 98).

[27] (Permanent Court of Arbitration, 2014, 99).

[28] (Permanent Court of Arbitration, 2014, 101).

[29] (European Court of Human Rights, 2011, 302).

[30] (Permanent Court of Arbitration, 2014, 102).

[31] (Permanent Court of Arbitration, 2014, 63); (Permanent Court of Arbitration, 2014, 102); (European Court of Human Rights, 2011, 304).

[32] United Nations Commission on International Trade Law.

[33] UNCITRAL Arbitration Rules of 1976 (available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (last visited 28 July 2015)).

[34] (Permanent Court of Arbitration, 2014, 112).

[35] (Permanent Court of Arbitration, 2014, 112).

[36] (Permanent Court of Arbitration, 2014, 112).

[37] Available at: http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (last visited 23 July 2015).

[38] Vienna Convention on the Law of Treaties of 23 May 1969, UNTS 1155, p. 331.

[39] International Law Commission.

[40] ILC Articles on Responsibility of States for Internationally Wrongful Acts 2001, in: Annex to GA/Res. 56/83 of 12 December 2001 (UN Doc A/Res/56/83).

[41] (Permanent Court of Arbitration, 2014, 113).

[42] See Energy Charter Secretariat (ed.), The Energy Charter Treaty and Related Documents. A legal framework for International Energy Cooperation, 2004, p. 14 (http://www.encharter.org/fileadmin/user_upload/document/EN.pdf (last visited 28. July 2015)).

[43] See (Yannaca-Small, 2010, p. 38).

[44] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952, CETS No. 009.

[45] See e.g. (Dolzer and Schreuer, 2012, pp. 154–156).

[46] (Permanent Court of Arbitration, 2014, 1585).
[47] (Permanent Court of Arbitration, 2014, 63); (Permanent Court of Arbitration, 2014, 102); (European Court of Human Rights, 2011, 304).
[48] (European Court of Human Rights, 2009, 439).
[49] (European Court of Human Rights, 2009, 442).
[50] (European Court of Human Rights, 2009, 443).
[51] (European Court of Human Rights, 2009, 442).
[52] See http://www.encharter.org/fileadmin/user_upload/document/ECT_ratification_status.pdf (last visited 28 July 2015).
[53] See also Article 25(1)(a) VCLT. Concerning legal problems surrounding Article 45 ECT see e.g. (Hobér and Nappert, 2007, p. 53).
[54] See also Article 25(2) VCLT.
[55] On the political background of Russia's decision not to become a party to the ECT see (Szwedo, 2010, p. 58).
[56] See http://www.encharter.org/fileadmin/user_upload/document/ECT_ratification_status.pdf (last visited 28 July 2015); see, however, also (Permanent Court of Arbitration, 2009, 339): 19 October 2029.
[57] By way of exception to Article 27(1) VCLT. See (Szwedo, 2010, p. 59).
[58] See (Permanent Court of Arbitration, 2009, 71).
[59] (Permanent Court of Arbitration, 2009, 71).
[60] (Permanent Court of Arbitration, 2009, 329).
[61] (Permanent Court of Arbitration, 2009, 383).
[62] (Permanent Court of Arbitration, 2009, 407).
[63] (Permanent Court of Arbitration, 2009, 411); (Permanent Court of Arbitration, 2009, 413).
[64] (Permanent Court of Arbitration, 2009, 416).
[65] On the incorporation, principal seat and control ‚theories' see e.g. (Schlemmer, 2008, pp. 75–81).
[66] (Permanent Court of Arbitration, 2009, 416).
[67] See (International Court of Justice, 1970, 70).
[68] (Permanent Court of Arbitration, 2009, 419).
[69] (Permanent Court of Arbitration, 2009, 431); see also (Permanent Court of Arbitration, 2009, 434).
[70] See (Permanent Court of Arbitration, 2009, 433).
[71] Cf. (Permanent Court of Arbitration, 2014, 1313).
[72] (Permanent Court of Arbitration, 2014, 1352); see also (Permanent Court of Arbitration, 2014, 1374).
[73] (Permanent Court of Arbitration, 2014, 1353–1354); (Permanent Court of Arbitration, 2014, 1375).
[74] (Permanent Court of Arbitration, 2014, 1370).
[75] (European Court of Human Rights, 2011, 637).
[76] See (European Court of Human Rights, 2011, 641–642).
[77] See (European Court of Human Rights, 2011, 641–642).
[78] (Black, 2014, p. 258).
[79] (Permanent Court of Arbitration, 2014, 1407); (Permanent Court of Arbitration, 2014, 1430 et seq).
[80] (Permanent Court of Arbitration, 2014, 1444).
[81] See (Permanent Court of Arbitration, 2014, 1406) ; (Permanent Court of Arbitration, 2014, 1410 et seq). Obviously, taxation is a highly sensitive issue belonging to the core sovereign powers of states. Hence, states wish to keep as much latitude as possible in the field of taxation when entering into international economic law treaties. On the other hand, property concerns of private actors have to be taken into account as well. Accordingly, the ECT strived for a balance between the states' right to take taxation measures and the investors' rights in cases of expropriation (hence Article 21(5) ECT). Interestingly enough, also the ECHR, a human rights treaty, tries to strike a balance between the states' right to take taxation measures and the right to property. According to Article 1(2) ECHR-Prot. 1, the right to property 'shall not … in any way impair the right of a State to enforce such laws as it deems necessary … to secure the payment of taxes'.
[82] (Permanent Court of Arbitration, 2014, 1428).
[83] On this rule in general see e.g. (Amerasinghe, 2004).
[84] (Permanent Court of Arbitration, 2014, 1425)..
[85] As couched by the ECtHR, Article 35(2) ECHR excludes the 'jurisdiction' of the Court (see (European Court of Human Rights, 2011, 520); (European Court of Human Rights, 2011, 522)).
[86] (European Court of Human Rights, 2011, 520).
[87] (European Court of Human Rights, 2011, 521).
[88] (European Court of Human Rights, 2011, 523).
[89] See (European Court of Human Rights, 2011, 524); (European Court of Human Rights, 2011, 526).
[90] (Permanent Court of Arbitration, 2009, 597); see also (Permanent Court of Arbitration, 2014, 1272).
[91] (Greer and Wildhaber, 2012, pp. 667 et seq).
[92] (Rainey et al., 2014, p. 24); (Meyer-Ladewig, 2011, Introduction, para 21).
[93] (Meyer-Ladewig, 2011, Introduction, para 21).
[94] (European Court of Human Rights, 2011, 5).
[95] (European Court of Human Rights, 2011, 4); see also (European Court of Human Rights, 2011, 5).
[96] (Permanent Court of Arbitration, 2014, 117–246).
[97] (Permanent Court of Arbitration, 2014, 118).
[98] (Permanent Court of Arbitration, 2014, 117); see also (Permanent Court of Arbitration, 2014, 4).
[99] (Permanent Court of Arbitration, 2014, 117).

[100] Cf. (Permanent Court of Arbitration, 2014, 181).
[101] (Permanent Court of Arbitration, 2014, 120–121); (Permanent Court of Arbitration, 2014, 181–182).
[102] (Permanent Court of Arbitration, 2014, 123), (Permanent Court of Arbitration, 2014, 128), (Permanent Court of Arbitration, 2014, 135), (Permanent Court of Arbitration, 2014, 148), (Permanent Court of Arbitration, 2014, 157), (Permanent Court of Arbitration, 2014, 163).
[103] (Permanent Court of Arbitration, 2014, 141).
[104] (Permanent Court of Arbitration, 2014, 170).
[105] (Permanent Court of Arbitration, 2014, 173).
[106] (Permanent Court of Arbitration, 2014, 175).
[107] (Permanent Court of Arbitration, 2014, 178).
[108] (Permanent Court of Arbitration, 2014, 184).
[109] (Permanent Court of Arbitration, 2014, 187), (Permanent Court of Arbitration, 2014, 204), (Permanent Court of Arbitration, 2014, 219), (Permanent Court of Arbitration, 2014, 223).
[110] (Permanent Court of Arbitration, 2014, 200).
[111] (Permanent Court of Arbitration, 2014, 211), (Permanent Court of Arbitration, 2014, 235).
[112] (Permanent Court of Arbitration, 2014, 230).
[113] (Permanent Court of Arbitration, 2014, 226).
[114] (Permanent Court of Arbitration, 2014, 239).
[115] (Permanent Court of Arbitration, 2014, 272–1253).
[116] (Permanent Court of Arbitration, 2014, 260).
[117] (Permanent Court of Arbitration, 2014, 500).
[118] (Permanent Court of Arbitration, 2014, 756).
[119] (Permanent Court of Arbitration, 2014, 820).
[120] (Permanent Court of Arbitration, 2014, 887).
[121] (Permanent Court of Arbitration, 2014, 980).
[122] (Permanent Court of Arbitration, 2014, 1037).
[123] (Permanent Court of Arbitration, 2014, 1043).
[124] (Permanent Court of Arbitration, 2014, 1148).
[125] (Permanent Court of Arbitration, 2014, 1180).
[126] (Permanent Court of Arbitration, 2014, 1247).
[127] (Permanent Court of Arbitration, 2014, 1253).
[128] See supra in and at endnote 14.
[129] (European Court of Human Rights, 2011, 665).
[130] (European Court of Human Rights, 2011, 665).
[131] (Permanent Court of Arbitration, 2014, 801): see also (Permanent Court of Arbitration, 2014, 487), (Permanent Court of Arbitration, 2014, 636)
[132] (Dolzer and Schreuer, 2012, p. 98).
[133] For the distinction of these two concepts see e.g. (Salacuse, 2010, pp. 294–299).
[134] (Permanent Court of Arbitration, 2014, 1585).
[135] (Permanent Court of Arbitration, 2014, 1580).
[136] (Permanent Court of Arbitration, 2014, 1580).
[137] (Permanent Court of Arbitration, 2014, 1580).
[138] (Permanent Court of Arbitration, 2014, 1548).
[139] See (Permanent Court of Arbitration, 2014, 1549). For so-called 'creeping expropriations', see e.g. (Dolzer and Schreuer, 2012, pp. 125–126).
[140] (Permanent Court of Arbitration, 2014, 1581).
[141] …
[142] (Permanent Court of Arbitration, 2014, 1533), (Permanent Court of Arbitration, 2014, 1541), (Permanent Court of Arbitration, 2014, 1543).
[143] (Permanent Court of Arbitration, 2014, 1578).
[144] See e.g. (Dolzer and Schreuer, 2012, pp. 115–117); (Salacuse, 2010, pp. 311–313).
[145] (Permanent Court of Arbitration, 2014, 1576).
[146] (Permanent Court of Arbitration, 2014, 1576).
[147] See International Thunderbird Gaming Corporation v. The United Mexican States, Award, 26 January 2006, para. 147.
[148] (Permanent Court of Arbitration, 2014, 1579).
[149] (Permanent Court of Arbitration, 2014, 1480).
[150] (Permanent Court of Arbitration, 2014, 1472).
[151] See supra in and at endnote 40.
[152] (International Court of Justice, 1986, 115); (International Court of Justice, 2007, 400).
[153] ILC Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, in: Yearbook of the International Law Commission, 2001, Vol. II, Part Two, Article 8, para. 6.
[154] (Permanent Court of Arbitration, 2014, 1468).
[155] (Permanent Court of Arbitration, 2014, 1469).
[156] (Permanent Court of Arbitration, 2014, 1470).
[157] Cf. also the Russian President's press statement as reproduced in (Permanent Court of Arbitration, 2014, 1470).

158 (International Court of Justice, 2007, 400).
159 ILC Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, in: Yearbook of the International Law Commission, 2001, Vol. II, Part Two, Article 11, para. 5.
160 (Permanent Court of Arbitration, 2014, 1480).
161 ILC Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, in: Yearbook of the International Law Commission, 2001, Vol. II, Part Two, Article 11, para. 6.
162 See supra in and at endnote 170.
163 ILC Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, in: Yearbook of the International Law Commission, 2001, Vol. II, Part Two, Article 11, para. 8.
164 (Permanent Court of Arbitration, 2014, 1037).
165 (Permanent Court of Arbitration, 2014, 1472), (Permanent Court of Arbitration, 2014, 1480).
166 (European Court of Human Rights, 1993, 45).
167 (European Court of Human Rights, 2011, 558).
168 (European Court of Human Rights, 2011, 559).
169 See (European Court of Human Rights, 2011, 563).
170 (European Court of Human Rights, 2011, 563).
171 (European Court of Human Rights, 2011, 21).
172 (European Court of Human Rights, 2011, 564).
173 (European Court of Human Rights, 2011, 84).
174 See (European Court of Human Rights, 2011, 84).
175 (European Court of Human Rights, 2011, 565).
176 (European Court of Human Rights, 2011, 566).
177 (European Court of Human Rights, 2011, 569).
178 (European Court of Human Rights, 2011, 572).
179 (European Court of Human Rights, 2011, 573).
180 (European Court of Human Rights, 2011, 575).
181 (European Court of Human Rights, 2011, 594).
182 (European Court of Human Rights, 2011, 591).
183 (European Court of Human Rights, 2011, 599).
184 See (European Court of Human Rights, 2011, 598–599).
185 (European Court of Human Rights, 2011, 605).
186 (European Court of Human Rights, 2011, 616).
187 (European Court of Human Rights, 2011, 615).
188 (European Court of Human Rights, 2011, 615).
189 (European Court of Human Rights, 2011, 646).
190 See supra in and at endnote 146-147.
191 (European Court of Human Rights, 2011, 646).
192 (European Court of Human Rights, 2011, 666).
193 (European Court of Human Rights, 2011, 646).
194 (European Court of Human Rights, 2011, 647); see also (European Court of Human Rights, 2011, 664).
195 (European Court of Human Rights, 2011, 647).
196 (Permanent Court of Arbitration, 2014, 1583).
197 (European Court of Human Rights, 2011, 666).
198 (Permanent Court of Arbitration, 2014, 1579).
199 (European Court of Human Rights, 2011, 647).
200 (European Court of Human Rights, 2011, 648), (European Court of Human Rights, 2011, 651).
201 (European Court of Human Rights, 2011, 648).
202 (European Court of Human Rights, 2011, 657).
203 (European Court of Human Rights, 2011, 646–647), (European Court of Human Rights, 2011, 657); see also (European Court of Human Rights, 2011, 606).
204 (European Court of Human Rights, 2011, 653–654).
205 (European Court of Human Rights, 2011, 655).
206 (European Court of Human Rights, 2011, 656).
207 (European Court of Human Rights, 2011, 666).
208 (Permanent Court of Arbitration, 2014, 1578).
209 See (Permanent Court of Arbitration, 2014, 1578–1580).
210 (Permanent Court of Arbitration, 2014, 1583).
211 (Permanent Court of Arbitration, 2014, 1583).
212 (Dolzer and Schreuer, 2012, p. 101).
213 (Dolzer and Schreuer, 2012, pp. 145–149), (Dolzer and Schreuer, 2012, pp. 154–156), (Dolzer and Schreuer, 2012, pp. 159–160).
214 (Permanent Court of Arbitration, 2014, 1585).
215 (European Court of Human Rights, 2011, 551).
216 (European Court of Human Rights, 2011, 540).
217 (European Court of Human Rights, 2011, 540); see also at (European Court of Human Rights, 2011, 546).

[218] (European Court of Human Rights, 2011, 540); see also at (European Court of Human Rights, 2011, 546).
[219] (European Court of Human Rights, 2011, 540).
[220] (European Court of Human Rights, 2011, 545).
[221] (European Court of Human Rights, 2011, 548).
[222] (European Court of Human Rights, 2011, 547).
[223] (European Court of Human Rights, 2011, 543), see also (European Court of Human Rights, 2011, 590).
[224] See (Permanent Court of Arbitration, 2014, 1589).
[225] See (Permanent Court of Arbitration, 2014, 1607–1608).
[226] (Permanent Court of Arbitration, 2014, 1621), (Permanent Court of Arbitration, 2014, 1633–1635).
[227] (Permanent Court of Arbitration, 2014, 1615).
[228] (Permanent Court of Arbitration, 2014, 1634).
[229] (Permanent Court of Arbitration, 2014, 1637).
[230] (Permanent Court of Arbitration, 2014, 1636).
[231] (Permanent Court of Arbitration, 2014, 1637).
[232] (Permanent Court of Arbitration, 2014, 1636) citing MTD Equity Sdn Bhd. v. The Republic of Chile, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 101.
[233] See supra in and at endnote 154.
[234] (Permanent Court of Arbitration, 2014, 1761).
[235] (Permanent Court of Arbitration, 2014, 1761).
[236] (Permanent Court of Arbitration, 2014, 1762).
[237] Cf. (Permanent Court of Arbitration, 2014, 1763).
[238] Emphasis added.
[239] (Permanent Court of Arbitration, 2014, 1765).
[240] On the 'Hull formula' see e.g. (Salacuse, 2010, pp. 323–324).
[241] See (Permanent Court of Arbitration, 2014, 1766).
[242] (Permanent Court of Arbitration, 2014, 1769).
[243] (Permanent Court of Arbitration, 2014, 1768) (emphasis added).
[244] ILC Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, in: Yearbook of the International Law Commission, 2001, Vol. II, Part Two, Article 35, para. 2.
[245] ILC Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, in: Yearbook of the International Law Commission, 2001, Vol. II, Part Two, Article 35, para. 2.
[246] ILC Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, in: Yearbook of the International Law Commission, 2001, Vol. II, Part Two, Article 35, para. 2.
[247] Cf. also Article 35(a) of the ILC Articles.
[248] (Permanent Court of Arbitration, 2014, 1777).
[249] (Permanent Court of Arbitration, 2014, 1768).
[250] (Permanent Court of Arbitration, 2014, 1768).
[251] (Permanent Court of Arbitration, 2014, 1769).
[252] (Permanent Court of Arbitration, 2014, 1782).
[253] (Permanent Court of Arbitration, 2014, 1787).
[254] (Permanent Court of Arbitration, 2014, 1783).
[255] (Permanent Court of Arbitration, 2014, 1045).
[256] (Permanent Court of Arbitration, 2014, 1789).
[257] (Permanent Court of Arbitration, 2014, 1778).
[258] (Permanent Court of Arbitration, 2014, 1811).
[259] (Permanent Court of Arbitration, 2014, 1812).
[260] See the table in (Permanent Court of Arbitration, 2014, 1811).
[261] See (Permanent Court of Arbitration, 2014, 1778).
[262] (Permanent Court of Arbitration, 2014, 1687).
[263] (Permanent Court of Arbitration, 2014, 1826).
[264] (Permanent Court of Arbitration, 2014, 1827).
[265] 39.972 billion USD were awarded to Hulley; 1.846 billion USD were awarded to YUL; 8.203 billion USD were awarded to VPL.
[266] (European Court of Human Rights, 2014, 19).
[267] (European Court of Human Rights, 2014, 20).
[268] (European Court of Human Rights, 2014, 20).
[269] (European Court of Human Rights, 2014, 24).
[270] (European Court of Human Rights, 2014, 23).
[271] (European Court of Human Rights, 2014, 22).
[272] (European Court of Human Rights, 2014, 25).
[273] (European Court of Human Rights, 2014, 26).
[274] (European Court of Human Rights, 2014, 30).
[275] (European Court of Human Rights, 2011, 653).
[276] (European Court of Human Rights, 2011, 653–654)
[277] (European Court of Human Rights, 2014, 31).
[278] See supra in and at endnote 268.

[279] (European Court of Human Rights, 2014, 33).
[280] (European Court of Human Rights, 2014, 32).
[281] (European Court of Human Rights, 2014, 34).
[282] (European Court of Human Rights, 2014, 35).
[283] (European Court of Human Rights, 2014, 28).
[284] (European Court of Human Rights, 2014, 36); see supra in and at endnote 269 and 276.
[285] (European Court of Human Rights, 2014, 36).
[286] (European Court of Human Rights, 2014, 38).
[287] (European Court of Human Rights, 2014, 39).
[288] (European Court of Human Rights, 2014, 40–44).
[289] (European Court of Human Rights, 2014, 40–44).
[290] (European Court of Human Rights, 2014, 40–44). Conversely, in the Yukos case before the PCA Tribunal the claimants had promised that 'should any pecuniary damages be awarded to Yukos in the ECtHR proceedings, and should the Claimants receive any payments, such payments would be deducted from the amounts claimed in these arbitrations' ((Permanent Court of Arbitration, 2014, 1266)).
[291] With the interim and the final awards being practically the same in all three Yukos cases before the PCA Tribunal (see supra in and at endnote 3).
[292] (Permanent Court of Arbitration, 2014, 801).
[293] United Nations Conference on Trade and Development.
[294] UNCTAD IIA Issues Note, No. 2, May 2015, p. 2.
[295] Constitution of the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) of 23 May 1949 (BGBl. 1949 p. 1). For a quasi-official translation into English see http://www.gesetze-im-internet.de/englisch_gg/basic_law_for_the_federal_republic_of_germany.pdf (last visited 28 July 2015).
[296] International Centre for Settlement of Investment Disputes, Washington, D.C. (USA).
[297] Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12.

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Рассмотрение дел компании «ЮКОС». Сравнительный анализ решений Европейского суда по правам человекам и Постоянной палаты третейского суда

Ханс-Георг Дедерер
Пассау, Германия

Решения, вынесенные Европейским судом по правам человека по делам компании «ЮКОС» в 2009, 2011 и 2014 гг., и решения международного арбитражного трибунала, вынесенные Постоянной палатой третейского суда в 2009 и 2014 гг., требуют сравнительного анализа. Два суда пришли к достаточно различным решениям, особенно в части возмещения убытков со стороны России: согласно трибуналу, Россия должна выплатить компенсацию в размере приблизительно 50 миллиардов долларов США, в то время как ЕСПЧ обязал Россию выплатить компенсацию в размере всего лишь 2 миллиардов евро. Тем не менее обстоятельства дела, принимаемые во внимание при вынесении решений ЕСПЧ и ППТС, не различались. Российские власти применили в отношении компании «ЮКОС» повторное налогообложение и связанные с ним принудительные меры, признанные законными в российских судах. В конце концов компания «ЮКОС» была объявлена банкротом и ликвидирована. Значительные различия между решениями можно объяснить, в некоторой степени, различными правовыми базами, лежащими в основе принятия решений. ЕСПЧ руководствовался Европейской конвенцией о защите прав человека (ЕКЗПЧ) и связанными с ней дополнительными протоколами (протоколы ЕКЗПЧ), т.е. инструментами в области прав человека, в то время как Постоянная палата третейского суда была обязана применить положения о защите инвестиций Договора к Энергетической Хартии (ДЭХ). Трибунал классифицировал повторное налогообложение и связанные с ним принудительные меры как «ползучую» фактическую экспроприацию (статья 13 ДЭХ), тогда как Европейский суд постановил, что эти меры представляли собой исключительно незаконное и несоразмерное вмешательство в право собственности (статья 1 протокола 1 ЕКЗПЧ). Соответственно, с точки зрения трибунала Россия должна была компенсировать стоимость компании «ЮКОС» как многомиллиардного акционерного общества. В отличие от этого решения, по мнению Европейского суда Россия была обязана возместить необоснованное налогообложение и оплату исполнительных сборов. ЕСПЧ также заявил, что Россия нарушила право на справедливое судебное разбирательство (статья 6 ЕКЗПЧ). Арбитражный суд, напротив, не рассматривал процессуальные нарушения отдельно, хотя это было возможно, например, в рамках пункта о «справедливом и равноправном отношении» (статья 10 (1) (2) ДЭХ). Отличительной особенностью аргументации Арбитражного суда было «кредо» арбитров, что Россия намеревалась недобросовестно ликвидировать «ЮКОС» по политическим причинам. Арбитражный суд пришел к этому выводу на основе многочисленных показаний свидетелей, вызванных истцами. ЕСПЧ, напротив, воздержались от любых гипотез о политических мотивах повторного налогообложения и связанных с ним принудительных мерах, принятых российскими властями и подтвержденных российскими судами.

Ключевые слова: ЮКОС, арбитражное разбирательство по зарубежным инвестициям, Договор к Энергетической хартии, Постоянная палата третейского суда, международная защита прав человека, Европейская конвенция по защите прав человека, Европейский суд по правам человека, фактическая экспроприация, возмещение убытков.

Научная специальность: 12.00.00 – юридические науки.