# ARTICLES

## THE *YUKOS* ANNULMENT: ANSWERED AND UNANSWERED QUESTIONS

*George A. Bermann**

On April 20, 2016, a Dutch court issued a major judgment annulling awards rendered in a dispute between the Russian Federation and three majority shareholders[1] of the former giant Russian oil producer, OAO Yukos Oil Company ("Yukos").[2] The annulment by a national court of any investor-State award is always of great moment, but it was particularly so in the case of an award in excess of $50 billion. Discussion of the judgment has understandably occupied much of the international arbitration blogosphere.

After setting out the basic facts of the case, this piece briefly describes the position that the Tribunal had taken and that the Dutch court found sufficiently flawed to justify the award's annulment. It then examines the court's own reasoning in some detail. Lastly, it shows that, however momentous the annulment may have been, the Dutch court avoided answering several very difficult and important questions that it might otherwise have had to address and that warrent serious consideration.

### I. THE BASIC FACTS

Starting in 2003, the Russian tax authorities charged Yukos with systemic and large-scale tax evasion. It imposed on Yukos very substantial tax assessments and fines, and ultimately seized Yukos' assets, as a result of which Yukos went into bankruptcy in August 2006. The Yukos shareholders claimed that the Russian Federation had thereby unlawfully expropriated most of Yukos' assets, and thus their protected investment.

The Yukos shareholders ("the Claimants") initiated three separate arbitral proceedings at the Permanent Court of Arbitration ("PCA") in the Hague against the Russian Federation under Article 26(4)(b) of the Energy Charter Treaty ("ECT") [3] and the UNCITRAL Arbitration Rules. After the parties had appointed their arbitrators, the Secretary-General of the PCA appointed a third arbitrator, Yves Fortier. Following the replacement in 2007 of one of the arbitrators

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* Jean Monnet Professor of European Law and Walter Gellhorn Professor of Law; Director, Center for International Commercial and Investment Arbitration, Columbia Law School. The author has filed an expert opinion on behalf of the Russian Federation in the award enforcement proceeding pending in the federal district court for the District of Columbia.

[1] Veteran Petroleum, Ltd., Yukos Universal Ltd. and Hulley Enterprises, Ltd.

[2] Cases C/09/477160 / HA ZA 15-1, 15-2 and 15-112 [hereinafter the Judgment].

[3] Entry into force April 16, 1998.

appointed in 2005, the Tribunal consisted of the aforementioned Mr. Fortier (Chairman), Charles Poncet and Stephen M. Schwebel. The Tribunal was assisted by Mr. Martin Valasek, described as an "assistant" to the Tribunal. The three arbitrations were heard in parallel with the full participation of all the Parties at the relevant stages of the proceedings.

## II. THE ARBITRATION AND AWARD

The Russian Federation initially contested the Tribunal's jurisdiction on the ground that Russia had not in fact acceded to the ECT and thereby become subject to the jurisdiction of the Tribunal. In December 1994, the Vice Prime Minister of the Russian Federation had signed the ECT on behalf of the Federation. Although the Russian government then presented to the Parliament a bill of ratification of the ECT, the Parliament never in fact took that action.[4] Eventually, in August 2009, the Russian Federation notified the Portuguese Republic (the depository State under ECT Article 49) that it would not ratify the ECT.

Complicating matters for Russia, however, is the fact that the ECT expressly contemplated its "provisional application." According to ECT Article 45(1):

> Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that the provisional application of this Treaty is not inconsistent with its constitution, laws or regulations.

By its own terms, Article 45(1) was thus subject to an important proviso: the ECT could receive provisional application[5] against a State only "to the extent that [such] provisional application of this Treaty is not inconsistent with [the State's] constitution, laws or regulations." This proviso was referred to both by the Tribunal and the Dutch court as Article 45(1)'s "Limitation Clause."

Article 45(2)(a) then goes on to permit a State to make a declaration upon signature altogether rejecting provisional application of the ECT:

> Notwithstanding paragraph (1), any signatory may, when signing, [declare] that it is not able to accept provisional application [in which case], [t]he obligation contained in paragraph (1) shall not apply to a signatory making such declaration.

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[4] According to Article 94 of the Russian Constitution "ratification and denunciation of international treaties and agreements of the Russian Federation" may only be performed by the Federal Parliament.

[5] Article 25 of the Vienna Convention on the Law of Treaties specifically contemplates provisional application of a treaty or certain of its provisions: "A treaty or a part of a treaty is applied provisionally pending its entry into force if (a) the treaty itself so provides."

All parties appear to have understood Article 45(2) to mean that, upon signing the ECT, a State may declare that it is unable to accept the Treaty's provisional application.

In the arbitration, the Russian Federation contended broadly that, since it had done nothing more than sign the ECT (i.e. had not ratified it), it could not be bound by any provisions of the Treaty, including Article 45(1). The Tribunal rejected that argument:

> There is no room for ambiguity. The Tribunal therefore concludes that the Russian Federation has consented to be bound — albeit provisionally — by Article 26 of the ECT by its signature of the ECT. Article 45(1) of the ECT establishes beyond the shadow of a doubt, and notwithstanding Article 39 of the ECT, that the Russian Federation and other signatories agreed that their signature of the Treaty would have the effect of expressing the consent of the Russian Federation (and each other signatory) to be provisionally bound by its terms.[6]

A more difficult question concerned the interplay between ECT Articles 45(1) and 45(2), and more specifically whether a State could invoke Article 45(1) in a proceeding brought against it even if it had never made a declaration under Article 45(2). Based on the ordinary meaning of Article 45(1), the Tribunal found the two provisions to be separate, so that a State's entitlement to invoke Article 45(1) did not depend in any way on its having previously invoked Article 45(2).[7] The Tribunal also found more generally that no prior declaration by Russia was necessary in order for it to invoke Article 45(1).[8]

Having found that Russia was entitled to invoke Article 45(1), the Tribunal turned to the meaning of that provision. The Federation argued that, even if Article 45(1) were applicable, Russia could avoid provisional application of Article 26 of the ECT Treaty on dispute resolution[9] because arbitration of the kind

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[6] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, http://www.italaw.com/cases/documents/1176#sthash.c0JvBi98.dpuf (Nov. 30, 2009), ("Interim award"), para. 382.

[7] Interim award, paras. 262-64.

[8] *Id*. para. 284.

[9] According to Article 26 ECT:

**Settlement of disputes between an Investor and a Contracting Party**

1. Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
2. If such disputes cannot be settled according to the provisions of paragraph 1 within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
   a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

b) in accordance with any applicable, previously agreed dispute settlement procedure; or

c) in accordance with the following paragraphs of this Article.

3. a) Subject only to subparagraphs b) and c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph 2a) or b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

4. In the event that an Investor chooses to submit the dispute for resolution under subparagraph 2 c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or

c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

5. a) The consent given in paragraph 3 together with the written consent of the Investor given pursuant to paragraph 4 shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and

(iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.

of dispute at issue in the *Yukos* case was inconsistent with Russian law, within the meaning of Article 45(1). As a consequence, Russia was not subject to the ECT's provisional application.

The Federation plainly read the limitation clause in Article 45(1) to mean that a State can avoid provisional application of any particular provision of the ECT if it is contrary to Russian law, as the Federation claimed Article 26 was. (The Tribunal referred to the Federation's position as the "piecemeal" approach to Article 45(1).)[10] The Claimants took a different view, maintaining that provisional application could be avoided only if such application were, as a whole, inconsistent with a State's constitution, laws or regulations; it would not be enough that one or more specific provisions of the Treaty were inconsistent with domestic law. (The Tribunal referred to this as the "all-or-nothing" approach.)[11]

On this point, the Tribunal agreed with the Claimants, holding that the Limitation Clause was available only if provisional application of the ECT was, as such, and in itself, contrary to Russian law. It found that use of the term "this Treaty," without further qualification, should, according to its ordinary meaning, be understood as referring to the Treaty as a whole, and not to merely a part of it.[12] "Either the entire Treaty is applied provisionally, or it is not applied provisionally at all."[13] The Tribunal thought that allowing a piecemeal invocation of the Clause would run contrary to Article 27 of the Vienna Convention on the

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b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

6. A tribunal established under paragraph 4 shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.
7. An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph 4 and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State."
8. The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

[10] Interim award, para. 292.
[11] *Id*. para. 292.
[12] *Id*. paras. 308, 329.
[13] *Id*. para. 311.

Law of Treaties ("VCLT"), described by the Tribunal as a "cardinal principle of international law," which bars a State from invoking its internal legislation as a justification for failure to perform a treaty obligation.[14]

The Tribunal then readily concluded that provisional application of the ECT was *not*, as a whole, inconsistent with Russia's "constitution, laws or regulations."[15] Even the Russian Federation had not maintained otherwise. The net result was that the Federation was provisionally bound by the ECT up until August 2009, when it gave notice of its intention not to become a Contracting Party.

Having so ruled, the Tribunal had no need to inquire into the consistency with Russian law of the ECT's Article 26 in particular. However, in light of the attention the Parties had given to that question, the Tribunal nevertheless proceeded to address it and to find no inconsistency between the two. It based that result on a finding that two provisions of the 1991 Russian Law on Foreign Investments – Article 9, paragraph 2, as well as Article 10 of the 1991 act in its 1999 version – contemplated the arbitration of investor-State disputes, such as *Yukos*. Basically, it found that nothing in Russian law excluded the settlement of disputes between investors and the State through arbitration.[16]

The Tribunal addressed several further jurisdictional arguments advanced by the Federation.

Russia had argued that Article 23(2) of the Russian Federal Law on International Treaties ("FLIT") requires that a treaty subject to provisional application be submitted to and ratified by the State Duma within six months from its signature and the start of its provisional application, and that that had not been done, with the result that continued provisional application of the ECT would have been inconsistent with Russian law. The Tribunal dismissed the six-month limitation period as a mere "internal requirement" incapable of bringing the ECT's provisional application to an end in Russia.[17]

The Federation also invoked Article 17(1), the ECT's "denial-of-benefits" clause. That article reserves to each Contracting Party the right to deny the substantive protections of the ECT to "a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the area of the Contracting Party in which it is organized." The Tribunal found that the challenge went, not to jurisdiction, but to the merits, yet went ahead and decided the issue in its interim award. Ultimately, it read the clause literally to merely "reserve" a State's right to deny benefits to such an entity, and found that Russia had failed to exercise that right.[18]

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[14] *Id*. paras. 313-14. Article 27 VCLT states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

[15] Interim award, paras. 330, 338.

[16] *Id*. para. 370.

[17] *Id*. para. 387.

[18] *Id*. para. 456. Though it was unnecessary to do so, the Tribunal went on to inquire into whether the requirement for application of Article 17(1) – namely, that the Claimant

Another threshold objection raised by Russia was the ECT's so-called "taxation measures carve-out." ECT Article 21 provides that, "[e]xcept as otherwise provided in [that] Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties." Finding it unwise to address the applicability of Article 21 "in a vacuum," the Tribunal deferred the matter to the merits phase of the proceeding.[19]

Finally, Russia invoked the ECT's "fork-in-the road" provision,[20] Article 26(3)(b)(i), pursuant to which it was entitled to withhold consent to arbitration if the investor had previously submitted the dispute to other fora. In fact, the Claimants had instituted certain Russian court proceedings and also pursued Russia in the European Court of Human Rights. The Tribunal rejected the argument on the ground that these proceedings lacked the "triple identity" with the ECT proceeding – identity of parties, cause of action and object of the dispute – required for application of the "fork-in-the road" principle.[21]

Following extensive hearings and numerous procedural orders, the Tribunal issued an Interim Award upholding its jurisdiction. The Federation did not seek to annul the Award, and the Tribunal resumed hearings on the merits. Then on July 18, 2014, the Tribunal rendered its Final Award in all three cases. On the merits, the Tribunal awarded Claimants a total of over $50 billion in damages against the Federation.[22]

## III. THE ANNULMENT ACTION AND THE COURT'S STANDARD OF REVIEW

The Russian Federation thereafter filed an action in the Dutch courts for the annulment of the Interim and Final Awards, as well as costs of the proceedings, plus interest. Invoking several provisions of the Dutch Code of Civil Procedure, the Federation advanced five grounds for annulment of the Awards, as follows:

- absence of a valid arbitration agreement (sec. 1065(1)(a))
- irregularities in the Tribunal's composition (sec. 1065(1)(b))
- excess of arbitral authority (sec. 1065(1)(c))
- failure of substantiation (sec. 1065(1)(d))
- violation of Dutch public policy due to Tribunal's partiality and bias (sec. 1065(1)(e))

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be owned or controlled by nationals or citizens of third States – was satisfied. The Tribunal found that it was not. *Id*. paras. 537, 546.

[19] *Id*. para. 585.

[20] ECT, Art. 26(3)(b)(i)**.**

[21] Interim award, para. 598.

[22] Final Award, Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case no. AA 227 (July 18, 2014) ("Final award").

Thus, the jurisdictional challenge addressed by the court was only one of several challenges to the award advanced by the Federation.

Before confronting Russia's jurisdictional arguments, the court determined, squarely, as an initial matter, that its review of arbitral jurisdiction was to be conducted on a *de novo* basis. The court held that, in light of the fundamental character of the right to access to the courts, it was required, notwithstanding the doctrine of *Kompetenz-Kompetenz,* to conduct the jurisdictional inquiry independently.[23] This is a proposition with which the *Yukos* annulment will always be closely associated.

A. *The ECT Limitation Clause*

Like the Tribunal, the court focused its attention on ECT Treaty Article 45, and in particular on the Limitation Clause. As noted, the Claimants had advanced the argument that Russia was foreclosed from invoking Article 45(1) in the arbitration because it had failed, upon signing the ECT, to make a declaration under Article 45(2) that it did not consent to the Treaty's provisional application. Like the Tribunal before it, the court rejected that argument, finding that Article 45(2) did not prescribe the sole manner in which the Limitation Clause could be invoked. "Nothing in the texts of these paragraphs indicates that paragraph 2 is intended as a procedure rule for the specification of the arrangement in paragraph 1."[24]

However, the court then turned to the thorny matter of the proviso's meaning, ultimately rejecting the Tribunal's view that, in order to invoke Article 45(1), a State must establish that provisional application of the ECT would in itself be inconsistent with Russian law. The court determined that it was required to give the term "to the extent" in paragraph 1 of the ECT its meaning in common parlance, deducing that inconsistency with State law, within the meaning of Article 45, was a matter of degree and was to be gauged on the basis of individual treaty provisions.[25]

Having interpreted Article 45(2) the way it did, the court proceeded to examine whether the arbitration provision in ECT Article 26, from which the Tribunal of course derived its competence, was consistent or inconsistent with Russian law. The Claimants took the position that a provision of the ECT, such as Article 26, could only be considered as incompatible with Russian law if it prescribed something that national law prohibited. However, the court took a different view of "inconsistency": enforcement of ECT Article 26 would also be considered as contrary to Russian law if there was no positive legal basis in that law for dispute settlement through that means, i.e. if the Treaty provision "does not harmonize with the legal system or is irreconcilable with the starting points and principles that have been laid down in or can be derived from [a State's]

[23] Judgment, para. 5.4.
[24] *Id*. para. 1.27. *See also id*. para. 5.31.
[25] *Id*. paras. 5.11, 5.18.

legislation."[26] A direct contradiction between the Treaty and Russian law need not be shown.

It still remained, of course, to determine whether ECT Article 26 was actually inconsistent with Russian law under this standard. On this matter, too, the court found the Tribunal to have erred. Relying heavily on expert opinions furnished by the Russian Federation,[27] the court concluded that there was no basis in Russian law for the arbitration of disputes to which the Russian State is a party if the dispute is of a public law nature unless Russia had consented to such arbitration, which was of course the very issue in the case.

The Tribunal had found support for the general arbitrability of public law disputes involving the Russian State in Article 9 of Russia's 1991 Law on Foreign Investment. Article 9 states:

> (1) Investment disputes, including disputes over the amount, conditions and procedure of the payment of compensation, shall be resolved by the Supreme Court of the RSFSR or the Supreme Arbitrazh Court of the RSFSR, unless another procedure is established by an international treaty in force in the territory of the RSFSR.
> (2) Disputes of foreign investors and enterprises with foreign investments against RSFSR State bodies, disputes between investors and enterprises with foreign investments involving matters relating to their operations, as well as disputes between participants of an enterprise with foreign investments and the enterprise itself shall be resolved by the RSFSR courts, or, upon agreement of the parties, by an arbitral tribunal, or, in cases specified by the laws, by authorities authorized to consider economic disputes.

The court saw matters differently. It concluded that these two paragraphs designate two distinct classes of disputes. As the court saw it, paragraph 1 encompasses disputes of a public law character (which may be brought only before State courts, unless *a treaty* provides otherwise), while paragraph 2 encompasses disputes of a civil, or private, law matter (which may be brought

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[26] *Id*. para. 5.33.

[27] Expert reports by Professor A.A. Kostin, who was head of the Private International and Civil Law Department of the Moscow State Institute of International Relations (January 2006) and by Professor A.V. Asoskov, who was Professor of the International Private Law Department of the Russian School of Private Law and Assistant Professor of the Civil Law Department at M.V. Lomonosov Moscow State University (October 2014). Both experts had demonstrated that Russian legislation made arbitration conditional on the nature of the dispute and, more particularly that only disputes involving the Russian State of a civil law character may be arbitrated. They cited, among other pieces of legislation, Article 21 of the 1992 Arbitrazh Procedure Code (arbitration of "economic" disputes); Article 1 of the 1992 Provisional Regulation on Arbitral Tribunal for Resolving Economic Disputes (arbitration of disputes "arising out of civil law relations"); Article 23 of the 1995 Arbitrazh Procedure Code (arbitration of disputes "that arise out of civil law relations"). Judgment, para. 5.37.

only before State courts, unless *an agreement* between the parties provides otherwise). Pursuant to this understanding, the dispute between the Claimants and the Russian Federation would fall within paragraph 1 and therefore be reserved for decision by the courts.

The court determined that Article 9 had to be understood in light of a special Russian enactment known as "The Fundamentals of Legislation," Article 1 of which provides that "[t]he laws of the republics shall regulate in accordance with these Fundamentals the relations arising in connection with foreign investments in the republics' territories, subject to specific features of their economic operations and investment policy."[28] The relevant provision of the Fundamentals of Legislation is Article 43 which, like Article 9 itself, distinguishes between two categories of disputes between foreign investors and the Russian State. According to that distinction,

> (1) Disputes between foreign investors and the State are subject to consideration in the USSR in courts, unless otherwise provided by *international treaties* of the USSR, [while]
> (2) Disputes of foreign investors and enterprises with foreign investments with Soviet State bodies acting as a party to relationships regulated by civil legislation, enterprises, social organizations and other Soviet legal entities, disputes between participants of the enterprise with foreign investments and the enterprise itself are subject to consideration in the USSR in courts or, upon *agreement* of the parties, in arbitration proceedings, inter alia, abroad, and in cases provided by legislative acts of the Union of SSR and the republics - in arbitrazh courts, economic courts and others.

This provision – Article 43 of the Fundamentals of Legislation – does clearly provide that when the State acts in the capacity of a private party ("acting as a party to relationships regulated by civil legislation"), its disputes with foreign investors may be decided by arbitral tribunals to whose jurisdiction the parties agreed. But in other circumstances – notably a public law dispute – the Russian courts have exclusive jurisdiction, absent a treaty to the contrary. The court thus essentially carried over the distinction between public law and civil law disputes of the State from Article 43 of the Fundamentals to Article 9 of the Law on Foreign Investment.

The Tribunal had also found support for the arbitrability of disputes involving the Russian State in Article 10 of Russia's 1991 Law on Foreign Investment, in its 1999 version. According to this article, which does not distinguish between categories of disputes:

> A dispute of a foreign investor arising in connection with its investments and business activity conducted in the territory of the Russian Federation shall be resolved in accordance with international treaties of the Russian

[28] Judgment, para. 5.44.

> Federation and federal laws in courts, arbitrazh courts or through international arbitration.

Again, the court disagreed. Although Article 10 makes reference to international arbitration as a forum for investment disputes, the court did not read it as actually furnishing a legal basis for the arbitration of such disputes. The court read it, rather, as permitting the arbitration of investment disputes only in the presence of a provision to that effect in an international treaty of Russia or Russian legislation. "Article 10 … makes the option of arbitration conditional on the existence of a provision in treaties and federal laws to that effect."[29]

The court thus concluded overall that neither Article 9 nor Article 10 of the Law on Foreign Investment sufficed to render ECT Article 26 compatible with Russian law. ECT Article 26 thus "does not have a legal basis in Russian law and is incompatible with the starting points laid down in that law."[30]

B. *Estoppel*

The court next considered the Claimants' argument that the Russian Federation was, in effect, estopped from denying the consistency of ECT Article 26 with Russian law. The basis for the argument was the fact that, in its 1996 explanatory memorandum to the Russian Parliament urging ratification of the ECT, the Russian government had made remarks suggesting the absence of any inconsistency. Those remarks were as follows:

> "The provisions of the ECT are consistent with Russian legislation."
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> "The legal regime of foreign investments envisaged under the ECT is consistent with the provisions of the existing Law […] on Foreign Investment in [Russia], as well as with the amended version of the Law currently being discussed in the State Duma."
>
> "[The ECT regime] does not require the acknowledgement of any concessions or the adoption of any amendments to the abovementioned Law."

The court disposed of this argument through reasoning based on the Russian Constitution and, in particular, its principle of separation of powers set out in Article 10 of the Constitution:[31]

> [I]n assessing the meaning of the explanatory memorandum the Tribunal insufficiently recognized that this memorandum originated from the

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[29] *Id*. para. 5.56.

[30] *Id*. para. 5.60.

[31] *Id*. para. 5.77. Article 10 reads: "State power in the Russian Federation shall be exercised on the basis of its division into legislative, executive and judicial. The legislative, executive and judicial authorities shall be independent."

> executive and was primarily aimed at prompting the Duma, as part of the legislature, to ratify the ECT. Since the ECT was never ratified, the opinion of the executive (the government) cannot be ascribed to the legislature and the government's standpoint therefore does not have independent meaning.[32]
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> The Constitution and the principle of the separation of powers enshrined therein preclude a representative of the executive from being able to bind the Russian Federation to Article 26 ECT.[33]
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> [T]reaties that deviate from or supplement national Russian laws, cannot be applied based only on their signature, but require prior ratification. In accordance with this, these limitations also apply if treaties, like the ECT, are applied provisionally.[34]

In sum, in signing the ECT – even with its provisional application feature – the Russian Federation could not and did not extend to foreign investors an offer to arbitrate. The Claimants therefore could not, by filing a notice of arbitration, form an arbitration agreement with Russia, thereby binding Russia to arbitrate their dispute. The court accordingly concluded that the Tribunal lacked competence to entertain the underlying claims or issue the resulting award.[35] It ruled in favor of Russia and ordered the Claimants to pay the Russian Federation's costs.[36]

There can be no denying that the court took an extremely close look at every aspect of the reasoning by which the Tribunal had rejected the Federation's jurisdictional challenges, and disagreed with virtually every one of them. The *Yukos* judgment is therefore remarkable, not only for the amount of the award annulled, but also for the very serious scrutiny to which the award was subjected. The court's review may well evidence an abiding conviction that questions going to the authority of an arbitral Tribunal to adjudicate a dispute are those most worthy of serious judicial attention.

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[32] Judgment, para. 5.62. Article 15, paragraph 4, of the Constitution states:
The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation establishes other rules than those envisaged by law, the rules of the international agreement shall be applied.

[33] Judgment, para. 5.95.

[34] *Id*.

[35] *Id*. paras. 5.98-99.

[36] *Id*. para. 6.8.

## IV. THE "UNDISCUSSED" QUESTIONS

As noted, the Dutch court had before it several other grounds for annulment of the *Yukos* award, some jurisdictional and others non-jurisdictional in nature. Understandably, it chose to decide the case on one of the jurisdictional grounds, namely that the Russian Federation never agreed to apply provisionally Article 26 of the ECT because Article 45(1) of the Treaty excludes provisional application of treaty provisions inconsistent with Russian law, and thus never submitted to arbitration. Having found reason to annul the award on the ground it did, the court had no reason to address any of the other challenges mounted by the Federation in support of annulment, even though the Tribunal had considered and rejected them all. It left those challenges, to use the court's own words, "undiscussed."[37] But though undiscussed, they are of very considerable interest.

### A. *The Nationality Question*

Among the "other" grounds that Russia had advanced was another – quite common – jurisdictional ground, namely that the claimants were not "investors of another Contracting Party," i.e., not nationals of another ECT member state, defined as "(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law; [or] (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party."[38] Russia argued that the purported investment was in a shell company owned by the host State's own nationals and, for that reason, could not be regarded as an "an investor from another Contracting State," within the meaning of ECT Article 26. This constituted a jurisdictional objection because if the Russian Federation's standing offer to arbitrate in Article 26 was never extended to the Claimants, because they were of the "wrong" nationality, they were not in a position to accept that offer and produce a binding arbitration agreement merely by initiating arbitration.

The Tribunal expressed appreciation for this argument, acknowledging that "[i]f the States that took part in the drafting of the ECT had been asked in the course of that process whether the ECT was designed to protect – and should be interpreted and applied to protect – investments in a Contracting State by nationals of that same Contracting State whose capital derived from the energy resources of that State, it may well be that the answer would have been in the negative, not only from the representatives of the Russian Federation but from the generality of the delegates."[39] Nevertheless, the Tribunal came to the conclusion that, given the language of the ECT, in order to qualify as a protected "investor," a company

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[37] *Id*. para. 5.100.
[38] ECT, Art. 1(7).
[39] Interim Award, para. 434.

need only show that it is organized under the laws of a Contracting State, and nothing more.[40] This remains a controversial proposition.

B. *The Right To Be Heard*

The Federation also raised several non-jurisdictional challenges, among them a claim that its right to be heard was violated by the Tribunal's decision to deviate from both parties' submissions on damages, develop and employ a damages methodology of its own, and at the same time fail to give the parties an opportunity to comment on that methodology.

This claim too is a serious one. Procedural fairness is essential to the legitimacy of the arbitral process and the resulting award. International tribunals have themselves long acknowledged and underscored the importance of the right to be heard, whether as a matter of sound adjudicatory policy or as a means of ensuring the validity and enforceability of the eventual award. Disrespect of that right is accordingly widely available as a basis for annulment of a local award, as well as for defeating recognition or enforcement of a foreign award.[41] An ICSID annulment committee ruled that it is "fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal."[42]

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[40] *Id*. paras. 411, 417. Similarly, the shares in Yukos qualified as a covered "investment." *Id*. para. 434.

[41] According to Article V(1)(b) of the New York Convention, a court may decline to recognize or enforce a foreign award when "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." *See*, *e.g.*, Judgment of 8 December 2003, XXIX Y.B. COM. ARB. 834, 839-40 (Swiss Federal Tribunal 2004): "A foreign decision can be incompatible with the Swiss legal system not only because of its substantive content, but also because of the procedures that lead to it. In this respect, Swiss public policy requires compliance with the fundamental principles of procedure, as deduced from the Constitution, such as the right to a fair process and the right to be heard."

*See also* UNCITRAL MODEL LAW 1985, as revised in 2006, Art. 18 (Equal treatment of parties): "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case"; UNCITRAL ARBITRATION RULES 2010, Art. 17: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case"; ICC ARBITRATION RULES 2012, Art. 22(4): "In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."

[42] Wena Hotels Limited v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Annulment Proceedings, Decision, ¶ 57 (Feb. 5, 2002). *See also* a series of other ICSID cases: Maritime International Nominees Establishment (MINE) v. Guinea, ICSID Case No. ARB/84/4, Decision, ¶ 5.06 (Jan. 6, 1988); CDC Group Plc v. Republic of the Seychelles, ICSID Case No. ARB/02/14, Annulment Proceedings, Decision, ¶ 49 (June

It has indeed become a special preoccupation in international practice that arbitral tribunals refrain from rendering decisions that come as a "surprise" to the parties because based upon considerations that were extraneous to their submissions and debate or upon reasoning that they could not reasonably have anticipated. As stated by another ICSID annulment committee, "It is no answer to a failure to accord such a right that both parties were equally disadvantaged."[43] Moreover, "once it is shown that there was significant surprise it will usually be reasonable to assume procedural prejudice in the absence of indications to the contrary."[44]

In arguing that the award should be annulled on the ground that it never knew, and therefore could never address, the Tribunal's damages methodology, Russia advanced a highly plausible basis for annulment of the award.[45] Surprise decisions on remedial issues, such as damages and their calculation, should be considered as offensive to the right to be heard as surprise decisions on issues of liability.

### C. *The Use of Tribunal Secretaries*

Among the most interesting and controversial issues that the Dutch court was spared from deciding in the *Yukos* case is the proper use by tribunals of tribunal secretaries. The question arises because a cardinal feature of international arbitration proceedings is the right of the parties, in an exercise of party autonomy, to select their arbitrators and define their mandate. In practice, parties select arbitrators on account of such factors as their personal knowledge, experience, judgment, reputation, and character, as well as their availability to serve. The importance of party autonomy in the selection of the arbitrators is reflected in Article V(1)(d) of the New York Convention which authorizes courts to deny recognition or enforcement of a foreign award if "[t]he composition of the arbitral authority … was not in accordance with the agreement of the parties." [46]

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29, 2005) (quoting *Wena Hotels*); MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/02/14, Annulment Proceedings, Decision, ¶ 49 (Mar. 21, 2007) (quoting *Wena Hotels*).

[43] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Annulment Proceedings, Decision, ¶ 202 (Dec. 23, 2010). *See also* GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 145 (2004) (requirement that parties have an opportunity to comment on all the crucial points of the reasoning that the tribunal intends to adopt).

[44] Rotoaira Forest Trust v. Attorney-General, [1999] 2 NZLR 452, 463 (Comm) (Auckland High Ct.).

[45] *See, e.g.*, Paklito Investment Limited v. Klockner East Asia, Ltd, XIX Y.B. COM. ARB. 664 (HK Sup. Ct. 1993).

[46] Encyclopaedia Universalis SA v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 91 (2d Cir. 2005) (stating that "Article V(1)(d) of the New York Convention itself suggests the importance of arbitral composition" and refusing to enforce an award because the

Irregular composition of the tribunal is also a ground for annulment under the UNCITRAL Model Law.[47] It follows that the mandate of an arbitrator is a personal one. Thus, the AAA/ABA Code of Ethics, Canon V(C), expressly provides that "[an] arbitrator should not delegate the duty to decide to any other person." Legal scholars unanimously and uniformly subscribe to the view that, as one authority has expressed it, "In accepting appointment, an arbitrator necessarily accepts a duty not to delegate that mandate."[48] As Gary Born has put the matter, "a central premise of the role of the secretary is that he or she may not assume the tribunal's or (an arbitrator's) functions and may not influence the tribunal's decision."[49] The institutional rules and guidance notes are virtually all to the same effect.[50]

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tribunal did not "comport with [the] agreement's requirements for how arbitrators are selected").

[47] UNCITRAL MODEL LAW, Art. 34.

[48] Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARB. INT'L 147, 147 (2002).

[49] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2000 (2d ed. 2014).

[50] Among such rules and guidance notes are the following:

(a) UNCITRAL, Notes on Organizing Arbitral Proceedings 1996, ¶ 27:

"To the extent the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal."

(b) ICC, Note on the Appointment, Duties and Remuneration of Administrative Secretaries, ¶ 2:

"An Administrative Secretary may perform organizational and administrative tasks such as: transmitting documents and communications on behalf of the Arbitral Tribunal; organizing and maintaining the Arbitral Tribunal's file and locating documents; organizing hearings and meetings; attending hearings, meetings and deliberations; taking notes or minutes or keeping time; conducting legal or similar research; and proofreading and checking citations, dates and cross-references in procedural orders and awards as well as correcting typographical, grammatical or calculation errors.

Under no circumstances may the Arbitral Tribunal delegate decision-making functions to an Administrative Secretary. Nor should the Arbitral Tribunal rely on the Administrative Secretary to perform any essential duties of an arbitrator.

…

A request by an Arbitral Tribunal to an Administrative Secretary to prepare written notes or memoranda shall in no circumstances release the Arbitral Tribunal from its duty personally to review the file and/or to draft any decision of the Arbitral Tribunal."

It is of course common arbitral practice around the world, especially in investor-State arbitration, for tribunals to employ secretaries to assist them in administering arbitral proceedings. As the term "secretary" suggests, such an individual is generally meant to perform tasks of an essentially administrative character, and it is so understood. In fact, the title applied to Mr. Valasek in this case was not "secretary," but "assistant," a term of no particular meaning in the arbitration context. It is difficult to tell from this term alone the functions that a person can be expected to perform. Whatever the nomenclature, however, the personal nature of the arbitrator's mandate, as described above, necessarily imposes limits on a tribunal's use of arbitral secretaries or, to the extent they are employed, arbitral assistants.

Of particular concern in this connection is the role, if any, of arbitral secretaries in producing early drafts of an award. The prevailing view is that, if a secretary engages in any drafting, it should be limited to non-substantive portions of an award (such as portions of an award that identify the parties and counsel, identify the applicable law or language of the arbitration, or recite the basic

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(c) LCIA, Frequently Asked Questions, What is the LCIA's position on the appointment of Secretaries to Tribunals:

"The duties of the administrative secretary should neither conflict with those for which the parties are paying the LCIA Secretariat, nor constitute any delegation of the Tribunal's authority.…

Administrative secretaries should, therefore, confine their activities to such matters as organizing papers for the Tribunal, highlighting relevant authorities, maintaining factual chronologies, keeping the Tribunal's time sheets and so on."

(d) HKIAC, Guidelines on the Use of a Secretary to the Arbitral Tribunal (June 1, 2014), Arts. 3.4, 3.6: "Unless the parties agree or the arbitral tribunal directs otherwise, a tribunal secretary may provide the following assistance to the arbitral tribunal, *provided that the arbitral tribunal ensures that the secretary does not perform any decision-making function or otherwise influence the arbitral tribunal's decisions in any manner*:

(a) conducting legal or similar research; collecting case law or published commentaries on legal issues defined by the arbitral tribunal; checking on legal authorities cited by the parties to ensure that they are the latest authorities on the subject matter of the parties' submissions;
(b) researching discrete questions relating to factual evidence and witness testimony;
(c) preparing summaries from case law and publications as well as producing memoranda summarizing the parties' respective submissions and evidence;
(d) locating and assembling relevant factual materials from the records as instructed by the arbitral tribunal;
(e) attending the arbitral tribunal's deliberations and taking notes; and
(f) preparing drafts of non-substantive letters for the arbitral tribunal and non-substantive parts of the tribunal's orders, decisions and awards (such as procedural histories and chronologies of events).

…

A request by the arbitral tribunal to a tribunal secretary to prepare notes, memoranda or drafts shall in no circumstances release the arbitral tribunal from its duty personally to review the relevant files and materials, and to draft any substantive parts of its orders, decisions and awards."

procedural history of the case). Michael Hwang, for example, considers it proper for secretaries to perform the following tasks, and only those tasks:

(1) handle all secretarial and administrative matters in the absence of an institution.

(2) communicate with the parties under the supervision of the Tribunal (through its Chairman).

(3) proof-read procedural orders and award(s) that may be rendered by the Tribunal.

(4) check on legal authorities cited by Counsel to ensure that they are up to date and most relevant to the subject matter of Counsel's submissions (any new cases unearthed by the Legal Assistant will be referred to the Parties for their comments).

(5) assemble or locate relevant factual materials from the record as instructed by the Tribunal.

(6) *prepare a first draft of the formal or uncontroversial parts of any decision or award that may be rendered by the Tribunal (e.g., procedural history and chronology of events)*.[51]

Other leading scholars and practitioners echo that same view.[52] According to Professor Klaus Peter Berger, it is not sufficient that the Tribunal subsequently reviews the award and edits it:

> As a general rule, the drafting of the substantive parts of the final award, which include its operative part, must be reserved for the arbitral tribunal. It is particularly in this substantive section where *writing* one's own text instead of *reading* the text prepared by someone else remains the ultimate means of intellectual control of the tribunal's decision of the dispute as the essential tool for safeguarding the proper performance of the arbitrators' personal decision-making duty owed to the parties that have appointed them, thereby preserving the integrity of the arbitral process as such.[53]

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[51] Michael Hwang, *Introduction: Musings on International Arbitration*, *in* SELECTED ESSAYS ON INTERNATIONAL ARBITRATION 16 (SIAC 2013) (emphasis added).

[52] *See* Thomas Clay, *Le secrétaire arbitral*, REV. ARB. 953-55 (2005):

> [I]t does not seem to me acceptable that the arbitral secretary participates in the deliberations or is entrusted with the task of drafting a procedural order or award, even a partial award (my translation from the French original).

[53] KLAUS PETER BERGER, Part III, *27th Scenario: Deliberation of the Tribunal and Rendering of the Award*, *in* PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS NEGOTIATION, MEDIATION AND ARBITRATION 613-42, at 625, para. 27-19 (3d rev. ed. 2015) (emphasis in original).

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> Even a careful review by an arbitrator of a secretary's first draft does not entirely remove the scope given to the secretary to make judgements as to what to emphasize and what to omit, judgements that the arbitrator reviewing the draft may not even by able to identify never mind control. The act of writing is the ultimate safeguard of intellectual control. An arbitrator should be reluctant to relinquish it.[54]

According to a 2015 survey of international arbitrators and practitioners conducted by Queen Mary University of London (in conjunction with White & Case LLP), and based on 763 questionnaire responses and 105 in-person interviews, over 87% of survey respondents opposed having arbitral secretaries prepare drafts of substantive parts of the awards or even discuss the merits of the dispute with the arbitrators.[55] Similar surveys of international arbitrators decidedly reflect that same consensus.[56]

This is not, of course, to say that parties cannot agree to more extensive participation by arbitral secretaries than the prevailing view allows. The principle of party autonomy clearly so suggests. But this presupposes that the parties are made aware in advance that the Tribunal will follow such practices, and give their assent.

The question raised before the Dutch court was whether the Tribunal in *Yukos* had observed these widely agreed upon disciplines. There is reason to believe, at least based on information on hours[57] and fees[58] made available by the PCA, that

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[54] Partasides, *supra* note 48, at 158.

[55] 2015 Queen Mary/White & Case International Arbitration Survey, pp. 42-44.

[56] See Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association which found in a survey of a small number of highly prominent international arbitrators that:

(a) 14 respondents considered it proper to use secretaries only for "organization of the documents in the file, the drafting of letters regarding scheduling and procedural matters, and the preparation and minutes of hearings,"

(b) 11 respondents considered it proper to use secretaries for drafting purposes only in connection with "non-substantive" portions of the award, such as "the procedural history of the arbitration, the description of the parties, and sometimes also the summary of the parties' contentions," and

(c) two respondents would "refuse to assign any drafting responsibilities to the secretary," while

(d) only three Respondents would permit secretaries to prepare a first draft of the award.

Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitration Tribunals*, 17 AM. REV. INT'L ARB. 575, 585 (2006).

[57] According to the PCA's Statement of Account, over the life of the proceedings, Mr. Valasek performed 3006.2 hours of work, a figure greatly in excess of the number of hours any members of the Tribunal had spent. The difference was particularly pronounced for the specific period between close of the hearings and rendition of the award.

Mr. Valasek's role in the arbitration extended considerably further,[59] so much so that, had the Dutch court addressed the matter, it is likely to have found the situation deeply problematic.

## V. CONCLUSION

The *Yukos* annulment is in itself a matter of moment, and for reasons other than the magnitude of the award and the fact that the rendering court is especially sophisticated in international arbitration, and increasingly so in investor-State arbitration, given the PCA's presence in the Hague. The ruling is emblematic of the view that, while national courts rightly defer to arbitral tribunals on the merits of a dispute, they should be less solicitous on the question of whether parties ever agreed to arbitrate. Arguably, this concern arises with particular emphasis in investor-State arbitration. The judgment is, in this regard, especially remarkable, for the court engaged in truly searching *de novo* review on all aspects of jurisdiction.

Momentous though it may be, the judgment left unaddressed numerous issues that are certainly no less important and, in some cases, a great deal more central to, or controversial in, the world of international arbitration. They will likely resurface in the Dutch appellate proceedings that will ensue and in award enforcement proceedings that the Claimants have brought. In any event, these are matters to which national courts, at some undetermined time in the future, will return. Even in the meantime, they warrant serious reflection

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[58] The Final Award shows that Mr. Valasek billed in excess of US 1 million (EUR 970,562.50) in connection with his role as assistant to the Tribunal. Final Award, para. 1863.

[59] Evidently the Russian Federation produced a report by a forensic expert affirming, based on the expert's research, that it was "extremely likely" that Mr. Valasek wrote the majority of at least three major sections of the Final Awards, namely, 78.57% of the Preliminary Objections section, 65.38% of the Liability section and 71.43% of the Quantification of Claimant's Damages. *See* Carole Chaski, Expert Report Regarding Authorship of the Final Award dated September 11, 2015, para. 7.