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COMMENTARY ON YUKOS AWARD. EXPROPRIATION, TAX MEASURES AND FAULT OF THE PARTY SUFFERING THE DAMAGES

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ABSTRACT

Los laudos dictados en los casos Yukos contra Rusia han marcado un importante hito en la historia del ECT (*Energy Charter Treaty*). No solo han supuesto la mayor condena de daños en un arbitraje (50.000 millones de dólares) y uno de los pocos laudos en el que se condena a un Estado por expropiación bajo el ECT, sino que además analizan importantes y complejas cuestiones como el papel de las medidas fiscales en las expropiaciones y la incidencia de la culpa del perjudicado. Finalmente, el Tribunal realiza un elaborado análisis de la valoración de los daños, que ha dado como resultado esa cifra de 50.000 millones de dólares. Este artículo comenta brevemente estas cuestiones.

I. INTRODUCTION

1. USD 50 billion. This is the amount of damages awarded to the claimants in this arbitration by the Arbitral Tribunal. This is the amount that the Russian Federation has been ordered to pay for the expropriation of one of the largest former oil companies in the world. The Russian Federation was charged with tax harassment, as well as the freezing, seizure and auction of the oil company's main assets, along with imprisonment of the company's manager and finally the bankruptcy and appropriation of the company's remaining assets.

2. The award is not only significant because it is the highest ever award for damages under the ECT but also because it declared that a State has carried out an expropriation, which is unusual in arbitrations under the ECT. The award also deals with other interesting issues such as how the misconduct of the claimant may have an impact on its protection under the ECT or in the assessment of damages (either under the unclean hands «principle» or the contributory fault principle). It also analyses the circumstances under which article 21 of the ECT

on tax measures can be applied and the consequences of such an application. Finally, it is interesting to see how rigorously the Arbitral Tribunal dealt with the issue of the assessment of damages.

3. In this article we will firstly summarise the background of the case and we will then go through the legal arguments raised by the parties and upon which the award is based.

II. FACTUAL BACKGROUND

4. This case deals with the claims filed by: (i) Yukos Universal Ltd («YUL»), a company incorporated under the laws of the Isle of Man; (ii) Hulley Entreprise Limited («Hulley»), a company incorporated under the laws of Cyprus; and (iii) Veteran Petroleum Limited («VPL»), a company incorporated under the laws of Cyprus. YUL, Hulley and VPL will jointly be referred to as the «Claimants»). All the Claimants held shares in OAO Yukos Oil Company («Yukos»), a company incorporated under the laws of Russia.

5. Yukos was incorporated as a joint-stock company in 1993 and was subsequently privatised. Yukos' activities included the exploration, production, refining, marketing and distribution of crude oil, natural gas and petroleum products. After its privatisation, Yukos became one of the world's largest oil and gas companies.

6. This is where the dispute between the parties began: the Claimants stated that Yukos' success was perceived by the Russian Federation as a political threat and that the government decided to destroy the company in order to remove this threat. However, the Russian Federation sustained that Yukos was a criminal enterprise embroiled in fraudulent activities (such as tax evasion).

7. The Russian Federation established a favourable tax regime in impoverished areas of the country in order to draw investment into those areas. Yukos restructured its operations in order to profit from this tax regime. This was interpreted by the Russian Federation as a fraudulent manoeuvre devised as a way of interposing between Yukos and its customers shells registered in low-tax regions for the purposes of tax evasion.

8. Another of the controversial issues at stake in this arbitration dealt with the criminal proceedings initiated by the Russian Federation against Yukos' management. The Claimants asserted that Yukos' managers were victims of a concerted campaign of harassment against them, due to one of them being actively involved in Russian opposition politics. According to the Claimants, such a campaign included the imprisonment of a number of them under the tax evasion, fraud and money laundering charges, among others. The Russian Federation argued that criminal proceedings were initiated because these managers had taken part in a transfer pricing scheme aimed at divesting the money derived from Yukos' activities to offshore entities.

9. The Claimants also based their claim on the following facts: (i) a potential merger between Yukos and another oil company was frustrated by the Russian government; (ii) the Russian tax authorities carried out several tax reassessments as a result of Yukos' use of the low-tax regime, which culminated in the freezing and seizure of Yukos' assets; (iii) the Russian Federation sold YNG, a subsidiary of Yukos and one of its core assets, at a very low price, and the sole bidder was a newly incorporated company which was subsequently bought by a Russian State-owned company; and (iv) as a result of the mentioned actions Yukos went bankrupt, which resulted in the sale of Yukos' remaining assets to State-owned companies.

10. The Tribunal came to the following conclusions: (i) by using the low-tax regime established by the Russian Federation, Yukos was mainly availing itself of the tax advantages provided for under law; (ii) when carrying out the tax reassessment concerning Yukos, the Russian Federation's primary objective was not to collect taxes but rather to bankrupt the company in order to take over its assets; (iii) the Russian Federation's investigations into Yukos were excessively harsh and this conduct contributed to the demise of the company and detrimentally affected the Claimants' interests; (iv) the Russian Federation did not cause the demerger of Yukos and the other oil company; (v) there is no doubt that the purpose of the Russian Federation's tax reassessment of Yukos was not truly related to tax collection since it failed to even consider Yukos' offers for settlement; (vi) the auction of YNG was rigged in order to bring the company under the control of the Russian Federation, leading to the loss of Yukos' core asset; and (vii) Yukos being effectively led into bankruptcy was the final act of the destruction of the company and the expropriation of its assets.

11. In conclusion, the Tribunal accepted most of the Claimants allegations and concluded that all the actions carried out by the Russian Federation (albeit under the guise of taxation and the pursuit of a tax evader) were in fact the stages of a complex plan to dismantle Yukos and expropriate the assets of the company from the shareholders.

12. The next section of this article will analyse the legal arguments upon which the award was based.

III. OBJECTIONS UNDER ARTICLE 21 ECT

13. Article 21 ECT has not received much attention so far in ECT arbitrations. The Yukos case is one of the first in which a thorough analysis of Art. 21 ECT was carried out. The Russian Federation objected to Yukos' claim on the grounds that the Tribunal lacked jurisdiction over claims concerning Taxation Measures (1) other than those based on expropriatory taxes.

(1) In the sense ascribed to the term by the ECT.

14. This allegation was based on the so-called carve-out clause established in Art. 21 (1) ECT (2), whereby the ECT does not create rights or impose obligations with respect to Taxation Measures.

15. The Claimants alleged that article 21 ECT only applied to *bona fide* taxation, not to any taxation measures aimed at carrying out an expropriation (the Claimants' counsel referred to «actions under the guise of taxation»).

16. In any case, paragraph (5) of Art. 21 ECT establishes a claw-back clause whereby Article 13 (which prohibits illegal expropriations) applies to taxes.

17. The Russian Federation contended that the carve-out clause applied to the case at hand but not the claw-back clause since the term Taxation Measures (defined in the ECT) was broader than the term taxes, which is not defined in the ECT.

18. The Tribunal came up with the following reasoning: (i) even if the carve-out clause did apply, the claw-back clause would therefore also have been applicable and any referral to the competent tax authorities would have been futile; and (ii) the carve-out clause did not apply.

A. Reasoning on the basis that the carve-out clause applies

19. The Tribunal found that the term tax could not be narrower than the term Taxation Measures and hence it reached the conclusion that even if the carve-out clause applied, the claw-back clause also applied. In conclusion, it had jurisdiction to decide over the issues related to taxation.

20. The second argument of the Russian Federation in this regard was that the Claimants failed to firstly refer the issue to the competent tax authorities, as required in Article 21 (5). The Russian Federation asserted that such a referral amounted to a requirement in order to be able to consider that the Russian Federation had granted its consent to submit the matter to arbitration. In other words, the Tribunal lacked jurisdiction if such a referral had not been made, as was the case.

21. The Claimants opposed such an argument on the following grounds: (i) the expropriation was not carried out by means of taxation but by means of a combination of actions, with taxation being just one of them. They argued that the Russian Federation's claims could only succeed if the alleged expropriation had only been carried out as a result of tax measures, which was not the case); and (ii) the referral to the tax authorities would be meaningless since the Russian Federation (by means of its tax authorities) would be a judge in its own cause. The latter argument seemed persuasive to the Tribunal.

(2) «(1) Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency».

22. The Tribunal added that compliance with this requirement to refer the matter to the tax authorities would be futile since it would not be possible fir the tax authorities to reach a timely and meaningful conclusion. The Tribunal stated that the purpose of the referral is to assist arbitral tribunals in distinguishing between normal and abusive taxes and that in the case at hand the referral would not comply with this purpose.

23. In any case, the Tribunal found that even if the referral had been made, the decision of the tax authorities would not be binding on the Tribunal. Art. 21 (5) (b) (iii) states in this regard that the tribunals «(…) *may take into account any conclusions arrived at by the Competent Tax Authorities*» in connection with whether the tax measures amount to expropriation (however, the conclusions of such authorities shall be binding regarding whether the tax measures are discriminatory). It should be taken into account that the award ultimately states that the Russian Federation breached Art. 13 of the ECT. If the Tribunal had based its award on the infringements of Art. 10 ECT, the resolution in this specific issue could have been quite different since the referral would have been compulsory and the tax authorities report would have been binding.

24. In conclusion, according to the award examined, the referral provided for in Article 21 (5) may be an obstacle when infringements of Article 10 are invoked but not when the analysis of Article 13 is at stake.

B. Reasoning on the basis that the carve-out clause does not apply

25. The Tribunal considered that it had jurisdiction because the carve-out clause was not applicable in the case at hand. As the Claimants sustained, such a clause only applies to *bona fide* taxation but not to actions carried out under the guise of taxation. The difference between one kind of taxation and the other is that *bona fide* taxation aims to increase public income whereas actions carried out under the guise of taxation are actually measures carried out for entirely unrelated purposes and it is only incidental that such purposes were managed by means of taxation.

26. The *rationale* of this distinction is clear. A State cannot avoid the application of Part III of the ECT by merely labelling a measure as taxation.

27. In this regard, the Tribunal also stated that when the carve-out clause does not apply because the tax measure is not *bona fide* taxation it is not necessary to comply with the referral requirement since the expertise of the competent tax authorities (usually the tax authorities of the host state) will not shed any light on the issue of whether the taxation measures were carried out for legitimate reasons or not.

IV. ANALYSIS OF WHETHER THE RESPONDENT CARRIED OUT AN ILLEGAL EXPROPRIATION OR NOT

28. It must be noted that the Claimants' argued that the Russian Federation breached both article 10 and 13 of the ECT. The Arbitral Tribunal firstly dealt with whether or not article 13 ECT had been breached (and hence whether an illegal expropriation had been carried out by the Russian Federation). This is interesting to note, since in other ECT cases the reasoning went in the opposite direction, i.e. the Tribunals analysed whether the State had infringed article 10 ECT and if that were indeed the case, they would refuse to analyse whether an expropriation had occurred (3).

A. Expropriation cases under the auspices of the ECT

29. One of the reasons why the Yukos award is so important is that the Arbitral Tribunal decided that the host State had indeed carried out an expropriation. This has rarely happened under the application of the ECT. One of such cases was the Ioannis Kardassopulos and Fuchs v. Georgia (4). In this case, the government approved a decree in which a State-owned Company was awarded with the rights to a gas pipeline. The rights to the pipeline had been formerly owned by the companies controlled by the claimants. The Tribunal understood in that case that an expropriation had been carried out and that it was in fact a case of direct illegal expropriation. This is because the host State did not follow the requirements of due process.

30. In the Nykomb v. Latvia case (5) the Latvian State undertook to pay Windau (a company in which Nykomb had a stake), a double tariff over electric power. Subsequently, that tariff ceased to be paid as a result of a regulatory amendment. The award was rendered in application of the ECT and particularly its article 13. The Tribunal recognised that, in general terms, regulatory provisions can lead to direct or indirect expropriations. Nevertheless, the Tribunal stated that this would only happen if the measures effectively involved taking possession of the investor's assets, or an interference with the shareholder's rights or with the management's controlling stake. Such a circumstance did not occur in this case. Consequently, the Tribunal established that the legislative change did not constitute an expropriation.

31. In the Petrobart v. Kyrgyz Republic case (6), where the ECT was also applicable, the Tribunal denied that an expropriation had occurred because the adopted measures were not specifically directed against the investor. Addition-

(3) An example is the award dated 9 December 2013 handed down in the SCC case 116/2010, Anatoli Stati et. al v. Kazakhstan.

(4) ICSID cases n.º ARB/05/18 y ARB/07/15, Ioannis Kardassopoulos and Ron Fuchs v. Georgia. The award was rendered on 3 March 2010.

(5) SCC case, Nykomb Synergetics Technology Holding AB v. The Republic of Latvia. Award rendered on 16 December 2003.

(6) SCC Case No. 126/2003, Petrobart Limited v. the Kyrgyz Republic. Award rendered on 29 March 2005.

ally, these measures did not involve an economic value transfer of the Investor to the State.

32. The cases mentioned above clearly demonstrate that the Tribunals do not often consider that an expropriation has taken place, in application of the ECT. However, as we will see, the extraordinary circumstances of the facts under discussion in this case explain why the Tribunal upheld the expropriation claim.

B. Analysis carried out by the Tribunal concerning expropriation

33. In the case at hand, among other alleged breaches, the Russian Federation required Yukos to pay USD 13 billion in unpaid taxes and fines for unpaid VAT on oil exports. Within this framework, the Tribunal analysed whether the following requirements for an expropriation being considered illegal had been met:

— If it is not in the public interest.

— If it is discriminatory.

— If it is not carried out in compliance with due process.

— If prompt, adequate and effective compensation is not made.

34. The Tribunal reached the conclusion that it could not establish that these four requirements were met. However, it considered that the fact that the effective expropriation of Yukos was not accompanied by the payment of compensation was enough to consider that the Russian Federation had breached article 13 of the ECT.

35. In this regard, the position that the Tribunal held in connection with the third requirement mentioned above is very interesting, i.e. whether or not the expropriation was carried out in compliance with due process. Specifically, the Tribunal considered that it cannot be accepted that this requirement has been met by merely subjecting it to a predetermined legal procedure (that is to say, compliance with due process as a mere formality is not enough). The Tribunal also deemed that the fact that the Russian courts reviewed the due process infringements alleged by the Claimants and that they dismissed the Claimants» contentions, does not prevent the expropriation from breaching the due process of law.

36. As for the remedy offered by the Russian Federation, the Tribunal looked to the terms established by the *Factory at Chorzów case* and the ILC Articles on State Responsibility as a starting point. In this sense, the Tribunal stated that since the Russian Federation was declared to have breached international law, the Claimants had to be fully compensated. This means that the company suffering such an infringement should be re-established in the situation in which it would have been in had the infringement not existed.

37. However, the Tribunal found that the Claimants» misconduct gave rise to the acceptance of the existence of contributory fault, which reduced the amount of the damages to which the Claimants were entitled.

C. May expropriation be made by means of tax measures? International precedents and the Draft of Multilateral Agreement on Investments

38. Although the Tribunal did not state that the expropriation had been carried out by means of tax measures alone (since other actions were taken in order for the expropriation to take place), it is interesting to analyse the standard established by other awards and international legal materials in terms of how to determine when tax measures amount to expropriation. As we will see, the standard is very high since taxation implies the appropriation of taxpayer income.

39. In the award rendered in the EnCana v. Ecuador case (7), it was stated that unless the host State had previously expressly undertaken not to establish taxes on investments for a certain period, the investor does not have the right or even a legitimate expectation that the tax regime will remain untouched during the time of the investment. In this case, it was established that taxation measures could only have an expropriatory effect in certain extreme cases (8). However, in such a case a dissenting opinion was issued. The dissenting opinion stated that expectations on future revenues were also a kind of property which could be expropriated.

40. In the Link-Trading Joint Stock Company v. Moldovia case (9), the repealing of a tax exemption on imports was at stake. The Arbitral Tribunal considered that such a repeal could only amount to an expropriation if the host State had undertaken to maintain the tax regime

41. Although the ECT was not applied in these cases, it shows that tax measures will rarely be considered as expropriatory. This position is in line with the draft of Multilateral Agreement on Investments, which specifically deals with this issue and states the following principles:

(i) As a general rule, the creation of tax measures does not constitute an expropriation.

(ii) The creation of a tax will not be considered as an expropriation provided that it is within the limits of internationally-recognised policies.

(iii) The creation of a tax is less likely to be considered as an expropriation if it is a general tax. However, tax measures applicable to individuals or to a group of tax payers of the same nationality are more likely to be considered as expropiatory.

42. In light of the above, the threshold for tax measures to constitute an expropriation cannot be considered to have been lowered in the Yukos case. It could be understood that the tax measures at stake were not general but particular and had a purpose beyond tax collection or the increasing of State income. This

(7) Award dated 3 February 2006 (LCIA case no. UN3482, En Cana Corporation v. Ecuador).
(8) Similarly, the award dated 16 December 2002 (CIADI case No. ARB (AF)/99/1, Martin Feldman v. Mexico).
(9) Award dated 18 April 2002 (ad hoc arbitration, Link-Trading Joint Stock Company v. Moldovia).

was only one of the methods used by the host State to wipe out the Claimants» investment.

V. THE MISCONDUCT OF THE CLAIMANT: UNCLEAN HANDS AND CONTRIBUTORY FAULT

A. Unclean hands

43. The Russian Federation alleged that the Claimants filed their claim with unclean hands, i.e., that they committed several actions infringing legality and good faith. The Russian Federation contended that this should have the following consequences: (i) that the Tribunal lacked jurisdiction to decide over the dispute; (ii) that the claim was inadmissible; and/or (iii) that the Claimants should be deprived of the substantive protection of the ECT. In the event that such contentions were finally rejected, the Russian Federation argued that the illegal actions should be considered as contributory fault or a breach of the duty to mitigate damages.

44. The Russian Federation presented a long list of the alleged actions amounting, in its opinion, to unclean hands (10). Such a list included: (i) conduct related to the acquisition of Yukos by its shareholders and the subsequent consolidation of control over Yukos and its subsidiaries; (ii) conduct related to Yukos' abuse of the double taxation agreement entered into by Russia and Cyprus; (iii) conduct related to the tax optimisation scheme; and (iv) actions taken to hinder the enforcement of Russia's tax claim. The Russian Federation alleged that some of the actions were carried out prior to making the investments and other actions were carried out after the investment was made.

45. The Russian Federation contended that there is an international principle of law whereby a claimant cannot receive protection under the auspices of the ECT if it has carried out illegal actions or has contravened the *bona fide* principle. In order to support its arguments the Russian Federation invoked several arbitral awards. Specifically, it referred to the award rendered in the Plama (11) case in which the investment had breached the law of the host State and therefore the claimant's conduct was not in good faith, meaning that granting protection under the ECT would have been contrary to the clean hands requirement.

46. The Claimants countered that: (i) there was no such principle concerning unclean hands in the ECT; (ii) nor in international law; and (iii) in any case, if the Tribunal were to accept that such a principle existed, the facts presented by the Russian Federation as evidence of the Claimants' unclean hands would only be collateral illegalities beyond the scope of any so-called unclean hands doctrine.

(10) The principle that a party cannot seek equitable relief or assert an equitable defence if that party has violated an equitable principle, such as good faith.
(11) ICSID case No. ARB/03/24, Plama Consortium Limited v. The Republic of Bulgaria.

47. The Claimants argued that the Plama case did not support the Russian Federation's arguments. Moreover, they alleged that the jurisdictional award rendered in that case did not uphold that the illegality of the investment could affect its jurisdiction.

48. As for the existence of an international principle of law concerning unclean hands, the Claimants stated that the recognition of such a principle would be subject to a far higher threshold that would not be reached in the case at hand. Neither ILC Articles on State responsibility, or the PCIJ or the ICJ, or any of the arbitral awards relied upon by the Russian Federation established such a principle.

49. Finally, the Claimants argued that the Russian Federation had acquiesced to the actions it was now claiming were illegal and hence it was estopped from arguing their illegality in the arbitration. The Claimants also defended that illegalities could only give rise to the allegation of unclean hands if they had an immediate and necessary link to the claimant's cause of action, which was not the case. The Claimants finally alleged that the potential existence of a principle of unclean hands did not entitle the State to breach investor rights.

50. As for the possibility that an unclean hands principle has been recognised as a principle of international law, the Tribunal agreed with the Claimants that in order for a principle of international law to be created, a wide level of consensus is necessary. This was not the case for the unclean hands argument, which has not been applied by any majority decision within the framework of investment arbitration.

51. Likewise, the Tribunal found that there is no reference to the unclean hands principle in the ECT. However, it drew the conclusion on the basis of the award rendered in the Plama case that an investor who has obtained the investment by means of illegal actions or actions infringing good faith cannot benefit from ECT mechanisms. However, the Tribunal made a distinction between illegal actions carried out when making the investment (as such, these would be the actions preventing the investors from benefitting from the ECT) and those carried out in the performance of such investments. As far as the latter are concerned, the host States may (and must) use internal legal mechanisms in order to prevent such illegalities. If they do not, these illegalities cannot be claimed within the framework of investment treaty arbitrations. Applying such conclusions to the facts presented before the Tribunal, it stated that the illegal conduct alleged by the Russian Federation would have taken place in the performance and not in the making of the investment. As a result, the Claimants could not be deprived of seeking the protection of the ECT due to having carried out these actions.

52. Finally the Tribunal analyses the specific acts that, according to the Russian Federation, meant that the Claimants had «unclean hands». The Tribunal considered that most of them dealt with the performance of the investment (not the making of the investment itself). Thus, the Tribunal has only analysed whether the Claimants' action related to the acquisition of Yukos. The Tribunal

asserted that such actions were not carried out by the Claimants themselves but by other entities separate from the Claimants. The Tribunal rejected the Russian Federation's contention that the illegal action prior to the Claimants' actions affected the whole investment. As a result, they reached the conclusion that the Claimants could not be prevented from invoking the protection of the ECT.

B. Contributory fault

53. However, the Tribunal also analysed the Respondent's assertion that the amount of the compensation should be reduced under the legal principle of contributory fault, i.e., the concept that nobody can be awarded with damages arising from its own wrongdoing. We have already analysed in section II that such wrongdoings do not prevent a claimant from invoking the protection provided by the ECT but they will certainly be considered at the time of assessing damages and allocating liabilities. In any case, the Tribunal stressed the difference between contributory fault and the duty to mitigate losses.

54. Specifically, the Tribunal analysed four of Yukos's actions alleged by the Russian Federation and stated whether or not they could amount to contributory fault:

(i) The Tribunal considered that there was contributory fault in Yukos' abuse of the system in some of the low-tax regions.

(ii) The Tribunal considered that some of the actions carried out by Yukos, such as warning potential purchasers of YNG against participating in the auction, did not have material effects and did not contribute to reducing the price that YNG reached in the auction.

(iii) The Tribunal considered that the fact that Yukos failed to pay a loan did not amount to contributory fault in connection with Yukos being declared bankrupt.

55. Consequently, the Tribunal decided that Yukos contributed to 25 per cent of the situation while the remaining 75 per cent was allocated to the conduct of the Russian Federation.

VI. ASSESSMENT OF DAMAGES

56. One of the most interesting issues that this award addresses is the valuation of damages.

57. In this regard, the Tribunal firstly established that the yardstick for assessing the valuation of the payment established in art. 13 ECT (fair market value of the expropriated asset) was only applicable for legal expropriations. It follows then that the amount to be paid by the expropriating state must be higher if the expropriation is deemed illegal, as was the case. Thus, the Tribunal accepted the Claimants' contention that they should be awarded with the highest of the two following figures: (i) the value of the expropriated asset at the date of the expropriation; or (ii) the value of the expropriated asset at the date of the award.

58. As for causation, since the expropriation had been carried out by multiple actions of the State, the Tribunal discussed whether it was enough to prove that all the actions as a whole caused the damage or rather causation of the damages must be proved for every single action. The Tribunal held that this discussion was not relevant since the Claimants had actually succeeded in proving the causation for any single action and the damages. The Tribunal stated that even if there were concurrent causes intervening in the expropriation, the onus was on the Respondent to prove a lack of causation.

59. The Tribunal uses several pages to explain the valuation method it follows. In short, the valuation of Yukos would be the sum of: (i) the valuation of Yukos' shares; plus (ii) the valuation of Yukos' dividends that would have been distributed to the shareholders if the expropriation had not taken place. 25 per cent was deducted from this final amount on the grounds of contributory fault.

60. The Tribunal also looked into which of the usual methods used by experts in calculating damages (and the valuation of companies) should be used in this case. The possibilities were: (i) the discount of cash flows (DCF); (ii) the comparable companies' method; and (iii) the comparable transactions method. The Tribunal found that the DCF calculation had been biased and that in the case of Yukos, there was no comparable transaction upon which the calculations could be made. Thus, the Tribunal opted for the comparable companies' method. This method consists of establishing the damages for the destruction of the company for an amount in line with the value of a similar company (which has already been assessed). To such a valuation, a valuation of dividends was added. Such calculations were made both at the date of the expropriation and at the date of the award. The claimants would be entitled to the highest of both figures.

61. The Yukos award followed the yardstick also stated in the other award accepting an expropriation claim under the ECT (the Ioannis Kardassopoulos v. Georgia case). It can therefore be asserted that the method of calculation of damages for expropriation is becoming clearer: the fair market value at the time of the expropriation is a method for calculating the compensation to be paid by a State in the framework of a legal expropriation. Illegal expropriations must be compensated under the principle of full reparation.

VII. CONCLUSION

62. In conclusion, the Yukos cases analysed significant issues under the ECT. Specifically, it established that Article 21 cannot be invoked for those cases in which the host State has not established *bona fide* taxation but rather its intention goes beyond the collection of taxes. It also confirms that the standard for a State to carry out an illegal expropriation under the ECT is high but not impossible to achieve. Finally, it rejects that claimants not acting in good faith in the performance of the investment may be prevented from benefitting from the protection of the ECT although this conduct may certainly lead to a decrease in the amount of the damages to be awarded.