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BY HAND

August 29, 2011

Hon. Harold H. Koh
Office of the Legal Adviser
United States Department of State
Harry S. Truman Building
2201 C Street, NW (Room 6421)
Washington, DC 20520

Re: *Chevron Corp. v. Maria Aguinda Salazar, et al.*, 11 Civ. 3718 (S.D.N.Y.) (LAK) and *Chevron Corp. v. Donziger*, 11 Civ. 0691 (S.D.N.Y.) (LAK)

Dear Harold:

Thank you again for meeting with us on June 28 to discuss the legal proceedings now pending in the Southern District of New York and the Second Circuit. I write to further address certain key issues you raised.

The power of a federal court to preserve the status quo by temporarily enjoining parties properly before it from acting to further a fraud or other wrongful conduct pending a trial on the merits is well established, and unexceptional.[1] Indeed, after our meeting the Lago Agrio Plaintiffs ("LAPs") effectively conceded in their reply brief in the Second Circuit that, specifically in the foreign money judgment recognition context, a preliminary injunction like the one here is proper under the right circumstances: "[T]here may be rare circumstances where a federal court could legitimately enjoin enforcement of a foreign judgment worldwide."[2] Even the LAPs must, in the end, recognize that the propriety of Judge Kaplan's injunction turns on the facts, rather than some broad anti-injunction principle divorced from the

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1 *See* Brief of Plaintiff-Appellee (Chevron) at 35-39, *Chevron Corp. v. Mendoza*, No. 11-CV-00691 (2d Cir. Jun. 23, 2011) ("Chevron Br."); *see also, e.g.*, *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987) ("The power of federal courts to enjoin foreign suits by persons subject to their jurisdiction is well-established."); 43A C.J.S. Injunctions § 113 (2011) ("A court of equity has power to restrain a person over whom it has jurisdiction from instituting a suit or proceeding with a suit in a foreign state[.]"); C.B. De S., *Injunction Against Enforcement of Judgment Rendered in Foreign Country or Other State*, 64 A.L.R. 1136 (2011) ("[T]he power which the court possesses, by virtue of its jurisdiction of the person or the party affected, to enjoin the enforcement of a judgment rendered in another state or country, is not limited to enjoining its enforcement in the state or country in which the court is sitting; and it may under proper conditions grant an injunction operating generally.").

2 Reply Brief of Defendants-Appellants (LAPs) at 9, *Chevron Corp. v. Mendoza*, No. 11-CV-00691 (2d Cir. July 5, 2011).

evidentiary record.[3] And, as previously explained, the evidentiary record of the LAPs' and their agents' wrongdoing is extensive, compelling, and largely unrefuted.

The legal principles supporting the injunction are not aberrant artifacts of U.S. law. On the contrary, most common and civil law systems accept anti-suit injunctions issued to prevent injustice and fraud. Eminent international legal scholars, writing as *amici curiae* supporting Chevron, have explained in detail that jurisdictions such as Germany,[4] France,[5] and the European Union[6] recognize anti-suit injunctions with extraterritorial effect.[7] The *Institut de Droit International*, which gathers leading international legal scholars from around the world, has emphasized that "nothing in [its principles recommending sensitivity to comity when granting anti-suit injunctions] is intended to prevent the grant of bona fide provisional or protective measures by a court having a reasonable connection with the parties or the measures to be taken."[8] The *Institut* expressly lists a party's "unreasonable or oppressive conduct in a foreign jurisdiction" as a legitimate ground for anti-suit injunctions.[9]

This commonality of fundamental principles must inform any proper comity analysis. And comity concerns are further reduced by the specific terms of the injunction, which does *not* reach or interfere with any foreign court. It constrains only parties over which the District Court properly has personal jurisdiction.[10] *See* 43A C.J.S. Injunctions § 113 (2011)

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3 While the LAPs assert repeatedly that the SDNY injunction is "unprecedented" (Brief of Defendants-Appellants at 1, *Chevron Corp. v. Mendoza*, No. 11-CV-00691 (2d Cir. June 2, 2011) ("LAPs Br.")) and "smacks of judicial imperialism" (*id.* at 3), they admit to the existence of routine "appellate review [over] anti-foreign-suit injunctions" (*id.* at 38) and cite case law making clear that "[i]t is common ground that federal courts have the power to enjoin those subject to their personal jurisdiction from pursuing litigation before foreign tribunals." *Quaak v. KPMG Bedrijfsrevisoren*, 361 F.3d 11, 16 (1st Cir. 2004). Indeed, the *Quaak* court *affirmed* an foreign anti-suit injunction. *Id.* at 22.

4 Amici Curiae Brief supporting Plaintiff-Appellee (Chevron) at 23-25, *Chevron Corp. v. Mendoza*, No. 11-1150-cv (L) (2d Cir. July 1, 2011) ("International Legal Scholars Brief").

5 *Id.* at 26.

6 *Id.* at 27-29.

7 The International Legal Scholars Brief was drafted by leading Continental European and North American authorities in the fields of public and private international law: Professors Roger Alford, Julian Ku, Janet Walker, Herbert Kronke (University of Heidelber, previously Secretary General of Unidroit), Burkhard Hess, Christoph Schreuer, and Rudolph Dolzer, as well as Hon. Davis Robinson (Former Legal Adviser to the United States Department of State).

8 *Institut de Droit International*, Second Commission, The Principles for Determining when the Use of Doctrine of Forum Non Conveniens and Antisuit Injunctions is Appropriate, Res. 5 (Sept. 2, 2003), cited in International Scholars Brief at p.13.

9 *Id.*

10 *See Chevron Corp. v. Donziger*, No. 11 Civ. 0691, 2011 WL 778052 at *36-40 (S.D.N.Y. Mar. 7, 2011) ("March 7 Order") (discussing the district court's personal jurisdiction over the LAPs and their allies); In-

[Footnote continued on next page]

("Courts do not, in such cases, pretend to direct or control the foreign court, but the decree acts solely upon the party."). The injunction specifically does not apply to the courts of Ecuador,[11] and there are no other foreign enforcement proceedings underway. Unsurprisingly, no foreign court has expressed any interest in adjudicating the enforceability of the Lago Agrio Judgment. Nothing in the injunction disparages the courts of any other country, or "arrogates" (to use the LAPs' term) to the Southern District of New York any authority over any foreign jurisdiction. Naturally, if the LAPs do—as they have threatened—violate the injunction by seeking recognition in some other country, then that country's courts will have to decide for themselves what force or effect to give to the order from the Southern District. Nothing in the injunction or any other order from the Southern District suggests otherwise.[12]

A foreign court faced with an attempt by the LAPs to enforce the judgment will, however, likely find it *helpful* to have the benefit of Judge Kaplan's careful analysis of the lengthy evidentiary record containing tens of thousands of pages of internal correspondence and hours of video footage showing the LAPs' counsel's abuse and corruption of the Ecuadorian judicial system.[13] For example, in a recent decision from the United Kingdom, a British court considered very favorably a Dutch court's findings that a Russian judgment had been obtained by fraud.[14] In fact, the British court expressly accorded the Dutch findings estoppel effect, binding the judgment creditor with the Dutch holding that the Russian judg-

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[Footnote continued from previous page]
ternational Scholars Br. at 11 ("there is little doubt under the Section 421 standards [of the Restatement (Third) of the Foreign Relations Law of the United States] that adjudicatory jurisdiction is appropriate in this case, given that Defendants-Appellees, through their agents, 'consented to the exercise of jurisdiction.'"); Chevron Br. at 73-83 (discussing personal jurisdiction). *See also* International Scholars Br. at 3 (noting that New York is "the natural forum" for recognition and enforcement of the judgment); (Brief of Plaintiffs-Appellants at 15, *Republic of Ecuador v. Chevron Corp.*, Nos. 10-1020-cv(L), 10-1026-cv(CON) (2d Cir. May 18, 2010) (LAPs' counsel representing to the Second Circuit that New York's recognition law was Chevron's "escape hatch in case of misconduct, fraud, or other problems [in the Judgment]").

11 March 7 Order at *51 (enjoining recognition and enforcement "outside the Republic of Ecuador").

12 Accordingly, Judge Kaplan's injunction differs from those in antitrust and securities cases in which the extraterritorial reach of an order may risk creating a conflict with a foreign law. Even in such cases, Judge Henry Friendly has held that "[t]he problem of conflict between our laws and that of a foreign government is much less when the issue is the enforcement of the anti-fraud sections of the securities laws [because, if] our anti-fraud laws are stricter than [another country's], that country will surely not be offended by their application." *IIT, an Intern. Inv. Trust v. Cornfeld*, 619 F.2d 909 (2nd Cir. 1980).

13 *See Lago Agrio Plaintiffs v. Chevron Corp.*, 409 F. App'x 393, 396, 2010 WL 5151325 at *2 (2d Cir. Dec. 15, 2010) ("[W]e wish to note the exemplary manner in which the able District Judge [Kaplan] has discharged his duties. There is no question but that all concerned, not least this Court, are well served by the careful and comprehensive analysis [of the] District Court[.]").

14 *Yukos Capital v. OJSC Rosneft*, [2011] UKQB 1461 (attached as Ex. 1).

ment was obtained by fraud.[15] Assistance of this nature will be particularly important here because the LAPs intend to bring political pressure to bear on the courts in their chosen enforcement jurisdictions, just as they have pressured the court in Lago Agrio. In their internal strategy memo, *Invictus*, the LAPs' counsel are clear about their intent to rely on high level relationships where the law does not favor them. Noting that they will consider, "Patton Boggs' connection to the sovereign," in their selection of forum, they state: "Patton Boggs' current and former representation of numerous, geographically diverse foreign governments means that barriers to judgment recognition in a given country may not necessarily preclude enforcement there."[16]

If, as the LAPs admit, the law permits cases "where a federal court could legitimately enjoin enforcement of a foreign judgment worldwide,"[17] then surely this is such a case. As Judge Kaplan recognized in his preliminary injunction order, the LAPs' fraudulent procurement of the $18.2 billion judgment was planned and funded by U.S. lawyers operating largely in the United States, and it was spearheaded mainly by U.S. lawyers and their U.S. consultants operating in the United States.[18] Moreover, the question at the core of the dispute before Judge Kaplan is whether or not that judgment can be enforced under New York's Foreign Money Judgments Recognition Act, N.Y. C.P.L.R. art. 53. This is a perfectly appropriate question for a U.S. court sitting in New York to decide.[19] And the unusual facts and record evidence here provide ample ground for limiting the precedential reach of the injunction, to the extent this is a concern. To pick only one key example, it will likely be a relatively rare case in which the foreign judgment creditors have sued the U.S. judgment debtor repeatedly in the U.S. venue, such that the court may permissibly exercise jurisdiction over them in a declaratory judgment action for non-recognition. Perhaps rarer still, will be the case where those same foreign judgment creditors sued the U.S. judgment debtor in U.S. court and argued to the U.S. courts that the New York Recognition Act and the New York venue would properly govern in any recognition action. Ex. 2 (*Republic of Ecuador v. Chevron Corp.*, Nos. 09 Civ. 9958, 10 Civ. 316 (Hearing Tr.) (S.D.N.Y. Mar. 11, 2010) at 83:17-18) (counsel

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15 *Id.* at ¶¶ 1-107.

16 *Invictus* Memorandum, submitted to the Department on June 20, 2011 as Exhibit 2 to Binder 2.

17 Reply Brief of Defendants-Appellants (LAPs) at 9, *Chevron Corp. v. Mendoza*, No. 11-CV-00691 (2d Cir. July 5, 2011).

18 *See* March 7 Order at *7-8, *13-15, *17, *33-34.

19 For these and other reasons, the Supreme Court's recent opinion on the extraterritorial application of U.S. statutes, *Morrison v. Nat'l Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010), is irrelevant here. *Morrison* does not impose any substantive limitations on the well-established judicial powers to enter anti-suit injunctions, nor does it expand "comity" or an enhanced regard for foreign sensibilities. The LAPs cite *Morrison* only for an ancillary point about the differences between foreign legal systems. *See* LAPs Br. at 87 n.187.

for LAPs asserting that the New York Recognition Act "gives [Chevron] the forum and a venue").[20]

I also wanted to update you and your colleagues on a recent event you may find of interest. Judge Kennedy of the U.S. District Court for the District of Columbia has dismissed—*for the third time*—Patton Boggs' case against Chevron and Gibson Dunn. The court initially dismissed Patton Boggs' case on April 19, 2011 (*Patton Boggs, LLP v. Chevron Corp.*, No. 10-cv-1975 (HHK), 2011 WL 1474866 (D.D.C. Apr. 19, 2011)) and then again on July 8, 2011, when it denied Patton Boggs' motion for reconsideration. *Patton Boggs LLP v. Chevron Corp.*, No. 10-cv-1975 (HHK), 2011 WL 2652466 (D.D.C. July 8, 2011). Despite the initial dismissal, which was thorough and unequivocal, Patton Boggs filed another, nearly identical complaint while its motion for reconsideration was pending. *See Patton Boggs LLP v. Chevron Corp.*, No. 11-799 (HHK) 2011 WL 3471072, *2 (D.D.C. Aug. 8, 2011). On August 8, the court dismissed *that* complaint, finding that Patton Boggs' arguments were simply "repackaged" from the earlier proceeding, and its claims barred by issue preclusion. *Id.* at *4. The court noted that it was refraining from sanctioning Patton Boggs for filing its second nearly identical action "only because the bar for the impositions of fees and costs under § 1927 is extremely high." *Id.* at *6.

In closing, Chevron respectfully submits that the interests of the United States and the rule of international law would best be served by the Department's provision of assistance to Chevron in the ways outlined in my June 20 letter. There is no conceivable reason for the Department to intervene in the Second Circuit in a way that would undermine a U.S. court's ability to apply well-settled principles to protect U.S. citizens from vexatious attempts to enforce a judgment obtained through fraud and corruption. Thank you for your consideration.

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20 In our meeting, you mentioned the *Bank of Nova Scotia* cases. We view these as confirming that U.S. courts may properly assert their authority over the foreign elements of disputes before them. In addition, in those cases the court ordered a party to take affirmative acts that potentially violated foreign law—certainly a more intrusive order than the injunction here, which merely prohibits conduct. *See In re Grand Jury Proceedings (Bank of Nova Scotia)*, 740 F.2d 817 (11th Cir. 1984) (affirming $1.825 million fine against bank for failure to comply in good faith with subpoena seeking production of documents held in the Bahamas and the Cayman Islands, notwithstanding evidence that such production violated bank secrecy laws in those jurisdictions); *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384 (11th Cir. 1982) (affirming contempt order against bank for refusing to comply with subpoena seeking production of documents held in the Bahamas, notwithstanding evidence that such production would violate Bahamian law).

GIBSON DUNN

Respectfully submitted,

Randy M. Mastro/cuz

Randy M. Mastro

EXHIBIT 1

Neutral Citation Number: [2011] EWHC 1461 (Comm)

Case No: 2010 Folio 315 and 316

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 June 2011

Before :

MR JUSTICE HAMBLEN

Between :

YUKOS CAPITAL S.a.r.L **(a company incorporated in the Luxembourg)**	**Claimant**
- and -	
OJSC ROSNEFT OIL COMPANY **(a company incorporated in the Russian Federation)**	**Respondent**

Mr Gordon Pollock QC
Mr Jonathan Nash QC and Mr James Willan (instructed by **Byrne and Partners**) for the **Claimant**
Mr Anthony Trace QC
Mr Benjamin John and Mr Ciaran Keller (instructed by **Travers Smith**) for the **Respondent**

Hearing dates: 16,17,18,19 May 2011

Judgment

Mr Justice Hamblen :

Introduction

1. The present proceedings concern the determination of two preliminary issues ordered to be tried by David Steel J in relation to the claims made by the Claimant ("Yukos Capital") to enforce four arbitration awards issued on 19 September 2006 (the "Awards").

2. The Awards were issued by a tribunal acting under the rules of the International Commercial Arbitration Court at the Chamber of Trade and Industry of the Russian Federation. The Defendant ("Rosneft") is the universal successor to the rights and liabilities of the respondent to the Awards, OJSC Yuganskneftegaz, pursuant to an amalgamation that took place on 1 October 2006. The Awards were subsequently set aside by the Russian Arbitrazh Courts, in a series of decisions (the "Annulment Decisions") which Yukos Capital contends were biased and pre-determined.

3. The amount of the Awards was about US$425 million, which was paid in August 2010 following enforcement proceedings in the Netherlands (the "Dutch enforcement proceedings") in which the Amsterdam Court of Appeal determined in a judgment dated 28 April 2009 that the Annulment Decisions should not be recognised as they were the result of a partial and dependent judicial process. Yukos Capital now seeks to recover interest in respect of Rosneft's refusal to satisfy the Awards between 2006 and 2010. The interest claimed (at Russian Central Bank rate) amounts to over US$160 million.

4. The preliminary issues are:

(1) Whether Rosneft is issue estopped by the judgment of the Amsterdam Court of Appeal dated 28 April 2009 (the "Appeal Decision") from denying that the judgments of the Russian civil courts annulling the arbitral awards were the result, or likely to be the result, of a partial and dependent judicial process; and

(2) The issues relating to Act of State/non-justiciability pleaded in Rosneft's Rejoinder (on the assumption that the facts pleaded in the Claimant's Reply are true) and whether paragraph 7(1) of Yukos Capital's Re-Amended Reply should be struck out.

General Background

5. Yukos Capital was a member of the Yukos Group, a well-known Russian group of companies involved in oil production and trading.

6. After the forced break-up of the Yukos Group in Russia, Rosneft acquired the majority of the latter's assets. At that time, Rosneft was wholly owned and controlled by the Russian government; it remains majority owned and effectively controlled by the Russian state.

7. The Awards relate to certain intra-group loans made between Yukos Capital and a (former) production subsidiary of Yukos (OJSC Yuganskneftegaz or "YNG"). By the time that the Awards were made, and the Russian Arbitrazh Courts came to consider them, YNG had been acquired by Rosneft as part of the re-nationalisation of Yukos' assets. The Arbitrazh Courts were therefore considering Awards which required Rosneft (then wholly state owned) to pay Yukos Capital (still controlled by Yukos and its shareholders) a sum in excess of US$400 million.

8. The Awards were claims in respect of loan agreements which YNG (under Rosneft's control) had accepted, before the arbitrators, were valid. The claims were that YNG had not repaid the loans and Yukos Capital sought repayment of the full capital amount and interest. The Tribunal found in favour of Yukos Capital.

9. The Awards were subsequently set aside by the Russian Arbitrazh Courts on Rosneft's application. The challenge was entertained notwithstanding the expiry of the 3 month period in which a challenge could be brought. The Awards were set aside on what Yukos Capital contends were the flimsiest of grounds including, for instance, that Yukos Capital had been permitted to amend its claim and that one of the arbitrators had spoken at a major conference of which Yukos' lawyers were co-sponsors. The decision to set aside the Awards was upheld on appeal, and permission to appeal to the Highest Arbitrazh Court was refused.

10. Yukos Capital contends that the Annulment Decisions should not be recognised by the English court because they were the product of a judicial process that was partial and dependent and therefore offend against English principles of substantial justice.

11. As Lord Lindley held in *Pemberton v Hughes* [1899] 1 Ch 781 at 790:

> "If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice".

See also *Dicey, Morris and Collins on Conflicts of Laws* (14th edition) Rule 45; *Adams v Cape Industries Plc* [1990] 1 Ch 433.

12. In the Dutch enforcement proceedings it has been determined that the Annulment Decisions were the result of a partial and dependent legal process. If, which is the subject of the first preliminary issue, Rosneft is issue estopped from contending otherwise then Yukos Capital contends that it will have essentially established that the Annulment Decisions should not be recognised.

13. If, however, there is no issue estoppel then Yukos Capital wishes to make good its case that the Annulment Decisions were the result of a partial and dependent legal process by reference to evidence to which objection is taken by Rosneft on the grounds of Act of State/non-justiciability. This is the subject matter of the second preliminary issue.

14. In outline, Yukos Capital relies, in part, on the alleged perverse application of Russian law within the Annulment Decisions themselves (Reply, paras. 7(2) to 7(5)), supported by the evidence of its Russian expert witness. But Yukos Capital also seeks to rely on various circumstances surrounding the Annulment Decisions. In particular it alleges:

(1) That there was, from December 2003, a concerted campaign against Yukos with the twin aims of destroying a political adversary (Mr Khodorkovsky) and re-nationalising strategic oil assets (i.e. the assets of Yukos), which involved unfair and partial judicial proceedings in which the courts were led by the executive in numerous respects (Reply, para. 7(6));

(2) That, in any event, there are numerous clear examples of the Russian Arbitrazh Courts treating Yukos Oil and companies associated with it unfairly, and manifestly misapplying Russian law. From that, it can be inferred that Yukos Capital did not receive a fair hearing in the proceedings leading to the Annulment Decisions (proposed amendment to the Reply, para. 6A and Annex 1);

(3) That Yukos is a matter of significant state interest and, in such cases, the judges of Russian Courts are susceptible to improper influences and pressure with the result that such cases are decided in the interests of the state rather than in accordance with the merits of the case (Reply, para. 7(1)).

15. Rosneft contends that each of the allegations in 14(1) to 14(3) above cannot be made because of the Act of State and/or non-justiciability principles (Rejoinder, paras. 6(1).ii and 6(3).i) and, also, that the allegation in 14(3) should be struck out as being

too vague to be tried (Rejoinder, para. 6(1).i). It is those contentions which are the subject of the second preliminary issue.

(1) Issue Estoppel

The English proceedings

16. In the English proceedings Rosneft disputes the claims for interest on the grounds that the Awards have been set aside by the Annulment Decisions. In its Reply Yukos Capital contends as follows:

> "5A. By a final and binding decision of the Amsterdam Court of Appeal dated 28 April 2009 between Yukos Capital and Rosneft, that Court held (as a necessary part of its decision) that the decisions of the Moscow Arbitrazh Court referred to in paragraphs 11 and 12, and the dismissal of the Claimants' appeals from those decisions referred to in paragraphs 13 and 14 were (alternatively, were likely to be) the result of a partial and dependant judicial process. Rosneft had submitted to the jurisdiction of the Dutch Courts by participating in the proceedings. That decision is to be recognised by this Court and gives rise to an issue estoppel binding upon Rosneft to that effect.
>
> 5B. Accordingly, those decisions were tainted by bias (actual or apparent); and/or were procured in circumstances contrary to natural justice and/or substantial justice; and/or were procured in circumstances which deprived the Claimant of a fair trial contrary to Article 6 of the European Convention on Human Rights."

The Dutch enforcement proceedings

Proceedings at First Instance

17. Yukos Capital began the Dutch enforcement proceedings on 9 March 2007 by an application for "exequatur" (i.e. leave to enforce) under Articles 1075 (together with the New York Convention) and/or 1076 of the Dutch Civil Code of Procedure ("DCCP"). At that time, the Awards had not been set aside.

18. The proceedings were brought before the District Court of Amsterdam. On 24 May 2007 the District Court listed a hearing for 11 December 2007. Following the pronouncement of the Russian Annulment Decisions on 18 and 23 May 2007, Yukos Capital submitted a supplement to its application on 4 December 2007. On 7 December 2007, Rosneft submitted its Statement of Defence in which it contested the validity of the arbitration agreement, relied upon the Russian Annulment Decisions and invoked public policy to resist enforcement.

19. A hearing took place on 11 December 2007 with "pleading notes" (i.e. written submissions) put forward by both sides. A judgment was rendered on 28 February 2008. By that decision, leave to enforce was refused. The judge held that an annulment decision by the courts of the seat should only be disregarded in "extraordinary circumstances", including partiality and dependency, and that such circumstances had not been sufficiently asserted.

Proceedings on Appeal

20. The Dutch appellate system permits a complete re-hearing, with admission of new evidence, before the Court of Appeal. In this case, the Dutch law experts agreed that the case was submitted for a full re-assessment on appeal.

21. On 28 April 2008, Yukos Capital lodged an appeal with the Amsterdam Court of Appeal. The Statement of Appeal ran to about 100 pages and went into some considerable detail concerning the break-up of Yukos and the alleged partiality of the Russian courts (in particular, in Yukos-related cases). A Statement of Defence was served on behalf of Rosneft on 28 October 2008.

22. The main relevant rules of procedure and evidence are as follows:

(1) "Exequatur" proceedings do not involve re-assessment of the merits of the underlying claim, but an assessment of whether the requirements for enforcement are satisfied. In particular, if an award has been set aside by a foreign judgment, the court will only grant leave to enforce the arbitral award if the foreign judgment setting aside the arbitral award cannot be recognised in the Netherlands.

(2) In this case, therefore, Yukos Capital was required to prove that the Annulment Decisions were the result of partial and dependent legal proceedings and consequently could not be recognised.

(3) The normal Dutch rules of evidence apply to "exequatur" proceedings. The same rules of procedure and evidence apply on appeal as they do at first instance. The appeal involves a rehearing.

(4) In summary, the main relevant rules of evidence are as follows:

(1) A party bringing proceedings by a writ of summons or application must "contend" the facts on which he relies (and adduce evidence in support). In its statement of defence, the defendant may dispute those facts (and adduce evidence in support).

(2) Parties are entitled to furnish proof "by all means": Article 152 DCCP. Accordingly, a party is entitled to submit witness statements, expert reports and documents. No permission is required to submit written statements or expert reports. As well as submitting documents and written statements, a party can also make an "offer of proof" (e.g. to tender oral evidence from witnesses).

(3) If facts have not been "sufficiently disputed", they are deemed to have been proven under Article 149(1) DCCP, which provides (insofar as relevant) that "facts or rights asserted by one party and not or insufficiently disputed by the other party must be deemed by the court to have been established…".

(4) However, if facts are sufficiently disputed such that they are properly in issue, the party contending them bears the burden of proof under Article 150 DCCP. The court may then issue a decision requiring a

party to tender further proof which he has offered; however, an offer of proof can be ignored if it is not sufficiently specific.

(5) As for the standard of proof, the court is required to be "sufficiently convinced" that the facts contested have been proven. This requires facts to be proven to a "reasonable degree of certainty".

23. The Statement of Appeal was a detailed document. From paragraphs 5 to 157, there was a statement of facts relating to the Yukos affair generally. From paragraphs 158 to 166, Yukos Capital further developed (by reference to documentary evidence) allegations relating to the "bias and dependency of the Russian courts". From paragraphs 182 to 232, there was a specific critique of the Annulment Decisions.

24. Yukos Capital submitted 124 exhibits in support of the facts contended in its Statement of Appeal, including Council of Europe documents; foreign court decisions; reports of state bodies and NGOs; and press reports. The majority of these were exhibited to the Statement of Appeal. Yukos Capital also made a detailed offer of proof (paragraphs 318 to 320 of its Statement of Appeal) specifying what facts it offered to prove by live testimony witnesses and expert if necessary, and the names of those witnesses.

25. Rosneft submitted a lengthy defence. As the experts agreed, Rosneft could have submitted documentary evidence, witness statements or expert reports in opposition to the extensive evidence deployed by Yukos Capital. However, it chose not to submit any documentary evidence in support of its opposition, save for a statement of appeal in other (related) proceedings. It also made an offer of proof in generalised terms: "... Rosneft offers to prove all its contentions by all legal means".

26. Rosneft's trial lawyer, Mr Deckers explained that "Rosneft did not file any expert or factual evidence in relation to Yukos Capital's allegations relating to the bias and dependence of the Russian Courts, which, as set out above, Yukos Capital had asserted in its Notice of Appeal was 'a fact of general knowledge that neither needs to be asserted nor proven' (and in relation to which Yukos Capital had failed to file any factual or expert evidence)".

27. Although it is correct that one ground of appeal (ground 7) contended that such matters are "... fact[s] of general knowledge", that does not reflect the totality of the Statement of Appeal. For instance, ground 6 contended that "... it has sufficiently asserted and motivated why the setting-aside judgments [for] the Dutch court... cannot be a reason for refusing leave to enforce. In any case, the facts and circumstances put forward on appeal show that... exceptional circumstances actually apply in the current case... because they are contrary to principles of due process, because they are judgments of a biased and dependent court and because they are insufficiently motivated" and then, in the commentary, cross-referred to the detailed allegations of fact. Ground 8 contended that: "... Yukos Capital has explained why the judgments by the Russian state court to set aside the awards do not stand up to the test of criticism; this is in any case demonstrated by the facts put forward on appeal...". Yukos Capital also submitted factual evidence on appeal to support the allegations it had made, particularly as regards bias and dependence of the Russian courts, including (in particular) decisions of foreign courts concerning the Russian judicial process and reports of NGOs, although not evidence relating directly to the Judges involved in the Annulment Decisions.

28. The experts agreed that the Amsterdam Court of Appeal did not rule that it is a generally known fact that Russian judges are partial and dependent but made its own assessment based on the documents provided. The experts also agreed that Rosneft had the opportunity to produce evidence, but did not do so.

29. It appears that Rosneft took the view that only evidence directed at the particular judges concerned in the Russian Annulment Decisions could be relevant. As it said in relation to Yukos Capital's offer of proof: "... the offer to furnish proof... is irrelevant [because] none of the facts and circumstances asserted, even if they could be proved, can result in a decision that is decisive for the case...".

30. The hearing of the appeal took place, after several delays, on 13 January 2009.

The Appeal Decision

31. The Court of Appeal considered that the entire matter had been submitted to it for re-hearing: paragraph 3.3.

32. As to the relevant legal principles, the Court of Appeal held that the Dutch court was not compelled to refuse to enforce an award under the New York Convention if the decision annulling that award could not be recognized in the Netherlands. This applies "particularly... if the manner in which said judgment was arrived at does not satisfy the principles of proper administration of justice and for that reason recognition of the judgment would be in breach of Dutch public order. In the event that the Judgments of the Russian civil court to set aside the arbitral awards cannot be recognised in the Netherlands, when assessing the application to grant leave to enforce the arbitral awards, the judgments to set aside these arbitral awards should not be taken into account" (paragraph 3.5).

33. The Court of Appeal said that for this reason it would first assess whether the judgments can be recognised in the Netherlands. It held that (paragraph 3.6):

> "The point of departure in this assessment is that a foreign judgment, irrespective of its nature and purport, is recognised if a number of minimum requirements have been satisfied, including the requirement that the foreign judgment was arrived at following a proper administration of justice. There is no proper administration of justice if it must be assumed that the foreign judgment was rendered by a judicial instance that is not impartial and independent."

34. At paragraph 3.8, the Court of Appeal recited what had "become apparent" from the documentary evidence submitted by Yukos Capital and set out the main elements of the evidence relied upon by Yukos Capital in support of its contention that "setting aside the arbitral awards is part of the actions of the Russian state since the summer of 2003, which are aimed at (a) dismantling the Yukos Group and (b) obtaining control of the assets of the Yukos Group and (c) eliminating its political opponents. According to Yukos Capital, the Russian judiciary is an instrument that is used by the Russian state to pursue these goals" (paragraph 3.7).

35. The Court of Appeal then identified the issue that it "must assess", namely: "in light of the facts and circumstances set out above... whether the decision of the Russian

civil court to set aside the arbitral awards can be recognised in the Netherlands, more in particular whether these judgments were rendered by a judicial instance that is impartial and independent" (paragraph 3.9). The Court of Appeal then recorded the findings that it made "in this respect". In particular:

(1) At paragraph 3.9.1, the Court of Appeal found that "Rosneft and the Russian state are closely intertwined";

(2) At paragraph 3.9.2, the Court of Appeal concluded that "... the case at issue also involves considerable interests that the Russian state considers to be its own";

(3) At paragraph 3.9.3, it held that Rosneft had insufficiently refuted or contested (there was a dispute over the better translation) that "... in cases pertaining to (parts of) the (former) Yukos Group or the (former) directors of this group, which involve state interests that the Russian state considers to be its own, the Russian judiciary is not impartial and independent but is guided by the interests of the Russian state and is instructed by the executive". The Court of Appeal held that this was "properly substantiated" by Yukos Capital, and that Rosneft had failed to advance any concrete facts or to submit documents to shed a different light on that evidence.

36. The Court of Appeal also rejected Rosneft's argument that direct evidence of partiality and dependence of the individual judges concerned was required, pointing out that "partiality and dependency by their very nature take place behind the scenes" (paragraph 3.9.4).

37. The Court of Appeal concluded as follows:

> "3.10. Based on the foregoing, the Court of Appeal concludes that it is [so plausible/likely] that the Russian civil court judgments setting aside the arbitral awards are the result of an administration of justice which is to be qualified as partial and dependent, that it is not possible to recognize those judgments in the Netherlands. This entails that in considering Yukos Capital's application for enforcement of the arbitral awards, the setting aside of that decision by the Russian court must be ignored."

38. Accordingly, having also dismissed Rosneft's other New York Convention defences to enforcement, leave was given to enforce the Awards.

Rosneft's Application for Cassation

39. On 29 June 2009, Rosneft lodged a cassation appeal with the Dutch Supreme Court. A cassation appeal is limited to review, rather than re-hearing; the Supreme Court is bound by findings of fact, and can upset the lower court's decision only on the basis of a misapplication of law or procedural error.

40. The appeal was ultimately rejected on jurisdictional grounds because, in cases of enforcement of an award under the New York Convention, Dutch law does not permit an appeal against the grant of "exequatur".

41. Rosneft advanced various grounds of appeal. In particular, it contended that the evidence submitted by Yukos Capital did not relate to the particular decisions in issue

and, therefore, the Court of Appeal had applied the wrong legal test. However, Rosneft did not contend that the hearing was procedurally unfair in that it was "surprising" or deprived Rosneft of the opportunity to submit evidence according to its tender of proof. As the Supreme Court held: "the exclusion of a legal remedy [i.e. appeal] can be overridden on the grounds accepted in the case law of the Netherlands Supreme Court, but... Rosneft has not asserted such grounds, nor are these encompassed by that asserted by Rosneft in its rebuttal of Yukos Capital's invocation of non-admissibility".

Issue estoppel – the law

42. The core requirements which need to be established to create an issue estoppel (or estoppel *per rem judicatam*) are conveniently set out in Lord Brandon's judgment in *The Sennar (No. 2)* [1985] 1 WLR 490 (HL) at 499:

> "... in order to create an estoppel of that kind, three requirements have to be satisfied. The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent Jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action."

See also *Dicey, Morris and Collins* at para. 14-029.

43. Requirement 1(a) was admittedly satisfied because Rosneft submitted to the jurisdiction of the Dutch court by participating in the proceedings. Requirement 1(b) was admitted. Requirement 2 was not in issue: the parties are identical. The requirements in issue were whether the judgment was "on the merits" (requirement 1(c)) and whether there was an identity of subject matter (requirement 3).

44. Whilst accepting that these were the core requirements for an issue estoppel to arise Rosneft stressed the following features of the approach of the courts to issue estoppel:

(1) When an issue estoppel is said to arise from a foreign judgment, the English court must exercise caution.

(2) The "issue" determined by the foreign court must be a "condition necessary to the cause of action" litigated before the foreign court; a determination of a disputed fact relevant merely to proving the fulfilment of such a condition will not suffice.

(3) It is important that there has been "full contestation" of the relevant issue in the foreign court.

(4) If the issue could be relitigated in the foreign courts, no issue estoppel will arise in English proceedings.

(5) The application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice and the Court can refuse to give effect to a foreign judgment in "special circumstances" where it would be unjust to recognise that decision.

45. A further feature stressed by Yukos Capital was that it is irrelevant that the foreign court decision is wrong in fact or in law and that its procedures or rules of evidence may be different.

(1) The need for caution

46. In this connection Rosneft drew attention in particular to the judgments of Lord Reid and Lord Wilberforce in *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853. Lord Reid said at 917C-919D:

> "It seems to me that there is room for a good deal more thought before we settle the limits of issue estoppel…
>
> I can see no reason in principle why we should deny the possibility of issue estoppel based on a foreign judgment, but there appear to me to be at least three reasons for being cautious in any particular case. In the first place, we are not familiar with modes of procedure in many foreign countries, and it may not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral or obiter. Secondly, I have already alluded to the practical difficulties of a defendant in deciding whether, even in this country, he should incur the trouble and expense of deploying his full case in a trivial case: it might be most unjust to hold that a litigant here should be estopped from putting forward his case because it was impracticable for him to do so in an earlier case of a trivial character abroad, with the result that the decision in that case went against him…the third reason for caution does raise a difficult problem with which I must now deal.
>
> It is clear that there can be no estoppel of this character unless the former judgment was a final judgment on the merits. But what does that mean in connection with issue estoppel?...

47. The speech of Lord Wilberforce was to similar effect at 967A-E:

> "From the nature of things (and here it is right to record Lord Brougham's warning) this [deciding whether there is an issue estoppel], in the case of foreign judgments, may involve difficulties and necessitate caution. The right to ascertain the precise issue decided, by examination of the court's judgment, of the pleadings and possibly of the evidence, may well, in the case of courts whose procedure, decision-making technique and substantive law is not the same as our own, make it difficult or even impossible to establish the identity of the issue there decided with that attempted to be raised, or the necessity for the foreign decision. And I think it would be right for a court in this country,

> when faced with a claim of issue estoppel arising out of foreign proceedings, to receive the claim with caution in circumstances where the party against whom the estoppel is raised might not have had occasion to raise the particular issue. The fact that the court can (as I have stated) examine the pleadings, evidence and other material, seems fully consistent with its right to take a broad view of the result of the foreign decision. But with these reservations, where after careful examination there appears to have been a full contestation and a clear decision on an issue, it would in my opinion be unfortunate to exclude estoppel by issue decision from the sphere of recognition."

48. In *The Good Challenger* [2004] 1 Lloyd's Law Rep 67, the Court of Appeal considered the legal principles applicable to issue estoppel. Clarke LJ, giving the leading judgment, said that one of the "important features of the approach of the courts to issue estoppel" was that at [54]:

> "The courts must be cautious before concluding that the foreign Court made a clear decision on the relevant issue because the procedures of the Court may be different and it may not be easy to determine the precise identity of the issues being determined."

49. Whilst Lord Reid's formulation in *Carl Zeiss* of the reasons for caution when considering whether an issue estoppel arises from a foreign judgment were not exhaustive ("at least..."), it is most likely to be relevant when considering the precise identity of the issue determined, whether it was necessary for the decision and whether there has been a decision "on the merits". Where differences in procedure make these issues difficult to determine then the Court needs to exercise caution. However, if these matters are clear then the need for caution does not arise. As the House of Lords said in *The Sennar (No. 2)*: "... I would say only that the reasons given for the need for such caution do not apply in any way to the present case" (at 500C). Considerations such as that it may have been impractical for a litigant to deploy his full case in an "earlier case of trivial character abroad" are more likely to be relevant to whether there are "special circumstances" which would make it unjust to recognise the decision.

(2) The issue must be necessary for the decision

50. The point of fact or law determined must have been fundamental to the original decision, that is:

> "Even when the court has expressly determined the same issue in the earlier proceedings an issue estoppel will not necessarily result. Only determinations which are necessary to the decision, and fundamental to it, will found an issue estoppel. Other determinations, however positive, cannot. - *Spencer Bower and Handley on Res Judicata* (4th edition) at para. 8.23 (cited by Lewison J in *Meretz Investments NV v ACP Ltd* [2007] Ch 197, revsd. on other grounds [2008] Ch 244).

51. In this connection Rosneft drew attention in particular to the following authorities;

(1) *Thoday v Thoday* [1964] P 181 in which Diplock LJ said at 197-198:

> "The determination by a court of competent jurisdiction of the existence or non-existence of a fact, the existence of which is not of itself a condition the fulfilment of which is necessary to the cause of action which is being litigated before that court, but which is only relevant to proving the fulfilment of such a condition, does not estop at any rate per rem judicatum either party in subsequent litigation from asserting the existence or non-existence of the same fact contrary to the determination of the first court."

(2) *Fidelitas Shipping Co Ltd v V/O Exportchelb* [1966] 1 QB 630, in which Diplock LJ said at 641-642:

> "...while an issue may thus involve a dispute about facts, a mere dispute about facts divorced from their legal consequences is not an 'issue' [for the purposes of issue estoppel]."

(3) *Arnold v National Westminster Bank plc* [1991] 2 AC 93 in which Lord Keith said at 105D-E:

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue".

(4) *Blair v Curran* [1939] 62 CLR 464 in which Dixon J said at 532-3:

> "The distinction between *res judicata* and issue-estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.
> Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue-estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived.....matters of law or fact which are subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to more than steps in a process."

52. Rosneft submitted that these authorities showed that the issue will only be necessary to the decision if is an essential ingredient of a cause of action or claim asserted. This should be considered in the abstract and divorced from the facts of the particular

case, so, for example, a defence unsuccessfully raised gives rise to no issue estoppel on the factual issue thereby raised.

53. I reject this analysis. The issues which are necessary to a decision in a particular case will depend on the matters in issue in that case. It cannot be answered in general or abstract terms. One test of whether a finding is fundamental is whether the decision could stand without that particular finding: see *The UB Tiger* [2007] 1 WLR 2288 at [23]-[24]. If it could not do so then it can be said to be fundamental to the decision.

(3) Full contestation

54. Rosneft submitted that it is necessary that there be "full contestation" of the issue in question. In this connection it relied in particular upon Lord Wilberforce's reference to this in the passage from his judgment in *Carl Zeiss* which is cited above. It also relied upon what was said by Clarke LJ in *The Good Challenger* at [54]:

> "The authorities establish that there must be "a full contestation and a clear decision" on the issue in question. That is made clear in the speech of Lord Wilberforce in the Carl Zeiss case and...was echoed by Lord Brandon in The Sennar (No. 2)..."

55. The reference to *The Sennar (No.2)* indicates that Clarke LJ was not thereby suggesting some requirement which is not there set out. In Lord Brandon's judgment the issue is addressed when considering what is meant by a decision "on the merits" (at 499E-H). In my judgment there is no requirement that the issue be actively contested; it could, for example, have been admitted. If, however, there are good reasons why an issue has not been fully contested that may, as already observed, be relevant to whether there are "special circumstances" which would make it unjust to recognise the decision.

(4) Whether the issue could be relitigated in the foreign courts

56. I accept that if the issue could be relitigated in the foreign courts, no issue estoppel is likely to arise in English proceedings. As stated by Lord Reid in *Carl Zeiss* at 919:

> "When we come to issue estoppel I think that...we should have to be satisfied that the issues in question cannot be relitigated in the foreign country. In other words, it would have to be proved in this case that the courts of the German Federal Republic would not allow the re-opening in any new case between the same parties of the issues decided by the Supreme Court in 1960, which are now said to found an estoppel here. There would seem to be no authority of any kind on this matter, but it seems to me to verge on absurdity that we should regard as conclusive something in a German judgment which the German courts themselves would not regard as conclusive. It is quite true that estoppel is a matter for the lex fori but the lex fori ought to be developed in a manner consistent with good sense."

57. Lord Wilberforce's judgment was to similar effect. He said at 969G-970:

> "The textbooks are in agreement in stating that for a foreign judgment to be set up as a bar in this country it must be res judicata in the country in which it is given...generally, it would seem unacceptable to give a foreign judgment a

> more conclusive force in this country than it has where it was given...Moreover, I think that it is for the defendant, who sets up the bar, to establish the conclusive character of the judgment."

58. Yukos Capital pointed out that this passage relates to res judicata rather than issue estoppel and that the same reasoning does not necessarily apply in the latter case. However, I accept that it generally will do so for the reasons given by Lord Reid.

(5) Special circumstances and the needs of justice

59. Rosneft submitted that the application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice and that it is, in that sense, a flexible doctrine.

60. It placed reliance upon a number of general statements made as to the importance of considerations of justice, and in particular:

(1) Lord Upjohn's statement in *Carl Zeiss* at 947 that:

> "All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."

(2) Lord Keith's statement in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 at 110-111 endorsing the passage from the judgment of Sir Nicolas Browne-Wilkinson, V.-C. at first instance that "the yardstick of whether issue estoppel should be held to apply is the justice to the parties...".

(3) Clarke LJ's statement in *The Good Challenger* at [54] that:

> "The application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice".

61. As Yukos Capital submitted, and Rosneft accepted, considerations of justice are relevant to whether there are special circumstances which mean that it would be unjust to hold that there is an issue estoppel. They are not relevant to whether or not the core requirements of issue estoppel as set out in *The Sennar (No 2)* can be shown to be satisfied. Either those requirements are satisfied or they are not; there is no element of discretion.

62. As stated by Clarke LJ in *The Good Challenger* at [79]:

> "....the correct approach is to apply the principles set out above unless there are special circumstances such that it would be unjust to do so. Whether there are such special circumstances or not will of course depend upon the facts of the particular case."

63. The matter was put as follows by Lord Hoffman in *Carter v Ahsan* [2008] 1 AC 696 at 708D:

> "It is true that the severity of the [issue estoppel] rule is tempered by a discretion to allow the issue to be reopened in subsequent proceedings when

there are special circumstances in which it would cause injustice not to do so: see Arnold v National Westminster Bank plc [1991] 2 AC 93. As Lord Keith of Kinkel said, at p 109, the purpose of the estoppel is to work justice between the parties."

64. *Arnold* was an unusual case. It involved a challenge to a judgment of Walton J on an issue of construction concerning rent review clauses in circumstances where: (i) the judgment had subsequently repeatedly been held to be wrong; (ii) the judgment had been unchallengeable because the judge had himself (wrongly) refused permission to appeal in circumstances where only he could give permission; (iii) the restriction on the right of appeal had only been enacted after the relevant contract had been entered into; (iv) there would be ongoing rent reviews over a period of 20 years; (v) there was no issue of bringing litigation to an end given that each successive rent review could lead to its own arbitration; and (vi) it would favour, rather than prevent, an abuse of process to give effect to the issue estoppel - see *Arnold* at 110-111.

65. In *Coflexip SA v Stolt Offshore MS Ltd* [2004] FSR 34 the Court of Appeal treated this as being a "limited exception" (at [144] and [146]). Further, as stated in *Spencer Bower* at para. 8.33 there have been very few cases where special circumstances have been established. Whilst, as stated in *The Good Challenger*, whether there are special circumstances will depend upon the facts of the particular case, such cases have been and are likely to continue to be rare. As stated in *Spencer Bower* at para. 8.32, the doctrine "must be kept within narrow limits to avoid undermining the general rule and provoking increased litigation and uncertainty".

(6) Irrelevance of criticism of the foreign judgment or procedure

66. "Issue estoppel operates regardless of whether or not an English court would regard the reasoning of the foreign judgment as open to criticism." - *per* Lord Diplock in *The Sennar (No. 2)* at 493; see also *Adams v Cape Industries* [1990] Ch 422 at 569; *The Good Challenger* at [55-57]. As stated in *Spencer, Bower* at para. 1.14: "The decision need not be correct in law or fact"; and *Dicey, Morris and Collins* at 14R-109: "A foreign judgment which is final and conclusive on the merits... cannot be impeached for any error either (1) of fact; or (2) of law".

67. It is not relevant that a foreign court system applies different rules of evidence: so, for instance, it is irrelevant that the foreign court has admitted evidence which the English court would have excluded or *vice versa* (see the cases cited in *Dicey, Morris and Collins* at para. 14-152). Nor does it matter that the foreign court has a different procedure from the English courts unless this deprives the judicial process of the quality of substantial justice. Thus in *Brossiére v Brockner* (1899) 6 T.L.R. 85 at 86 Cave J dismissed a "startling" attempt to impugn the judgment of a French Court of Appeal on that basis: "the only ground for such an allegation [that the proceedings were contrary to natural justice] appears to be that the practice differs from our practice. It is, however, hardly necessary to say that the practice of our Court is not the only or even necessarily the best method of arriving at justice... ".

68. It is also no defence to recognition of a foreign judgment that the foreign court has committed an error of its own procedural rules: "it is clear law that mere procedural irregularity, on the part of the foreign court and according to its own rules, is not such a ground of defence". - *Adams v Cape Industries* at 567.

69. It will, however, be a defence to recognition and therefore to any alleged issue estoppel arising therefrom if the foreign procedure offends against English principles of substantial justice. As Lord Lindley held in *Pemberton v Hughes* [1899] 1 Ch 781 at 790 in the passage already cited: "If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice".

Issue estoppel – the facts

The Dutch law expert evidence

70. I heard evidence from two Dutch law experts: Professor Bartels for Yukos Capital and Professor Jongbloed for Rosneft. Much of their evidence was agreed as set out in their Joint Memorandum. The principal issues between them were:

(1) Whether it was found as a fact that the Annulment Decisions were the result of partial and dependent proceedings and, if so, the basis of that finding.

(2) Whether that finding would have the force of res judicata.

(3) Whether the Court of Appeal decision was a "surprising" decision.

(1) Whether it was found as a fact that the Annulment Decisions were the result of partial and dependent proceedings and, if so, the basis of that finding.

71. It was the opinion of Professor Bartels that the Court of Appeal had found this as a fact pursuant to both Article 149(1) and Article 150 and subsequent Articles. Professor Jongbloed agreed that the Court of Appeal had reached its decision applying Article 149(1), but disputed that it had also done so applying Article 150 and following.

72. Article 149(1) provides that:

> "Facts or rights asserted by one party and not or insufficiently disputed by the other party must be deemed by the court to have been established…"

73. Professor Jongbloed accepted in cross examination that this means that the fact has been "established" which means that it is established to "the full 100%". There are no gradations of findings of fact. He also accepted that facts may be established in different ways: by admission; through lack of contestation under Article 149(1) and, where there is sufficient contestation, on the evidence. All lead to facts being "established" and once a fact has been "established" it makes no difference by which route that has occurred. It is treated as existing – "100%".

74. This is borne out by the Joint Memorandum in which it was stated that:

> "Applying the normal rules of evidence, the Court of Appeal deemed it established that the Russian judgments setting aside the arbitral awards are the result of partial and non-independent legal proceedings…(see Article 149 DCCP…)"

75. Given that it is common ground that the Court of Appeal applied Article 149(1) I find pursuant to the terms of that Article, and on the evidence, that it was found as a fact

that the Annulment Decisions were the result of partial and dependent legal proceedings.

76. In any event, I also accept Professor Bartels' evidence that the Court of Appeal went further and also found that this was proved on the evidence, and not merely through lack of contestation. In para. 3.9.3 it was held that "Rosneft has insufficiently refuted/contested" Yukos Capital's case, which reflects Article 149(1). However, it was then held that Yukos Capital had "properly substantiated its argument". It was then concluded in para. 3.10 that "based on" the foregoing findings it was "so plausible/likely" that the Russian Annulment Decisions were the result of an administration of justice that was to be qualified as partial and dependent, that they could not be recognised. I accept Professor Bartels' evidence that the phrase "so plausible" or "so likely" reflects the application of the Dutch civil standard of proof and supports the conclusion that this is a finding made on the evidence.

(2) Whether that finding would have the force of res judicata.

77. It was common ground between the experts that pursuant to Article 236 DCCP the decision of the Court of Appeal would have the force of res judicata, but Professor Jongbloed suggested that this would not extend to findings that precede the decision. This was disputed by Professor Bartels who drew attention in his supplementary report to the Dutch Supreme Court decision in *Siegers/Citco Bank Antilles N.V.* in which it was held that res judicata extends to the establishment of a fact which "is part of a decision regarding the legal relationship in dispute". It was his opinion that that applied to the finding of partial and dependent legal proceedings in this case.

78. The Supreme Court decision was not addressed or referred to by Professor Jongbloed in his supplementary report, nor were any materials cited in support of his contrary view. In evidence in chief he accepted that it would not be possible to argue again the facts established relating to the partial and dependent legal process given that there had been a Supreme Court decision. In cross examination he expressly accepted that "the finding that the Russian Arbitrazh courts were partial and dependent is res judicata in Holland in other proceedings between these parties".

79. It was therefore ultimately common ground on the expert evidence that the finding that the Annulment Decisions were the result of a partial and dependent legal process would be res judicata in the Netherlands. Rosneft continued to submit otherwise based on arguments that were not set out in Professor Jongbloed's reports or indeed in his evidence. I reject its case on the evidence, including its own expert evidence.

(3) Whether the Court of Appeal decision was a "surprising decision".

80. According to the Dutch Supreme Court a "surprising decision" is involved if the court acted:

> "in breach of the fundamental principle of procedural law that regarding the essential elements on which the court decision is based the parties must have been sufficiently heard and that the parties may not be surprised by a decision of the court that they did not have to allow for in view of the course of the procedural debate."

81. Professor Bartels pointed out that the cases show that it is not readily assumed that a surprising decision is involved and that such cases are rarely successful. In relation to the present case he observed that:

> "The question regarding whether the Russian judgments setting aside the arbitral awards could be recognised in the Netherlands was precisely at stake in the debate because the answer to this question was very important for the decision of whether or not to grant leave to enforce arbitral awards. Yukos Capital submitted a great deal of material to support the argument that the judgments setting aside the arbitral awards were the result of partial and non-independent legal proceedings and Rosneft continually had the opportunity to conduct a defence."

82. As Yukos Capital submitted, nobody could have been in any doubt that the question in issue was whether the Annulment Decisions were the product of a partial and dependent judicial process; Yukos Capital submitted extensive evidence about the Russian judicial process and Yukos-related proceedings generally; and, whilst Rosneft denied the relevance of such facts, it clearly appreciated that that was the factual basis on which Yukos Capital advanced its case. It chose not to engage with that material, and submitted no evidence in response (although it had the opportunity to do so).

83. It was Professor Jongbloed's opinion that the Court of Appeal ought to have ruled that Yukos Capital's case had been sufficiently contested and issued an interim decision allowing Rosneft the opportunity to submit counter evidence and that proceeding to a final decision without so doing involved a "surprising decision".

84. This was disputed by Professor Bartels who pointed out, as was agreed in the Joint Memorandum, that Rosneft had the opportunity to provide evidence. However, it chose not to do so in the light of its assertion that the evidence relied upon by Yukos Capital was irrelevant because it was not direct evidence of partiality or dependence in relation to the Judges concerned in the Annulment Decisions. I find that that was a deliberate and considered decision, most probably made for tactical reasons.

85. In any event, as Professor Jongbloed accepted in cross examination, it could only be a "surprising decision" if Rosneft was in fact surprised. However, there was no evidence from Rosneft or its lawyers that they were in fact surprised in the sense required by the doctrine of "surprising decision". Such a contention formed no part of their appeal to the Dutch Supreme Court (although it would have been a proper ground of appeal) and indeed forms no part of its ECHR case (addressed below). As Professor Jongbloed accepted, all that he could say is that if Rosneft and its lawyers were able to state that they were surprised then there is an argument; but there is no such evidence.

86. I accordingly find that there is no proper evidential basis for the suggestion that the Court of Appeal's decision was a "surprising decision" and that, on the evidence before this court, it was not such a decision for the reasons given by Professor Bartels.

Rosneft's case on issue estoppel

87. Rosneft disputed that there was an issue estoppel on three grounds:

(1) The pleaded issue was not decided.

(2) The "issue" could be relitigated in the Netherlands

(3) The interests of justice

88. I have rejected ground (2) on the Dutch law evidence so that leaves grounds (1) and (3) to be considered.

The pleaded issue was not decided

89. I have already found on the Dutch law evidence that the pleaded issue was found as a fact in the Dutch proceedings and that it would have the force of res judicata in the Netherlands. Rosneft nevertheless submitted that it would not found an issue estoppel for a number of reasons, namely:

(1) The only "issue" decided by the Court of Appeal was that the Awards could be enforced in the Netherlands.

(2) Alternatively, the only further "issue" decided was that the Russian judgments should not be recognised in the Netherlands as a matter of Dutch public order.

(3) Alternatively, there had not been the requisite "full contestation" of the issue.

(4) Alternatively, the position was not clear and therefore, in recognition of the need for caution, no issue estoppel should be found.

(1) The only "issue" decided by the Court of Appeal was that the Awards could be enforced in the Netherlands.

90. This reflected Rosneft's legal argument that issue estoppel only relates to the ingredients of the cause of action or claim viewed in the abstract. It was submitted that under the New York Convention what was required to enforce an award was production of certified copies of the award and the arbitration agreement and that these were the only issues which are necessary or fundamental to a decision to enforce.

91. I reject this unreal submission. The issues which are fundamental to a decision will depend on the issues raised in the case in question. In this case Rosneft's defence to the enforcement claim was that the Awards had been set aside by the Annulment Decisions. Yukos Capital's answer to that defence was that those decisions should not be recognised as a matter of Dutch public order because they were the result of a partial and dependent legal process. Those were the matters in issue in the enforcement proceedings; those were the issues which the court had to decide if it was to reach a decision.

92. The Court of Appeal held that the starting point was that it had to recognise the Annulment Decisions, unless certain minimum requirements were not satisfied; therefore, absent a finding of partiality, the Annulment Decisions would have been recognised. The conclusion that the Annulment Decisions were the result of a partial and dependent judicial process was therefore necessary to the decision not to recognise those decisions and, therefore, to granting leave to enforce (see paragraphs 3.5 – 3.6); the Court of Appeal decision could not stand without that finding of fact.

93. Indeed Professor Jongbloed accepted in his report that the Court of Appeal found it was "necessary" for Yukos Capital to establish that the Annulment Decisions could not be recognised in order to permit enforcement. He confirmed this in cross

examination. He expressly agreed that it was a necessary and essential step to the Court's decision. That was also Professor Bartels' evidence.

(2) Alternatively, the only further "issue" decided was that the Russian judgments should not be recognised in the Netherlands as a matter of Dutch public order.

94. For the reasons already given, and as borne out by the Dutch law evidence, the finding that the Annulment Decisions were the result of a partial and dependent legal process was both necessary and fundamental to the decision. That the Amsterdam Court of Appeal determined that issue in the context of a different legal question (i.e. by reference to Dutch public order) makes no difference. The finding made was not indivisible, as Rosneft suggested; nor does it involve "salami slicing" as warned against by Evans LJ in *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 at 854J-855G. It was the factual basis, and the sole factual basis, upon which Dutch public order was engaged.

(3) Alternatively, there had not been the requisite "full contestation" of the issue.

95. I have already held that in considering whether the core requirements set out in *The Sennar (No.2)* have been satisfied there is no need to prove contestation over and above what is required to prove that there has been a decision "on the merits".

96. As a matter of English law, "a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned" – *The Sennar (No.2)* at 499. The Court of Appeal decision was such a decision.

97. The Dutch law experts agreed that the decision was "on the merits" as to the questions at issue in the Dutch enforcement proceedings (rather than on the underlying cause of action). As stated in the Joint Memorandum: "the Amsterdam Court of Appeal did assess the facts and the law and the Court of Appeal arrived at a final decision by applying the law to the facts". In his supplementary report, Professor Jongbloed said that "the Court of Appeal paid attention per se to the matters that arise in the context of exequatur proceedings and in this sense judged the exequatur proceedings on the merits".

98. In so far as it is necessary to consider the issue of "full contestation" Rosneft relied in particular on the following:

(1) The Court of Appeal's decision was reached as the result of a procedural "deeming" provision of Dutch law (i.e. Article 149(1) of the DCCP).

(2) As a result of the Court of Appeal's failure to give Rosneft the opportunity to put forward evidence, as it had offered, it reached its decision based not only on generalised and conclusory allegations that did not go to the question of actual partiality and dependence of the courts that gave the Annulment Decisions but also on material that was not contested, let alone fully.

(3) Rosneft's appeal to the Dutch Supreme Court position was never heard because it determined, for the first time in this very case, that no appeal was available against a decision of a Dutch court to enforce a foreign arbitral award; in contrast to a decision to refuse enforcement.

(4) For all these reasons, accordingly, Rosneft's evidence contesting even the generalised assertions made by Yukos Capital was never properly aired before the Dutch courts. In such circumstances, it would be wrong for an issue estoppel to be founded on the Dutch decision.

99. As to (1), as I have already found, this was not the only basis of the decision. The Court of Appeal also found that Yukos Capital's case was established on the evidence. In any event, Rosneft had the opportunity to contest Yukos Capital's case and evidence by putting in evidence of its own, but chose not to do so. Rosneft can hardly complain of lack of contestation when that was the result of its own chosen conduct of the litigation.

100. As to (2), that is a criticism of the substantive decision reached by the Court of Appeal, which is an irrelevant matter. In any event, as the Court observed in rejecting Rosneft's argument that direct evidence was required, "partiality and dependence by their very nature take place behind the scenes".

101. As to (3), criticism of Dutch Court procedure is irrelevant. In any event, there had been the opportunity for contestation before two courts. Further, even if Rosneft had been entitled to appeal it could only have appealed on matters of law rather than fact and therefore not on matters relating to the evaluation of the evidence. It could in any case have appealed on the grounds of "surprising decision" but it did not seek to do so.

102. As to (4), the evaluation of the evidence submitted by Yukos Capital was a matter for the Court of Appeal. The lack of contesting evidence from Rosneft was the result of its own choice. It had the opportunity to put forward such evidence as it wished.

103. Even if it be relevant to consider whether there was "full contestation" I accordingly do not consider that any of the matters relied upon by Rosneft provide good reason for refraining from finding that there is an issue estoppel. As Yukos Capital submitted, natural justice does not *require* contested evidence; both parties (admittedly) had the *opportunity* to adduce evidence in any lawful form, including factual and expert evidence; and, as the experts agreed, the Court of Appeal made findings based on the evidence before it.

(4) Alternatively, the position was not clear and therefore, in recognition of the need for caution, no issue estoppel should be found.

104. I do not find the position to be unclear. On the contrary I find it to be clear that the issue was decided by the Court of Appeal; that it was a necessary part of its decision; that it was a decision "on the merits", and that it would have the force of res judicata in the Netherlands. The issues of Dutch law raised have all been resolved clearly in favour of Yukos Capital.

Interests of justice

105. Rosneft submitted that it would be unjust for Rosneft to be shut out from denying that the Annulment Decisions were the result of a partial and dependent judicial process for the following principal reasons:

(1) If Rosneft is issue estopped, the result would be that the English court would, in effect, be bound not to recognise (six) decisions of a friendly sovereign state

on the basis not of the English court's own analysis or consideration of the events that took place before that foreign court, but merely because the courts of a different foreign state had decided (in an action for an exequatur) that it should not recognise those decisions.

However, whether the Annulment Decisions should be recognised in the light of the findings made by the Amsterdam Court of Appeal will be a matter for this court to decide in due course. If it decides not to do so that will be consistent with the decision reached by the Court of Appeal and it is in the interests of finality that the underlying factual issue decided by that court should not have to be relitigated.

(2) This is a case in which the most serious allegations are made against the government and judiciary of a friendly foreign sovereign state. No fewer than six decisions of the Russian courts (including of the Supreme Arbitrazh Court of the Russian Federation), which decisions would *prima facie* themselves give rise to issue estoppels against Yukos Capital, are sought to be impugned as tainted by bias and corruption.

It is correct that serious allegations have been made and found established in the Netherlands proceedings. However, the application of the principle of issue estoppel does not depend on or vary according to the nature or seriousness of the issue involved.

(3) It is said by Yukos Capital that the English court must proceed on the basis that those allegations are correct because of a conclusion reached by a foreign court on the basis of an inference made from a "finding", if it be that, of fact made by virtue of a procedural deeming provision and without any proper analysis or contested evidence.

This issue has already been addressed in paragraph 99 above.

(4) That deemed "finding" was itself based upon the most unsatisfactory indirect and general evidence.

This issue has already been addressed in paragraph 100 above.

(5) The failure of the Court of Appeal to give Rosneft the opportunity to submit the evidence it had offered to submit was unusual and rendered the Dutch decision a "surprising decision".

This issue has already been addressed in paragraphs 80-86 above.

(6) The result was that not only was there no "full contestation", by way of evidence or argument, there was no contestation at all.

This issue has already been addressed in paragraphs 98-103 above.

(7) The Dutch Supreme Court did not even consider, let alone endorse, the Court of Appeal's decision, which had reversed the decision of the first instance court in favour of Rosneft. It merely ruled that the appeal was inadmissible, on the basis that there could be no appeal from a decision enforcing a foreign arbitral

award (notwithstanding that there could be not one but two appeals from a decision refusing enforcement of that same award).

This issue has already been addressed in paragraph 101 above.

(8) An application has been made by Rosneft to the European Court of Human Rights ("ECHR") for breach, among other things, of its right to a fair trial under Article 6 of the European Convention on Human Rights ("the Convention"). It would be a very strong thing indeed, and manifestly not "just", for the English court to find that Rosneft is issue estopped from asserting a matter "determined" against it in foreign proceedings, from which it had no right of appeal, which it is Rosneft's position, and the ECHR may determine, breached Rosneft's fundamental rights under article 6 of the Convention (to which the United Kingdom is, of course, a party).

However, the determination of the preliminary issue cannot be held over pending what may or may not be ultimately decided by the ECHR. The main issues raised by the application concern the asymmetrical appeal system in the Netherlands rather than issues particular to this case, in relation to which any appeal was in any event limited to matters of law or fundamental procedural unfairness (which was not alleged). Even if a breach of article 6 was established it would not follow that the decision offended English principles of substantial justice. That would depend on the nature and gravity of the breach and it would only be in such a case that the English court would not have regard to the Amsterdam Court of Appeal decision.

(9) It is Rosneft's position that very significant parts of Yukos Capital's case in the Dutch proceedings to support the alleged inference that the Russian judgments were the product of a partial and dependent process would not be justiciable in English proceedings pursuant to the Act of State doctrine and the *Buttes Gas* non-justiciability principle.

For reasons set out later in this judgment I reject Rosneft's case on this issue. In any event, even if an English court would not embark on a particular investigation on these grounds it does not follow that the court should refuse to recognise the results of such an investigation where it has been undertaken by a foreign court and the English court is not itself at risk of violating the principles underlying the Act of State/non-justiciability doctrines.

(10) Even if Yukos Capital succeeds in establishing an issue estoppel, this will not be an end of these proceedings. On the contrary, it is part of Rosneft's case that it would in any event be contrary to UK public policy to enforce the Awards, because the Loan Agreements were part of an illegal and fraudulent tax scheme and/or amounted to an abuse of right and/or were sham transactions under Russian law. This will require the Court to explore much the same ground in that context as would have to be explored in relation to Yukos Capital's case relating to the alleged partiality and dependence of the Annulment Decisions.

However, if Yukos Capital succeeds in its issue estoppel argument the battle lines of this litigation will fundamentally change and it is difficult to predict what may or may not ultimately be tried. Further, even if it be the case that

some similar issues or evidence are traversed at trial, the effect of the issue estoppel will be to limit the need for evidence on a major issue. In any event, this is more a consideration of convenience than of justice.

106. I therefore do not accept Rosneft's case of alleged injustice. In any event, whether viewed individually or collectively the factors relied upon do not amount to the requisite "special circumstances" as will exceptionally lead a court to refrain from finding an issue estoppel. In particular, unlike *Arnold*, this is not a case where further material has become available after the event which could not have been adduced by reasonable diligence at the time. On the contrary, all the material upon which Rosneft would wish to rely is material that it had the opportunity to put before the Dutch court, which opportunity it chose not to take, most probably for tactical reasons.

Conclusion on Issue Estoppel

107. For the reasons outlined above I conclude that Rosneft is issue estopped by the Appeal Decision from denying that the Annulment Decisions were the result of a partial and dependent judicial process and shall declare accordingly.

(2) Act of State/Non-justiciability

Outline of Yukos Capital's case

108. Yukos Capital submitted that the issue in this dispute, namely whether the Annulment Decisions were the result of a partial and dependent judicial process, is one which the court can determine and, indeed, that that is not in dispute. As held by Lord Collins in giving the judgment of the Privy Council in *AK Investment CJSC v Kyrgyz Mobil Tel* [2011] UKPC 7 at [101]:

> "there is no rule that the English court... will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence".

109. The underlying issue is therefore what evidence the court is able to receive when determining that question and whether the court must deny itself the ability to receive all relevant evidence. As it submitted, as a general principle, "in the administration of justice nothing is of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that is charged with deciding according to the truth" - *Russell v Russell* [1924] AC 687 at 748.

110. Whilst it accepted that certain limitations apply where the English court is asked to consider allegations involving foreign sovereign states, it submitted that those limitations, like any limitation upon the court's ability to ascertain the truth, should be kept strictly circumscribed, that they should not be allowed to extend beyond the purpose which they serve and that none of them apply in the present case.

111. In particular, Yukos Capital stressed that it does not contend, in these proceedings, that the tax demands or bankruptcy auctions or any other acts which it relies upon were invalid; there are plainly manageable standards to resolve the allegations; and the United Kingdom government has not certified the existence of any embarrassment in the court determining the issues raised.

Outline of Rosneft's case

112. Rosneft contended that the allegations made by Yukos Capital engage the Act of State principle. It submitted that the essence of the allegation requires the English court to adjudicate upon and call into question the legitimacy and legality of the acts of a recognised (and friendly) foreign state or government within its own territory, including the legitimacy and legality of the decisions of its courts. The allegation made is that all the events relating to the Yukos matter (for example, the tax claims, their pursuit through the Russian courts, the resulting judgments of the Russian courts, the enforcement of those judgments under Russian law in Russia by the relevant arm of the executive, the decisions of the Russian courts upholding that enforcement process, the auction of the YNG shares effected by the Russian state, and even extending, so it is alleged, to the Russian decisions annulling the Awards in this case) are part of a governmental and political campaign involving, it is effectively alleged, the expropriation of assets from Yukos by illegitimate and illegal means, arranged and directed by the Russian state or government. Citing the words of Lord Templeman in *Williams and Humbert Ltd. v W & H Trade Marks (Jersey) Ltd.* [1986] 1 AC 368, it submitted that "no English judge could properly entertain such an attack launched on a foreign friendly state".

Act of State/Non-justiciability-the law

113. There are three potentially relevant principles in issue:

(1) The "pure" Act of State principle whereby the court will not adjudicate upon the act of a sovereign government within its territory.

(2) The judicial abstention principle whereby a court will not assess or determine issues which depend upon certain acts of a foreign sovereign, either within or without its territory, if there are no measurable standards by which such assessment or determination can be made.

(3) The political embarrassment principle whereby a court will not determine issues if so to do would embarrass the government of our own country, which issue generally only arises where that embarrassment has been certified by the Foreign and Commonwealth Office.

See, for these distinctions, *Berezovsky v Abramovich* [2011] EWCA Civ 153 at [87] and [100].

"Pure" Act of State principle

114. The development of the principle of Act of State was considered in some detail by Lord Wilberforce in *Buttes Gas and Oil Co v Hammer* [1982] AC 888. He pointed out (at 932) that the first trace of it is to be found in the 17th Century case of *Blad v Bamfield* (1674) 3 Swan. 604 and that it emerged more clearly as a recognition of general principle in the 19th century case of *Duke of Brunswick v Hanover* (1844) 6 Beav 1, (1848) 2 HL Cas. He commented that in that case he found "the principle clearly stated that the courts in England will not adjudicate upon acts done abroad by virtue of sovereign authority". He referred to Lord Cottenham stating the question as being "whether the courts of this country can "sit in judgment" upon the act of a sovereign, effected by virtue of his sovereign authority abroad" as conveyed in the following passage from his judgment:

> "It is true, the bill states that the instrument was contrary to the laws of Hanover and Brunswick, but, notwithstanding that it is so stated, still if it is a sovereign act, then, whether it be according to law or not according to law, we cannot inquire into it".

115. *Duke of Brunswick* was followed by the US Supreme Court in the case of *Underhill v Hernandez* 168 US 250 (1897) in which a much quoted and followed formulation of the Act of State principle was stated by Chief Justice Fuller at 252:

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the Courts of one country will not sit in judgment on the acts of the Government of another done within its own territory."

116. That formulation was adopted by the Court of Appeal in the United Kingdom in a number of cases in the early twentieth century arising out of the 1917 Revolution in Russia. In particular:

(1) *Luther v Sagor & Co.* [1921] 3 KB 532. The issue in this case was whether the defendants had title to a stock of timber which they claimed to have acquired from agents of the Russian revolutionary government which had passed a decree by which the plaintiffs' sawmill and its stock of timber, situated in Russia, had been seized. The Court of Appeal refused the plaintiffs' claim to the timber on the basis that the validity of acts done by a recognised foreign government in respect of its own subjects and in respect of property within its own territory is not justiciable in the English courts. Warrington LJ said, at 548, that:

> "It is well settled that the validity of acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country..."

He then proceeded to quote Chief Justice Fuller's dictum from *Underhill v Hernandez* which had, subsequently, been repeated by the US Supreme Court in *Oetjen v Central Leather Co.* (1918) 268 US 297.

(2) *Princess Paley Olga v Weisz* [1929] 1 KB 718. Like *Luther v Sagor*, this case involved a nationalisation of the plaintiff's property by the new Soviet government. The Princess brought a claim for recovery of those of her possessions nationalised, or damages for their detention or conversion. The Court of Appeal dismissed the action. One ground for doing so was explained by Scrutton LJ, at 723-4, as follows:

> "...if the seizure of this property began without legal justification, or only by revolutionary right, it was ultimately adopted by a Government, which was recognized by the British Government as the lawful Government of the territory in which the property was, and that this was an act of State into the validity of which this Court would not enquire."

Sankey LJ, at 728-30, held that English law was the same as the US law (as expressed in, inter alia, *Oetjen v Central Leather*) and concluded that "...the Princess was dispossessed of this property by an act of State behind which our Courts will not go". Russell LJ agreed and stated at 736:

> "The Court will not inquire into the legality of acts done by a foreign government against its own subjects in respect of property situate in its own territory".

117. In *Buttes Gas* Lord Wilberforce regarded these cases as being "concerned with the applicability of foreign municipal legislation within its own territory, and with the examinability of such legislation" (at 931B).

118. The House of Lords considered the Act of State principle in *Williams and Humbert Ltd.* That case was concerned with actions brought by companies which had been compulsorily acquired by the Spanish government against, *inter alia*, former shareholders who were alleged to have misappropriated millions of dollars while in control of the companies. The former shareholders defended, including on the basis that the expropriatory decrees by which the compulsory acquisition was achieved were discriminatory, specifically aimed at the family of the former shareholders, had been passed with the aim and intention of oppressing the former shareholders and should not be recognised or enforced in England. Having referred to *Luther v Sagor* and *Princess Paley*, Lord Templeman said at 431:

> "These authorities illustrate the principle that an English court will recognise the compulsory acquisition law of a foreign state and will recognise the change of title to property which has come under the control of the foreign state and will recognise the consequences of that change of title. The English court will decline to consider the merits of compulsory acquisition. In their pleadings the appellants seek to attack the motives of the Spanish legislators to allege oppression on the part of the Spanish Government and to question the good faith of the Spanish administration in connection with the enactment, terms and implementation of the law of 29th June 1983. No English judge could properly entertain such an attack launched on a friendly state."

119. In *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 & 5)* [2002] 2 AC 883 Lord Hope described the "general effect" of the Act of State principle in the following terms at [135]:

> "It applies to the legislation or other governmental acts of a recognised foreign state or government within its own territory. The English courts will not adjudicate upon, or call into question, any such acts. They may be pleaded and relied upon by way of defence in this jurisdiction without being subjected to that kind of judicial scrutiny".

120. Rosneft relied on the generalised statements made in these cases as supporting a broad application of the Act of State principle. It stressed phrases such as "sit in judgment" upon; "we cannot inquire into it"; "cannot be questioned"; "would not enquire" into; "behind which our courts will not go"; will not "call into question". It submitted that any inquiry into the lawfulness of the act of a state was barred under the doctrine and that there is no distinction between issues of legality and validity. It also submitted that the definition of what constitutes an Act of State is broad. It covers administrative and executive acts of the state, any act done on the instructions of the executive and may include court decisions.

121. It is, however, to be noted that Lord Wilberforce pointed out in *Buttes Gas* that general phrases such as those used in some of the cases "are not to be used without circumspection: the nature of the judgment, or inquiry or entertainment must be carefully analysed" (933B). Further, on Rosneft's case the Act of State principle is of very wide application. As Yukos Capital submitted, it would effectively mean that an English court could not inquire into an act of a foreign government committed in its territory, for any purpose whatsoever, if that involved any suggestion that the act might be unlawful by the local law or might have been wrongfully procured.

122. Yukos Capital, on the other hand, submitted that the "pure" Act of State principle is a narrow one. It only prevents a court determining the validity or applicability of legislation or executive acts of a sovereign within its own jurisdiction. In this connection Yukos Capital relied upon the general statement of the principle set out by Lord Phillips In *R v Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte (No. 3)* [2000] 1 AC 147 at 286:

> … it is contrary to international law for one state to *adjudicate upon* the internal affairs of another state… Where a state is not directly or indirectly impleaded in the litigation, so that no issue of state immunity as such arises, the English and American courts have none the less, as a matter of judicial restraint, held themselves not competent to entertain litigation that *turns on the validity* of the public acts of a foreign state, applying what has become known as the act of state doctrine (emphasis added).

123. It also relied upon a number of statements in the English case law which describes the principle as relating to the "validity" of sovereign acts, such as: *Luther v Sagor* at 548 *per* Warrington LJ ("…*validity of the acts* of an independent sovereign government… cannot be questioned…"); *Princess Paley Olga v Weisz* ("... that this was an act of State into *the validity of which* this Court would not enquire... "); *Nissan v Attorney-General* [1970] AC 179 at 237G-H; *The Playa Larga* [1983] 2 Lloyd's Rep. 171 at 194; *Dubai Bank Ltd v Galadari* (Morritt J, unreported, 20 June 1990) ("... the court cannot enquire into *the validity of acts* done in a sovereign capacity"); *A Ltd v B Bank* [1997] 1 I.L.Pr 586 ("the principle established in the judgments of the courts in England is limited to the proposition that the courts of England will not adjudicate upon the *validity of acts* done abroad by virtue of foreign sovereign authority") and *JSC BTA Bank v Ablyazov* [2011] EWHC 202 (Comm) at [37] and [55.i] ("the act of state doctrine prevents the court from enquiring into *the validity of a foreign sovereign act*... ") [all emphasis added].

124. It submitted that the principle only applies where the validity of the act done in a sovereign capacity has to be adjudicated upon. Validity in this context connotes determining that the act is of no legal validity or effect. Adjudication in this context means that it is an issue which the court has to decide – the case must "turn on" the issue in the sense that it cannot be decided without the court reaching a determination upon it.

125. Strong support for Yukos Capital's contentions is to be found in the United States Supreme Court case of *Kirkpatrick v Environmental Tectonics Corporation Intl* 493 US 400, 110 Sup Ct. Rptr 701 (1990) which has been applied in two Court of Appeal

decisions. In the *Kirkpatrick* case the Supreme Court was considering a claim for damages by a company against a competitor because the competitor had been awarded a contract by bribing Nigerian state officials. The competitor sought to dismiss the claim by virtue of the Act of State principle. At first instance, the claim was dismissed on the basis that, to succeed, the court would necessarily have to conclude that the Nigerian government had accepted, and been influenced by, bribes. The Court of Appeal reversed that decision. The Supreme Court agreed with the Court of Appeal and held that the Act of State principle did not apply. Scalia J, delivering the opinion of the Court, held that:

> "Act of state issues only arise where a court *must decide* – that is the outcome of the case turns upon – the effect of official action by a foreign sovereign. When that question is not in issue, neither is the act of state doctrine".

126. The Supreme Court stated that the "factual predicate" for the application of the Act of State principle was the court being required "to declare invalid and thus ineffective…the official act of a foreign sovereign".

127. The Petitioners in the case had argued that the facts necessary to establish the claim (bribery of Nigerian government officials) would also establish that the contract was unlawful and invalid under Nigerian law. The Court observed that even if that were so the Act of State principle was not engaged:

> "Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires. Cf. Sharon v Time, In., 599 F.Supp. 538 , 546 (SDNY 1984) ("The issue in this litigation is not whether [the alleged] acts are valid, but whether they occurred")."…

128. The Court concluded as follows:

> "The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."

129. That concluding passage was cited and applied by the Court of Appeal in *A Ltd v B Bank*. Leggatt LJ described it at [14] as having "conclusively summarised the matter". Morritt LJ described it at [31] as being "particularly apposite" to the case. Both applied it and ruled that the Act of State principle did not apply in the case before them because the court was not being asked to adjudicate upon the validity of any sovereign act of the state.

130. The Court of Appeal in *Berezovsky*, at [95], stated that the Court in *A Ltd v B Bank* had "applied Kirkpatrick" "as part of its ratio" and accepted that it was consequently "bound by authority to say that the act of state doctrine only applies to challenges to

the validity of the act of state relied upon, unless there is subsequent higher authority to a different effect".

131. It follows that I am equally bound to hold that "the act of state doctrine only applies to challenges to the validity of the act of state relied upon." In any event, I consider that that approach is consistent with principle. An English court is (in the ordinary case) competent neither to conduct judicial review proceedings in respect of a foreign territory nor to sit as if an international court assessing compliance with international law. So, if a foreign state has expropriated property within its jurisdiction, the English court must (ordinarily) accept that title has passed – whatever the motivation for, or legality of, the foreign act. However, if the validity of the act of the foreign state is not an issue that has to be determined then the act of state principle is not engaged. The principle should not be treated as generally preventing any enquiry into, or criticism of, the behaviour of a foreign state or of its organs where it is relevant to some issue which the court must decide: that is for the English court to deny itself the ability to consider evidence (which is *ex hypothesi* relevant) without good reason.

132. Rosneft submitted that, contrary to what was expressly stated by the Court of Appeal in *Berezovsky*, at [95], the Court of Appeal in *A Ltd v B Bank* had not applied Kirkpatrick "as part of its ratio"; alternatively, if it did, it was *per incuriam*. I reject those arguments. This was part of the ratio in *A Ltd v B Bank,* as authoritatively stated by the Court of Appeal in *Berezovsky*. Further, there is no foundation for the submission that *A Ltd v B Bank* was somehow decided *per incuriam*. In particular, the judgment expressly refers to the *Buttes Gas* case which sets out the English law authorities in considerable detail.

133. Rosneft also stressed the note of caution marked by Longmore LJ in the following passage in *Berezovsky* at [96]:

> "Nevertheless some caution may be appropriate. Lord Hope has, subsequently to A Ltd, in Kuwait Airways reiterated the traditional English law formulation that the court will not "adjudicate upon or call into question" acts of a foreign state within its own territory. If it were an essential part of an English litigant's case that an act of a foreign state was "wrongful" whether by its own law or by international law, and if that was disputed by the other side, it could well be said that that argument (and any decision upon it) was indeed "adjudicating upon or calling into question" that act, even if it was not specifically alleged that the act was "invalid". It is worth remarking that Dicey, Morris & Collins, Conflict of Laws, 14th ed (2006) para 5–045 cites Kirkpatrick without any endorsement and does not even refer to it in the Table of Cases."

134. However, that comment does not alter the fact that the Court of Appeal held that it was bound to hold that "the act of state doctrine only applies to challenges to the validity of the act of state relied upon" and that I am equally so bound. In any event, I consider that it is important that the limits of the Act of State principle are defined with reasonable clarity. Limiting it to necessary challenges to the validity of an act does so. Extending it to cases where such validity is merely called into question, or to wider issues of legality or wrongfulness, makes it of a potentially broad and uncertain application. In this connection it is worth noting that the Act of State principle is a common law doctrine and does not exist in civil law. Further, in a number of cases

where it has been applied the same result can be reached through the application of the ordinary rules of conflicts of laws – *Dicey, Morris and Collins* at para. 5-045.

135. I accordingly hold that the "pure" Act of State principle only applies to challenges to the validity of the act of state relied upon. I further hold that guidance as to what this requires is to be found in the *Kirkpatrick* case, as the Court of Appeal has held. I further hold, in line with that guidance, that as a general rule "validity" in this context means determining that the act is of no legal validity or effect and that "challenges" to such validity means that it is an issue which the court must decide in order to reach its decision in the case before it.

Exceptions to the Act of State principle

136. In *Kuwait Airways*, the House of Lords refused to give effect to an expropriatory decree made by Iraq as part of its invasion of Kuwait. Lord Nicholls held that there was a relevant exception to the Act of State principle (at [16] and [18]):

> "… blind adherence to foreign law can never be required of an English court. Exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court. A result of this character would not be acceptable to an English court. In the conventional phraseology, such a result would be contrary to public policy. Then the court will decline to enforce or recognise the foreign decree to whatever extent is required in the circumstances…
>
> Despite its lack of precision, this exception to the normal rule is well established in English law. This imprecision, even vagueness, does not invalidate the principle. Indeed, a similar principle is a common feature of all systems of conflicts of laws … When deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such a provision. But the principle cannot be confined to one particular category of unacceptable laws. That would be neither sensible nor logical. Laws may be fundamentally unacceptable for reasons other than human rights violations."

137. The relevant cases were considered by Teare J in *BTA Bank*. They include *Oppenheimer v Cattermole* [1976] AC 249, *R v Secretary of State for Foreign and Commonwealth Affairs ex p. Abbasi* [2003] UKHRR 76 and *Jones v Ministry of Interior of Saudi Arabia* [2005] QB 699.

138. His conclusion, which I respectfully accept and follow, was that (at [69]):

> "where there has been a flagrant breach of international law or of human rights the court can in appropriate circumstances consider those breaches as an exception to the act of state doctrine".

139. Relevant considerations in applying this exception include the clarity of the breach, the gravity of the breach and whether manageable standards exist to determine the allegation – see *Kuwait Airways*; *Abbasi*.

140. Whether the country in question is a party to the European Convention on Human Rights may also be relevant. The Court of Appeal in *Berezovsky* recognised, at [99], that there "may be some room for development of the law" in such circumstances. In this connection it is to be noted that in *Government of USA v Montgomery (No. 2)* [2004] 1 WLR 2241, the House of Lords accepted as correct the principle that where there has been a flagrant breach of article 6 "a contracting state may incur responsibility by reason of assisting in the enforcement of a foreign judgment, originating from a contracting or a non-contracting state, which has been obtained in conditions which constitute a breach of article 6".

The judicial abstention principle

141. The basis of this principle of non-justiciability is that, in the case of certain issues involving the acts of foreign sovereigns, either within or outside its territory, the "court has no measurable standard of adjudication or is in a judicial no-man's land" - see *Berezovsky,* at [100].

142. As stated by the Court of Appeal in that case - "a court will not engage in assessing or determining issues which call into question acts of a foreign sovereign, either within or outside its territory, if there are no measurable standards by which such assessment or determination can be made" - at [87].

143. Whilst the judicial abstention principle may overlap with the "pure" Act of State principle it does not reflect, as does the Act of State principle, an obligation to refuse to consider issues, but reflects rather a limitation "... inherent in the very nature of the judicial process..." *Buttes Gas* (at 932). It reflects "... what issues are capable, and what are incapable, of judicial determination" – *Buttes Gas* (at 936). It is, therefore, a principle which turns more on whether the English court can resolve the question, than whether it should do so.

144. The judicial abstention principle was the basis for the decision in *Buttes Gas* itself, as the Court of Appeal pointed out in *Berezovsky*. That was a case which turned upon a dispute between four sovereign states as to their territorial boundaries under international law, and required the Court to determine (i) which state had sovereignty of certain waters in 1969; and (ii) whether another state had exercised sovereignty unlawfully, in breach of international law. Lord Wilberforce (at 938) found that the issues were:

> ... not issues upon which a municipal court can pass... [T]here are... no judicial or manageable standards by which to judge these issues, or to adopt another phrase (from a passage not quoted), the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a

> precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law.

145. The principle therefore raises the question whether the issue is one on which the English court is competent – by reference to judicial and manageable standards – to resolve. As Brooke LJ recognised in *Kuwait Airways* (CA) (at [319]), it is not easy to generalise about which acts engage the judicial abstention principle. However, it is likely to cover "disputes involving sovereign authority which can only be resolved on a state to state level" [ibid] and sensitive issues of diplomacy and controversial issues of international law would be examples.

The political embarrassment principle

146. An English court may refuse to adjudicate an issue that would cause embarrassment to the United Kingdom's foreign relations (*Buttes Gas*; *Berezovsky*; *KNIC*). However, this usually requires a certificate or indication to that effect from the Foreign and Commonwealth Office.

147. In *KNIC,* the Court of Appeal reversed Field J, who had ruled that an allegation that the North Korean state had "fraudulently procured" a North Korean judgment as part of a criminal scheme to generate foreign currency was non-justiciable. Field J had held that the allegation "has an obvious potential for embarrassing the foreign relations between Her Majesty's Government and the Government of N Korea". The Court of Appeal, however, held that the judge should not have ruled the allegations non-justiciable "without some indication from the Foreign and Commonwealth Office that some embarrassment might be caused to the diplomatic relations between the United Kingdom and North Korea if the court did adjudicate on the same" (at [28]).

148. In *Berezovsky*, the Court of Appeal held that the English courts may stay or strike out proceedings "if there is a reason to suppose (usually as a result of a communication from the Foreign Office) that an investigation into the facts of a foreign state would embarrass the government" (at [100]). It observed that: "no doubt there is an area where the English courts and the English executive should speak with a single voice but in such cases it has to be the executive which speaks first" (at [101]).

The Yukos FSA case

149. The case of *R (Yukos Oil Company) v FSA* [2006] EWHC 2044 (Admin) arose out of the decisions (or proposed decisions) of the Financial Services Authority ("the FSA") and the London Stock Exchange ("the LSE") (i) to approve the prospectus submitted by OJSC Rosneftegaz ("Rosneftegaz") and Rosneft regarding the proposed listing and offering of ordinary shares in Rosneft in the form of Global Depositary Receipts ("Rosneft GDRs"), (ii) to approve the application for admission of Rosneft GDRs to the official list, and (iii) to admit Rosneft GDRs to trading on the LSE's International Order Book. Yukos Oil Company ("Yukos") and Stichting Administratiekantoor Yukos International ("Stichting Yukos") applied for permission for judicial review of those decisions.

150. In the course of the decision making processes of the FSA and the LSE, Yukos and Stichting Yukos made submissions and representations as to why the decisions set out

above should not be made. Those submissions and representations are similar to those advanced by Yukos Capital in the present case. Charles J summarised the position at the start of his judgment as follows:

> "5. In 2003, Yukos had a wholly owned subsidiary, referred to as YNG, which owned assets of considerable value. As has been well publicised in this country and a number of other countries, the claimants [Yukos and the Stichting] maintain that dishonestly, unlawfully, and in a manner which constituted a fraud on the shareholders of Yukos, YNG was (a) expropriated from Yukos and (b) acquired by Rosneft. Rosneft dispute this. So YNG, and thus its assets, which were once owned by Yukos, now form a significant element of the value placed on Rosneft for the purposes of the proposed IPO. Unsurprisingly, in the context of these proceedings and more generally the events in Russia which resulted in YNG being acquired by Rosneft, are described differently by the claimants on the one hand, and Rosneft on the other.
>
> 6. In the skeleton argument put in on behalf of Rosneft, the claimants' assertions of dishonest expropriation are described as a conspiracy theory. The three main elements of the expropriation allegation or conspiracy theory are, in my view, accurately summarised in a very truncated form in paragraph 9 of the skeleton argument of Rosneft which reads as follows, with some omissions:
>
> > "There are three main elements. First, it is alleged that a series of arbitrary purported tax assessments were issued against Yukos by the Russian tax authorities and that Yukos's assets were then frozen by the Russian court preventing it from paying those tax assessments. Secondly, complaint is made about the conduct of the bailiff appointed by the Russian court and of the court itself in enforcing the tax liabilities. Thirdly, Yukos complains about the auction of its shares in YNG in respect of which it alleges that there are reasonable grounds to suspect, if not more, that there was a concerted plan to deprive Yukos of its interest in YNG by unlawful means".
>
> 7. On the claimants' case that plan involved the participation of officers of the Russian state and of the Russian courts.
>
> 8. The allegations are, therefore, extremely serious ones and at their heart are allegations against various parts or emanations of the Russian Federation, including its courts."

151. Rosneft submitted to the FSA that it should not take Yukos' submissions and representations into account in reaching its decisions on the basis that the doctrine of Act of State and/or the Buttes Gas principle of non-justiciability precluded it from doing so. The FSA received advice from Michael Brindle QC to that effect (i.e. that it was clear that the Act of State doctrine/Buttes Gas principle of non-justiciability applied to the matters which were the subject of Yukos' submissions and representations). The FSA accepted that advice.

152. Charles J heard Yukos' and Stichting Yukos' application for permission for judicial review at an oral hearing, following directions for the filing and service of evidence and written arguments, including by Rosneft. As set out at paragraph 40, Charles J

had to consider whether Yukos' application raised a sufficiently arguable case to warrant permission being given for a full hearing.

153. In deciding whether or not to grant permission for judicial review, Charles J proceeded on the basis that (i) the underlying issue on arguability was whether the advice tendered to and accepted by the FSA (and the LSE) as to the position as to Act of State, and that that position was clear, was correct or incorrect as a matter of English law, and (ii) he could, and should, decide whether or not the advice given to, and the views taken by the FSA, the LSE and Rosneft, were correct, and clearly correct, at the permission stage of the judicial review proceedings.

154. Charles J concluded that the advice was correct and that the Act of State doctrine clearly did apply to Yukos' submissions and representations. He said:

> "84. It was pointed out to me, and in my judgment correctly, that what this case does come close to is cases in which the principle has in fact been applied. Indeed, in the earlier cases, the same country, in broad terms – and I say "broad terms", in the sense that Russia is included in the title of the country – was involved. A point is made that those cases might have been differently decided if decided today because of the existence and effect of the ECHR. To my mind that does not alter the position as to the nature and extent of, or the application of the relevant principle.
>
> 85. After citation of authority, both from textbook and the authorities themselves – and those citations obviously included citations from Dicey v Morris; Luther v Sagor [1991] 3 QB 523-548; the Central Leather case, as cited in Buttes Gas; and of course Buttes Gas itself, that is Buttes Gas Oil Company v Hammer [1982] AC 888.
>
> 86. Mr Howard...referred me to Williams and Humbert v W&H Trade Marks (Jersey) [1986] AC 368 where Lord Templeman said this, and he refers back to the earlier authorities:
>
> > "These authorities illustrate the principle that an English court will recognise the compulsory acquisition law of a foreign state and will recognise the change of title to property which has come under the control of the foreign state and will recognise the consequences of that change of title. The English court will decline to consider the merits of compulsory acquisition. In their pleadings the appellants seek to attack the motives of the Spanish legislators to allege oppression on the part of the Spanish Government and to question the good faith of the Spanish administration in connection with the enactment, terms and implementation of the law of 29th June 1983. No English judge could properly entertain such an attack launched on a friendly state."
>
> 87. This is a clear exposition of the principle. It has to be read with the acknowledgment that there have been circumstances when it has not been applied. However, it seems to me, on the present state of the authorities, that a first instance judge, having regard to the authority binding upon him on her, would necessarily reach the conclusion that the Act of State [doctrine] does apply to the situation under attack in this case.

....

> In my judgment, on the law as it stands at present, notwithstanding the submissions persuasively advanced on behalf of the claimants, that there is room for development in that law, that the answer is clear and it is that the Act of State doctrine does apply. The range of arguments advanced in the claim form and orally…do not, in my judgment, indicate that the FSA erred in law on this point."

155. Rosneft submitted that Charles J's decision meant that adjudication of the very allegations on which Yukos Capital relies in these proceedings has already been held by the English court to be precluded by the Act of State principle, that the court should similarly so conclude in this case and indeed that to do otherwise would involve an abuse of process.

156. Yukos Capital, however, submitted that the case deals with a completely different situation. The relevant allegation being made in the judicial review proceedings was that the listing on the LSE should not be allowed to proceed because of the existence of criminal activity and because the listing involved laundering the proceeds of crime contrary to the Proceeds of Crime Act 2002. That necessarily required the court to determine the validity of the acts of the Russian Federation: if the assets of Yukos have been validly transferred by the exercise of sovereign authority, they could not be the proceeds of a criminal act. The allegations required a finding that acts of the Russian government within Russia were invalid so as to lead to a finding of criminality.

157. It was therefore an example of the application of the "pure" Act of State principle. Charles J relied on *Williams & Humbert*, which was a case which recognised that the English courts would recognise the validity of decrees made under foreign compulsory acquisition laws without enquiring into the merits or motivation of the acquisition. That is a statement of the "pure" Act of State principle. The application of that principle to a claim in which Yukos sought to have foreign executive acts treated as invalid so that the transfer of title could be treated as a criminal act was a conventional application of that principle.

158. Yukos Capital further submitted that this reading is supported by the reasoning of Sir Anthony Colman in *Berezovsky v Abramovich* [2010] EWHC 647 (Comm).

159. Sir Anthony summarised the *Yukos FSA* decision as follows at [97]:

> "….In that case it was contended that the FSA should be judicially reviewed substantially on the grounds that in the course of its decision-taking as to listing on the LSE it had failed to take into account evidence that the company to be listed had acquired its assets from property and funds wrongfully expropriated by the Russian state. It was held that the FSA was entitled to have regard to advice it had received that the Act of State doctrine precluded investigation of or reliance on that allegation….
> 98….in the Yukos Case it was an essential part of the claimant's case that corporate assets had in truth been wrongfully expropriated."

160. He distinguished the *Yukos FSA* decision from the case before him in a passage with which Rosneft expressed agreement at [168]:

> "The facts alleged in this case therefore differ crucially from the facts before the court in R (on the application of Yukos Oil Co.) v. FSA [2006] EWCA 2044 (Admin) in which the underlying issue involved the allegation that the assets of the company seeking listing *had been* wrongfully expropriated by Russia. This was alleged as an accomplished fact. Whether it was true would have to be determined by the FSA and subsequently the Court."

161. I agree with Sir Anthony's summary and explanation of the issues in the *Yukos FSA* case. The court would have had to decide whether there had been a wrongful appropriation by the Russian government of Yukos' assets. It was the necessity to make such a determination that resulted in the application of the "pure" Act of State principle. Whether the present case necessarily involves the same or a similar determination will be considered further below.

Cherney v Deripaska

162. Yukos Capital placed considerable reliance upon the case of *Cherney v Deripaska (No. 2)* [2009] 1 All ER (Comm) 333. It was a jurisdiction dispute which involved consideration in the context of the issue of forum conveniens of whether substantial justice would or could be done in Russia, which was the natural forum for the claim.

163. In order to resolve that issue Christopher Clarke J considered wide ranging evidence relating to the Russian legal system, much of which was similar to that which Yukos Capital wishes to adduce in this case and which included evidence relating to the Yukos case and the alleged campaign against it. In particular:

(1) He considered expert evidence (summarised at [203]-[204]) of the importance of Mr Deripaska's Rusal group to the Russian state; of the corruption and partiality of the Arbitrazh Courts; and the interference of the executive in judicial proceedings where strategic interests are in play. In this connection, it is to be noted that it was effectively common ground between the experts that the Russian state did use its influence in judicial proceedings where the state had direct and vital strategic interests; and that there were serious irregularities in the "Yukos" case in which a prominent oligarch and critical energy resources were in play: see [218] and [221].

(2) He received evidence of:

(i) miscarriages of justice, unrelated to the parties, including the "Gazprom Media" and "Yukos" cases (at [205]);

(ii) the appointment of an executive-friendly individual, with no judicial experience, as Chairman of the Higher Arbitrazh Court (at [207]);

(iii) examples of meetings between the executive and judges (at [208]-[209]);

(iv) examples of corruption, including those involving the state apparatus (at [210]-[212]);

(v) examples of misuse of criminal prosecutions (at [213]-[215]);

(vi) an instance of demonstrated interference by the Russian government in judicial proceedings in the *Films by Jove* litigation, in which minutes described the "reinforcement of control" of decisions of the courts presiding over the litigation (at [227]-[236]).

(3) He held that it was right "to have some regard to any consensus of academic opinion, based on research and personal familiarity, particularly when backed by specific instances (such as the Yukos and Guzinsky affairs) or determinations of the ECHR or other courts" (at [237]).

(4) He concluded that "the Russian State may well regard the question as to who was beneficially entitled to 20% of Rusal and is beneficially entitled to a 13.2% interest in UCR (even if the interest is held on trust for sale), as sufficiently important to justify encouraging the courts to see their way to rejecting Mr Cherney's claims" (at [246]).

164. In the light of this evidence he concluded that he was "satisfied that, in this particular case, there is a significant risk that Mr Cherney will not obtain in Russia a trial unaffected by improper interference by state actors and that substantial justice may not be done" (at [260]).

165. A challenge to that conclusion was rejected on appeal. The Court of Appeal held that there was cogent evidence to support it. It referred to evidence of misuse of the criminal justice system as a tool of governmental policy (including "...the well-known proceedings against Mr Khordorkovsky of Yukos..." – at [62]), of manipulation of the judicial process ("...the proceedings against Yukos and Mr Khordorkovsky provide one obvious example..." – at [64]) and of the government's willingness to interfere in the judicial process in circumstances where it considers that national interests are engaged ("... it can be said with some justification that the Yukos case involved both what might be described as the re-nationalisation of strategic assets and the damaging of a political opponent..." – at [66]).

166. Yukos Capital submitted that this was an important case, not only because of the overlap with the evidence which it wishes to adduce in this case, but also because it demonstrates the type of evidence on which the court is entitled to rely; the type of findings which the court may make; and the permissibility of making findings that a foreign government has previously engaged in acts which are characterised as improper.

167. Rosneft sought to distinguish this and other cases in which the fairness of a country's judicial system has been evaluated by the English court (as, for example, in extradition cases) on the grounds that the issue in such cases related to the future risk of injustice due to sovereign acts. It did not require determination of whether there had been injustice as a result of past sovereign acts and therefore the Act of State principle was not engaged.

168. This is not a principled distinction. In the forum conveniens/extradition cases the court assesses the risk that substantial justice will not be done by considering past

evidence of substantial injustice. That will involve it considering, evaluating and most probably making findings in respect of such evidence. Indeed if the evidence is particularly compelling the court may conclude not merely that there is a real risk that justice will not be done, but that it will not be done. As stated by Lord Collins in the *AK Investment* case (at [95]):

> "The better view is that, depending on the circumstances as a whole, the burden can be satisfied by showing that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption. Of course, if it can be shown that justice "will not" be obtained that will weigh more heavily in the exercise of the discretion in the light of all other circumstances."

169. In order to conclude that justice may not or will not be done in the foreign court the court may well make, and indeed have to make, findings as to past acts of injustice. Yet on Rosneft's case that would not be permissible. It accepted that the court could explore such issues in the evidence but submitted that it could not make any findings in relation thereto, however compelling the evidence may be. There is no support in the authorities for this distinction and to impose such a dividing line between what the court can and cannot do is unprincipled and impractical.

170. In the *AK Investment* case it was argued that the court could not find whether that "justice will not, or may not, be done because of endemic corruption in the foreign system" (at [96]) because of the Act of State doctrine or the Buttes Gas principle of judicial restraint. This argument was rejected by the Privy Council. It was held that (at [101]):

> "The true position is that there is no rule that the English court (or Manx court) will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence. That, and not the act of state doctrine or the principle of judicial restraint in Buttes Gas & Oil Co v Hammer, is the basis of Lord Diplock's dictum in The Abidin Daver and the decisions which follow it. Otherwise the paradoxical result would follow that, the worse the system of justice in the foreign country, the less it would be permissible to make adverse findings on it."

171. In the forum conveniens cases it is therefore clearly established that the English court can examine whether a foreign court system is lacking in independence notwithstanding that that may involve an examination of acts of the state which result in that lack of independence. It is necessary to examine and make findings on that evidence in order to establish whether substantial justice will not or may not be done. In the context of recognition of judgments the issue is similarly one of substantial justice. In order to determine that question the court should similarly be able to examine whether the foreign court system is lacking in independence notwithstanding that that may involve an examination of and findings in relation to acts of the state which result in that lack of independence.

172. Further, as Lord Collins pointed out, "otherwise the paradoxical result would follow that, the worse the system of justice in the foreign country, the less it would be

permissible to make adverse findings on it" (at [101]).The same would be true if the court was unable to do so in the context of recognition of judgments.

173. I therefore accept Yukos Capital's submission that *Cherney* and like cases provide powerful and principled general support for its case.

174. In the light of the relevant legal principles and the main relevant authorities I will now turn to consider whether any of the particular allegations made in this case are non-justiciable as alleged.

Act of State/Non-justiciability- application to this case

First Allegation: The Campaign Against Yukos

175. Yukos Capital alleges that there was, from 2003, a campaign against Yukos with the aim (in particular) of re-nationalising Yukos' assets and destroying a political opponent which involved interference by the Russian government in the judicial process (Reply 7(6)).

176. It stressed that this is an allegation which the English courts have shown themselves willing and able to investigate as shown by the *Cherney* case and also various extradition cases. For instance, in the Bow Street Magistrates Court, Senior District Judge Timothy Workman (considering an application for extradition in *Government of Russia v Maruev and Chernysheva*) considered that "it was more likely than not that the prosecution of Mr Khordorkovsky is politically motivated" and that "...this particular case... is so politically motivated that there is a substantial risk that the Judges of the Moscow City Court would succumb to political interference...".

177. It further stressed that it is important that it be allowed to show the court the entire story, and all relevant evidence, associated with the dismemberment of Yukos. In summary, its case is that:

(1) Entirely unsubstantiated tax demands were made, after Yukos had previously been given a clean audit by the tax authorities; and that those demands were pursued in such a manner as was intended to impede their discharge by Yukos. Thereafter, the tax demands were upheld by the Russian courts in proceedings which were grossly unfair and involved a manifestly improper application of Russian tax law; and any judge who found in favour of Yukos was summarily removed. Enforcement of the tax demands was then carried out in a manner intended not to maximise recovery, but to ensure that Yukos' assets were transferred at the lowest possible price to Rosneft. This process included enforcing against Yukos' critical production facilities first; the admission by the courts of manifestly unsubstantiated claims by Rosneft; and rigged auctions by the bankruptcy manager. All challenges by Yukos to these manifestly inappropriate acts were dismissed by the courts.

(2) This needs to be put in the political context of the Russian Federation's desire to re-nationalise strategic energy assets and to destroy Mr Khodorkovsky (who was a political opponent) so as to explain why these were not the ordinary application of Russian law and practice uninfluenced by executive inference, but that the Russian government procured each of the steps taken against Yukos Oil.

(3) Against that background and in light of the clear examples of interference by the Russian state in the judicial process, it is unthinkable that the Russian government would have allowed the Russian courts (or that the Russian courts would have dared) to uphold awards worth over US$400 million against Rosneft (i.e. the recipient of Yukos' assets) in favour of, effectively, Yukos' former shareholders, including Mr Khodorkovsky. On that basis, the court will be invited to infer that the Annulment Decisions were the result of a partial and dependant judicial process.

178. Rosneft points out that these are essentially the same allegations as were held to be non-justiciable in the *Yukos FSA* case and contends that they are similarly non-justiciable in these proceedings.

179. The fact that similar allegations have been held to be both justiciable and non-justiciable in other proceedings in this country highlights that the crucial matter is the decision which is required to be made on the basis of the allegations, rather than the allegations in themselves. In the *Yukos FSA* case the decision which was required to be made was whether the assets of Yukos had been wrongfully expropriated. In the present case the decision which is required to be made is whether the Annulment Decisions offend against English principles of substantial justice. For reasons already stated, that is, or is at least analogous to, the purpose for which similar evidence was adduced in the *Cherney* case and the extradition cases.

180. In order to reach its determination in the present case the court will not need to declare that the Annulment Decisions, or any other acts relied upon, were invalid or ineffective.

181. As Yukos Capital submitted, its case involves inviting the court to find only that – as a matter of fact – there was co-ordinated activity aimed at re-nationalising Yukos' assets which, in fact, involved the executive intervening in the judicial process. Whether such intervention was 'valid' or 'invalid', "lawful" or "unlawful", is not an issue which the court will be required to decide. For the purpose of Yukos Capital's case in these proceedings what matters is whether it happened.

182. Rosneft further submitted that even if the case does not "turn on" the issue of validity, nevertheless the allegations relied upon are in themselves non-justiciable. In this connection it stressed in particular the allegations made in relation to "three main elements" of the campaign identified in the *Yukos FSA* case; namely, unwarranted tax assessments; the conduct of the bailiffs and the courts in enforcing those assessments which resulted in forced insolvency, and the rigged auctions. It submitted that these were all acts of state which should not be inquired into. Even if no declaration of invalidity of these acts was sought, Yukos Capital's case nevertheless involved an inquiry into and at least inferential determination of the legality of those acts.

183. This is very similar to the argument rejected by the Supreme Court in the *Kirkpatrick* case. There too it was said that findings would necessarily be made which bore on the legality of the acts of the state. However, the Supreme Court made it clear that that was insufficient to engage the Act of State principle. The "factual predicate" was the need to rule upon that legality and to declare the act invalid or ineffective.

184. The irrelevance of legality/illegality to Yukos Capital's case was well illustrated by the example that it would make no difference to its case if Russian law expressly

permitted the executive to instruct the judiciary how to resolve cases of strategic importance. Despite that being a legal act of the executive, to do so would still offend against English principles of substantial justice.

185. Rosneft's case is also contradictory. It acknowledges that the court can determine whether the Annulment Decisions were partial and dependent. If so, it must similarly have to acknowledge that Yukos Capital can support that case with examples of other partial and dependent decisions. However, inquiry into the subject matter of those other decisions (for example, the tax assessments) is apparently not permissible. So, Yukos Capital can seek to show that the court decisions relating to the tax assessments were partial and dependent, as borne out by the unwarranted nature of the tax assessments, but not invite the court to inquire into the tax assessments themselves.

186. For all these reasons I find that the allegations concerning the campaign against Yukos Capital do not engage the "pure" Act of State principle. In particular, I find that its case does not concern the validity of any Acts of State. I further find that even if the principle extends to wider issues of legality its case does not require the court to decide upon or determine such issues.

187. I further find its case does not engage the judicial abstention principle. It does not involve allegations in respect of which "the court has no measurable standard of adjudication" or which puts it in a "judicial no-man's land".

188. The case does not involve issues of acute political sensitivity, diplomacy or international law, which are beyond the English court's competence as a (domestic) judicial body. The court is well able to assess and determine what, in fact, took place between 2003 and 2006; to analyse (with the assistance of expert evidence) whether those events were consistent with ordinary taxation and judicial processes; and to draw appropriate inferences as to whether the acts were performed as part of a scheme controlled by the Russian government, as Yukos Capital alleges.

189. Further, as Yukos Capital points out, the allegations now being made have already been subjected to judicial scrutiny applying manageable standards as borne out by:

(1) the Yukos-related extradition cases;

(2) the fact that the ECHR is considering very similar allegations under the aegis of the European Convention of Human Rights - see the admissibility of the complaint to the ECHR (*Yukos v Russian Federation* [2009] ECHR 287).

(3) the award issued by a Tribunal (Prof Bockstiegel, Lord Steyn and Sir Franklin Berman QC) in *Rosinvestco UK Ltd v Russian Federation*. In *Rosinvestco*, the Tribunal considered each of the steps on which Yukos Capital now relies (e.g. the tax assessments, the bankruptcy auction, etc). Whilst recognising that it was not an appellate court on Russian law, it considered whether there was a manifest misapplication of Russian law (e.g. paras. 446-455). It drew inferences from the primary facts, e.g. as to what occurred during the bankruptcy auctions. It was able to conclude that the tax assessments upheld by the Russian courts were not *bona fide* (paras. 489-497) and that the auction process (paras. 518-524) was set up under the control of the Russian Federation to bring Yukos' assets under Respondent's control. From its

findings, the Tribunal was able to conclude that the acts of the Russian state were not *bona fide* (para. 567), were not justified by enforcement of tax laws (para. 574), were linked to the strategic objective of returning petroleum assets to the control of the Russian state and to an effort to suppress a political opponent (para. 617), were part of a scheme to deprive Yukos of its assets (para. 620) and (cumulatively) were structured and intended to remove Yukos' assets from its control (para. 621). These conclusions were reached by the application of proper judicial standards, and this is the sort of factual and legal enquiry which the Commercial Court is also well able to perform.

190. Finally, I further find that the allegations do not engage the political embarrassment principle, nor indeed was this alleged. There is no evidence, or certification, that it would embarrass foreign relations if the Russian Federation is found to have engaged in the campaign alleged.

Second Allegation: Specific Instances of Unjust Yukos-related Proceedings

191. By a proposed amendment to its Re-Amended Reply, Yukos Capital seeks to rely on the fact that there are numerous other instances of unfair proceedings or perverse judicial decisions in Yukos-related proceedings being conducted at about the same time before the same courts (Annex 1 to the draft Re-Re-Amended Reply) in support of an inference that the Annulment Decisions are, similarly, likely to be the product of partiality or bias (paragraph 6A). Rosneft resists the amendment on the basis that the allegation is subject to the Act of State and/or non-justiciability principles.

192. There is an inherent contradiction in Rosneft's case on this issue. It accepts that Yukos Capital is entitled to invite the English court to infer partiality or corruption on the basis that the Annulment Decisions themselves involve manifest misapplications of Russian law. If the court is entitled to criticise those decisions without breaching the Act of State and non-justiciability principles, and to conclude that those decisions are the result of partiality or corruption, it is difficult to understand why or how those same principles prevent the court investigating other decisions and drawing the same (albeit a wider) conclusion of partiality or corruption.

193. Rosneft's principal argument to the contrary was that in order for the alleged "inference" to be drawn, Yukos Capital must rely (at least implicitly) on the existence and effect of the "political campaign". It submitted that it is only through the alleged existence and effect of the political campaign that Yukos Capital can explain (i) what it alleges to be the consistently biased and unfair approach of the Russian Arbitrazh Courts to the adjudication of proceedings involving Yukos or companies associated with it, (ii) the reasons for that allegedly biased and unfair approach, and, most importantly, (iii) the reason why it says that the Russian courts are likely to have applied the same allegedly biased and unfair approach in the adjudication of the Russian decisions at issue in this case. Rosneft stressed in particular that Yukos Capital's case that there was a deliberate misapplication of the law highlighted how the court decisions cannot be separated from the political campaign.

194. Annex 1 does not, however, make any allegations in respect of the political campaign. Yukos Capital submitted that this is deliberately so and that the very purpose of Annex 1 is to avoid any enquiry into *why* Yukos was being treated unfairly by the Russian courts, but merely to demonstrate that it *was* being treated unfairly on a

consistent basis. Any number of reasons might explain bias in the courts in favour of the state or state-owned companies. However, what the reason(s) may be does not matter to Yukos Capital's case, which does not require the court to make any such enquiry or finding.

195. I agree with Yukos Capital's analysis of its case. Further, on any view it has an arguable and pleadable case to that effect. Yet further, the premise of Rosneft's challenge to the plea is its contention that the allegations relating to the political campaign are non-justiciable, which I have rejected.

Third Allegation: Bias in Cases Involving Matters of Importance to the Russian Federation

196. Paragraph 7(1) of the Re-Amended Reply alleges that:

> "Judges of Russian Courts are susceptible to improper influences where significant state interests are, or are perceived to be, in issue, whether by way of indications made out of court to Judges…or the tendency of Judges assigned to such matters to act in accordance with the perceived interests of the Russian Federation irrespective of the merits of the case.".

197. Yukos Capital contends that, in cases that involve matters of significant interest to the Russian Federation, the Arbitrazh Courts do not act impartially or independently, but are either instructed by the executive or will (in any event) decide such cases in accordance with the perceived interests of the state. Yukos Capital relies on this both alone and in combination with other facts, such as the extraordinary reasoning in the Annulment Decisions themselves, to demonstrate that the judicial process was partial and non-independent.

198. Rosneft contended that this allegation is also non-justiciable and that in any event it is too vague and unspecific to be triable.

199. As to non-justiciability, Rosneft's principal contention was again that in order for Yukos Capital to make any relevant point or to invite the Court to draw any relevant inference from this allegation, it is necessary for it to invoke the "political campaign".

200. I agree with Yukos Capital that this is not so. For example, it relies, amongst other matters, on the mere fact that a claim of US$400 million against one of Russia's most important state-owned entities, and in effect against the state coffers, would attract state interest. In any event, it has an arguable and pleadable case that it is not necessary to do so. Moreover, the premise of Rosneft's challenge to the plea is its contention that the allegations relating to the political campaign are non-justiciable, which I have rejected.

201. Further, there is no rule against passing judgment on the judiciary of a foreign country: see the *Abidin Daver* [1984] AC 398 and the subsequent decisions reviewed in the *AK Invest* case. As borne out by that case, allegations of systemic partiality or corruption are not subject to the Act of State or non-justiciability principles. It makes no difference in this regard that the reason for the finding of endemic partiality or corruption is the risk of state inference - see, for example, *Cherney*. Moreover, the allegation made is consistent with the factual inquiry conducted and indeed the

finding made by Christopher Clarke J in *Cherney* (partly on the basis of the "Yukos" affair), which was upheld by the Court of Appeal.

202. As to vagueness, I agree with Yukos Capital that it can be determined by reference to expert evidence of those with an intimate knowledge of the relevant court system, documented examples of state inference (such as the *Films by Jove* example) and consideration of features of the relevant judicial system generally (such as the very limited security of tenure in the Arbitrazh Courts). Indeed, this is borne out by the fact that Christopher Clarke J was able to and did consider, and determine, a closely related allegation in *Cherney* (his decision being upheld by the Court of Appeal).

203. If the complaint is simply that Rosneft does not know precisely what matters will be relied upon to establish the general proposition, the answer to that is procedural: for example, further information can be provided or expert evidence exchanged sequentially.

Exception to Act of State principle

204. In the light of my conclusion that the "pure" Act of State principle does not apply it is not necessary to decide whether, if it did, Yukos Capital's case arguably comes within the exception. It was accepted that for this purpose all the allegations made by Yukos Capital must be assumed to be true and that the issue would be whether, on that basis, its claim should be struck out. I would only observe that whilst, as Rosneft submitted, the exception is a narrow one and the only example of its application, the *Kuwait Airways* case, was a case of extreme and unusual facts, the principle does extend to "flagrant" breaches of human rights, and that whether a breach is sufficiently "flagrant" is very fact dependent.

Conclusion on Act of State/non-justiciability

205. I accordingly hold that none of Rosneft's pleas of Act of State or non-justiciability in its Rejoinder are valid, and accordingly decline to strike out the relevant paragraphs of Yukos Capital's pleading. I also grant Yukos Capital permission to re-amend its Amended Reply.

206. In so ruling I should make it clear that the court is not saying anything about the merits of the allegations made by Yukos Capital. That will depend on the evidence although for the purpose of the present application the facts alleged have been assumed to be true. In this connection I was referred by Rosneft to the recent judgment of the ECHR in *Khodorkovsky v Russia* no. 5829/04 and in particular paragraphs 249 to 261 of the judgment. Whilst noting what is there said I do not consider that it bears on the matters which need to be determined for the purpose of the preliminary issues.

Conclusion

207. For the reasons set out above I rule in favour of Yukos Capital on both of the preliminary issues and shall make declarations accordingly.

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REPUBLIC OF ECUADOR,

Petitioner,

v. 09 CV 9958 (LBS)

CHEVRON CORPORATION and TEXACO PETROLEUM COMPANY,

Respondents.

DANIEL CARLOS LUSITANDE YAIGUAJE, et al,

Plaintiffs,

v. 10 CV 316 (LBS)

CHEVRON CORPORATION and TEXACO PETROLEUM COMPANY,

Defendants.

New York, N.Y.
March 11 2010
2:15 p.m.

Before:

HON. LEONARD B. SAND,

District Judge

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(Case called)

(In open court)

THE COURT: Good morning. You may proceed.

MR. ABADY: Good morning, your Honor. Jonathan Abady for the plaintiffs. Thanks for hearing us this morning.

The first critical point that I want to emphasize to the Court is that we represent the plaintiffs, residents and farmers of the Amazon basin community there that are affected by the defendants' practices. We are not the Republic of Ecuador. We have different interests, different claims, different rights and different standing. We are not, contrary to their allegations, stalking horses for the Republic.

When we commenced this suit in 1993, the Republic filed an amicus brief in opposition to our case. I think there

he cited and all the arguments he made are irrelevant. They are inapposite. No U.S. Court has ever permitted a party to do what the defendants are seeking to do here. That is extinguish almost two decades of litigation by referring the matter to an arbitration where the plaintiffs can't be present after they promised that they were going to litigate the case in Ecuador, and the parties have invested almost seven years of litigation in Ecuador. There's no case that stands for that proposition.

THE COURT: May I interrupt --

MR. ABADY: Let me just finish one point first.

THE COURT: No, let me go first.

MR. ABADY: I'm sorry.

THE COURT: Let's assume -- I have no view on it, but let's assume that the 40 specific allegations of Chevron as to why the lawsuit in which your clients are plaintiffs were conducted in a manner which deprives it of due process. Would that negate the validity of any judgment rendered in the litigation to which your clients are parties?

MR. ABADY: I think it would threaten, it would threaten very seriously and provide the defendants an improper opportunity to collaterally attack a judgment that they agreed would be adjudicated and rendered in Ecuador, subject only to --

THE COURT: Chevron is saying that the government of Ecuador, which is a party to the case, has acted in an improper

fashion, has arrested its lawyers, has made statements which impair the independence and integrity of the Court and so on and so forth. Yes? I don't understand why anything which Chevron has done or agreed to prior to these events precludes it from invoking its treaty rights.

MR. ABADY: I have at least two responses to that. The first one is possibly going to irritate the Court, because I will repeat that there is an express provision that is forward-looking, that anticipates and contemplates the very issues that you are describing. And under the unique circumstances of this Court, in a forum non conveniens dismissal, where the Second Circuit said you cannot dismiss this case unconditionally, they must submit to jurisdiction, and as that issue evolved between the Second Circuit and the district court, there was an express agreement that they would adjudicate these claims in Ecuador subject only to 5304. There's no prejudice to them because 5304 gives them the forum and a venue post judgment to have their discussion and their arguments about each one of those issues.

THE COURT: And what is going to happen in the interval of time between the rendition of a judgment, presumably in your client's favor, and proceedings under 5304? What is going to happen?

MR. ABADY: First of all, there is no demonstration that there's even any prejudice to Chevron at this point.

There's no judgment that has been rendered.

THE COURT: Well, wait a minute. Wait a minute. Are you saying that there would be no adverse consequences to Chevron on the rendition of a judgment for billions and billions of dollars against it? Is that what you're saying? It's a ludicrous position, but is that what you're advancing?

MR. ABADY: No, your Honor.

THE COURT: Are you willing to stipulate that you will take no efforts to enforce the judgment until Chevron, the arbitration is completed?

MR. ABADY: No, your Honor. We would not and cannot do that.

THE COURT: Why can you not?

MR. ABADY: Because Chevron, the defendants have agreed that those concerns would be --

THE COURT: Please answer my question. Are you willing to agree that no efforts will be made to enforce any judgment that you receive in the ongoing litigation unless and until Chevron, proceeding expeditiously, either arbitrates or seeks other relief?

MR. ABADY: I don't believe we can make that stipulation, Judge, for the following reason, and I think this gets to the second part of my answer, which is really an examination and an analysis of the claims in the notice of petition. What are they seeking to do in this notice of

petition in this arbitration? If it were a matter disconnected to adjudication of the environmental claims in Ecuador, we would have no process. They're free to have an international BIT arbitration on many issues, but they cannot relitigate after 17 years and after seven years of trial in Ecuador, they can't relitigate those claims. And if you look at the claims in the arbitration, in the notice of arbitration, it becomes clear what this is.

THE COURT: I'm saying, I guess probably for the 20th time in the past two days, that I am not determining the validity of all of their claims. I am not determining whether their claims would justify the relief they are seeking. I am not passing on that. I will say again I am focusing on whether there is a single claim which is arbitrable. And that claim is that the government of Ecuador, a party to the treaty, has acted with respect to the lawsuit in such a way which would constitute a deprivation of due process.

MR. ABADY: And my answer to you, your Honor, with tremendous and sincere respect is that our view, and I want to look at the claims with you based on the ones that you've raised --

THE COURT: I've looked at one claim. Please, don't look at all of the claims. I think there are claims here for relief which I think I categorized as imaginative. Let's assume that at the hearing, at the arbitration, Chevron