ARBITRATION WITHOUT PRIVITY AND RUSSIAN OIL: THE YUKOS CASE BEFORE THE HOUSTON COURT

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"This is a very large case. . . . [I]t is the largest bankruptcy case ever filed in the United States."\(^1\)

"Yukos Oil Company Chief Executive Officer, Steven Theede, said . . . 'We believe the merits of our case are strong and simple. Our assets were illegally seized. We want them back and/or damages paid.'"\(^2\)

1. FACTUAL BACKGROUND

The Yukos Oil Company was established in Russia in 1993 as a result of the privatization of one of the foremost state-owned oil and gas companies. Yukos experienced fast growth during the 1990s due to the entrepreneurial inventiveness of Mikhail Khodorkovsky.\(^3\) In order to attract foreign partners after the ruble crisis of 1998, Khodorkovsky changed Yukos into a multinational

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enterprise by publishing the financial information and the accounts of Yukos according to the international standards, as well as by revealing the identities of its shareholders.4 By employing managers and directors from several Western oil companies he formed the management of Yukos and assured himself of control over the group through indirect participations and trusts.5 The following data help illustrate the size of Yukos: approximately 600 subsidiaries, of which 200 are active; an average daily output of more than 1.6 million barrels of oil in 2003; $2 billion in dividends distributed that same year; and $18 billion in assets.6

Khodorkovsky's political ambitions and huge fortune fueled the Kremlin's hostility. As a result, Platon Lebedev, Khodorkovsky's partner and president of Menatip Group, Yukos's major shareholder, was arrested by Russian police in the beginning of July 2003. He was suspected of having illegally acquired a stake in a state-owned fertilizer company, Apatit, in 1994.7 In the early morning of October 25, 2003, before he could take off in his private jet from a Siberian airport, Khodorkovsky was arrested and immediately transferred to Moscow, where he was charged with fraud and tax evasion. Investigations continued during the subsequent months, even abroad.8 In the spring of 2004, the

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4 For a case study on this topic, see Richard P. Cunningham, Jr., Corporate Governance and Foreign Investment Nightmares in Russia: A Case Study of Unified Energy Systems, 42 VA. J. INT'L L. 889, 891 (2002).

5 On this topic, see Torrey Clark, Russia's Corporate Values, FOREIGN POL'Y, Nov.–Dec. 2001, at 90, 91.


7 On the arrest of Khodorkovsky and its effects on the market value of Yukos's shares, see Legal Briefs: Investigation of Oil Tycoon Seen as Test for Russia, BROWARD DAILY BUS. REV., July 25, 2003, at 13. The charges against Mr. Lebedev concern the auction of the fertilizer producer, Apatit. In 1994, the Russian government held a public auction in order to privatize twenty percent of Apatit's stock. It is the opinion of prosecutors that the four companies that took part in the auction were mere shell companies, created by Lebedev and Khodorkovsky in order to simulate the competition required by the law.

8 In March 2004, the Swiss authorities, according to a request by Russian prosecutors, froze about $4.8 billion in five different bank accounts that belonged to twenty Yukos managers, such as Khodorkovsky and Lebedev. See Andrew Jack & Haig Simonian, Prosecutors Claim $5bn of Yukos Assets Frozen, FIN. TIMES (London), Mar. 12, 2004, at 27 (detailing the amounts frozen and the alleged crimes of Yukos executives); Susan B. Glasser, Russia Says Imprisoned Tycoon's Swiss Assets Are Frozen, WASH. POST, Mar. 12, 2004, at A18 (discussing the implications of the seizure of Yukos's assets for the Russian government and
Russian Ministry of Finance made several assessments for amounts due to the tax authorities from previous years; at the same time, from April to June of 2004, almost all of Yukos’s assets (e.g., shares of subsidiaries, bank accounts, real estate) were frozen by the Russian authorities.

On November 19, 2004, the bailiffs of the Ministry of Justice announced that an auction would take place on December 19. The aim was to recover Yukos’s assets by auctioning off 76.79% of Yuganskneftegaz (“YNG”) stock. YNG, entirely owned by Yukos, manages 60% of the production of the group. According to the notice of sale, the final bidder could have acquired this colossus of oil production by paying only half of its actual market price.10

With the purpose of halting the YNG auction, on December 14, 2004, the managers of Yukos filed a voluntary bankruptcy petition before a bankruptcy court in Houston, Texas. In this petition they asked the court to issue a temporary restraining order to stop the auction and protect Yukos’s bankruptcy estate. On December 16, 2004, Judge Clark of the Bankruptcy Court for the Southern District of Texas granted the plaintiff’s motion, given that “participants in international commerce . . . need to have an expectation that when they invest in foreign enterprises they may do so without fear that their investments may be the subject of confiscatory action by agencies of the foreign government.”12 With this order Judge Clark

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10 The initial offer for YNG’s shares was $8.65 billion. Id. at 12.

11 In re Yukos Oil Co., 321 B.R. 396, 399 (Bankr. S.D. Tex. 2005). The simple filing of a petition before a bankruptcy court creates a procedural situation called an “automatic stay,” and accordingly all the actions filed by the creditors are automatically suspended. As intended by Congress, the automatic stay aims to protect both the debtor, who in this way can escape the creditors’ financial pressure, and the creditors, who are protected by the par condicio. H.R. REP. No. 95-595, at 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97. The automatic stay is not permanent and can be revoked by the judge according to specific provisions of law. See generally Frank R. Kennedy, The Automatic Stay in Bankruptcy, 11 U. Mich. J.L. Reform 175, 177 (1977) (explaining the importance of the use of a stay in bankruptcy proceedings). The automatic stay has applied to Yukos since the filing of the voluntary petition in the Houston court on December 14, 2004.

12 Erin E. Arvedlund & Simon Romero, Kremlin Reasserts Hold on Russia’s Oil Published by Penn Law: Legal Scholarship Repository, 2014
forbade the various involved entities from taking part in the auction: the monopolist company Gazpromneft; Deutsche Bank, BNP Paribas, and JP Morgan (banks intended to finance the entire operation); as well as “those persons in active concert or participation with them.”

The Houston court found jurisdiction over Yukos based on three issues: the nationality of its Chief Financial Officer; the fact that Yukos had bank accounts in Texas; and finally, the fact that a substantial fraction of Yukos stock (more than 15%) was the property of American institutional investors. Thus the court concluded that “the Debtor maintains significant assets in the Southern District of Texas, and that Debtor has standing to be a debtor under Chapter 11 of the Bankruptcy Code . . . . The Court concludes that the instant case was properly commenced.”

In fact, in the United States, a foreign entity can be qualified as a debtor according to the Bankruptcy Code provisions and be subject to bankruptcy proceedings before U.S. courts if it has assets within the territory of the United States. Federal courts have exclusive authority on sentencing in regard to bankruptcy proceedings, and have no discretion when applying 11 U.S.C. § 109(a): “there is ‘virtually no formal barrier’ for these courts to establish their jurisdiction over foreign debtors, and they have no


14 Id. at 132. The amount of $2 million had been deposited into a bank account at the Southwest Bank of Texas; one must add to this sum $6 million managed by Yukos lawyers. These financial data have been ascertained through the affidavit of Yukos’s Chief Financial Officer, Mr. Misamore. On December 22, 2004, Yukos had deposits of almost $22 million in this bank account.

15 Id.


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discretion to determine whether a debtor does or does not have properties in the United States.\textsuperscript{19} Once it has been demonstrated that the debtor has properties within the territory of the United States, the case cannot be dismissed for lack of jurisdiction because "bank accounts constitute property in the United States for purposes of eligibility under section 109 of the Bankruptcy Code."\textsuperscript{20} The quantity of money contained in the bank accounts is irrelevant, since even one dollar can be sufficient.\textsuperscript{21}

Furthermore, the Bankruptcy Code provides for the bankruptcy to be extended to all the debtor's assets and properties, "wherever located."\textsuperscript{22} This means that one must consider the

\textsuperscript{19} Concerning the discretionary application of section 109(a) of the Bankruptcy Code, the point is that:

[T]he statute does not appear to be vague or ambiguous, and it seems to have such a plain meaning as to leave the Court no discretion to consider whether it was the intent of Congress to permit someone to obtain a bankruptcy discharge solely on the basis of having a dollar, a dime or a peppercorn located in the United States. 


\textsuperscript{20} \textit{In re Global Ocean Carriers}, 251 B.R. at 39.


In many other provisions of the statute the word "property" will be found; and it is apparent that Congress intended that the United States courts should deal with and administer the estates of bankrupts if property existed and was found within our borders. Starting with this premise, it logically follows that Congress did not mean to exclude from the operation of the act those persons who are aliens, whether living here or abroad, who have property within the United States.


\textsuperscript{22} According to the Bankruptcy Code, "[t]he commencement of a case... creates an estate" that "is comprised of all the following property, wherever located and by whomever held." 11 U.S.C. § 541 (2000). "A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter." 11 U.S.C. § 301(a) (2000). Since all the debtor's assets pass to the bankruptcy estate automatically, it is enough that a petition is filed by a debtor.
procedure as covering all of Yukos’s assets, even those situated in Russia, including the YNG shares, which were auctioned as previously mentioned. Finally, one can argue that the basis of a court’s jurisdiction in this type of situation lies in the need to protect the bankruptcy estate from imminent damage, i.e., the dismemberment of Yukos’s major subsidiary.

Notwithstanding the court’s decision, the Russian government held the auction as scheduled. Gazpromneft was expected to be the winner; however, two days before the auction, a previously unknown corporation named Baikalfinansgroup applied to participate in the auction. On December 19, 2004, Baikalfinansgroup was the highest bidder and purchased YNG for the amount of $9.3 billion. According to the press, Baikalfinansgroup acted on behalf of Gazpromneft, who was subject to the Houston court’s restraining order.23 Following this, Yukos presented a report to the court alleging a violation of the restraining order by Gazpromneft.24

On December 28, 2004, the defendant, Deutsche Bank, filed a motion to dismiss the case. In this motion, Deutsche Bank first argued that Yukos was not eligible as a debtor according to the Bankruptcy Code; second, that Yukos filed a voluntary petition in bad faith with the sole purpose of relitigating before a U.S. court the disputes pending before the Russian courts; and finally, that the continuation of the process would have been obstructed by the application of the doctrines of forum non conveniens, comity, and act of state.25 Obviously, Yukos challenged these claims,

The federal court before which the petition is filed “shall have exclusive jurisdiction . . . of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.” 28 U.S.C. § 1334(e) (2000) (emphasis added).

23 Baikalfinansgroup was found to be domiciled in an office of Gazprom. Moreover, a few days after the auction, Baikal was merged with Rosneft, a state-owned company, which at the time of the auction was supposed to be merged with the oil and gas monopoly Gazpromneft. It is the opinion of some financial analysts that Baikal has been used by Gazpromneft, subject to the Houston court’s order, and the Russian government in order to renationalize Yukos’s productive units. Yukos’s CEO publicly declared that he intends to sue all of the entities involved in the YNG auction for $20 billion. Benoit Faucon, Yukos CEO: Finalizing New Strategy After Yugansk Sale, Dow Jones Newswire, Feb. 1, 2005, http://jpmc .lonebuffalo.com/story.cfm?story_id=948777 (last visited Jan. 25, 2006).


25 Deutsche Bank AG’s Motion to Dismiss Chapter 11 Bankruptcy Case at 9-

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presenting a detailed plan of reorganization. On February 24, 2005, after a two-day hearing, Judge Clark of the Houston bankruptcy court granted Deutsche Bank’s motion and dismissed the case, terminating the dispute based on § 1112(b) of the Bankruptcy Code.

2. ARBITRATION AND RUSSIAN LAW

Along with the bankruptcy petition, Yukos simultaneously filed a motion to force arbitration with the Russian Federation. According to the plaintiff’s motion, the Russian Federation’s attack against Yukos “violate[d] Russia’s foreign investment laws, which provide for international arbitration of investment disputes, as well as Russia’s obligations under its treaties and international law.”

Which laws and international treaties cited by Yukos were supposed to be the basis for referring the dispute to arbitration? How could the dispute be settled through arbitration without an arbitration agreement between Yukos and the Russian Federation?

26 See Press Release, Yukos Oil Co., Yukos Oil Company Comments on Ruling of U.S. Bankruptcy Court (Feb. 24, 2005) (explaining the merits of their position in reaction to the dismissal).
27 In re Yukos Oil Co., 321 B.R. 396, 410–11 (Bankr. S.D. Tex. 2005). In its judgment, the court applied § 1112(b) of the Bankruptcy Code, which justifies the dismissal of the case “for cause,” i.e., for a specific reason provided by the law. 11 U.S.C. § 1112(b) (2000). However, the court did not refer to any of the causes listed by § 1112(b), but instead referred to the intention of Congress. According to Congress, the list of causes is not exhaustive. In re Yukos Oil, 321 B.R. at 410 (citing H.R. Rep. No. 95-595, at 406 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6362). Thus, the totality of circumstances convinced Judge Clark to grant Deutsche Bank’s motion to dismiss. Id. at 411.
29 Motion to Compel Arbitration, supra note 28, at 2.
First of all, with regard to Russian domestic law, one must note that the major problem encountered by foreign investors in the oil and gas sectors comes from the transition (still in progress) of the old Soviet regime to the new market economy. In fact, the Russian market presents several evident risks related to: on the one hand, economic matters, such as the instability of the system and the persistent power of state-controlled monopolies; and, on the other hand, political and juridical matters, such as the deficiency of detailed regulations, the lack of antitrust rules, and the uncertainty of laws.\textsuperscript{30} The first laws enacted by the Russian Parliament ("the Duma") at the beginning of the 1990s inadequately protected foreign investors, even though those laws were formally intended to attract foreign capital, because there was strong support for maintaining the old sector monopolies.\textsuperscript{31} Although celebrated as a

\textsuperscript{30} See Arina Shulga, Comment, Foreign Investment in Russia's Oil and Gas: Legal Framework and Lessons for the Future, 22 U. PA. J. INT'L ECON. L. 1067, 1069 (2001) ("[T]he structural risks to foreign investors include, but are not limited to, the present control of Russia's oil and gas sectors . . . by former oil and gas ministers, the existence of an oil pipeline monopoly . . . and the lack of antitrust measures").

\textsuperscript{31} See David F. Black, So You Want to Invest in Russia? A Legislative Analysis of the Foreign Investment Climate in Russia, 5 MINN. J. GLOBAL TRADE 123, 123-57 (1996) (describing the risks foreigners take when investing in Russia given the statutes in place); see also Shulga, supra note 30, at 1079-103 (describing the privatization of Russia's oil sector, and the regulatory framework for foreign investment that followed). Some laws enacted aimed to provide a minimum standard of support against political risks but failed to offer adequate protection for foreign investment. E.g., Federal'niy Zakon o RSFSR ob Inostrannix Investitsiyax v RSFSR [Law on Foreign Investments in the RSFSR], Vedomosti S"ezda Narodnykh Deputatov RSFSR i Verkhovnogo Soveta RSFSR [Ved. RSFSR] [Bulletin of the Congress of People's Deputies of the Russian Soviet Federal Socialist Republic and Supreme Council of the RSFSR] 1991, No. 29, Item 1008, translated in COLLECTED LEGISLATION OF RUSSIA bk. XII.A.1-7, at 15 (trans. W.E. Butler, 1993) [hereinafter 1991 Law on Foreign Investment]. The 1991 Law on Foreign Investment required some foreign investment projects to register with and get authorization from the Ministry of Finance. Id. art. 16. Article 7 of that law only provided a generic guarantee against nationalizations and expropriations, exempting protection in exceptional "cases when such measures are adopted in social interests." Id. art. 7. Article 10 only allowed foreign corporations to repatriate dividends after paying high taxes. Id. art. 10. For a global view of these issues, see Robert Starr, Foreign Participation in Oil and Gas Projects in the Former Soviet Union: A Legal Perspective, 12 J. ENERGY & NAT. RESOURCES L. 442, 442-51 (1994). There are similar gaps in other laws, including one forcing foreign investors to obtain government licenses taxed at a high rate. See Law of the Russian Federation on the Subsoil, Ved. RSFSR 1992, No. 16, Item 834, translated in COLLECTED LEGISLATION OF RUSSIA bk. VII.2-4, at 1 (trans. W.E. Butler, 1993) [hereinafter 1992 Law on Subsoil]. On the genesis of the licenses enabled by the 1992 Law of Subsoil, see Giuditta Cordero Moss, Contract or

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real change in the regulation of the Russian oil market, the 1995 PSA Law, which regulated production sharing agreements, did not concretely change the situation because its norms continued to guarantee the Russian Federation a more advantageous position than those given to private contractors.\textsuperscript{32}

The 1999 Law on Foreign Investment was an attempted revolution, expressly granting foreign investors a range of protective instruments.\textsuperscript{33} Its scope encapsulates "state guarantees . . . to foreign investors in connection with their investments in the Russian Federation."\textsuperscript{34} Foreign investors (as defined in article 2) are entitled to enjoy a range of "legal protection[s], guarantees and privileges," namely:

(a) the principle of national treatment;\textsuperscript{35}

\textit{License? Regulation of Petroleum Investment in Russia and Foreign Legal Advice, 16 J. ENERGY & NAT. RESOURCES L. 186, 186-99 (1998).}

\textsuperscript{32} Enacted by President Yeltsin on December 30, 1995, this law, Federal’niy Zakon o Soglasheniyax o Razdele Produktsii [Federal Law on Production Sharing Agreements], Sobranie Zakonodatels’stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1995, No. 225-FZ, translated in 35 I.L.M. 1256 (1996) [hereinafter 1995 PSA Law], contains new provisions on international joint ventures. Article 8 allows foreign companies to deduct the costs from a percentage of a project’s earnings. \textit{Id.} art. 8. Article 13 exempts foreign investors from any quantitative restriction to export of oil, only forcing them to pay taxes on profits and on the subsoil exploitation. \textit{Id.} art. 13. However, like the 1991 Law on Foreign Investment and the 1992 Law on Subsoil, the 1995 PSA Law is pervaded by a protectionist spirit. Investors are still requested to obtain licenses from the government and cannot assign their licenses to third parties without the government’s consent. \textit{Id.} art. 16.1. Although article 17.1 requires consent of both parties to modify an agreement, its unconventional wording may hamper this guarantee. See Ernest Chung, \textit{Petroleum Investment in the Russian Federation, Russian Federal Law No. 225-FZ on Production Sharing Agreements (Dec. 30, 1995), 37 HARV. INT’L L.J.} 551, 562-64 (1996) ("Potential investors have voiced concern that under this provision, the Russian government may unilaterally modify contracts in the event of an unanticipated rise in world oil prices . . . ."); Mark A. Stoelson, \textit{Investment at an Impasse: Russia’s Production-Sharing Agreement Law and the Continuing Barriers to Petroleum Investment in Russia, 7 DUKE J. COMP. & INT’L L.} 671, 682-86 (1997) (critiquing the statutory protections offered to foreign investors in the wake of the 1995 PSA Law).


\textsuperscript{34} 1999 Law on Foreign Investment, \textit{supra} note 33, art. 1.1.

\textsuperscript{35} The principle of national treatment is contained in article 4.1 of the 1999
(b) the freedom to acquire securities and to assign the rights and duties associated with contracts to third parties;\textsuperscript{36}

c) the freedom to transfer dividends abroad;\textsuperscript{37}

d) the right to "receive compensation for damages inflicted on it as a result of illegal actions (failure to act) of any governmental . . . authorities";\textsuperscript{38}

e) protection against specific measures intended to limit an investors' patrimonial rights, such as "forced seizure, including nationalization [and] requisition" and the related right to claim compensation of "the value of the seized property";\textsuperscript{39} and

\begin{quote}
Law on Foreign Investment. "The legal regime governing the investment activities of a foreign investor . . . may not be less favorable than regime governing the investment activities . . . established for Russian investors . . ." \textit{Id.} art. 4.1. Because the national treatment clause is inserted in multinational or bilateral treaties, it is useful to remember that it applies exclusively to citizens of parties to those treaties. See Luigi Migliorino, \textit{Gli Accordi Internazionali Sugli Investimenti [The International Agreements on Investments]} 81–89 (1989). The benefits provided by the 1999 Law on Foreign Investment, however, have an \textit{erga omnes} scope, extending to all foreign investment—even if the investor is not a citizen of parties to those treaties.

\textsuperscript{36} 1999 Law on Foreign Investment, \textit{supra} note 33, arts. 7, 13.
\textsuperscript{37} \textit{Id.} art. 11.
\textsuperscript{38} \textit{Id.} art. 5.2.
\textsuperscript{39} \textit{Id.} art. 8:

1. The property of a foreign investor or an organization with foreign investments shall not be subject to forced seizure, including nationalization and requisition, except in the instances and on the grounds established by the federal laws or treaties of the Russian Federation.

2. In the event of a requisition, a foreign investor or a commercial organization with foreign investments shall be compensated for the value of the seized property. After the circumstances in connection with which a requisition occurred cease to exist, a foreign investor or a commercial organization with foreign investments shall have the right to demand the return of the remaining property through the court system, but in so doing that, the investor must then return the received compensation amount, taking into account the property's depreciation.

When the property of a foreign investor or a commercial organization with foreign investments is nationalized, such investor or the organization shall be compensated for the value of the property and other damages. Disputes regarding such damages shall be settled in

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(f) the right to resolve "disputes between the state and the investor . . . by litigation, arbitration, or court of arbitration."\textsuperscript{40}

At the same time, foreign investors have to respect some rules, such as Russian antitrust regulations, liquidation procedures, and disclosure rules.\textsuperscript{41} Yukos is entitled to enjoy the benefits provided by the 1999 Law on Foreign Investment because it has enough foreign patrimonial interests to be included under its protection program. While Yukos is a Russian corporation, its shareholders are almost entirely foreign corporations. Although the majority is held indirectly by a group of Russian oil tycoons (including Lebedev and Khodorkovsky), 60.5% of Yukos stock is owned by Menatep Group (a company incorporated in Gibraltar), which controls an additional 10% through the Veteran Petroleum Trust.\textsuperscript{42} It is also important to note that a significant share, some 15%, is owned by American and European institutional investors.\textsuperscript{43} Yukos can take advantage of some protections afforded by the 1999 Law on Foreign Investment that generally apply to corporations having at least 10% of their stock held by foreign investors.\textsuperscript{44} In order to

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  \item \textsuperscript{40} 1995 PSA Law, supra note 32, art. 22. The 1995 PSA Law states that the arbitration can be initiated exclusively according to the express agreement of the parties to the production sharing agreement ("PSA"). \textit{Id.} According to article 23, agreements between the Russian Federation and foreign nationals or legal entities could be grounds for a waiver of the government's sovereign immunity. \textit{Id.} art. 23. According to article 24, international treaties that the Russian Federation has entered into supersede any conflicting domestic law. \textit{Id.} art 24. For a brief commentary on the dispute resolution provisions, see Chung, supra note 32, at 565-66.
  \item \textsuperscript{41} 1999 Law on Foreign Investment, supra note 33, arts. 18, 20, 21.
  \item \textsuperscript{42} As of December 14, 2004, 60% of Yukos's stock was held by the Menatep Group Ltd., a Gibraltar corporation, through its subsidiary Yukos Universal Ltd., an Isle of Man corporation, which owns the actual shareholder, Hulley Enterprises Ltd., a Cyprus corporation. Motion to Compel Arbitration, supra note 28, at 8. Also, 10% of Yukos's stock is held by Veteran Petroleum Trust, which is a group of retired Yukos managers, and 18% is held by the Deutsche Bank Trust Company Americas. Yukos Oil Co., Shareholding Structure, http://www.yukos.com/new_ir/Shareholding_structure.asp (last visited Feb. 18, 2006).
  \item \textsuperscript{43} Motion to Compel Arbitration, supra note 28, at 8.
  \item \textsuperscript{44} 1999 Law on Foreign Investment, supra note 33. Article 4.5 requires that foreigners who hold at least a 10% stake in Russian investments be afforded full legal protections. \textit{Id.} art. 4.5. Article 4.6 states that foreigners are afforded these protections because they are shareholders in Russian commercial organizations
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discover with certitude the exact degree of protection provided to Yukos by Russian and international law, it is appropriate to begin with an analysis of the 1999 Law on Foreign Investment's arbitration provision.

3. YUKOS AND THE PYRAMIDS CASE

As anticipated, article 10 of the 1999 Law on Foreign Investment generally provides that "[a] foreign investor's implementation of investment and entrepreneurial activities on the territory of the Russian Federation shall be resolved in compliance with the international treaties of the Russian Federation and federal laws in the court or arbitration court or in an international arbitration court (umpire)."\(^{45}\)

As stated in the title of article 10, the Russian legislature intended to give investors a "guarantee" of recourse to arbitration according to the internal laws and international treaties practiced in Russia.\(^{46}\) It is useful to clarify the real significance of this provision and ask both whether it gives investors a seamless guarantee and whether the content of this guarantee is determined according to the cited norms. It therefore seems appropriate to make some remarks regarding the general problem of foreign investors using arbitration when dealing with the internal laws and international treaties that are supposed to protect investments abroad.

To start, the primary origin of arbitration lies in an agreement between the parties. In other words, arbitration can be defined as a "product" of contract.\(^{47}\) According to this traditional concept,

afforded the same protections. *Id.* art. 4.6. Lawyers for Yukos have argued that the protections afforded by the 1999 Law on Foreign Investments should be applied to *all* legal guarantees, not simply those associated with the principle of national treatment. See Motion to Compel Arbitration, *supra* note 28, at 17 (arguing that the protections afforded by the 1999 Law on Foreign Investments should be applied to Yukos and the court should therefore force arbitration of issues pursuant to the Law).

\(^{45}\) 1999 Law on Foreign Investment, *supra* note 33, art. 10.

\(^{46}\) Article 10 of the 1999 Law on Foreign Investment is entitled "The guarantee of the resolution in due course of a dispute arising from a foreign investor's investment and entrepreneurial activities on the territory of the Russian Federation." *Id.* art. 10 (emphasis added).

\(^{47}\) Note, however, that this point has been widely disregarded by academics. See e.g., Piero Bernardini, *L'ARBITRATO COMMERCIALE INTERNAZIONALE* 91 (2000) (Italy); Rene David, *L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL* 86 (1982) (Fr.); Jacqueline Nolan-Haley, *ALTERNATIVE DISPUTE RESOLUTION: IN A NUTSHELL* 143.
when an agreement is lacking, arbitration cannot be initiated. The ICSID Convention of 1965,48 which dealt with the settlement of investment disputes between a state and the citizens of another state, represents the principle instrument in the realm of investment protection. The convention was intended to suit the contractual vision of international arbitration. Article 25, regarding the submission of the disputes to the jurisdiction of the International Centre for Settlement of Investment Disputes (“ICSID”), required that “the parties to the dispute consent in writing to submit to the Center” and, consequently, that “[w]hen the parties have given their consent, no party may withdraw its consent unilaterally.”49

What about the rules concerning disputes which are not protected by an agreement? In this case the traditional doctrine confirms that the investor has no other choice than to file claims before a national court.

One frequently used solution is to understand whether or not,

(1992); and JEAN-CHRISTOPHE POMMIER, PRINCEP D’AUTONOMIE ET LOI DU CONTRAT EN DROIT INTERNATIONAL PRIVE CONVENTIONNEL (1992) (Fr.). At the same time, several decisions in American jurisprudence do consider that arbitration is “a creature of contract.” See, e.g., White v. Kampner, 641 A.2d 1381, 1384 (Conn. 1994); Waterbury v. Waterbury Police Union Local 1237, 407 A.2d 1013, 1014 (Conn. 1979); Bd. of Mgmt. of Courtyards at Woodlands Condominium Ass’n v. IKO Chicago, Inc., 697 N.E.2d 727, 731 (Ill. 1998) (stating that arbitration is a creature of contract). There are also a large number of cases that define arbitration as a “matter of contract.” See, e.g., John Wiley & Sons v. Livingston, 376 U.S. 543, 547 (1969) (“[W]hether or not the company was bound to arbitrate, is a matter to be determined by the court on the basis of the contract entered into by the parties.”); Hussey Metal Div. v. Lectromelt Furnace Div., McGraw-Edison Co., 471 F.2d 556, 557 (3d Cir. 1972) (“Arbitration is a matter of contract ....”). For additional examples of cases, see the jurisprudence referred to in 1 DOMKE ON COMMERCIAL ARBITRATION 1-5 (Larry E. Edmondson ed., 3d ed. 2003).


even without a contract, the state has previously given the investor the consent to arbitration through either a national law norm or an international treaty provision. In these cases, one might carefully assume that the state intended to "offer" the investor the chance to unilaterally activate arbitration without a specific arbitration agreement. This solution has been adopted by the decisions of some arbitration tribunals run according to the ICSID rules. In those decisions, the lack of jurisdiction, which is the absence of the state's consent, has been overcome by recognizing the consent of the state in the national laws or in international treaties to submit disputes to ICSID jurisdiction when dealing with foreign investment arbitrators.

With regard to the consent sanctioned by national laws, in the famous Pyramids case, an arbitration tribunal constituted under ICSID rules heard a dispute between a Hong Kong corporation, Southern Pacific Properties Ltd. ("SPP"), and the Egyptian Government. This happened because article 8 of an Egyptian

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50 Note that no uniformity exists among the different national legislations concerning the acceptance of the ICSID jurisdiction. For a discussion of this, see George R. Delaume, How To Draft an ICSID Arbitration Clause, 7 ICSID REV.—FOREIGN INV. L.J. 168, 172-74 (1992). For a bibliography of scholars' contributions about different national laws, see Ruvan de Alwis, Margrete Stevens & Nassib G. Ziadé, Bibliography on Recent National Investment Codes, 7 ICSID REV.—FOREIGN INV. L.J. 497, 512 (1992). In his commentary on article 25 of the ICSID Convention, Christoph Schreuer describes the various national legislations and divides them in five groups: (a) the laws that "provide unequivocally for dispute settlement by ICSID," such as the Albanian Law on Foreign Investment of 1993; (b) those that, more commonly, "include a reference to the Convention as one of several possible means of dispute settlement"; (c) those that "state that the foreign investor 'shall be entitled to request' that the dispute be conclusively settled by one of several methods including the ICSID Convention, [or] that any of the parties to the dispute 'may transfer the dispute' to one of several institutions, including ICSID, or that the dispute 'shall be settled' by one of these methods," such as article 8 of the Egyptian Law No. 43 of 1974, translated in 16 I.L.M. 1476 (1977); (d) those that recall the ICSID "Additional Facility" rules, applying when one of the parties of the dispute "does not meet the nationality requirements of Art. 25 of the Convention"; and (e) those that require the existence of a specific arbitral agreement between the parties in order to initiate arbitration. Christoph H. Schreuer, The ICSID Convention: A Commentary 200–05 (2001).

51 S. Pac. Prop. Ltd. v. Arab Republic of Egypt (Pyramids), 16 Y.B. COM. ARB. 19 (ICSID Arb. Trib. 1991). The Pyramids case was concluded in December 1992, fourteen years after the constitution of the arbitration tribunal. The case concerned a dispute arising in May of 1978, when the Egyptian government decided to revoke authorization for the construction of a tourist oasis in the Pyramids area, which had been granted to Southern Pacific Properties Limited ("SPP") a few years before. In 1974, the Egyptian Ministry of Tourism, the Office of Tourism ("EGOTH"), and SPP concluded an agreement for the realization of
Law of 1974 generally provided that all the investment disputes related to foreign investments would have been settled according to the ICSID Convention and other international treaties applicable

the aforementioned project, recalling in the preamble the norms contained in the Egyptian Law No. 43 of 1974, supra note 50, at 1476. At the end of the same year, EGOTH and SPP concluded a second contract, providing that their dispute would be settled according to the International Chamber of Commerce ("ICC") Rules. This agreement was signed by the Ministry of Tourism. The oasis's construction began in July 1977, but in May 1978, as anticipated above, the Egyptian government halted the project. In December of that year, SPP and its subsidiary requested arbitration before the ICC, against both the EGOTH and the Egyptian Republic. On Feb. 16, 1983, the arbitral tribunal rendered an award, notwithstanding the defendant's exceptions with regard to the tribunal's jurisdiction. The ICC award in the SPP decision can be found in 22 I.L.M. 752 (1983), 1986 REVUE DE L'ARBITRAGE [REV. ARB.] 105, 9 Y.B. COM. ARB. 111 (1984). On March 28, 1983, Egypt filed a claim before the Paris cour d'appel, asking for the suspension of the award. On July 12, 1984, the court granted the plaintiff's claim. Arab Republic of Egypt v. S. Pac. Prop. Ltd., Cour d'appel [CA] [regional court of appeal] Paris, July 12, 1984, translated in 23 I.L.M. 1048 (1984). The cour de cassation confirmed the judgment on January 6, 1987. S. Pac. Prop. Ltd. v. Arab Republic of Egypt, Cour de cassation, première chambre civile [Cass. 1e civ.] [highest court of ordinary jurisdiction] Jan. 6, 1987, Bull. civ. 1, No. 24P, translated in 26 I.L.M. 1004 (1987). At the same time, SPP sought enforcement of the award in the Netherlands, where the courts granted the exequatur. S. Pac. Prop. Ltd./Arab Republic of Egypt, Gerechtshof [Hof] [ordinary court of appeal], Amsterdam, 12 juli 1984, translated in 24 I.L.M. 1040 (1985). This was appealed by the defendant but suspended pending the trial before the French cour de cassation. SPP also sought enforcement in the United Kingdom, SPP (Middle East) Ltd. v. Arab Republic of Egypt, March 19, 1984, High Court of Justice, Queen's Bench Division (Commercial Court), aff'd, March 19, 1984, Court of Appeal (Civil Division), reprinted in 10 Y.B. COM. ARB. 504 (1985), and initiated a new arbitral proceeding before an ICSID tribunal. After having rendered two other decisions regarding the jurisdiction on November 27, 1985 and April 14, 1988, the ICSID tribunal pronounced an award on May 20, 1992. S. Pac. Prop. (Middle East) Ltd. v. Arab Republic of Egypt, May 20, 1992 (ICSID Arb. Trib.), reprinted in 32 I.L.M. 933 (1993); 4 RIVISTA DELL'ARBITRATO 145 (1994) note Giardina (Italy); 121 JOURNAL DU DROIT INTERNATIONAL [J.D.I.] 218 (1994) note Gaillard (Fr.). On May 27, 1992, Egypt asked for the annulment of the award, but the ad hoc committee, who should have decided this last claim, never pronounced a decision because the parties entered into an agreement of the same year on December 11, 1992 that terminated the dispute. S.P.P Settled: Annulment Proceedings Before ICSID Discontinued, 8 MEALEY'S INT'L ARB. REP. 1, 2 (1993).

to Egypt.\textsuperscript{52} SPP alleged that article 8 "contains a sequence of obligatory hierarchies in establishing the rules of the disputes."\textsuperscript{53} This meant that because the parties' agreement lacked an arbitration clause, the bilateral treaty, and consequently the ICSID Convention, would be used. The law uses mandatory terms, such as "dispute shall be settled," and in this way discloses Egypt's consent to submit disputes to those specific procedures of settlement.\textsuperscript{54} On this issue, the arbitration tribunal argued that "nobody contradicts that the State can give the consent to the competence of an international arbitration both in a specific contract, and more generically, in a law related to foreign investments."\textsuperscript{55}

Case in point, the arbitration tribunal observed that Egypt's consent did not come from an internal law but from article 25 of the ICSID Convention, which describes the conditions under which investment disputes are submitted to international arbitration.\textsuperscript{56}

The case \textit{Tradex Hellas v. Albania}\textsuperscript{57} involved a dispute between a Greek corporation and the Albanian government concerning the expropriation of a joint venture. When the plaintiff initiated arbitration before an ICSID tribunal, Albania contended that the

\textsuperscript{52} Investment disputes in respect of the implementation of the provisions of the law \textit{shall be settled} in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law Number 90 of 1971, where such law applies. Disputes may be settled through arbitration.


\textsuperscript{54} \textit{Id.} para. 74, \textit{reprinted in} 32 I.L.M. at 951 (emphasis added).

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} Gaillard explains:

\textit{Il ne s'agit ni d'une question d'interprétation d'un traité, ni d'une question d'interprétation d'une loi, mais simplement de la recherche de l'existence d'une volonté (unilatérale s'agissant d'une offre) de recourir à ce mode de règlement des différends [It is not a question of interpreting a treaty or a law. It is simply the research of an existing consent (which is unilateral because it is an offer) to use this rule for the disputes].}

Gaillard, \textit{supra} note 51, at 227.

tribunal did not have jurisdiction over the dispute. As a response, arbitrators observed, citing the *Pyramids* case, that:

although consent by written agreement is the usual method of submission to ICSID jurisdiction, it can now be considered as established and not requiring further reasoning that such consent can also be effected unilaterally by a Contracting State in its national laws the consent becoming effective at the latest if and when the foreign investor files its claim with ICSID making use of the respective national law.58

Although the proposed solution was not really consistent with the intention of the contracting states during the negotiations of the ICSID Convention, arbitrators considered that internal laws can constitute an expression of consent according to article 25 of the Convention.59 Fundamentally, the recognition of ICSID

58 *Tradex*, 14 ICSID—FOREIGN INV. L.J. at 186–87. This case refers to article 8.2 of the Albanian Law No. 7764 of Nov. 2, 1993, which states:

If a foreign investment dispute arises between a foreign investor and the Republic of Albania and it cannot be settled amicably, then the foreign investor may choose to submit the dispute for resolution to a competent court or administrative tribunal of Republic of Albania in accordance with its laws. In addition, if the dispute arises out or relates to expropriation, compensation for expropriation, or discrimination... then the foreign investor may submit the dispute for resolution and the Republic of Albania hereby consents to the submission thereof, to the International Centre for Settlement of Investment Disputes . . . .

*Id.* at 174.


Consent of the parties must exist when the Centre is seized... but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromis* regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the
jurisdiction through national legislation can be interpreted as a unilateral "offer" to conclude an arbitration agreement directed from the state to the foreign investor who, in order to set up the arbitration proceedings, will be surely able to accept.

4. CONSENT TO ARBITRATION IN THE ICSID SYSTEM

In studying ICSID dispute resolution, one has to keep in mind that previous investment protection treaties had only encouraged parties to use arbitration when specific arbitration agreements between investors and host states existed when they examine the jurisdiction provisions contained in both bilateral and multilateral treaties. In contrast, more recent international

jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.


Concerning the bilateral treaties, one must observe that "[n]ot all references to the Convention in BITs [bilateral investment treaties] constitute binding offers of consent by the host State." Schreuer, supra note 50, at 212. There are four ways for a host state to express its consent to ICSID jurisdiction in a bilateral treaty: (a) provisions that subject some disputes to ICSID jurisdiction (for examples, see the case Asian Agricultural Products v. Sri Lanka, 30 I.L.M. 580 (1991), and the cases cited infra note 63); (b) provisions, while not expressly mentioning consent, that state that all disputes "shall be submitted to the Centre" or that parties have the right to initiate arbitration; (c) provisions that make ICSID jurisdiction an eventual alternative for dispute settlement; and (d) provisions that offer consent in the future or promising consideration of arbitration initiation requests by foreign investors. See Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties 131-36 (1995) (providing real examples of the ways a host state may express their consent to ICSID jurisdiction); Christoph Schreuer, The Interpretation of ICSID Arbitration Agreements, in International Law: Theory and Practice, Essays in Honour of Eric SuY 719, 719 (Karel Wellens ed., 1998) (addressing the ways consent agreements may be expressed in bilateral treaties); Paul Peters, Dispute Settlement Arrangements in Investment Treaties, 22 Neth. Y.B. Int'l L. 91, 120-25 (1991) (discussing the variety of clause types in those BITs lacking compulsory arbitration).

agreements make the use of arbitration compulsory, requiring that host states give investors unilateral ability to initiate arbitration. Several treaties demand that all disputes arising between investors and host states be resolved by arbitration whenever an investor demands it. According to article 25 of the ICSID Convention, host states that sign such agreements are essentially consenting to ICSID jurisdiction.

However, that unilateral "offer" to arbitrate does not conclude an arbitration agreement; an arbitration agreement is concluded only when an investor has "accepted" that offer. Given this, an investor's acceptance is essential to initiate arbitration correctly. Consequently, a host state that has agreed to ICSID arbitration cannot activate that arbitration without an investor's consent. In contrast, no host state that has given such consent can withdraw that consent without violating its treaty obligations.


62 On this point, see Geneviève Bastid-Burdeau, Nouvelles Perspectives pour l'Arbitrage dans le contentieux économiques intéressant les États, 1995 REV. ARB. 1, 12 (Fr.). In Asian Agricultural Products, the arbitral tribunal held that ICSID jurisdiction existed even without specific arbitral agreement between the parties involved. 29 I.L.M. at 586-87. In this instance, the arbitrators observed that the Agreement for the Promotion and Protection of Investments, U.K.-Sri Lanka, art. 8.1, Feb. 13, 1980, 19 I.L.M. 888, between the United Kingdom (the investor's state) and Sri Lanka (the state where the investment sat) contained a provision allowing ICSID jurisdiction for the settlement of disputes concerning foreign investment. By applying this provision, the tribunal retained jurisdiction. On this case, see Patrick Rambaud, Des Obligations de l'État vis à vis de l'Investisseur Etranger (sentence AAPL c.Sri Lanka), 38 A.F.D.I. 501-10 (1992).


64 On this problem, see Aron Broches, Bilateral Investment Protection Treaties and Arbitration of Investment Disputes, in The Art of Arbitration 63, 68-69 (Jan C. Schulz & Albert Jan van den Berg eds., 1982) (concluding that an investor who wants to rely on a host state's consent expressed in an investment protection
When a host state has expressed its consent to ICSID arbitration, an investor can formally manifest its consent to accept by simply initiating the ICSID arbitration. Then, article 25 of the ICSID Convention provides that such consent be considered permanent once it has been given. At this point, the arbitration agreement is definitively concluded.\textsuperscript{65} Obviously, an investor’s acceptance must precisely correspond to the host state’s offer, respecting the established forms, conditions, terms, and limitations therein.\textsuperscript{66} If neither the relevant international treaty nor domestic law requires formal acceptance, an investor can accept a host state’s offer by written notice.\textsuperscript{67}

5. THE ESSENCE OF ARBITRATION WITHOUT PRIVITY

In order to describe this phenomenon, scholars use the concept of “arbitration without privity.”\textsuperscript{68} Basically, this concept expresses the right of the investor to initiate arbitration against the host state

treaty should therefore promptly signify his own consent in order to assure irrevocability).

\textsuperscript{65} Article 25 of the ICSID Convention requires “consent in writing” by host states. ICSID Convention, supra note 48, art. 25; see SCHREUER, supra note 50, at 207 (“The investor may express its acceptance in a variety of ways other than instituting proceedings. These include an investment agreement with the host State, a simple communication to the host State that consent to ICSID jurisdiction in accordance with the legislation is accepted . . . .”); see also Aron Broches, Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction, 5 COLUM. J. TRANSN’L L. 263, 269 (1966) (discussing the binding effect of consent once it has been given); Broches, supra note 59, at 352 (describing the ICSID Convention’s consent requirements).


\textsuperscript{67} See SCHREUER, supra note 50, at 210 (arguing that written notice in the absence of formal consent requirements is acceptable because it allows for maximum flexibility).

\textsuperscript{68} The expression “arbitration without privity” was first used by Jan Paulsson, Arbitration Without Privity, 10 ICSID REV.—FOREIGN INV. L.J. 232, 232 (1995). See also Jan Paulsson, Arbitration Without Privity, in THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT & TRADE 422, 422-423 (T.W. Wälde ed., 1996) (“This new world of arbitration is one where the claimant need not have a contractual relationship with the defendant, and where the tables could not be turned; the defendant could not have initiated the arbitration, nor is it certain of being able even to bring a counterclaim.”); Ahmed Sadek El-Kosheri, ICSID Arbitration and Developing Countries, 8 ICSID REV.—FOREIGN INV. L.J. 104, 106 (1993) (describing this phenomenon in terms of “new techniques [that in recent years] have emerged [and that] are theoretically conceivable under the ICSID Convention, but quite unlikely in the context of transnational business arbitration”).

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without a previous arbitration agreement. Therefore, this situation seems to have effected a recent evolution of international law whereby individuals become entitled to enjoy benefits, rights, and guarantees established in international law norms. These norms give individuals the ability to enforce these obligations that international law places on states.\textsuperscript{69} The advantages of this situation are clear. From a policy standpoint, states will be induced to respect their obligations under international treaties. And from an economic perspective, foreign investors can initiate arbitration without being forced to negotiate an arbitration agreement or global contract, thus saving time and money. Accordingly, laws recognizing arbitration attract more foreign investments than laws lacking arbitration clauses.

A correct reconstruction of the concept of "arbitration without privity" requires some preliminary remarks. First, when analyzing the international laws by which this concept has been built, it seems that the content of article 25 of the ICSID Convention represents a formal source of consent. As the consent of the state to arbitration originates in this norm, this is also where the original consent of the state to be compelled to arbitration is derived. Consequently, a national law granting arbitration does not bind a state that has not ratified the ICSID Convention.

This limitation is illustrated by the decision of the ICSID arbitration tribunal in the case of \textit{Amco Asia Corp. v. Republic of Indonesia.}\textsuperscript{70} In that case, the plaintiff asked the ICSID tribunal to

\textsuperscript{69} With regard to the consent to ICSID jurisdiction as contained in the ECT, Thomas W. Wälde observes:

\begin{quote}
In instituting such compulsory jurisdiction . . . [the] negotiators/drafters must have—or should have had—in mind the idea of using individuals' complaints as a measure of enforcing the Treaty's law, a thought that is familiar to domestic legal systems . . . [H]ere, the individual plaintiff . . . is seen as an instrument to achieve compliance, albeit motivated mainly by self-interest—the "invisible hand" uses the self-interested plaintiff to achieve the higher purposes of the law.
\end{quote}


\textsuperscript{70} Amco Asia Corp. v. Republic of Indonesia, Decision on Jurisdiction, Sept. 25, 1983 (ICSID Arb. Trib.), reprinted in 23 I.L.M. 351 (1984); see also SCHREUER, The ICSID Convention, supra note 50, at 206 (providing a brief summary of the tribunal's decision.); Christopher T. Curtis, Amco Asia Corp. v. Republic of
declare its jurisdiction over Indonesia. According to article 23.5 of the Indonesian Law of 1967, "if no agreement can be reached between the two parties regarding the amount, type and procedure for payment of compensation, arbitration shall take place which shall be binding on both parties." On this point, the arbitration tribunal considered that:

[n]o mention is made of the ICSID arbitration in this provision, and indeed could not have been made, since at the time of enactment of that law, the Convention had not entered into force in respect of Indonesia... that means necessarily that article 23 of Law no. 1 of 1967 is not and cannot be a direct and sufficient commitment to submit investment disputes to ICSID arbitration.\(^{71}\)

Also, the ICSID Convention will be applied according to the specific manner used by the state to give its consent. This means that the host state has to verify the actual existence of either a norm of internal law or an international treaty expressing the mentioned consent.\(^{72}\) Furthermore, the choice of using national law instead of an international treaty is not without consequences under international law. In fact, when exclusively dealing with national laws, one must ascertain whether the state has or has not revoked its consent in any way; by contrast, when applying the rules of an international treaty, it would be enough to verify the entry into force of the treaty because a unilateral withdrawal would constitute a violation of the state's international obligations according to international law.

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\(^{71}\) Amco Asia Corp., 23 I.L.M. at 367-68.

\(^{72}\) Obviously, the treaty must be entered into force. See, e.g., Tradex Hellas S.A. v. Republic of Albania, Decision on Jurisdiction, Dec. 24, 1996, 14 ICSID REV.—FOREIGN INV. L.J. 161, 178 (1999) (requiring the agreement be entered "into force thirty days after the date on which the Contracting Parties have informed each other... of its ratification or approval"); Cekoslovenska Obchodni Banka, A.S. v. Slovak Republic, Decision on Jurisdiction, May 24, 1999, 14 ICSID REV.—FOREIGN INV. L.J. 251, 264 (1999) (declaring that because neither claimant nor respondent offered proof that the BIT was entered into force the tribunal could give no definitive resolution to the dispute).

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6. Arbitration Without Privity Constrains the Kremlin

The Russian Federation, like fifty-one other countries, is a contracting party to the Energy Charter Treaty ("ECT"), the major international instrument regarding the sector of energy sources, concluded in Lisbon in December 1994 and entered into force in April 1998. Actually, the Russian Federation has not proceeded with the ratification of this treaty, but it has consented to its provisional application, in line with article 45 of the treaty.

Part 3 of the ECT merges several provisions concerning the protection of foreign investments. First of all, the application of national treatment, as well as the clause for most-favored nations, is guaranteed. Second, foreign investments:

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75 Article 44 of the ECT provides that "[t]he treaty shall enter into force on the ninetieth day after the date of deposit of the thirteenth instrument of ratification." ECT, supra note 61, art. 44.1. However, according to article 45, the signatory party automatically agrees to a provisional application of the treaty, id. art. 45.1, unless it deposits a declaration, id. art. 45.2(a), and in this case, neither the state nor the investor can claim the benefits accorded by the provisional application of the Treaty, id. art. 45.2(b). At any rate, even when the declaration has been deposited by the state, part 7 of the ECT concerning the institutional structure of the ECT can be applied. Id. art. 45.2(c). On the coincidence of Russian interests with the interests protected by the ECT, see Andrew Seck, Investing in the Former Soviet Union's Oil Industry: The Energy Charter Treaty and its Implication for Mitigating Political Risk, in The ENERGY CHARTER TREATY, supra note 68, at 110, 110-34; Andrei A. Konoplyanik, The Energy Charter Treaty: A Russian Perspective, in The ENERGY CHARTER TREATY, supra note 68, at 156, 156-78.

76 Article 10.7 of the ECT states:
shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation . . . except where such [e]xpropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.77

Compensation amounting to the “fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation”78 can be claimed before a national tribunal.79 In order to avoid any doubts, it is expressly provided that expropriations include even those situations in which the expropriated subject is a corporation or an enterprise with investments by foreign investors (including foreign ownership of shares).80

Part 5 of the ECT is assigned to the settlement of disputes. The key provision is article 26. This article provides that when an

Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

ECT, supra note 61, art. 10.7. The Conference of the Signatory Parties attached to the ECT a declaration containing the Decisions With Respect To the Energy Charter Treaty. Id. Annex 2. According to this declaration, with respect to article 10.7, “[t]he Russian Federation may require that companies with foreign participation obtain legislative approval for the leasing of federally-owned property, provided that the Russian Federation shall ensure without exception that this process is not applied in a manner which discrimimates among Investments of Investors of other Contracting Parties.” Id. Annex 2, para. 2.

77 ECT, supra note 61, art. 13.1.

78 Id.

79 The norm concerning expropriations is article 13. See Thomas W. Wälde, International Investment Under the 1994 Energy Charter Treaty, in THE ENERGY CHARTER TREATY, supra note 68, at 251, 299-303 (discussing how the treaty introduces the concept of “fair market value” and how it sets the valuation date for expropriation).

80 According to article 13.3, “[f]or the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.” ECT, supra note 61, art 13.3.
initial noncontentious phase ends,\textsuperscript{81} the investor can file an action either in the national courts of the host state or "in accordance with any applicable, previously agreed dispute settlement procedure" according to paragraphs 3 to 8.\textsuperscript{82} It is important to highlight that according to paragraph 3, each contracting party of the ECT (except for the states listed in Annex 1A) "gives unconditional consent" to refer to arbitration before an international tribunal. In this case, the initiation of arbitration is precluded if the investor has already commenced an action before the national courts or an arbitration tribunal based on an arbitration clause. However, the Russian Federation is listed therein.\textsuperscript{83} Once the investor has decided to initiate arbitration, he must choose one of the following arbitration proceedings:

(a) an arbitration tribunal constituted according to ICSID rules;

(b) the Additional Facility Rules of ICSID, when either the host state or the investor's national state is not a Contracting Party of the ICSID Convention;

(c) a sole arbitrator or an arbitration tribunal established according to the United Nations Commission on International Trade Law ("UNCITRAL") rules; or

(d) an arbitral proceeding according to the rules of the Chamber of Commerce of Stockholm.\textsuperscript{84}

\textsuperscript{81} See ECT, supra note 61, art. 26.1 ("Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.").

\textsuperscript{82} ECT, supra note 61, art. 26.2(b).

\textsuperscript{83} ECT, supra note 61, art. 26.3 ("Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article... The Contracting Parties listed in Annex 1D do not give such unconditional consent where the investor has previously submitted the dispute under subparagraph (2)(a) or (b) [i.e., before the national courts or according to the arbitration established by a contractual clause]."). The rationale for this norm lies in the states' worry that investors could use arbitration proceedings to appeal the decisions of national courts. See Wälde, supra note 69, at 457 (discussing the concern that arbitration would provide an appeal against judgments by national courts and the resulting compromise formulated in article 26.3(b) of Annex ID).

\textsuperscript{84} ECT, supra note 61, art. 26.4; see Kenneth J. Vandevelde, Arbitration

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Arbitration shall take place, at the request of a party, in a state that has signed the New York Convention of 1958\textsuperscript{85} according to the applicable treaties and the principles of international law.\textsuperscript{86} At that point the final verdict shall be effective and executive.\textsuperscript{87} As far as the residual matters are concerned, article 10.1 of the ECT states that a “Contracting Party shall observe any obligations it has entered into with an Investor or an investment of an Investor of any other Contracting Party.”

This provision contains a norm of international law that requires the states to respect, in good faith, its obligations contracted into foreign investors.\textsuperscript{88} In the ECT system, this norm can be excluded from arbitration according to article 26.3(c) that contains an opt-out clause: in doing so, arbitration cannot be extended to violations of article 10.1 by the host state when the same claim has already been filed before national courts.\textsuperscript{89}

A first remark on article 26 of the ECT regards the statement of “unconditional consent,” cited above: this can be considered an “offer” given by the state to the foreign investor in order to


\textsuperscript{85} Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 4739 [hereinafter New York Convention]; see ECT, supra note 61, art. 26.5(b) (“Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention.”); see also Vandevelde, supra note 84, at 418 (“The Treaty requires that . . . the arbitration be held in a state that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention.”).

\textsuperscript{86} ECT, supra note 61, art. 26.6.

\textsuperscript{87} Id. art. 26.8.

\textsuperscript{88} See G.A. Res. 1803, ¶ 8, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217, at 15 (Dec. 14, 1962) (“Foreign investment agreements freely entered into, by or between sovereign States shall be observed in good faith.”); Wälde, supra note 69, at 455 (“[A]ll contractual obligations . . . arising out of other contracts or quasi-contractual licences relating to an investment (pre-contractual agreements; obligations stemming from authorizations generating obligations for the host state, e.g. petroleum exploration and production licences, but probably also licences authorizing, for example, energy generation or transmission) are covered, be they of a primarily commercial law or administrative law nature.”).

\textsuperscript{89} ECT, supra note 61, art. 26.3(c) (“A Contracting Party listed in Annex IA does not give such unconditional respect to a dispute arising under the last sentence of Article 10(1).”). The Russian Federation did not reserve its consent according to this opt-out clause. But clearly it is irrelevant, because Russia does not allow investors, as in article 26.3(b)(j) of the ECT, to initiate arbitration when the dispute has been already claimed before national courts.
conclude an arbitration agreement. This surely represents a big change.

Furthermore, the consent of the state applies not only to the arbitration institutions mentioned above, but also the relation to the New York Convention of 1958. Therefore, the states signing the New York Convention will have to make the consent totally effective.  

Finally, the state’s consent can be given without the host state having to undersign either the ICSID Convention or a bilateral treaty with the national state of the investor. In this case the ICSID Additional Facility Rules have to be applied when one of the parties—i.e., the investor or the host state—has not undersigned the ICSID Convention. Consequently the consent expressed by the state through article 26 of the ECT is effective even though other instruments are not in use. This undoubtedly represents an extremely practical realization of “arbitration without privity” in the energy sector. Thus, “arbitration without privity” can be applied to the Yukos case: in fact, the ECT gives the investor a new and useful instrument to initiate arbitration even without a specific arbitration agreement.

This solution can be confirmed by reading article 26.1, which establishes a hierarchy between the proceedings activated before national courts and the international arbitration procedure. An investor is able to file his complaints in national courts and, subsequently, initiate arbitration before one of the mentioned institutions. When the opt-out clause is not exercised, the treaty sets up an “appeal body” against such national courts’ decisions,

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90 See New York Convention, supra note 85, art. 2 (stipulating that all contracting states must, “recognize arbitral awards as binding and enforce them in accordance with the rules and procedure of the territory where the award is relied upon.”); Olivia Q. Swaak-Goldman, The Dispute Resolution Procedures of the Energy Charter Treaty: Made to Measure, 6 AM. REV. INT’L ARB. 317, 321 (1995) (discussing the ECT investor-to-state dispute resolution mechanism).

albeit on the limited grounds listed in part 3 of the treaty.\textsuperscript{92}

One can certainly argue that this solution opens the system to the danger of conflicts between decisions and cases of international \textit{lis pendens}.

To finish, there exists a specific norm in regard to tax disputes. On this topic, article 21.5 of the ECT entitles an investor to initiate arbitration in order to determine whether a fiscal measure constitutes an expropriation according to article 13.\textsuperscript{93} In this case, the fiscal authorities of the host state are given precedence and have to reach a decision within six months after the dispute arises.\textsuperscript{94} At any rate, arbitration can be initiated according to article 26, and arbitrators will have to consider the previous judgment of the fiscal authorities\textsuperscript{95} to finally make their decision.

\textsuperscript{92} Walde, supra note 69, at 460.

\textsuperscript{93} The ECT states that "Article 13 shall apply to taxes." ECT, supra note 61, art. 21.5(a).

\textsuperscript{94} Concerning this matter, article 21.5(b) of the ECT provides:

Whenever an issue arises under Article 13, to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply:

(i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) shall make a referral to the relevant Competent Tax Authorities;

(ii) The Competent Tax Authorities shall, within a period of six months of such referral, strive to resolve the issues so referred. Where non-discrimination issues are concerned, the Competent Tax Authorities shall apply the non-discrimination provisions of the relevant tax convention or, if there is no non-discrimination provision in the relevant tax convention applicable to the tax or no such tax convention is in force between the Contracting Parties concerned, they shall apply the non-discrimination principles under the Model Tax Convention on Income and Capital of the Organisation for Economic Co-operation and Development.

\textit{Id.} art 21.5(b); see also Swaak-Goldman, supra note 90, at 332 (discussing the provisions for taxation).

\textsuperscript{95} The ECT provides:

(iii) Bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) may take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the tax is an expropriation. Such bodies shall take into account any conclusions arrived at within the six-month period prescribed in subparagraph (b)(ii) by the Competent Tax Authorities.
7. CAN YUKOS INITIATE AN ARBITRATION AGAINST RUSSIA?

Thus, what is the actual significance of article 10 of the 1999 Law on Foreign Investment? Counsel for Yukos tried to demonstrate, through arguments, that the mentioned article 10 constitutes an offer to arbitrate. Yukos would have accepted this offer by using arbitration against the Russian Federation,\(^\text{96}\) thus, completing an arbitration agreement, which would have also supported the use of the New York Convention of 1958 on the validation and enforcement of the arbitration norms.

Although provocative, this solution is not at all convincing. First, it seems too extreme to consider article 10 an expression of the Russian Federation's consent to be bound by arbitration, especially considering the ICSID cases cited above. In fact, according to the aforementioned international jurisprudence, the

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Authorities regarding whether the tax is discriminatory. Such bodies may also take into account any conclusions arrived at by the Competent Tax Authorities after the expiry of the six-month period;

(iv) Under no circumstances shall involvement of the Competent Tax Authorities, beyond the end of the six-month period referred to in subparagraph (b)(ii), lead to a delay of proceedings under Articles 26 and 27.

ECT, supra note 61, art 21.5(b).

\(^{96}\) Yukos contended that, starting from article 10 of the 1999 Law on Foreign Investment:

35. There are no limitations on the scope of the Russian Government's consent to arbitration. Moreover, by its terms, Article 10 does not require any additional agreement for the Russian Government's consent to be operative. As noted above, under the Russian Foreign Investment Law, Yukos is guaranteed the same investment protections, including those provided in Article 10, as a foreign investor, based on its significant percentage of foreign ownership. Yukos, therefore, is entitled to submit its investment disputes with the Russian Government to international arbitration.

36. With the Russian Government's consent in Article 10 of the Russian Foreign Investment Law to submit investment disputes to international arbitration, all that is required is the investor's acceptance of the offer to arbitrate. That an offer to submit investment disputes to international arbitration, which is set forth in a national investment law, can be accepted by a notice of arbitration is now widely recognized . . .

38. This Notice of Arbitration, together with the Russian Government's consent to international arbitration contained in Article 10 of the Russian Foreign Investment Law, constitutes a binding and enforceable arbitration agreement . . .

Amended Motion to Compel Arbitration, supra note 28, at 14–15.

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norms of internal laws and international treaties expressing consent of the state were definitely more detailed than article 10 of the Russian Law. The internal laws and international treaties call to mind the ICSID Convention of 1965, while article 10 generically refers to the "international treaties of the Russian Federation." Moreover, one must consider that Russia has not ratified the ICSID Convention. This circumstance is parallel to the dispute arising in the Amco case, where the ICSID tribunal refused to retain jurisdiction. In fact, even though the Indonesian law permitted the investor to initiate arbitration, this could not be considered a proper expression of the state consent considering Indonesia had not ratified the ICSID Convention. From this standpoint, article 10 cannot be considered an expression of Russia's consent because the very jurisdiction permitting arbitration comes from a convention that has not been ratified by Russia.

The solution is the same achieved in the bilateral treaties presently ratified by the Russian Federation. Only eleven of the thirty-two treaties regarding the protection of foreign investments concluded by Russia have entered into force. The treaty with the United States is among those that have not entered into force.

97 1999 Law on Foreign Investment, supra note 33, art. 10.
100 See sources cited supra note 70.
Moreover, none of those treaties regards a national state of any Yukos shareholder. The only pertinent treaty, concluded with the United Kingdom in 1989 and in use since 1991, does not apply to Gibraltar, the place where the Menatep Group was founded.102

By contrast, a positive solution derives solely from the Energy Charter Treaty, which is concretely applicable in the Yukos case. In this treaty, Russia gave its consent to the application of the ECT. Thus, by article 26, Russia offers to foreign investors the right to initiate arbitration. Such an offer is only revocable by Russia if it withdraws from the ECT. Once the investor accepts these conditions, the arbitration agreement is concluded. Referring to article 26 of the ECT, Yukos is thus entitled to initiate arbitration against the Russian Federation.

This solution had previously been proposed to the Houston court by one of the experts called by the parties, Professor Thomas Wälde, who correctly observed that “Articles 8, 10, and 4.5 and the preamble of the [Russian Federation’s 1999 Law on Foreign Investment] create a right of arbitration for Yukos . . . [and] that the Energy Charter Treaty requires submission by Russia to international arbitration with respect to investment disputes.”103 Wälde testified that “[a]ny other way would subject an investor to


102 In fact, the treaty concluded on June 17, 1992, but the United States has still not entered it into force. On this treaty, see Black, supra note 31, at 136. See also U.K.-U.S.S.R. Agreement, supra note 101, art. 1(e)(i) (outlining what lands the term “territory” within the agreement includes). Concerning this treaty, article 8.3 states that investors “shall have the right to refer the dispute either to: (a) the Institute of Arbitration of the Chamber of Commerce of Stockholm; or (b) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.” Id. art. 8.3.

the vagaries of politically dominated opponents."

It remains to be examined whether any serious obstacle opposes the full implementation of this solution. The question rests on two issues. The first regards the effect of international law norms. In Russia, it does not seem to be a real problem that the ECT has received a temporary application. Usually the only limit to provisional applications is the existence of national constitutional provisions inconsistent with the norms of the treaties according to article 45.1. However, this is not the case here. In fact, "in case[s] of anticipated application, the conventional regime is then applied." The second issue concerns the inability to contradict the fiscal nature of the concrete complaint of pending disputes. Article 21.5 of the ECT, as observed above, expressly provides the possibility to initiate arbitration on disputes involving fiscal issues. Therefore, based on this norm, arbitration will be as useful as it is necessary to ascertain whether a fiscal measure constitutes an expropriation under the ECT.

Moreover, one cannot object that the disputes between Yukos and the Russian Government have been decided already by Russian courts, and as a result, arbitration is precluded by the opt-out clause signed by the Russian Federation under article 26.3(b)(i) of the ECT. Rather, it seems that the preclusion applies only to

104 Id.
105 See discussion supra note 75.
106 Wålde skillfully describes this situation. According to the author, the investment arbitration provision of article 26.1 in conjunction with the provisional application provision of article 45 "means that governments have, using their existing executive powers in this field, effectively and with immediate effect made the required 'offer' of investment arbitration which becomes effective once investors agree to it . . . The signature of the Treaty . . . implies an irrevocable offer to current and prospective investors to accept Treaty arbitration . . . The only defence for governments is therefore that submission to international arbitration would be 'ultra vires,' i.e. not authorized by national law." Wålde, supra note 69, at 463 (first emphasis added).
107 See supra text accompanying notes 81-85 (describing the mechanics through which investment disputes are resolved in the ICSID).
108 On the possibility of initiating arbitration on taxes, when they concern a foreign investment, see Bernard Hanotiau, L’arbitrabilité, 296 RECUEIL DES COURS 24, 171 (2002) (Fr.); Ibrahim Fadlallah, Arbitrage international et litiges fiscaux, 2001 REV. ARB. 299, 308 (Fr.).
109 See ECT, supra note 61, art. 26.3(a) (excepting contracting parties that have previously submitted the dispute under subparagraph (2)(a) or (b) from the ECT default rule that "each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation").
disputes which have been already judged by national courts, and are limited to the complaint before those courts.\textsuperscript{110} Clearly, under the opt-out clause, complaints already submitted to national courts cannot be arbitrated, but this barrier operates only if the disputes submitted to arbitration and those submitted to national courts concern the same pleading. On the contrary, a dispute having an original, previously unexamined pleading can be submitted to arbitration.

This is the issue involving Yukos. The disputes brought before Russian courts represent mere objections to the tax claims against Yukos. By contrast, the request for arbitration concerns alleged expropriations or supposed violations of the obligations owed to the state as a result of international treaties and customary law.\textsuperscript{111} It appears clear that the complaints are different.

To conclude, nothing seems to bar the application of the arbitration without privity doctrine in the Yukos case. Thanks to the ECT, Yukos is entitled to enjoy an unquestionable right to initiate arbitration that can be activated by the investor through a simple expression of consent to arbitrate the dispute. This raises the question of what consequences would follow from the adoption of this doctrine in the Houston bankruptcy court proceedings.

8. YUKOS IN TEXAS

Once it has been established that an arbitration agreement exists between Yukos and the Russian Federation, one can argue that the Houston court must automatically enforce this agreement. However, it is useful to make some preliminary remarks about the concrete complaint of the pending dispute between the parties. On the one hand, one cannot forget that this complaint regards a

\textsuperscript{110} Id. The norm refers to the case when “the Investor has previously submitted the dispute” to the national courts or a consensual arbitration. Id. art. 26(c)(b)(i) (emphasis added).

\textsuperscript{111} One can consider the paradoxical character of article 10 of the Russian Federation’s 1999 Law on Foreign Investment: On one hand, that provision gives the investor the right to initiate arbitration under applicable treaties and laws. 1999 Law on Foreign Investment, supra note 33, art. 10. While on the other hand, the Russian Federation has not given its unconditional consent to the use of arbitration procedure, through the opt-out clause provided by article 26.3(b)(i) of the ECT, annuling de facto the right to arbitration of the investor who has previously filed a claim before the national courts. ECT, supra note 61, art. 26.3(b)(i).
bankruptcy proceeding. Can the bankruptcy court use arbitration in a dispute that has arisen between the debtor and one of its creditors? On the other hand, if one of the parties involved in the arbitration is a sovereign state, is the creditor *quid juris* subject to the court's order to compel arbitration in a foreign state?

In answering these questions one must consider that in the United States, jurisprudence and scholars affirm that bankruptcy courts have the discretion to submit a dispute to arbitration after having assessed the interests involved therein.112 Thus, there is no question about the concrete possibility of the bankruptcy judge compelling parties to international arbitration.

Second, regarding the sovereignty of foreign states, one should remember that sovereign immunity usually does not apply to arbitration.113 The Foreign Sovereign Immunities Act states that a

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113 See Riccardo Luzzatto, *International Commercial Arbitration and the Municipal Law of States*, 157 RECUEIL DES COURS 13, 93 (1977) ("There should be ... no doubt ... that an agreement to arbitrate constitutes an implicit waiver and that therefore international or municipal rules granting sovereign immunity should
foreign state is deprived of its immunity not only when the arbitration is initiated because of an arbitration agreement (e.g., if the New York Convention is applied)\textsuperscript{114} but also when the dispute concerns the alleged expropriation of U.S. investors' assets abroad.\textsuperscript{115}

Moreover, it is important to note that the existence of an arbitration agreement between the parties produces some significant results. First, article 2, paragraph 3 of the New York Convention states that:

\[ \text{[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.}\textsuperscript{116}\]

\textsuperscript{114} The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.) [hereinafter FSIA], contains the fundamental norms of this topic and generally establishes that foreign states remain immune from the U.S. courts' jurisdiction, except when an express exclusionary rule applies. Before the 1988 amendment, FSIA did not provide for the case of an arbitration clause between an individual and a foreign state; however, the fact that the foreign state had signed the New York Convention constituted an implied waiver to immunity. Actually, since section 1605(a)(6) of FSIA applies, it is required either that arbitration take place in the United States or, alternatively, that the foreign state is a party to an international treaty concerning arbitration clauses or awards relevant in that specific case. Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012 (2d Cir. 1993); see George Kahale, III, Arbitration and Choice-of-Law Clauses as Waivers of Jurisdictional Immunity, 14 N.Y.U. J. INT'L L. & POL. 29 (1981) (discussing the issue of whether an arbitration of choice-of-law clause may be construed as a waiver of jurisdictional immunity); Paul A. Pavlis, Note, International Arbitration and the Inapplicability of the Act of State Doctrine, 14 N.Y.U. J. INT'L L. & POL. 65 (1981) (examining the feasibility and legal ramifications of extending the act of state doctrine to deny the arbitrability of an investment dispute following a foreign expropriation); Gary B. Sullivan, Comment, Implicit Waiver of Sovereign Immunity by Consent to Arbitration: Territorial Scope and Procedural Limits, 18 TEX. INT'L L.J. 329 (1983) (analyzing the scope of an implied waiver by arbitration agreement under FSIA). On this point, one must specify that American courts consider adequate that the state is a party to the New York Convention.


\textsuperscript{116} New York Convention, supra note 85, art. 2. This so-called negative effect of the arbitration agreement clearly shows the process efficiency of this contract:
As a result, the Houston bankruptcy court would be able to refer the parties to arbitration only after ascertaining that the conditions requested by the norm were realized. On this matter, section 206 of the Federal Arbitration Act of 1976 provides that “[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.”

This provision contains four issues that are very relevant in the present case. First, the courts called to compel arbitration must have jurisdiction over the parties according to the general principles and doctrines. Second, the New York Convention of 1958 must be applied. Third, it is not a problem that section 206 the hybrid nature of the arbitration agreement appears in its process dimension, not its jurisdictional dimension, by prohibiting the courts and judges from deciding the same case. José Carlos Fernández Rozas, Le rôle des juridictions étagées devant l’arbitrage commercial international, 290 Recueil des Cours 72, 78 (2001) (Fr.); see also 2 PHILIPPE FOUCHARD, L’ARBITRAGE COMMERCIAL INTERNATIONAL 116 (1965) (Fr.). The first two paragraphs of article 2 of the New York Convention state:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

New York Convention, supra note 85, art. 2. On this article, see DOMENINCO DI PIETRO & MARTIN PLATTE, ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS: THE NEW YORK CONVENTION OF 1958, at 104 (2001).


118 See Ledee v. Ceramiche Ragno, 684 F.2d 184, 186-87 (1st Cir. 1982) (explaining the analysis that is necessary for determining whether or not arbitration falls under the scope of the Convention). Section 202 of the Federal Arbitration Act provides that:

[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.
provides that the court may refer disputes to arbitration, while in contrast, article 2.3 of the Convention establishes that national courts shall grant the arbitration motion.\footnote{9 U.S.C. § 202 (2000).} In fact, U.S. courts made clear that they are undoubtedly bound to initiate arbitration according to the\textit{ favor arbitrati}, which characterizes the Federal Arbitration Act.\footnote{See Albert Jan van den Berg, \textit{The New York Arbitration Convention of 1958}, at 135 (1981) (discussing the omission of the word "shall" in one edition as a typographical error); see also Mauro Rubino-Sammartano, \textit{International Arbitration Law} 250 (1989) (discussing the problems with having measures decided by the parties or by the judge's discretion).} Finally, the referred arbitration must take place in the venue chosen by the parties, even if located abroad. If a specific venue for the arbitration agreement is not chosen, courts rule that arbitration will take place in the district where the filing occurred.\footnote{[S]o long as parties are bound to arbitrate and district court has personal jurisdiction over them, the court is under an unflagging, nondiscretionary duty to grant a timely motion to compel arbitration and thereby enforce the New York Convention... even though the agreement in question requires arbitration in a distant forum.}

At this point, one should remember nevertheless that it could be very difficult to compel arbitration against the Russian Federation before a U.S. court. Russia is a sovereign state and the Yukos affair implies important issues related to Russian politics and its economy. The Russian government is strictly involved in the world oil market and it would not be diplomatically and politically dignified for Russia to be judged by a foreign court. For these reasons, an international arbitration would be the best solution for resolving Yukos's claims.

The Houston bankruptcy court did not decide that Yukos must be compelled to arbitration. As noted above,\footnote{Section 206 does not allow parties to initiate arbitration if they did not agree on the arbitration's venue. In Bauhinia Corp. v. China Nat'l Mach. & Equip. Import & Export Corp., 819 F.2d 247, 250 (9th Cir. 1987), the district court noted that "[i]n the absence of a term specifying location, a district court can only order arbitration within its district" since "section 206 does not permit a court to designate a foreign forum when the agreement fails to designate a place."} the court decided to dismiss the case for other reasons.\footnote{See supra text accompanying notes 25–27.} Certainly, this would have

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\item[119] See Albert Jan van den Berg, \textit{The New York Arbitration Convention of 1958}, at 135 (1981) (discussing the omission of the word "shall" in one edition as a typographical error); see also Mauro Rubino-Sammartano, \textit{International Arbitration Law} 250 (1989) (discussing the problems with having measures decided by the parties or by the judge's discretion).
\item[120] [S]o long as parties are bound to arbitrate and district court has personal jurisdiction over them, the court is under an unflagging, nondiscretionary duty to grant a timely motion to compel arbitration and thereby enforce the New York Convention... even though the agreement in question requires arbitration in a distant forum.
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\item[122] See supra text accompanying notes 25–27.
\item[123] There is only one reference to arbitration—except for the experts' references—in the \textit{In re Yukos Oil Co.} opinion "[b]ecause the court has concluded that the instant case is to be dismissed, the court does not reach the question of
\end{enumerate}
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been a good opportunity to know the court’s opinion on some of the issues described in this Article. It is curious, however, that in her final decision, Judge Clark refers to both the ECT and the prospect that under a different forum, the process would be conducted with complete involvement of the Russian Federation. This suggests that the court seriously considered the consequences of initiating arbitration, even though in the end the judge opted to dismiss the case for other reasons.124

Despite the judgment of February 24, 2005, the Yukos affair is experiencing further developments. In fact, Yukos’s major shareholder, Group Menatep, requested arbitration according to article 26 of the ECT and the rules of UNCITRAL in the amount of $28 billion!125 This proceedings will follow the others currently pending before the Russian courts, against both the Ministry of

whether the act of State doctrine would apply to the court’s consideration of the motion to compel arbitration.” In re Yukos Oil Co., 321 B.R. 396, 410 (Bankr. S.D. Tex. 2005).

124 Id. at 404, 408-09.

125 Democracy in Retreat in Russia: Hearing Before the S. Comm. on Foreign Relations, 109th Cong. 26 (2005) (statement of Timothy Osborne, Member, Board of Directors, Group Menatep). In his prepared statement before the U.S. Senate, Osborne gives the details of their proposed arbitration:

[O]n February 9 of this year, Group Menatep proceeded to file a claim against the Russian Federation under the terms of the 1994 Energy Charter Treaty. Group Menatep’s claims are based on the Russian Federation’s failure to protect the company’s investments in Russia, and specifically the expropriation of Yuganskneftegaz. The claims seek compensation of approximately US $28.3 billion. Under the terms of the Treaty, breaches by the Russian Federation of its international obligations entitle the Claimants to the payment of prompt, adequate and effective compensation. Under Article 26 of the Energy Charter Treaty, disputes can be referred to international arbitration if they are not settled amicably between the disputing parties within 3 months of a notification of claim. The Claimants delivered original notifications to the Russian Federation on November 2, 2004. Since then, the Russian Federation has totally ignored the notifications and has failed to settle amicably the dispute.

Finance and all companies involved in the YNG auction. In conclusion, the Yukos affair is far from finished and seems to have more surprises ahead.

126 See, e.g., Andrew Neff, Too Little, Too Late? Yukos’ 2000 Back Tax Penalties May Be Dropped, WORLD MARKETS ANALYSIS, Mar. 2, 2005 (discussing the outlook for Yukos after its “victory” in front of Russia’s Supreme Arbitration Court).