Arbitration Institute of the
Stockholm Chamber of Commerce

RENTA 4 S.V.S.A.
AHORRO CORPORACIÓN EMERGENTES F.I.
AHORRO CORPORACIÓN EUROFONDO F.I.
ROVIME INVERSIONES SICAV S.A.
QUASAR DE VALORS SICAV S.A.
ORGOR DE VALORES SICAV S.A.
GBI 9000 SICAV S.A.

Claimants

and

THE RUSSIAN FEDERATION

Respondent

AWARD ON PRELIMINARY OBJECTIONS

20 March 2009

Before the Tribunal comprising:

Charles N. Brower
Toby T. Landau
Jan Paulsson

Representing the Claimants:

Covington & Burling LLP
O. Thomas Johnson, Jr.
Marney L. Cheek
Jonathan Gimblett
John P. Rupp

Cuatrecasas Abogados, S.R.L.
Jorge Capel Novarro

Representing the Respondent:

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Katya Akkush
Johannes Koepp
Devashish Krishan

Place of arbitration: Stockholm

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1. BACKGROUND

1. Renta 4 S.V.S.A. identifies itself as the parent corporation and depositary of the Spanish investment fund (*fondo de inversion*) Renta 4 Europa Este FI. The two "Ahorro" entities identify themselves as Spanish investment funds. The four remaining Claimants identify themselves as Spanish variable stock companies (*sociedades anónimas de capital variable*). All act jointly in this case through Covington & Burling LLP and Cuatrecasas Abogados SRL.

2. The Russian Federation ("Russia") is represented by its Ministry of Justice. The First Deputy Minister executed a power of attorney dated 15 May 2007 (renewed on 26 September 2008) authorising attorneys in Baker Botts LLP to act in this case.

3. The Claimants allege that Russia unlawfully dispossessed Yukos Oil Company ("Yukos") of its assets and expropriated it from its shareholders. They state that they are owners of Yukos American Depository Receipts (ADRs) and demand compensation for their loss. Their claim is that the dispossession was achieved by means of a variety of abuses of executive and judicial power. The narrative of these alleged abuses is lengthy. For the purposes of this Award it is sufficient to note the general nature of the allegations.

4. The Claimants rely on the Agreement for Reciprocal Promotion and Protection of Investments between Spain and the USSR which entered into force on 28 November 1991 ("the Spanish BIT"). The authentic languages of the BIT are Russian and Spanish. Quotations

herein are taken from the translation into English published in the United Nations Treaty Series. Both sides have relied on that translation. Neither has argued that either of the two authentic texts differs materially.

5. Article 10 of the Spanish BIT reads as follows:

> *Disputes between one Party and investors of the other Party*
>
> *1. Any dispute between one Party and an investor of the other Party relating to the amount or method of payment of the compensation due under article 6 of this Agreement, shall be communicated in writing, together with a detailed report by the investor to the Party in whose territory the investment was made. The two shall, as far as possible, endeavour to settle the dispute amicably.*
>
> *2. If the dispute cannot be settled thus within six months of the date of the written notification referred to in paragraph 1 of this article, it may be referred to by* [sic] *either of the following, the choice being left to the investor:*
>
> - *An arbitral tribunal in accordance with the Regulations of the Institute of Arbitration of the Chamber of Commerce in Stockholm;*
>
> - *The* ad hoc *arbitral tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).*

> *3. The decisions of the arbitral tribunal shall be based on:*
>
> *- The provisions of this Agreement;*
>
> *- The national legislation of the Party in whose territory the investment has been made, including the rules of conflict of laws;*
>
> *- The universally recognized norms and principles of international law.*
>
> *4. The decisions of the arbitral tribunal shall be final and binding on the Parties involved in the dispute. Each Party shall undertake to abide by such decisions in accordance with its national legislation.*

6. The Claimants separately wrote letters to the Russian Ministry of Foreign Affairs in the period between 10 July 2006 and 9 November 2006 by which they gave notice of their claims. They lodged a joint Request for Arbitration before the SCC Institute on 25 March 2007.

7. Russia submitted an Answer dated 16 May 2007 to the SCC Institute. It took the position that the SCC Institute "manifestly lacks jurisdiction over the dispute" and should therefore dismiss the case. The SCC Institute determined otherwise and proceeded to constitute the present Arbitral Tribunal.

8. Russia asserts that the Arbitral Tribunal has no jurisdiction. Its objections to that effect were explained in a Memorial on Preliminary Objections dated 18 February 2008 and amplified in a Reply Memorial dated 27 June 2008. The Claimants answered these Memorials in a Counter-Memorial and a Rejoinder on Preliminary Objections dated respectively 21 April 2008 and 8 September 2008.

9. The Claimants initially took the position that to survive a preliminary jurisdictional challenge they needed only to allege ownership of Yukos ADRs. Their argument was that factual determinations are matters for the merits phase. Russia objected. The Arbitral Tribunal agreed with Russia in principle. It accepted that the factual bases of a claim may be assumed *pro tem* when jurisdiction is at issue. The factual basis of a claimant's standing should nevertheless in principle be demonstrated at that stage. Otherwise the very purpose of a preliminary determination could be defeated. Accordingly the Arbitral Tribunal instructed the Claimants to give proof of their ownership prior to the hearing of Preliminary Objections. The Claimants did so in the form of a Submission Concerning Proof of Ownership dated 22 August 2008. It included a number of documents as well as a Declaration by Mr Jesus Mardomingo Cozas (an "expert in the Spanish law on collective investment institutions"). Russia responded by letter dated 24 September 2008 to the effect that the Claimants' submission was "inadequate" and "failed to document their standing".

10. A hearing on the Preliminary Objections was held in Washington D.C. on 27 and 28 September 2008. The Claimants did not offer any witnesses. They made Mr Mardomingo available to answer any questions with respect to his Declaration but no questions were put to him. The hearing therefore consisted of oral submissions by counsel.

11. The Tribunal sees no need to burden this text with a recital of correspondence with counsel. Nor is it necessary to set out the content of procedural orders. They have all been reduced to writing. Suffice it to say that at the end of the hearing on the Preliminary Objections the Parties explicitly confirmed that they considered the objections were "ripe for adjudication" (T:453-4).

12. The Arbitral Tribunal assumes *pro tem* that the conduct imputed by the Claimants to Russia is correctly described and characterised. Nothing in this decision should be construed as a prejudgment of those allegations.

13. Some of Russia's objections are properly understood as arguments that the claims are inherently beyond the scope of the Arbitral Tribunal's jurisdiction. Other objections are to the effect that the claims are inadmissible due to alleged defects in their presentation. A tribunal having jurisdiction over given claims has the plenary authority to decide whether they have been properly presented and are in that sense admissible. This distinction explains the division of the matters decided herein.

14. Russia has moreover raised an issue as to the Claimants' possible disqualification by virtue of the rule of continuous nationality. The Claimants answer that any sales of ADRs have not been accompanied by corresponding assignments of claim against Russia. They readily concede that the timing of such sales may be relevant to the calculation of prejudice. This matter is not ripe for decision. The Tribunal sets it aside for now without prejudice to the Parties' various past and future contentions.

15. The sources of law applied by the Tribunal are defined in Article 10 of the BIT itself (see Paragraph 5 above). It is an international instrument that if necessary falls to be interpreted in accordance with the Vienna Convention on the Law of Treaties. Both Spain and Russia are parties to that Convention.

16. The Tribunal is not obliged to adopt the conclusions of other courts or tribunals. The elements of the present arbitration are not identical to those of other cases brought to the attention of the arbitrators. The present Parties are entitled to a decision based on the arbitrators' examination of the facts and arguments presented in this case. The arbitrators do not in any event operate in a hierarchical and unitary system which requires them to follow precedents. They are nevertheless attentive to prior decisions brought to their attention. They are bound to do so as part of their basic duty to consider the Parties' arguments. Moreover they are inclined to do so on the premise that there is value in considering the reasoning

of decision-makers who have given careful attention to issues similar to those that arise here. The arbitrators would be hesitant to depart from a proposition followed in a series of fully-reasoned decisions reflecting a *jurisprudence constante.*

2. JURISDICTION

17. The oral arguments were dominated by a debate concerning the scope of Article 10 of the Spanish BIT (quoted in Paragraph 5 above). This debate concerns two fundamental issues. The first is the inherent ambit of the Article. The second is the possibility of extending that ambit by reference to the Treaty's promise of treatment equivalent to that accorded to most-favoured nationals ("MFN"). These two matters were given more attention in the course of the hearing than all others combined. They will therefore be considered first. The Tribunal will then turn to three issues of standing.

18. Russia had also argued in its written pleadings that specific consent was required for any individual case to be arbitrated under Article 10 due to its non-mandatory nature: "[B]oth parties must agree to refer arbitrable disputes to arbitration before the proceedings can be commenced." This contention viewed the words "may be referred" in Article 10(2) as insufficient consent to arbitration. It was withdrawn by letter dated 20 October 2008.

2.1 Does Article 10 allow arbitration of this claim?

19. Article 10 of the Spanish BIT (quoted in Paragraph 5 above) covers investor-State disputes "relating to the amount or method of payment of the compensation due under Article 6 of this Agreement". Article 6 reads as follows:

Nationalization and Expropriation

> *Any nationalization, expropriation or any other measure having similar consequences taken by the authorities of either Party against investments made within its territory by investors of the other Party, shall be taken only on the grounds of public use and in accordance with the legislation in force in the territory. Such measures should on no account be discriminatory. The Party adopting such measures shall pay the investor or his beneficiary adequate compensation, without undue delay and in freely convertible currency.*

20. Russia argues that Article 10 plainly does not encompass all conceivable disputes under the Spanish BIT and that the Claimants' Request for Arbitration was therefore misguided when it relied on Articles 4 to 6. Article 4 proscribes "unjustified or discriminatory measures affecting investments". Article 5 warrants fair and equitable treatment as well as MFN benefits. International investor-state arbitration is expressly accessible under the Treaty only with respect to claims under Article 6. Even such claims are subject to the further limitation that they must relate to disputes about the amount or the method of payment of the compensation due. Russia considers that there is continuing disagreement as to whether any of the criticised measures were expropriatory in the first place. That controversy must therefore (in Russia's contention) be resolved in some other proper forum before matters of quantum may go to international arbitration under Article 10. The present claims therefore perforce fall outside the scope of Article 10.

21. It is important to survey the layers of limitation Russia places on Article 10. Russia seeks not just to restrict arbitration to disputes concerning "compensation". That might leave the door open to disputes whether there should be any compensation at all. Russia considers that

the words "amount or method of payment" allow nothing but a narrow debate about quantum or timing and currency. Even that might leave a door open to say that "amount" includes "no amount" (e.g. because the asset has nil value or because no expropriation has occurred). Yet Russia contends that it has a further rampart: the dispute must concern amounts *already established* as "due" under Article 6. The measures of nationalisation and expropriation dealt with in that Article are subject to familiar requirements of lawfulness and non-discrimination. Those requirements may naturally lead to debate. Russia asserts that such matters may be heard in one of two types of fora. There may be litigation in Russian courts. Spain might act on behalf of its nationals under the Spanish BIT. But Article 10 does not allow investor-State arbitration of disputes as to compliance with Article 6.

22. *Vladimir and Moïse Berschader v. Russian Federation* (2006) involved a claim by Belgian nationals under the 1989 BIT entered into by the Belgium/Luxembourg Economic Union and the Soviet Union. It is relied upon by Russia in the present case because the arbitrators in *Berschader* faced a virtually identical conjunction of treaty provisions. Article 5 of that BIT defined the elements of permissible expropriation and nationalisation. Those elements included compensation reflecting "the real value" of the investment to be paid promptly in convertible currency. Article 10 gave investors the right to arbitrate disputes "concerning the amount or mode of compensation to be paid under Article 5". (Nothing apparently turns on the choice between the English words "method" or "mode" in the translations.) *Berschader* considered that this limitation excluded "disputes concerning whether or not an act of expropriation actually occurred under Article 5" (para. 153).

23. The impact of *Berschader*'s consideration of this point is attenuated by the fact that its conclusion was superfluous. The arbitrators gave primary attention to what they deemed to be an unprecedented feature of the case: whether "the sole claimants are foreign shareholders in a foreign incorporated company seeking to rely on the terms

of a BIT without having made any direct investment on their own part" (para. 135). They devoted 26 paragraphs of the award to this issue. Their conclusion was that there was no jurisdiction with respect to the claimants' indirect investment. The door had therefore already been shut on the claimants by the time the arbitrators next turned to consider the phrase "amount or mode of compensation". Their conclusion in this regard may be considered *obiter*. It is explained in seven short paragraphs. It cannot be adopted by the present arbitrators because it does not do justice to the extensive and refined debate which has emerged in the present case. There is no way of knowing from their award how the *Berschader* arbitrators would have reacted to the points raised here. (*Berschader* was decided by a majority but the dissenting arbitrator did not take issue with these seven paragraphs.)

24. *Berschader* basically repeats that "the ordinary meaning" of the limitation "is quite clear[ly]" to the effect that only disputes "concerning the amount or mode of compensation" may be subject to arbitration. This is no more than a restatement of the problem. It is necessary to determine whether these words exclude disputes over *entitlement* to compensation (with the effect of limiting jurisdiction to mere quantification or mode of payment). The quoted words do not exclude that a claimant may react to a respondent's refusal to accept that *any* "amount" is due by bringing into play the substantive predicate of arbitral jurisdiction: an expropriation carried out in such a fashion as to create an entitlement to compensation pursuant to Article 6.

25. *Berschader*'s only conceptual treatment of this issue is contained in para. 153. The arbitrators there state that they were "satisfied" that Article 10 excluded "disputes concerning whether or not an act of expropriation actually occurred under Article 5". This is a simple affirmation. It does not appear to be supported by analysis. The rationale is set down in two sentences. They are founded on an explicit assumption:

> *From the ordinary meaning of Article 10.1, it can only be assumed that the Contracting Parties intended that a dispute concerning whether or not an act of expropriation actually occurred was to be submitted to dispute resolution procedures provided for under the applicable contract or alternatively to the domestic courts of the Contracting Party in which the investment is made. It is only a dispute which arises regarding the amount or mode of compensation to be paid subsequent to an act of expropriation already having been established, either by acknowledgement of the responsible Contracting Party or by a court or arbitral tribunal, which may be subject to arbitration under the Treaty.*

26. The words "it can only be assumed" will not do for present purposes. The "assumption" is certainly not inevitable. Words may have an "ordinary meaning" as units of language. It does not follow that their import is self-evident when viewed in context.

27. Russia invites the arbitrators to conclude that Article 10(1) lexically excludes the Claimants' reading. The words "compensation due" are said to *modify* "amount" or "method" (T:56). That grammatical inference is less than convincing. The plainest proposition to be derived from Article 10(1) is that it allows arbitration with respect to debates about the amount or method of such compensation as may be due under Article 6. The difficulty begins precisely once one asks: Who determines whether compensation is indeed "due" under Article 6?

28. Consideration of this question leads the Tribunal to conclude that the word "due" in fact disfavours Russia. The reference to disputes relating to "compensation due under Article 6" is found in Article 10 itself. The logical progression seems straightforward. Article 6 establishes that there shall be no expropriation unless it is lawful by

reference to criteria set out in that Article. Article 10 gives an investor the right to seek arbitration with respect to "[a]ny dispute ... relating to the amount or method of payment of the compensation due under Article 6". The Claimants allege expropriation. Russia denies any obligation under this head. There is therefore a dispute as to whether compensation is "due". The force of this simple proposition is buttressed by the open texture of the introductory words: *any disputes ... relating to.*

29. Russia argues that there is no dispute as to quantification. It does not assert that the value of the putative investment is zero. For jurisdictional purposes it need not deny that the assets have whatever value the Claimants seek to ascribe to them. The Claimants are in Russia's view really seeking to debate whether expropriation occurred. Russia submits that Article 10 does not allow them to do so.

30. The flaw in Russia's argument is that there is more than one basis on which a respondent State could say "zero". One might indeed be a divergence as to quantification. Another could be a denial of any obligation on account of alleged expropriation. The first raises no problem. Russia would accept (purely hypothetically) that the Tribunal could decide whether the value of allegedly expropriated assets was zero or some higher number as a matter of proper valuation. But the second is different. Russia denies that the Tribunal is empowered to decide that the basic predicate to its jurisdiction has arisen: an event of such a nature as to require the compensation unquestionably to be assessed by the arbitrators.

31. An investor seeking an award of compensation under Article 10 may thus face more than one conceptual building block. It may face a disagreement as to quantification. But it may also (or only) face a challenge as to whether an obligation has arisen under Article 6. Such an obligation is the evident predicate to any amount being "due" and thus the object of the type of debate allowed under Article 10. The existence of the basic predicate of a remedy under Article 10 cannot be deemed outside the

purview of a tribunal constituted under that very Article. Russia correctly observes that "international courts and tribunals must decline jurisdiction over prerequisite cognate issues that are outside the bounds of the parties' consent" (in footnote 22 of Russia's Memorial on Preliminary Objections). But this principle does not apply here. It is precisely Article 10 that defines the bounds of the State-parties' consent. The present Tribunal is both empowered and obligated to construe the scope of authority thereby created.

32. The arbitrators have considered whether their conclusion contradicts the familiar canon of interpretation which holds that all expressions in an agreement should if possible be given meaning. It is not always evident how isolated the relevant expression must be. Article 10 contains some 200 words arranged within four paragraphs. Its purported overall effect is to create international arbitral jurisdiction. It is constructive; its *raison d'être* is not to limit a pre-existing jurisdiction. The search to give meaning to the eight (or eleven) words that follow "relating to" in Article 10(1) simply cannot be allowed to deprive the remaining text of its essential positive meaning.

33. There is more. Article 10(1) does not inevitably identify a narrower mandate than would have been the result of a simpler text referring curtly to "disputes concerning Article 6". Consider the case of an expropriation which has led to payment in an amount established by a municipal administrative or judicial body. There is no issue of legality or discrimination. The investor wishes to challenge the amount of compensation. The State retorts that the adequacy of compensation was established in accordance with law and should not be questioned internationally. An international tribunal may be reluctant to exercise jurisdiction to second-guess a procedure presenting *prima facie* regularity. Such a scenario is a central concern of investors who are averse to allowing the host State to act as judge and party in measuring the monetary extent of its own liability. The wording of Article 10(1) would give comfort in these circumstances: "any dispute ... relating to the amount" of "compensation due" would be internationalised. These

words would certainly not be perceived as superfluous. A similar example is plainly conceivable with respect to "method" (currency and timing).

34. Both sides sought to derive support from the judgment rendered by the English High Court in *The Czech Republic v. European Media Ventures SA* (2007). The BIT in that case limited jurisdiction to disputes "concerning compensation due" by virtue of "dispossession". An UNCITRAL arbitral tribunal had found jurisdiction to hear a claim for indirect expropriation. The High Court rejected a challenge to that jurisdictional finding. The Claimants rely on the judgment because it interprets the arbitration clause to extend to "entitlement as well as quantification". Russia counters *a contrario* that the arbitration clause did not contain the words "amount or method of payment" which it says further limits the concept of compensation.

35. What the High Court would have decided if these additional words had been found in the BIT relevant in the *European Media Venture* case must remain a matter of conjecture. Yet it should be noted that the presence of the word "due" did not dissuade the High Court from finding that the arbitrators had jurisdiction to determine *entitlement.* Indeed the word "due" was relied upon as establishing a linkage between the provisions concerning dispossession and arbitration in the BIT in question. That linkage brought within the purview of arbitral authority a range of matters concerning the application of the dispossession provision itself (as notably explained in the Judgment in para. 45). It was not necessary that entitlement be preestablished under the provision relating to dispossession to which the arbitration clause referred.

36. Counsel for Russia were asked on the first day of the hearing whether the simple denial that an expropriation had taken place would have the result of "an insurmountable loss of jurisdiction without qualification". They confirmed that this was indeed Russia's position and proposed the following illustration:

> *The Spanish investor buys a farm. And Russia comes in and they take the farm, and they don't tell the investor why, but they say, "You're not due any compensation; you have no right to this," period, end of story, and they don't even say "well, can this panel then have jurisdiction?" The answer is no, because you don't know whether that taking was lawful or not. You don't know if it was taken because Claimants never had property rights. You don't know whether they didn't pay their taxes. You don't know whether there was a regulatory matter that they were growing marijuana. You just don't know. And that's an area that the state may have the right to come after the host country, but not an individual investor to come in, as with every single taxing matter, every single taking. This treaty is to go to the issue where there is a dispute over the amount of compensation due under the treaty. And if there's a situation where there is not simply the fight on the amount of compensation due, then you have, respectfully, no jurisdiction in this case.* (T:26-27.)

37. They later added that:

> *if there's a dispute as to whether there was an expropriation, then you have no jurisdiction.* (T:31.)

38. They confirmed that this meant that even if there had been a decree of expropriation a subsequent denial that the event had been properly characterised would prevent a claim under Article 10 (T:32).

39. On the second day of the hearing counsel for Russia seemed to retreat. They stated that arbitrators acting

under Article 10 of the Treaty could "proceed" in the presence of a "final court order" acknowledging that there has been a compensable event as defined in Article 6. They were asked whether this was so "no matter what we're told by the Russian Federation with respect to it". They then assented (T:320). One can hardly resist the impression that this wavering posture reflects the difficulty of maintaining Russia's rather extreme stance. The Tribunal does not believe that the text allows a curtailment of the international tribunal's authority to decide whether compensation is "due". That perforce entrains the power to determine whether there has been a compensable event in the first place.

40. Indeed counsel for Russia also observed straightforwardly that "Article 10 limits you to some aspects of Article 6" (T:82). The arbitrators do not rush to attribute decisive effect to one utterance among many. But they are struck by the tension between this plainly sensible remark and Russia's insistence that the Tribunal must treat Article 6 as a locked and inviolable strongbox to which the present arbitrators have no key. This cannot be so. Article 6 defines the precondition of compensation being "due" for the purposes of Article 10. It is an "aspect" of Article 6 which cannot be beyond the arbitrators' reach.

41. The Claimants also submitted that the wording of Article 10 allows the Tribunal to deal with only certain aspects of Article 6. Their analysis proceeds as follows. "Nationalization or expropriation" is compliant with the BIT (according to Article 6) if four requirements are met: (1) existence of grounds of public use; (2) conformity with legislation in force in the territory; (3) absence of discrimination; (4) payment of "adequate compensation without undue delay and in freely convertible currency" (see Paragraph 19 above). The first three of these requirements constitute criteria of international lawfulness. A State-party which satisfies each of them ensures that the measure of compensation can be only that set out under the fourth element of Article 6. But a failure of compliance with those three criteria would open the door to a measure of compensation which is not so restricted. This leads the Claimants to say that the reference in Article 10 to "the

amount or method of the compensation due under Article 6" serves the specific function of excluding the Tribunal's authority to decide whether an expropriation is internationally unlawful – e.g. to adjudicate upon any of the first three criteria in Article 6. Article 10 would thus leave only the possibility of determining the monetary concomitant of internationally *lawful* expropriation.

42. This analysis was advanced by the Claimants in conjunction with an important specific concession to the effect that Article 10 of the BIT "precludes jurisdiction over disputes arising from ... three of four conditions imposed on the contracting parties by Article 6 when they expropriate property" (T:183).

43. Russia maintains that this analysis undercuts the Claimants' own position. It explains that the last sentence of Article 6 defines an agreed standard of compensation. Standards of international law pertaining to unlawful expropriation would be inapplicable even if Article 10 allowed a full inquiry into compliance with all requirements of Article 6. Hence (so Russia argues) the Claimants' position impermissibly renders superfluous the phrase "the amount or method of the compensation due under Article 6" in Article 10.

44. The Tribunal finds this argument to be hyper-technical and unpersuasive. Russia views the Claimants' position as more intricate than it is. There can be no expectation (let alone certainty) that an international tribunal would – in the absence of the restrictive words of Article 10 – read the last sentence of Article 6 to exclude international norms as to the measure of compensation. It seems equally clear that the restrictive language has potential weight as regards the issue whether international norms relating to *unlawful* expropriation are excluded (and by the same token whether the Tribunal may adjudicate upon the first three criteria in Article 6).

45. It is convenient to articulate succinctly the Tribunal's conclusions so far:

(i) The arbitrators are not asked to determine whether Russia has acted discriminatorily or without the justification of public purpose. Nor would they be entitled to do so given the Claimants' concession (see Paragraph 42 above). It is unnecessary to consider issues that might have arisen if this concession had not been made. (A familiar feature of this area of international law is precisely the proposition that the lawfulness or otherwise of a measure of dispossession may affect the *amount* of compensation.)

(ii) The arbitrators are therefore not entitled to determine generally whether Russia's actions contravened its "legislation" on nationalisation and expropriation. They may however assess whether Russia's actions breached international law by depriving the claimants of adequate compensation for the dispossession of which they complain.

46. The textual analysis above is sufficient to decide the issue at hand. There is strictly speaking no need to consider whether extraneous considerations confirm the conclusion. Nevertheless the Tribunal believes it appropriate to explain why it finds that both evidence of the purported intentions of the parties and inferences as to the object and purpose of the Spanish BIT validate the arbitrators' conclusion.

47. *Berschader* asserts that "support" for its contrary conclusion is to be found in other BITs signed by the Soviet Union at the time of the Belgian/Luxembourg BIT. It expresses the view that these other treaties reflect a policy of limiting the arbitral option open to investors under BITs to "disputes concerning the amount or method of compensation to be paid on foot [*sic*] of an expropriatory act" (para. 155). This of course does no more than restate the issue. Moreover the award notes that two BITs (those concluded in 1989 with France and Canada) allowed arbitration with respect to the "consequences" of host state measures. The very exemplar cited for the policy of limitation (the BIT signed in 1989 by the UK and the

USSR) refers to "the amount or payment of compensation" and therefore appears to put into question the very predicate of any payment at all.

48. It is true that *RosInvestCo v. Russia* (2007) did not accept that the UK BIT's formulation conferred jurisdiction to rule whether expropriation had occurred. But that award does not consider whether the word "payment" may lead to consideration of the reality of its predicate: expropriation. This may be because it was not argued. Nor does the formulation in that treaty include the word "due". It is also noteworthy that the tribunal at any rate found that it had jurisdiction on another ground (MFN). Lastly one cannot overlook the following unusual declaration by one of the arbitrators in para. 123 of the award: "*I would not want our common conclusion that Article 8 does not confer jurisdiction in this case to be taken in any way as an expression of opinion on how that article or other similar treaty clauses relate to other claims that might be brought forward in other cases based on an allegation of expropriation.*"

49. Russia made eight jurisdictional objections in *Sedelmayer v. Russia* (1998). The claim there was brought under the USSR/FRG BIT. One of Russia's objections was to the effect that there had been no expropriation. Russia argued that the claimant's activities had been declared to be illegal by two court orders. Thereafter property was "returned" to the Russian State under a lawful order. This contention was submitted to the arbitral tribunal for decision. The treaty limited the scope of investor-State arbitration to disputes relating either to "the amount of compensation or the method of its payment" or to "freedom of transfer" of funds invested or repatriated. Yet no point was apparently made that (as Russia has put it in the present case; see Paragraph 37 above) "if there's a dispute as to whether there was an expropriation, then you have no jurisdiction." The failure to take this point in *Sedelmayer* is by no means decisive here. Yet it is natural to reflect that the alleged non-arbitrability of expropriation appears to have been less than striking and fundamental. This observation is even more clearly supported by the fact that BITs signed by the Soviet Union present significant textual

variations in this respect. It is difficult to say that the USSR had a single objective of public policy in negotiating the scope of its consent to international adjudication as expressed in BITs.

50. Indeed a paper on BITs published in 1991 by a member of the USSR's negotiating team (Mr R. Nagapetyants) referred to the "special practical significance" for foreign investors of the "opportunity to appeal" to international arbitration in cases of expropriatory measures. The author did not mention the proposition now being advanced by Russia to the effect that the existence of a compensable expropriation is beyond international jurisdiction. Such a restriction would have had vast "practical significance". The failure to mention it would have been inexplicable if such had indeed been the author's understanding of the USSR's approach. (Russia complains that Mr Nagapetyants' statement is taken out of context inasmuch as his paper elsewhere mentions the restrictive language in Article 10. The arbitrators do not see it that way. The recitation of the terms of Article 10 simply restate the problem. The comments about the "special practical significance" of international arbitration shed light on treaty objectives.)

51. The premise that one may consider the intentions of one of the parties to a BIT is questionable in the first place. The preceding paragraphs confirm that even if one did so in this case the result would be inconclusive. The alleged policy of the Soviet Union did not find a consistent expression in the various BITs concluded at the relevant time. Nor is it persuasive to suggest that socialist doctrines upheld for many decades should lead to a presumption against the acceptance of international determinations of whether state measures are expropriatory. A series of BITs were signed by the USSR in the years of *perestroika* shortly before the dissolution of the Union. They may with at least equal logic be viewed as a rupture with past dogma and the acceptance of an international regime intended to reassure investors.

52. It was one thing for the BIT not to give access to international arbitration with respect to the other terms of Article 6. It is understandable that a State might agree to international arbitration with respect to its duty to pay compensation for expropriation but not with respect to allegations that its measures were wrongful under international law due to discrimination or lack of public purpose. Investors would surely prefer assurance that expropriations be non-discriminatory and for a public purpose. Yet they might tolerate such violations as long as they were confident that takings would be followed by compensation. This has been the central desideratum of investor protection for two centuries of international arbitration. As counsel to the Claimants put it: "the threat of one's property being taken without compensation is existential" (T:215). It cannot seriously be thought that investors would be attracted by a regime that gave them access to international arbitration of the issue of the quantum of compensation but not of whether any compensation is due at all.

53. It moreover appears equally relevant (or irrelevant) to give weight to the objectives or understanding *of the other party* to the BIT. The Tribunal has not had access to any official Spanish comment directly on point. The Spanish BIT and the Belgium/Luxembourg BIT are virtually identical with respect to this matter. Evidence is available of Belgium's understanding. The Belgian Ministers of Foreign Affairs and Foreign Trade explained to their Parliament in an official *Exposé des motifs* of 28 February 1990 that the treaty they were recommending for ratification allowed arbitration "in all areas covered by Article 5". *Berschader* notes this fact and recognises that the Ministerial statement envisaged that the issue to be arbitrated could therefore also include whether or not there had been an expropriation. The tribunal explicitly rejected the statement on the footing that the language of the BIT is "quite clear" and "could not possibly" lend itself to the interpretation given by the two Ministers. This is the very last word on the subject to be found in *Berschader*. It leads the reader back to the starting point: a simple assertion that the words are clear. *Berschader*'s treatment of this matter is essentially to endorse an assumption. That simply

cannot be decisive either way. As the same arbitrators put it with respect to a different issue:

> *When, as in the* Genin *case, an arbitral award provides no reasons for the course of action [*sic*] chosen by the tribunal, such an award has very little relevance as a persuasive source of law* (para. 134).

54. It is instructive to consider the relevant terms of the Belgian Ministers' statement:

> *There was a difference of views between the Belgian and Soviet delegations concerning both field of application and procedure, the Soviets refusing to accept the idea of a state submitting to international arbitration at the beginning of the negotiations.*
>
> *Eventually, the Soviet delegation accepted "ad hoc" arbitration before the SCC in all matters covered by article 5.*
>
> *It should be underlined that the concept of nationalization in this article extends to "all other measures having similar effects," thereby rendering Article 10's field of application extremely broad.*

The middle paragraph is of course debatable. Article 10 of the Belgian BIT would not (if the Claimants' concession noted in Paragraph 41(i) above is correct) allow SCC arbitration with respect to disputes as to whether an expropriation is for public purpose or whether it is discriminatory. But as seen above (in Paragraph 52) these are undoubtedly secondary considerations as compared to the principle that expropriation must in any event be compensated (see Paragraph 52 above). In this respect the two Ministers' explanation emphasises both the importance

of international arbitration (which the USSR negotiators had initially resisted) and their perception that the scope of Article 10 was "extremely broad" with respect to nationalisations and all other measures having similar effect. It would be unimaginable in this light that the Ministers had understood that the respondent State could avoid Article 10 by claiming that it did not allow arbitrators to determine whether there had been a compensable event at all.

55. Article 31 of the Vienna Convention is frequently debated in the context of BITs. It provides that treaties are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Article 31 must be considered with caution and discipline lest it become a palimpsest constantly altered by the projections of subjective suppositions. It does not for example compel the result that all textual doubts should be resolved in favour of the investor. The long-term promotion of investment is likely to be better ensured by a well-balanced regime rather than by one which goes so far that it provokes a swing of the pendulum in the other direction.

56. Yet some considerations of purpose have a solid foundation. It must be accepted that investment is not promoted by purely formal or illusory standards of protection. It must more specifically be accepted that a fundamental advantage perceived by investors in many if not most BITs is that of the internationalisation of the host state's commitments. It follows that it is impermissible to read Article 10 of the BIT as a vanishingly narrow internationalisation of either Russia's or Spain's commitment. Yet that would be the consequence if Russia – taken at the international level as a state composed of all of its organs including national courts – could determine unilaterally and conclusively whether the very predicate of the Tribunal's jurisdiction were operative or not. That predicate is the existence of an obligation to make compensation. If there is no obligation to make compensation the arbitration clause would never operate. The dispute would not be internationalised if the

respondent State could simply declare whether there is an obligation to compensate. Either signatory State could thus by its fiat (including that of its courts given the State's responsibility for their acts under international law) ensure that there would never be an arbitration under Article 10. This would be an illusion which the Tribunal cannot accept as consonant with Article 31 of the Vienna Convention if ever that Article is to be given full weight.

57. The tribunal in *SGS v. Philippines* (2004) wrote:

> *The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other". It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.*

This paragraph was cited with approval by the English Court of Appeal in *Ecuador v. Occidental* (2007). To "favour the protection of covered investments" is not equivalent to a presumption that the investor is right (cf. Paragraph 55 above).

58. Russia contends that two relevant fora may be available to determine whether compensation is due: the Russian courts or State-to-State arbitration. Yet each of these avenues is problematic. Remedies by means of diplomatic protection are from the investors' perspective notoriously unreliable in practice. It is moreover implausible that States would want to provide for inter-State arbitration of controversies as to whether an expropriation had occurred at the same time as they carve out the possibility of separate investor-State arbitration with respect to the amount and method of compensation. Such pointless and unprecedented complications would be absurd. The notion of actions before the courts of the host country are problematic in principle. Courts are on the

international level equivalent to other organs of the State. This means that the predicate of obtaining *any* amount of compensation according to *any* method would be hostage to the host State's self-determination as to whether it is due at all.

59. The present Tribunal does not deny that such a provision could be given effect if such was the clear import of the Treaty. Article 6 might have explained how entitlement is to be determined. Article 10 might have stipulated that the proposition that compensation is "due" may be established only by an authority identified in Article 6. But there is nothing of the kind. The present Tribunal is more inclined to give weight to the Belgian Foreign Ministers' unequivocal explanation (see Paragraph 54 above) of their understanding of an identical text – not so much as an expression of intent as the reflection of a proper reading to the effect that an international tribunal could decide whether there was a duty to compensate for an expropriatory measure. The Claimants have provided the text of an opinion by the Spanish Council of State in 1991 concluding that the Spanish BIT called for "special arbitration" with respect to "disputes arising from expropriation" and noting that this constituted a departure from the "general" Spanish regime. The absence of any reference to the limitation of arbitral jurisdiction now argued by Russia would be curious if the Spanish understanding had been to similar effect.

60. Article 10 of Russia's Federal Law No. 160-F2 provides: "Foreign investments in the USSR shall not be subject to nationalisation except for instances when it is effectuated in accordance with legislative acts of the USSR and republics". Counsel for Russia relied on the following gloss added in a published commentary: "By its very nature nationalisation is always a measure which cannot be taken other than by the adoption of some sort of legislative act" (T:308). The commentary surely goes further than the law. Nevertheless it is the proposition advanced by Russia and falls to be assessed as such.

61. Russia's posture is not easily reconciled with its argument as to the restricted scope of the Spanish BIT. Article 6 of the Treaty establishes protections not only in the event of nationalisation; it also covers "any other measures having similar consequences". Such a broadly-defined category of governmental measures is not limited to legislation. Indeed it would be peculiar to find a legislative act proclaiming itself to have consequences "similar" to those of other texts. National lawmakers do not generally draft in simile. But anyone familiar with practice and commentary in the field of investment treaties is well aware of the frequent use of the broad criterion of similarity. Its purpose is precisely to establish an international norm that transcends the peculiarities of national classifications of governmental acts. It gives rise to a strong inference that the reality of the compensable event was understood to be within the purview of international control. Whether the Claimants here are claiming explicit dispossession (nationalisation or expropriation) or a "measure having similar consequence" is immaterial in this respect. The point is that Article 6 of the Treaty naturally suggests susceptibility to international control under Article 10.

62. The Claimants explicitly allege expropriation and not indirect or regulatory acts equivalent to expropriation. They affirm that there is therefore no need when examining this particular jurisdictional objection for a debate as to whether the state's actions gave rise to a compensable taking. Whether this allegation succeeds is a matter for the merits. In the arbitrators' view it suffices at this stage and with respect to this aspect of the jurisdictional debate to say that the Tribunal has jurisdiction to determine the compensation which is due on the *pro tem* assumption that there has been an expropriation.

63. Russia argues that the Claimants' position is "ideological" rather than "legal" in that they insist that all forms of dispossession are perforce expropriations. The effect would be to disavow (for example) the widely accepted notion that dispossession in the exercise of police powers need not trigger a duty of compensation as it would in the case of expropriation. The Tribunal does not accept

this characterisation of the Claimants' case. The fact that an international tribunal may consider whether compensation is "due" does not prejudice the ultimate determination of such issues. It is as simple as that. The debate may become complex in due course. It concerns the merits of the case. In sum: the Tribunal has jurisdiction under the BIT to hear the contention that there has been a compensable expropriation.

64. The Claimants have an alternative defence to the challenge. They argue that measures taken by Russia constitute an obvious and direct expropriation with respect to which Russia has effectively acknowledged that compensation is due. In the Claimants' view these measures therefore inherently pass the Article 6 threshold and "require[e] no exercise of judgment on the part of this Tribunal ..." (T:139).

65. The Claimants cite the OECD Working Paper on International Investment 2004/4 to the effect that: "International law is clear that a seizure of legal title of property constitutes a compensable expropriation" (p. 3). They add the following proposition as formulated by G.C. Christie in an oft-cited article:

> *[T]here are certain types of State interference which, from the outset, will be considered expropriation even though not labeled as such. Among these are the appointment of a receiver to liquidate the business or other property.* "What Constitutes a Taking of Property under International Law?" 38 *Brit. YB Int. Law* 307 (1962).

Against the background of these principles the Claimants make their argument succinctly thus:

> *Beginning with the seizure and sale of* [Yuganskneftegas in 2004]*, every asset of Yukos was seized by order of Russian*

> *courts and other agencies of the Russian state, and then sold to third parties, principally the state-owned oil company, Rosneft, and to other state-owned enterprises. This process resulted in the complete liquidation of Yukos, as a legal entity.*
>
> *Respondent has not challenged any of these facts. They are now part of the common ground in this case. As Christie observed, there are certain types of state interference which, from the outset, would be considered expropriation, even though not labelled as such. And among these are the appointment of the receiver to liquidate the business or other property.*
>
> *In addition – and this is what I think is somewhat surprising about what's happened here – in addition to explicitly taking all assets of Yukos and liquidating the company, Russia, in fact, has compensated Yukos for this taking, and it has done this by applying the proceeds of each sale to the satisfaction of Yukos' tax assessments and other debts.* (T: 147-148.)

66. Russia rejects the characterisation and significance attributed by the Claimants to the relevant governmental measures. The debate is entangled within the vaster web of circumstances of Yukos's demise. The arbitrators are reluctant to make conclusive factual findings without the benefit of insights likely to emerge in the course of the merits phase of the arbitration. They have in mind the Claimants' explanation: "We have not put in at this stage all of the evidence that might be put in concerning the nature of the seizure of the assets. There's a lot of documentation that could come in concerning the way in which the assets were received" (T:167). Naturally such evidence might be countered by what Russia will present.

67. What suffices for now is this. The Claimants have established that the Tribunal has jurisdiction to decide whether compensation is "due" to them under international law by reason of the conduct of which they complain (and if so in which amount).

2.2 Does Article 5 expand this Tribunal's jurisdiction on the foundation of a more favourable treaty?

68. The promise of most favoured nation ("MFN") treatment is found in Article 5(2) of the Spanish BIT. It is necessary to read all of Article 5. It is entitled "Treatment of Investments" and provides as follows:

> *1. Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party.*
>
> *2. The treatment referred to in paragraph 1 above shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of any third State.*
>
> 3. *Such treatment shall not, however, include privileges which may be granted by either Party to investors of a third State, by virtue of its participation in:*
>
> - *A free trade area;*
> - *A customs union;*
> - *A common market;*
> - *An organization of mutual economic assistance or other*

> *agreement concluded prior to the signing of this Agreement and containing conditions comparable to those accorded by the Party to the participants in said organization.*
>
> *The treatment granted under this article shall not include tax exemptions or other comparable privileges granted by either Party to the investors of a third State by virtue of a double taxation agreement or any other agreement concerning matters of taxation.*
>
> 4. *In addition to the provisions of paragraph 2 above, each Party shall, in accordance with its national legislation, accord investments made by investors of the other Party treatment no less favourable than that granted to its own investors.*

69. The Claimants argue that Article 5(2) would entitle them to bring their case before this Arbitral Tribunal even if Article 10 did not. They observe that Russia is a party to BITs with third States containing liberal arbitration clauses. They invoke notably Article 8(1) of the Denmark-Russia BIT. Its definition of the scope of disputes susceptible of being brought before an SCC Institute tribunal is unquestionably broader than that of Article 10 of the Spanish BIT. Article 8(1) does not limit arbitration to disputes "relating to the amount or method of payment of the compensation due under Article 6". It refers to:

> *Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment on the territory of that other Contracting Party ....*

70. Russia objects preliminarily that the Claimants forfeited the possibility of invoking the Danish BIT because they did not do so in their Request for Arbitration. Article 2 of the SCC Arbitration Rules requires that the Request include "a copy or description" of the relevant arbitration agreement. Article 25 allows the amendment of claims only if it is "comprised by the arbitration agreement". Russia therefore argues that it was impermissible for the Claimants to invoke a new or expanded jurisdictional foundation as late as the Counter-Memorial on Preliminary Objections. Russia adds that unawareness of a MFN-based jurisdictional assertion could lead to the constitution of a tribunal without proper consideration of issues of conflict of interest by reason of the identity of the third country in question. Moreover an extension of jurisdiction "in the midst of an arbitration" would prejudice the respondent's "right to challenge unfounded assertions of jurisdiction".

71. The Tribunal observes that the Request for Arbitration included a copy of the Spanish BIT. The Claimants sought relief "in accordance with the terms of the treaty". They are entitled to seek to establish that those terms incorporate benefits accorded by Russia by virtue of the promise of MFN treatment. The Tribunal is unwilling to infer that the SCC requirement would implicitly extend to a duty to "include or describe" the Danish BIT. The Claimants are not in fact seeking arbitration under the Danish BIT at all; they are drawing the full consequences (as they see them) of the terms of the Spanish BIT.

72. These observations are sufficient to defeat this formal objection. It may be added that Russia's complaint of prejudice is unpersuasive in light of the fact that the Claimants gave notice in the Request for Arbitration of their "intention to rely as necessary on the MFN clause" in the Spanish BIT (notably in footnote 1 on page 14 of the Request for Arbitration). The Request also claimed breaches of Articles 4 and 5 of that BIT. It is common ground that Article 10 cannot encompass claims of breaches of the material provisions of those two Articles. It should therefore have been passably clear that the Claimants were envisaging a jurisdictional foundation

which could have been derived only from the MFN provision. Russia did not press for clarification.

73. The Tribunal's conclusion with respect to this objection is consonant with *RosInvestCo*. That case was conducted under the 1999 SCC Arbitration Rules. They were not materially different from the 2007 SCC Rules relevant here.

74. Russia also argues preliminarily that the Danish BIT is automatically excluded from application here because it states in Article 11(3): "The provisions of this Agreement shall not apply to taxation." The present Claimants could therefore not have proceeded even if they were Danish investors because they complain precisely of tax measures taken with respect to Yukos. This argument was not pursued with great insistence. Nor should it have been. The Claimants allege that Russia imposed a bogus reassessment of taxes in order to effect a spoliation of Yukos assets. To think that ten words appearing in a miscellany of incidental provisions near the end of the Danish BIT would provide a loophole to escape the central undertakings of investor protection would be absurd. Complaints about types and levels of taxation are one thing. Complaints about abuse of the power to tax are something else. A "decree" to the effect that "all tax inspectors are henceforth instructed to collect everything they can get their hands on from Danish investors" would not be insulated because of Article 11(3) of the BIT. Abuse and pretext are at the heart of the Claimants' allegations. Whether they are true is a matter for the merits.

75. Russia's final preliminary argument is that the Claimant's invocation of MFN treatment in respect of jurisdiction breaches a prior arbitration agreement (namely Article 10 of the Treaty). This contention appears to presume that the arbitration provisions of the Spanish BIT excluded the possibility of invoking an expanded scope of consent by virtue of third-country BITs. And so the argument seems to proceed on the footing that claims under

the Spanish BIT cannot conceivably be brought to SCC arbitration outside the constraints set down in Article 10.

76. That premise is unsustainable. Consider the effect of a stipulation in Article 5 (however oddly placed) that "any investor complaints about fair and equitable treatment may be brought to SCC arbitration". There is no reason why such a claim would fail on jurisdictional grounds merely because Article 10 itself does not encompass matters of fair and equitable treatment. The stipulation is made by the same respondent State; the beneficiary is the same presumptively qualified investor. There is no logical leap from this hypothesis to the jurisdictional foundation asserted by the Claimants here. Their argument is that Article 5(2) in effect contains an inchoate stipulation having the very same effect of broadening the possibility of recourse to investor-State arbitration. (Notionally: "any investor may bring the same types of complaint to the SCC as the host State has agreed may be brought by investors of a third State".) Article 5 was thus precisely so enlivened the moment the Danish BIT came into effect. Spanish investors too could accordingly seek SCC arbitration of claims within the broad ambit of the subsequent Treaty. Whether access to arbitration may in principle fall within the scope of the MFN undertaking is a different issue (see Paragraphs 86-102 below). Whether such an effect flows from a proper reading of the terms of Article 5 is yet another (see Paragraphs 103-119 below). But there is no substance to the thesis that Article 10 is an inherently exclusive portal to investor-State arbitration under the Treaty. Otherwise the debate as to whether MFN treatment may ever include matters of dispute resolution would be over before it began; in all cases the original arbitration provisions would self-evidently not be those sought to be invoked by reference to MFN.

77. The stage is now set to consider the substance of the MFN debate. Some first principles need to be recalled. The treaty that contains the MFN promise is conventionally referred to as the "basic treaty". The treaty invoked as evidence of more favourable treatment may be referred to as the "comparator treaty". The party asserting a MFN entitlement is a stranger to the comparator treaty and is

therefore in no position to make any claim under it. The claim can arise only under the basic treaty. Article 9(1) of the International Law Commission's 1978 Draft Articles on MFN Clauses defines the mechanism thus: "the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it," a right to the more favourable treatment accorded to third states or their nationals. The third-party treaty is incorporated by reference into the basic treaty without any additional act of transformation.

78. These basic points should be kept in mind as the substantive discussion begins with the broadest of Russia's objections: that the Claimants simply have no warrant to invoke the Danish BIT. If this were true there is no reason to examine whether it (as the comparator treaty) contains any element of MFN as contrasted with the Spanish BIT.

79. Russia relies in this respect on the *Anglo-Iranian* case. Iran's unilateral declaration of acceptance of ICJ jurisdiction had been expressly limited to disputes under future treaties. The United Kingdom nevertheless sought to invoke two longstanding treaties it had entered into with Iran that contained MFN clauses (but no ICJ jurisdiction clause). The alleged more favoured nation again happened to be Denmark; it had a treaty with Iran that allowed access to the ICJ for complaints of breach. The ICJ rejected the UK's claim as an impermissible attempt to rely on instruments – i.e. "basic treaties" – which were not extant at the date of Iran's acceptance of compulsory ICJ jurisdiction. The UK could not rely on its old treaties for the purposes of establishing ICJ jurisdiction. There was therefore no basis on which the ICJ could either rule on the scope of the MFN clauses or on the material terms of the Danish treaty. Russia relies on this holding to support its argument that Article 10 of the Spanish BIT simply does not allow an inquiry into Article 5(2) and its promise of MFN treatment.

80. The Tribunal is unpersuaded. The starting point of its analysis is to observe that Russia cannot deny the Tribunal's authority to decide whether it has jurisdiction to

deal with a claim under Article 5(2) of the Spanish BIT. A constant attribute of international tribunals (one of the "universally recognized norms and principles of international law" referred to in Article 10(3) of the Treaty) is that they have the authority to rule on questions pertaining to their own jurisdiction. Abundant citations could be given. It seems sufficient to recall the ICJ's reference in *Nottebohm* (1953) to:

> *a rule consistently accepted by general international law in the matter of international arbitration: Since the* Alabama *case, it has been generally recognised, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.* (1953 *ICJ Reports* 119; this passage was explicitly recalled in paragraph 46 of the ICJ's 1991 judgment in the *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal).*

Such authority is specifically established in Article 2 of the Swedish Arbitration Act which applies to these proceedings. The Tribunal needs no further warrant to consider and dispose of jurisdictional arguments. It may well be that its jurisdictional rulings are susceptible to challenge before another authority. This alters nothing. It would mean only that the other authority has the capacity to review the scope of arbitral jurisdiction and not that the present Tribunal lacked the power to make the initial determination.

81. The consequence should be manifest when one considers the mighty debate about the scope of jurisdiction created by Article 10 (see Section 2.1 above). Russia argues that the arbitrators may decide only some controversies arising with respect to Article 6. This is a

debate about the terms of Article 10. It is a debate which Russia unreservedly asks the Tribunal to decide in its favour. Russia makes no issue of the fact that Article 10 does not stipulate that a dispute about its own terms may be decided by the arbitrators. Nor could Russia seriously make such an argument; it is foreclosed by Article 2 of the Arbitration Act.

82. No difference in principle arises when the debate focuses on the jurisdictional consequences of Article 5 of the Spanish BIT. There is no rule that the entirety of arbitration agreements must be contained in a single article of an instrument. There is no rule that elements of arbitral jurisdiction may not be defined in an article (like Article 5) which also contains substantive provisions. These are trivial observations. The important question is whether there has been consent to arbitrate the claims raised in this case. The Claimants say that the scope of jurisdiction in the Spanish BIT is derived from both Article 5 and Article 10. This contention is denied by Russia. It may be true or false. But the Tribunal has the right to decide (subject to such review as may be available). There was no need for Article 10 to stipulate that controversies with respect to jurisdictional implications of particular provisions of the BIT may be decided by the Tribunal – whether those provisions appear in Article 10 or elsewhere. In the end the matter is thus quite simple.

83. To be clear: the Claimants are not seeking to establish that Russia breached an obligation under the basic treaty (the Spanish BIT) by failing *explicitly* to grant to Spanish investors the same access to international arbitration as the access the Claimants say is enjoyed by Danish investors. The question is instead simply whether Article 5(2) of the Spanish BIT evidences Russia's consent that this Tribunal's jurisdiction should have an ambit beyond that of Article 10.

84. The *Anglo-Iranian* case turned on a fundamentally different point. The ICJ of course also has power to decide its own jurisdiction (Article 38(6) of the ICJ Statute). It was asked to rule on the consequences of treaties that

predated Iran's consent to ICJ jurisdiction. That consent was limited to disputes arising out of future treaties entered into by Iran. They were the "basic treaties" (see Paragraph 77 above). It followed that the UK could not invoke the antecedent treaties before the ICJ. Invocation of a "comparator treaty" could not alter that basic jurisdictional fact. The ICJ held: "A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*." (1952 *ICJ Reports* 109.) The ICJ had no warrant to consider the basic treaties because they were antecedent to consent. Had they been subsequent the UK may have prevailed. It would have come down to the content of the comparator treaty. Access to ICJ jurisdiction granted to Denmark might have been imported into the UK treaties; that is the equivalent of the present question; what the ICJ would have thought of it will never be known.

85. The Claimants argue that Article 5(2) of the Spanish BIT contains no restriction as to the date when more favoured nation treatment may be established. They are right. Article 5(2) does not in fact prevent the right to MFN treatment from arising out of undertakings to third nations which are given in the future. That is typically how MFN promises are enlivened. It is therefore open to the Claimants to invoke the Danish BIT. *Anglo-Iranian* is simply inapposite.

86. What remains is of course to determine what the Claimants are able to derive from the Danish BIT. And so the analysis moves to the more specific issue of the possibility of expanding investor-State arbitration via MFN provisions. It is a familiar topic. Yet it comes in a great variety of guises. The answers may change as the questions become more refined. May one conclude that qualifying "investments" under the Spanish BIT are given less favourable treatment than such investments enjoy under the Danish BIT if the latter are given greater access to international arbitration? Is such access an element of the types of treatment that may be compared for purposes of assessing compliance with the MFN standard? These questions are at the heart of a current debate on this aspect of investor-state arbitrations. Yet they are not decisive in

this case. It is to the contrary indispensable to understand that in light of the wording of the Spanish BIT either of them may be answered affirmatively without defeating Russia's objection.

87. The Tribunal approaches this matter against a normative background which merits a brief overview.

88. The International Court of Justice in the *Rights of US Nationals in Morocco* (1952) considered the effects of MFN clauses contained in a treaty of 1836 with respect to the "footing" of "commerce" with the United States and to the entitlement of US nationals to "whatever indulgence, in trade or otherwise" were granted to nationals of certain other States. The UK subsequently became entitled under an 1861 treaty to insist that its nationals must be brought before consular jurisdictions to the exclusion of local courts. The ICJ was satisfied that the MFN provisions in the basic treaty created an entitlement to the same advantage for US nationals. It was not necessary that there be explicit mention of jurisdictional advantages. (1952 *ICJ Reports* 190.) This was however the statement of a premise rather than a conclusion. The decisive issue in the case was different: whether the entitlement to MFN treatment expired with the renunciation of the UK treaty (as well as that of a treaty involving Spain). The ICJ answered affirmatively.

89. The 1956 case of the *Ambatielos Claim* (23 *ILR* 306) is seminal. It examined the *ejusdem generis* principle: "the most-favoured nation clause can only attract matter belonging to the same category of subject as that to which the clause itself relates". The field of application of the relevant treaty containing a MFN clause was defined as "all matters relating to commerce and navigation". Greece sought to derive a jurisdictional extension by virtue of MFN rights. The UK countered that scope of jurisdiction was not among the matters that could be considered common objects of the treaties under comparison. The commissioners rejected the UK's argument:

> *It is true that "the administration of justice", when viewed in isolation, is a subject-matter other than "commerce and navigation", but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.*
>
> *Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes "all matters relating to commerce and navigation". The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.*

90. It is undoubtedly fair to compare BITs for the purpose of assessing compliance with promises of MFN treatment given their congruent objective: the promotion and protection of investments. Yet such a general statement is insufficient to decide any particular case. It is a matter of the wording of the relevant instruments. This is one of the reasons awards under BITs are of variable relevance and value in subsequent cases.

91. There are other reasons why alleged precedents may be of limited normative applicability. Quotations of incidental comments are not entitled to be considered as precedents at all; they are not part of the *ratio decidendi* and thus are not part of the reasoning by which the arbitrators fulfil their mandate to decide. That is where they exercise personal responsibility. *Obiter dicta* are commentary. They may be persuasive but are *a priori* of less weight.

92. Speculations as to policy desiderata thought to favour one reading or another of an instrument should be considered with care. An example is the occasional reflection that access to different types of dispute resolution mechanism should not be held to be part of "treatment" for MFN purposes because it would lead to forum shopping. That proposition may have adherents but may equally well be rejected. The use of the expression "forum shopping" in a derogatory sense is but the assertion of an opinion. It does not deal with the countervailing consideration to the effect that dispute resolution mechanisms accepted by a State in various international instruments are all legitimate in the eyes of that State. Some may be inherently more efficient. Others may be more reliable in a particular context. Having options may be thought to be more "favoured" for MFN purposes than not having them. It is not convincing for a State to argue in general terms that it accepted a particular "system of arbitration" with respect to nationals of one country but did not so consent with respect to nationals of another. The extension of commitments is in the very nature of MFN clauses. Drafters wishing to do so would have little difficulty in defining restrictions that would go further than the general *esjudem generis* constraint. Some BITs exhaustively enumerate acceptable MFN extensions. Others explicitly exclude dispute resolution from the reach of MFN provisions. Absent such stipulations it is the task of international tribunals to determine whether arbitration clauses in comparator treaties in fact comport more favoured treatment.

93. To choose one of the contending policy theses as the reason to read a BIT in a particular way may be presumptuous. The stakes are high and the policy decisions appertain to the State-parties to the treaties. Speculations relied upon as the basis of purposive readings of a text run the risk of encroachment upon fundamental policy determinations. The same is true when "confirmation" of hypothetical intentions is said to be found in considerations external to the text. The duty of the Tribunal is to discover and not to create meaning.

94. A considerable number of awards under BITs have dealt with the jurisdictional implications of MFN. Many of

them have been invoked in the present arbitration. They are of uneven persuasiveness and relevance. The present Tribunal would find it jejune to declare that there is a dominant view; it is futile to make a head-count of populations of such diversity. What can be said with confidence is that a *jurisprudence constante* of general applicability is not yet firmly established. It remains necessary to proceed BIT by BIT.

95. Two contrasting awards are nevertheless of particular interest: *Berschader* and *RosInvestCo.* Each involved a BIT to which Russia is a party. *Berschader* refused to extend the scope of investor-state arbitration in the USSR/Belgium-Luxembourg BIT notwithstanding an MFN clause which guaranteed MFN "in all matters covered by this Agreement". The majority of the arbitrators relied on the jurisdictional decision in *Plama v. Bulgaria* (2005). They were persuaded by the view expressed in that decision (at para. 223) that there should be a presumption that a MFN provision "does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty". This was *dictum* since *Plama* upheld jurisdiction under alternative grounds. *(Berschader so* acknowledged in para. 171.) *Plama* also suggested elliptically that the expression "with respect to all matters" is insufficient to overcome this presumption. Yet the only authority cited in support of this significant hardening of the presumption was *Siemens v. Argentina* (2004). But that decision *upheld an extension of arbitral authority on the basis of an MFN undertaking which did not refer to "all matters".* The *Berschader* majority thus seems to have relied on a *dictum* which in turn had relied on another *dictum.*

96. The contrary reasoning of *Ambatielos* (set out in Paragraph 89 above) strikes the present Tribunal as more persuasive. *Ambatielos* had been preceded by an attempt to bring the matter before the ICJ. That Court held (1953 *ICJ Reports* 10) that (i) it had no jurisdiction to deal with the merits of the claim but (ii) directed the UK to submit to the jurisdiction of an arbitration commission. That gave rise to the award quoted above. The Court's judgment (rendered by a 10:4 majority) said nothing about the scope and

applicability of the MFN clauses relied upon by Greece. The four dissenting judges opined on the other hand that a clause referring to "matters of commerce and navigation ... cannot be extended" to cover aspects of "the administration of justice". This brief conclusion appears to be pure affirmation. It was of course known to the commissioners whose reasoned conclusion was to opposite effect. Moreover all BITs were unknown in 1953. What the four dissenters would have thought of the relationship between "favoured treatment" of foreign investment and access to neutral arbitration cannot be divined.

97. The reasoned view of the commissioners who finally decided *Ambatielos* have found echoes (half a century later) in a number of modern investor-State cases. Thus the unanimous arbitrators in *RosInvestCo* adopted a similar position in the following passages:

> *For it is difficult to doubt that an expropriation interferes with the investor's use and enjoyment of the investment, and that the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with this "*use*" and "*enjoyment*", procedural options of obvious and great significance compared to the sole option of challenging such interference before the domestic courts of the host state. ...*
>
> *While indeed the application of the MFN clause ... widens the scope of Article 8 and thus is in conflict to its limitation, this is a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty.*
>
> *If this effect is generally accepted in the context of substantive protection, the*

> *Tribunal sees no reason not to accept it in the context of procedural clauses such as arbitration clauses. Quite the contrary, it could be argued that, if it applies to substantive protection, then it should apply even more to "only" procedural protection. However, the Tribunal feels that this latter argument cannot be considered as decisive, but that rather, as argued further above, an arbitration clause, at least in the context of expropriation, is of the same protective value as any substantive protection afforded by applicable provisions such as Article 5 of the BIT.* (Paragraphs 130-132.)

98. This reasoning is similar to that of paras. 19-20 of the dissenting opinion in *Berschader*. It contrasts with that of *Plama* (of which the *RosInvestCo* arbitrators indicated they had taken note; see para. 136). *Plama* reasoned that it may be "argued with equal force" that the fact that the identified exceptions to MFN treatment made in the relevant basic treaty related to "privileges" demonstrated that the MFN treatment involved "substantive protection to the exclusion of the procedural provisions relating to dispute settlement" (para. 191). Yet this assertion of "equal force" depends on the premise – stated but not substantiated – that there is a significant distinction between procedural and substantive protection.

99. It may be that some international lawyers reflexively adopt the dichotomy of primary/secondary obligations made familiar by the International Law Commission. This might explain the temptation to consider "treatment" a matter of primary or substantive rules and thus distinct from "secondary" rules – such as remedies – in the event of alleged breach. Perhaps this idea merges into that of a substance/procedure distinction. Yet there is nothing *normative* about the primary/secondary dichotomy; it has simply been the classification by which the ILC determined its field of work on State responsibility:

> *The law relating to the content and the duration of substantive State obligations is as determined by the primary rules. The law of State responsibility as articulated in the Draft Articles provides the framework – those rules, denominated "secondary", which indicate the consequences of a breach of an applicable primary obligation.* (James Crawford, *The International Law Commission's Articles on State Responsibility* 16 (2002).)

100. There is no authority for the proposition that MFN is limited to "primary" obligations. The established proper criterion is rather *ejusdem generis.* That criterion resounds through the quotations in the preceding paragraphs – from *Ambatielos* onward. Nor can it be doubted that access to international arbitration has been a fundamental and constant desideratum for investment protection and therefore a weighty factor in considering the object and purpose of BITs. The arbitrators are aware of the concern that "it would be invidious for international tribunals to be finding (in the absence of specific evidence) that host State adjudication of treaty rights was necessarily inferior to international arbitration". This is how Messrs McLachlan Shore & Weiniger put it in their monograph *International Investment Arbitration* (at p. 257). It is however possible that the invidiousness rather lies in this way of articulating the issue. Investors who desire access to a neutral international forum are not "necessarily" denigrating national justice. They do no more than make clear that their comfort is greater knowing that the international alternative is open to them. This is a rational concern. Nor is there anything illegitimate about the desideratum of an option to seise a neutral forum. History is replete with examples of investment disputes which have overwhelmed the capacity of national institutions – in countries of all stages of development – for dispassionate judgment.

101. Under *Ambatielos* both of the questions noted under Paragraph 86 above therefore in principle could be answered in the affirmative. Rights and obligations may be classified as substantive or jurisdictional or procedural.

Such classifications are not watertight and in any event primarily of pedagogical use. There is no textual basis or legal rule to say that "treatment" does not encompass the host state's acceptance of international arbitration. Whether MFN treatment is stated in the relevant BIT to relate to investors rather than investments is in principle of no moment. Investors will not claim access to international arbitration by way of MFN treatment in the abstract. They will assert a breach and harm in connection with a qualifying investment under the relevant BIT. The investor's gateway to MFN treatment is the status of protected investor and ownership of a qualifying investment in terms of the BIT as the "basic treaty". This is the position the Claimants here seek to establish under the Spanish BIT. There is nothing unsound about the general proposition they seek to vindicate.

102. Yet the general proposition is not a laser beam pointing to an answer (see Paragraph 90 above). To move from broad purposive considerations to a specific determination of what has been agreed requires coming to grips with the singular features of the case at hand. Russia has invoked a specific textual impediment to expanding the scope of arbitral jurisdiction. That decisive argument now moves centre-stage.

103. The MFN promise affects only matters within the scope of Article 5(2) of the Spanish BIT which in turn covers only "treatment referred to in paragraph 1 above". The treatment in question is "fair and equitable treatment" ("FET"). FET is a substantive standard of treatment. Russia insists that access to international arbitration is not an inherent part of FET. This is confirmed by the existence of BITs guaranteeing FET without any recourse to international arbitration whatever. A promise to match the level of FET extended to third-party nationals therefore cannot in Russia's submission widen the scope of arbitral jurisdiction.

104. One immediately perceives that the present case is unlike *Berschader* in that the latter involved a promise of MFN "in all matters covered by this Agreement" (see

Paragraph 95 above). That is simply not the case with the Spanish BIT. (Nor did the UK BIT under consideration in *RosInvestCo* have such breadth. Given the dissimilarities between the UK BIT and the Spanish BIT it is unnecessary for the present Tribunal to comment on how *RosInvestCo* nevertheless concluded that the MFN clause in that case expanded arbitral jurisdiction.)

105. This then becomes the crux of the matter: the Spanish BIT does not contain an MFN clause entitling investors to avail themselves in generic terms of more favourable conditions found "in all matters covered" by other treaties. Instead it establishes the right to enjoy a no less favourable level of FET. The obvious questions arise immediately: is access to international arbitration a necessary part of FET? May it be said that a BIT which does not give access to international arbitration provides for less FET than one that does? Negative answers to these questions would be fatal to the Claimants' attempt to enlarge arbitral jurisdiction.

106. Notwithstanding the existence of a BIT it may be the case that an investor has no other avenue for the enforcement of its rights except through the national courts of the host State. There is no legal authority known to the present Tribunal in support of the proposition that this state of affairs would violate an FET undertaking in the treaty. Instances of denial of justice by such courts may assuredly trigger the State's international responsibility. Yet that possibility does not mean that access to international arbitration *per se* implies a higher level of FET. The neutrality of an international tribunal may legitimately be said to enhance investor protection. Access to it may be more *favourable* than lack of access. But that does not mean that failure to give access to such a tribunal is *unfair* or *inequitable.* The implications of a contrary inference would be extraordinary. (For one thing it would plainly justify the objection of Messrs McLachlan *et al* quoted in Paragraph 100 above.)

107. The Claimants argue that FET is an invariable standard and that it would be nonsense to speak of more or

less favourable FET treatment. The purpose of this argument was to suggest that the word "treatment" in Article 5(2) should not be qualified by the adjectives "fair and equitable" found in Article 5(1) (reproduced in Paragraph 68 above). The implication would be that the MFN clause in Article 5(2) should be construed broadly so that the Claimants could invoke all types of advantage stipulated in other BITs. The importance of this point hardly needs to be emphasised. It was much debated in the hearings.

108. The proposition that FET should have a universal meaning has an undeniable cogency if one considers FET as part and parcel of a general minimum standard of international law. That standard may evolve over time. It is nevertheless a single standard. The notion of a "variable general standard" would be oxymoronic. Yet international legal standards may also be created by treaties that bind only the parties to that particular instrument. It is true that the use in individual treaties of heterogeneous ad hoc definitions of expressions which are also used elsewhere to denote a general principle may give birth to confusion and therefore be undesirable. But nothing can prevent its occurrence if States so decide. Indeed it has happened.

109. One well-known example is the "interpretation" proclaimed in 2001 by the three NAFTA State-parties to the effect that FET (for NAFTA purposes) does not require "treatment in addition to or beyond that, which is required by the customary international law minimum standard of treatment of aliens". This initiative of the three governments was sharply criticised by Sir Robert Jennings in an opinion delivered in *Methanex v. United States* in which he challenged "the impropriety of the three governments making such an intervention well into the process of the arbitration, not only after the benefit of seeing the written pleadings of the parties but also virtually prompted by them". What matters here is not whether the three governments were right to act as they did. What is significant is rather that a former President of the ICJ perceived that the three governments were agreeing to *amend* general principles. Such was indeed also the opinion of the arbitral tribunal whose interim award

apparently triggered the "interpretation" (see *Pope & Talbot v. Canada* at paras. 47-59 (2002)). Other examples could be given. One instance arising in the BIT context is that of *MTD v. Chile* (2004). An MFN clause contained in the Chile-Malaysian BIT was expanded by reference to two other BITs concluded by Chile which contained more detailed treaty language on "fair and equitable" treatment. The basic treaty was thus enlarged to encompass obligations (i) to grant permits subsequent to approval of an investment and (ii) to fulfil contractual obligations.

110. Of particular relevance for present purposes is the fact that Russia itself has elsewhere explicitly stipulated that FET may be more or less favourable. Thus Article 3(1) of its Danish BIT provides:

> *Each Contracting Party shall accord investments made by investors of the other Contracting Party in its territory fair and equitable treatment no less favourable than that which it accords to investments of its own investors or to investments of investors of any third state, whichever treatment is more favourable.*

This text unmistakably contemplates variable levels of FET. Investors would therefore find it meaningful to be assured that they may invoke the most favourable level of FET. Other equally clear instances may be imagined apart from the example of treaty practice. A State may unilaterally take a formal position that FET has a particular meaning with respect to nationals of a particular country. An investor entitled to MFN treatment would be in a position to insist that that State could not legitimately treat it in a less favourable manner.

111. The Tribunal finally turns to some lexical difficulties. Article 5 (reproduced in Paragraph 68 above) uses the word "treatment" at least once in each of its four subparagraphs. Moreover the pronoun "that" in subparagraph 2 replaces "treatment". The result is not ideal in terms of understanding the quite different senses

which the word may carry in its various iterations. It is best to consider the uses as they occur. This involves rather arid yet indispensable parsing.

112. Subparagraph 1 speaks of "fair and equitable treatment". Subparagraph 2 begins by referring to the "treatment referred to in paragraph 1 above". So far so good. The difficulty begins with the pronoun *that* which appears next in Subparagraph 2. If Article 5 contained only two Subparagraphs there would be no problem; one would conclude that the pronoun simply avoids a third iteration of "fair and equitable treatment". But then comes Subparagraph 3. It begins: "Such treatment shall not, however, include privileges" of certain types: advantages created e.g. by membership in a free trade area or a customs union. The fact that an import duty may be set at *x %* or *y %* is naturally not a matter of FET. This strongly suggests that the pronoun "such" in Subparagraph 3 cannot be read to stand for "fair and equitable treatment" but rather for "treatment" simpliciter.

113. The exception made for negotiated tax advantages in the final section of Subparagraph 3 is to similar effect. It may indeed be described as even more troubling since it refers to "treatment under this article". One might infer that every time the word "treatment" appears *throughout Article 5* it is intended to have the same meaning. Tax advantages are like customs tariffs in that they are not ordinarily matters of FET.

114. The Claimants say this proves that "treatment" is generic and not limited to FET. The focus of Subparagraph 2 is of course the hypothetical treatment accorded to a third-party national under a "comparator treaty". If this is broad treatment (the Claimants reason) it gives them access to investor-State arbitration.

115. Now that the lexical ground has been traversed the problem may be restated in simpler terms. One logical sequence is the following. Subparagraph 1 explicitly concerns FET. Subparagraph 2 equally unmistakeably refers back to FET. Subparagraph 2's promise of MFN

therefore does not encompass access to investor-State arbitration.

116. Yet if MFN treatment is restricted to FET Subparagraph 3 was unnecessary. One should if possible avoid the conclusion that treaty provisions are superfluous. Therefore the MFN clause should be understood in a broad sense. It captures investor-State arbitration. Thus Subparagraph 2 seems to envisage MFN treatment which is simultaneously restricted and broad.

117. Something has to give. The choice is between an explicit stipulation and a revelation by grammatical deconstruction. The Tribunal naturally prefers the former. Why then would the drafters have included Subparagraph 3 unless they understood the pronoun "*such*" to stand for broader treatment? The arbitrators believe the answer lies ready to hand. The drafters were conscious of the ramifications of the MFN promise. They were determined to ensure that it would not encroach on their freedom to extend special privileges in the context of regional integration or other arrangements envisaged in Subparagraph 3. Such exceptions to MFN clauses are commonplace in BIT practice. This may have led to a reflexive insertion of the clause in the Spanish BIT. A searching exegetical endeavour would have revealed that this was unnecessary in this particular instance. The drafters may not have realised this. Or they may not have wished to rely on others – including trade representatives or tribunals – to reach the same recondite conclusion. Either way the attribution to Subparagraph 3 of sophisticated implications simply cannot dislodge the qualifying adjectives "fair and equitable" in Subparagraph 1. Even less can it undermine the unambiguous reference in Subparagraph 2 to "treatment referred to in paragraph 1 above".

118. The final Subparagraph 4 presents its own difficulty. It contains a promise of "treatment no less favourable than that" granted to nationals. Here there are no qualifying adjectives. Nor is there a cross-reference having that effect. Arguably this is therefore "treatment"

writ large. So imagine that Russia were to offer international arbitration to its own citizens making claims against the State. The Claimants too would then be entitled to international arbitration by virtue of this Subparagraph. Such a provision is as far as the Tribunal knows unheard of in international treaty practice. It would be odd indeed if *national* treatment were in this respect sharply more favourable than MFN. One might therefore wonder if the drafters of the Spanish BIT truly applied their minds to the issue of arbitration when drafting Article 5. The doubt may be justified. Yet it hardly advantages the Claimants. The Treaty must be taken as it is written.

119. The conclusion must be that the specific MFN promise contained in Article 5(2) of the Spanish BIT cannot be read to enlarge the competence of the present Tribunal. This conclusion (and the analysis in Paragraphs 105-118 upon which it is built) is that of a majority of the Tribunal. The separate opinion appended hereto is viewed with full respect by the majority. They agree that "more favourable" may in principle include accessibility to international fora. Ultimately however their view is that the terms of the Spanish BIT restrict MFN treatment to the realm of FET as understood in international law. This in the majority view relates to normative standards and does not extend to either (i) the availability of international as opposed to national fora or (ii) "more" rather than "less" arbitration (as the separate opinion puts it).

120. The Claimants have also invoked Russia's BITs with other countries. The Tribunal's conclusion makes it superfluous to analyse them, since the impediment to expansion of arbitral jurisdiction via the MFN avenue lies in the Spanish BIT itself and cannot be overcome by the texts of such other instruments.

2.3 Are the Claimants "investors" covered by the Spanish BIT?

121. This objection pertains to three of the Claimants. Two of them are challenged for an identical reason. It is convenient to begin with them.

122. Russia argues that Emergentes and Eurofondo are not corporate bodies. Spanish law (specifically: Article 3 of Law 35/2003 of 4 November 2003) treats them as collective investment funds without legal personality. It follows in Russia's submission that they are not investors as defined in the Spanish BIT. Article 1 of the Treaty states:

> *1. The term "investor" shall mean:*
>
> *(a) Any individual having the nationality of either Party and entitled under the relevant legislation of that Party to make investments in the territory of the other Party;*
>
> *(b) Any corporate body established in accordance with the legislation of either Party, domiciled in its territory, and allowed under the legislation in force there to make investments in the territory of the other Party.*

123. An opinion letter on Spanish law dated 25 April 2008 produced by the Claimants contains the following statements by Antonio Hierro of the Cuatrecasas law firm:

> *I have analyzed the definition of investor under article 1 of the Spain/USSR BIT. Although it is clear that [Eurofondo] and [Emergentes] are not a corporate body ("*persona jurídica*"), it is also clear that they are capable of acquiring rights and obligations of a contractual nature. They can own property .... They were authorized to operate by the Spanish stock market regulator* (Comisión Nacional del Mercado de Valores – CNMV) *and are registered entities, as required under section 10 of the above act .... In the*

> *ordinary course of business, these and similar investment funds sometimes become involved in legal actions, both as claimants and respondents, regarding the rights and obligations they acquire during their activities. When these situations arise, the Funds' claims are asserted on their behalf by their management companies, following the same pattern established by our civil system to have represented by a court the interest of minors or of other entities that can own rights and obligations, but cannot act directly at Court.*

124. The Parties derive quite different conclusions from the propositions articulated in the Cuatrecasas letter. Russia's position is exceedingly simple: an entity which is not a corporate body is not covered by the Spanish BIT.

125. The Claimants counter that the Spanish system under which Emergentes and Eurofundo operate involves three different entities that have an "organic" interrelationship. Assets are owned by the fund. The fund is managed by a company capable of bringing claims in relation to the assets. The assets are held by the depository as custodian. The latter conducts purchases and sales of the assets. The Claimants insist that it was proper for Emergentes and Eurofundo to be put forward as claimants through the initiative of their management company (Ahorro Corporacíon Gestíon SGIIC). Thus the "attributes" of ownership and legal personality are joined.

126. The somewhat metaphysical notion of "joined attributes" has been given no legal definition. The difficulty here is obvious. The Treaty requires that "the investor" be a "corporate body". The Claimants answer that this tripartite Spanish system was in place when the Spanish BIT was signed and it would be "hair-splitting" (T:277) not to consider that investments generated under that system were not intended to be covered.

127. It is a vexing issue. No rational basis has been proposed to explain why either of the State-parties to the Spanish BIT should have desired to promote and protect the investments of physical persons and corporate bodies but not those of entities that are able to mobilise capital but lack legal personality. Yet the words of the Treaty are what they are. Apparently Spanish law considers that investment funds may be "corporate bodies" for some purposes (e.g. as beneficiaries of authorisation to operate granted by the CNMV) although not for others (e.g. standing to sue or be sued). But it is difficult to overlook Mr Hierro's unambiguous disqualification of the funds as corporate bodies while explicitly referring to Article 1 of the Spanish BIT. It requires a juridical leap to allow the funds to qualify as investors by absorbing a corporate identity which is not their own.

128. In fact the English words "corporate body" are vaguer and thus possibly broader than the official Spanish "*persona juridical*". One might debate the meaning of "body" in the abstract sense of "entity". A fund might well be thought of as an *entidad.* That word was indeed used by the Barcelona Court of Appeal in its decision of 26 July 2006 in Case 59/2006. Yet it immediately went on to qualify the fund involved in that case as being *sin personalidad.* Having the status of a "body" or "entity" clearly does not (necessarily) imply legal personality. International law does not contain a definition of "legal personality" capable of being applied to constructs of national law. One must look to Spanish law. The letter from counsel for the Claimants to the Russian Minister of Foreign Affairs on 17 October 2006 "on behalf of our client" Ahorro Corporación Gestión SGIIC S.A. identified Emergentes and Eurofondo ("managed by Ahorro") as "Spanish Investors under the Treaty". This simply cannot be; Article 1(b) of the Spanish BIT excludes it.

129. Purpose does not overcome text. A servant corrects the command "toss out the baby and put the water to bed" not by dint of purposive interpretation but by an instant and proper understanding of the plain (though jumbled) meaning of the words in context. The literal syntax is absurd but is corrected without pause. The

problem of the Spanish funds is quite different. The Spanish BIT's disqualification of corporate entities bereft of legal personality may well have been inadvertent. Yet as long as it does not lead to absurdity it must be accepted as the expression of the will of the State-parties.

130. One may ask how Spanish law characterises these funds other than by making clear what they are not. Law 35/2003 refers to them as *patrimonios separados*. *Patrimonios* may best be understood as "estates" or "assets". (The word "equities" that appears in the translation provided by the Claimants seems misleading. It was probably inferred from the expression *patrimonio social* – shareholders' equity.) This is not of great assistance. One might speculate that the State-parties simply did not wish to protect investors who did not have legal personality. This would parallel the possible disqualification of minors or other incompetent persons under Article 1(a). Why this was desirable leads to further speculation. The exercise is futile; it is what was agreed.

131. With respect to Renta 4 S.V.S.A. Russia argues that it does not qualify as an investor because the Yukos ADRs on its books are held in custody for an investment fund named Renta 4 Europa Este FIM. Once again the Claimants answer by reference to the tripartite Spanish system described in Paragraph 125 above. Once again the Tribunal understands that the owner of the asset that constitutes the investment is not a corporate entity. The named Claimant (Renta 4) is in this instance the depository. It seems to have an undisputed right to act on behalf of its client. But the problem is that the fund (i.e. Renta 4 Europa Este FIM) lacks the formal requisite to be an investor under the definition of the Spanish BIT.

132. The Claimants have suggested in the alternative that the Tribunal could "recognise" the management companies as Claimants (T:277). The Tribunal has considered that hypothesis. For that purpose it put to the side any formal difficulties that might arise under Swedish law or the SCC Rules. It also assumed that the suggestion might extend to Renta 4 as depository. The reasoning then

progresses as follows. It may well be that each of the three entities pass muster under Article 1(b) as Spanish corporate bodies allowed under Spanish law to "make investments" in Russia. But did they do so in this case? The Cuatrecasas letter does not allow that inference. To the contrary it describes the main "activity" *of the funds* as "buying, selling and owning all types of assets, including commodities, securities and real estate, both in Spain and abroad". It is difficult on this footing to consider that the management and depository companies (albeit potential qualified investors) actually made investments. The investments were as far as the Tribunal can see made by funds insusceptible of qualifying as investors under the Spanish BIT.

133. The management and depository companies are not named parties to this arbitration. It is not clear that the present decision could bind them. They may have their own arguments to invalidate the reasoning of Paragraph 132. The Tribunal finds that it cannot in the circumstances "recognise" substitute claimants.

134. This conclusion may seem formalistic but is unavoidable. It bears similarity to *L.E.S.T.-Dipenta v. Algeria* (2005) which involved an attempt by a two-member consortium to act as a sole claimant although the case was brought by reference to a contract that was signed by them separately. The tribunal declared that it had no jurisdiction to consider the dispute as engaged. This decision was naturally without prejudice to the possibility that the individual consortium members might bring a new action (as indeed they did). The Claimants seek to rely on the Jurisdictional Award rendered in SCC Case 21/1999 in support of their proposal that the Arbitral Tribunal might "recognise" substitute claimants. That case however illustrates rather than solves the Claimants' problem; an unincorporated consortium was dismissed as a claimant but its members were retained on the footing that they had been named parties "from the outset".

2.4 Is ownership of Yukos-related ADRs an investment covered by the Spanish BIT?

135. The arguments in this respect involve two provisions of the Spanish BIT. The first is the following definition of investment in Article 1(2):

> *The term "investments" shall apply to all types of assets, and particularly but not exclusively to:*
>
> - *Shares and other forms of participation in companies;*
>
> - *Rights deriving from any type of investment made to create an economic value;*
>
> - *Immovable property as well as any other rights relating thereto;*
>
> - *Intellectual property rights, including patents, trade marks, appellations of origin, trade names, industrial designs and models, copyrights and technology and know-how;*
>
> - *Concessions, accorded by law or by virtue of a contract, for engaging in economic and commercial activity, including concessions for prospecting, tapping, mining and managing natural resources.*

136. The second is the definition of the scope of the Treaty that appears in Article 2:

> *Scope of Agreement*

> *This Agreement shall be applicable in the territory over which either Party exercises or may exercise jurisdiction or sovereign rights, in accordance with international law, in particular for the purposes of prospecting, tapping, mining and managing natural resources.*
>
> *This Agreement shall apply to investments made by investors of one Party in the territory of the other Party, in accordance with the legislation in force there as of 1 January 1971.*

137. Russia contends that the Claimants' alleged investments were not made "in the territory" of Russia. It submits that the characterisation of investments as "assets" is necessary but not sufficient. The notion of investment "has its own core meaning" to be derived from prior awards or "just common sense" (T:113). American Depository Receipts are by necessity issued by US banks or trust companies. Russia has no "prescriptive jurisdiction" over the ADRs in this case notwithstanding that the value of Yukos may be reflected in them. In Russia's view they constituted a "commercial transaction" rather than an "ownership interest" in Yukos and are therefore not investments.

138. Russia goes on to observe that the shareholder in Yukos was a Deutsche Bank affiliate incorporated in New York. Its relationship with ADR holders was contractual. The holders could not vote at a Yukos assembly. That was the formal prerogative of Deutsche Bank. There may have been a contractual duty on Deutsche Bank to follow ADR holders' instructions. Its failure to do so would raise a contractual issue "completely outside of the Russian territory" (T:120). The same would be true if Deutsche Bank failed to credit the ADR holder with dividends paid by Yukos by reference to the shareholding reflected in the ADRs. The ADR holders' right to sell was likewise governed by a contract subject to New York law rather than by the Russian regime applicable to Yukos shareholders.

139. It should be noted from the outset that Russia's reference to *Gruslin v. Malaysia* (2000) is inapposite. There the Belgian investor purchased shares in a Luxemburg mutual fund. The fund was specialised in Asian equities. It purchased those equities in various national markets as it saw fit. Some of its holdings were traded on the Kuala Lumpur Stock Exchange. The investor considered that the Malaysian government had taken measures in violation of a BIT which had the effect of depressing the value of his investment. Of course the value of his investment reflected the aggregate value of the Luxemburg mutual fund. The issue whether his was an investment in Malaysia is clearly very different from asking whether the present Claimants invested in Russia. A Yukos ADR perforce reflects an investment in that Russian company. Mr Gruslin's mutual fund invested in many countries and had no duty to invest in Malaysia at all if it deemed it more propitious to invest elsewhere.

140. Russia's argument in this case is inconsistent with statements made by Russian officials. A guidance letter issued on 7 February 2005 by Russia's Ministry of Finance states that a depository share evidences "a property interest in a Russian organization". To similar effect is a letter issued on 25 July 1996 by the State Committee of the Russian Federation for Management of State-Owned Property. The letter set forth "Recommendations for Preparation of Actions for Sale of Securities in the International Equity Markets". It contains this statement:

> *[I]t virtually makes no difference (from the point of view of the actual raising of the capital) as to how it will be implemented from the technical standpoint - in the form of ADRs, GDRs, through bonds, conversion, directly in the form of shares or a combination thereof.*

141. Article 1(2) of the Spanish BIT defines "investments" as "all types of assets". It immediately gives a non-exhaustive list of examples which includes not only "shares and other forms of participation in companies" but

also "rights deriving from any type of investment made to create an economic value". This denotes very broad acceptance of unspecified vehicles of investment ("other forms"). To assert that Yukos ADRs are not investments in Russia is not sustainable in light of this liberal text and the statements of Russian governmental bodies. ADRs are internationally well-known securities. They were obvious candidates to fit under the Article 1(2) definition and equally obvious forms of investments designed to be encouraged by the BIT. The "property interest" represented by ADRs naturally runs with their ownership. The fact that formal share ownership may be recorded as that of the depository is of no moment. To follow Russia's invitation to apply "common sense" to this question is to decide it in favour of coverage under the Treaty.

142. This conclusion is confirmed by the fact that Article 6 of the Spanish BIT refers to the duty to compensate "the investor or his beneficiary". Counsel for Russia adroitly suggested that this expression was intended to cover the case of subrogees (T:362). That is certainly credible in light of the Treaty's specific provisions about beneficiaries of subrogation (Article 8). But there is no limiting cross-reference. The language seems broad enough to encompass holders of ADRs as well. It is true that on-selling may raise issues of causation. Double recovery is obviously not allowed. But both of these reservations also apply to shareholders. In either case they raise issues of substance rather than of jurisdiction.

143. Russia's arguments about the essentially contractual nature of ADR holders' rights (as well as their extraterritorial locus) are unpersuasive. Such a conclusion would doubtless invalidate holders of shares of Russian enterprises which chose to trade on any foreign bourses. Formal shareholdings are routinely in the hands of third party custodians. It would be astonishing to think that a BIT excluded such familiar vehicles for capital mobilisation. Official Russian communications (as seen) are to the opposite effect. The suggestion that these communications were intended to amalgamate various forms of investments only for limited purposes (such as taxation) does not in the Tribunal's view have a credible

textual foundation. Moreover it contradicts Article 1(2) of the Spanish BIT. Even if ADRs are not (contrary to the arbitrators' view) to be considered "other forms of participation" they are most certainly "rights deriving from" an investment.

144. Nor is the Tribunal convinced by Russia's reliance on the requirement in Article 2 that investments must be "made ... in the territory of the other Party". The nexus required by this Article between "investment" and "territory" must be understood by reference to the types of investments encompassed by Article 1. They are exceedingly broad: "other forms of participation" and "rights derived". The contractual relationship here surely qualifies.

2.5 Have the Claimants sufficiently demonstrated ownership?

145. The Claimants responded to Russia's challenge by submitting seven statements of depositaries detailing transactions concluded for various Claimants. Claimant Renta 4 S.V.S.A. submitted a similar statement on behalf of Renta 4 Europa Este FI. The Claimant also provided a declaration of Mr Mardomingo (see Paragraph 9 above) "explaining features of Spain's regulatory system relevant to proof of ownership of ADRs and other securities" by collective investment institutions.

146. The exit of Renta 4 S.V.S.A. and the two "Ahorro" entities from these proceedings makes it unnecessary to consider this issue with respect to them.

147. The four remaining claimants are all *sociedades anónimas de capital variable*. The Tribunal is satisfied with the depository statements furnished on their behalf as well as the statement of Mr Mardomingo. Russia questions the reality of their rights as "beneficiaries" vis-à-vis the formal "holders" of the relevant ADRs. The Tribunal considers that beneficiaries possess a "form of participation" for the purposes of the Spanish BIT. Any

misrepresentation of their status would be fraudulent. Fraud is not to be presumed. Russia may pursue its inquiries if it wishes. But its bare challenge to the evidence of these four Claimants' ownership is inadequate to defeat their standing.

3. ADMISSIBILITY

148. Two issues of admissibility were raised in Russia's written pleadings: adequacy of notice and exhaustion of local remedies. The latter was explicitly abandoned at the hearings (T:103). Only adequacy of notice remains.

149. Russian maintains that the "detailed report" required under Article 10(1) of the BIT (see Paragraph 5 above) was not provided by the Claimants.

150. Russia was entitled to a "detailed report". This means it could have insisted on greater specificity. It does not mean that it could keep silent and then complain about its ignorance of matters which the Claimants would certainly have had every reason to be willing to clarify if asked. The words "detailed report" are not self-defining. The Claimants' notices were succinct but nonetheless contained much detailed information about the circumstances of their investment and the fact that their interest in Yukos had been adversely affected by governmental measures. The Claimants could reasonably have expected that this matter was not unfamiliar to the Government.

151. The issue is not whether Russia (as the point was put in its pleadings) "is expected to negotiate with an undocumented American lawyer on the basis of some random demand letter". The notion that the host State could simply cross its arms and disregard any communications which it deems to be formally insufficient is hardly consonant with the attitude to be expected of officials of a government which has encouraged foreign investors. Nor can it be said that a claimed treaty violation

relating to the Yukos controversy – front-page news around the world – was a trivial matter which the central organs of a State could reasonably ignore. Russia should have stated that it considered the notice to be incomplete or incomprehensible if it believed that it did not fulfil its purposes or did not give Russia (as its counsel now puts it) "an opportunity to investigate the *bona fides* of the purported investors' claims".

152. Russia's challenge adds one degree of specificity with respect to two of the Claimants. It denies that a letter from the manager of Emergentes and Eurofondo qualifies as a notice by them. The discussion in Section 2.3 should have made clear that the role of the managing company is precisely to bring claims in relation to a fund's assets. The point is however academic in light of the Tribunal's conclusion that these two funds are not qualified investors.

153. The objection of inadequacy of notice must fail with respect to the four Claimants concerned.

154. This award and the separate opinion attached to it follow extensive and collegial deliberations. The arbitrators have had numerous oral and written exchanges with respect to the challenging issues raised by the Parties. The result has been a refinement of the views of each arbitrator and the emergence of the fullest possible consensus.

4. DECISION

155. The Tribunal hereby decides that:

(i) it has subject matter jurisdiction under Article 10 of the Spanish BIT to decide whether compensation is due by virtue of claims of expropriation raised in this arbitration;

(ii) it has no subject matter jurisdiction under Article 5 of the Spanish BIT;

(iii) its jurisdiction is limited to the claims of the following four entities:

- Rovime Inversions SICAV S.A.

- Quasar de Valors SICAV S.A.

- Orgor de Valores SICAV S.A.

- GBI 9000 SICAV S.A.

(iv) the claims of the four corporate entities identified in Subparagraph (iii) are admissible within the scope of Subparagraph (i).

156. Costs are reserved.

Done on 20th March 2009.

Charles N. Brower

Toby T. Landau

Jan Paulsson

Arbitration Institute of the Stockholm Chamber of Commerce

In an arbitration between

RENTA 4 S.V.S.A.
AHORRO CORPORACIÓN EMERGENTES F.I.
AHORRO CORPORACIÓN EUROFONDO F.I.
ROVIME INVERSIONES SICA V S.A.
QUASAR DE VALORS SICA V S.A.
ORGOR DE VALORES SICA V S.A.
GBI 9000 SICA V S.A.

Claimants

and

THE RUSSIAN FEDERATION

Respondent

SEPARATE OPINION OF CHARLES N. BROWER

INTRODUCTION

1. I begin by confirming what is stated in Paragraph 154 of the Award on Preliminary Objections ("the Award") to which this Separate Opinion is appended. The fact that the Award does result from such "extensive and collegial deliberations" with co-arbitrators whose integrity and intellect I respect most highly renders me particularly hesitant to air the views set forth below. Yet, I choose to articulate my partially differing views for two reasons. First, I believe that by doing so I may contribute usefully to the public debate over the issues addressed by this Tribunal in this case, a debate reflected in past awards of other tribunals and doubtless to be continued in ongoing and future arbitrations. Second, given what we have been informed may be the practical impact of the Award,[1] it may not be amiss to anticipate the possibility of judicial proceedings in due course in which the correctness of the Award is put in issue, in which case I entertain the

[1] At the hearing leading to the Award Claimants' counsel noted that "owners of about $10 billion in losses reside in countries that have bilateral investment treaties with Russia, and the large majority of those live in countries that have bilateral investment treaties with Russia that are similar to the UK treaty [involved in *RosInvestCo v. Russia*, referred to in the Award at paragraphs 48, 73, 95, 97, 98 and 104] and the Spanish treaty" (T:378). Hence, counsel stated, "[t]his is a very important case. This is about more than the few million dollars that are at stake for the Claimants in this case" (T:377).

fond hope that the views I express may further illuminate certain issues for the benefit of any such forum.

2. I agree entirely with subparagraph (i) of paragraph 155 of the Award. Hence I am in agreement with what has been said in paragraphs 19-67 of the Award, while adding only my own emphasis to the statements in its paragraph 45 to the effect that it is solely the Claimants' own insistence that we may not address the issue of whether the alleged expropriation of which they complain was lawful or unlawful that has precluded us from addressing such issue, and that the Award therefore expresses no opinion as to whether, in the absence of that insistence, we would have had jurisdiction under the Spanish treaty to address that issue.

3. I am in disagreement with, and hence dissent from, subparagraph (ii) of paragraph 155 of the Award. While I do embrace some of the Award's conclusions leading up to its rejection of jurisdiction based on Article 5(2), namely those establishing that Claimants' raising of the MFN issue was timely, that it is not precluded by Article 11(3) of the Danish treaty with Russia nor is it negated by Article 10 of the Spanish treaty, and that dispute settlement mechanisms may be encompassed by the term "treatment," I disagree with the majority's analysis insofar as it denies Claimants access through the MFN clause of the Spanish treaty to the broader consent to international arbitration Respondent gave under Article 8(1) of the Danish treaty. Thus I would have ruled that this Tribunal has jurisdiction not only to consider Claimants' claim of expropriation, with all of its ramifications, under Article 6 of the Spanish treaty, but also to hear claims arising under Articles 4 (protection against arbitrary or discriminatory measures) and 5(1) (fair and equitable treatment) of that treaty.

4. Finally, I also am in disagreement with, and hence dissent from, subparagraph (iii) of paragraph 155 of the Award insofar as it excludes from this arbitration the Claimants Emergentes, Eurofondo and Renta 4 S.V.S.A., who, in my view, either should be admitted as qualified Claimants or given an opportunity to undertake whatever formalities may be required for their claims to be presented to this Tribunal. That is to say, while I concur with paragraphs 135-153 of the Award, holding that ADRs qualify as "investments" under the Spanish treaty, that ownership is proven and that there is no

problem as regards admissibility, I reject paragraphs 121-134 of the Award, which find Emergentes, Eurofondo and Renta 4 S.V.S.A. not to be qualified investors under the Spanish treaty.

ARTICLE 5(2) OF THE SPANISH TREATY

5. In my view the majority in this case is mistaken in its view that Article 5(2) of the Spanish treaty grants most-favored-nation treatment only in respect of fair and equitable treatment, and does not permit Claimants to incorporate Respondent's broader consent to arbitration under Article 8(1) of the Danish treaty with Russia, which accords the right to SCC arbitration in respect of any dispute under that treaty, for the benefit of investors covered under the Spanish treaty.

6. At the outset, while the Award deals with *Plama* (in paragraphs 95 and 98) and rightly ascribes to it no weight for present purposes, I think it nonetheless important to emphasize, as part of what the Award in paragraph 87 calls "normative background," the wrongheadedness of *Plama's* analytical *diktat* to the effect that

> an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.[2]

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[2] *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 Feb. 2005, para. 223. The same point was expressed repeatedly by the *Plama* Tribunal in terms of the MFN provision needing to be "clear and unambiguous" in that respect:

> . . . [A]n agreement of the parties to arbitrate . . . should be clear and unambiguous (para. 198).
>
> . . . [T]he parties' clear and unambiguous intention . . . (para. 199).
>
> . . . [T]he reference [in the MFN clause] must be such that the parties' intention to import the arbitration provision of the other agreement [BIT] is clear and unambiguous (para. 200).
>
> . . . [C]learly and unambiguously . . . (para. 200).
>
> . . . [T]he intention to incorporate [into the primary BIT] dispute settlement provisions [from the BIT sought to be accessed] must be clearly and unambiguously expressed (para. 204).
>
> . . . [U]nless the States have explicitly agreed thereto . . . (para. 212).
>
> . . . [A]n arbitration clause must be clear and unambiguous and the reference to an arbitration clause [via an MFN clause] must be such as to make the clause part of the contract (treaty) (para. 218 - the parenthesized reference to "treaty" is in the original).

7. The principle basis on which the *Plama* tribunal reached its conclusion, and on which also the tribunals in *Telenor, Berschader* and *Wintershall* relied, i. e., that a State's acceptance of jurisdiction must be "clear and unambiguous", however, is a principle that, whatever validity it may have had in an earlier era, is patently incompatible with Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Thus, the International Court of Justice and numerous arbitral tribunals have repeatedly stated that instruments containing a State's consent to submit to the jurisdiction of an international court or tribunal are to be interpreted like any other international legal instrument, that is neither restrictively nor liberally, but according to the standards set down in the Vienna Convention.

8. Thus, after a meticulous review of the jurisprudence of both the Permanent Court of International Justice as well as the International Court of Justice, Judge Rosalyn Higgins, in her Separate Opinion in the *Oil Platforms* case, concluded that

> [i]t is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses. But equally, there is no evidence that the various exercises of jurisdiction by the two Courts really indicate a jurisdictional presumption in favour of the plaintiff. ... The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other.[3]

Following *Plama v. Bulgaria,* see also *Telenor Mobile Communications A.S. v. The Republic of Hungary,* ICSID Case No. ARB/04/15, Award of 13 Sept. 2006, para. 90 (stating that "[t]his Tribunal wholeheartedly endorses the analysis and statement of principle furnished by the *Plama* tribunal"); *Vladimir Berschader andMoïse Berschader v. The Russian Federation,* SCC Case No. 080/2004, Award of 21 April 2006, para. 181 (stating that "the present Tribunal will apply the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties"); *Wintershall Aktiengesellschaft v. Argentine Republic,* ICSID Case No. ARB/04/14, Award of 8 Dec. 2008, para. 167 (observing that "ordinarily and without more, the prospect of an investor selecting at will from an assorted variety of options provided in other treaties negotiated with other parties under different circumstances, dislodges the dispute resolution provision in the basic treaty itself – *unless of course the MFN Clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted"* – emphasis in the original). I note, however, that the award in *Wintershall AG v. Argentina* was rendered after the close of the oral hearings in the present case, without the Parties having had an opportunity to comment upon this decision. Therefore, it is, in the present context, cited solely for purposes of completeness.

[3] *Oil Platforms (Islamic Republic of Iran v. United States of America),* Preliminary Objections, Judgment of 12 Dec. 1996, Separate Opinion by Judge Higgins, I.C.J. Reports 1996, p. 857, para. 35.

9. The same approach to interpreting jurisdictional instruments also dominates the practice of arbitral tribunals. Thus, as Professor Berthold Goldman and his colleagues famously said more than a quarter of a century ago in the jurisdictional decision in the first *Amco Asia* ICSID arbitration, which has been followed by a number of other tribunals:

> [L]ike any other conventions, a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law.[4]

10. In view of this broad consensus on the interpretative methodology to be applied to questions regarding the jurisdiction of international dispute settlement bodies, the principle basis of the decisions in *Plama, Telenor, Berschader* and *Wintershall* is, with respect, wrong and cannot be followed. In consequence, I see no reason why an issue of the incorporation of broader consent to arbitration under the host State's third-country investment treaties should be treated differently from the consistently accepted application of MFN clauses to substantive standards of treatment, or the (rather) consistently accepted application of MFN clauses to the shortening of waiting periods.[5] While, on the one hand, there is no reason to differentiate between admissibility-related aspects of accessing investor-State arbitration and matters of jurisdiction, there equally is little merit in distinguishing between matters of substantive investment protection and the enforcement of these rights through investor-State dispute settlement.[6]

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[4] *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on Jurisdiction of 25 Sept. 1983, para. 14(i), 23 I.L.M. 351, 359 (1984) (emphasis in the original); see also, e. g., *Ethyl Corporation* v. *The Government of Canada*, Award on Jurisdiction of 24 June 1998, para. 55; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 Oct. 2002, para. 43; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interaguas Servicios Integrates del Agua, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction of 16 May 2006, para. 64.

[5] It may be noted that, so far, only the tribunal in *Wintershall v. Argentina*, paras. 108-197, has declined to rule that waiting periods can be shortened based on an MFN clause. Unlike earlier tribunals it qualified the requirement to pursue local remedies for eighteen months before turning to international arbitration as a jurisdictional condition to the host State's consent to arbitration, rather than as an admissibility-related question, and declined to shorten waiting periods based on an MFN clause.

[6] *Cf*. in this respect *Gas Natural SDG, S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction of 17 June 2005, para. 29; *Suez Inter Aguas* v. *Argentina*, Decision on Jurisdiction,

11. Against this "normative background," my dissent from the majority's reasoning relates to the construction of Article 5(2) of the Spanish treaty. While in the majority's view that provision constitutes an MFN clause which, due to its reference to paragraph 1 of Article 5, encompasses only matters forming part of fair and equitable treatment, I consider this construction not to be in conformity with the interpretative rules set out in the Vienna Convention on the Law of Treaties and hence mistaken. I am further of the view that, even if the majority's construction of Article 5(2) were correct, the result reached should not differ from that which follows from the construction I give to Article 5(2); namely, the Respondent's broader consent to arbitration under the Danish treaty is an aspect of fair and equitable treatment, hence Article 5(2) enlarges the jurisdiction of this Tribunal to encompass claims made under Articles 4, 5(1) and 6 of the Spanish treaty.

12. The Award spells out, in paragraphs 102-120, the conundrum presented by the unofficial English translation of the Spanish treaty as regards the reference that Article 5(2) makes to "[t]he treatment referred to in paragraph 1." The Award, in this context, acknowledges (in its paragraph 111) what it calls "some lexical difficulties." They are easily recapitulated thusly: if it is concluded that the reference in Article 5(2) to "[t]he treatment referred to in paragraph 1 above" is only to "fair and equitable treatment" rather than "treatment" more broadly, how can this be reconciled with the fact that (1) Article 5(3) excludes from "[s]uch treatment ... privileges" accorded to third-State investors pursuant to a "free trade area," a "customs union," a "common market," or certain "mutual economic assistance" arrangements, while providing also that "[t]he treatment under this article shall not include tax exemptions or other comparable privileges" granted to third-State investors "by virtue of a double taxation [or similar] agreement," all of which privileges and exemptions extend well beyond any concept of "fair and equitable treatment" and have nothing whatsoever to do with it; and (2) Article 5(4) provides that, "[i]n addition to the provisions of paragraph 2 above" [note the reference is not to paragraph 1], each of the treaty parties will grant national treatment, a

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May 16, 2006, para. 57; *AWG Group Ltd. v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction of 3 Aug. 2006, para. 59; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction of 3 Aug. 2006, para. 59 (all pointing out that differentiating between substance and procedure has no merit).

concept likewise entirely separate and apart from the notion of "fair and equitable treatment," and which grants treatment extending well beyond it. In the end, the Award resolves these "lexical difficulties" by declaring (in its paragraph 117):

> Something has to give. The choice is between an explicit stipulation and a revelation by grammatical deconstruction. The Tribunal naturally prefers the former.

It then proceeds to speculate on why the treaty's drafters acted as they did, suggesting their actions may have been "reflexive," and that had they engaged in a "searching exegetical endeavor" they might have realized that some of Article 5's language was "unnecessary in this particular instance."

13. I believe that Articles 31 and 32 of the Vienna Convention on the Law of Treaties preclude the existence of such a "choice" as that which the majority has posited. It is rather like Alexander the Great severing the Gordian Knot, instead of untying it, as the ancient King of Phrygia had prescribed, and as I understand the Vienna Convention requires. The result of interpretation may be "unambiguous," but it nonetheless must result from a process that includes the very "grammatical deconstruction" rejected by the majority. Under Article 31 of the Vienna Convention one looks not just to the "ordinary meaning" of a word or words; words must be viewed "in light of [the treaty's] object and purpose," and in their "context," which under Article 31(2) of the Convention includes the entire text of the treaty. If the meaning of a term remains unclear following application of Article 31 of the Convention, or is ambiguous, or is "manifestly absurd or unreasonable," a tribunal then must look to supplementary means of interpretation as prescribed in Article 32. The majority here has not followed the prescribed route.

14. Furthermore, in placing such heavy emphasis on the "lexical" implications of the reference in Article 5(2), the Award bases its analysis and reasoning exclusively on the English translation of a treaty which, according to its terms, was executed only in the Spanish and Russian languages, each being equally authentic. Conclusions derived from a non-authentic version of an international treaty, however, must be treated with utmost caution. This is all the more so considering that Article 33 of the Vienna Convention provides both a special rule of interpretation where two authentic texts may vary and a rule for when a non-authentic translation can be considered as an authentic text. The

Tribunal, however, has discussed neither the Spanish nor the Russian version of the treaty provision in question, nor has it indicated that the English translation could be considered as authentic pursuant to Article 33(2) of the Vienna Convention.[7]

15. As a matter of textual analysis, I would have found that the reference in Article 5(2) to that Article's paragraph (1) should, in context, be read as referring to "treatment," not to "fair and equitable treatment." In support of this conclusion, I note that the Spanish heading of Article 5, which is part of the "context," is "Tratamiento," or simply "Treatment." Moreover, the Spanish text of Articles 5(1) and (2) is more consistent than the non-authentic English version with the interpretation I favor. They state:

> 1. Cada Parte garantizará en su territorio un tratamiento justo y equitativo a las inversiones realizadas por inversores de la otra Parte.
>
> 2. El tratamiento mencionada en el punto anterior no será menos favorable que el otorgado por cada Parte a las inversiones realizadas en su territorio por inversores de un tercer Estado.

The combination of the heading and the text support the conclusion that the term "treatment" in Article 5(2) refers to all treatment ("tratamiento") under the treaty, not just "fair and equitable treatment," considering that Article 5 itself deals with MFN treatment and national treatment in addition to fair and equitable treatment.

16. The Russian version of the Spanish treaty lends further support to the broad understanding of Article 5(2) as a general most-favored-nation clause. Thus, the heading of Article 5 reads as "Rezhim kapitalovlozhenii" which, translated literally, means "Investment Regime," in the sense of overall conditions relating to investment. This suggests that every subparagraph in Article 5 concerns a quality or characteristic of the investment regime the Contracting Parties must accord to investors covered under the Spanish treaty, i. e., a regime that is fair and equitable and no less favorable than that granted to domestic or third-country investors. This is consonant with the Russian version of Article 5(2), which provides that "[t]he regime mentioned in point 1 of this article shall be no less favorable than the regime granted by each party in relation to investments carried out on that party's territory by investors of any third state." This

[7] In fairness it must be noted, however, that neither Party has put forward arguments relating to the Russian version of the treaty and references to the Spanish text were limited.

makes rather clear that the investor is not limited to such "fair and equitable" regime as Russia may grant to third-country investors, but can avail itself of any other regime under which third-country investors operate.

17. Apart from the parsing of the Article's text, i. e., the "lexical difficulties," I find comfort in this regard in other sources, ones on which the Award has relied in part in concluding that is has jurisdiction of Claimants' claims under Article 10. For example, the legislative history concerning the ratification of the Spanish treaty suggests that Spain understood the provision in Article 5(2) on most-favored-nation treatment in a broad sense as encompassing all treatment accorded to foreign investors. Thus, the Spanish Council of State observed in an opinion concerning the question of whether the approval of the Cortes Generales was necessary prior to the ratification of the treaty that

> [i]f, in addition, we take into account the most favored nation clause contained in article 5.2, guaranteeing to USSR investors *in all events* the same benefits as that granted by Spain to any investment of a third-party nation, it is clear ... that this text requires preliminary authorization from the Cortes Generales for the declaration of consent of the state to be bound thereunder.[8]

18. As regards the understanding of the USSR, a comparable legislative history is missing. However, in the paper on BITs published in 1991 by a member of the USSR's negotiating team (Mr. R. Nagapetyants), to which the Tribunal has referred in paragraph 50, the author stated in regard to most-favored-nation clauses in Soviet BITs:

> By according most-favored treatment, the host country established the terms of business for the partner country's investors equal to those under which the investors of any third country operate. This means that if any agreement concerning the protection of investment that was signed at a later date provides more benefits and advantages, then they automatically are extended to all investors from countries with which investment agreements were previously signed on most-favored terms.[9]

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[8] Council of State Opinion No. 55-810/RS, 14 March 1991, Exhibit C-55 – emphasis added.

[9] R. Nagapetyants, *Agreements Concerning the Promotion and Mutual Protection of Investment*, Foreign Trade 1991, No. 5, at 11, Exhibit C-49. It may be noted, however, that such statements made by government officials in a non-official quality are not attributable to the State. In consequence, they do not constitute context in the sense of Article 31 of the Vienna Convention on the Law of Treaties and may not be relied on as *travaux préparatoires* under Article 32 of the Convention. However, they may be useful as an indicator of the ordinary sense of the wording used in an international instrument and reflect the general

19. Even were the Award correct in its conclusion that Article 5(2) refers exclusively to "fair and equitable treatment," the question remains whether the Respondent's broader consent to international arbitration given under Article 8 of the Danish treaty must be extended to the Claimants as part of the "more favorable" fair and equitable treatment available under that treaty. Succinctly, the issue here is whether the Danish treaty's provision of broader arbitration possibilities represents an aspect of "fair and equitable treatment" that is more favorable than the Spanish treaty's restriction of such dispute settlement mechanisms to issues of "compensation due" for an expropriation under its Article 10.

20. Here the majority, once again in my view, goes astray when it rejects such a possibility. Notably, the majority does not reject the notion that dispute settlement mechanisms can be included in the broader concept of "treatment" of foreign investors and investments. Instead, it expresses concern that "it would be invidious for international tribunals to be finding (in the absence of specific evidence) that host State adjudication of treaty rights was necessarily inferior to international arbitration" (paragraph 100, quoting McLachlan, Shore & Weiniger, *International Investment Arbitration*, at p. 257; similarly paragraph 106). That, I submit, is not the issue. It is not a question of whether the broader access to international arbitration accorded under the Danish treaty is more favorable than domestic adjudication in Russia. Instead, the question is solely whether the scope of international arbitration available under Article 8 of the Danish treaty is "more favorable" than that under Article 10 of the Spanish treaty. I dare say that it is undeniable that "more" arbitration, i. e., that additional causes of action may be pleaded and decided by an international arbitral tribunal, is "more favorable" than a more limited scope of arbitration. To state the question is to answer it.

21. In any case, strictly speaking, it is not relevant, in my view, to attempt evaluation of whether one dispute settlement mechanism objectively is "more favorable" than another. What is relevant is that Danish and Spanish investors in Russia are afforded "different" dispute settlement options. The purpose and rationale of MFN clauses is, as the International Court of Justice has so clearly stated in *Rights of Nationals of the United*

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understanding of certain provisions of those involved at the time an international treaty was negotiated and concluded.

States of America in Morocco to "establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned."[10] From this perspective, the mere existence of differences in the available dispute settlement mechanisms is sufficient to trigger an MFN clause and thereby to extend the treatment afforded by the Danish treaty to those benefitting from the MFN clause in the Spanish treaty.

22. The focus, then, again assuming that the majority is correct in understanding Article 5(2) as incorporating only more favorable fair and equitable treatment, must be on whether international arbitration is an aspect of fair and equitable treatment. My view is that it is. Yet, the question here is not whether the standard of fair and equitable treatment *requires* access to international arbitration, or, as the Award puts it in paragraph 105, whether "access to international arbitration [is] a necessary part of FET." That is an entirely separate subject and irrelevant to determining the scope of more favorable fair and equitable treatment actually accorded to a third party. Rather the issue is whether the Danish treaty's grant of across-the-board treaty dispute arbitration is a form of fair and equitable treatment granted to those third-party investors.

23. That consent to arbitrate investment treaty disputes is a form of fair and equitable treatment that a State may grant to investors also becomes evident if we consider that the prohibition against denial of justice not only forms part of customary international law, but also is an integral part of the fair and equitable treatment standard itself.[11] Thus, a State that does not provide to a foreign investor dispute settlement procedures at all necessarily will deny that investor any fair and equitable treatment when a dispute arises. The means by which the State in questions offers dispute settlement, in order to avoid a denial of justice, is largely in its discretion. It can do so by setting up a domestic court system, but it may equally provide dispute settlement by consenting to arbitration.

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[10] *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment of 27 Aug. 1952, I.C.J. Reports 1952, p. 192.

[11] See Stephan W. Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law*, IILJ Working Paper 2006/6 (Global Administrative Law Series), pp. 18-19, 26-27, available at http://iilj.org/publications/documents/2006-6-GAL-Schill-web.pdf (visited 16 March 2009); see generally on the development of the modern definition of denial of justice, including the jurisprudence in investor-State arbitration relating to fair and equitable treatment, Jan Paulsson, *Denial of Justice in International Law*, pp. 57 *et seq.* (Cambridge University Press 2007).

24. For these reason, I conclude that Article 5(2) of the Spanish treaty, on any interpretation, grants Claimants the benefits of the Respondent's broader consent to SCC arbitration provided in Article 8 of the Danish treaty, both as a jurisdictional alternative to Article 10 of the Spanish treaty in respect of Claimants' claim of uncompensated expropriation pursuant to Article 6 and as a basis for the Tribunal hearing their claims under Articles 4 and 5(1).

ARTICLE 1(1) (B) OF THE SPANISH TREATY (EXCLUSION OF EMERGENTES, EUROFUNDO AND RENTA 4 S.V.S.A.)

25. Finally, in my view the majority is equally mistaken in declining jurisdiction over the Claimants Emergentes, Eurofondo and Renta 4 S.V.S.A. on the basis that they are not protected investors under Article 1(1) of the Spanish treaty because they are not, in the case of Emergentes and Eurofondo, corporate bodies with independent legal personality under Spanish law, or, in the case of Renta 4 S.V.S.A., because it does not own the ADRs in question. In my view, however, all three entities either should have been admitted as qualified Claimants or should have been given an opportunity to undertake whatever formalities may be required for their claims to be presented to this Tribunal.

26. As regards Emergentes and Eurofondo, the Award correctly notes (in its paragraph 127) that

> No rational basis has been proposed to explain why either of the State-parties to the Spanish BIT should have desired to promote and protect the investments of physical persons and corporate bodies but not those of entities that are able to mobilise capital but lack legal personality.

Well said! The ensuing sentence - "Yet the words of the Treaty are what they are" - , however, hardly answers the question.

27. The majority cites the letter of 25 April 2008 of Claimants' Spanish counsel stating that "it is clear that [both Claimants] are not a corporate body ('persona jurídica')," while at the same time making it "also clear that they are capable of acquiring rights and obligations of a contractual nature . . . were authorized to operate by the Spanish stock market regulator . . . and are registered entities, as required . . . [and that when involved in legal proceedings] the Funds' claims are asserted on their behalf by

their management companies, following the same pattern established by [the Spanish] civil system to have represented by a court the interest of minors or of other entities that can own rights and obligation, but cannot act directly at Court." The record shows that these two funds fall into the Spanish legal category of an "entity" which may invest abroad and is the owner of its investments, but whose assets will be held by a depositary and which must be represented in judicial proceedings by a management company. This tripartite foreign investment system under Spanish law was in place at the time the Spanish treaty was concluded (T:277). The majority proceeds on the basis that since these two funds are not themselves "personas jurídicas," i. e., they are not "juridical persons" having themselves the power to sue though existing as legal entities, that is the end of the story. It beggars imagination, however, to conclude that the investment fund cannot appear before us because it is not itself, technically speaking, a "persona jurídica;" and that the "persona jurídica" who is entitled under Spanish law to represent it in judicial proceedings is not able to represent it here because it has not itself made the investment.

28. The Award arrives at its result based on a mistaken approach to interpretation of the term "corporate body", or, as the authentic Spanish version of the treaty states "persona jurídica". Instead of interpreting this term from the perspective of international law, the Award equates it with the same term under domestic Spanish law. Thus, in the majority's view the fact that Emergentes and Eurofondo, as investment funds, are not "corporate bodies"/"personas jurídicas" in the sense of the Spanish Civil Code, disqualifies them as "corporate bodies"/"personas jurídicas" under Article 1(1)(b) of the Spanish treaty. This interpretative approach violates the principle of the primacy of international law over domestic law and the principle that international treaties must be interpreted autonomously, i. e., not in accordance with the domestic legal orders of the contracting State parties involved.

29. Thus, from the point of view of an autonomous interpretation of the term "corporate body"/"persona jurídica" we need not concern ourselves with the lack of legal personality of investment funds under Spanish legislation. Instead, the term "corporate body"/"persona jurídica" under the treaty encompasses any legal entity (other than a physical person) provided that it has been established, in the case at hand, in accordance

with Spanish legislation, is domiciled in Spain, and is not precluded by Spanish legislation from investing in the Yukos ADRs in question. An investment fund that has been created in accordance with Spanish legislation and is designed to engage in investment activities, both domestic and foreign, qualifies as a "corporate body" in the sense of Article l(l)(b) of the BIT independent of its legal personality (or lack thereof) under domestic law. All these criteria are fulfilled as regards the Claimants Emergentes and Eurofondo.

30. The majority further comforts itself, in part, with the conclusion (in its paragraph 130) that this interpretation of Article l(l)(b) "would parallel the possible disqualification of minors or other incompetent persons under Article 1(a)," which deals with natural persons. Here, as when confronting the "lexical difficulties" of Article 5, the majority follows this with the declaration that "[w]hy this was desirable leads to further speculation. The exercise is futile; it is what was agreed." That minors are excluded as covered investors, however, is nowhere to be found in Article l(l)(a). Instead, this provision merely requires that an individual have the nationality of either Party and be entitled to invest in the territory of the other Party. This entitlement in the Spanish version is designated by the use of the words "facultada, de acuerdo con la legislación vigente en esa misma Parte, para realizar inversiones en el territorio de la otra Parte." The term "facultada" does not concern, however, as the majority mistakenly assumes, the legal capacity of an individual, but rather that individual's entitlement to invest abroad, an entitlement that could be limited by domestic legislation restricting investments in third countries.[12] This mistaken conclusion regarding the potential disqualification of minors as investors seems to have affected the majority's view that corporate bodies must have legal personality under domestic law. Yet, such requirement equally is nowhere to be found in Article l(l)(b) of the treaty which merely states:

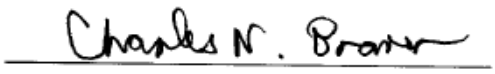
> Cualquier persona jurídica constituida con arreglo a la legislación de una Parte, domiciliada en su territorio y facultada, de acuerdo con la

[12] This conclusion is also supported by the Russian text of the treaty. The word in the Russian text corresponding to "facultada" ("allowed" in the English text before us) is, transliterated, "pravopolnomochnoye." While Russian-English dictionaries translate this as "competence," Russian-Russian dictionaries define the term as "having a legal right" to do something. This richer definition of the word corresponding to "facultada" ("allowed") is consonant with the two roots comprising the word: "pravo" (meaning "law") and "polnomochiye" (meaning "authority" or "power").

> legislación vigente en esa misma Parte, para realizar inversiones en el territorio de la otra Parte.

31. With respect to Claimant Renta 4 S.V.S.A., which is the depositary for the Yukos ADRs of Renta 4 Europa Este FIM, an entity apparently of the same type as Eurofundo and Emergentes, the majority comes to an equally unacceptable conclusion: just as the funds themselves cannot come before the Tribunal because they do not have the right under Spanish law to represent themselves, so the custodian of Renta 4 S.V.S.A.'s Yukos ADRs has no standing because it is not itself the investor. This decision by the majority results literally in a "Catch 22" situation and makes no more sense of the situation than did the dismissal of Eurofondo and Emergentes. While Renta 4 S.V.S.A may not be the entity owning the Yukos ADRs in question, it is clear that it is bringing this action for the real party in interest, which is Renta 4 Europa Este FIM. Since the ADRs are, as the Award correctly finds, protected investments, one should either have accepted Renta 4 S.V.S.A.'s standing as acting for the funds owning the ADRs, or have allowed whatever amendment might be necessary to remedy any lack of standing on behalf of the real party in interest, i. e., Renta 4 Europe Este FIM.

32. I would at least have granted the three Claimants in question a period of time within which to cure the situation by prevailing on their respective management companies to enter the fray, based on my conclusion that a proper interpretation of Article 1(1)(b) should allow the management companies to act here in the interests of the funds.



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