What Can Arbitration and Human Rights as Mechanisms of Dispute Resolution Learn from Each Other in Order to Meet the Challenges of Climate Change?

Ana Stanič * *and Petra Butler* **

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According to the International Bar Association (IBA) Presidential Task Force on Climate Change Justice and Human Rights, "[g]lobal climate change is a defining challenge of our time".[1] It "poses an effective obstacle to the continued progress of human rights" further exacerbating the "existing inequities that afflict a world already riven with vast inequality, poverty and conflict".[2]

Courts are becoming the "new front line of climate change action".[3] In particular, there is a rise in tortious and other claims being brought by affected populations against

* English lawyer specializing in arbitration, EU and international law; founder of E&A Law; visiting lecturer at the Centre for Energy, Petroleum and Mineral Law and Policy in Dundee, the Technische Universität in Berlin, and the UIBE in Beijing; represents states and energy companies in commercial and investment treaty arbitrations, has appeared before the Court of Justice of the EU and filed a number of cases before the Court.

This is a longer version of a paper presented by the author at the ICCA 2018 Conference in Australia during the panel on Potential of Arbitration Involving New Types of Claims. The paper was prepared after extensive discussions with Petra Butler. Sect. VI of this paper was written by Petra Butler and represents her views on what arbitration can learn from human rights.

** Professor, Victoria University of Wellington; co-director, Centre for Small States; and Visiting Professor, Queen Mary University of London. The author of Sect. VI of this paper would like to thank Christoph Katerndahl for his valuable research assistance.

1. International Bar Association, "Achieving Justice and Human Rights in an Era of Climate Disruption, International Bar Association Climate Change Justice and Human Rights Task Force Report" (November 2012) available at <https://www.ibanet.org/PresidentialTaskForceCCJHR2014.aspx> (last accessed 12 June 2018).
2. *Ibid.*
3. Damian CARRINGTON, "Can climate litigation save the world?", available at <https://www.theguardian.com/environment/2018/mar/20/can-climate-litigation-save-the-world> (last accessed on 12 June 2018).

corporations in national courts including in respect of climate change.[4] At the same time, claims are increasingly being brought against states in national courts and international human rights courts, including for contributing to climate change.[5] For example, claims are being brought against states for breaches of Art. 8 of the European Convention on Human Rights (ECHR) including for failing to take steps to stop serious pollution from a waste treatment plant operated by a private company[6] and for granting a permit to operate a goldmine using the cyanidation process.[7] Specifically in *Guerra and Others v. Italy* the European Court of Human Rights (the Court) found "that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely", holding Italy in breach of its obligation under Art. 8 by failing to provide the affected individuals information on the serious pollution risk from a factory near them.[8]

At the same time private corporations are increasingly bringing claims against states for breaches of human rights, whether as part of investment treaty claims or as stand-alone claims in national courts and international human rights courts.

There is no doubt that the number of climate change, environmental and human rights cases being brought against states as well as private corporations will rise in the future. Given the nature and the complexity of these cases, the way in which national

4. Numerous cases are ongoing in national courts around the world. By way of example on 3 March 2015 four victims of the fire in a factory in Pakistan filed claims against the German retailer Kik in the court in Dortmund in Germany. Kik was the main buyer of goods produced in the factory. On 30 August 2016, the Dortmund court accepted jurisdiction and granted legal aid to the claimants to cover their costs. In February 2019 the same court dismissed the case on the basis that the claims were statute barred. At the time of the publication of this article, the claimants were planning to appeal the decision. For more information on the case see <https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/> (last accessed on 18 April 2019). *Saul v. RWE – Case of Huaraz* is the first case brought before courts in Europe against an energy company for its alleged contribution to climate change. Information on the case and the pleadings by the parties in the case are available at <https://germanwatch.org/en/huaraz> (last accessed on 12 June 2018). *Okpabi and others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2018] EWCA Civ 191 is an example of an unsuccessful attempt to sue two companies in the Shell group (domiciled in the United Kingdom and Nigeria respectively) in the UK Courts for alleged pollution in the Niger Delta in Nigeria. More information is available at <www.bailii.org/ew/cases/EWHC/TCC/2017/89.html> (last accessed on 12 June 2018).
5. One of many such cases around the world is the case brought by the Urgenda Foundation together with 900 Dutch citizens against the Dutch government for failing to set ambitious enough targets for cutting greenhouse emissions by 2020. On 4 June 2015, the District Court of The Hague ordered the Dutch government to cut the country's greenhouse gas emissions by at least 25 percent by the end of 2020. On 9 October 2018, The Hague Court of Appeal upheld the decision of the lower court, finding that the Netherlands had breached its duty of care by failing to pursue more ambitious targets. More information on the case is available at <www.urgenda.nl/en/themas/climate-case/> (last accessed on 18 April 2019).
6. *Lopez Ostra v. Spain* (Application no. 16798/90), (9 December 1994) available at <http://hudoc.echr.coe.int/eng?i=001-57905> (last accessed on 12 June 2018).
7. *Taşkın and Others v. Turkey* (116/1996/735/932), (30 March 2005) para. 104, available at <http://hudoc.echr.coe.int/eng?i=001-67401> (last accessed on 12 June 2018).
8. *Guerra and Others v. Italy* (Application no. 46117/99), (19 February 1988) para. 60, available at <http://hudoc.echr.coe.int/eng?i=001-58135> (last accessed on 12 June 2018).

courts, international human rights courts and arbitral tribunals resolve these disputes will thus need to change to ensure that there is no enforcement gap.

Through the prism of the *Yukos* cases this article examines the differences in approach adopted by the Court and the investment treaty arbitral tribunal (the Tribunal) set up under the Energy Charter Treaty[9] (ECT) to resolving, in essence, the same dispute, and thereby highlights what investment treaty arbitration and human rights litigation can learn from each other in order to meet the challenges of climate change and thereby ensure there is no enforcement gap.

By way of background Sect. I sets out the key facts giving rise to the dispute in the *Yukos* cases heard before the Court and the Tribunal. Sect. II examines the approach and reasoning adopted by the Tribunal established to resolve the dispute between the three controlling shareholders of Yukos and the Russian Federation (Russia) under the ECT. Sect. III in turn examines the approach and reasoning adopted by the Court in proceedings brought by Yukos against Russia for breaches of the ECHR. The key reasons for the difference in the approaches of the two bodies are presented in Sect. IV. Sect. V discusses the ways in which the enforcement of human rights can be bolstered by using the reasoning and powers adopted by arbitral tribunals in investment treaty arbitrations. As finally, Sect. VI sets out what investment treaty arbitration can learn from human rights law from the point of view of a human rights lawyer.

I. KEY FACTS GIVING RISE TO THE *YUKOS* CASES

OAO Yukos Oil Company (Yukos) was a Russian company engaged in the exploration, production, refining, marketing and distribution of crude oil, natural gas and petroleum products. In 2003 it had around 100,000 employees and a market capitalization of over US$ 33 billion which ranked it among the ten largest oil and gas companies in the world by market capitalization.[10]

The fact that Yukos had reallocated its trading operations to low-tax jurisdictions in order to maximize profits was at the heart of the dispute between Yukos and Russia. Although initially the Russian Tax Ministry had not objected to Yukos' "tax optimization structure", in December 2003 it ordered a tax re-audit for the year 2000. On 29 December 2003 the Tax Ministry demanded that Yukos pay approximately US$ 3.5 billion for tax owed for 2000.

Shortly thereafter, given the size of the tax liability and the alleged fear that Yukos would dissipate its assets the Russian Government proceeded to freeze shares Yukos held in its subsidiaries as well as its other assets.

In November 2004 the Tax Ministry had re-assessed Yukos' tax liabilities for the years 2000 to 2003 at US$ 14.36 billion.

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9. The text of the Energy Charter Treaty is available at <https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf> (last accessed on 12 June 2018).

10. *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227), Final Award (18 July 2014) para. 73, available at <https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf> (last accessed on 12 June 2018) (Award).

Given the size of the tax liabilities, Russia sold Yukos' core asset, Yuganskneftegaz (YNG), in December 2004. YNG was sold to Baikal Finance Group, a company incorporated only a few days before, and participating as the only bidder in, the auction for US$ 9.37 billion although Dresdner Bank had previously valued it at between US$ 15.7 billion and US$ 18.3 billion and JP Morgan at between US$ 16 billion and US$ 22 billion. A few days later Baikal Finance Group sold YNG to the Russian state-owned company, Rosneft. Thereafter, Yukos' remaining assets were nearly all acquired by Gazprom and Rosneft in subsequent bankruptcy auctions raising a total of US$ 31.5 billion. In November 2007, Yukos was liquidated and struck off the register of legal entities.

During the period from 2003 to 2006 criminal investigations were initiated by Russia against Yukos' management. The Tribunal had found that by 2006 "no fewer than 35 top managers and employees of Yukos had been interrogated, arrested or sentenced".[11] In particular, Mr. Khodorkovsky, the director and main shareholder of Yukos, was arrested at gunpoint in October 2003 and taken to Moscow where he was charged with economic crimes including fraud, tax evasion and embezzlement. He was in prison for over ten years until his much-publicized release in December 2013.

Russia denied that Yukos and its officers were targeted in a discriminatory way, contending that taxation measures had also been applied to other tax offenders and that the searches and seizures were taken as part of legitimate taxation measures and conducted in accordance with usual practice and the appropriate procedural protections available under Russian law.

II. THE DECISION OF THE TRIBUNAL

The three controlling shareholders of Yukos commenced investment treaty arbitrations against Russia under the ECT in 2005. Claiming damages of US$ 114 billion, Yukos' shareholders alleged that Russia had (i) failed to treat their investments in Yukos in a fair and equitable manner and on a non-discriminatory basis in breach of Art.10(1) of the ECT;[12] and (ii) expropriated their investments in breach of Art. 13(1) of the ECT.[13] The three arbitrations were consolidated into a single arbitration by the parties agreeing to appoint the same arbitrators to resolve them. The award on the merits was rendered on

11. *Id.*, para. 83.
12. Pursuant to Art. 10(1) Russia had undertaken to "encourage and create stable, equitable, favourable and transparent conditions for Investors ... to make Investments.... Such conditions shall include a commitment to accord at all times to Investments ... fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal...."
13. Under Art. 13 of the ECT Russia had undertaken that investments of investors would "not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'Expropriation') except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation".

18 July 2014,[14] over nine years after the original proceedings were commenced. The Tribunal's reasoning in respect of these claims as well as regarding damages is examined below.

1. *Breach of Art. 13 of the ECT*

When considering the claim of expropriation, the Tribunal acknowledged that the ECT expressly circumscribes the jurisdiction of the ECT in respect of tax in recognition of states' sovereign rights in international law concerning taxation and their reluctance to subject taxation measures to review by international arbitral tribunals. In particular, the Tribunal noted that it had to determine whether actions taken by the Russian tax authorities fell within the scope of the jurisdictional carve-out set out in Art. 21(1) concerning taxation and/or were "brought back within the Tribunal's jurisdiction by the claw-back of Article 21(5) of the ECT".[15] Thus, albeit not applying the doctrine of the margin of appreciation of the Court, the Tribunal acknowledged that the threshold for the reviewability of a state's actions in respect of tax under the ECT is high. In this regard the Tribunal noted that the investors had "no issue with the right of the Russian Federation to enact tax provisions or with the content of Russian tax law", but with "the manner in which Russian tax law was grossly distorted, misapplied and abused to effect the destruction of Yukos".[16]

The Tribunal held that the carve-out of Art. 21(1) "appl[ied] only to *bona fide* taxation actions, i.e., actions that are motivated by the purpose of raising general revenue for the State".[17] Having examined the facts, and in complete contrast to the conclusions reached by the Court (discussed in Sect. III below), the Tribunal concluded that "the tax assessments levied against Yukos by the Russian Federation, which the Tribunal has found were designed mainly to impose massive liabilities based on VAT and related fines, and were essentially aimed at paralyzing Yukos rather than collecting taxes, are not exempt from scrutiny under the ECT".[18] Furthermore, it found that the "subsequent steps in the enforcement of the tax assessments [were] not captured by the carve-out", because "they too were exigently pursued by means that indicate that Yukos was not just being chased to pay taxes, but was being driven into bankruptcy".[19] It therefore concluded that it had both direct and indirect jurisdiction over claims under Art. 13 of the ECT as the carve out of Art. 21(1) did not apply in the case and that, in any event, the claw-back of Art. 21(5) could be invoked.

In reaching the opposite conclusion to the Court regarding expropriation, the Tribunal noted that it was not bound by the findings of the Court as *ordre public* as per Art. 31(3)(c) of the Vienna Convention of the Law of the Treaties.[20] It then went on to find that the auction of YNG and the bankruptcy of Yukos amounted to an effective

14. Award, fn. 10, para. 63.
15. *Id.*, para. 1406.
16. *Id.*, para. 1381.
17. *Id.*, para. 1407.
18. *Id.*, para. 1444.
19. *Id.*, para. 1445.
20. The text of the Convention is available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> (last accessed on 12 June 2018).

expropriation of Yukos and thus a breach of Art. 13. It is clear from the tone of the award that the Tribunal was convinced that Russia's actions were politically and economically motivated, rather than aimed at legitimate tax enforcement.

2. *Breach of Art. 10 of the ECT*

One of the key reasons for the Tribunal's finding that Russia breached Art. 10 was the refusal of the Russian Tax Ministry and, subsequently, of its courts to reattribute to Yukos its trading companies' VAT refunds. The Tribunal noted that Russia had sought to convince it to adopt a broad interpretation to Russia's anti-tax abuse policy in order to reassign VAT obligations from the subsidiaries located in low-tax regions to Yukos, whilst at the same time seeking to rely on Yukos' error in filing VAT returns annually rather than monthly as a basis to prevent Yukos from claiming such refunds for itself.

In contrast with the Court, the Tribunal held that "it was arbitrary and contradictory for the authorities to re-attribute the trading companies' oil, revenues, profits, tax liabilities and activities to Yukos but to refuse to re-attribute to Yukos those companies' entitlement to VAT refunds".[21]

Interestingly, the Tribunal went out of its way to explain why its conclusions differed from those of the Court. Referring to the ECHR principle of proportionality, it noted that such principle requires a state "not to go further than is necessary to attain the objectives of ensuring the correct levying and collection of the tax and the prevention of tax evasion".[22] The Tribunal noted that the Court seemed to "have entirely missed the point being made, namely that if the tax authorities were going to attribute to Yukos the transactions carried out in the names of its trading companies, they should also have attributed to Yukos the submission of normal VAT documentation by the trading companies".[23] It criticized the Court for adopting an entirely formalistic approach when finding "that relevant rules made the procedure for VAT refunds sufficiently clear and accessible for the applicant company to [be] able to comply with it"[24] and that Yukos "failed to submit any proof that it had made a properly substantiated filing in accordance with the established procedure".[25]

In particular, the Tribunal strongly disagreed with the Court's conclusion that Yukos had not received "any adverse treatment in this respect",[26] finding that Yukos had received "some thirteen billion dollars-worth of adverse treatment by reason of the imposition on it of VAT liabilities earlier excluded by the undisputed export of the oil in question".[27]

As evidence corroborating its finding that Russia "would have done whatever was necessary to ensure that the VAT liability was imposed on Yukos" the Tribunal made reference to the second trial and conviction of Mikhail Khodorkovsky noting that after having been convicted of various tax-related crimes and sentenced for a term of nine

21. Award, fn. 10, para. 656.
22. *Id.*, para. 677.
23. *Id.*, para. 698.
24. *Id.*, para. 699.
25. *Ibid.*
26. *Ibid.*
27. *Id.*, para. 700.

years of imprisonment in May 2005 he was sentenced to an additional thirteen years and six months in prison essentially on the basis of the same circumstances surrounding Yukos that led to his original conviction for tax evasion.[28]

Turning next to the fines imposed by Russia for failing to pay liabilities, the Tribunal found these to be disproportionate and in breach of Russia's obligation under Art. 10. In this regard the Tribunal noted that the Court held that the retroactive application of Resolution 9–P violated the fundamental principle of legality and breached Art. 1 of Protocol No. 1 of the ECHR. The Tribunal concluded that the fines levied in relation to the 2000 tax year were therefore barred by the statute of limitations.[29]

The following facts persuaded the Tribunal to find that Russia had further breached its obligations under Art. 10. First, and unlike the Court, the Tribunal found that Yukos had made good faith attempts to settle its tax claim. Second, it noted that soon after Yukos was acquired by Rosneft, a significant portion of the tax assessments levied against YNG were set aside or vastly reduced by Russian courts. Third, and again unlike the Court, the Tribunal concluded that the price paid by Baikal at the auction for YNG was far below the fair value of those shares. Fourth, and contrary to the Court, the Tribunal was persuaded that the western banks "were actively 'encouraged' to enter into the confidential sale agreement in order to accomplish their objective of being paid".[30] The Tribunal held that although Yukos was to shoulder some of the blame for not paying the western banks and thereby increasing its exposure to the risk that it could be petitioned into bankruptcy, it appeared undeniable "that initiating bankruptcy was not the goal of the Western banks, but rather the objective of Rosneft, in the interests of its owner, the Russian Federation".[31] Finally, the Tribunal relied on the events surrounding the formal withdrawal by PricewaterhouseCoopers of all of its prior audit reports for Yukos as evidence "that Yukos was the object of a series of politically-motivated attacks by the Russian authorities that eventually led to its destruction".[32]

In view of the above, the Tribunal concluded that Russia had breached the shareholders' right to fair and equitable treatment "by failing to meet basic requirements of procedural propriety and due process, engaging in conduct that was unreasonable, arbitrary, disproportionate and abusive, and failing to ensure a stable and transparent legal and business framework".[33] Furthermore, it held that the removal of judges refusing to rule in Russia's favour and the lack of independence and impartiality of judges hearing Yukos' cases constituted a denial of justice in breach of the fair and equitable treatment standard of Art. 10(1). Finally, it held that Russian authorities had discriminated against the shareholders' investments by (i) singling out Yukos and treating it in a markedly different manner from other similar oil companies in Russia, (ii) treating YNG differently before and after its acquisition by Rosneft, and (iii) ensuring a differential treatment in the bankruptcy proceedings between creditors related to Yukos, on the one hand, and state-related creditors, on the other hand.

28. *Ibid.*
29. The Court reached the same decision.
30. Award, fn. 10, para. 1148.
31. *Ibid.*
32. *Id.*, para. 1253.
33. *Id.*, para. 108.

3. *Damages*[34]

In assessing damages suffered by the shareholders as a result of Russia's breaches of the ECT the Tribunal observed that there was an agreement between the parties that "in the event of an expropriation through a series of actions, the date of the expropriation is the date on which the incriminated actions first lead to a deprivation of the investor's property that crossed the threshold and became tantamount to an expropriation".[35]

The Tribunal then found that "a substantial and irreversible deprivation of Claimants' assets occurred on 19 December 2004, the date of the YNG auction"[36] since YNG was its main production asset.

Turning to the methodology for assessing damages the Tribunal noted that as the case before it was one of unlawful expropriation (the requirements set out in paras. (a) to (d) of Art. 13(1) not having been complied with by Russia) the shareholders were "entitled to select either the date of expropriation or the date of the award as the date of valuation".[37] In this regard the Tribunal made reference to Art. 36 of the International Law Commission's (ILC) Draft Articles on State Responsibility and noted that in case of an illegal expropriation investors "must enjoy the benefits of unanticipated events that increase the value of an expropriated asset up to the date of the decision, because they have a right to compensation in lieu of their right to restitution of the expropriated asset as of that date".[38]

In determining Yukos' value as of 21 November 2007 the Tribunal opted for the comparable companies method and then used the RTS Oil and Gas Index to calculate Yukos' value as at the date of the award, being 30 July 2014.

Loss of dividends which would have been paid to the shareholder but for the expropriation was considered by the Tribunal as the second element of the damages suffered by them as a result of expropriation of their investment. In the case of the value of Yukos, the Tribunal determined the value of the lost dividends on the date of the expropriation and the date of the award. The Tribunal concluded that "Yukos' dividends in 2004 would have been USD 2.5 billion, and the sum of Yukos' dividends over the period from 2004 through the first half of 2014 would have been USD 45 billion".[39]

It accordingly concluded that the damages suffered by shareholders (including interest) due to Russia's breach of Art. 13 of the ECT, based on a valuation date of 30 June 2014, amounted to US$ 66.694 billion.[40]

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34. For a good analysis of the Tribunal's reasoning concerning damages see Irmgard MARBOE, *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (Case Comment), 30 ICSID Review – Foreign Investment Law Journal (2015, no. 2) p. 326.
35. Award, fn 10, para. 1761.
36. *Id.*, para. 1762.
37. *Id.*, para. 1763.
38. The text of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts is available at <https://casebook.icrc.org/case-study/international-law-commission-articles-state-responsibility> (last accessed on 12 June 2018).
39. Award, fn. 10, para. 1812.
40. *Id.*, para. 1825.

Since the Tribunal had determined that the shareholders had contributed 25 percent to the prejudice they suffered at the hands of Russia, the total amount of damages awarded was reduced by 25 percent to US$ 50,020,867,798.

III. THE DECISION OF THE COURT

Yukos lodged a case against Russia for breaches of inter alia its rights under Arts. 6 and 18 of the ECHR and Art. 1 of Protocol No. 1 to the Convention on 23 April 2004. A one-day hearing was held on 4 March 2010.[41] The Court rendered its decision on the merits on 20 September 2011, just under three years before the Tribunal rendered its decision in respect of the ECT.

1. *Exclusion of Jurisdiction*

Before turning to the merits of the case, the Court had to determine whether it had jurisdiction to hear the case as arbitral proceedings discussed in Sect. II were underway. In particular, the Court had to determine whether its jurisdiction was excluded pursuant to Art. 35(2) of the ECHR.

Art. 35(2) provides that the Court cannot consider a matter which is "substantially the same" as one already being submitted to another procedure of international investigation or settlement.[42] Accordingly, the Court had to determine whether the case brought under the ECT was substantially the same as the matter put before it.

In reaching its decision on this point the Court adopted the triple identity test approach regularly adopted by arbitral tribunals in investment treaty cases in respect of "fork in the road" provisions.[43] Applying this test the Court found that although the proceedings before it and the Tribunal refer "to the same events"[44] the parties before them are different and that therefore the two matters were not "substantially the same".[45]

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41. *OAO Neftyanaya Kompaniya Yukos* v. *Russia,* (Application No. 14902/04), (8 March 2012) available at <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-106308%22]}> (last accessed on 12 June 2018) (Decision).
42. The text of the ECHR is available at <https://www.echr.coe.int/Documents/Convention_ENG.pdf> (last accessed on 12 June 2018).
43. *Vivendi v. Argentina* (ICSID Case No. ARB/97/3), Award (21 November 2000) para. 53-5, available at <https://www.italaw.com/sites/default/files/case-documents/ita0206.pdf> (last accessed on 12 June 2018), *Azurix v. Argentina* (ICSID Case No. ARB/01/12), Decision on Jurisdiction (8 December 2003) paras. 37-41, 86-92, available at <https://www.italaw.com/sites/default/files/case-documents/ita0060.pdf> (last accessed on 12 June 2018). For further cases see fn. 166 in Rudolf DOLZER and Christopher SCHREUER, *Principles of International Investment Law,* 5th edn. (OUP 2012) p. 267.
44. Decision, fn. 41, para. 524.
45. *Ibid.*, para. 526.

2. *Breach of Art. 6*

Turning to the first substantive claim made by Yukos against Russia the Court examined the facts in the case through the prism of the obligations imposed on Russia under Art. 6 of the ECHR.[46] The Court found that Yukos had not been given enough time during the trial court or the appeal phase to study "the entirety of these documents and, more generally, to prepare for the hearings on the merits of the case on reasonable terms".[47] It also held that the "appeal court failed to acknowledge, let alone to remedy the shortcomings committed by the first-instance court as regards the applicant company's restricted access to the case file".[48] It therefore found Russia in breach of its obligation to accord Yukos a fair trial pursuant to Art. 6(1), taken in conjunction with Art. 6(3)(b).

3. *Breach of Art. 1 of Protocol No.1*

Turning next to Russia's obligations under Art. 1 of Protocol No. 1, taken alone and in conjunction with Arts. 1, 7, 13, 14 and 18 of the ECHR, the Court noted that Yukos alleged that the "imposition and enforcement of the 2000-2003 Tax Assessments"[49] as well as the auction of YNG "were unlawful, arbitrary and disproportionate".[50]

Pursuant to Art. 1 of Protocol No. 1

> "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[51]

Accordingly, the Court had to determine whether the actions taken by Russia as related to the tax re-assessment, the auctioning of YNG and the bankruptcy of Yukos amounted to interferences with its property rights and met the requirement of lawfulness, pursued a legitimate aim, were proportionate to the aim pursued and were not discriminatory within the meaning of Art. 14 of the Convention, taken in conjunction with Art. 1 of Protocol No. 1.

Contrary to the Tribunal, the Court started its analysis by finding that Yukos' decision to structure its operations in low-tax jurisdictions was a sham. The Court described its

46. Art. 6(1) provides that "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Art. 6(3) guarantees that "[e]veryone charged with a criminal offence has the following minimum rights: … (b) to have adequate time and facilities for the preparation of his defence;…". ECHR, fn. 43.
47. Decision, fn. 41, para. 540.
48. *Id.*, para. 545.
49. *Id.*, para. 552.
50. *Ibid.*
51. *Id.*, para. 553.

role in quite a different manner to how the Tribunal saw its own. It noted that "[a]s regards the compliance with the domestic law, the Court has limited power ... since it is a matter which primarily lies within the competence of the domestic courts ... and that [a]s regards the quality of the law, the Court's task (was) to verify whether the applicable provisions of domestic law were sufficiently accessible, precise and foreseeable...".[52] Importantly, it noted that in respect of tax it had to afford Russia "an exceptionally wide margin of appreciation"[53] in the exercise of its fiscal functions under the lawfulness test given that the third sentence in Art. 1 of Protocol No. 1 expressly reserved the right of "[c]ontracting States to pass 'such laws as they may deem necessary to secure the payment of taxes'".[54]

Turning to the facts in question the Court held that "notwithstanding the [s]tate's margin of appreciation in this sphere", the Court found "that there has been a violation of Article 1 of Protocol No. 1 on account of the change in interpretation of the rules on the statutory time-bar resulting from the Constitutional Court's decision of 14 July 2005 and the effect of this decision on the outcome of the Tax Assessment 2000 proceedings".[55] It then went further to note that Yukos' "conviction under Article 122 of the Tax Code in the 2000 Tax Assessment proceedings laid the basis for finding the applicant company liable for a repeated offence with a 100% increase in the amount of the penalties due in the 2001 Tax Assessment proceedings", and thus found "that the 2001 Tax Assessment in the part ordering [Yukos] to pay the double fines was not in accordance with the law, as required by Article 1 of Protocol No. 1".[56]

Turning to the tax authorities' refusal to allow Yukos to claim a refund for the VAT reattributed to it, the Court simply found that Yukos "failed to submit any proof that it had made a properly substantiated filing in accordance with the established procedure".[57] As noted in the preceding Section, the Tribunal had found that the refusal of the tax authorities to allow Yukos to claim the refund resulted in a VAT obligation of US$ 13 billion. Therefore, the Court's conclusion that Yukos "did not receive any adverse treatment in this respect"[58] is perplexing.

Turning next to examine the actions of the Russian authorities to enforce the debt resulting from the tax assessments for the years 2000-2003, the Court noted that these involved the seizure of Yukos' assets, the imposition of a 7 percent enforcement fee on the overall amount of the debt and the forced sale of YNG. The Court, in stark contrast to the Tribunal, saw these actions as having the "common and ultimate goal ... to force the company to meet its tax liabilities".[59] It noted that it had "no reason to doubt that throughout the proceedings the actions of various authorities had a lawful basis and that the legal provisions in question were sufficiently precise and clear to meet the Convention standards concerning the quality of law".[60]

52. *Id.*, para. 559.
53. *Id.*, para. 566.
54. *Ibid.*
55. *Ibid.*
56. *Ibid.*
57. *Id.*, para. 602.
58. *Ibid.*
59. *Id.*, para. 646.
60. *Id.*, para. 647.

Although the Court found that the choice of auctioning YNG "as the first item"[61] to be auctioned in satisfaction of Yukos' liability was capable of dealing a fatal blow to its ability to survive the tax claims and to continue its existence, it nevertheless found that "in principle" the choice of auctioning YNG was not "entirely unreasonable".[62] The Court therefore found that the auctioning of YNG was disproportionate to the objectives of enforcing tax obligations but not arbitrary.

Turning to the 7 percent enforcement fee the Court found that "in the circumstances of the case the resulting sum was completely out of proportion to the amount of the enforcement expenses which could have possibly been expected to be borne or had actually been borne by the bailiffs".[63] It, therefore, held that "domestic authorities failed to strike a fair balance between the legitimate aims sought and the measures employed".[64] Without any detailed reasoning the Court held that an enforcement fee of 4 percent rather than 7 percent would have been proportionate.

4. *Breach of Art. 18 of the ECHR*

Turning next to Art. 18, the Court refused to find that the overall effect of the actions taken by Russia was "to destroy the company and to take control of its assets".[65] Accordingly, and unlike the Tribunal, the Court held that Yukos had not been able "to furnish the Court with an incontrovertible and direct proof in support of his or her allegations"[66] that the restrictions applied in respect of its rights under Art. 1 of Protocol No. 1 were in fact being applied for a purpose other than the one for which it was prescribed.[67]

The Court noted that it was Yukos which had to substantiate its allegations that the actions taken against it were politically motivated. It found that although it was "true that the case attracted massive public attention and that comments of different sorts were made by various bodies and individuals in this connection ... [t]he fact remained ... that those statements were made within their respective context and that as such they are of little evidentiary value for the purposes of Article 18".[68] The Court thus concluded that "there has been no violation of Article 18 of the Convention, taken in conjunction with Article 1 of Protocol No. 1, on account of the alleged disguised expropriation of the company's property and the alleged intentional destruction of the company itself".[69]

61. *Id.*, para. 633.
62. *Id.*, para. 654.
63. *Id.*, para. 655.
64. *Id.*, para. 657.
65. *Id.*, para. 623.
66. *Id.*, para. 663.
67. Art. 18 of the ECHR provides that "[t]he restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed". Fn. 42, p. 14.
68. Award, fn. 10, *id.*, para. 665.
69. *Id.*, para. 666.

5. *Assessment of Damages*

The Court turned to the question of the assessment of damages in its decision dated 15 December 2014.[70] Invoking the powers granted to it under Art. 41 of the ECHR the Court noted that it could not "speculate as to what the outcome of court proceedings might have been had the violation of the Convention not occurred"[71] and that there was "insufficient proof of a causal link between the violation found and the pecuniary damage allegedly sustained by the applicant company".[72] It therefore found that in respect of the breaches of Art. 6 there was "no ground for an award [of damages]".[73]

Turning to the assessment of damages in respect of the breaches of Art. 1 of Protocol No. 1 the Court found that the amount Yukos should be compensated on account of the retroactive imposition of the penalties, the payment of the enforcement fee and the conduct of enforcement proceedings was € 1,866,104,634. Although it had found that the auctioning of YNG was a disproportionate act, it did not award any damages in respect thereof.

IV. KEY REASONS FOR THE DIFFERENCES IN THE TWO DECISIONS

As Sects. II and III reveal the Tribunal and the Court reached starkly different decisions, with the Tribunal awarding damages in excess of US$ 50 billion and the Court awarding damages of € 1.86 billion. Given that the same facts are the basis for both decisions, the question is: What is the reason for this?

At first glance it may seem that the key reason for this difference is the different legal basis for reviewing Russia's actions vis-à-vis Yukos as between the Tribunal and the Court. However, it is clear from a careful review of the decisions that the key reason for the difference is their different findings of facts in the cases.

Whereas the Tribunal looked at the totality of the actions directed at Yukos, the Court did the opposite, dissecting the actions in turn. In fact, some of the most striking actions taken by the Russian authorities against Yukos, such as the commencement of the bankruptcy proceedings and its ultimate winding up, were only reviewed by the Court in a cursory manner.

Moreover, it is evident that the Tribunal perceived Russia's actions in a completely different light than the Court. By way of example, whereas the Tribunal found the fact that within forty-eight hours of issuing their payment demands for the year 2000 the tax authorities required Yukos to pay in full US$ 3.48 billion in alleged tax arrears, interest and fines and prohibited Yukos from selling or encumbering the company's shareholdings in its Russian subsidiaries as arbitrary and unfair, the Court found "no indication of arbitrariness or unfairness … in this connection".[74]

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70. *OAO Neftyanaya Kompaniya Yukos v. Russia,* (Application No. 14902/04) (15 December 2014) available at <http://hudoc.echr.coe.int/eng?i=001-145730> (last accessed on 12 June 2018) (Damages Decision).
71. *Id.*, para. 18.
72. *Id.*, para. 19.
73. *Ibid.*
74. Decision, fn. 41, para. 535.

Moreover, whereas the Tribunal considered the imprisonment of Mr. Khodorkovsky and other members of the management of Yukos as facts corroborating its findings, the Court dismissed their relevance, insisting that the burden of proof was on Yukos to establish the political motivation behind the actions taken by the Russian authorities.

The approach taken by the Court is surprising and disappointing. Given the nature of allegations concerning breaches of human rights, one would have expected the Court to adopt a broad approach to the review of the relevant facts rather than a narrow one. Adopting a highly technical and formalistic approach to reviewing the facts in cases of breaches of human rights runs the risk of failing to identify the heart of the breach. Governments are increasingly sophisticated in the manner in which they breach human rights of their citizens and deal with their political opponents. Consequently, the Court and other international institutional mechanisms for holding states to account must rise to that challenge.

As noted in Sect. II, the Tribunal accused the Court of being overly formalistic in its reasoning. From reading the Court's decision one does not get at all a sense of the gravity of the actions taken nor even the sheer amount of the tax liabilities, which exceeded US$ 31 billion, imposed on Yukos. Even the tone of the decisions is completely different, with the Court taking a more deferential view.

One possible way of explaining the different understanding of the facts could be the difference in the nature of the proceedings themselves. Whereas the hearing lasted only one day in the Court, the hearing on the merits in the arbitration took a month and was preceded by a hearing on jurisdiction of ten days. Moreover, the hearing before the Tribunal was preceded by several rounds of exchanges of written submissions and expert evidence and extensive document production. The Court did not have the benefit of detailed legal submissions nor the ability to cross-examine experts or witnesses.

The second key reason for the difference between the decisions is likely to stem from the presumption of bona fides on the part of a State to which the Court referred in its judgment. In fact the entire judgment is replete with statements of deference to Russia. No such presumption or deference exists under international investment law or general public international law.

The effect the operation of this presumption has on the outcome of a case can be seen from the different way in which the Court and the Tribunal approached the determination of the existence and significance of various so-called "anti-abuse" doctrines under Russian law. Unlike the Court, the Tribunal held that "at the time of the tax assessments against Yukos, the 'business purpose' doctrine ... had not yet been explicitly adopted into Russian law".[75] This important difference between the findings of the Tribunal and the Court is particularly stark since the Tribunal acknowledged that it had chosen not to accept in full the evidence put forward by Russia's expert concerning the anti-abuse doctrine even though the shareholders had not put forward any testimony challenging his evidence and chose not to cross-examine him on the existence of the doctrine. The readiness of the Tribunal to find against Russia has been criticized by human rights lawyers used to the Court taking a much more deferential view of a state's actions.

75. *Id.*, para. 663.

The third reason for the difference between the two decisions stems from their different approaches to the assessment of damages and causation further discussed in Sect. V below.

V. WHAT CAN HUMAN RIGHTS LEARN FROM ARBITRATION TO MEET THE CHALLENGES OF CLIMATE CHANGE LITIGATION?

Now that the key reasons for the difference between the two decisions have been identified, this Section discusses the four key ways in which the system of protecting human rights ought to be enhanced to meet the challenges of climate change litigation by adopting the rules of procedure used in commercial and investment treaty arbitration and by granting powers regularly exercised by arbitral tribunals to the Court and other international human rights institutions.

First, the procedural rules of the Court ought to change to allow for several rounds of pleadings, exchanges of expert reports, and the cross-examination of experts and witnesses. As noted in Sect. IV, whereas the hearing on the merits before the arbitral tribunal lasted fourteen days the hearing on the merits of the *Yukos* claim in the Court was only one day.[76] This is simply inadequate to deal with the complexity of climate change and environmental cases going forward.

Moreover, the idea that such a complex case as *Yukos*, where there was a considerable difference between the parties' pleadings on Russian law, could be determined by the Court without probing the experts or witnesses is at odds with how such matters are resolved in arbitration and, for that matter, in national courts. As discussed at the beginning of this article, in the future many more claims for breach of proprietary rights are likely to be brought before the Court and other human rights institutions whether relating to climate change or otherwise. These claims will be factually and legally much more complex than the types of claims heard to date by these institutions and will likely be largely based on expert evidence. The rules of procedure concerning pleadings and hearings, as well as the format of the application form, will need to be changed to allow the Court to fulfil its function as the protector of human rights.

Second, the presumption of the bona fide nature of state actions applied by the Court when analyzing actions of States must be abolished. The Court underlined the importance of this presumption in the Khodorkovsky case when it noted that the "whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith".[77] The Court does not provide any authorities for the existence of this assumption in international or national laws. It is often claimed that such a presumption is the corollary of a state's obligation under customary international law to act in good faith.[78] But how can a state's international law obligation to act in

76. In fact typically cases before the ECHR are decided on documents only.

77. *Khodorkovskiy v. Russia* (Application no. 5829/04), Judgement (28 November 2011), available at <http://hudoc.echr.coe.int/eng?i=001-104983> (last accessed on 12 June 2018).

78. William BURKE-WHITE and Andreas VON STADEN, "The Need for Public Law Standards of Review in Investor-State Arbitrations" in Stephan W. SCHILL, ed., *International Investment Law and Comparative Public Law* (OUP 2010) p. 705.

good faith be turned into a presumption that it does in fact act in good faith? This simply cannot be correct.

Moreover, how can such a "general assumption" be defended in the twenty-first century especially within a body of law concerned with ensuring the defence of human rights and by a court whose purpose is to act as the objective enforcer of human rights? The operation of this presumption together with the requirement of exhaustion of local remedies and the doctrine of the margin of appreciation unjustifiably limit the ability to hold states to account in respect of human rights, and in a way that the reviewability of acts *iure gestionis* is not limited in national courts.

Third, the Court must start using its power to grant interim measures under Art. 39 of the ECHR more robustly. The power to grant injunctions is a powerful tool at the disposition of tribunals in international commercial and investment treaty arbitrations. The readiness of tribunals and national courts to use this power is key to an efficient and effective legal system as it provides a mechanism to address the situation where irreparable damage would otherwise be caused to a claimant. The ability to obtain freezing of assets orders and other interim measures significantly reduces the likelihood of breaches and, as such, the mere threat of the power being used acts as an important deterrent.

Although the test for granting an injunction adopted by international arbitral tribunals is substantially the same as that under Art. 39 of the ECHR, the Court has interpreted its power extremely narrowly. The Court has to date held that torture, house eviction and extradition are the only instances of "an imminent risk of irreparable harm".[79]

Such a narrow interpretation of the Court's power under Art. 39 further and seriously undermines the effectiveness of the international human rights legal system, especially when combined with the requirement of exhaustion of local remedies. The fact that multinational companies are able to obtain interim measures in respect of proprietary claims whereas individuals are not able to get them in respect of breaches of human rights is difficult to justify in modern democracies. This difference in standards of protection is putting the credibility of the entire system of enforcement of human rights at stake.

Fourth, there is a wide consensus amongst human rights lawyers that awards of damages granted by the Court are "relatively low compared to damages awarded by domestic courts of some Council of Europe states".[80] Compared to awards in arbitration they are very low. The difference in the amount of damages awarded by the Court in the *Yukos* case when compared to that of the Tribunal is revealing. The key reason for this difference is the "prevailing view that the primary remedy in Strasbourg is the finding of a violation of the Convention itself".[81] The support for this narrow interpretation of the Court's powers cannot be found in the actual wording of the ECHR.[82] There is nothing

79. ECHR, Interim measures (1 February 2018), available at <https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf> (last accessed on 12 June 2018).
80. Philip LEACH, *Taking a Case to the European Court of Human Rights*, 3rd edn. (OUP 2011) p. 600.
81. *Ibid.*
82. Art. 41 of the ECHR provides that "[i]f the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party". Fn. 48.

in the wording of Art. 41 to support the argument that the finding of breach should double up as a remedy.

As Judge Bonello said in *Aquilina v. Malta* it is "wholly inadequate and unacceptable that a court of justice should 'satisfy' the victim of a breach of fundamental rights with a mere handout of legal idiom".[83]

The Court has a lot to learn from investment treaty tribunals as well as from commercial arbitral tribunals and national courts with regard to the assessment of damages and causality. In cases of breaches of political rights under Art. 6 the Court regularly refuses to grant damages on the grounds that there is no clear link between the damages claimed and the alleged violation.[84] Many ECHR judges have expressed their dismay at the continued reluctance of the Court to even ensure that redress for fundamental rights at the international level is at least the same as that granted in national courts. For example, Judge Casadevall and Judge Kovler noted in *Kingsley v. UK*[85] that the Court could have made an award of damages by reference to loss of opportunities or damage to reputation.

How stark the gap is in the approach taken by the Court and arbitral tribunals is revealed by looking at the *Yukos* case. Whereas the Court refused to award damages in respect of the breach of an Art. 6 right, the Tribunal had no difficulty in respect of the same facts granting damages for the breach of fair and equitable treatment applying the "but for" test.

That the principle which the Court should apply when assessing pecuniary damages is the same as that taken by an investment treaty or commercial arbitral tribunal is clear from the ECHR's Practice Directions on Just Satisfaction of Claims. It provides that "the applicant should be place[d] as far as possible in the position in which he or she would have been had the violation found not taken place, in other words *restitutio in integrum*".[86]

The same basis for the assessment was adopted by the Tribunal. However, unlike the Court the Tribunal noted that since restitution can only take place at the time of the award, the value of an asset at the time of the award was decisive. It therefore held that shareholders (i) should enjoy the benefits of unanticipated events that increase the value of the expropriated assets up to the date of the decision, and (ii) should not bear risks of unanticipated events which diminish the value of the assets. By granting the shareholders the right to choose between the date of expropriation and date of the award as the date of assessment of damages, the shareholders were able to receive over US$ 44 billion more in damages.

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83. *Aquilina v. Malta* (Application no. 25642/94), (29 April 1999) p. 20, available at <http://hudoc.echr.coe.int/eng?i=001-58239> (last accessed on 12 June 2018).
84. ECHR, *Practice Direction: Just Satisfaction Claims* (September 2016) at paras. 7 and 8, available at <https://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf> (last accessed 12 June 2018).
85. *Kingsley v. United Kingdom* (Application no. 35605/97), (28 May 2002) available at <http://hudoc.echr.coe.int/eng?i=001-60487> (last accessed on 12 June 2018).
86. ECHR, fn. 84, para. 10. For a discussion on how the approach taken by the Court in assessing damages in case of expropriation differs from that adopted in public international law see Héléne RUIZ FABRI, "The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for 'Regulatory Expropriations' of the Property of Foreign Investors", 11 N.Y.U. Envtl L.J. (2002-2003) p. 148.

VI. WHAT CAN INTERNATIONAL ARBITRATION LEARN FROM HUMAN RIGHTS – A HUMAN RIGHTS LAWYER'S POINT OF VIEW[87]

The task of the state to protect and to foster its citizens' rights inevitably results in conflict: between the rights of the individual – natural or legal – on the one hand, and the right of the community represented by the state on the other.[88] Decision-makers tasked with resolving investment disputes have to take account of that conflict and must develop a framework that aids the reconciliation of the actors' competing rights and duties. The Court has been a pioneer in the creation of a framework balancing the right of the individual and the right of the state as a place-holder for the community of citizens it represents.

An analysis of the Court's judgment in *Yukos* and the *Yukos* Tribunal's final award reveals substantive similarities in the reasoning of the two bodies. Both the Court and the Tribunal put an emphasis on the Russian authorities' "excessive harshness"[89] and their "unyielding" inflexibility as to the pace of the proceedings.[90] Both considered the rights-infringements on the part of Russia to be so severe that they granted the Claimant a record amount of compensation. In that respect, the *Yukos* case confirms that a human rights analysis does not significantly differ in its outcome from the analyses of tribunals under an investment treaty.

Similarities notwithstanding, the decisions are far from identical. The Tribunal refused to examine the procedural improprieties of the case under "fair and equitable treatment" standard, whereas the Court conducted an in-depth analysis of a violation of the Claimant's right to a "fair trial". And the two bodies advanced diametrically opposed views on the Claimant's "political motivation" charge. Since investment tribunals and human rights courts do not operate in "parallel universes" it should be the aim of either regime to learn from the other and to adopt, albeit modified, proven paradigms to avoid divergence regarding fundamental legal principles. The following briefly outlines four principles arising out of the Court's judgment which in the author's view should be adopted by investment arbitral tribunals to aid the reconciliation of the actors' competing rights and duties.

87. This Section was written by Petra Butler and represents her views on what arbitration can learn from human rights.

88. *Soering v The United Kingdom*, Application No. 14038/88 (7 July 1989) p. 89; Rolv RYSSDAL, "Opinion: The Coming Age of the European Convention on Human Rights", 1 EHRLR (1996) p. 18, p. 26. This is a very simplistic statement – being the core/starting point-issues arise in all shades of grey. For the purpose of the argument advanced in this addendum the core statement is sufficient.

89. Award, fn. 10.

90. Decision, fn. 41, para. 1583.

1. *Balancing of Conflicting Rights' Positions*

Human rights methodology provides for a balancing of conflicting rights' positions.[91]

The *Yukos* case illustrates the importance of this balancing. While the Tribunal did not accept that Russia's measures had pursued the legitimate aim of collecting taxes,[92] the Court considered that the Russian authorities' actions "pursued a legitimate aim of securing the payment of taxes", and that the 2000-2003 assessments were proportionate measure in pursuit of that aim.[93] The Court went further – adopting the domestic authorities' assessment that the Claimant's trading companies were "sham entities"[94] and accepting the "fact"[95] that the Claimant had been found guilty of running a tax evasion scheme.

All this testifies to the Court's opinion that Russia had not acted arbitrarily. However, the Court's determination that measures pursued the legitimate aim of collecting taxes was not determinative. Instead, the Court proceeded through a wider proportionality analysis, in which it considered whether the measures were suitable, necessary and proportional in view of the legitimate aim. Ultimately, the court determined that the measures were not.

It is this proportionality analysis to which tribunals should pay particular note. The analysis formed the focal point of the Court's reasoning whether Russia's actions were justified.[96] According to well-established Court jurisprudence, the proportionality analysis has four limbs: (1) the measure in question is prescribed by law; (2) the measure has a legitimate aim; (3) the measure is necessary to achieve that aim;[97] and (4) there is a reasonable relationship of proportionality between the measure and the aim sought to be realized.[98] A fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[99]

A full account of the Court's analysis is beyond the scope of this addendum,[100] but the important point to note for the instant purpose is that the Court acknowledged Russia's

91. Petra BUTLER, "Red Riding Hood – Is Investor-State Arbitration the Big Bad Wolf?", 5 Penn. St. J.L. & Int'l Aff. (2017) p. 328, p. 362.
92. Holding that the respondent was "not engaged in a true, good faith tax collection exercise" (*Yukos* Award, fn. 2, p. 985), and was "not driven by motives of tax collection", p. 1037.
93. Decision, fn. 41, para. 606.
94. *Id.*, para. 592.
95. *Id.*, para. 649.
96. See Christoph GRABENWARTER and Katharina PABEL, *Europäische Menschenrechtskonvention: Ein Studienbuch*, 6th ed. (C. H. Beck, München 2016) Sect. 18 paras. 14 et seq.
97. Monica CARSS-FRISK, "A Guide to the Implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights", Human Rights Handbook No. 4 (Council of Europe, Strasbourg 2003) p. 109 et seq.
98. *James v. the United Kingdom*, A98 (1986) p. 50; and *Lithgow v. the United Kingdom*, A102 (1986) p. 120
99. *Sporrong and Lönnroth v. Sweden*, A52 (1982) p. 69 and 73; *Tre Traktörer Aktiebolag v. Sweden*, A159 (1989) p. 59; *Hentrich v. France*, A296-A (1994) p. 45-49; *Holy Monasteries v. Greece*, A301-A (1994) p. 70.
100. Decision, fn. 41, paras. 606 et seq.

legitimate aim to pursue the collection of taxes[101] (relying on Art. 1(2) of Protocol No. 1 to the ECHR)[102] and the wide margin of appreciation Russia enjoyed in the tax sphere in order to implement its policies. However, when ascertaining whether Russia struck a fair balance between the legitimate interest in enforcing the tax debt in question and the protection of the Claimant's rights set forth in Art. 1 of Protocol No. 1[103] it found that Russian authorities did not employ the least infringing measures to pursue their aim.[104] The Court stressed that the crux of the case did not lie in the attachment of the Claimant's assets and cash per se, but rather in: (1) the speed with which the authorities demanded the company make payment, (2) the decision that that Claimant's main production unit would be the first asset to be compulsorily auctioned, and (3) the speed with which the auction had been carried out.[105] Thus, Russia had violated the Claimant's right to property under Art. 1 of Protocol No. 1 by instituting the enforcement proceedings against the Claimant.[106]

2. *Reliance on Well-Established Legal Standards*

Investment treaty arbitration proceedings generally evolve around standards that are "re-phrased" human rights standards, such as "fair and equitable treatment", denial of justice, or expropriation. In the Award the parties argued about the standard for expropriation laid out in Art. 13(1) ECT, and the level of protection guaranteed by the "fair and equitable" treatment standard in Art. 10(1) ECT (minimum standard or higher level of protection?).

The Court's jurisprudence, as well as the jurisprudence of other human rights tribunals, provides arbitral tribunals with an important extra resource to interpret those standards. As Harris et al. note, the ECHR is the "most advanced instrument of this kind. It has generated the most sophisticated and detailed jurisprudence in international human rights law."[107]

Having regard to Court jurisprudence would have added to the robustness of the Tribunal's reasoning.[108]

101. *Id.*, para. 606.
102. David HARRIS et al., *Law of the European Convention on Human Rights*, 2nd ed. (OUP 2009) p. 668. Compare also Clare OVEY and Robin WHITE, *The European Convention on Human Rights*, 4th ed. (OUP 2006) p. 370, p. 373; Nußberger observes that only rarely will an interference with the right to property be unlawful due to an illegitimate aim, as states enjoy a very wide margin of appreciation in this respect: Angelika NUßBERGER, "*Enteignung und Entschädigung nach der EMRK*" in Otto DEPENHEUER and Foroud SHIRVANI, ed., *Die Enteignung: Historische, vergleichende, dogmatische und politische Perspektiven auf ein Rechtsinstitut* (Springer, Berlin 2018) p. 89 p. 102.
103. Decision, fn. 41, paras. 646, 648.
104. *Id.*, para. 653.
105. Decision, fn. 41, para. 650.
106. *Id.*, para. 658.
107. David HARRIS et al., fn. 102, p. 30.
108. E.g., the Court has continuously stressed that under Art. 6 ECHR it is only concerned with the question whether the proceedings as a whole have been fair: see *Gäfgen v. Germany*, Judgment, ECtHR App. No. 22978/05, paras. 162-188 (1 June 2010); Decision, fn. 41, para. 534; see also

3. *Implementation of Judicial Self-Restraint*

Tribunals should include a human rights analysis in their decision-making process. In the author's view, the inclusion of such a process will lead to judicial self-restraint.

The "margin of appreciation" doctrine plays a crucial role in this respect. The baseline of the doctrine was first explained by the Court in *Handyside v. the United Kingdom*, which noted that state authorities are in a better position than an international judge to take a view on the content of moral requirements and on the "'necessity' of a 'restriction' or 'penalty' intended to meet them".[109] This discretion is encapsulated in the "fourth instance" doctrine, which states that the Court does not constitute a further court of appeal from the decisions of national courts applying domestic law.[110]

The implementation of the margin of appreciation meant that the Court was not called upon to scrutinize the legality of the Russian tax authorities' measures under domestic law. It was "sufficient" for the Court to satisfy itself that the findings of the domestic courts had neither been arbitrary nor manifestly unreasonable.[111]

In the author's view arbitral tribunals should develop a margin of appreciation doctrine within investment arbitration. A state must have some scope to decide on how to fulfil its function. Margin of appreciation is part of the proportionality analysis, and speaks to whether the measure has a legitimate aim and whether or not the state has to choose the least infringing measure available to the state if the result of doing so is that other legitimate goals can also be achieved. The margin of appreciation has to be assessed in light of the investment treaty (or in the *Yukos* case, the ECT). By entering into an investment treaty a state circumscribes its policy choices, with the result that it may only be able to limit the rights of an investor in the most severe circumstances.[112]

4. *Standard of Proof*

The Tribunal and the Court differ in the standard of proof they each apply. The Court defines the standard of proof for the party who bears the burden of persuasion with regard to a certain factual question or mixed factual and legal questions. The jurisprudence of the Court reveals that the state's standard of proof can fall into three categories: strict, intermediate, and lenient scrutiny.[113] The nature of the violation and

Petra BUTLER, "Human Rights" in Andrea BJORKLUND et al., *Cambridge Compendium of International Commercial and Investment Arbitration* (CUP, forthcoming).

109. See *Handyside v. the United Kingdom*, Judgment, ECtHR App No 5493/72, para. 48 (7 December 1976).
110. See David HARRIS, et al., fn. 102, p. 14.
111. Decision, fn. 41, para. 594.
112. See Art. 9 of the Hong Kong – ASEAN Free Trade Agreement (FTA) (12 Nov 2017) which sets out explicitly when the state can adopt measures necessary to maintain public morals or the protection of privacy of individuals.
113. Depending on the width of the margin of appreciation. Mónika AMBRUS, "The European Court of Human Rights and Standards of Proof" in Lukasz GRUSZCZYNSKI and Wouter WERNER, eds., *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (OUP, 2014) p. 235. The Canadian Supreme Court also has noted that the right in question and the facts of a case are determinative on the level of standard of proof required (*R v. Oakes* [1986] 1 RCS 103, 137, 138 (SCC)).

the importance of the right are the most important factors in determining which standard the Court applies.[114] For example, the Court requires a high standard of proof in cases concerning the right to life and the freedom from torture.[115]

Tribunals should look to adopt a more nuanced approach to standard of proof – one which is linked to the margin of appreciation. By adopting a more bespoke approach, tribunals will be better equipped to strike fair balance between safeguarding the individual's rights on the one hand, and the rights of the community on the other.

5. *Conclusion*

Arbitral tribunals are tasked with balancing the rights of the investor with those of the state's community. Using a human rights framework in an arbitral tribunal's decision-making will not necessarily lead to a different outcome. However, it will lead to a more robust methodological approach and reliance on well-established legal principles. The inclusion of a human rights analysis into its decision-making process will increase an investment arbitration tribunal's legitimacy and public acceptance. In terms of Darwinian theory, "evolution by means of adaptation" might be one in a range of the silver bullets for mastering the current challenges of investment arbitration.

VII. CONCLUSION

Human rights protection and the protection of foreign investment have the same objective: to protect non-state entities from state power.[116] In order to meet the challenges posed by climate change both arbitration and human rights must learn from each other. In particular, rather than lowering the bar of investor protection we must raise the bar for the protection of human rights by ensuring that the Court exercises its powers to grant interim measures and award damages, and by changing the way it takes evidence.

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114. See, e.g., *Guiliani and Gaggio v. Italy* (App. no. 23458/02), ECtHR 2011; *Nachova and others v. Bulgaria* (app. nos. 43577/98, 43579/98), ECtHR (Chamber) 2004.

115. *Guiliani and Gaggio v. Italy*, above; The Court's jurisprudence regarding Arts. 2 and 3 reveals that strict scrutiny is akin to "beyond reasonable doubt".

116. Erik DE BRABANDERE, "Complementarity or Conflict? Contrasting the *Yukos*-case before the European Court of Human Rights and the Investment Tribunals", 30 ICSID Review – Foreign Investment Law Journal (2015, no. 2) p. 345.