

PCA Case No 2013-31

**IN THE MATTER OF
AN ARBITRATION PURSUANT TO
ARTICLE 26 OF THE ENERGY CHARTER TREATY**

**BEFORE
A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH
THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW OF 1976**

- between -

**YUKOS CAPITAL LIMITED
(formerly YUKOS CAPITAL S.À R.L.)**

(the Claimant)

- and -

THE RUSSIAN FEDERATION

(the Respondent and, together with the Claimant, the Parties)

DISSENTING OPINION OF J. WILLIAM ROWLEY QC

Arbitral Tribunal

Professor Campbell McLachlan QC (Chairman)
Mr J William Rowley QC
Professor Brigitte Stern

Mr Jack L W Wass, Assistant to the Tribunal

Ms Helen F Brown, Assistant Secretary to the Tribunal

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I. INTRODUCTION

1. I am in agreement with large parts of the Award, including the findings establishing the Respondent's liability under the ECT. I also agree with the conclusion that Claimant is entitled to compensation for its loss of the value of the December 2003 Loan in the amount of USD 2,630,706,272.17, plus interest, as set out in [6] of the Disposition. However, I consider that the Respondent's liability to compensate the Claimant goes beyond these amounts.
2. My difference with my esteemed colleagues concerns their conclusions that: (a) only 50% of the sums advanced by Claimant after 26 May 2004 on the December 2003 Loan is recoverable (because Claimant contributed equally to its loss); and (b) Claimant's loss on its August 2004 Loan is irrecoverable in these proceedings (because Claimant alone caused its loss).
3. These conclusions are untenable.
4. As regards the irrecoverability of the loss of the August 2004 Loan, there is no credible legal support for the majority's decision. No cases were cited in which an investor-state tribunal has ever concluded that an investor is entitled to no compensation where (as here) its loss would not have occurred in the absence of the impugned conduct of the host state. This almost certainly means that there are no such cases.
5. The majority contends that "A finding that the proximate cause of the claimant's loss is his own actions has been dispositive in a number of cases, despite findings of culpability on the part of the respondent."¹
6. These cases relied on for this contention are discussed below where I deal with the August 2004 Loan. However, they provide no support for the majority's conclusion that Respondent should be freed of its treaty obligation to compensate for its effective taking of the August 2004 Loan. The cases cited all concern investments which became worthless, or had been lost (either by reason of the investor's own mistakes, mismanaged

¹ Award at [606].

or bad luck) before the relevant respondent state was alleged to have breached its treaty obligation. In the only case where a treaty breach was actually found, it occurred only after the investment had become valueless, thus causing no loss.

7. As regards the conclusion that Claimant contributed (to the extent of 50%) to the loss of the advances it made under the December 2003 Loan after 26 May 2004, the majority errs (as discussed below) by failing to take into account that, on the record before the Tribunal, even if Yukos Oil were to face bankruptcy it would have had sufficient assets to repay the December 2003 Loan absent Respondent's unlawful acts against it and against Claimant.
8. Put differently, even if the majority was correct to conclude that Claimant was negligent in making the final three advances on the December 2003 Loan, that negligence was not causative of its loss.

II. THE EFFECT OF THE MAJORITY'S CONCLUSIONS ON CONTRIBUTION/CAUSATION

9. Before turning to the more detailed discussion of the majority's contribution/causation analysis of the two loans, the effect of the majority's conclusions makes plain the majority's error.
10. In the case of the December 2003 Loan, RUB 3,916,683,000.00 was advanced after 26 May 2004 (drawdowns of 16, 22 and 28 June 2004). The effect of the majority's 50% discount on Claimant's compensation for this component of its December 2003 Loan enables Respondent and its designees to retain and be unjustly enriched by RUB 1,958,341,500.00, or approximately USD 66,610,255.10² of Claimant's funds.
11. In the case of the August 2004 Loan of USD 355 million, the effect of the majority's holding that Claimant was entirely responsible for this loss enables Respondent and its designees to retain and be unjustly enriched by the whole of the USD 355,000,000.00.

² The same exchange rate as that set out at [789] of the Award is applied here, namely 29.40 Russian roubles to 1 US dollar.

12. A conclusion that Respondent should not be held to its treaty obligation to compensate Claimant for the taking of the entirety of its two loans and the associated contractual and pre-award interest (i.e., to have its obligation to compensate Claimant reduced by at least the principal sum of USD 421,610,255.10) cannot be correct in circumstances where Claimant would almost certainly have been repaid in full had Respondent: (a) not sold Yukos Oil's YNG to Rosneft in a rigged auction for a fraction of its true worth in a transaction that was acknowledged to be a practical nationalisation;³ and (b) not treated Claimant unlawfully in Yukos Oil's eventual bankruptcy proceedings.

III. DID CLAIMANT "CONTRIBUTE" TO ITS INJURY IN RELATION TO THE DECEMBER 2003 LOAN?

13. When performing a comparative contribution-to-loss analysis between an investor and, in this case, as found, a state which (in its relevant treaty breaches) intended to destroy the investor's ability to recover its investment, a tribunal should be very sure that it does not engage in hindsight as to what was foreseeable. In the case of doubt or uncertainty, it is certainly proper to give the innocent investor the benefit of the doubt over a state that has intended in its unlawful actions to injure the investor. A tribunal must also determine whether the risk foreseen would have occurred in the absence of the host state acting unlawfully. If not, the foreseen risk would not be causative of loss.
14. The majority's holding that the Claimant should bear 50% of its loss in relation to the three drawdowns that remained to be made after 26 May 2004 is based on the conclusion that "there was a reasonably foreseeable risk that the Claimant's investment might not be repaid from 27 May 2004".⁴ This assessment of foreseeability was based on and limited to the possibility that Yukos Oil might have to declare bankruptcy. No consideration was given as to the prospects for Claimant to recover its loan in such a future bankruptcy. Nor did the majority consider the foreseeability of any treaty breach by Respondent in relation to Claimant's December 2003 Loan, including its ability to recover its loan in a

³ Award at [138]-[146].

⁴ Award at [677].

bankruptcy proceeding absent any unlawful action by Respondent. These omissions constitute a fundamental error. Finally, no real attempt was made to justify a 50% figure.

15. The majority placed much weight on the 26 May 2004 decision of one judge in the Moscow *Arbitrazh* Court to uphold the first Tax Assessment (the 2000 Tax Assessment) and Yukos Oil's statement the next day, on 27 May 2004, that it faced the risk of bankruptcy. It says that these facts "should have given a reasonable lender in Yukos Capital's position cause to consider whether it was prudent for it to continue to advance loans under the December 2003 Loan Agreement."⁵
16. At [683] of the Award, the majority states that "the Tribunal considers that the Claimant was negligent in safeguarding its own interests as lender", and at [684] it says that "[t]he Tribunal considers that the Claimant's failure in this respect equally contributed to this part of the loss along with the Respondent's subsequent breaches of the treaty."
17. With respect, this is an untenable conclusion and outcome. The majority gave no consideration to Claimant's ability to recover its loan in any bankruptcy proceeding that might be instituted. There was no suggestion that Respondent's future unlawful acts against Claimant could be foreseen. And the conclusion ignores the important facts that:
 - (i) Yukos Oil had been advised in very plain terms by its outside lawyers that there was utterly no merit in the 2000 Tax Assessment (discussed further below in relation to the August 2004 Loan);
 - (ii) another judge of the Moscow *Arbitrazh* Court had, on 19 May 2004, suspended the 2000 Tax Assessment, and that this suspension remained in force as at the 26 May 2004 court ruling;
 - (iii) even if Yukos Oil were to declare bankruptcy, at this stage of events (well before Respondent's unlawful behaviour in relation to the rigged YNG auction) Yukos Oil had more than enough assets (details below) to pay the 2000 Tax Assessment

⁵ Award at [682].

and any penalties should the assessment survive the challenge Yukos Oil had launched against it;

- (iv) on 17 June 2004, the day after Claimant made its next advance on the Loan, President Putin made a strong statement (details below) that was evidently designed to reassure concerned foreign investors that the Russian authorities, the government and the economic officials of the country were not interested in seeing Yukos Oil go bankrupt; and
 - (v) the last two advances on the December 2003 Loan were made (as required in the Loan Agreement) during the week that followed President Putin's widely reported reassurance (*i.e.*, on 22 and 28 June 2004).
18. On these facts, it must be wrong to conclude that Claimant's decision to complete the December 2003 Loan Agreement was negligent, let alone of sufficient risk as would require Claimant to share equal responsibility with Respondent for its loss. It is true that Yukos Oil was being subjected to reassessment by the Russian tax authorities on how it had self-assessed its taxes for its 2000 and 2001 tax years. But this happens every day in every country in the world and it is not negligent for counterparties to continue to deal with companies who are facing tax audits. It is only negligent if the counterparty has reason to believe there is merit in the audit and that its borrower will not be able to repay a loan if, in the end, it is found that it has to pay the tax.
- IV. OUGHT CLAIMANT TO BEAR THE SOLE RESPONSIBILITY FOR THE LOSS OF ITS AUGUST 2004 LOAN?**
19. Having assessed Claimant's loss on a foreseeability/contribution based analysis for the December 2003 Loan, the majority moves to a foreseeability/break-in-the-chain analysis of the August 2004 Loan. That Loan was made on 19 August 2004, less than two months after President Putin's announcement and the date Claimant made its final advances on the December 2003 Loan.
20. The relevant cases and the ILC (in its Commentary on ARSIWA) make it clear that it is only proper to abandon a contribution-based analysis in favour of a break-in-the-chain analysis where, on the facts of a particular case, it is clear that the investor's loss was

incurred (or was inevitable) solely or predominantly because of its own conduct (or improvidence) before its investment was affected by the impugned conduct of the host state.

21. As noted above, no case was cited in which a tribunal has determined that an investor is entitled to no compensation where its loss would not have been incurred in the absence of the impugned conduct of the host state.
22. At [606] and [607] of the Award, reference is made to a number of cases in which other tribunals are said to have concluded that the relevant investor caused its own loss (and thus was entitled to no compensation from the relevant state) despite the fact that the state in question has also been found culpable. The paragraphs wrongly suggest that these cases are good precedents for the majority's conclusion that Claimant should receive no compensation for the loss of its August 2004 loan.
23. These paragraphs give the wrong impression as to the findings in the cited cases and what they stand for. This is because, in each of these cases, the relevant investor's loss: (a) had accrued or become inevitable before the allegedly wrongful act of the state; and (b) no part of the relevant investor's loss flowed from or was made worse by any subsequent act of the state. Thus, each of these cases is fundamentally different from the present case, where the only reason Yukos Oil faced (and was ultimately driven into) bankruptcy and Claimant lost its investments was the internationally unlawful acts of Respondent.
24. Put differently, Claimant did not make its August 2004 Loan to Yukos Oil when it was, through its own fault or mismanagement, unable to repay the Loan. Yukos Oil only became unable to repay, and Claimant only became unable to claim as a creditor in Yukos Oil's bankruptcy, because of multiple acts by Respondent in breach of the ECT, most of which occurred after both the December 2003 and August 2004 Loans had been made. The relevant factual chronology is set out at [46] below.
25. In this case, had Respondent not acted against Yukos Oil and Claimant as it did, Yukos Oil would unquestionably have been able to repay both the December 2003 and the August 2004 Loans and Claimant would have suffered no loss.

26. The cases cited by the majority in [606] and [607] are summarised briefly below. I respectfully suggest that these cases do not support the conclusion that the loss suffered by Claimant in relation to the August 2004 Loan was entirely or predominantly attributable to its own conduct such that Respondent can properly be released of any responsibility for its unlawful treatment of Claimant.
27. ELSI:⁶ In this case, the ICJ Chamber concluded that, prior to the “requisition” (the impugned act), ELSI was in an actual or virtual state of insolvency which had been brought about entirely by reason of its own mismanagement of its business. In any event, even though the requisition had no deleterious effect on ELSI’s business (indeed it likely helped it), the Chamber was unable to see anything which could be said to amount to a violation of the relevant Article of the FCN Treaty by reason of the requisition.⁷
28. MAFFEZINI v. SPAIN:⁸ Here, the tribunal concluded that the losses suffered by Mr Maffezini (*i.e.*, as the result of the failure of his investment in Spain) were not the result of allegedly wrong advice regarding the costs of the project given by a Spanish state entity (one of four alleged breaches of the relevant BIT). Rather, the tribunal held that the state entity was not carrying out a public function – hence Spain had committed no BIT breach. It was in this context that the Tribunal observed that BITs were not insurance policies against bad business judgements and that Spain could not be held responsible for Mr Maffezini’s own business losses.⁹ But this cannot be taken to suggest that BIT’s do not constitute a form of insurance against the BIT state signatories’ contravening the treaty in its treatment of a qualifying investor.
29. OLGUÍN v. PARAGUAY:¹⁰ Mr Olgúin invested in a project in Paraguay. In so doing, he lost the funds he deposited with a finance company when it went bankrupt. The funds were being held on deposit pending their commitment to the project. Four allegations of

⁶ *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)*, Judgment, ICJ Reports 1989, p. 15 (CL-99).

⁷ *Ibid* [65], [66], [83], [92], [99], [100].

⁸ *Emilio Agustín Maffezini v Spain*, ICSID Case No ARB/97/7, Award (13 November 2000) (RL-287).

⁹ *Ibid* [39], [40]-[44], [62]-[64].

¹⁰ *Eudoro Armando Olgúin v Paraguay*, ICSID Case No. ARB/98/5, Award (26 July 2001).

breach of the relevant BIT were made. The allegations, which concerned the lost deposit, were all rejected by the tribunal. It held that the finance company went bankrupt because of the irregular conduct of its managers, not by reason of unlawful conduct of the state. While the tribunal noted that the finance company's bankruptcy might have been prevented had Paraguay's financial regulators performed better, this did not amount to a breach of the BIT, but simply reflected the rather lax regulation of financial institutions in Paraguay at the time the investment was made. This *obiter* observation by the tribunal was not a finding that the state was the cause of Mr Olguín's loss. The tribunal also noted that Mr Olguín had his reasons for investing in Paraguay and it was not reasonable for him (an accomplished businessman, with a track record as an entrepreneur going back many years, etc.) to seek compensation for losses he suffered on making a speculative, or at best, a not very prudent investment. The key take-away from this case is that Paraguay was found not to have breached the BIT in any way and that Mr Olguín had to bear the same risks as anyone else who put money on deposit with a financial institution in Paraguay at that time.¹¹

30. **BIWATER v. TANZANIA**:¹² This case is relied on by the majority in [607] and [608] of the Award as being particularly apposite to the proposed finding that Claimant was entirely or predominantly responsible for its loss in relation to the August 2004 Loan. The opposite is true. The case concerned Biwater's failed investment in rejuvenating and operating the Dar es Salaam water and sewerage systems. Biwater alleged a series of breaches of the relevant BIT that occurred between 13 May and 1 June 2005. While the tribunal concluded that each of the alleged breaches was proven, the fundamental difference between *Biwater* and the present case is that the tribunal also found on the facts before it that Biwater's investment had been such a bad one that, well before 13 May 2005 (the date of the first alleged breach of the BIT), the investment had become of no economic value.¹³ That is to say, the state's conduct had nothing to do with (*i.e.*, had not

¹¹ Ibid [45], [48], [55], [59], [64], [65](a) and (b), [70]-[75].

¹² *Biwater Gauff (Tanzania) Limited Ltd v. Tanzania*, ICSID Case No. ARB/05/22, Award, (24 July 2008) (RL-493).

¹³ Ibid [15], [778], [792].

caused) the loss because the investment had been lost by the investor before the state breached its treaty obligations.

31. By comparison, in the present case, it was not properly open to the majority to conclude that the August 2004 Loan, when made on 19 August 2004, would not or could not be repaid in the absence of Respondent's unlawful conduct, and thus that Claimant caused its own loss by making the Loan.
32. Although Russia's Ministry of Justice announced its plan to sell YNG on 21 July 2004 (three weeks after the last draw down on the December 2003 Loan), Claimant had no knowledge when it advanced the August 2004 Loan that the later YNG auction would be rigged, and that YNG's assets would be sold for a song. Had YNG's assets been sold properly, there would unquestionably have been sufficient funds to cover the August 2004 Loan. As to this, [139] and [140] of the Award set out details of the DKW valuation of the seized YNG assets. That valuation also stated that, even if future tax and environmental liabilities were accounted for, the value range would be between USD 15.7 and 18.3 billion. Respondent's later tax assessments (*i.e.*, those that come after the loans were advanced), would have reduced these amounts by less than USD 5 billion. It is to be recalled that YNG was valued by Rosneft at USD 55.78 billion at the end of 2005 in its prospectus for offering shares – *i.e.*, after YNG had been acquired by it through the rigged auction.¹⁴
33. In addition, even though the possibility that Yukos Oil might have to enter into bankruptcy proceedings in the future was known when the August 2004 Loan was advanced, those bankruptcy proceedings were not commenced in Russia until March 2006, 18 months after the August 2004 Loan was advanced.¹⁵
34. Against this background, the only proper conclusion is that Respondent's unlawful campaign against Yukos Oil and its unlawful acts against Claimant were the cause of Claimant's loss of the August 2004 Loan. The simple reason for this is that, on the balance of the evidence, the Loan would not have been lost had Russia not committed its

¹⁴ Award at [146], n. 146.

¹⁵ Award at [152]-[153].

campaign against Yukos Oil and expropriated Claimant's investment. This is confirmed by the Tribunal's conclusion (by majority of McLachlan/Rowley), that the factors set out in [781]:

...provide overwhelming evidence establishing that, were it not for the Respondent's actions, the financial position of Yukos Oil would have been such as to enable it to repay Yukos Capital's Loan in full and to continue to make quarterly interest payments in accordance with its terms. A reasonable lender in the position of Yukos Capital would have so concluded and valued the FMV of the Loan at face value.¹⁶

V. DID CLAIMANT "CONTRIBUTE" TO ITS INJURY IN RELATION TO THE 2004 LOAN?

35. Assuming the impropriety of a conclusion that Claimant's loss of the August 2004 Loan was "entirely attributable to [its own conduct] and not at all to that of the "responsible" State [Russia]",¹⁷ the question of whether it should bear some of its own loss (because it contributed to it) turns on whether the dispute (*i.e.*, arising from Respondent's unlawful treatment of Claimant) was reasonably foreseeable at the time the Loan was made on 19 August 2004. This is because, absent Respondent's conduct which gave rise to the dispute, Claimant could have claimed in the bankruptcy and would likely have been paid.
36. The questions concerning contribution that the Tribunal put to the Parties prior to their closings all bore on the foreseeability of the dispute at the time Claimant's investments were made.¹⁸
37. Claimant and Respondent agreed that the foreseeability of the dispute was relevant to the calculation of damages. Respondent also accepted that foreseeability cannot be assessed with hindsight.¹⁹
38. The majority concludes that: (a) there was a foreseeable risk that Claimant's investment might not be repaid from 27 May 2004; and (b) it was reasonably foreseeable on

¹⁶ Award at [782].

¹⁷ ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries* [2001] I BILC II (2)31, 110 n 627, (RL-240).

¹⁸ Award at [563].

¹⁹ Award at [570].

19 August 2004, less than three months later, that Claimant's August 2004 Loan would be lost altogether.

39. There are at least two problems with these findings.
40. First, they do not focus on the actual dispute (*i.e.*, whether Respondent's conduct vis-à-vis Claimant, not Yukos Oil, constituted a breach of the ECT). Recall that the Tribunal limited its assessment of ECT breach to Respondent's treatment of Claimant's claims under the Loans and not the claims of its debtor Yukos Oil or other members of the Yukos Group. And Claimant's claims are limited to the treatment it received from Respondent as it attempted to make its claims in Yukos Oil's bankruptcy as a creditor based on the Loans.²⁰
41. Second, the majority gives virtually no consideration in the Award as to the foreseeability of that dispute. With the exception of one paragraph ([695]), at no point in Part VII does the majority concern itself with whether it was reasonably foreseeable by Claimant, when it made the two Loans, that Respondent would attack it, as it did, when it later sought to register its claims in Yukos Oil's bankruptcy.
42. Dealing briefly with [695], the majority asserts that, on the date that Claimant advanced the August 2004 Loan (19 August 2004), it not only foresaw that Yukos Oil might be driven into bankruptcy, but it also foresaw:
- that this was as a result of deliberate conduct on the part of the Respondent, which was 'intent on destroying the entire company'. The foreseeability of such an intention would affect the totality of the assets of the Yukos Group on the territory of the Respondent.
43. With respect, this assertion can only be attributed to Claimant (or Yukos Oil) with the aid of hindsight. It is now evident, from a detailed review of its behaviour over a three-year period (2004-2007), that Respondent was then determined to eradicate the Yukos Group after devouring its assets and distributing them to its favoured entities. But the record

²⁰ Award at [4], [390].

before the Tribunal as to what was happening in the spring and summer of 2004 simply does not indicate that this was known at the time.

44. The majority says that it does not matter that the August 2004 Loan was made “well before the Yukos Oil bankruptcy proceedings and the Respondent’s measures against the Claimant in those proceedings”.²¹ But with respect, it does matter.
45. Exactly what was happening and when is set out in useful detail at [114]-[153] of the Award. In broad sweep, it shows plainly that at the time the two Loans were advanced, what we now know was an unlawful campaign to acquire the Yukos Group’s assets was only just getting underway.
46. The chronological data-points below (taken from the paragraphs cited above) show clearly that Claimant had no reasonable basis, either in late May or in mid-August 2004, to foresee either the present dispute or that either of the Loans would not be repaid.
 - (i) Only the first of the five Tax Assessments had reached a stage where Yukos Oil had been found liable for tax offences when the August 2004 Loan was made. The second Assessment (the 2001 Tax Assessment) came to a decision on such liability only on 2 September 2004,²² well after the two Loans had been made. All the others come later.
 - (ii) Initially, after it received the 2000 Tax Assessment, Yukos Oil’s external Russian counsel stated in robust terms that it was so unmeritorious, and the extent of the tax ministry’s violations were so apparent that it would be “impossible even for the most biased judge to support the clearly unlawful inspection act.”²³

²¹ Award at [687].

²² Award at [119].

²³ Award at [643], citing Summary of the tax inspection of OAO NK Yukos, Sergey Pepeliev (5 January 2004), 3 (R-577).

- (iii) Although the tax ministry's collection claim on the 2000 Tax Assessment was upheld by one judge of the Moscow *Arbitrazh* Court on 26 May 2004, the effect (*i.e.*, the enforceability) of that Assessment had previously been suspended (by another judge of the same court), and remained so until the suspension was annulled on 23 June 2004.²⁴
- (iv) On 17 June 2004, a day before an expected court ruling on the 2000 Tax Assessment, President Putin was reported in the New York Times as saying:

Russian authorities, the government, and the economic officials of our country are not interested in seeing Yukos go bankrupt... The government will try to do everything not to topple this company.²⁵

The majority expressed the view, "based on its assessment of the Respondent's conduct to this date", that "little weight can be placed on this statement". Given that this statement was made less than six months after the 2000 Tax Assessment, and long before the rigged auction of YNG's assets and the 2006 bankruptcy, the majority's "view" can only be hindsight based. In any event, it is well established that what governments say in these circumstances to and about investors matters (and can have consequences) in the context of investor-state disputes. It may now be a relatively common view that Mr Putin cannot wholly be trusted. But that was not so clear in the summer of 2004. Moreover, the fact that he made the statement on behalf of the government and the relevant Russian authorities was clearly intended to calm roiling markets and to be believed.

- (v) The New York Times reported further that shares of Yukos Oil jumped 42% on the news (of Mr Putin's statement) before trading was suspended for the day and gave details of settlement discussions between Yukos Oil and Russia. The market's reaction to Mr Putin's statement was signalling the possibility of Yukos Oil's tax problems being resolved.

²⁴ Award at [125]-[126].

²⁵ *Putin Says Russia Wants Yukos to Survive*, Seth Mydans, The New York Times (18 June 2004) (C-24).

- (vi) As mentioned earlier, on 21 July 2004, the Ministry of Justice announced plans to sell the seized YNG assets. All of the valuations that were carried out at this time indicated that the share capital of YNG well exceeded the then known and future tax liabilities. Valuations ranged between USD 18.6-21.1 billion (DKW valuation), USD 16.1-22.1 billion (JP Morgan valuation) and USD 20-25 billion (possible bid range by TNK-BP).²⁶
 - (vii) The second to fifth Tax Assessments all occurred after the August 2004 Loan was advanced.²⁷ The rigged YNG auction took place on 19 December 2004²⁸ and Yukos Oil was petitioned into bankruptcy in March 2006.²⁹
47. The central point of the above chronology is that it shows that what Respondent was really up to only became clear well after the two Loans were advanced.
48. On this record, I consider that it was not possible for the majority properly to conclude either that Claimant was entirely responsible for the loss of the August 2004 Loan or that it was reasonably foreseeable that a possible future bankruptcy proceeding against Yukos Oil would result in the loss of the Loan (having regard to Yukos Oil's and YNG's net asset values at this time).
49. On this record, it is my respectful view that finding that Claimant was entirely responsible for the loss of the August 2004 Loan is perverse. It is equivalent to saying that if a state is sufficiently likely to breach its treaty obligations, then, even if a particular treaty breach against the investor itself cannot be foreseen, the state will be free to breach the treaty in the future and be relieved of its solemn treaty obligation not to do so and to compensate its investors if it does.

²⁶ Award at [139], n. 129.

²⁷ Award at [118]-[122].

²⁸ Award at [144].

²⁹ Award at [152]-[153].

50. Even if treaties do not serve as “insurance policies against business risk”, as pointed out in *Ripinsky and Williams*, BITs “do mitigate risks of certain government actions”.³⁰ That is to say, they do serve as insurance against behaviour prohibited by the treaty.
51. I therefore would not have decreased the amount of compensation due on the basis of causation and contribution to the injury. I consider that Claimant ought to be entitled to the total value of both the December 2003 and August 2004 Loans, comprising the principal advanced and any interest due thereunder.

Geneva, Switzerland

Date: 23 July 2022



J. William Rowley QC

³⁰ Ripinsky & Williams, *Damages in International Investment Law* (BIICL, 2008), 328-329, p. 4 (RL-360).