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# SOVEREIGN IMMUNITY FOR RUSSIA'S ROCKET ENGINES? ENFORCING THE “YUKOS” AWARD

## INTRODUCTION

In 2014, the former shareholders of Yukos Oil Company<sup>1</sup> celebrated a major victory in their ongoing legal battle against the Russian Federation. After nearly a decade of litigation, the Permanent Court of Arbitration (PCA) awarded Yukos shareholders<sup>2</sup> US \$50 billion in compensation for Russia's expropriation<sup>3</sup> of Yukos assets in violation of the Energy Charter

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1. Yukos Oil Company was once the largest oil company in Russia, and its CEO, Mikhail Khodorkovsky, was Russia's richest man. Terry Macalister, *Mikhail Khodorkovsky: How the Yukos Tycoon Became Russia's Richest Man*, GUARDIAN (Dec. 20, 2013), <https://www.theguardian.com/world/2013/dec/20/mikhail-khodorkovsky-russia-richest-man>. Before the company's dissolution, Yukos was producing over twenty percent of Russia's total oil output—more than 1.7 million barrels per day. *Biography of Mikhail Khodorkovsky*, KHODORKOVSKY.COM, <https://www.khodorkovsky.com/biography/yukos-2/> (last visited Nov. 11, 2018). For comparison, this is significantly more than the output of the entire nation of Libya. *Libya facts and figures*, ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES, [https://www.opec.org/opec\\_web/en/about\\_us/166.htm](https://www.opec.org/opec_web/en/about_us/166.htm) (last visited Nov. 10, 2019).

2. The former shareholders of Yukos Oil Company have, for the purposes of pursuing legal action against the Russian Federation, organized themselves variously as Hulley Enterprises Limited (Cyprus), Yukos Universal Limited (Isle of Man) and Veteran Petroleum Limited (Cyprus). See *infra* note 4. These organizations have pursued separate actions against Russia stemming from the same facts involving the dissolution of Yukos. *Id.* at ¶ 2. For the purposes of this Note, the separate actions will be consolidated and attributed to the former Yukos shareholders (“Yukos” or “the shareholders”) except where procedural clarity requires otherwise. The Russian Federation (or “Russia”) persistently refers to these individuals as “the oligarchs” in official documentation. *Id.* at ¶ 84 n. 6.

3. In 2003, Yukos and its executives came under increasing scrutiny from the Russian government. Bruce W. Bean, *Yukos and Mikhail Khodorkovsky: An Unfolding Drama*, CORP. GOVERNANCE IN RUSSIA 324, 349 (Daniel J. McCarthy, Sheila M. Puffer & Stanislav V. Shekshnia, eds., 2010). After a multibillion-dollar assessment of the company's tax arrears, Yukos' most valuable holdings were acquired through bankruptcy auction by Rosneft, an oil company with close ties to the Russian government. Dmitri Gololobov, *The Yukos War: The Five Year Anniversary*, SSRN ELECTRONIC LIBR. 1, 26 (Sept. 29, 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1275444](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275444). By 2008, Yukos had been dissolved, its assets all sold off, and its top executives were either in prison or in exile. *Id.* CEO Mikhail Khodorkovsky was arrested for fraud and tax evasion, and Leonid Nezvlin, the third-ranking Yukos oli-

Treaty (ECT).<sup>4</sup> This was twenty times the size of the largest arbitral award in history, with legal fees alone totaling US \$60 million.<sup>5</sup> Pending an appeal in the Hague,<sup>6</sup> Yukos shareholders now face the difficult task of enforcing the PCA judgement against Russia. In order to collect their award, the shareholders must convince national courts to attach Russian assets located within their jurisdictions.<sup>7</sup> Most of these assets are shielded from attachment by “sovereign immunity,” a doctrine of international law<sup>8</sup> that broadly protects states and their

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garch, escaped prosecution by fleeing to Israel and has been convicted in absentia for orchestrating the assassination of several Yukos’ competitors. *Id.*

4. The PCA consolidated the three main Yukos claims into a single award: *Hulley Enters. Ltd. (Cyprus) v. The Russian Fed’n*, PCA Case Repository AA 226 (2014); *Yukos Univ. Ltd. (Isle of Man) v. The Russian Fed’n*, PCA Case Repository AA 227 (2014); *Veteran Petrol. Ltd. (Cyprus) v. The Russian Fed’n*, PCA Case Repository AA 228 (2014). Yukos’ shareholders won their case at the Hague on July 18, 2014. Jennifer Rankin, *Russia Ordered to Pay \$50bn in Damages to Yukos Shareholders*, *GUARDIAN* (Jul. 28, 2014), <https://www.theguardian.com/business/2014/jul/28/russia-order-pay-50bn-yukos-shareholders-khodorkovsky-court>.

5. The next largest arbitral award in history was US \$1.7 billion. *See Occidental Petroleum Corp. & Occidental Exploration & Production Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012).

6. In 2016, The Hague District Court quashed the award on the grounds that Russia had never agreed to be bound by the arbitration provisions of the ECT. *Judge Stays Case Pending Appeal of Ruling Setting Aside Yukos Awards*, 31 *MEALEY’S INT’L ARB. REP.* 10 (2016). This ruling is currently being challenged by the shareholders at the Court of Appeal in the Hague. *Id.*

7. As Sebastian Okinczyc relates, “[h]arder to reach will be Russian financial assets and assets of companies owned or controlled by the state, since recovery will [only] be possible from instrumentalities of Russia and each country will have its own view on what is and what is not an instrumentality or alter ego of the state.” Sebastian Okinczyc, *Yukos Arbitration - Past, Present . . . Future?*, SSRN ELECTRONIC LIBR. 1, 7 (Dec. 30, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2543850](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2543850). This process will most likely necessitate a multi-pronged litigation approach because each national court system will decide independently whether sovereign immunity applies under domestic and international law. *Id.*

8. US courts have codified this doctrine in the Foreign Sovereign Immunities Act (FSIA). *See generally* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–1611 (2019). Nevertheless, the customary international law standard for sovereign immunity is still applicable in US courts because, as the US Supreme Court (“the Court”) stated in the *The Paquete Habana*, “[i]nternational law is part of our law, and [it] must be ascertained and administered by the courts of justice . . . as often as questions of right depending upon it are duly presented for their determination.” *The Paquete Habana*, 175 U.S. 677, 700 (1900).

property in foreign courts, with certain exceptions. Critically, if Yukos can show that Russia is holding property abroad for “commercial, non-governmental purposes,” that property would not be protected by sovereign immunity and can be attached to satisfy the shareholders’ arbitral award.<sup>9</sup> For Yukos, however, it may prove easier to claim their right than to enjoy their remedy.

Pending the outcome of the investors’ appeal in the Hague, Yukos may seek to enforce the 2014 PCA award against Russian space assets in the United States (US). These assets may be especially attractive to Yukos investors because of their significant value, commercial purpose, and clear connection to the Russian government.<sup>10</sup> Most satellites built for the US Department of Defense are launched using the Atlas V rocket, which is powered by twin RD-180 rocket engines manufactured by NPO Energomash (“Energomash”), a Russian company.<sup>11</sup> These engines are a rare example of a high-value, high-tech Russian industrial export to the West, and despite challenges from the US Congress and Treasury Department, it appears as if these engines will not be subject to sanctions until the US develops a suitable replacement.<sup>12</sup> The Antares rocket is also powered by engines built by Energomash,<sup>13</sup> making two out of

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9. This important exception will be explored in some detail and is expressed in similar terms under the FSIA and in customary international law. See 28 U.S.C. §§ 1602–1611; see also United Nations Convention on the Jurisdictional Immunity of States and their Property, Dec. 2, 2004 (adopted during the 65th plenary meeting of the General Assembly by resolution A/59/38, but not in force) [hereinafter UN Convention].

10. Yukos has already targeted Russian space assets for enforcement in France. *Attempted Asset Seizures: France*, INT’L CENTRE FOR LEGAL PROTECTION, <https://www.yukoscase.com/court-actions/attempted-asset-seizures/france/> (last visited Sept. 15, 2019).

11. The Atlas V rocket, produced by United Launch Alliance (ULA)—a joint venture between Boeing and Lockheed Martin Co.—is the only lift vehicle qualified to launch many government satellites. *Russian Engine Purchase Adds to ULA’s Atlas 5 Inventory*, SPACEFLIGHT NOW (Dec. 30, 2015), <https://spaceflightnow.com/2015/12/30/>. It is powered by twin RD-180 engines, which are purchased by ULA through intermediary RD Amross, a Miami-based joint venture between United Technologies Corp. and NPO Energomash of Khimki, Russia. *Id.*

12. Matthew Bodner, *Energomash Raises Alarm Over US Ban On Russian Rocket Engines*, SPACENEWS (July 10, 2018), <https://spacenews.com/energomash-raises-alarm-over-u-s-ban-on-russian-rocket-engines/>.

13. The Antares rocket, built by Orbital ATK, recently transitioned to the RD-181 engine, which is custom-built by Energomash and sold directly to

three US launch providers dependent on Russian space technology for the foreseeable future.<sup>14</sup> This Note will argue that both international and domestic jurisprudence have made attachment of foreign assets difficult, but possible, for a determined investor. In light of the close relationship between Energomash and the Russian government, Yukos has a strong chance of attaching Russia's rocket engines if it targets these assets in the US.

Part I of this Note will describe the rise and fall of Yukos Oil Company. It will discuss how Yukos became the largest oil company in Russia and how the political circumstances surrounding the dissolution of that company have affected the unique progress of the Yukos cases. Part II will provide some background to the current system of investor-state dispute settlement and describe the status and significance of the Yukos cases within that system. Part III will expand this analysis to include foreign legislation and jurisprudence connected to the Yukos cases, further considering the United Nations (UN) Articles on the Jurisdictional Immunities of States. Part IV will explore the rules of sovereign immunity in the Foreign Sovereign Immunities Act (FSIA), including connected caselaw. Finally, Part V will apply these rules to the specific circumstances of Russia's space assets in the US and endeavor to identify the most likely outcome of an attachment effort by Yukos.

## I. THE YUKOS AFFAIR

Beginning in the early 1990s, the newly created Russian Federation pursued a crash policy of economic privatization, commonly referred to as "shock therapy," in order to transition to a market economy.<sup>15</sup> Following the advice of Western econo-

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Orbital. Peter V. de Selding, *Orbital Sciences Expects RD-181 Delivery*, SPACENEWS (Jan. 26, 2015), <https://spacenews.com/orbital-sciences-expects-rd-181-delivery/>. Prior to its merger with ATK, Orbital Sciences Corp. utilized the unique AJ-26 engine, which in reality is a refurbished NK-33 engine, developed for the failed Soviet lunar program and hidden in storage until being discovered by American engineers from Aerojet. *Id.*

14. Jeff Foust, *Orbital ATK Looks to Antares To Handle Cargo Resupply Missions*, SPACENEWS (Nov. 10, 2017), <https://spacenews.com/orbital-atk-looks-to-antares-to-handle-cargo-resupply-missions/>.

15. "Shokovaya terapiya" (translated literally as shock therapy) is a Russian term colloquially used to refer to the rapid privatization initiatives undertaken by the Yeltsin-era ministers Anatoly Chubais and Yegor Gaidar,

mists,<sup>16</sup> the Russian government, which had previously retained exclusive ownership of the nationalized industries of the USSR, initiated a program of distributing “vouchers” representing shares of state enterprises to private individuals.<sup>17</sup> Ostensibly, the goal of this program was to ensure a fair distribution of the wealth generated by the large Soviet industrial base and increase market participation.<sup>18</sup>

In practice, the system enabled a relatively small number of individuals, usually Soviet-era managers and powerful Communist Party members, to acquire complete ownership of these state industries for a negligible price.<sup>19</sup> These individuals, who would later gain infamy as Russia’s first “oligarchs,” were able to manipulate the rules of privatization and acquire enormous fortunes in a relatively short period of time.<sup>20</sup> The oligarchs

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especially from the years 1992-1996. MARSHALL I. GOLDMAN, *THE PIRATIZATION OF RUSSIA: RUSSIAN REFORM GOES AWRY* 11 (2003). Marshall Goldman inquired, “why did Russian reformers choose a shock therapy strategy and by extension a program of rapid privatization, a mistake that will take years to correct? Why didn’t they move gradually?” *Id.*

16. Goldman relates further that “Gaidar and Chubais were also influenced by the arguments, long associated with the University of Chicago, that the de-politicization of enterprise ownership and its privatization results in greater efficiency and is preferable to state ownership.” *Id.* at 67.

17. The “voucher privatization” scheme of 1992 generally marks the beginning of this period, and it was terminated with the accession to the Presidency of Vladimir Putin in the year 2000. *Id.*

18. Bean, *supra* note 3, at 327.

19. During this era, connections with the Communist Party, KGB, or state industrial apparatus often translated into de facto ownership of certain state assets. GOLDMAN, *supra* note 15, at 93. The managers of factories under Communist power (referred to as “Red Directors” during the privatization era) were frequently able to acquire the same factories they had previously managed. *Id.* Goldman writes: “[s]ome also wondered why a former Deputy Minister of the Petroleum Industry, such as Vagit Alekperov, or the former Deputy Minister of the Gas Industry, Rem Vyakhirev, should end up owning so much of what they formerly supervised.” *Id.*

20. Goldman reflects:

[T]his made [the oligarchs] very different from the robber barons in the United States who built their empires by building steel mills, railroads, and refineries. These Russian oligarchs did not build. They simply purloined what previously belonged to the state and in the process became instant millionaires, if not billionaires.

*Id.* at 117.

used the comparatively large value of Russia's extractive industries to leverage loans and amass capital abroad, while the industries themselves either stagnated or their assets were sold off piecemeal to foreign investors.<sup>21</sup> By the mid 1990s, Russia's economy was in collapse, corruption was widespread, and political power was largely in the hands of the oligarchs.<sup>22</sup> In 1996, in response to a looming election defeat to the Communist Party, President Yeltsin authorized a series of property transfers in which controlling shares in the most valuable remaining government assets were supposed to be temporarily given to private investors in exchange for emergency loans to the government.<sup>23</sup> In practice, the "loans for shares deal" consisted of a series of rigged auctions where pro-Yeltsin oligarchs were given permanent control over Russia's most valuable industries, especially the oil and gas sector.<sup>24</sup>

Yukos Oil Company, along with Rosneft, Sibneft, Lukoil, and other major Soviet oil producers, were among the only companies not divested by the government during "voucher privatization."<sup>25</sup> Accounting for more than one-third of the world's gas

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21. Serguey Braguinsky, *Postcommunist Oligarchs in Russia*, 52 J.L. & ECON. 307, 308 (2009).

22. This era was characterized by an "orgy of stealing." Bean, *supra* note 3, at 327.

23. The corrupt "bargain" struck between President Yeltsin and the future oligarchs would return to haunt Yukos investors, as the succeeding Putin government would eventually prosecute Yukos for its ill-gotten gains. Braguinsky noted:

The complex loans-for-shares program finally put into place called for the government to borrow hundreds of millions of dollars in a handful of transactions from Russia's new private banks owned by the richest of a new generation of successful young Russian businessmen. These oligarchs, having become fabulously rich early in Russia's transformation, had a common interest in both preserving the Yeltsin government and seeing what else they could acquire.

*Id.* at 330.

24. Russia has consistently argued against the Yukos investors' assertion of an "international" identity, which was established through the creation of various shell corporations dating from the "loans-for-shares" deal. *Id.* This series of rigged auctions is also at the center of the Russian Government's claims of tax evasion and corruption. *See id.*

25. *Id.* at 329–30. The sale of these assets has been called "one of the most shameful moments in post-communist Russia." *Id.*

reserves and a significant part of its oil, the Soviet petroleum industry was considered the “crown jewel” of Russia’s economy, with only minor shares being distributed to certain Kremlin “insiders” during the first wave of privatization.<sup>26</sup> Mikhail Khodorkovsky, one of Russia’s first millionaires, was able to acquire more than eighty percent of Yukos Oil Company through the “loans for shares” auctions.<sup>27</sup> Khodorkovsky, now the CEO of Yukos, initiated a major reorganization of the company that brought partially-owned subsidiaries under Yukos control, implemented a vertically organized management structure, and consolidated his personal control over the company against Russian and other foreign investors.<sup>28</sup> Russia’s tax code during the 1990s was complex and even contradictory, hindered further by corruption and a lack of transparency on the part of government officials.<sup>29</sup> During the first half-decade of its existence, Yukos underwent several periods of ownership restructuring and relocation in order to avoid tax burdens.<sup>30</sup>

By 1999, Khodorkovsky had consolidated his ownership of Yukos and earned a ruthless reputation for removing his opponents and becoming immensely wealthy in the process.<sup>31</sup> At that time, dissatisfaction with the corruption of the Yeltsin administration was widespread, and the Russian economy was suffer-

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26. *Id.* at 332.

27. *Id.* at 331.

28. *Id.*

29. *Id.* at 332.

30. One of Yukos chief financial officers, Arkady Zakharov, agreed to testify against his former bosses at Yukos during the PCA arbitration. Concerning the real relationship between Bank Menatep and Yukos, he testified:

As a rule, the companies that we serviced for Bank Menatep and ZAO Rosprom did not engage in active business operations nor employ any staff, but rather were used solely to move, hold, and conceal the fact that Menatep Group had interest in those assets. . . . Despite our status as directors of these companies, however, all decisions regarding the acquisition or sale of assets by the companies were made by the principals of the Menatep Group.

Yukos Universal Limited (Isle of Man) v. Russian Federation, UNCITRAL, PCA Case No. AA 227, Declaration of Arkady Vitalyevich Zakharov (Oct. 20, 2015).

31. Bean, *supra* note 3, at 332.

ing significantly after the Ruble devaluation and default of 1998.<sup>32</sup>

In May 2000, Putin called a meeting in the Kremlin with Russia's major oligarchs.<sup>33</sup> The substance of the meeting was a proposed deal: the oligarchs would not be prosecuted for the crimes that allowed them to amass their fortunes, but, in exchange, they would be obligated to reinvest part of their wealth in the Russian economy and stay out of politics.<sup>34</sup> This accommodation appeared to be successful through the early 2000s; nevertheless, Khodorkovsky's increasing involvement in politics, as well as a purported plan to sell a controlling stake of Yukos to Exxon Mobil, is thought to have prompted his arrest in 2003.<sup>35</sup> Following Khodorkovsky's arrest, bailiffs seized most

32. PIOTR DUTKIEWICZ, MISSING IN TRANSLATION: RE-CONCEPTUALIZING RUSSIA'S DEVELOPMENTAL STATE IN RUSSIA: THE CHALLENGES OF TRANSFORMATION 14 (D. Trenin & P. Dutkiewicz eds., 2011).

33. In a 2014 interview with *Time* magazine, former Putin ally and current London billionaire Sergey Pugachev related how himself and the other oligarchs were invited to their first meeting with newly-elected President Putin at the former dacha of dictator Joseph Stalin outside Moscow. *Time* relayed:

Putin's accession came as a surprise to Russia's big businessmen, who were nervous about the ex-KGB man's intentions. Pugachev says he persuaded Putin to meet them in summer 2000, a few months after his election. Putin had been reluctant, but eventually agreed, provided he could specify the venue. "I only found out about it two hours before the meeting," Pugachev recalls. "I rang up and asked, 'Where's the meeting? In the Kremlin, or where?' And he said: 'No, I've decided to do this informally.' The meeting was at Stalin's dacha. That was very symbolic."

Oliver Bullough, *Former Aide Says Putin Has No Strategic Plans*, TIME (Nov. 5, 2014), <http://time.com/3547935/putin-pugachev-oligarchs/>.

34. Thomas Land, *Putin Pursues Russia's Oil Oligarchs*, 285 CONTEMP. REV. 65, 70-71 (2004).

35. Leonid Nevzlin, former deputy head of Yukos, explained the Putin-Khodorkovsky rift in terms of a personal dispute; his candid interview at the Carnegie Center in 2005 shed some light on the otherwise mysterious falling-out between Russia's richest man and Russia's most powerful man:

Putin initially approved the Yukos-Sibneft-ChevronTexaco swap, which was projected to be the deal of the century. Khodorkovsky was given the authority to act and informed Putin on progress in monthly meetings. . . . In order to speed up the deal and make it more lucrative, Khodorkovsky entered into talks with Exxon Mobil. . . . During a trip to the U.S. in late September 2003, Putin was asked by the CEO of Exxon Mobil, Lee Raymond, whether he knew that

of Yukos’ assets in order to satisfy unpaid taxes, and these assets were acquired by the Russian state-controlled oil company, Rosneft, through a series of bids and transfers. Yukos Oil Company was dissolved in 2007, and Khodorkovsky remained in prison until 2013, when he was released by presidential pardon.<sup>36</sup>

## II. INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) AND THE STATUS OF THE YUKOS CASES

Although Yukos investors won a critical battle in the Hague, they face perhaps an even greater struggle ahead in trying to collect their spoils.<sup>37</sup> The unprecedented size of the PCA award alone has raised eyebrows and serious issues concerning the feasibility of enforcement.<sup>38</sup> There are also political considera-

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Exxon intended to acquire 51 percent of Yukos. Putin was furious and accused Khodorkovsky of lying. Soon after Khodorkovsky was arrested and the Kremlin alleged that it was opposed to a Yukos-Chevron deal from the beginning. Reportedly, German Gref told Putin that if the deal went through only Bill Gates would remain richer than Khodorkovsky; Putin replied that it was time to put Khodorkovsky in jail.

Leonid Nevzlin, *What does the Yukos Affair Mean for Russia?*, CARNEGIE MOSCOW CENTER (July 12, 2005), <https://carnegieendowment.org/2005/07/12/what-does-yukos-affair-mean-for-russia-event-796>. Nevzlin fled to Israel in 2007 after the collapse of Yukos and has been subsequently convicted of tax evasion, bribery, and murder. *Yukos Security Chief Gets 20 Years for Murder*, FIN. TIMES (Mar. 30, 2005), <https://www.ft.com/content/c7a9ffba-a107-11d9-95e5-00000e2511c8>.

36. Shaun Walker, *Mikhail Khodorkovsky Freed After Pardon From Vladimir Putin*, GUARDIAN (Dec. 20, 2013), <https://www.theguardian.com/world/2013/dec/20/mikhail-khodorkovsky-freed-putin-pardon-russia>.

37. Group Menatep Ltd. (GML) Executive Timothy Osbourne, in a 2014 interview with Forbes magazine, stated: “It’s going to take a long while to collect \$50 billion but there are assets out there. I can see it taking another ten years. We’ve stuck at this for ten years . . . and we’re not going to stop now.” Andrew Cave, *The Man Who Won \$50B From Russian President Vladimir Putin—And Now Has To Collect It*, FORBES (Aug. 8, 2014), <https://www.forbes.com/sites/andrewcave/2014/08/08/the-man-who-won-50-billion-from-russian-president-vladimir-putin-and-now-has-to-collect-it/#1fe57e237d02>.

38. Yukos’ market capitalization in 2003 has been calculated at US \$90 billion, and shareholders claimed before the PCA “no less than US \$117.174 billion” in damages. *Testimony of Mr. Tim Osborne*, Hearing Before The Sub-

tions that may ultimately block the enforcement of a meritorious award.<sup>39</sup> Finally, Russia has shown its willingness in the past to pursue an aggressive strategy of litigation to protect its assets abroad.<sup>40</sup> Regardless of their eventual outcome, the Yukos cases have already stretched the seams of ISDS jurisprudence, making some of the issues in the system stand out with greater relief, and perhaps offering a glimpse of issues to come.<sup>41</sup>

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committee On Domestic And International Monetary Policy, Trade, And Technology Of The Committee On Financial Services U.S. House Of Representatives One Hundred Tenth Congress First Session 5 (Oct. 17, 2007). Of this total, US \$6 billion was owed to American investors. *Id.*; see also the “Destruction of Yukos” page on his official website for CEO Mikhail Khodorkovsky’s calculation of damages to American investors, which is somewhat higher. *Destruction of Yukos*, KHODORKOVSKY.COM, <https://www.khodorkovsky.com/resources/destruction-of-yukos/> (last visited Sept. 15, 2019).

39. Should Yukos succeed in the courts, it may still be defeated in the legislature. For an overview of European legislative proceedings related to enforcement of the Yukos awards see Sebastiaan Barten & Marc Krestin, *State Immunity from Enforcement in The Netherlands: Will Creditors be Left Empty-Handed?* WOLTERS-KLUWER ARBITRATION BLOG (Apr. 25, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/04/25/state-immunity-from-enforcement-in-the-netherlands-will-creditors-be-left-empty-handed/>.

40. Dmitri Gololobov, once Deputy General Counsel for Yukos, observed:

The long fight in *NOGA* and *Sedelmayer* persuaded the Russian Federation to take proper care of legal protection of its foreign assets. It is difficult to give an accurate assessment of the assets belonging directly to Russia but their overall worth is highly unlikely to exceed several billion dollars. More than 95 percent of these assets are covered by state immunity. Any attempts to arrest the rest, which may be used for commercial purposes as was the case with the property in Sweden arrested by *Sedelmayer*, may result in prolonged legal battles in different jurisdictions with unpredictable outcomes and high legal costs.

Dmitri Gololobov, *The Prospect of Enforcement of Hague Arbitration Awards Against State-Controlled Companies in the United States and the United Kingdom*, 3 RUSSIAN L. J. 7, 10 (2015).

41. Simon Bushell and James Davies have stated:

[i]t is clear that . . . the claimants would face significant hurdles if they were to pursue the assets of Russia’s state-owned enterprises. If they do, there is little doubt that Rosneft and Gazprom will be very well prepared. . . . In any

The importance of enforcement in investor-state arbitration is not unique to Yukos, but Yukos provides a real-life *reduction ad absurdum* scenario in which the limits of enforcement jurisprudence have been tested and explored thoroughly. Arguably, this thorough examination has not only clarified, but actually modified, the doctrine of sovereign immunity in ISDS award enforcement. Accordingly, before exploring the unique issues raised or generated by the Yukos cases, it is necessary to first examine the background and development of ISDS.

### A. Development of ISDS

The network of multilateral and bilateral investment treaties (BITs) underpinning modern ISDS was developed as a tool for resolving investment disputes in the 1980s, and began a period of rapid growth in the 1990s.<sup>42</sup> During the Cold War, strong ideologies of socialism and nationalism led to a period of expansion of state sovereignty, perhaps best embodied by the nationalization of energy resources and extractive industries.<sup>43</sup> The existing rules of immunity favored states over private investors and, accordingly, there were few cases brought by investors under this investment-unfriendly system.<sup>44</sup> This state of affairs changed dramatically after the fall of the Soviet Un-

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event, it will provide an opportunity for further clarification of this increasingly important area of law.

Simon Bushell & James Davies, *Yukos Arbitration: The Difficulties of Enforcement*, UK PRAC. L. (Aug. 28, 2014), <https://uk.practicallaw.thomsonreuters.com/6-578-8425>.

42. By the end of the 1960s, only sixty-five BITs had been concluded. Antonio R. Parra, *ICSID and the Rise of Bilateral Investment Treaties: Will ICSID be the Leading Arbitration Institution in the Early 21st Century?*, 94 PROCEEDINGS OF THE ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 41 (April 5-8, 2000). As of 2017, this figure had grown to 3,322 (including TIPs and similar multilateral agreements). U.N. Conference on Trade and Development [UNCTAD], *World Investment Report 2018: Investment and New Industrial Policies*, U.N. Doc. UNCTAD/WIR/2018 (2018).

43. George Kahale III, *A Problem in Investor/State Arbitration*, 6 TRANSNAT'L DISP. MGMT. 1, 2 (Mar. 2009).

44. Prior to 1990, there was only one known treaty-based ISDS case. UNCTAD World Inv. Rep., *supra* note 42, at 92. Between 1990 and 2017, there have been an additional 845 cases. *Id.*

ion and the subsequent popularization of Washington Consensus-style market reforms.<sup>45</sup>

In both developing and industrialized nations, privatization became the ready answer for any economic malaise, and the potential for interstate investment grew accordingly.<sup>46</sup> With the growth of investment came the growth of protections for investors, as states signed on to investment treaties in order to attract foreign direct investment.<sup>47</sup> For states, this system had the effect of providing investors with valuable risk insurance against political change at the cost of significant disadvantages during arbitration proceedings.<sup>48</sup> As such, the system, although

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45. The term is used here with reference to its popularly-associated connection to neoliberal economic policies. See John Williamson, *The Washington Consensus as Policy Prescription for Development*, INST. FOR INT'L ECON. (Jan. 13, 2004), <https://piie.com/publications/papers/williamson0204.pdf>.

46. George Kahale, one of the foremost ISDS arbitration lawyers in the world, reflected that “[s]imply put, the prevailing view was that privatization was good and state control over industry was bad . . . from a legal perspective, this ideology was fortified by an absolutist view of the principle of *pacta sunt servanda* (sanctity of contracts).” Kahale III, *A Problem in Investor/State Arbitration*, *supra* note 43, at 3.

47. See Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 53 OSGOODE HALL L. J. 211 (2012).

48. States have the distinct disadvantage of nearly always filling the role of Respondent in ISDS cases, which impacts their preparedness and ability to litigate in important ways at the outset of any case. Kahale III, *A Problem in Investor/State Arbitration*, *supra* note 43, at 10. Firstly, states must hire counsel, perform legal research, gather evidence, and create a litigation strategy, all of which a claimant will presumably have had ample time to arrange on their own schedule. *Id.* This problem is sensibly magnified by the size of a given arbitration. *Id.* at 11. Secondly, states must meet the deadlines established in the applicable arbitration rules for the selection of an arbitrator: arguably the most important single decision a party can make in an arbitration. *Id.* at 10. This deadline may be as near as thirty days after receipt of an arbitration notice (e.g., the International Chamber of Commerce (ICC) or UN Commission on International Trade Law (UNCITRAL) rules), or as comparatively distant as ninety days (e.g. International Centre for the Settlement of Investment Disputes (ICSID) rules). International Chamber of Commerce, ARBITRATION RULES, art. 12 (2017), available at <https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf> [hereinafter ICC Rules]; United Nations Commission on International Trade Law [UNCITRAL], ARBITRATION RULES, art. 9 (2014), available at <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 38, opened for signature Mar.18, 1965, 17 U.S.T.1270, T.I.A.S.

not created by investors, generally produces results favorable to them<sup>49</sup> and has often been criticized on this ground.<sup>50</sup> Moreover, states are often ill-informed as to the potential exposure to liability resulting from the signing of BITs.<sup>51</sup> Making matters even more complicated for states is the prevailing doctrine that investors may structure their investments to take advantage of treaty arrangements with third-party countries, such as the Netherlands or Cyprus,<sup>52</sup> even absent any meaningful connection with the signatory state.<sup>53</sup> In recent years, a number of

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No. 6090, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. The main Yukos case at the PCA was conducted according to the UNCITRAL rules.

49. Looking at the totality of decisions on the merits, about sixty percent of all ISDS cases have been decided in favor of the investor and forty percent in favor of the state. See UNCTAD, *World Inv. Rep. 2018*, *supra* note 42, at 95; see also Howard Mann, *ISDS: Who Wins More, Investors or States?*, INV. TREATY NEWS (June 2015); but see George Kahale III, *Rethinking ISDS*, 5 TRANSN'L DISP. MGMT. 1, 9 (2018) (“A study showing, for example, that states win as many cases as they lose does not mean that the system is in perfect balance . . . if most of the cases never should have seen the light of day. . . .”)

50. See Kahale III, *Rethinking ISDS*, *supra* note 49, at 5 n. 20, quoting Vaughan Lowe, *Book Review of “Commentaries on Selected Model Investment Treaties,”* 30 ICSID REV. – FOREIGN INV. L. J. 276 (2015) (“to criticize a BIT on the ground that it only gives rights to investors is like criticizing a screwdriver for only being useful for attaching screws.”)

51. As an illustration of this problem, the former Attorney General of Pakistan admitted in an interview that his country signed BITs “without any negotiation or consideration of the consequences,” and that most of the treaties were signed because a dignitary was visiting a foreign country and the two governments “couldn’t think of any other document to sign,” and that a BIT “provides a good photo opportunity.” *Id.* at 1, quoting Alison Ross, *Former Pakistan AG Opens Up About Investment Treaties*, GLOBAL ARB. REV. (Jan. 17, 2011).

52. The Yukos shareholders have taken full advantage of this tactic, structuring their holdings through Gibraltar, Cyprus, and the Isle of Man. See Hulley Enters., PCA Case Repository AA 226, at xiv, ¶ 1. The Russian government has challenged the investors’ assertion that they are, indeed, “foreign” investors for the purposes of the ECT, despite being citizens of Russia. *Id.* ¶ 1294.

53. George Kahale reflected on the considerable capacity for abuse of investment treaties through restructuring, stating:

This is the investment law version of what tax lawyers used to call the ‘Dutch sandwich,’ referring to the practice of non-Dutch investors taking advantage of the vast network of Dutch tax treaties to structure investments in third countries through The Netherlands. With this mechanism, 2700 investment treaties are not really necessary, as one Dutch

states have taken steps to either withdraw from or limit their participation in multilateral investment treaties.<sup>54</sup>

These instances have not been limited to developing countries.<sup>55</sup> The Yukos case has been litigated in a legal environment that may have recently passed the “crest” of investor-friendly arbitration.<sup>56</sup> For those states that have chosen to remain within the system, one response to the imbalance in ISDS has been an increasing focus on the enforcement stage of arbitration, in which states retain an advantage.<sup>57</sup> This trend is significant and should not be discounted as an important background influence on the progression of the investors’ enforcement actions in the US and internationally.<sup>58</sup>

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treaty with the host state could suffice to cover investors from any country in the world. . . .

George Kahale III, *Is Investor-State Arbitration Broken?*, 7 TRANSNAT'L DISP. MGMT. 1, 10 (Oct. 2012).

54. Kahale notes of this recent trend:

In recent years, India, Indonesia, South Africa, Bolivia, Ecuador, and Venezuela have all taken steps to terminate investment treaties, some more radical than others, but all the result of frustration with treaties that did not fulfill the promise of increased foreign investment and seemed to bring nothing but headache and the risk of catastrophic awards.

Kahale III, *Rethinking ISDS*, *supra* note 49, at 3.

55. See, e.g., DAVID A. GANTZ, BAKER INST. FOR PUB. POL'Y, THE UNITED STATES-MEXICO-CANADA AGREEMENT: SETTLEMENT OF DISPUTE: REPORT (May 2, 2019), <https://www.bakerinstitute.org/media/files/files/d14a5a86/bi-report-050219-mex-usmca-3.pdf>.

56. 2017 marked the lowest number of international investment agreements (IIAs) concluded since 1983, and the very first year in which IIA terminations exceeded newly concluded agreements. UNCTAD, *World Inv. Rep. 2018*, *supra* note 42, at 88.

57. See Ivan Philippov, *Yukos Award – Beginning of a New Enforcement Saga*, CIS ARB. F. (Jun. 10, 2015), <http://www.cisarbitration.com/2015/06/10/yukos-award-beginning-of-a-new-enforcement-saga/>.

58. António Guterres, Secretary-General of the UN, stated in his introduction to the 2018 World Investment Report: “Global flows of foreign direct investment fell by 23 per cent in 2017.” UNCTAD, *World Inv. Rep. 2018*, *supra* note 42, at 92. Cross-border investment in developed and transition economies dropped sharply, while growth was near zero in developing economies. *Id.*

### B. Status of the Yukos Cases

In the wake of their 2014 award, Yukos proceeded to seek discretionary enforcement of the PCA award in several European and American courts.<sup>59</sup> These attempts to enforce the award are ongoing, but have so far been unsuccessful.<sup>60</sup> Shareholders’ claims have been rebuffed in the United Kingdom (UK) and France.<sup>61</sup> After several negative rulings by the Brussels Court of Appeal in February 2018, Yukos withdrew all attempts to pursue enforcement against Russia in Belgium.<sup>62</sup> Likewise, the Dutch Supreme Court ruled that foreign assets are protected by sovereign immunity, unless they are intended for non-governmental purposes, and thus cannot be attached for purposes of satisfaction or conservation.<sup>63</sup> Yukos cases have also been dismissed in Ireland and Sweden and stayed in the US.<sup>64</sup>

Yukos shareholders have initiated several parallel actions against the Russian Federation relating to the dissolution of Yukos and the arrest of Yukos managers.<sup>65</sup> These proceedings

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59. For an updated catalogue of the various avenues through which Yukos has diligently pursued compensation, see *Attempted Asset Seizures*, INT’L CENTRE FOR LEGAL PROTECTION, <https://www.yukoscase.com/court-actions/attempted-asset-seizures/> (last visited Sept. 15, 2019).

60. Russia recently announced that “[d]espite the Dutch court overturning the \$50bn awards, the Yukos oligarchs are still trying to ‘enforce’ their claims around the globe. Most have ground to a halt.” *Id.*

61. *Id.*

62. Yukos also desisted its efforts to attach Russian Government assets in Belgium. *Russia Says Yukos Will Not Pursue Brussels Enforcement Of Awards*, 32 MEALEY’S INT’L ARB. REP. 10 (2017).

63. Sebastian Barten & Marc Krestin, *State Immunity from Enforcement in The Netherlands: Will Creditors be Left Empty-Handed?*, WOLTERS-KLUWER ARB. BLOG (Apr. 25, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/04/25/state-immunity-from-enforcement-in-the-netherlands-will-creditors-be-left-empty-handed/>.

64. Through the International Centre for Legal Protection, the Russian government stated that “[t]hese developments follow other setbacks in recent weeks including the Yukos oligarchs’ withdrawal of their enforcement claims in Germany and India, indefinite adjournment of the Yukos enforcement claim in the UK. . . .” *Press Release from Russian Federation*, INT’L CENTRE LEGAL PROTECTION, <https://www.yukoscase.com/wp-content/uploads/2017/03/13-20161003-US-and-Dutch-court-decisions.pdf> (last visited Sept. 15, 2019).

65. Initially, there were three separate avenues through which shareholders sought redress: (1) in the European Court of Human Rights, related to the arrest of Yukos managers; (2) through the ICC in Moscow, as Yukos Capital

have taken place under various rules of investment arbitration,

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S.A.R.L. against state oil company Rosneft; and (3) though proceedings at the PCA in the Hague. Andrey Kotelnikov, *Yukos Case: Background and the Main Themes, Proceedings of the Energy Arbitration Conference*, SSRN ELECTRONIC LIBR. 1, 3 (2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2690245](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2690245). The last of these actions is most commonly referred to as the “Yukos case.” *Id.*; see also *Yukos Capital S.A.R.L. v. OJSC Rosneft Oil Company*, High Court of Justice, Queen’s Bench Division, Commercial Court, in *Y.B. COM. ARB.* Volume XXXVI (Jan van den Berg ed., 2011). Yukos pursued a parallel effort to collect additional monies from interest in England, resulting in a decision against Rosneft in 2014. Jonathan Kelly, Adam Grant & Marina Zarubin, *English Court Denies Application to Enforce Russian Arbitral Award Set Aside by Russian Courts*, KLUWER ARB. BLOG (Oct. 9, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/10/09/english-court-denies-application-enforce-russian-arbitral-award-set-aside-russian-courts/>.

In 2015, Rosneft announced that it had reached settlements with its remaining investor-claimants without disclosing the condition for these settlements. *Rosneft Reaches Settlement With Yukos Investors, Ends Legal Disputes*, 30 *Mealey’s Int’l Arb. Rep.* 13 (2015). It claimed that the settlement “will cease all legal arguments pending in The Netherlands, England, Russia, the United States and other jurisdictions.” *Id.* In Canada, a claim by Cyprus-based Luxtona Ltd. against the Russian Federation is currently suspended with respect to consideration on the merits as the PCA-administered tribunal in Toronto rules on a jurisdictional issue raised by Russia. Jerrod Hepburn, *Interim Award in Luxtona v. Russia Arbitration Comes to Light, Offering New Reasoning on Provisional Application of Energy Charter Treaty And Russia’s Attempted Denial of Benefits to this Yukos Shareholder*, *INV. ARB. REP.* (Jan. 4, 2018). Yet another claim by Yukos Capital against the Russian Federation is currently being litigated in the Swiss Supreme Federal Court, where in 2017 the tribunal most recently rejected a jurisdictional objection raised by Russia, which contended that the state was not bound by provisional application of the Energy Charter Treaty (ECT) since it had not ratified the instrument. Jerrod Hepburn, *Russia Turns To Canadian And Swiss Courts, Seeking To Set Aside A Pair Of Yukos “Second-Wave” Energy Charter Rulings – But Swiss Bid Is Deemed Premature*, *INV. ARB. REP.* (Aug. 10, 2017), available at <https://www.iareporter.com/articles/russia-turns-to-canadian-and-swiss-courts-seeking-to-set-aside-a-pair-of-yukos-second-wave-energy-charter-rulings-but-swiss-bid-is-deemed-premature/>. Finally, in June 2018, the Svea Court of Appeal of Stockholm set aside an award to certain Spanish investment funds (Spanish Funds) arising from an alleged breach of the Spain–USSR BIT on the grounds that the awarding tribunal lacked jurisdiction in accordance with the Swedish Arbitration Act. *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. (Spanish Investment Funds) v. The Russian Federation*, *Hovrätt [HovR]* [Court of Appeal of Svea] 2018-06-07 9294-12 (Swed.). The preceding list of claims does not include a considerably larger number of enforcement proceedings that have been imitated by various Yukos entities in response to the 2014 decision of the PCA or awards in other jurisdictions. *Id.*

including UN Commission on International Trade Law (UNCITRAL)<sup>66</sup> and International Chamber of Commerce (ICC)<sup>67</sup> rules. The largest of these actions was an arbitration initiated at the PCA in the Hague, in which the shareholders claimed damages of “no less than US \$114.174 billion” for violations of Russia’s obligations under the ECT.<sup>68</sup> In 2009 the PCA issued an interim award in favor of Yukos, and in 2014 reached a decision on the merits, awarding the shareholders US \$50 billion in damages.<sup>69</sup> Yukos shareholders subsequently initiated enforcement proceedings against Russia in the US,

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66. UNCITRAL produces a “comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations.” UN COMMISSION ON INTERNATIONAL TRADE LAW [UNCITRAL], ARBITRATION RULES (2014), *available at* <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>. The primary Yukos proceedings in the Hague were conducted according to the 1976 version of the UNCITRAL rules. *See* *Hulley Enters.*, PCA Case Repository AA 226, ¶ 10.

67. The ICC, Stockholm Chamber of Commerce (SCC), and International Centre for the Settlement of Investment Disputes, among others, all provide modal arbitral rules which parties can agree to apply in the case of investment disputes. *See* ICC Rules, *supra* note 48; ICSID Rules, *supra* note 48; SCC Rules *supra* note 48.

68. The PCA went to some length in the preamble to the 2014 Yukos award, which gives an idea of the unprecedented scale, not only of the Yukos awards, but of the arbitration itself. It began:

By any standard, and as will be seen, these have been mammoth arbitrations. At the highest, Claimants are claiming damages from Respondent of ‘no less than US\$ 114.174 billion.’ Since February 2005, the Tribunal has held five procedural hearings with the Parties and issued 18 procedural orders. In the fall of 2008, the Tribunal held a ten-day hearing on jurisdiction and admissibility in The Hague and, in November 2009, issued three Interim Awards, each over 200 pages. . . . The written submissions of the Parties span more than 4,000 pages and the transcripts of the hearings more than 2,700 pages. Over 8,800 exhibits have been filed with the Tribunal.

*Hulley Enters. Ltd. (Cyprus) v. The Russian Fed’n*, PCA Case Repository AA 226 (2014).

69. *Id.*

UK, France, Belgium, Germany, Ireland, Sweden, and other countries.<sup>70</sup>

### 1. Attachments Blocked in Europe

In France, Parisian courts blocked shareholders' efforts to attach the assets of RSCC Energia, a Russian rocket building company, as well as Sputnik News Agency and Roscosmos, ruling that the assets of legal entities separate from the Russian government cannot be used to satisfy government debts.<sup>71</sup> In 2016, the French government passed legislation significantly expanding the scope of sovereign immunity as applied to state assets abroad, applying an expansive interpretation of the protections provided by the UN Convention on the Jurisdictional Immunities of States and their Property (the "UN Convention").<sup>72</sup> Previously, France was one of the few countries that allowed interim measures of constraint against state property without prior authorization from a judge.<sup>73</sup> This legislation has effectively barred creditors from attaching state assets without an express waiver of immunity or consent from the state in question.<sup>74</sup> Belgium, too, has followed suit with a similar statute enhancing sovereign immunity.<sup>75</sup>

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70. See the updated statuses of each case at the Russian Government site. INT'L CENTRE FOR LEGAL PROTECTION, *supra* note 59.

71. Ben Knowles, *The US\$50 Billion Yukos Award Overturned – Enforcement Becomes A Game of Russian Roulette*, KLUWER ARB. BLOG (May 13, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/05/13/the-us50-billion-yukos-award-overturned-enforcement-becomes-a-game-of-russian-roulette/>.

72. In its report explaining this Section to the Parliament, the French government pointed out that "more generally, relating to the assets of foreign States, the conditions under which measures of constraints may be taken are specified: as provided for in the 2004 Convention, the State must have expressly consented to application of such measures. . . ." Fleur Malet-Deraedt, *The New French Legislation on State Immunities from Enforcement*, 36 ASA BULL. 332, 344 (2018), available at [www.kluwerlawonline.com/ASAB2018029](http://www.kluwerlawonline.com/ASAB2018029).

73. *Id.* at 3.

74. There may also be a diplomatic dimension to this legislation, which is explored by Malet-Deraedt's article:

[In 2016] Russia enacted a new law on Jurisdictional Immunities of a Foreign State and Property of a Foreign State . . . specifically, the Kremlin stated that "[t]he law envisages the possibility for a Russian Federation court to limit the jurisdictional immunity of a foreign State if it finds that the

The press has dubbed these pieces of legislation “the Yukos Laws,” for the apparently obvious connection they have with enforcement efforts in the Yukos case. In a 2016 ruling in the Netherlands, the Dutch Supreme Court held that foreign state assets cannot be the subject of conservatory or executory attachment without pre-authorization from the court.<sup>76</sup> Further, the court stated that, consistent with the UN Convention, the sovereign immunity granted to state assets by Article 19 of the UN Convention should be considered customary international law and thus applicable in the courts of the Netherlands.<sup>77</sup> Attachment efforts have been rejected for lack of jurisdiction in Sweden and Ireland.<sup>78</sup> Proceedings in the UK have been suspended, and Yukos has voluntarily abandoned its efforts to pursue assets in Germany.<sup>79</sup>

## 2. Award Overturned in the Hague

On April 20, 2016, the Hague District Court quashed the 2014 PCA award in its entirety on the grounds that Russia had not agreed to be bound by the arbitration provision of the ETC and the PCA thus lacked jurisdiction over the shareholders’ claims.<sup>80</sup> The Yukos arbitration was initiated in the Hague and litigated in accordance with PCA rules established by UNCITRAL.<sup>81</sup> Because the seat of arbitration is the Hague,

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*State in question offers the Russian Federation limited jurisdictional immunity’.*

*Id.* at 332 (emphasis in original). Unsurprisingly, the new Russian law was nicknamed in France the ‘Retaliation Act.’ *Id.* at 333.

75. *Russia Says Yukos Will Not Pursue Brussels Enforcement Of Awards*, 32 MEALEY’S INT’L ARB. REP. 10 (2017).

76. Gerard Meijer and Marike Paulsson, *National Report for The Netherlands*, in ICCA INT’L HANDBOOK ON COM. ARB., (Jan Paulsson & Lise Bosman eds., Supp. 2018).

77. Barten & Krestin, *supra* note 63.

78. *Irish Court Refuses Jurisdiction Over Enforcement Action Filed By Yukos*, 29 MEALEY’S INT’L ARB. REP. 7 (2014); *Swedish Court Finds Tribunal Lacked Jurisdiction Over Yukos-Related Arbitration*, 31 MEALEY’S INT’L ARB. REP. 6 (2016).

79. *See* Gololobov, *supra* note 40, at 10.

80. This was the first time in twenty years that the Hague Court overturned an arbitral award, which was twenty times larger than the next largest award in history, and would have amounted to twenty percent of the Russian Federation’s total annual budget. Knowles, *supra* note 71.

81. Hulley Enters., PCA Case Repository AA 226, ¶ 10, 13.

member states can now refuse to enforce the 2014 PCA award against the Russian Federation; however, the phrase “may be refused” indicates that the standard is discretionary.<sup>82</sup> Presently, Yukos is continuing to seek enforcement of the PCA judgment in France and the US, although the latter action has been suspended pending the resolution of Yukos’ appeal at the Hague Court of Appeals, which is projected to continue for up to five years.<sup>83</sup>

### III. SOVEREIGN IMMUNITY IN INTERNATIONAL JURISPRUDENCE

The Yukos cases are not the first instances of foreign investors attempting to enforce arbitral awards against Russia’s assets abroad. There were two highly publicized cases in the 1990s, in which aggrieved investors pursued Russian assets with varying degrees of success. While US courts are not bound by the foreign decisions connected with these cases, the parallels to Yukos’ efforts are so extensive that they may have significant persuasive value.

#### A. *The Sedelmayer Case*

In 1998, the Stockholm Chamber of Commerce (SCC) awarded US \$2.35 million to a German citizen, Mr. Franz Sedelmayer, on the basis of alleged violations of the 1989 USSR-FRG (Federal Republic of Germany) BIT.<sup>84</sup> Sedelmayer had been an early private investor in the Soviet Union, where his company provided equipment and security services to the Leningrad po-

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82. Article V(1)(e) of the 1958 New York Convention states:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority proof that . . . the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Convention on the Recognition and Enforcement of Arbitral Awards, Sept. 30, 1970, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter *New York Convention*] (emphasis added).

83. *Judge Stays Case Pending Appeal of Ruling Setting Aside Yukos Awards*, 31 MEALEY’S INT’L ARB. REP. 10 (2016).

84. Mr. Franz Sedelmayer v. The Russian Federation, SCC, Award, 118, July 7, 1998.

lice department.<sup>85</sup> When his investments were lost through a series of property transfers inside the Leningrad security apparatus, he pursued compensation at the SCC,<sup>86</sup> ultimately defending his claim successfully through the Svea Court of Appeals and up to Swedish Supreme Court.<sup>87</sup> The initial arbitral proceedings in Stockholm progressed quickly and concluded favorably for Sedelmeyer,<sup>88</sup> but the ease of obtaining his award was compensated by the extreme difficulty of its enforcement.<sup>89</sup> Following an extended saga of efforts to attach Russian government assets abroad, Sedelmeyer was ultimately able to collect around US \$6.8 million from the sale of certain government-owned properties in Cologne, Germany.<sup>90</sup> This was the

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85. Mr. Sedelmeyer entered into a joint venture with the Leningrad Internal Affairs Bureau, known as Kamenny Ostrov, purchasing real estate and equipment for promotion of the business. Yarik Kryvoi, *Chasing the Russian Federation*, CIS ARB. F. (July 13, 2011), <http://www.cisarbitration.com/2011/07/13/chasing-the-russian-federation/>. “In particular, he worked with the Deputy-Mayor of Saint Petersburg Vladimir Putin who later became Russian President. Mr. Sedelmeyer built up, trained, equipped and fully financed the FSB (formerly known as KGB) Counter Terrorist Team ‘GRAD’ for the 1994 Goodwill Games.” *Id.*

86. *Sedelmeyer*, SCC, Award (1998).

87. Franz J. Sedelmeyer v. The Russian Federation & Embassy of the Russian Federation, Högsta Domstolen [HD] [Supreme Court] 2011-07-01 Ö 170-10 (Swed.), <http://hogstodomstolen.old.domstol.se/Domstolar/hogstodomstolen/Avgoranden/2011/2011-07-01%200%20170-10%20Beslut.pdf>.

88. Damien Charlotin observed of the arbitral proceedings that “German businessman Franz Sedelmeyer’s claim against the Russian Federation was a model of efficiency – taking a mere two years to arbitrate, notwithstanding a stark divergence of views among the tribunal.” Damien Charlotin, *Looking Back: German Investor, Franz Sedelmeyer, Was Early-Adopter Of Investment Treaty Arbitration, But Had To Engage In Decade-Long Assets Hunt Against Russia*, INV. ARB. REP. (Aug. 29, 2017), <https://www.iareporter.com/articles/looking-back-german-investor-franz-sedelmeyer-was-early-adopter-of-investment-treaty-arbitration-but-had-to-engage-in-decade-long-assets-hunt/>.

89. “While Sedelmeyer was eventually able to track down enough assets to satisfy at least most of his award, it took nearly twenty years and reportedly 140 execution suits.” Brandon Rice, *States Behaving Badly: Sovereign Veil Piercing in the Yukos Affair*, SSRN ELECTRONIC LIBR. 1, 29 (Oct. 12, 2015), <https://ssrn.com/abstract=2673335>.

90. Accounting for interest compounding from the time of the award, this amount was still somewhat less than the total awarded at the SCC. Charlotin, *supra* note 88. Sedelmeyer’s victory also seems to have prompted a considerable counterclaim alleging that Sedelmeyer owes US \$65 million to Russia in back taxes related to his defunct joint venture. *Id.*

first, and so far only, case where a building currently used as a trade mission by Russia was not considered immune from attachment, making Sedelmayer arguably the most successful litigant to date in pursuing Russia's foreign assets.<sup>91</sup>

For the better part of twenty years, Sedelmayer diligently pursued Russia's assets abroad in almost every imaginable form, including payments by Lufthansa for overflights of Russian territory, value-added tax refunds to the Russian embassy in Germany, models of satellites belonging to Roscosmos during the international aerospace show, and even a TU-204-300 jet displayed at the 2006 International Space Exhibition.<sup>92</sup> With the exception of the aforementioned property in Cologne and a parallel ongoing matter in Sweden,<sup>93</sup> all of these efforts were blocked by the application of either diplomatic or sovereign immunity.<sup>94</sup>

The 2011 Swedish Supreme Court decision in Mr. Sedelmayer's favor explored the extent of the application of sovereign immunity to state assets in some detail. Asserting that the principle of sovereign immunity over state property is an essential consequence of the equality of states, the court looked to the UN Convention as a codification of customary international law.<sup>95</sup> Specifically, the court looked to Article 19 of the Convention<sup>96</sup> for rules governing the post-judgment attachment of

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91. The Russian Federation rented flats in the building to individuals and companies that were not working for the trade mission. Kryvoi, *supra* note 85. The occupiers included ten Swedish nationals and two Swedish companies that had the mission's address as their official business addresses. *Id.*

92. *Id.*

93. While initially Sedelmayer managed to get a decision in his favor in the Swedish Supreme Court and started the auction proceedings for the sale of a trade office in Stockholm, the process was later delayed by new court cases, and at present, the building remains unsold, perhaps because of a dearth of willing buyers. Charlotin, *supra* note 88.

94. Kryvoi, *supra* note 85.

95. The court stated that "[i]t has been viewed as a bigger intrusion in a state's sovereignty to subject its property to distraint than subjecting the state to the jurisdiction of foreign courts." *Sedelmayer*, Högsta Domstolen 2011-07-01 Ö 170-10, ¶ 9.

96. Article 19 of the Convention, entitled State Immunity From Post-Judgment Measures Of Constraint, reads:

No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of

state assets.<sup>97</sup> The court focused on the interpretation of Article 19, sub-point (c) of the Convention as dispositive in determining whether foreign assets may be subject to an exception from sovereign immunity.<sup>98</sup> The court ultimately concluded that a property that is owned by a state, but that is mainly used for purposes that are unofficial in nature, is not protected from attachment by sovereign immunity.<sup>99</sup> Although US courts are not constrained to follow the UN Convention, they are likely to be influenced by its application in Sweden and elsewhere as a matter of customary international law.<sup>100</sup>

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another State unless and except to the extent that: [a state has consented to this attachment, or] it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

UN Convention, *supra* note 9, art. 19.

97. The court noted that the UN Convention was “largely—but not entirely—a codification of customary law,” and that it should be incorporated into Swedish law despite the fact that the Convention had not yet entered into force at the time of the decision. *Sedelmayer*, Högsta Domstolen 2011-07-01 Ö 170-10, ¶ 12.

98. The court stated that “property . . . specifically in use or intended for use by the State for other than government non-commercial purposes.” *Id.* ¶ 13

99. The court stated that, “[i]n the light of the above, it is clear that the property . . . was not to a substantial part used for the official purposes of the Russian Federation, [and] has not otherwise been of such specific nature as to grant the property immunity from enforcement in the present enforcement matter.” *Id.* ¶ 23.

100. The Report prepared for the Special Representative of the UN Secretary General for business and human rights assessed the impact of the Convention in its current form, stating that:

[s]tate immunity, being concerned with inter-State relations, is . . . a doctrine of public international law. Accordingly, its ambit was and, for the time being at least, remains a matter of customary international law. In other words, its content is to be derived primarily from the custom and practice of States.

*B. The NOGA Case*

In early 1991, Swiss investor Nessim Gaon arranged a loan to the Russian government through his company, NOGA, for the importation of various agricultural products.<sup>101</sup> After the fall of the Soviet Union later that year, the newly-formed Russian Federation ceased making oil shipments, which were expected as repayment of the loan.<sup>102</sup> NOGA subsequently prevailed in an arbitration against the Russian Federation at the SCC and initiated enforcement proceedings in the US, Switzerland, and France.<sup>103</sup>

In 2000, NOGA persuaded French authorities to impound the *Sedov*, the world's largest sailing ship, as it lay in the harbor at Brest.<sup>104</sup> At the 2001 Paris Air Show, two Russian MiG and Sukhoi fighter jets actually flew away to escape a similar seizure by French police.<sup>105</sup> In both instances, Paris courts held that military assets were subject to sovereign immunity and could not be seized without state consent.<sup>106</sup> NOGA also successfully attached bank accounts connected to Russia's United Nations Educational, Scientific, and Cultural Organization (UNESCO) mission in France, as well as the account of the Russian Embassy.<sup>107</sup> The Paris Court of Appeal lifted these attachments on the grounds that they were protected by diplomatic immunity, even though the Russian government had

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<https://www.businesshumanrights.org/sites/default/files/media/bhr/files/Clifford-Chance-State-immunity-state-owned-enterprises-Dec-2008.PDF>.

101. *Russia Confident Noga Will Not Get Seized Assets*, REUTERS (Jan. 23, 2008), <https://www.reuters.com/article/noga-assets/russia-confident-noga-will-not-get-seized-assets>.

102. *Compagnie Noga d'importation et d'exportation S.A. (Switzerland) v. The Russian Federation*, 361 F.3d 676, 679 (2nd Cir. 2004).

103. *Id.* at 679. NOGA was initially awarded US \$27 million. *Id.* at 680.

104. The ship had initially been captured from Germany in 1945 and used as a training ship for the Russian Navy; it is currently owned by Murmansk State Technical University. *Seized Russian Ship Sets Sail*, BBC (July 24, 2000), <http://news.bbc.co.uk/2/hi/europe/849455.stm>.

105. Jon Henley, *Russian Jets Flee Seizure in Paris*, GUARDIAN (June 22, 2001), <https://www.theguardian.com/business/2001/jun/23/5>.

106. *NOGA*, 361 F.3d at 669.

107. *See Embassy of the Russian Federation in France v. Permanent Delegation of the Russian Federation at UNESCO, Commercial Bureau of the Russian Federation in France v. Compagnie NOGA d'Importation et d'Exportation*, Cour d'Appel du Paris, civ., Aug. 10, 2000, in Y.B. COM. ARB. Volume XXVI (Jan van den Berg ed., 2001), <http://www.kluwerarbitration.com/document/ipn22917>.

previously waived its jurisdictional immunity.<sup>108</sup> In Switzerland, NOGA succeeded in seizing Russian paintings insured at more than US \$1 billion, but only for a single day.<sup>109</sup> The paintings, on loan from the Pushkin State Museum of Fine Arts of Moscow, included the works of Manet, Renoir, and Cézanne, on exhibition in Martigny.<sup>110</sup> The Federal Council of Switzerland immediately reversed the grant of the lower courts, stating that national cultural goods were considered public property under international law and thus could not be confiscated.<sup>111</sup>

In the US, NOGA primarily pursued enforcement of its SCC award in the Western District of Kentucky, chosen because of the large grain shipments to Russia that pass through the jurisdiction along the Ohio and Mississippi rivers.<sup>112</sup> Western Kentucky is also home to the US Department of Energy’s highly enriched uranium (HEU) processing facility, which is the storage location for much of Russia’s enriched uranium stockpile.<sup>113</sup> In 2000, NOGA filed a petition to seize the stockpile, prompting Russia to suspend shipments of uranium to the US.<sup>114</sup> President Bill Clinton responded by blocking the attachment by executive order.<sup>115</sup> The remaining Kentucky sei-

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108. Dmitri Davydenko, *Russia Losing Battles but Winning Wars with Foreign Investors: Cases Overview*, CIS ARB. F. (June 22, 2016), <http://www.cisarbitration.com/2016/06/22/russia-losing-battles-but-winning-wars-with-foreign-investors-cases-overview/>.

109. Steven Lee Myers, *Swiss Businessman Tries to Seize Art in a Dispute with Russia*, N.Y. TIMES (Nov. 17, 2005), <https://www.nytimes.com/2005/11/17/world/europe/swiss-businessman-tries-to-seize-art-in-a-dispute-with-russia.html>.

110. *Id.*

111. *Fédération de Russie v. Commission de Surveillances des Offices des Poursuites et des Faillites du Canton de Genève*, Federal Council of Switzerland, case 7B.55/2006 (Sept. 21, 2006), <http://www.kluwerarbitration.com/document/ipn27200?q=%22NOGA%22> (available in French).

112. Philipp Bleek, *Clinton Protects Russian ‘HEU Deal’ Assets*, ARMS CONTROL, <https://www.armscontrol.org/print/705> (last visited Jan. 11, 2019).

113. Under the terms of the 1993 US-Russia HEU Agreement, the US government committed to purchase five hundred metric tons of weapons-grade uranium from Russia over a twenty year period. *Id.* This uranium, sourced from dismantled Soviet nuclear weapons, is shipped to a processing facility in Paducah, Kentucky, where it is processed for use in civil nuclear energy. *Id.* To date, the US has committed more than US \$12 billion toward converting Russia’s weapons stockpile for peaceful uses. *Id.*

114. *Id.*

115. Exec. Order No. 13159, 3 C.F.R. 1429 (2000).

zures were eventually consolidated with another action by NOGA against Russian deposits in New York banks, which NOGA appealed to the US Court of Appeals for the Second Circuit.<sup>116</sup> Although the court did not explore the effect of sovereign immunity on the particular commercial activities in question, it nevertheless affirmed the continuing applicability of international standards to enforcement questions in US courts.<sup>117</sup> All of NOGA's efforts to enforce its SCC award in the US were ultimately rejected on appeal.<sup>118</sup>

#### IV. SCOPE OF SOVEREIGN IMMUNITY UNDER THE FSIA

The FSIA<sup>119</sup> determines when US courts may assert authority over foreign states and their property.<sup>120</sup> The statute gives

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116. *NOGA*, 361 F.3d at 678.

117. On appeal from Southern District of New York, the Second Circuit was faced with the issue of whether the Russian government could be considered a juridical entity distinct from the Russian Federation and, accordingly, whether the Russian Federation could be held liable for the debts of the government. *Id.* at 677. The court considered the separate standards of federal common law, Russian domestic law, and public international law, concluding that under all three standards, a state and its government are not separate entities. *Id.* at 683

118. *Id.*

119. In *Gibbons v. Udaras na Gaeltachta*, the court commented that the FSIA of 1976 was "[a] statutory labyrinth that, owing to the numerous interpretative questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary." *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1105 (S.D.N.Y. 1982).

120. The legislative history of the FSIA shows that the statute is intended to preempt any other state and federal legislation concerning sovereign immunity, establishing a "sole and exclusive" standard in line with international norms. H.R. Rep. No. 94-1487, 1398 at 1402 (1976). The Supreme Court has confirmed this interpretation, stating that "immunity is granted in those cases involving violations of international law that do not come within one of the FSIA's exceptions." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

The legislative report is replete with references to international law standards, and it makes clear that the FSIA was formulated to depoliticize determinations of state immunity by removing the question from the State Department, which had previously made such decisions, and placing them exclusively before the courts. See H.R. Rep. No. 94-1487 (1976). For a more detailed description of the evolution of sovereign immunity in US law, see Sandra Engle, *Choosing Law for Attributing Liability under the Foreign Sovereign Immunities Act: A Proposal for Uniformity*, 15 *FORDHAM INT'L L.J.* 1060, 1070 (1991).

states total immunity from suit and prohibits any attachment or arrest of state property, subject only to certain exceptions.<sup>121</sup> Claimants seeking to enforce an arbitration award in the US have the burden of demonstrating that the debtor state is not jurisdictionally immune and that its assets are not immune from seizure.<sup>122</sup> As a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), the US is required under international law to recognize arbitral awards as binding and enforce them in US courts.<sup>123</sup> Therefore, if Yukos pursues enforcement of its PCA award in the US, its main challenge will be to show that Russia’s assets are not subject to immunity from execution.<sup>124</sup>

#### A. *Exceptions to the Immunity from Attachment or Execution*

Section 1610 of the FSIA enumerates the exceptions under which a foreign state’s property may be subject to attachment in US courts.<sup>125</sup> The most pertinent exception for arbitration creditors is § 1610(a)(6), which reads:

The property in the United States of a foreign state . . . shall not be immune from attachment in aid of execution, or from execution upon a judgement, [if] . . . (6) the

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121. Sections 1604–05 of the statute govern immunity from jurisdiction, while sections 1609–10 govern immunity from attachment. Both sections are structured such as to provide total protection, by default, to foreign states, and then enumerate specific exceptions. 28 U.S.C. §§ 1604–05.

122. Molly Steele & Michael Heinlen, *Challenges to Enforcing Arbitral Awards Against Foreign States in the United States*, 42 INT’L LAW. 87, 88 (2008).

123. Since acceding to the New York Convention in 1970, US courts have consistently recognized and domesticated foreign arbitral awards. See Joseph T. McLaughlin & Laurie Genevro, *Enforcement of Arbitral Awards under the New York Convention - Practice in U.S. Courts*, 3 INT’L TAX & BUS. LAW. 249, 249 (1986). Article V of the New York Convention provides only seven grounds for refusing recognition of an award, such as improper notice or composition of the original arbitral tribunal, and the burden of proof is on the party wishing to block recognition. *Id.* The Convention has been incorporated into US domestic law through the Federal Arbitration Act (FAA). 9 U.S.C. §§ 201 – 208 (1925); New York Convention, *supra* note 82.

124. Even if the set-aside of the PCA award at the Hague is confirmed, US courts may still recognize Yukos’ award, as the set-aside exception in the New York Convention is discretionary. See Knowles, *supra* note 71.

125. 28 U.S.C. § 1610.

judgment is based on an order confirming an arbitral award rendered against the foreign state. . . ."<sup>126</sup>

This provision has received little attention from US courts or legislators,<sup>127</sup> but caselaw suggests that the holder of an arbitral award has no additional burden to show the applicability of § 1610(a)(6) beyond producing the award itself.<sup>128</sup> This burden is identical to that imposed by the New York Convention,<sup>129</sup> which is considered a low barrier for claimants.<sup>130</sup>

### *B. Agency or Instrumentality of a Foreign State*

The FSIA grants immunity from enforcement not only to states, but to the "political subdivisions, agencies or instrumentalities" of states.<sup>131</sup> The exceptions provided to this immunity are also applied to these agencies or instrumentalities; in this

126. *Id.*

127. There is no discussion of this provision in the legislative report on the FSIA. H.R. Rep. No. 94-1487, at 1398 (1976).

128. In *Libancell S.A.L. v. Republic of Lebanon*, the court wrote that a private creditor would be entitled to post-judgement recognition of an arbitral award against Lebanon under § 1610(a)(6) without any additional conditions. Attachment was not granted because the complainant had applied pre-judgement. *Libancell S.A.L. v. Republic of Lebanon*, U.S. Dist. LEXIS 29442 (S.D.N.Y. 2006). In *Suraleb, Inc. v. Prod. Ass'n "Minsk Tractor Works,"* a debt collector was allowed to domesticate its arbitration award against Belarus under § 1610(a)(6). *Suraleb, Inc. v. Prod. Ass'n "Minsk Tractor Works,"* 2008 U.S. Dist. LEXIS 7354 at 5 (N.D. Ill. 2008). The court stated simply that, "[b]ecause this judgment was based on an order confirming an arbitral award and concerns property used for commercial activity in the United States, the judgment falls within the § 1610(a) exception." *Id.* This was the entirety of its analysis. *Id.* In *Solgas Energy Ltd. v. Fed. Gov't of Nigeria*, the court held that the property of the Federal Government of Nigeria (FGN) could be attached by a garnishee "based on the order confirming the international arbitral award" from a lower court, citing 28 U.S.C. § 1610(a)(6). *Solgas Energy Ltd. v. Fed. Gov't of Nigeria*, 2010 U.S. Dist. LEXIS 72326 1, 6 (S.D. Tex. 2010). Finally, in *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, the court recognized that assets belonging to *Petróleos de Venezuela (PDVSA)*, a Venezuelan petroleum company, could be attached by a complainant because Venezuela did not dispute the existence of a valid arbitration award against it. *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 333 F. Supp. 3d 380, 416 (D. Del. 2018).

129. Article IV requires only that a party applying for recognition of an arbitral award should provide an authenticated copy of the award, along with a translation if necessary. New York Convention, *supra* note 82, art. IV.

130. McLaughlin & Genevro, *supra* note 123, at 249.

131. 28 U.S.C. § 1603.

way, a state cannot prevent enforcement of awards against it by simply cloaking its activities in a corporate or other ostensibly non-governmental form.<sup>132</sup> In order to seize the assets of a foreign company to satisfy an arbitral award against a state, a complainant must first demonstrate that the company qualifies as an agency or instrumentality of that state under § 1603 of the FSIA.<sup>133</sup> This showing has two main requirements: (1) that the company is a separate legal person, and (2) that the state holds the majority of ownership interests in the company.<sup>134</sup>

The first criterion is fulfilled by showing that the company can sue or be sued in its own name, as well as enter into contracts and hold property.<sup>135</sup> To distinguish the agents and instrumentalities of the state from organs of the state, which might also have a corporate form, US courts have considered whether the activity of foreign companies is primarily governmental or commercial.<sup>136</sup> When foreign entities are given a corporate form, courts have accorded them a strong presumption

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132. As the Supreme Court stated in its seminal decision on sovereign immunity for foreign corporations: “The corporate form will not be blindly adhered to where doing so would cause an injustice. . . . To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises.” *First Nat’l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 611 (1983) [hereinafter *Bancec*]. The Court held that the national bank of Cuba could not avail itself of sovereign immunity as an organ of a foreign state, while simultaneously insulating the Cuban government from liability through its separate legal status. *Id.* The Court also explored the important determination of whether an agent or instrumentality can be considered the “alter ego” of the state for liability purposes, which is a complex substantive topic not discussed in this Note. *Id.*

133. 28 U.S.C. § 1603.

134. 28 U.S.C. § 1603(b)(1); 28 U.S.C. § 1603(b)(2).

135. H.R. Rep. No. 94-1487, at 1406 (1976).

136. In *Transaero, Inc. v. La Fuerza Aerea Boliviana*, the court explored the difference between an organ of the state, which is treated as the state itself, and an agency or instrumentality. *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151–53 (D.C. Cir. 1994). It confirmed that the categorical approach, which looks to commercial versus government activity, was the best expression of the Supreme Court’s interpretation of the “restrictive theory” codified in the FSIA. *Id.* at 151. Under this approach, the court held that the Bolivian Air Force was an organ of the state, not an agency or instrumentality. State organs have been accorded greater protection than separate state-controlled entities. *Id.* at 154.

of separate status,<sup>137</sup> such that most state-owned enterprises will fulfill the "separate legal person" requirement.<sup>138</sup>

The second criterion is fulfilled by showing that the majority of shares of a company are owned by a foreign state.<sup>139</sup> This ownership may be either by the state itself, or through some political subdivision of the state.<sup>140</sup> In *Dole Food Co. v. Patrickson*, the Supreme Court held that only the government's direct ownership of shares, rather than ownership through a majority holding in one or several parent companies, is the correct test for majority ownership.<sup>141</sup> While there are circumstances where courts may elect to bypass the *Dole* test,<sup>142</sup> they are generally reluctant to do so except where there is strong evidence that the corporate form is being deliberately manipulated to shield a state from liability.<sup>143</sup> The second criterion may also be met by demonstrating that a company is in fact an organ of the state, but this designation has only been applied to companies which have primarily governmental, rather than commercial functions.<sup>144</sup> The definition of a "political subdivision" has likewise been interpreted by the courts to encompass government min-

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137. *Bancec*, 462 U.S. at 627.

138. Clifford Chance LLP, *supra* note 100, at 5.

139. H.R. Rep. No. 94-1487, at 1406 (1976).

140. The legislative report provides some examples, stating that a number of different organizational forms might be recognized as agents or instrumentalities for the purposes of the statute, including "a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency, or a department or ministry which acts and is suable in its own name." *Id.* at 1406.

141. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003).

142. The *Dole* court characterized these instances as a "rare exception" to the general rule applied in *Bancec* that foreign entities established independently from the government are presumed to be separate. *Id.* at 475.

143. In *Dole*, the Court applied the presumption of separateness to the Dead Sea Companies, which were owned by a series of subsidiary companies, the parent of which was majority owned by Israel. *Id.* The court held that, because the language of § 1603(a) uses "ownership" without including any qualifiers about "direct or indirect ownership," the purpose of the FSIA was only to grant agency status to entities directly owned by foreign governments, not their subsidiaries. *Id.*

144. *See, e.g.,* EOTT Energy Operating Ltd. P'Ship v. Winterthur Swiss Ins. Co., 257 F.3d 992, 997 (9th Cir. 2001) (where the Ninth Circuit remanded a lower court determination that an Irish state insurance company was not an "organ" of the state of Ireland because of the commercial nature of its activities).

istries and agencies,<sup>145</sup> and the legislative history states that it “includes all governmental units beneath the central government.”<sup>146</sup> Therefore, if a successful arbitration creditor can demonstrate majority ownership of a foreign company’s shares by a state or its subdivisions, that company will most likely be subject to the FSIA and fall under the § 1610(a)(6) sovereign immunity exception.<sup>147</sup>

## V. ANALYSIS

If Yukos moves to attach Russia’s space assets, US courts will look to the FSIA to determine whether to accord these assets sovereign immunity.<sup>148</sup> However, as the court recalled in *Bancec*, “[t]he expropriation claim . . . arises under international law, which, as we have frequently stated, ‘is part of our law. . . .’”<sup>149</sup> Further, the legislative history specifically states that the FSIA was drafted “to bring US practice into conformity with that of most other nations.”<sup>150</sup> Accordingly, courts may take into account both domestic and international jurisprudence when determining whether to accord sovereign immunity to Russia’s space assets.

There is little question that Yukos will be able to assert an exception to § 1609 of the FSIA because it is currently in pos-

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145. See *O’Connell Machinery Co. v. M.V. “Americana,”* in which the court held that a maritime holding company under direct control of an Italian public financial entity was a political subdivision of Italy, despite the fact that the Italian government had chosen to “double tier” its administrative agencies by making one subsidiary to another. *O’Connell Mach. Co. v. M.V. “Americana,”* 734 F.2d 115 (2d Cir. 1984). While the Supreme Court in *Dole* would later reject “tiering” ownership for the purposes of determining agency or instrumentality status, it never reached the issue of whether subsidiary ownership affects the status of political subdivisions. *Id.* See also *Chettri v. Nepal Bangl. Bank, Ltd.*, 2014 U.S. Dist. LEXIS 122731 (S.D.N.Y. 2014) (in which the court held that Nepal’s Department of Revenue investigation was a political subdivision of the Nepalese government, despite its status as a sub-department in the Department of Finance).

146. H.R. Rep. No. 94-1487, at 1406 (1976).

147. Gololobov, *supra* note 40, at 22.

148. H.R. Rep. No. 94-1487, 1398, at 1404 (1976).

149. *Bancec*, 462 U.S. at 623. The court further stated that, “the principles governing this claim are common to both international law and federal common law.” *Id.*

150. See H.R. Rep. No. 94-1487, 1398 (1976). The report concluded that “[i]n virtually every country, the United States has found that sovereign immunity is a question of international law to be decided by the courts.” *Id.*

session of a bona fide arbitral award against Russia.<sup>151</sup> US courts are bound by the New York Convention to recognize this award and may recognize it even if the award is ultimately overturned in the Hague.<sup>152</sup> This jurisdictional exception is also mirrored in Article 17 of the UN Convention.<sup>153</sup> United Launch Alliance (ULA) and Orbital ATK purchase the RD-180/181 engines for commercial satellite launches, which fulfils the “commercial activity” qualifier in both provisions.<sup>154</sup> Additionally, Yukos should have little difficulty showing that Energomash is a separate legal entity, as required by FSIA § 1603(b)(2), because Energomash is a corporation that follows the formalities of corporate structure and governance.<sup>155</sup> Despite the “re-nationalization” of Russia’s space sector, Energomash retains an independent board of directors and manages its own business with surprisingly little government oversight.<sup>156</sup>

Yukos will have more difficulty demonstrating that Energomash is an “agency or instrumentality” of the Russian government. Both the UN Convention and the FSIA provide excep-

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151. In line with the court’s decisions in *Libancell*, *Suraleb*, and *Crystallex*, any inquiry into the legitimacy of the arbitration should be very minimal, and the courts are not likely to challenge the validity of the PCA.

152. New York Convention, *supra* note 82.

153. The provision reads: “If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State. . . .” UN Convention, *supra* note 9, art. 17.

154. ULA also uses the RD-180 on Atlas launches of National Reconnaissance Office (NRO) spy satellites, but it accounts separately for engines used in military and non-military launches. Bodner, *supra* note 12. Both the FSIA and UN Convention grant complete immunity to military assets. New York Convention, *supra* note 82.

155. *Bancec*, 462 U.S. at 627.

156. Formed in 1931 as an independent design bureau (the corporate form did not exist in the Soviet Union), Energomash operated separately from the other design bureaus. See NPO Energomash, <https://engine.space/eng/about/history> (last visited Nov. 10, 2019). Energomash produced the engines used to launch the first artificial satellite (Sputnik), as well as those that carried the first man into space in 1961. *Id.* The company has maintained its independent governance and structure despite the acquisition of the entirety of its shares by the government-owned Unified Rocket and Space Corporation (ORKK) in 2015. NPO Energomash, <https://engine.space/about/> (last visited Nov. 10, 2019). Details about Energomash’s corporate structure and history are available on the main page of their website. *Id.*

tions to sovereign immunity for agencies and instrumentalities, but the standard under the UN Convention is friendlier to claimants.<sup>157</sup> Yukos could claim that, because Energomash is ultimately one hundred percent owned by the Russian government, it easily passes the *Dole* test of majority state ownership.<sup>158</sup> The ownership structure of Energomash, however, can be distinguished from the “direct control” required by *Dole*; indeed, the tiers of holding agencies that control Energomash<sup>159</sup> somewhat resemble those of the Dead Sea Companies in *Dole*.<sup>160</sup> The UN Convention has no requirement for direct or indirect control, and it states that agencies or instrumentalities will only be afforded immunity for their actions performed while “acting in the capacity of the sovereign.”<sup>161</sup> Nevertheless, a US lower court will still be bound by the Supreme Court’s holding in *Dole*.<sup>162</sup>

An alternate approach for Yukos would be to argue that, because Energomash’s majority shareholder, ORKK, is best characterized as a “political subdivision” of the Russian government, the government does, in fact, have direct control over Energomash’s majority shares.<sup>163</sup> This approach was applied by

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157. The official commentary prepared by the ILC on its 1991 Draft Articles on Jurisdictional Immunities states that “[s]tate enterprises or other entities are presumed not to be entitled to perform governmental functions, and accordingly, as a rule, are not entitled to invoke immunity. . . .” U.N. International Law Commission, Draft Articles on Jurisdictional Immunities of States and Their Property, art. 2, ¶ 15, U.N. Doc A/46/10 (1991).

158. On this point, the FISA commentary reads: “If such entities are entirely owned by a foreign state, they would of course be included in the definition.” H.R. Rep. No. 94-1487, at 1406 (1976).

159. Energomash stock is fifty-two percent owned by ORKK, the successor to the Roscosmos space agency, while forty-five percent is owned by State Space Corporation Roscosmos, and the remaining three percent is owned by the Russian Federation as State Space Corporation Roscosmos. NPO ENERGMASH, *supra* note 156.

160. *Dole*, 538 U.S. at 477.

161. UN Convention, *supra* note 9, art. 12.

162. The principle of *stare decisis* applies here, where lower courts must follow the holdings of higher courts. *See Stare Decisis*, BLACK’S LAW DICTIONARY (10th ed. 2014).

163. Although ORKK is the successor to the Roscosmos Federal Space Agency, which was eliminated by presidential decree in 2015, it is now entirely owned by the holding company, State Space Corporation Roscosmos. ROSCOSMOS, <https://www.roscosmos.ru/219/> (last visited Jan. 9, 2019). This latter entity is headed by Dmitri Rogozin, the former Deputy Prime Minister and head of Russia’s defense industry, and it is described as a “state corpora-

the court in *Filler v. Hanvit Bank* as an alternative to the “tiering” rejected in *Dole*, and it might be all the more appropriate in the present case because Energomash is entirely owned by the Russian government, so there is no issue of dilution of government control.<sup>164</sup> The *NOGA* court, when confronted with the status of the Russian government as a separate entity from the state, considered international law standards to resolve that novel question,<sup>165</sup> and the issue presented by Yukos would be similar. Following *Bancec*, the court would also need to consider equitable factors when determining agent or instrumentality status.<sup>166</sup> These cut strongly in favor of Yukos, as allowing states to reclassify agencies as corporations to avoid all liability would undermine the purpose of sovereign immunity.<sup>167</sup> In this case, designating ORKK as separate from the government would imply that Russia, which runs the world’s only human spaceflight program, has no national space agency.<sup>168</sup>

The *Sedelmayer* cases suggest that courts are willing to attribute agency status to state-owned entities like Energomash when equity requires it, and that the property of such entities engaged in commercial activities abroad will be subject to attachment.<sup>169</sup> Further, international jurisprudence suggests

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tion which realizes the policies of the Russian government in the space sector.” *Id.*

164. The court in *Filler v. Hanvit Bank* seemed to express the concern best, noting that majority government ownership of one company could create an infinite number of tiers of “state” companies because the recursive definition of “agency or instrumentality” in the FSIA would grant each company, in turn, the status of a state, allowing for perpetually diminishing levels of actual state control. *Filler v. Hanvit Bank*, 378 F.3d 213, 218 (2d Cir. 2004).

165. *NOGA*, 361 F.3d at 679.

166. *Bancec*, 462 U.S. at 631.

167. *Id.*

168. NASA currently purchases seats on Russian-made Soyuz rockets to ferry American astronauts to the International Space Station. Jeff Foust, *Nasa Signs Agreement with Boeing for Soyuz Seats*, SPACENEWS (Feb. 28, 2017), <https://spacenews.com/nasa-signs-agreement-with-boeing-for-soyuz-seats/>. These seats are acquired by NASA through The Boeing Company (“Boeing”), which in turn purchases them from the S.P. Korolev Rocket and Space Public Corporation Energia (“Energia”), another ORKK-owned company. *Id.* Plans are in place to purchase seats through 2020, when private launch providers based in the US are expected to return American astronauts to orbit. *Id.* Each seat currently costs US \$74.7 million. *Id.* Attaching Boeing’s payments to Energia would likely be impossible, as these funds come directly from the US government. *Id.*

169. *See generally Sedelmayer*, Högsta Domstolen 2011-07-01 Ö 170-10.

that Yukos can succeed in attaching Russia's strategic assets through the courts; it has already temporarily seized Roscosmos assets in France<sup>170</sup> and threatened to do the same in Belgium<sup>171</sup> and the Netherlands<sup>172</sup> before it was blocked by national legislation. Although NOGA was ultimately unable to seize Russia's uranium in Kentucky, it is worth noting that in that instance, too, attachment was prevented by executive order, not by the courts.<sup>173</sup> At the present time, it is entirely possible that a presidential order may block Yukos from attaching Russia's RD-180 engines.<sup>174</sup> However, this political 'ace in the hole' may not always be available, and Yukos has the investor's advantage of dictating the timing of its suit.<sup>175</sup> Waiting for a new presidential administration, for example, or the eventual development of a replacement American rocket engine for the RD-180, might be particularly advantageous to Yukos. In light of the continually deteriorating relationship between Russia and the West, Russia should perhaps be concerned that the strongest protections offered to its space assets are the political preferences of the US government.

## CONCLUSION

If Yukos attempts to attach Russia's rocket engines, US courts are likely to find that such assets are not protected by sovereign immunity. As property of a state instrumentality held in a foreign country for commercial, non-governmental purposes, the RD-180/181 seems to fit comfortably within the

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170. Malet-Deraedt, *supra* note 72, at 332.

171. *Russia Says Yukos Will Not Pursue Brussels Enforcement Of Awards*, *supra* note 75.

172. INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, *National Report for the Netherlands*, in INT'L HANDBOOK ON COM. ARB. (Paulsson & Bosman eds., 2018).

173. Exec. Order No. 13159, 3 C.F.R. 1429 (2000).

174. Since 2014, the US military has been the most vocal advocate of retaining the option to purchase Russian-made rocket engines for use in national security launches. Cf. Mike Gruss, *Losing Access to RD-180 Engine Would Prove Costly, Pentagon Panel Warns*, SPACENEWS (May 21, 2014), <https://spacenews.com/40645losing-access-to-rd-180-engine-would-prove-costly-pentagon-panel-warns/>. Any executive order would most likely come at the behest of the Air Force if the Energomash's RD-180s were seized by a US court. *Id.*

175. See Kahale III, *Is Investor-State Arbitration Broken?*, *supra* note 53 for a discussion of the many advantages on the side of investors accrued from choice of timing.

exception to immunity provided by both the FSIA and the UN Convention. To be sure, attachment of a foreign state's assets under the FSIA is exceedingly rare.<sup>176</sup> However, Yukos has already demonstrated that it is a determined litigant against Russia, and it presumably possesses the resources to continue pursuing its PCA award indefinitely.<sup>177</sup> The recent, high-profile success of Crystallex, an Canadian mining company, in attaching Venezuela's shares of Citgo to satisfy an International Centre for Settlement of Investment Disputes award is another potentially positive development for Yukos.<sup>178</sup> Depending on the outcome of the ongoing appeal at the Hague, Yukos may well be the next investor to attach a foreign state's commercial assets under the sovereign immunity exception.

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176. As of the date of this Note's publication, only three PCA awards have ever been recognized by US courts under the FSIA. *See* *Balkan Energy Ltd. v. Republic of Ghana*, 302 F. Supp. 3d 144 (D.D.C. 2018); *Tatneft v. Ukraine*, 301 F. Supp. 3d 175 (D.D.C. 2018); *Sterling Merchant Fin. Ltd. v. Republic of Cabo Verde*, 261 F. Supp. 3d 48 (D.D.C. 2017). A slightly higher number of ICSID awards have reached this stage. *See* *Annulment Proceeding, Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Oct. 7, 2008) at 34, n. 66 (noting that only four ICSID cases had ever reached the enforcement stage as of 2006) (internal citation omitted).

177. *See* *Cave*, *supra* note 37.

178. In *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, the Third Circuit affirmed a writ of attachment against PDVSA (Venezuela's state oil company) to satisfy a US \$1.2 billion award against Venezuela. *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, 932 F.3d 126 (3d Cir. 2019).

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