IN THE EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

APPLICATION Nos. 51111/07 and 42757/07

BETWEEN

MIKHAIL BORISOVICH KHODORKOVSKIY

PLATON LEONIDOVICH LEBEDEV

Applicants

- and -

THE RUSSIAN FEDERATION (No. 3)

Respondent

ANNEXE 3
ANALYSIS OF THE APPROACH OF COURTS TO
A PROSECUTION FOR TAX EVASION
FOLLOWED BY A SUBSEQUENT PROSECUTION
FOR MISAPPROPRIATION AND LEGALISATION

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1. This Annexe considers:

   (a) Relevant law and practice at a European level by reference to the *ne bis in idem* principles;

   (b) Domestic laws within Member States; and finally,

   (c) The position in other jurisdictions not subject to European legal requirements.

The European legal framework and ne bis in idem

2. The doctrine of *ne bis in idem* has attained such significance that it is now a fundamental principle of Community law[1]. The significant place of *ne bis in idem* within the EU is largely founded upon the incorporation of the Schengen *acquis* in the EC and EU legal order by the Amsterdam Treaty under Protocol 2 to the EC Treaty and Treaty of the European Union ("TEU"). The concept of *ne bis in idem* is essential because of its close link with the need to protect the rights of free movement: An individual moving between states in a borderless area of cooperation should not be subject to prosecution or penalty twice for the same acts merely as a result of his or her particular location. The significance of *ne bis in idem* on a European wide level is demonstrated by its presence, without exception, as a ground for non-execution in all of the mutual recognition measures adopted by the Council.

3. The sources giving rise to an established Europe wide, and as will be shown consistent, concept of *ne bis in idem* are to be found primarily in (i) Article 54 of the Convention Implementing the Schengen Agreement (CISA), (ii) Article 50 of the Charter of Fundamental Rights (the Charter), and (within particular Member States) common law concepts of 'double jeopardy', and (iii) Article 4 Protocol 7 of the Convention.

4. Article 54 CISA sets out the *ne bis in idem* principle as follows:

> "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

5. Article 50 of the Charter states:

> "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

6. Article 4 of Protocol No 7 provides in the relevant part:

[1] § [40] of the judgment in *Van Esbroeck*

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

7. It is readily apparent that there is a difference in these provisions. A number of questions have therefore arisen before the CJEU regarding the extent of the *ne bis in idem* protection, including the precise scope of (i) *idem*, (ii) *bis*, and (iii) the meaning of "*finally disposed of*".

The CJEU

8. Following a series of references by the national courts of Member States, the CJEU has now considered the scope of *ne bis in idem* at a European level in depth. The confirmed position is that the *ne bis in idem* must be given a broad protective interpretation. The first significant analysis of the scope and purpose of *ne bis in idem* principles in European law was provided in the joined cases of *Gözütok* C-187/01 and *Brügge* C-385/01. An essential point in these cases was the recognition by the CJEU of a clear need to adopt a purposive approach to the functioning of the provisions, and to understand the principles in a way consistent with the ultimate aim of the Schengen *acquis* and their integration into the European legal order (at para 37). In *Gözütok* and *Brügge* the CJEU held that Article 54 was an essential tool in bringing about the attainment of core EU objectives, and must therefore be approached in that way.

9. The reasoning in these landmark cases has been consistently followed by the CJEU, which went on to define other component parts of the doctrine; *bis* and *idem* just as broadly. For example, in *Van Esbroeck* C-436/04 ECR [2006] I-2333 the CJEU defined the *idem* aspect of Article 54 as based on "*the identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected*" (at para 42). This approach is plainly much wider than limiting the concept to second prosecutions for the same offences, or in some other such limited way. The decision to adopt this approach involved a clear rejection of any suggestion that *ne bis in idem* should be confined to the domestic legal classification of offences or to the juridical elements of offences. The rationale for this stance was again clearly purposive: any approach to limit the scope of *ne bis in idem* based upon legal classification at

national level "*might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States*" (at para 35).

10. The CJEU's broad approach to *ne bis in idem* was again restated in *Van Straaten* C-150/05, *Van Straaten v The Netherlands and Italy ECR* [2006] I-9327 and *Gasparini* C-467/04 ECR [2006] I-9199. It is also notable that in *Gasparini* the Court considered (echoing *Gözütok* (at para 119)) the undermining effect a narrow approach to *ne bis in idem* would have in relation to not just *ne bis in idem* but the doctrine of legitimate expectation and the requirement for legal certainty (itself a component of Article 7 of the Convention).

11. In *Kretzinger* C-288/05 *Jurgen Kretzinger,* [2007] ECR I-6641 the Court was required to determine arguments on a reference brought by Germany following an attempt by a German court to apply its relevant domestic customs and duty legislation to sustain a conviction of a defendant who had previously been convicted by an Italian court for related but arguably distinct conduct in importing and distributing tobacco across the Schengen area. In answering the questions posed, the ECJ emphatically reiterated the *Van Esbroek* reasoning that the only relevant criterion to understanding the scope of the *ne bis in idem* protection was the identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, adding that the criterion applied irrespective of the legal classification given to those acts or the legal interest protected (at para 29).

12. It is submitted therefore, that on multiple occasions, the CJEU has been required to consider the ambit of *ne bis in idem*. Its approach has been to hold consistently that the protections afforded are broad rather than restrictive, and are consistent with the approach of this Court to the substance of Article 4 Protocol 7 of the Convention that has been analysed in the applicants' answers to the Questions in Section I.

The Charter of Fundamental Rights

13. As set out above, the Charter also contains a *ne bis in idem* protection in Article 50. Although the wording differs to Article 54 CISA, the broad nature of the protection

should be read in the same way. The explanation of the Praesidium[2] accompanying Article 50 puts this beyond doubt:

> "The 'non bis in idem' rule applies in Union law (see, among the many precedents, the judgment of 5 May 1966, Joined Cases 18/65 and 35/65 Gutmann v Commission [1966] ECR 149 and a recent case, the decision of the Court of First Instance of 20 April 1999, Joined Cases T-305/94 and others Limburgse Vinyl Maatschappij NV v Commission [1999] ECR II-931). The rule prohibiting cumulation refers to cumulation of two penalties of the same kind, that is to say criminal-law penalties.
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> In accordance with Article 50, the 'non bis in idem' rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the acquis in Union law; see Articles 54 to 58 of the Schengen Convention and the judgment of the Court of Justice of 11 February 2003, C-187/01 Gözütok [2003] ECR I-1345, Article 7 of the Convention on the Protection of the European Communities' Financial Interests and Article 10 of the Convention on the fight against corruption. The very limited exceptions in those Conventions permitting the Member States to derogate from the 'non bis in idem' rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations. As regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR."

14. It is evident therefore by expressly referring back to the CJEU case law cited above, and indeed to the approach adopted by this Court in respect of Article 4 Protocol 7, that the approach to *ne bis in idem* at European level under the Charter is consistent and is also broad rather than restrictive in ambit.

Domestic laws within Member States

15. Given the legal effect of the CJEU's approach to Article 54 CISA and the force of the Charter in EU law, Member States are required in their domestic law to approach the issue of *ne bis in idem*/'double jeopardy' consistently[3].

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[2] As the Explanations Relating to the Charter of Fundamental Rights (2007/C 303/2) note: "*These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They have been updated under the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and of further developments of Union law.* ***Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter***."

[3] In summary, as a matter of EU law, Article 54 CISA takes effect under the general obligations under Article 4(3) TEU (ex. Article 10 EC). In addition, following the principles set down in *Pupino* C-105/03, domestic courts should interpret domestic law in light of third pillar law as far as it is possible to do so consistently with Article 7 of the Convention. So far as the Charter's application is concerned, following the Lisbon Treaty, the Charter has the force of Treaties as a matter of EU law.

16. Consequently there is now a well-established approach to the *ne bis in idem* doctrine in European law: whether by reference to Article 54 CISA or to the Charter, the protections afforded to individuals are uniform and are broadly construed, and are expressly intended to be consistent with the approach taken under Article 4 Protocol 7 of the Convention. The rationale is not confined to upholding high-level principles of free movement, but is meant to constitute a key protection for individuals within the Member States. The approach of domestic courts in Member States should seek to reflect this approach.

Common law jurisdictions

17. Away from the European legal framework, and thus having evolved differently, common law jurisdictions apply an equivalent principle to *ne bis in idem*; referred to as "double jeopardy". The double jeopardy protection generally consists of two elements: first, a 'plea in bar' of *autrefois convict/acquit* which entitles a defendant not to be prosecuted. This is a doctrine of narrower application than the *ne bis in idem* doctrine. Second, these legal systems also rely upon a wider discretionary protection afforded to defendants within the court's jurisdiction to stay proceedings as an abuse of the court's process. It is convenient briefly to examine these principles first by reference to the English criminal courts.

Autrefois acquit and autrefois convict

18. The key authorities in the English jurisprudence are *Connelly v DPP* [1964] AC 1254, HL (affirming *R v Elrington* (1861) 1 B. &S. 688), and later *R v Beedie* [1997] 2 Cr.App.R. 167. In *Connelly* Lord Morris identified nine "governing principles" in relation to double jeopardy. These cases confirm certain limits to the plea in bar, in particular the majority view in *Connelly*, as confirmed in *Beedie*, was that Lord Morris' third principle; that the *autrefois* doctrine extends to situations where the crime charged is in effect the same or substantially the same as one in respect of which the person charged has previously been acquitted or convicted, is not actually within the scope of the narrow *autrefois* doctrine which gives a defendant an absolute

right to relief, but rather falls within the ambit of the discretionary power of the court to protect its own process from abuse of process (see *Connelly* per Lord Devlin at pp 1340 and 1358 and Lord Pearce at p. 1364).

19. The discretionary relief relied upon by the common law courts prevents an individual from being punished twice *for an offence arising out of the same or substantially the same set of facts*. It is apparent from the Court's approach in *Beedie* that the jurisdiction gives rise to the exercise of a considerably wider discretionary power to stay proceedings on the grounds of abuse of process. Under this jurisdiction, it is the facts as they existed to the knowledge of the prosecutor when the first set of proceedings were concluded that is central.

20. This approach reflects the approach of other common law jurisdictions. In Australia in *Pearce v The Queen* (S87-1997) [1998] HCA 57 the High Court considered the limits of double jeopardy under Australian law, and in doing so gained assistance from the English case law, in particular *Connelly* and *Beedie*. At para 105 the Court noted:

> "The most recent consideration of the scope of the plea of *autrefois* convict in England appears in the decision of the House of Lords in *Connelly v DPP* which the English Court of Appeal applied in 1997 in *R v Beedie*. In the latter decision, giving the judgment of the Court, Rose LJ concluded that the majority in *Connelly v DPP* had "defined autrefois in the narrow way ... that is when the second indictment charges the same offence as the first". In his Lordship's view, it was not sufficient that the offence was "substantially" the same."

21. Later at paragraph 106, having surveyed the law and practice in other common law jurisdicitons, the Court noted:

> "In England, the United States and India, the most populous jurisdictions of the common law, a strict test is applied. It is one which looks to the elements of the successive charges. If those elements are different, there is no foundation for the plea of *autrefois acquit* or *autrefois convict*, or for invoking constitutional protection against double jeopardy. In such circumstances, it matters not that, in proof of a separate offence, reference may be made to facts common to each matter charged. It is the definition of the offence and not the common evidence which grounds the legal complaint of double jeopardy."

22. The court went on to recognize however, the inherent unfairness in an overly restrictive approach to the doctrine of *autrefois*, stating at para 109:

> "this narrow view denies repeated statements of common law authority that the principle

of the pleas of autrefois applies to offences which, although not exactly the same, are "substantially the same". As I have pointed out, such statements are by no means recent"

23. As to the application of the discretion to stay a prosecution, the Court noted at para 115:

> "In *Connelly v DPP*, Lord Devlin remarked:
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> "If I had felt that the doctrine of autrefois was the only form of relief available to an accused who has been prosecuted on substantially the same facts, I should be tempted to stretch the doctrine as far as it would go."
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> This candid judicial admission helps to explain the "inextricable confusion in the law of double jeopardy" as it developed around the pleas in bar. The judges sought to provide remedies for the perceived injustice of multiple prosecutions for what were, technically, different offences but, in substance, the same matter and referable substantially to the same facts and circumstances. The pleas in bar do not invoke a judicial discretion but the result has been a great deal of artificiality and uncertainty which the courts themselves have often admitted." The acceptance of a general judicial discretion to prevent abuse of the process of the courts is not new. It was affirmed by Lord Selborne LC and Lord Blackburn in their speeches in *Metropolitan Bank Ltd v Pooley*. The existence of a judicial discretion to stay a second prosecution, in appropriate circumstances, was suggested by Lord Alverstone CJ in *R v Miles* and by Lord Reading CJ in *R v Barron*. It was affirmed by the House of Lords in *Connelly v DPP*, a fact recognised and accepted by the majority of this Court in *Williams v Spautz*. The purpose of the jurisdiction is not only to prevent the accused from being twice vexed. It is also to prevent such conduct bringing the administration of justice into disrepute."

24. Concluding, in relation to the position under Australian law, the Court held at para 117:

> "In Australia, any earlier doubts about the existence of the judicial discretion to stay a second prosecution or double punishment for what is "substantially the same act" (suggested because of the conflicting opinions expressed in the House of Lords in *Connelly v DPP*) must now be taken as settled in favour of the existence of the power. Nor is the judicial discretion confined to cases which do not fall squarely within the principles giving rise to a plea in bar. The power to provide a stay represents a separate and independent safeguard afforded by the law and exercised by the judiciary. It does not require an applicant to prove that a second or double prosecution or punishment would be "well-nigh outrageous"… if oppression of, or prejudice to, an accused person can be demonstrated, the provision of a stay of proceedings upon the offending indictment, or count of the indictment, is warranted."

25. This approach is also consistent with the US Supreme Court's approach to the double jeopardy protections afforded by the Fifth Amendment, which in relevant part provides that "*nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*" In *Abbate v. United States* 359 U.S. 187 (1959) Mr Justice Brennan considered the application of this protection, holding as follows from page

359:

> "I think it clear that successive federal prosecutions of the same person based on the same acts are prohibited by the Fifth Amendment even though brought under federal statutes requiring different evidence and protecting different federal interests. It is true that this Court has said: "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U. S. 299, 284 U. S. 304. But, so far as appears, neither this "same evidence" test nor a "separate interests" test has been sanctioned by this Court under the Fifth Amendment except in cases in which consecutive sentences were imposed on conviction of several offenses at one trial. The accused, although punished separately and cumulatively for various aspects of a single transaction, is subject to only one prosecution and one trial. If the Government attempted multiple prosecutions of the same offenses, an entirely different constitutional issue would be presented, cf. *Hoag v. New Jersey*, 356 U.S. at 356 U. S. 467. The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts. "The underlying idea . . . is that the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity. . . ." *Green v. United States*, 355 U. S. 184, 355 U. S. 187. In short, "The prohibition is not against being twice punished, but against being twice put in jeopardy. . . ." *United States v. Ball*, 163 U. S. 662, 163 U. S. 669. Obviously, separate prosecutions of the same criminal conduct can be far more effectively used by a prosecutor to harass an accused than can the imposition of consecutive sentences for various aspects of that conduct. It is always within the discretion of the trial judge whether to impose consecutive or concurrent sentences, whereas, unless the Fifth Amendment applies, it would be solely within the prosecutor's discretion to bring successive prosecutions based on the same acts, thereby requiring the accused to defend himself more than once. Furthermore, separate prosecutions, unlike multiple punishments based on one trial, raise the possibility of an accused, acquitted by one jury, being subsequently convicted by another for essentially the same conduct. See *Hoag v. New Jersey*, supra; cf. *Ciucci v. Illinois*, 356 U. S. 571. Thus to permit the Government statutorily to multiply the number of offenses resulting from the same acts, and to allow successive prosecutions of the several offenses, rather than merely the imposition of consecutive sentences after one trial of those offenses, would enable the Government to "wear the accused out by a multitude of cases with accumulated trials." *Palko v. Connecticut*, 302 U. S. 319, 302 U. S. 328. Repetitive harassment in such a manner goes to the heart of the Fifth Amendment protection. This protection cannot be thwarted either by the "same evidence" test or because the conduct offends different federal statutes protecting different federal interests. The prime consideration is the protection of the accused from the harassment of successive prosecutions, and not the justification for or policy behind the statutes violated by the accused. If the same acts violate different federal statutes protecting separate federal interests those interests can be adequately protected at a single trial by the imposition of separate sentences for each statute violated. See, e.g., *Bell v. United States*, 349 U. S. 81, 349 U. S. 82-83; *Gore v. United States*, 357 U. S. 386."

26. Finally, in Canada, section 11(h) of the Canadian Charter on Rights and Freedoms provides that "*Any person charged with an offence has the right if finally acquitted of*

the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again". In the Canadian Supreme Court decision of *Canada v Schmidt* [1987] 1 SCR 500 the Court expressly referred to the US decision of *Abatte* (above) as evidence of the courts having the capacity to act to prevent oppressive behavior.

27. It thus follows from the above that in common law jurisdictions which apply a narrow *autrefois* approach to double jeopardy there is well-established recognition that double jeopardy protection has to be broader than that and is required to protect a defendant from oppressive conduct in the bringing of multiple prosecutions for the same or related conduct. It achieves this need by relying upon an abuse of process jurisdiction to prevent further prosecutions or punishment.

Conclusion

28. It is submitted that based upon the above review, the approach of the Government in the instant cases is impossible to reconcile with the approach taken to *ne bis in idem* across Europe and to the concept of double jeopardy within common law jurisdictions. Within Europe the law clearly and deliberately aligns to the standard embodied in Article 4 Protocol 7 of the Convention. Equally in common law jurisdictions there is a clear recognition of a requirement for broad protection of defendants to prevent oppressive repeat prosecutions which would not be caught by the narrow *autrefois* doctrine.

29. The Government, as noted in the applicants' replies to the Questions in Section I, has failed to provide any information about alternative jurisdictions in which the prosecutions considered in the applicants' case would be permitted. In addition to the inference to be drawn by its failure to do so, the analysis provided above provides a compelling basis to conclude that the circumstances and nature of the prosecutions are not only inconsistent with the requirements of Article 4 Protocol 7 of the Convention, but also with the protections afforded by European law, and by implication, the related standards required of Member States, and finally that such prosecutions would also be inconsistent with the protections afforded to defendants in common law jurisdictions.