F. HANDLING OF EVIDENCE

Question 17: Was the way in which the evidence for and against the applicants was taken and examined compatible with Article 6 § 1 of the Convention? In particular, did the applicants enjoy equality of arms in this respect, were the proceedings adversarial and were the rights of the defence, as provided by Article 6 § 3 (b), (c) and (d) of the Convention, respected?

SUMMARY OF THE GOVERNMENT'S RESPONSE

F1. The Government assert that "*The trial was conducted in accordance with the Russian criminal procedural legislation in force on the basis of the principles of adversarial proceedings and equality of arms. The lawfulness of the judgment was reviewed by higher courts*" (paragraph 124 of the Memorandum).

F2. The Government incorrectly assert that the "*applicants were not precluded from putting questions to defence and prosecution witnesses and had the opportunity to challenge the statements of the victims and witnesses against them by any legal means*" (paragraph 122 of the Memorandum): see further below.

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

F3. The applicants strongly maintain their claim that the way in which evidence was taken in the trial was fundamentally unfair and incompatible with Article 6 § 1. There was a profound disparity between the defence and the prosecution such that there was a breach of the principle of equality of arms which is a fundamental aspect of the right to a fair hearing. The Convention requires that each party should be afforded a reasonable opportunity to present their case, including their evidence, under conditions that do not place them at a disadvantage vis-à-vis his opponent (see *Bulut v. Austria*, no. 17358/90, 22 February 1996, Reports 1996-II, 346, § 47; *Foucher v. France*, 28 March 1997, Reports 1997-II § 34; *Babek v Poland* § 56, *Klimentyev v. Russia*, no. 46503/99, 16 November 2006, § 95).

F4. Contrary to the foregoing requirements of the Convention and showing obvious and exceptional bad faith, the trial court:

(a) Refused to ensure that almost all the prosecution experts were called to be cross-examined;

(b) Refused the defence permission to rely on the evidence of experts (or "specialists"[1]) the defence had called;

(c) Refused to add a large amount of important exculpatory material to the case file;

(d) Refused defence motions for relevant disclosure to be made; and

(e) Refused to exclude inadmissible evidence.

F5. Each of these key propositions are developed and substantiated in the applicants' responses to the Court's Questions in this Section.

Question 18: Was it permissible under Article 6 §§ 1 and 3 (c) and (d) to use in evidence against the applicants documents seized during the searches in the offices of Mr Drel and other lawyers who represented them in the first and/or second criminal cases? What particular documents seized from the applicants' lawyers were used in the second trial, and what importance did they have in those proceedings? Who else, besides Mr Drel from the law office of ALM Feldmans, could be considered as the applicants' "lawyer" within the meaning of Article 6 § 3 (c) for the purposes of the present cases? The Government are requested to produce copies of the search warrants, and to explain why those search warrants were issued by the prosecution and not by the court.

SUMMARY OF THE GOVERNMENT'S RESPONSE

F6. The Government assert that at the material time Articles 182 and 183 of the RF CCrP did not require judicial authorisation of a search of a lawyer's office

[1] The CCrP (Articles 57 and 58) distinguishes between two types of expert witnesses: "experts" *proprio sensu* [*experty*] and "specialists" [*spetsialisty*]. Their role in the proceedings is sometimes similar, albeit not absolutely identical: see further the Court's summary analysis in *Khodorkovskiy (no.2)* §§ 401-403.

(paragraph 133 of the Memorandum). The Government neglect to point out that, as this Court noted in *Khodorkovskiy (no.2),* the RF Constitutional Court has made it clear that in fact prior judicial authorisation is in fact required: see § 399 of the judgment.[2] The Government also failed to mention that, in pursuance of this binding legal stance of the RF Constitutional Court, this requirement was subsequently expressly provided for in the criminal procedure legislation.[3]

F7. The Government state that "*A large number of documents and electronic media, which had been seized during the searches in the premises of ALM Feldmans and lawyer Drel's office in the village Zhukovka, were used in evidence and were relied on in the judgment in the "second" criminal case*" (paragraph 134 of the Memorandum). The Government state that the "*documents confirmed the charges against the applicants for laundering of profits from the sale and purchase of stolen oil and corroborated the fact of the acquisition, to that end, of shares in Yukos Oil Company in favour of Yukos Universal Limited, the beneficiaries of which were the applicants*" (paragraph 131 of the Memorandum).

F8. Relying upon the Court's findings in *Khodorkovskiy (no.2)*, the Government assert that there was "*no violation of Article 6 §§ 1 and 3 (c) and (d) of the Convention on account of the use of the documents seized during the searches in the offices of the lawyers who represented the applicants in the first and second criminal cases in evidence against the applicants in the present case*" (paragraphs 136-137 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

F9. The Court has already examined this question in *Khodorkovskiy (no.2)* where the applicants have similarly complained that the search of Mr Drel's offices and the reliance on evidence seized in that search in the first trial was contrary to Article 6

[2] That paragraph states "*On 8 November 2005 the Constitutional Court issued ruling No. 439-O which gave constitutional interpretation to Articles 7, 29, and 182 of the CCrP, read in conjunction with Section 8 (3) of the Advocacy and Bar Act. It ruled, in particular, that the Advocacy and Bar Act is a lex specialis and must therefore take precedence over the general rules of authorisation of searches insofar as searches in the lawyer's offices are concerned. In particular, the Constitutional Court ruled that the applicable legislation in its constitutional meaning 'does not allow searches to be conducted on the business premises of a lawyer or lawyers' entity without a special court decision in this respect*'."

[3] Paragraph 7, part 2, Article 29, part 1, Article 165 of the RF CCrP.

of the Convention. The Court concluded the search and seizure were "*arbitrary*"[4] and in breach of Article 6 § 3 (c). The Court stated that the search and seizure were deliberate interferences with the secrecy of the lawyer-client contacts protected under Article 6 § 3 (c) of the Convention (see *André and Other v. France*, no. 18603/03, § 41, 24 July 2008) and concluded that there were no compelling reasons for such interference. Having done so, the Court nonetheless declined to go behind the Meshchanskiy District Court's decision to reject the defence arguments that the material seized in the search was inadmissible (see §§ 699-705).

F10. Whilst the applicants accept that admissibility is primarily a matter for regulation under national law (*Schenk v. Switzerland*, 12 July 1988, Series A no. 140 §§ 45-46; *Heglas v. the Czech Republic*, no. 5935/02, 1 March 2007, § 84) they nonetheless maintain that the Court is entitled to conclude that having unequivocally concluded that the material seized from Mr Drel's offices was obtained in breach of the Convention it was, in turn, contrary to the requirements under the Convention for a "fair hearing" under Article 6 for it to be relied upon in the second criminal trial.

[4] § 634 of the judgment.

Question 19: **It appears that the defence was unable to examine at the trial the audio recordings of telephone conversations between Ms Bakhmina and Mr Gololobov, Yukos in-house lawyers, and that only the transcripts of those recordings were shown to the defence. What sort of information did those transcripts contain and how did it affect the conclusions of the trial court? Did those transcripts cover all of the intercepted communications, or they contain only the extracts necessary, in the view of the prosecution, for the second trial? In the second scenario, who had power to decide what part of the transcripts should be shown to the defence and examined at the trial – the prosecution or the judge? Did the defence have any possibility of examining the records and/or the remaining parts of the transcripts? Why were the original audio-recording and the transcripts in their integrity not shown to the defence? Is that situation compatible with the principle of "equality of arms" and "adversarial proceedings", enshrined in Article 6 § 1 of the Convention?**

SUMMARY OF THE GOVERNMENT'S RESPONSE

F11. The Government admit that the defence were not given an opportunity to examine the audio recordings of the telephone conversations between Ms Bakhmina and Mr Gololobov. They also admit that the prosecutors refused to supply the disks containing the audio recordings to the trial court (paragraph 140 of the Memorandum) at the latter's request. The Government assert that the reason why the prosecutors refused the trial court's order was because disclosure would "*hinder the investigative actions*" in criminal case 18/41-03 (the "principal" case). The Government do not specify in what way investigative actions would have been hindered and specifically what investigative actions would have been hindered.

F12. The Government state that the conversations were relied upon by the trial court and that on the basis of those conversations the trial court concluded that the applicants were co-ordinating the actions of the "*organised group*" whilst in custody (paragraph 144 of the Memorandum).[5]

[5] The Government state that this answers the question footnoted on p.21 in the Statement of Facts "The domestic judgments do not specify clearly the evidence which allegedly confirmed that the applicants were giving orders from the remand prison. Was that conclusion based on any particular evidence or on the general understanding that such operations could not have been performed without the applicants' knowledge and agreement?"

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

What sort of information did the transcripts contain and how did it affect the conclusions of the trial court?

F13. The transcripts were of eight conversations between Mr Gololobov and Ms Bakhmina, both of whom were lawyers for Yukos.

F14. The trial court used the transcripts of the unlawfully intercepted telephone conversations between Mr Gololobov and Ms Bakhmina to "*substantiate*" its conclusion that "*M.B. Khodorkovsky and P.L. Lebedev organised the actions of the persons subordinate to them in relation to laundering funds acquired by criminal means, using the company Yukos Capital S.a.r.l., through their defence lawyers*" (see page 530 of the Verdict).[6] In doing so, the court, in a glaring manifestation of bad faith, even ignored the fact that Mr Lebedev's name was never mentioned in those telephone communications. This fact is further evidence of the obvious falsification of the entire case against the applicants.

Why were the original audio-recording and the transcripts in their integrity not shown to the defence?

F15. After the defence had studied the text of extracts from the audio recording provided by the investigation authorities, a motion was submitted to request, obtain and attach to the case file the original audio-recording and to be provided with transcripts of the entirety of the recordings. As indicated below in paragraph F17-F18 the trial court granted that motion and requested the CDs from the Investigative Committee, however the trial court's request was refused by the Investigative Committee on the purported "basis" that they were contained in criminal case No. 18/41-03 (the "parent" case) under which twenty other individuals were being investigated. It was asserted (without any particularity or substantiation) that the investigation would be prejudiced if the CDs were provided to the court.

[6] See tab C213 of the November 2011 Memorial.

Did those transcripts cover all of the intercepted communications, or they contain only the extracts necessary, in the view of the prosecution, for the second trial? In the second scenario, who had power to decide what part of the transcripts should be shown to the defence and examined at the trial – the prosecution or the judge? Did the defence have any possibility of examining the records and/or the remaining parts of the transcripts?

F16. The transcripts did not contain all of the intercepted communications. It was for that reason that the defence requested the disks themselves. The refusal of the prosecution to disclose the disks despite the trial court's order demonstrates that the trial court had no control over what was selected from the disks.

Why were the original audio-recording and the transcripts in their integrity not shown to the defence?

F17. On 24 July 2009 the defence made an application to the trial court for the audio disks to be disclosed.[7] The judge decided "*To postpone examination of the motion filed by the defence lawyer N.Yu. Terekhova on presenting from criminal case 18/41-03 compact disks for audition and comparison with the record of examination and audition of the audio record of 03 February 2007 until objective information is received about location of the named disks*."

F18. Subsequently, the trial court attempted unsuccessfully to ascertain from the prosecutors the whereabouts of the disks. On 28 August 2009 the court issued a judgment to grant the motion of the defence and to ask the Investigative Committee under the RF Procuracy to provide the disks. On 29 September 2009 investigator Alyshev informed the trial court that the disks could not be provided because "*at present, active investigative actions are being carried out in criminal case No. 18-41/03 (the disks are added to)… in which all the criminal case files are used, including the audio records. Sending to the court any criminal case file, including the audio records, would impede the investigative actions.*" In response the defence filed a motion with the trial court[8] requesting that it compel the Investigative Committee to disclose the disks and to investigate why investigator

[7] See p. 9 of the trial record of 24 July 2009 at Volume C, tab C108 of the November 2011 Memorial.

[8] See motion to submit materials to the Investigative Committee Chairman for inspection to be conducted and for a decision to be made in connection with V.N. Alyshev's willful non-compliance with a court ruling, and for a resolution to be issued concerning seizure or search at the IC to remove, from the materials of criminal case no. 18/41-03, compact disks with information of 9 November 2009 (Vol. 218, c.f.s. 107-109 of the case materials) at Volume C, tab C120 of the November 2011 Memorial.

Alyshev had failed to comply with the earlier order of the trial court. On 16 November 2009, the trial court refused to grant that motion."[9]

Conclusions: is this compatible with the principle of "equality of arms" and "adversarial proceedings", enshrined in Article 6 § 1 of the Convention

F19. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition Article 6 § 1 requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (*Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, ECHR 2000-II, § 60).

F20. The applicants accept that the Court has held that the entitlement to disclosure of relevant evidence is not an absolute right under the Convention and that there may be competing interests (such as national security). However, the case law is clear that only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (*Van Mechelen and Others v. the Netherlands*, 23 April 1997, *Reports of Judgments and Decisions* 1997-III § 58). Moreover, under domestic law the prosecution must submit all evidence on which they rely and the court must examine all of that evidence. The law expressly prohibits references in a verdict to evidence that was not examined in court in an adversarial setting. [10]

F21. Furthermore, under the Convention it cannot conceivably be argued that the restrictions on the defence's right to inspect the discs were "strictly necessary". The investigator simply made the unsubstantiated assertion that sending the disks to the court would "*impede the investigative actions*". Accordingly the applicants

[9] See tab 102 to this Reply. This is found in the case materials at Vol. 224, c.f.s. 201-204, trial record of 16.11.2009, see c.f.s. 240 (page 40 of the trial record).
[10] Article 240 (3) of the RF CCrP states "*A verdict may only be based on such proof that was examined in a court session.*"

maintain that the failure to provide the disks was a material non-disclosure of evidence contrary to Article 6 § 1.

F22. Furthermore, on the basis of the foregoing, the applicants submit that the prosecution deliberately concealed evidence from the defence and from the court with the objective of preventing yet another falsification from being exposed. The trial court understood that but did not find it necessary to oppose such efforts on the part of the prosecution.

Question 20. **The defence complained that although the prosecution had full access to the documents obtained within other criminal investigations concerning Yukos activities, namely evidence obtained during the searches, the defence had access only to the documents which the prosecution selected and attached to the file which was submitted to the Khamovnicheskiy District Court within the applicants' second case. Similarly, the applicants stated that the defence had no access to important "source materials", that is, materials given to the prosecution experts for analysis and hard drives from the computers seized during the searches. The prosecution submitted to the court only expert reports as such and written transcripts from the hard drives, but not the "source materials" and hard drives as such. If this is true, is that situation compatible with the principles of "equality of arms" and "adversarial proceedings" and, more generally, with the general requirement of "fair" proceedings under Article 6 § 1 of the Convention? In particular, did the transcripts from the electronic files contain all of the information contained therein, or only extracts selected by the prosecution?**

SUMMARY OF THE GOVERNMENT'S RESPONSE

F23. The Government do not dispute that "*the prosecution had full access to the documents obtained within other criminal investigations concerning Yukos activities, namely evidence obtained during the searches, the defence had access only to the documents which the prosecution selected and attached to the file which was submitted to the Khamovnicheskiy District Court within the applicants' second case*". Equally, the Government do not dispute that the defence did not have access to "source materials", that is, materials given to the prosecution experts for analysis and hard drives from the computers seized during the searches.

F24. The Government state that "*During the trial, the defence lodged motions for obtaining the documents which had been examined by the experts to*

be severed from the materials of criminal case no. 18/41-03 and to be included in the case file." The Government state "*The court found no reason to grant their motions*" (paragraph 152 of the Memorandum).

F25. The Government assert (and it is no more than an unfounded assertion: it is unreasoned and unsupported by reference to any case law of the Court, or, equally, the domestic legislation or the binding legal positions of superior courts) that the "*lack of certain documents or objects, on the basis of which particular expert examinations were carried out, in the materials of the* "*second" criminal case cannot indicate a violation of the principle of equality of arms and adversarial proceedings*" (paragraph 151 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

F26. The factual basis for the applicants' complaint in this regard, as summarised by the Court in Question 20, is not disputed by the Government. The issue is therefore whether such a situation is compatible with the principles of "equality of arms" and "adversarial proceedings" and, more generally, with the general requirement of "fair" proceedings under Article 6 § 1 of the Convention. The applicants submit that the Convention case law clearly indicates that such a situation is not compatible with the requirements of Article 6.

F27. Article 6 § 1 requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused: see *Fitt v. the United Kingdom* [GC], no. 29777/96, ECHR 2000-II. A defendant is entitled to have access to all case materials relevant to his case: see *Mirilashvili v. Russia*, no. 6293/04, 11 December 2008 §§ 157-159. Consequently the Court has found that non-disclosure of evidence to the defence has breached the principle of equality of arms (as well as the right to an adversarial hearing): see *Kuopila v. Finland*, no. 27752/95, 27 April 2000 § 38, where the defence was not given an opportunity to comment on a supplementary police report. In that case the Court concluded that the applicant had been unable to "*participate properly and in conformity with the principle of equality of arms in the proceedings….Accordingly, there has been a violation of Article 6 of the Convention*." The principle of equality of arms may also be breached when the

accused has limited access to his case file or other documents (for example on public interest grounds) – see *Matyjek v. Poland*, no. 38184/03, 24 April 2007 § 65).

F28. Although paragraph 3 (d) of Article 6 refers to "witnesses", and, if interpreted strictly, would not be applied to other evidence, the Court has held that it must be given an autonomous interpretation. Thus it can also include victims and expert witnesses. Furthermore, there are clear indications in the case law that this provision may be applied to other evidence than "witnesses". Thus, the Court has examined access to documentary evidence under Article 6 § 3 (d) of the Convention in the case of *Perna v. Italy* ([GC], no. 48898/99, § 25-32, ECHR 2003-V. In *Georgios Papageorgiou v. Greece*, (no. 59506/00, § 35-40, ECHR 2003-VI) the Court examined under paragraph 3 (d) the issue of access to the original documents and computer files relevant to the criminal accusations against the applicant and found a violation of Article 6 §§ 1 and 3 (d) of the Convention.

Question 21. Was the defence on an equal footing with the prosecution in respect of the expert evidence, and did the applicants have the right to produce expert evidence in their defence, as provided by Article 6 §§ 1 and 3 (d) of the Convention?

SUMMARY OF THE GOVERNMENT'S RESPONSE

F29. The Government set out the applicable domestic law that guarantees equality of arms in relation to expert evidence. They wholly fail to demonstrate that the domestic law was applied in the instant cases so as to ensure such equality of arms.

F30. The Government assert that "*The defendants and their lawyers, along with the prosecution, had full opportunity to present to the court their objections to the charges, to participate in the examination of the collected evidence, to submit new evidence to the court for examination, including expert reports, to lodge requests, to make statements and to use any other methods and means of defence permitted by law*" (paragraph 170 of the Memorandum). They claim that "*All requests lodged by the defence were adjudicated on by the court in accordance with the law and relevant reasoned decisions were issued. The procedural rights of the defendants and their lawyers were not infringed by the presiding judge*"

(paragraph 171 of the Memorandum). Those assertions are plainly and knowingly wrong for the reasons set out below.

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

F31. For the reasons set out in detail in the applicants' answers to Questions 22-24, there was undoubtedly an unfair disparity between the defence and the prosecution in respect of using expert evidence, thus breaching the equality of arms between the parties contrary to Article 6 §§ 1 and 3 (d). In particular:

(a) **The defence were unable to question all but one of the prosecution experts – Mr Shkolnikov.** That expert's answers to Mr Lebedev's questions actually confirmed the falsified nature of the charge of "*theft of VNK subsidiaries' shares*" (see paragraph F34 below). After that, afraid that this and other falsified charges might be exposed in the course of subsequent cross-examinations of experts, the prosecution – with the court's full support – did not allow any of its experts to be questioned in court. As the Court made clear in *Khodorkovskiy (no.2)*[11] when considering the same issue, there is an extensive case law of the Court which guarantees to the defence a right to study and challenge not only an expert report as such but also the credibility of those who have prepared it, through their direct questioning (see, amongst other authorities, *Brandstetter v. Austria*, 28 August 1991, § 42, Series A no. 211; *Doorson v. the Netherlands*, 26 March 1996, §§ 81-82, *Reports of Judgments and Decisions* 1996-II; and *Mirilashvili v. Russia*, no. 6293/04, § 158, 11 December 2008); and

(b) **The trial court refused to admit all the defence expert reports and permitted only one defence expert to give oral testimony**. As the Court noted in *Khodorkovskiy (no.2*) when considering what it described as the "*disbalance between the defence and the prosecution in the area of collecting and adducing 'expert evidence', Article 6 requires that "the*

[11] See § 711 of the judgment.

defence must have the same opportunity to introduce their own 'expert evidence. "[12]

Question 22. Concerning the expert evidence produced by the prosecution and admitted by the court for examination at the trial, what was the main conclusion of the expert reports, in particular the reports of October 2000, June 2004, February-March 2006, January and February 2007 (for more details, see the "Facts" part)? What particular factual allegation did each of those reports address?

SUMMARY OF THE GOVERNMENT'S RESPONSE

F32. The Government summarise the findings of the prosecution experts (paragraphs 172-182 of the Memorandum).

F33. The Government falsely state that "*The expert reports, taken in conjunction with other pieces of evidence, confirmed that the oil had been stolen and that the profits from the sales of the stolen oil had been laundered by the applicants together with the organised group*" (paragraph 183 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

F34. The reports may be summarised as follows:

(a) The opinions by ZAO Kvinto-Consulting experts A.A. Kozlov and L.K. Rusanov (October 2000), experts of ZAO International Appraisal Center A.S. Ivanov, D.A. Kuvaldin, S.V. Melnikov, V.B. Shepelev, and Yu.B. Shkolnikov (June 2004) concern the count of so-called "theft of shares of VNK subsidiaries", and have nothing to do with the charge of so-called "theft of oil."

(b) The report on an information-accounting expert review prepared by the expert V.R. Yeloyan (Feb-March 2006) contains conclusions: (1) on lack of discrepancies between data in the accounting databases of OOO Ratmir, OOO Yu-Mordovia, OOO Alta-Trade, and ZAO YUKOS-M and data in the

[12] See §711 of the judgment.

trial balance sheets of the same entities provided in hard copy; (2) on the list of suppliers from whom the aforementioned entities bought oil in 2000, on the amounts and price of oil so purchased; (3) on a list of buyers of oil from the listed entities in 2000, the amounts and price of oil so purchased; (4) from what suppliers and for what amount of funds the listed entities purchased oil products in 2000; (5) to what buyers and for what amount of funds the listed entities sold oil products in 2000.[13] The Government's Memorandum does not cite the conclusions made in this expert report;

(c) The report on the accounting-economic expert review performed by a panel, as prepared by the experts V.R. Yeloyan and P.V. Kupriyanov (January 2007) contains conclusions on the following: (1) in what amount and to which non-resident firms OOO Neftetrade-2000 wired funds by way of distributing net income in 2001, how non-resident firms used such funds; (2) from what entities and operations the funds used to pay monies to non-resident firms by way of distribution of net income arrived in the account held by OOO Neftetrade-2000 in 2001.[14] While the experts' conclusions are not cited in the Government's Memorandum in full, to the extent they are cited there are no distortions of the meaning;

(d) The report of the accounting review by a panel of experts performed by experts V.E. Chernikov and A.V. Migal (Jan-Feb 2007)[15] contains conclusions regarding the amount of oil acquired by OAO NK Yukos, ZAO YUKOS-M, OOO Yu-Mordovia from OAO Samaraneftegaz, OAO Tomskneft, and OAO Yuganskneftegaz in 1998-2000, as well as regarding the market value of oil acquired by them.

F35. Contrary to the Government's assertion, these reports did not in any way establish any criminality: whether taken individually or collectively or in conjunction with other evidence. On the contrary, they confirmed the statement by the applicants that

[13] See Vol. 54, c.f.s. 185-229, conclusions are at c.f.s. 223-227 rev.
[14] See Vol. 45, c.f.s. 200-275, conclusions are at c.f.s. 245-247.
[15] See Vol. 54, c.f.s. 260-278, conclusions are at c.f.s. 267-269.

oil had been sold to Yukos' producing entities on the basis of exchange-for-value supply contracts, and, consequently, could not have been stolen from them.

Question 23. Did the defence have a chance to challenge those reports, for example by (a) participating in the preparation of those reports at the pre-trial stage; (b) examining the source materials and questioning the experts; (c) providing counter-opinions by experts for the defence? More generally, was the defence entitled under Russian law to collect and submit to the court "expert reports" or "written opinions of the specialists"? Would the written opinion of a professional in a particular field, obtained by the defence, be regarded as "admissible evidence" under Russian law and under what conditions?

SUMMARY OF THE GOVERNMENT'S RESPONSE

F36. The Government falsely and misleadingly claim the "*applicants had been informed in advance of the decisions ordering the expert examinations and had been apprised of their rights to ask the investigator to put additional questions to the experts, to appoint specific experts to the expert team or to carry out the forensic expert examination in a specific expert institution. However, the defence had failed to use those rights at the pre- trial stage*" (paragraph 185 of the Memorandum). The defence were first presented with the orders to commission expert reviews and expert opinions in December 2006. However the compilation of the reports had started in 2000 in a different criminal case from the one in which the applicants were charged in February 2007. Thus it is patently false to say that the defence could in a timely fashion (let alone "in advance") "*to ask the investigator to put additional questions to the experts, to appoint specific experts to the expert team or to carry out the forensic expert examination in a specific expert institution"*: they were shown orders and expert reports that had already been drafted: precisely the same unfairness that they had faced in the first trial – see *Khodorkovskiy (no.2)* § 680. The applicants and the defence attempted to exercise their rights by moving to recuse experts whose lack of "competence" they had experienced during the first trial – Yeloyan and Kupriyanov, but those motions were dismissed by the court.

F37. The Government inform the Court that "*At the trial stage, the defence asked the court to summon experts to be questioned as witnesses and to attach the expert reports to the case file. The court examined those requests and reasonably*

refused to grant them" (paragraph 186 of the Memorandum). The assertion that the court was "*reasonable*" to refuse the defence requests is entirely unsubstantiated and is, in any event, in conflict with the Court's judgment on the same issue in *Khodorkovskiy (no.2)* §§ 711-716 – see further below. The Government also inform the Court that the defence were unsuccessful in seeking to have the prosecution experts or their reports declared inadmissible (paragraph 187 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

Did the defence have a chance to challenge those reports, for example by (a) participating in the preparation of those reports at the pre-trial stage; (b) examining the source materials and questioning the experts; (c) providing counter-opinions by experts for the defence?

F38. As stated above, the defence had no real ability to challenge these reports. It did not participate in the preparation of the prosecution reports at the pre-trial stage and indeed the reports were commissioned long before the applicants were even charged. The trial court declined the defence's requests to examine the underlying source materials upon which the prosecution experts were said to have based their reports (see the applicants' submissions above at paragraph F23). The applicants' motions seeking the recusal of the prosecution experts and of their reports as inadmissible evidence were dismissed with no proper reasons being given.

F39. The defence commissioned its own expert reports (as it was entitled to do so under the domestic law, see further below) and yet the trial court prevented the defence from deploying them: under far-fetched and false pretexts, the reports were deemed "inadmissible", the experts themselves purportedly "incompetent" or lacking impartiality. Only one expert was permitted to give oral evidence; however subsequently he, too, was ruled "incompetent".

Was the defence entitled under Russian law to collect and submit to the court "expert reports" or "written opinions of the specialists"? Would the written opinion of a professional in a particular field, obtained by the defence, be regarded as "admissible evidence" under Russian law and under what conditions?

F40. The Court analysed the applicable domestic law in *Khodorkovskiy (no.2)* – see in particular §§ 400-412.[16] The defence were entitled under Russian law to collect and submit to the court "expert reports" or "written opinions of specialists." Those reports should have been deemed admissible had the RF CCrP been interpreted in accordance with the Convention.

Question 24. What were the court's reasons for not summoning the expert witnesses for the prosecution whose attendance was sought by the defence, in particular, Mr Ivanov, Mr Kuvaldin, Mr Melnikov, Mr Shepelev, Mr Yeloyan, Mr Kupriyanov, Mr Chernikov and Mr Migal?

SUMMARY OF THE GOVERNMENT'S RESPONSE

F41. The Government explain that "*At the court hearing of 16 November 2009, the court dismissed motion of the second applicant for summoning experts Mr Kuvaldin, Mr Ivanov, Mr Melnikov, Mr Shepelev, since the motion was filed untimely*" (paragraph 195 of the Memorandum). The Government criticise the defence for not refiling the motion "*during the disclosure of evidence*". This is an absurd criticism given that the Government go on to note that defence motions asking for the prosecution experts to be summoned were also rejected by the court, on two subsequent occasions (paragraph 196 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

F42. The short answer to this question is that the trial court, as indicated below, wholly failed to give any adequate or specific reasons for rejecting the defence motions requesting that experts relied upon by the prosecution should be called to be questioned. The failure to give adequate reasons constitutes yet another instance of

[16] See also the Court's criticism of the narrow interpretation of the RF CCrP of the Meshchanskiy District Court in the applicants' first trial that it determined was incompatible with Article 6 §§ and 3 (d) 1 at §§ 724 – 735 of the judgment.

bad faith and is of particular importance given that as the Court observed in *Khodorkovskiy (no.2)* § 712 it is to be presumed that a prosecution expert should be called unless their evidence is "*manifestly irrelevant or redundant*".

F43. On 9 November 2009, Mr Lebedev submitted a written motion requesting that "*experts announced by the prosecution side in the bill of indictment: A.S. Ivanov, D.A. Kuvaldin, S.V. Melnikov, V.B. Shepelev*" should be called.

F44. On 16 November 2009 the trial court rejected a motion for prosecution experts to be summoned, stating "*To refuse in sustaining the motion on summoning experts Kuvaldin, Ivanov, Melnikov, Shepelev, as it was filed too early, as currently the side of prosecution presents evidence, and the procedure for presenting evidence is determined by that side.*"[17]

F45. On 24 August 2010[18] the court rejected a request that had been made on 16 August 2010 by Mr Lebedev[19] for the Messrs Chernkov and Migal to be summoned to give evidence. The trial court also rejected a defence motion that had been submitted on 16 August 2010.[20] The judge ruled that it was unnecessary for the experts to be summoned, stating:

> "The court, having heard opinions of the parties to the trial about the motion for finding expert report No. 8/17 of 2 February 2007 by experts Chernikov and Migal from the 8th Section of the EKTs of GUVD for Moscow Oblast to be inadmissible as evidence and its exclusion from the body of evidence, as well as a request by defendant Lebedev to the court – he requested to summon to the court experts Chernikov and Migal for correct resolution of the motion by the court, referring to relevant articles of the CCP of the Russian Federation – the court deems it possible to hear the specified motion without summoning the specified experts to court hearing and denies the motion filed. As for the motion for finding this piece of evidence to be inadmissible and excluding it from the body of evidence, the court denies the motion filed because it finds no lawful grounds to do as requested. The court will assess all the evidence when it issues the verdict."[21]

F46. On 28 June 2010, the defence filed a motion to summon Yeloyan and Kupriyanov. On 30 June 2010[22], the trial court dismissed the motion stating: "*The Court*

[17] Trial record of 16 November 2009 pp.39-41 at Volume C, tab C121 of the November 2011 Memorial.
[18] See trial record of 25 August 2010 pp. 33 at Volume C, tab C190 of the November 2011 Memorial.
[19] See Vol. 260, c.f.s. 24-58, pages 13-14 of the trial record, a copy is at tab 128 to this Reply.
[20] See Motion of 16 August 2010 at Volume C, tab C185 of the November 2011 Memorial. This is to be found at Vol. 260, c.f.s. 8-13 of the case materials.
[21] Trial record of 24 August 2010 at Volume C, tab C190 of the November 2011 Memorial.
[22] See Vol. 253, c.f.s. 137-139 of the case materials. A copy is at tab 123 to this Reply.

dismisses the motion as there are no legal grounds for granting it based on arguments set forth by the defence."[23]

F47. On 17 September 2010 the trial court rejected the defence motion to call Messrs Chernikov and Migal:

> "On 9 September 2010, the defence lawyer B.B. Gruzd filed a motion to call Chernikov and Migal in the court hearing and their questioning as experts - experts of the Tax Examinations Department, 8th Department of EKTs GUVD (the Forensic Science Center of the Main Department of Internal Affairs) for Moscow oblast, which prepared and signed the expert opinion no. 8/17 of 2 February 2007. The court, having listened to the views of the participants to the process, dismisses the filed in motion, because it does not see any legal grounds for this."[24]

Question 25. With regard to the expert evidence for the defence, what was the reason for the court's refusal to admit such evidence and either to hear oral submissions by the "specialists" or to attach their written reports to the materials of the case? In particular, why did the court refuse to hear Mr Dages, Mr Lopashenko, Mr Delyagin, Mr Romanelli, Mr Hardin[25], Mr Savitskiy and Ms Rossinskaya? Why did the court hear Mr Haun but refused to attach his written report? Is it true that Mr Haun was the only "specialist" whose appearance in court was not opposed by the prosecution? The applicants are invited to explain why the defence sought the appearance of those expert witnesses ("specialists") and what particular point each of them was expected to address.

SUMMARY OF THE GOVERNMENT'S RESPONSE

F48. The Government explain that the defence experts were "*not questioned during the criminal case hearing due to the fact that the court granted requests of the prosecution on their disqualification*" (paragraph 197 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

Mr Haun

F49. The only defence expert that the court permitted to be called to give oral evidence was Wesley Haun, a U.S. specialist in the energy industry. Mr Haun was the first expert that the defence sought permission to call and it seemed that the prosecution was not ready to actively object to him giving oral evidence. It is reasonable to

[23] See trial record of 30 June 2010 pp. 6 at Volume C, tab C167 of the November 2011 Memorial. This is to be found at Vol. 254, c.f.s. 12-34.
[24] Trial record of 17 September 2010 pp.14-15 at Volume C, tab C200 of the November 2011 Memorial.
[25] The Court mistakenly refers to Ms Hardin as "Mr Hardin."

infer that that is why the court granted the defence motion for him to give live evidence.

F50. Mr Haun testified that, in terms of all comparable parameters, including its vertically integrated organizational structure and marketing schemes, Yukos was similar and operated similarly to other large Russian and international oil companies, and that the actions of Mr Khodorkovskiy and Yukos' governing bodies were consistent with "*company management pursuing the scope of building up a model company capable of achieving sustainable growth indicators and long-term profitability.*"[26] Having carefully examined, via officially published statements and other public materials and specialised literature, the structure and operating procedures of Yukos, Mr Haun stated that the applicants' reorganisation and management of the company benefited all shareholders, the production subsidiaries, as well as the RF, and was consistent with industry standards, custom and practice. He stated that the charges brought against the defendants were wholly inconsistent with the company's performance statistics and growth which would have been impossible had crude oil indeed been misappropriated as alleged by the prosecution. He further noted that the prosecutors had drawn an inappropriate comparison between the price of oil at the oilfield in Russia and the end user price of crude oil exported to Western Europe. He explained that the price for oil at a well-head (in the oilfield) in Russia differs to a great extent both from numerous reference, benchmark and from actual, contractual prices for ultimate buyers in Western Europe and elsewhere in the world due to delivery and primary treatment costs, export taxes and duties, excise taxes, etc. Mr. Haun stated that comparing oil price in oil production regions with Urals prices in Rotterdam is, in essence, comparing apples and oranges. Sales and trading companies purchasing oil from exploration and production subsidiaries within the Yukos holding was consistent with the sector standards, customs, and practices. Yukos' publicly-available financial statements showed that the company fully, and even with a surplus, paid for the general operating expenses of the producing entities, paid taxes, made long-term investment and repurchased treasury shares and its own shares, and paid dividends on shares starting from 2000 out of proceeds. The company was

[26] See trial record of 31 May 2010 at Volume C, tab C156. This is to be found at Vol. 250, c.f.s. 101-133 of the case materials.

improving its assets and its balance sheet through re-investment and therefore the charges brought were untenable.

F51. Despite allowing the defence permission to call Mr Haun to give oral testimony, the court rejected two defence motions requesting that his very detailed written report[27] and supporting materials be added to the case file on the manifestly untenable basis that "…*as of the date of making out this opinion… the aforementioned person was not a specialist.*"[28] The court refused to include the specialists working materials in the case file: "*In relation to the supporting materials the trial court ruled the court denies inclusion in the criminal case materials of the working materials of specialist W. Haun that he used during investigation at the court session as Art. 74 CCP RF provides an exhaustive list of pieces of evidence that can be included in the criminal case file.*"[29] The reasoning is entirely unsustainable as the working materials could either have been admitted under the provisions for the admission of "specialist opinions" or for "other documents" (paras 3.1 and 6, part 2, article 74 of the RF CCrP), as well as due to an express permission in the law (part 3, article 189, article 279 of the RF CCrP that establish general rules of conducting interrogation) for a person being interrogated to use documents and notes during interrogation, including in court.[30]

F52. After Mr Haun's impressive performance in court, the prosecution strongly objected to any other defence expert being called to give oral testimony and the court, following the lead of the prosecution, refused to allow the defence

[27] A copy of his report is submitted with this Reply and is at tab 97 to this Reply.
[28] Trial record of 1 June 2010 and of 7 June 2010 at Volume C, tabs C157 and C159 of the November 2011 Memorial. They are to be found at Vol. 250, c.f.s. 141-185 and See vol. 251. c.f.s. 8-31.
[29] Trial record of 1 June 2010 tab C157 of the November 2011 Memorial which is to be found at Vol. 250, c.f.s. 141-185 of the case materials. See also the slides prepared by Mr Haun at tab 117 to this Reply.
[30] Article 74 RF CCrP provides:
"1. Any information based on which a court, prosecutor, investigator, or interrogating officer establishes in the procedure determined by this Code whether there are or there are no circumstances subject to be proven in proceedings in a criminal case or any other circumstances relevant to the criminal case shall be evidence in the criminal case.
2. The following shall be admitted as evidence:
1) Testimony by a suspect or the accused;
2) Testimony by an injured person or witness;
3) Expert opinion or expert testimony;
3.1) Specialist opinion or specialist testimony;
4) Exhibits;
5) Reports of investigative or court actions;
6) Other documents."

permission to call them to be examined. Thus, the court denied the defence motions requesting that all of the other defence specialists should be called to give oral testimony. It also refused to admit their reports to the case materials.

Mr Kevin Dages

F53. Mr Kevin Dages is a highly respected expert in finance and economic analysis. He has testified in the Federal Court in the USA as well as in State courts. He analysed the charges against the applicants and the case materials with particular reference to Yukos' activities and its accounting systems. His expertise in the US GAAP standards was particularly relevant bearing in mind that volume 7 of the bill of indictment was dedicated to the analysis of Yukos' accounting in accordance with the US GAAP standards whilst the accounting reports and appendices to them are contained in volume 131 of the case materials and in a number of other volumes. He concluded that the funds which the prosecution alleged were laundered had in fact been used to fund OAO NK Yukos' routine commercial activities. A copy of his report is at tab 113 to this Reply.

F54. Kevin Dages attended court on 3 June 2010 when he was cross-examined by the prosecutor about his qualifications.[31] After two hours of such "questioning" prosecutor V.A. Lakhtin requested an adjournment until the next morning when he moved for the recusal of the specialist on the grounds of his "incompetence", and also on the grounds that the court did not require his explanations regarding US GAAP standards and the activities of OAO NK Yukos as an international company. The applicants and their lawyers argued that Mr Dages' expertise was directly relevant and highly material to the defence. They also referred to facts and documents that corroborated his qualifications, including Mr Dages' extensive forensic experience. The trial court groundlessly rejected the defence arguments and on 7 June 2010, the court issued a ruling in which it accepted the prosecution's request that Mr Dages should withdraw as a specialist.[32] The ruling recorded that Mr Dages was not an expert in Russian corporate law and did not have detailed knowledge of the Russian accounting system even though there were no plans to

[31] The prosecutor began by cross-examining Mr Dages' interpreter. That cross-examination lasted some hours and resulted in the prosecutor demanding the recusal of the interpreter.
[32] Judgment of 7 June 2010 at volume C, tab C158 of the November 2011 Memorial. It is to be found at Vol. 251, c.f.s. 3-7 of the case materials.

have him clarify matters of Russian corporate law or the Russian accounting system, which the defence stated in so many words. The court stated that "*K.Dages was not involved in the participation in the case by either preliminary investigation authorities or the court*" which is an absurd basis for disqualifying a defence expert from giving evidence as if that reasoning was correct no defendant could ever instruct an expert and Article 58 of the RF CCrP would be rendered entirely pointless.

F55. The court ruled that "*Those circumstances allow the court to doubt the professional competence of K.Dages as a specialist, who pursuant to provisions of Art. 58 para 1 CCP RF can assist in examination of materials of this criminal case and clarification of matters that fall under his professional area of expertise. From the criminal case file it can be discerned that OAO NK Yukos oil company was a joint-stock company registered in the Russian Federation. The financial and economic activity of the company was regulated by provisions of Russian law. The arguments of the defence and defendant Khodorkovsky to the effect that the aforementioned company was an international one and its financial statements were not based on provisions of Russian law are not based on the criminal case file*." The court's conclusion is in bad faith and false since both the prosecution and eventually the court in its verdict found Yukos' GAAP accounts relevant to the case and made references to them.

Dr M.V.Delyagin

F56. Dr Delyagin is a renowned specialist in economics with expertise in oil and oil products price regulation issues; pricing within oil companies and managing access to the main trunk pipeline system in Russia.

F57. Dr Delyagin had commented publicly in the media on the case before giving his evidence and that he had been present in the court on a number of occasions before being called so that he could listen to the evidence. The court accepted the prosecution argument that this disqualified him as a specialist:

> "As was established in court hearing on 8 July 2010, M.G. Delyagin expressed in mass media, in particular in the publications mentioned by state prosecutor V.A. Lakhtin, the position he developed and his subjective opinion about the charges brought against defendants M.B. Khodorkovsky and P.L. Lebedev, partiality of the

court and forejudged nature of the decisions made by the court, which does not allow the court to conclude M.G. Delyagin is impartial and objective as an expert because the criminal case file was not produced to him and was not the subject of examination by him as an expert. The court believes these circumstances serve as grounds to believe M.G. Delyagin is interested directly personally or indirectly in the outcome of this criminal case, in this connection he is subject to withdrawal."[33]

F58. The trial court's reasoning is entirely unsustainable:

(a) There is nothing legally impermissible nor indeed unusual or unreasonable in an expert listening to evidence in a trial before he gives evidence;

(b) In fact Dr Delyagin had been able to review relevant extracts from the case materials. If there were further documents in the case materials that he needed to consider then of course those could have been put to him during his oral testimony;

(c) Whilst an expert commenting to the media on a case where a jury is sitting might be considered imprudent, in the instant cases the trial was being conducted before a professional judge. The Government itself states in paragraph 49 of the Memorandum that it is impossible to influence a judge in any way even via public statements made by the head of state, let alone an ordinary economist.

F59. The court's flawed reasoning denied the applicants an important opportunity for relevant expert evidence to be adduced in their defence.

Mr Romanelli

F60. Mr J.J. Romanelli was instructed by the defence as an expert in investment banking, having over 30 years' experience as an investment banker. He was asked to give evidence on matters in relation to the allegation of legalisation because of his expertise in banking. A copy of his report is at tab 130 to this Reply.

F61. The court accepted the prosecution demand that he should be recused as a specialist, using identical reasoning to that applied to the recusal of Mr Dages as a specialist:

[33] Judgment of 8 July 2010 at Volume C, tab 169 of the November 2011 Memorial

> "Neither the preliminary investigation authorities nor the court engaged J.J. Romanelli as a specialist for participation in the case, he did not familiarize himself, in the procedure established by law, with this criminal case file referred to the court, which does not allow the court to conclude the testimony of J.J. Romanelli, as a specialist engaged by the defence and the defendants to explain to the court concrete circumstances subject to be proven during the trial of this criminal case, is objective. These circumstances allow the court to doubt the professional competence of J.J. Romanelli as a specialist which can assist, as per provisions of Art. 58 para. 1 CCP RF, with the examination of this criminal case file."[34]

F62. As with its ruling on Mr Dages, disqualifying an expert presenting evidence to a trial court because he was neither engaged by the "*preliminary investigation authorities nor the court*" is patently absurd as such reasoning is an obvious ruse to disbar any expert being instructed by the defence.

Ms Hardin

F63. Ms Laura Hardin is a forensic economic analyst. A copy of her report is at tab 129 to this Reply.

F64. In its ruling to satisfy the prosecution application to recuse Ms Hardin as a specialist, the court noted Ms Hardin's background and the issues upon which she could give expert testimony:

> "Specialist Laura Russell Hardin confirmed to the court she was a competent specialist in the provision of consulting services and international corporate law, she had extensive work experience in providing litigation support. She has extensive experience in working with Russian companies, both on the territory of Russia and abroad, major business practices in working with Russian companies allow her to grasp well the area of corporate law and accounting based on Russian standards. In response to the questions the defendants' defence posed to her, she analyzed for economic well-groundedness, based on the criminal case file made available to her and based on the publicly-available information, a number of transactions in OAO NK Yukos, including with promissory notes, transactions with respect to laundering of the monetary funds generated from sales of stolen oil, as stated in the criminal case file, internal corporate borrowings and dividend payments."

F65. The court once again accepted the prosecution "argument" that this expert should be disqualified, applying the same faulty and bad faith reasoning that had been adopted in disqualifying the other defence experts:

> "As was established during the court hearing, Laura Russel Hardin as a specialist in corporate finance, provision of consulting services, and international corporate law was invited by defence counsel, lawyer K.E. Rivkin to court hearing to be examined

[34] Judgment of 17 August 2010, at volume C, tab 187 of the November 2011 Memorial. It is to be found at Vol. 260, c.f.s. 115-114 of the case materials.

> in the procedure established by Art. 271 para. 4 CCP RF as a specialist to explain to the court issues related to the explanation of economic well-groundedness of a number of transactions involving OAO NK Yukos, including, as stated in the criminal case file, those related to laundering of the monetary funds the defendants had generated from sales of oil, transactions related to corporate borrowings and dividend payments. To prepare her research, she used electronic copies of the criminal case file the defendants' defence had made available to her at her request and publicly available information.
>
> Neither the preliminary investigation authorities nor the court engaged L.R. Hardin as a specialist for participation in the case, she did not familiarize herself, in the procedure established by law, with this criminal case file referred to the court, which does not allow the court to conclude the testimony of L.R. Hardin, engaged as a specialist by the defence and the defendants to explain to the court concrete circumstances subject to be proven during the trial of this criminal case, is objective."[35]

F66. It cannot sensibly be deemed to be unreasonable for an expert to use "*electronic copies of the criminal case file"* as well as *"publicly available information*". If the prosecution thought that there was material that she had overlooked then of course it could put that material to the expert in cross-examination. Similarly the trial court's reasoning that the expert should be disqualified because she was not engaged by the investigation authorities or the defence is patently absurd and is equally patently in bad faith.

Professor Rossinskaya and Associate Professor Savitsky

F67. Professor E.R. Rossinskaya is a forensics scientist and a forensic examination methodologist; she is the Director of the Forensic Expert Examination Institute of the Moscow State Law Academy. Associate Professor Savitsky is an expert in accounting, audit, finance and credit relations as well as valuation. Both experts were instructed to analyse the expert report from the prosecution experts V.E. Chernikov and A.V. Migal. Having been denied the opportunity to cross-examine these two prosecution experts it was particularly important that the defence was permitted to call their own experts in rebuttal. A copy of their report is at tab 82 to this Reply.

[35] Judgment of 18 August 2010 at Volume C, tab C188 of the November 2011 Memorial. It is to be found at vol. 260, c.f.s. 149-153 of the case materials.

F68. On 9 August 2010, the court granted the prosecution's application for Professor Rossinskaya to be recused as a specialist[36] and on 10 August 2010 for the recusal of Associate Professor A.A. Savitsky.[37]

F69. In respect of both experts the court ruled that the defence was not permitted to challenge the reports by the prosecution experts V.E. Chernikov and A.V. Migal and that if there was any defect in those reports then it was for the court "*to schedule an additional or repeated expert examination in the procedure established by Art. 207 CCP RF.*"[38] Once more, the court's reasoning is entirely incompatible with the principle of the equality of arms between the prosecution and the defence. The defence were entitled to challenge the prosecution experts, both through their cross-examination and by adducing its own expert evidence in rebuttal. The court denied them both opportunities. This approach by the trial court and its effect are so starkly unfair that the reasonable observer would have no doubt that the trial court was biased against the defence and was not impartial as required by the Convention.

Professor Lopashenko

F70. Professor N.V. Lopashenko – a prominent Russian scientist in the area of criminal law, criminology and, especially, in the area of organised and economic crime – was asked by the defence to give her opinion as to "*whether deeds set forth in the OBC [Order to Bring Charges] is consistent with their criminal legal assessment without focusing on the issues of proof of the circumstances describing those deeds*."[39] In particular, Professor Lopashenko concluded that if a person or a group of persons who had jointly converted to their own use profit of oil-production companies owned in the aggregate 100 percent shareholdings in the latter those companies' profit could not be considered another's property under any circumstances whatsoever. She also made a number of other important findings confirming discrepancies between the charges brought and the requirements of

[36] See Judgment of 9 August 2010 at Volume C, tab C180 of the November 2011 Memorial. This is to be found at Vol. 258, c.f.s. 161-164 of the case materials.
[37] See Judgment of 10 August 2010 at Volume C, tab C181 of the November 2011 Memorial. This is to be found at Vol. 258, c.f.s. 165-168 of the case materials.
[38] Judgment of 9 August 2010 at Volume C, tab C180 and Judgment of 10 August 2010 at Volume C, tab C181 of the November 2011 Memorial.
[39] See page 1 of the report at tab 80 to this Reply.

criminal law and the criminal law doctrine, irrespective of their proof in the specific case. A copy of her report is at tab 80 to this Reply.

F71. The prosecution sought the professor's recusal and the trial court granted that request on 1 July 2010 on the "basis" that issues of interpretation and explanation of the criminal law doctrine and legal rules could not be vested in a specialist.[40] This reasoning was accepted by the judge despite the fact that under the RF Constitution (Article 45 (2) and the RF CCrP (para 21 in Article 47 (1) and para 11 in Article 53 (4)), the accused and his defence have the right to use all means and methods of defense that are not prohibited by the law. In addition, the RF CCrP does not prevent the court or the parties from seeking an expert opinion on legal matters while in any case reserving for the court the right to evaluate such opinion.

Question 26. What was the reason for not admitting in evidence "documents" submitted by the defence in support of their arguments (in particular RSBU financial reporting of Yukos subsidiaries as certified by PwC; Yukos's US GAAP financial statements, Yukos documentation describing production and sales processes and capital expenditures, legal explanations of Yukos's international corporate structure, reports by the State-appointed bankruptcy receiver for Yukos, copies of materials from the bankruptcy case, examined by the Commercial Court of Moscow in respect of Yukos)? Was the court's refusal to admit this evidence related to the improper form in which it was submitted, the manner in which it had been obtained by the defence or any other procedural defect, or rather to the substance of those documents? The Government are invited to refer, in respect of each document, to the wording of the relevant rulings by the trial court whereby it refused to attach those documents to the case file.

SUMMARY OF THE GOVERNMENT'S RESPONSE

F72. The Government, without any apparent embarrassment, explain that the trial court rejected the defence applications for these documents to be admitted, in unreasoned decisions stating that there were "*no lawful grounds for their granting*" and that the motions were "*ill-founded*", finding "*no grounds to grant them*" (paragraphs 205-206 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

[40] Judgment of 8 July 2010 at Volume C, tab C169 of the November 2011 Memorial.

F73. It is notable that although the Court specifically asked the Government to refer to the wording of the relevant rulings in respect of each document, the Government have conceded that they were all dismissed in unreasoned decisions that wholly failed to engage with the defence arguments.

F74. The applicants strongly maintain their claim that all of the following exculpatory material should have been admitted by the trial court and that any fair minded court would have admitted the material:

(a) RSBU financial reporting of Yukos producing entities and subsidiaries certified (and those opinions were never withdrawn) by PwC;

(b) Yukos' US GAAP financial statements, which were missing from the case materials introduced into the trial record for several of the years relevant to the allegations;

(c) Numerous sworn declarations from individuals formerly affiliated with Yukos and with knowledge directly relevant to the charges (see further below at paragraphs F102-F104 and F106-F124);

(d) Documentation from Yukos describing production and sales processes and capital expenditures;

(e) Legal opinions concerning Yukos' international corporate structure; and

(f) Reports of the state-appointed Yukos bankruptcy administrator.

F75. Similarly, the defence requested on a number of occasions that the ruling by the Arbitrazh Court of the City of Moscow in the case of bankruptcy proceedings regarding Yukos and properly certified copies of documents for this commercial litigation case no. A40-11836/06-88-35B be examined and added to the criminal case materials. In doing so, the defence explained that those materials contained numerous pieces of information which refuted the allegation that oil had been

stolen and that the stolen oil had subsequently been "legalised". All the requests were rejected by the trial court.[41]

Question 27. **The applicants requested the court to obtain appearance in the court of Mr Putin and several other Government officials (in particular Mr Sechin, Mr Kudrin, Mr Ustinov, Mr Kulikov, Mr Patrushev, Mr Rushailo, Mr Skuratov, Mr Stepashin, Mr Bukayev, Mr Zhukov, Mr Pochinok, Mr Karasev, Mr Sobyanin, Mr Titov and Mr Filipenko), as well as a number of other witnesses (Mr Zubchenko, Mr Kudryashov, Mr Mozhin, Mr Sapronov, Mr Tregub and Mr Yusufov). However, the court refused to summon any of them. The Government are invited to explain why the court refused to summon those persons as witnesses and whether this was compatible with the requirements of Article 6 § 3 (d) of the Convention. The applicants are invited to explain, briefly, what testimony those persons were expected to give, and how it was related to the case for the defence.**

SUMMARY OF THE GOVERNMENT'S RESPONSE

F76. The Government state that the defence motion of 31 March 2009 to summon Mr Putin, Mr Rushailo, Mr Skuratov, Mr Stepashin, Mr Patrushev, Mr Ustinov, Mr Kulikov, Mr. Kudrin, Mr Bukayev, Mr Zhukov, Mr Pochinok, Mr Karasev, Mr Sobyanin, Mr Titov, Mr Filipeuko, Mr Zubchenko, Mr Bogdanchikov, Mr Kudryashov, Mr Mozh, Mr Sapronov, Mr Tregub and Mr Yusufov was dismissed on the sole ground that it was "*untimely*" (paragraph 207 of the Memorandum).

F77. Subsequent repeated applications to call those individuals were first rejected as being "*premature*" (paragraph 208 of the Memorandum); then under the pretext that the proposed questions "*were of a general nature and did not relate to the case merits*" (paragraph 209 of the Memorandum); and, finally, the trial court said "*there are no legal grounds for its granting*" (paragraph 210 of the Memorandum).

F78. The Government do not answer the Court's question as to whether the refusal of the trial court to summon any of these witnesses was compatible with Article 6 § 3 (d) of the Convention.

[41] See extract of Trial Record of 23 March 2010 at Volume C, tab C125 of the November 2011 Memorial; Motion of 17 September 2010 at Volume C, tab C201 of the November 2011 Memorial; Trial Record of 21 September 2010 at Volume C, tab C205 of the November 2011 Memorial.

What testimony these witnesses were expected to give and its relevance to the case for the defence

F79. In the November 2011 Memorial the applicants listed the witnesses that they had asked to be subpoenaed and touched upon the relevance of their evidence. The relevance was in detail substantiated by the defence in written motions made during the court proceedings in the case (see paragraph 160 of the November 2011 Memorial).

Mr V.V. Putin

F80. At the trial on 31 March 2009[42] the applicants explained the relevance of Mr Putin's evidence:

> **"Khodorkovskiy:** it is important to summon the honourable Vladimir Vladimirovich Putin to court, because I personally reported to him on the aforementioned questions - where the oil was being supplied to and how YUKOS's money was being spent... within the framework of the preparation for a meeting with Vladimir Vladimirovich Putin I personally reported to Igor Sechin on these matters, he checked them and I think that he is fully aware of the facts, especially taking into account that he is the chairman of the board of directors of the successor of the majority of YUKOS's assets. Mainly acquired with the funds which the prosecution, in this trial, deems as having been received as a result of theft and laundering of oil... I personally received explanations from Kudrin about taxation for oil companies and, specifically, about the amount of taxes YUKOS had to pay on the oil, which the honourable Mr. Kudrin, having carried out the necessary checks, deemed not only as having been produced, but also sold, by YUKOS, i.e. not stolen."

F81. On 13 April 2010 the defence once again asked for Mr Putin to be summoned.[43] They said that Mr Khodorkovskiy had requested that Mr Putin should give evidence primarily because he used to personally report to him, as the president of the Russian Federation (quotes from the record of court session follow), on "*where the oil was supplied to and how Yukos's money was being spent*" which went to the heart of the issues in the trial.[44]

[42] See Trial Record of 31 March 2009 at Volume C, tab C100 of the November 2011 Memorial. This is to be found at Vol. 196, c.f.s. 291-319 of the case materials.
[43] See Motion of 13 April 2010 at Volume C, tab C134 of the November 2011 Memorial. This is to be found at Vol. 242, c.f.s. 3-5 of the case materials.
[44] Trial record of 19 May 2010 at Volume C, tab C142 and related motion at Volume C, tab C143; Trial record of 27 May 2010.

F82. On 19 May 2010 the defence lodged a written petition asking for Mr Putin to be summoned. Mr Lebedev explained to the court:

> "The president of the Russian Federation, the government, the legislators, the courts, the oil companies of the Russian Federation are aware, and it is obvious to all of them, that the prices of oil in the regions where it is produced on the territory of the Russian Federation are, a priori, economically incomparable with the global stock exchange prices for oil. What is the difference, and why are the legislation and the government of the Russian Federation imposing and collecting export duty from the Russian oil companies on the oil exported from the Russian Federation to the global markets - this needs to be clarified by almost all of the honourable witnesses."[45]

Mr I.I.Sechin

F83. On 19 May 2010 the defence asked the court to summon Mr I.I. Sechin, the Chairman of Rosneft and the Deputy Chairman of the RF Government. The defence wanted to question him regarding transfer pricing practices, their technological and economic reasons and their purposes and implications. The defence also wished to question him regarding the preparation by him for the meeting of the RF President Putin with Khodorkovskiy in 2002, during which he reviewed all the circumstances of activities of Yukos group of companies. Mr Sechin could also give evidence regarding the circumstances and conditions of acquisition of Yukos assets by Rosneft (the company of which Mr Sechin is the Chairman).[46] The defence wished to raise the same matters with Mr R.I. Viakhirev who, during the time specified in the charges, held the position of Chairman of the Management Board at OAO Gazprom and Mr A.B. Miller who subsequently held it. They also wished to question the following witnesses, all senior executives at OAO Rosneft: Mr S.M. Bogdanchikov, Mr A. Zubchenko, Mr S.I. Kudriashov, Mr V.M. Mozhin, Mr S.V. Tregub, Mr A.A. Sapronov. The defence also argued that the following additional witnesses could also address the same matters: Mr Ye.T. Gaidar, Mr A.N. Illarionov, Mr A.B. Chubais, Mr A.N. Shokhin, Mr I.I. Yurgens (see petition dated 31 March 2009[47]).

Mr A.L.Kudrin

[45] Trial record of 19 May 2010 at Volume C, tab C142. The petition is at Vol. 248, c.f.s. 223-224 and the trial record is at Vol. 248, c.f.s. 185-193.
[46] See motion at Volume C, tab C144 of the November 2011 Memorial. It is it to be found at Vol. 248, c.f.s. 220-222 of the case materials.
[47] See Motion dated 31 March 2009, copy at tab 93 to this Reply.

F84. Mr Kudrin was Finance Minister and Deputy Chairman of the RF Government. The defence set out the reasons why they wished to question him in a Motion to the court:

> "M.B. Khodorkovsky stated the he had "***personally got*** [from **Kudrin**] ***the explanations regarding the taxation of oil companies and specifically the level of taxes Yukos had to pay on the oil honourable Mr Kudrin deemed, having checked, not just produced, but also sold by Yukos, i.e., not stolen. Why he believed so, how he checked it, why he demanded taxes – all that could be found out from him quite at length***" (trial record of 31 March 2009).
>
> P.L. Lebedev, in his turn, told the court on the same day that he deemed it necessary to invite A.L. Kudrin because he believed that "***Minister of Finance Kudrin will explain the current provisions of the financial law to prosecutor Lakhtin. Besides, I believe, the court will not be indifferent to find out, for instance, what the Minister of Finance implies by the definition of "proceeds" and what prosecutor Lakhtin implies by the definition of "proceeds". Thus, there are many questions.***"[48]

F85. A motion to summon Mr A.L. Kudrin was filed again on 19 May 2010.[49] It was dismissed on the same day, stating: "***The court dismisses the said motion*** *as it finds no legal grounds. In the court's opinion, questions raised by the defence are not subject to being clarified in the framework of the charges brought.*"[50]

F86. The third time a motion to summon Mr A.L. Kudrin (and also yet another motion to summon Mr V.V. Putin) was filed in court on 27 May 2010.[51] On the same day, the court dismissed the motion stating: "*The court refuses to grant this motion. The court has already resolved this motion, the arguments set forth in this motion, the court does not see that they have changed in any way*."[52]

Mr G.I. Bukayev

F87. Mr G.I. Bukayev was the RF Minister for Taxes. The defence wished to question him in relation to the claims against Yukos by the tax authorities in the Moscow Commercial Court. The defence also wished to question him regarding the

[48] Motion at Volume C, tab C145 of the November 2011 Memorial. The trial record for 31 March 2009 is at Vol. 196, c.f.s. 291-319 and the motion is at Vol. 194, c.f.s. 129-180 of the case materials.
[49] See Motion of 19 May 2010 at Volume C, tab C145 of the November 2011 Memorial. This is to be found at Vol. 248, c.f.s. 214-215 of the case materials.
[50] See trial record of 19 May 2010 at Volume C, tab C142 of the November 2011 Memorial. This is to be found at Vol. 248, c.f.s. 253-265 of the case materials.
[51] See Motion of 27 May 2010 at Volume C, tab C152 of the November 2011 Memorial. This is to be found at Vol. 250, c.f.s. 9-11 of the case materials.
[52] See trial record of 27 May 2010 at Volume C, tab C151 of the November 2011 Memorial. This is to be found at Vol. 250, c.f.s. 47-59, page 5 of the court record.

activities of ZAO PricewaterhouseCoopers Audit and the circumstances of the inclusion of Yukos Capital S.a.r.l in the creditors' register of OAO NK Yukos and the repaying of a loan provided to the latter. The defence also explained that

> "The charges and the bill of indictment contain numerous allegations and assessments concerning the use of "understated prices" which were allegedly below "actual value", transfer pricing, taxation. Regulatory management and state control powers in the specified areas are exercised, *inter alia*, by the federal authority for taxes and charges the name of which changed repeatedly during the period covered by the charges (the State Tax Service, Federal Tax Service, Ministry for Taxes and Charges, etc.). All the issues mentioned were also discussed substantively by M.B. Khodorkovsky and P.L. Lebedev with the heads of the federal government and administrative authorities mentioned both by correspondence and in person. Specific information about financial and business performance of Yukos group of companies was brought to the attention of the specified heads and was checked by them. The circumstances mentioned, which are of material evidential significance for the case, are to be found out by way of examination of witnesses G.I. Bukayev, A.D. Zhukov, and A.P. Pochinok who were the heads of the federal authorities mentioned during the period specified in the charges."[53]

The basis for the request for Government witnesses (heads of bodies of government and of executive agencies)

F88. The RF Federal Security Service, as well as the ministries of the interior, defence, the RF Prosecutor's General Office, all purchased oil products from OAO NK Yukos and/or its subsidiaries. In the charges, selling oil products was characterised as having been undertaken with a view to concealing the theft of oil and legalising the stolen property. As such the defence argued that they should be able to question Messrs V.V. Putin, B.V. Gryzlov, A.S. Kulikov, N.P. Patrushev, V.B. Rushailo, A.E. Serdyukov, Yu.I. Skuratov, S.V. Stepashin, V.V. Ustinov who all held official position in the period of time covered by the investigation (see the petition dated 31 March 2009).[54]

F89. According to the charges and the indictment, all of the 1998-2003 oil production of OAO NK Yukos' subsidiaries was stolen, and the actions involving deliveries of oil and oil products were performed to conceal theft and legalisation. However, deliveries (transportation) of oil and oil products were performed, correspondingly, by AK Transneft and Transnefteprodukt, and were regulated and overseen by the

[53] See page 7 of the Motion dated 9 July 2010 at Volume C tab C171 of the November 2011 Memorial. See also motions of 31 March 2009 (Vol. 194, c.f.s. 129-180), of 17 June 2010 (Vol. 252, c.f.s. 88-94), and of 09 July 2010 (Vol. 255, c.f.s. 98-105).
[54] See Motion dated 31 March 2009 tab 93 to this Reply.

RF Government's Commission for Pipeline Access, as well as by the RF Ministry of Fuel and Energy (the name was occasionally changed to the Ministry for Energy, RF Ministry for Industry and Energy). Consequently, the defence sought to question the following witnesses: Mr V.B. Khristenko, at the time specified in the indictment the Minister of Fuel and Energy (Minister of Industry and Energy) of the RF, and also deputy Chairman of the RF Government, as well as the head of the aforementioned RF Government's Commission; S.V. Gheneralov, B.Ye. Nemtsov, I.Kh. Yusupuv who, at the same period of time, held the posts of Minister of Fuel and Energy of the RF, as well as S.M. Vainshtok, D.V. Saveliev who, during the same period of time, held the posts of heads of AK Transneft and Transnefteprodukt (see again the defence petition of 31 March 2009).

Question 28. Did the court order the forced attendance of persons who were summoned at the request of the defence but who did not appear (Mr Bogdanchikov, Mr Rieger, Mr Pyatikopov and Ms Turchina)? What specific measures did the court or the authorities undertake in order to secure the attendance of those witnesses?

SUMMARY OF THE GOVERNMENT'S RESPONSE

F90. The Government bluntly inform the Court that "*the district court did not make any orders as to the forced attendance of any of the participants of the proceedings*" (paragraph 211 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

F91. As the Government have indicated: the trial court did not force the attendance of the defence witnesses that it had summoned and that the court and the authorities took no effective measures to secure the attendance of the witnesses; rather in some instances they impeded their attendance. Nothing in the Government response undermines that conclusion and the applicants strongly maintain their case as set out in paragraphs 162 – 164 of their November 2011 Memorial.

Messrs Bogdanchikov and Pyatikopov

F92. Mr S.M. Bogdanchikov, the president of OAO NK Rosneft, and Mr A.V. Pyatikopov, who represented the alleged "injured parties" (OAO NK Rosneft, OAO Samaraneftegaz and OAO Tomskneft) were each important witnesses for the defence who could give evidence as to whether indeed any damage had been

inflicted on Rosneft and its structural subdivisions (the "injured parties" in the case), whether oil had been sold at an "understated" price and whether Yukos' structures and practices differed in any way from other vertically integrated companies, Rosneft among them.

F93. The defence asked on a number of occasions for Mr Bogdanchikov and Mr Pyatikopov to be summoned to court. On 15 June 2010 the defence filed a motion asking the court to summon the two men. On 17 June 2010 the court granted the motion to summon Mr Pyatikopov but refused to summon Mr Bogdanchikov,[55] stating that the latter could be questioned in court if he voluntarily appeared pursuant to RF CCrP Article 271(4).[56]

F94. As a representative of "injured parties", Mr Pyatikopov had no right to refuse to attend court once summoned.[57] Despite that fact he refused to give evidence although a summons had been duly issued by the court.[58] The court nonetheless took no steps to compel his attendance and questioning. The court did not do that even after the "injured parties" themselves provided the court with documentary evidence that they had received proceeds and profits from the sale of oil, which completely refutes the charges that such oil was stolen

Ms Turchina

F95. Ms I.A. Turchina had worked at ZAO PricewaterhouseCoopers Audit and had been directly involved in auditing OAO NK Yukos, its production companies, oil refineries, and other entities. She had personally participated in the field audits of OAO Yuganskneftegaz in relation to which she had given evidence to the investigators. Consequently Mr Lebedev asked the trial court to summon her as a witness. On 13 September 2010 Mr Lebedev explained to the court

> "I am filing a motion and let them consider the time, the motion to immediately summon to the court Ms Turchina, from PricewaterhouseCoopers. She is the citizen of

[55] See court record of June 17, 2010, Vol. 252 c.f.s. 117 at tab 120 to this Reply:

[56] This provides

> "4. The court shall have no right to refuse the satisfaction of the petition for an interrogation in the court session as a witness or as a specialist the person, who has come to the court at the parties' initiative."

[57] See Article 42 (5) (1) of the RF CCrP:

> "5. The victim shall have no right: 1) to default the summons of the inquirer, of the investigator and the summons to the court;"

[58] See tab 115 of this Reply. It is to be found in the case materials at Vol.252, c.s. 53, 61 – 63

> the Russian Federation. And I assume that if Lakhtin is willing to clarify these questions and defend interests in particular, of Ms Turchina, then he and Karimov have an operative opportunity, or at least Karimov has one, to find her to ask her [to come] here and to examine her in the court hearing. Moreover, if we refer to the laws of the Russian Federation, I have the right to examine any witness, who has been examined in the course of the pre-trial investigation. This is just to make our rights equal."[59]

F96. Nonetheless on 29 September 2010 the Court declined to summon Ms Turchina stating: "***The court dismisses*** *the motion filed since it does not find any legal grounds for it. The court has taken exhaustive measures to summon Turchina to which effect there is a relevant postal notice*." (Emphasis as per original)[60]

Mr Frank Rieger

F97. Mr Frank Rieger was the Financial Controller of the Yukos group from spring 2003, having previously been Vice President of Yukos-RM. In his witness statement served with the November 2011 Memorial, Mr Rieger explained in detail the considerable efforts he took to try to give evidence during the applicants' trial. He instructed his own German lawyers to help ensure that he could give evidence and even wrote directly to the trial judge explaining why his evidence was relevant. In his statement, Mr Rieger explains that although the trial judge had summoned him (thereby making clear that his evidence was relevant to the trial) he subsequently declined to give permission for Mr Rieger to give evidence by videolink or in another manner that would provide him with requisite guarantees of personal safety (see further the applicants' response to Question 29 below).

Question 29. **With regard to witnesses living abroad, it appears that the defence sought to obtain information from them. Why did the court refuse to question those witnesses via video-conference link, or to send letter rogatory to foreign courts asking that they be questioned? What was the reason for not adducing to the case files the written "affidavits" from some of those witnesses, collected and produced by the defence? Is it true that under Russian law the courts cannot accept "affidavits", i.e. written sworn statements collected by the defence, but may, at the same time, accept written records of the questioning of witnesses by the prosecuting authorities? Does Russian law accept questioning of a witness living abroad via video-conference system, and, if not, what are the reasons and the legal basis for not accepting**

[59] See trial record for 13 September 2010 which is at Volume C, tab C198 of the November 2011 Memorial.
[60] See trial record of 22 September 2010 pp.11 at Volume C, tab C206 of the November 2011 Memorial. This is to be found at Vol. 266, c.f.s. 200-228.

such a form of questioning? The applicants are requested to explain what particular points relevant for the defence those witnesses would have addressed, if questioned.

SUMMARY OF THE GOVERNMENT'S RESPONSE

F98. The Government assert that although the defence are entitled to interview witnesses and to request that the records of those interviews should be added to the case materials (paragraphs 213-215 of the Memorandum) "*the inclusion of a written voluntary interview conducted by a lawyer into the case file may not replace the questioning of such person as a witness during the pre-trial proceedings or at the court hearing*" (paragraph 218 of the Memorandum).

F99. The Government state that the RF CCrP "*does not provide for the questioning of witnesses living abroad via video-conferencing systems*" (paragraph 220 of the Memorandum). They also assert that the trial "*reasonably*" dismissed "*requests filed by the defence to send inquiries to the authorities of foreign countries to question a number of witnesses and to attach records of their examinations to the case file*" (paragraph 222 of the Memorandum): the Government overlooking the fact that the trial court did not cite any specific reasons at all for rejecting the defence motions save for the unfounded statement that there were "*no lawful grounds*" to grant them.

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

Why did the court refuse to question those witnesses via video-conference link, or to send letter rogatory to foreign courts asking that they be questioned?

F100. As the applicants explained in their November 2011 Memorial, the defence submitted numerous motions for requests for mutual legal assistance so that important witnesses that were overseas could give evidence by video link or by way of letter rogatory – see paragraphs 165 -175; see, in particular, paragraph 164 setting out in detail the attempts made by the defence to secure the evidence of Mr Rieger.

F101. As explained in the November 2011 Memorial, all requests were rejected with no detailed reasons being given. The court simply stated that there were "no lawful

grounds" or "no legal grounds" for granting the motions. In fact any fair-minded court would have granted the motions and there was no prohibition under the RF CCrP that prevented the court acceding to the defence motions.

What was the reason for not adducing to the case files the written "affidavits" from some of those witnesses, collected and produced by the defence?

F102. The defence motions were all rejected with a formulaic dismissal by the trial court: see for example:

(a) When the court rejected the motions to add the records of interview with Michael Hunter and Bruce Misamore, it stated "*there are no lawful grounds for granting the motion based on the arguments set forth by the Defence*"[61]

(b) On 2 August 2010, the defence filed a motion requesting that the record of a defence interview with Mr Leonovich should be added to the case file. The court rejected the motion: "*To deny the motion of defence counsel K.E. Rivkin for examination and addition to the criminal case file as other document of the record of interview of A.B. Leonovich of 14 May 2010 as that containing information about the circumstances materially relevant to the criminal case since there are no lawful grounds to do as requested. The court does not find lawful grounds to find the record of interview of A.B. Leonovich to constitute evidence under Art. 74 CCP RF or grounds to add it under Arts. 83 and 84 CCP RF as evidence to the criminal case file*".[62]

(c) On 27 August 2010 the defence filed a motion requesting that certified copies of the interrogations of Mr V.G. Aleksanyan be added to the case file. The court rejected the motion as it found "*no legal grounds for*

[61] See copy of trial record of 30 June 2010 at tab 124 to this Reply. It is found at Vol. 254 c.f.s. 17 of the case materials.
[62] Motion at Volume C, tab C177 of the November 2011 Memorial (Vol. 257, c.f.s. 156-162 of the case materials); Trial record of 16 August 2010 at Volume C, tab C186. (Vol. 260, c.f.s. 24-58, page 12 of the trial record in the case materials).

attaching them. The court believes that improperly certified copy cannot be attached to the criminal case materials since the aforementioned certification cannot be deemed as official".[63]

(d) On 20 September 2010, the defence filed a renewed motion for adding to the case file defence records of interview with Messrs M. Hunter, B. Loze, M. Soublin, B. Misamore, Ms S. Carey and Mr A. Leonovich. The defence asked that the records be read out in court and that they should be permitted to refer to them in further court proceedings. The motion was rejected; "*To deny the motion defence counsel E.L. Liptser filed on 20 September 2010 for finding records of interviews of Michael Hunter, Bernard Loze, Michel Soublin, Bruce Misamore, Sarah Carey and Andrey Leonovich added to the case file to be examined by way of reading out and for giving an opportunity to the defence to refer to them as evidence in the final submissions (there is also an attachment to the motion in the form of record of interview of Sarah Carey together with a letter from James Shalleck, on a total of 141 sheets) since there are no lawful grounds to grant the motion. The records of interviews of persons specified in the motion were not found to be evidence in this criminal case in the procedure established by Arts. 81 and 84 CCP RF*".[64]

Is it true that under Russian law the courts cannot accept "affidavits", i.e. written sworn statements collected by the defence, but may, at the same time, accept written records of the questioning of witnesses by the prosecuting authorities?

F103. Under Russian law, courts can, in certain circumstances, read out and examine as evidence written records of questioning of witnesses by the prosecuting authorities in accordance with Article 281 of the RF CCrP - see further the response to the Court's Question 30 below. However, the Russian law does not – and cannot – prohibit adducing to the case file records of questioning conducted by the defence as the RF CCrP and the Advocacy and Bar Act directly provide the defence counsel

[63] Motion at Volume C, tab C191. It is to be found at Vol. 262, c.f.s. 22-23 of the case materials. Trial record of 3 September 2010 at Volume C, tab C194. See Vol. 262, c.f.s. 145-171, page 26 of the trial record.
[64] Motion at Volume C, tab C202. The motion is at Vol. 266, 29-34 of the case materials. The trial record of 22 September 2010 is at Volume C, tab C207 of the November 2011 Memorial. It is to be found at Vol. 266, c.f.s. 200-228, page 10 of the trial record in the case materials.

with the right to conduct such questioning. In addition, as noted above, the accused and his defence counsel are given the right to defend by any means and in any manner not prohibited by law. [65]

F104. The defence argued that the written sworn statements that it had collected were admissible under Russian law. The argument was repeatedly rejected by the court which applied a highly restrictive interpretation of the RF CCrP. The defence arguments were set out in the various motions filed in relation to the various witnesses living abroad – see for example the motion requesting the questioning of Mr Leonovich and for the sworn record of interview with Mr Leonovich to be added to the case file:

> "Interview of a person with their consent is one of the efficient statutory ways of evidence gathering by defence counsel. This provision is enshrined, in addition to law, in the general binding explanation of legal nature by the RF Constitutional Court as set forth in Ruling No. 467-O of 21.12.2004 which says, in particular, that "***the right of the suspect, accused, their defence counsel to gather and present evidence as enshrined in Art. 86 CCP of the Russian Federation is one of the crucial manifestations of the right of those parties to a trial to defence against criminal prosecution and of the constitutional adversarial and equality of arms principle."***
>
> Systemic analysis of Art. 48 para 1 of the RF Constitution, together with Art. 53 para 1 (2) and Art. 86 para 3 CCP RF, as well as court practice leave no doubt that factual data obtained as a result of interview by counsel of a person with their consent **is criminal procedural evidence** by means of which the defence has an opportunity to prove circumstances of the case material for it. We shall remind that Art. 74 CCP RF which contains a list of kinds of pieces of evidence, mentions "**other documents**" in para 2 (6). Art. 84 CCP RF, in its turns, which explains what "other documents" include, reads: "***Documents may contain information recorded either in writing or otherwise.***" These may include various "*sources of information* ***obtained, discovered, or presented in the procedure established by Art. 86 of this Code.***
>
> ..
> Reviewing the challenges of law enforcement practices related to the use of Art. 86 CCP RF, the RF Constitutional Court stated expressly that criminal procedural law "***rules out the possibility of arbitrary denial of either getting the evidence requested by the defence or of adding to the case file and examination of the evidence it presented.***"
>
> Relying on the legal framework mentioned, the defence interviewed in writing quite a number of persons who, as is known reliably, have important evidentiary information about the circumstances subject to be proven under Art. 73 CCP RF. Such persons include **Andrey Borisovich Leonovich."** (Emphasis as per original).[66]

[65] See Art 86 para 2, part 3 of the RF CCrP and Article 6 (3) of Federal Law No.63-FZ dated 31 May 2002 'On Legal Practice and the Legal Profession in the Russian Federation'. See copies of those provisions at tab 11 to this Reply.
[66] The Motion is at Volume C, tab C177 of the November 2011 Memorial.

Does Russian law accept questioning of a witness living abroad via video-conference system, and, if not, what are the reasons and the legal basis for not accepting such a form of questioning?

F105. Russian law does not prevent the questioning of a witness living abroad by video-conference nor did the trial court ever seek to argue that such questioning was prohibited. Indeed, the defence referred to several examples of successful video-conferencing that had taken place with witnesses abroad in their applications to the court, as Mr Rieger explained in his statement served with the November 2011 Memorial:

> "[O]n 6 August 2010, the defence lawyers submitted a motion asking for me to be given permission to give evidence by video-link and for the Record of Interview referred to above to be added to the case materials. Ms. Liptser, the lawyer for Mr Lebedev, explained that despite having been summoned two and a half months ago I had not received any official documents from the Russian Federation.
>
> Ms. Liptser explained that the defence fully supported my request and went on to list for the court several examples of successful video-conferencing being arranged to collect testimony. This included the Khamovnichesky Court's efforts during a trial of a leader of an organised criminal group, when several court sessions were held at the Moscow City Court, which had the necessary equipment to facilitate the questioning. She quoted from my Record of Interview to show the relevance of the evidence that I could give. I understand that at that point Prosecutor Lakhtin objected, demanding the court stop Ms. Liptser and issue her a warning."[67]

The applicants are requested to explain what particular points relevant for the defence those witnesses would have addressed, if questioned.

F106. The applicants summarise below the relevant evidence which the witnesses who were abroad could have given and which indeed they gave in their records of interview that the trial court refused to add to the case file.

Bruce Misamore

F107. Bruce Misamore was the Chief Financial Officer of OAO NK Yukos in 2001-2005. In his Record of Interview with Counsel he gave evidence that went to the heart of the charges that had been brought against the applicants – see, by way of example, the citations from that Record in Section G below at paragraphs G156, G162 and G168.

[67] His statement was at Volume B, tab B5 to the November 2011 Memorial.

F108. In his lengthy Record of Interview Mr Misamore gave evidence in relation to:

(a) The centralisation of management of the operating companies: Yukos-EP, Yukos-RM and Yukos-Moscow;

(b) The development and implementation of the budgeting process;

(c) Yukos' financial management in relation to capital expenditures, expenses, taxes, acquisitions, and payment of taxes and dividends;

(d) Yukos' use of trading companies to buy all output from the producing entities;

(e) Yukos' pricing policies and compliance with arm's length principles;

(f) Internal audit policies and other internal control systems;

(g) Consolidated Financial Reporting under US GAAP principles and external audit of the company;

(h) The rationale for the use of offshore structures and the external audit of all offshore entities;

(i) The use of offshore accounts to benefit Yukos and the producing entities;

(j) Relations with minority shareholders; and

(k) The withdrawal by PwC of its audit report in June 2007.

Michel Soublin

F109. Michel Soublin was Mr Misamore's predecessor and was the Chief Financial Officer of OAO NK Yukos between 1999 and 2001. In his Record of Interview by Counsel, Mr Soublin was asked in detail about

(a) The state of Yukos when he first joined the company and his responsibilities as Yukos' first Chief Financial Officer and as Chair of the Finance Committee;

(b) The measures that were taken to monitor the physical trading of oil and the sales revenues as well as how those functions related to monetary controls developed at Yukos;

(c) The role of auditors and outside consultants, including PwC, and the work that took place so that Yukos could issue US GAAP Consolidated Statements; and

(d) The way in which the Russian domestic trading companies as well as non-Russian entities fitted into the vertically integrated structure[68].

Sarah Carey

F110. Sarah Carey is a distinguished American lawyer. She had served as chair of the Legal Committee of the United States/Russian Business Council and had been appointed by President Clinton to the first board of directors of the Russian-American Enterprise Fund. She became an independent director of Yukos in June 2001 and remained on the Board until December 2004. She and the other four independent directors resigned in December 2004 when she says "*the Russia government's takeover of the Company made it impossible for the Board to properly perform its duties.*"

F111. In her Record of Interview by Counsel, Ms Carey commented in detail on

(a) the relationship between Yukos and the producing entities;

(b) Yukos' internal controls and external audit systems;

(c) The preparation for Yukos to be listed on the NY Stock Exchange and the reasons why Yukos did not complete the listing. She roundly rejected the prosecutors' suggestion that "*Mr Khodorkovsky suspended the project in 2003*

[68] A copy is at tab 90 to this Reply.

because he was afraid of potential liability for making false disclosures to the SEC [the Securities and Exchange Commission];"

(d) The charges of misappropriation of oil and legalisation that had been made against the applicants. She commented that "The audit requirements and controls in place would have revealed any systematic diversion of funds because Yukos' CFO closely monitored both income and expenditure streams. Any discrepancy remotely resembling embezzlement would have been identified, investigated and reported to the Board". She also gave evidence in relation to a meeting with PwC representatives in December 2003 in which she was assured by them that Yukos' "use of transfer pricing between the production companies and the trading companies in the internal tax havens complied with Russian law."[69]

Michel Hunter

F112. Michel Hunter was the CEO of Dart Management Inc. from 1998. He is referred to in the bill of indictment against the applicants and he had extensive personal knowledge of the events and circumstances surrounding the VNK subsidiaries shares exchanges. On 8 January 2009 he swore an affidavit[70] in which, inter alia, he gave detailed evidence concerning the VNK allegations but also his knowledge from 1996 onwards of the pricing practices adopted as between Yukos and the producing entities.[71] He explains that other Russian oil companies such as OAO Sibneft, OAO Rosneft and OAO Lukoil all used the same strategy.[72]

Bernard Loze

F113. Bernard Loze is a leading French investment banker. He was a member of the Board of Directors of OAO NK Yukos between 2000 and 2004. In 2000 and 2001 he was the Chairman of the Corporate Governance Committee. In his Record of Interview by Counsel[73] he explained:

[69] Page 15 of the Record of Interview with Counsel. A copy of the Record is at tab 89 to this Reply.
[70] A copy of the Affidavit is at tab 81 to this Reply.
[71] Paragraph 10, page 4 of his Affidavit.
[72] Paragraph 8, page 3 of his Affidavit.
[73] A copy of the Record of Interview with Counsel is at tab 83 to this Reply.

(a) That he had first-hand knowledge of the development and growth of Yukos from 1997 until 2004 (the date when he explains the Russian government made it impossible for the Board of Directors to fulfil its duties to shareholders). He describes in detail the corporate governance structures within Yukos that was supported by external audit and legal advice. In particular he describes the advice received from PwC; and

(b) That having read the charges against the applicants he had concluded that the prosecutors had sought to characterise as criminal "*sound fundamental business practices*" as criminal activity. In his view "*it is an incontrovertible fact that, by any objective standard, Mr Khodorkovsky and Yukos management took a company that was, in 1996, essentially bankrupt, and by 2003, carefully and lawfully converted the company into a model vertically integrated oil and gas company.*"[74]

Mr Frank Rieger

F114. Mr Rieger was the Financial Controller of the Yukos group from spring 2003, having previously been Vice President of Yukos-RM. The applicants have referred earlier at pararaph F97 to the efforts he himself made to give evidence personally at the trial court. In his Record of Interview he touched on a number of important areas:

(a) Yukos never refused to show any document requested by PwC. He personally met with Doug Miller, a PwC partner, on a regular basis and Mr Miller never expressed any concern about the sufficiency of the information that he was provided with;

(b) He met with Doug Miller in spring 2005 when Mr Miller told him that PwC could not work with Yukos anymore because of the pressure that the authorities were placing on PwC, through the GPO interrogating their staff and by threats to revoke PwC's licence to practise in Russia;

[74] Page 3 of the Record of Interview with Counsel

(c) The accounting practices at Yukos met the methods of consolidation under US GAAP and were approved by PwC; and

(d) The tax optimisation methods applied were generally accepted in the industry and met the requirements of the legislation of the RF.

Mr Leonovich

F115. Mr Leonovich was the Head of the Treasury of OAO NK Yukos and was alleged by the GPO to be an active participant of the organised group allegedly run by the applicants. He was mentioned on multiple occasions in the Bill of Indictment. It was alleged that when he was the Head of the Treasury of OOO Yukos-Moscow, he ensured accounting for, and financial transactions in, "stolen" monetary funds accumulated in the accounts of "sham" Russian companies. Consequently, his evidence was central to the allegations against the applicants.[75]

Mr Brudno

F116. Mr Brudno was alleged by the prosecution to be a member of the organized criminal group said to have been headed by the applicants and was said to have had a critical role in the theft of oil charge. Despite that fact there is not a single record of his interrogation in the criminal case file. The key areas upon which the defence wished to question Mr Brudno[76] were as follows:

(a) What tasks did the applicants require OAO Yukos Oil Company, OOO Yukos-RM and other Yukos subsidiaries to accomplish in the course of their business activities?; and

(b) What does he know about the substance of the charges of oil theft and subsequent "legalisation" brought by the investigators against the applicants? In particular, what can he say about the investigators' allegations about his role in the alleged theft of oil?

[75] A copy of his Record of Interview is at tab 111 to this Reply.
[76] See the petition for Mr Brudno's questioning of 19 May 2010, Vol. 248, c.f.s. 225-227. A copy is at tab 112 (a) to this Reply.

F117. Mr Dubov was similarly mentioned on numerous occasions in the case file as a member of the "organised group". As with Mr Brudno, despite that fact there was not one interrogation of Mr Dubov in the case file. The defence asked that he be questioned.[77] The defence wished to ask him similar questions to the ones that they wished to put to Mr Brudno.

Mr Shakhnovskiy

F118. The defence wanted to ask Mr Shakhnovskiy a number of questions similar to those that they wished to put to Mr Brudno.[78]

Mr Ivlev

F119. The defence explained the background to their request to question Mr Ivlev in their petition of 19 May 2010:

> "PP.Ivlev is mentioned on multiple occasions in the bill of indictment in connection with his work as Managing Partner of ALM Feldmans Law Office. He told about his attitude towards the charges brought against M.B. Khodorkovsky and P.L. Lebedev allegedly by association with him, as well as about the facts of activities of OAO NK Yukos and of the legal entities related to the oil company he is aware about during the interview by counsel the record of which is available in the case file (volume 193, c.f.s.108-137).
>
> Thus, P.P. Ivlev **falls under the category of persons aware of the material circumstances relevant to the settlement of this criminal case,** in connection with which he should be examined.
>
> During the interview by counsel held on 5 January 2009, when answering the questions of the defence, P.P. Ivlev stated he was willing to confirm his testimony in full if the Russian court sent an international legal request for his examination in the procedure established by Art. 453 RF CCP to the place of his stay."[79]

F120. The defence wanted to put a number of questions to Mr Ivlev including:

(a) What were your responsibilities during your work at ALM Feldmans?;

[77] See the defence petition of 19 May 2010 a copy of which is at is Volume C, tab C148 of the November 2011 Memorial. It is to be found at Vol. 248, c.f.s. 228-229 of the case materials.
[78] See the defence petition of 19 May 2010, at Vol. 248, c.f.s. 230-232 of the case materials. A copy is at tab 112(b) to this Reply. See also the Defence Motion 27 May 2010 at Volume C, tab C155 of the November 2011 Memorial and the Trial record of 27 May 2010 at Volume C, tab C151.
[79] See Motion at Volume C, tab C146 of the November 2011 Memorial. A copy of which is at Vol. 248, c.f.s. 250-252 of the case materials. See also the trial record of 20 May 2010 at Volume C, tab C149.

(b) What kind of work did you and other employees of ALM Feldmans have to do on behalf of OAO NK Yukos? Who were your direct contacts in OAO NK Yukos?; and

(c) What do you know about the substance of the charges of theft and laundering of stolen property brought by the investigative authorities against the applicants? How can you comment on them, including the investigators' allegations about your role in the commission of unlawful acts?

Mr Gololobov

F121. Mr Gololobov was the head of the legal department lawyer at Yukos. In the defence petition of May 27 2010 the defence explained:

> "D.V. Gololobov is mentioned in the order to charge M.B. Khodorkovsky and P.L. Lebedev and in the bill of indictment in connection with this case as their allegedly active accomplice. Therefore, his testimony is of material importance for establishing the facts to be proven. At the same time, in the process of providing evidence, the prosecution failed to provide any proof that it has made any attempts to summon D.V. Gololobov to testify at the Khamovnichesky Court, or that any requests have been sent to depose him at his current place of residence in Great Britain in accordance with Chapter 53 of the RF Code of Criminal Procedure.
> ….
>
> Since the preliminary investigation authorities have earlier successfully sent such international investigative requests to the United Kingdom of Great Britain and Northern Ireland (see vol. 10, c.f.s. 1-8), there is nothing to prevent the Khamovnichesky Court from adopting a similar decision with regard to taking D.V. Gololobov's deposition in London where he currently lives and works, which fact is reliably known to representatives of the prosecutor's office who have repeatedly used various interviews by Gololobov published in the press to extend the period of detention of our clients.
>
> In this connection, we deem it necessary to communicate to the court the letter that the defense received from D.V. Gololobov (appended to the petition) from which it follows that its copy has been addressed to the Khamovnichesky Court of the City of Moscow.
>
> Supporting the proposal set forth by D.V. Gololobov in his address, the defense shares the view that a video conference would be necessary also because it would enable all parties to the trial to put to the witness the questions they are interested in, including the prosecutors, the civil claimants and the victims, which will allay the concerns voiced by representatives of the prosecution in a similar situation (record of proceedings of March 31, 2009) that the principle of equality of arms may fail to be observed.

> Accordingly, we believe that the request for deposing D.V. Gololobov that the court is going to send to Great Britain should indicate that such investigative measure should be organized via a video-conference. Also, we would like to inform the court that during the investigation of this criminal case, video conferences were successfully used more than once, including to ensure that M.B. Khodorkovsky and P.L. Lebedev who were in the detention center in Chita take part in a session of the RF Supreme Court. In that particular instance, the distance from Moscow to Chita was 6,319 km, which is 2.5 times more than the distance from London to our capital." [80]

F122. The defence wished to question him about his role in the alleged "theft of oil". As the head of the legal department he could have offered important evidence directly bearing on the proper assessment of the charges against the applicants.

Conclusions on Question 29

F123. It is clear from the foregoing that

(a) the defence evidence from the witnesses living abroad went to the heart of the allegations against the applicants;

(b) there was no legal prohibition against the Records of Interviews with Counsel and Affidavits from these witnesses being admitted; and

(c) there was no legal prohibition against the witnesses giving evidence by way of video conference/video link.

F124. The trial court's rejection of all of the defence's requests to admit this evidence was patently unfair and very significantly affected what the Court's question refers to as "*the overall fairness of the proceedings*". Theb effect was that the trial was entirely unfair.

Question 30. According to the applicants, at the trial the prosecutors read out records of the questioning of 42 witnesses. Article 281 (3) of the CCrP permits the reading out of a record ("protocol") of the questioning of a witness who testifies orally before the court where "significant" inconsistencies exist between that witness's words during his or her oral

[80] Defence petition of 27 May 2010 is to be found in the case materials Vol 250, c.f.s. 18-21 of the case materials. A copy is at Volume C, tab C154 of the November 2011 Memorial. See also the trial record of 27 May 2010 which is at Volume C, tab C151.

examination and the testimony recorded earlier by the investigator. Does it mean that forty-two witnesses at the trial gave evidence which was "significantly" different from their recorded testimony? How does that fact affect the overall fairness of the proceedings?

SUMMARY OF THE GOVERNMENT'S RESPONSE

F125. The Government state "*According to the case file, records of the questioning of 34 witnesses who appeared in court were read out at the trial on the prosecution's initiative.* ***In particular, due to significant contradictions between the pre-trial statements and the statements given before the court****, the statements of the following witnesses were read out: Mr Kraynov, Mr Khvostikov, Mr Koval, Mr Zakharov, Ms Kolupayeva, Ms Atanova, Mr Borisov, Mr Kramer, Mr Orlov, Ms Rumyantseva, Ms Dmitriyeva, Mr Zaytsev, Mr Kudasov, Mr Vilyavin, Mr Anisimov, Ms Gubanova, Mr Gihnanov*" (paragraph 224 of the Memorandum, emphasis added). It is clear therefore that on the Government's own admission only 17 witnesses came within the scope of Article 281 (3) of the RF CCrP.

F126. The Government also state that pre-trial statements "*of another 17 witnesses questioned before the court were read out at the trial because of their incompleteness and inaccuracy due to much time elapsed since the events they were questioned about*" (paragraph 225 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

F127. The Government are silent on the clear legal regime for witness protocols to be read – despite the Court expressly referring to Article 281 (3) of the RF CCrP. They are silent for one reason only: it is beyond doubt that the reading of the witness protocols was contrary to that regime.

F128. Under Article 281(3) of the RF CCrP, the court has the right (upon application by one of the parties) to permit the reading of the testimony of a witness which had been given earlier during the preliminary investigation, provided there are significant differences between previously given testimony and testimony given in court.[81] However, this evidence may only be provided if it becomes apparent that

[81] See extract from the RF CCrP at Volume C, tab C8 of the November 2011 Memorial.

there are *significant* inconsistencies between the testimony given by a witness at the pre-trial stage and his oral testimony during the trial. Despite this requirement of the law, the prosecutor failed to demonstrate significant inconsistencies that were said to exist between the interrogation record and the oral testimony but the court nonetheless always acceded to the requests for the records to be read out.

F129. As the Court observed in *Khodorkovskiy (no.2)* the "*reading of a witness's written testimony at the trial… may sometimes be necessary – for example, to reveal discrepancies in his submissions, to undermine his credibility, to obtain clarifications, etc.*"[82] However, here the Government is not able to demonstrate there were such discrepancies. The applicants submit that this demonstrates (a) the lack of impartiality by the trial court (who permitted the prosecution to read out the records notwithstanding the clear provisions of the procedural law); (b) that the trial failed to conform sufficiently with the requirement for equality of arms between the parties; and (c) supports the applicants' argument that their trial was fundamentally unfair contrary to Article 6 § 1.

Question 31. What was the reason for not ordering the disclosure of documents which were in the possession of third parties and which the defence sought to obtain? This question concerns, in particular, an inventory of property of Yukos subsidiaries, information on oil prices applied by Rosneft and Sibneft, and the full inventory of documents found by the GPO as a result of searches in 2003, as well as the content of those documents? What particular point did the defence try to prove with those documents? How did the court's refusal affect the overall fairness of the proceedings?

SUMMARY OF THE GOVERNMENT'S RESPONSE

F130. The Government state the "*court dismissed the motions of the defence to obtain documents related to business operations from a number of oil producing companies and to include them in the case file having found no legal grounds to grant the requests*" (paragraph 227 of the Memorandum). They state that the motion for documents from case no. 18/41-03, including material examined by the prosecution experts and reports of investigative activities and other documents concerning the financing of the Yukos group, was dismissed as "*ill-founded*" (paragraph 230 of the Memorandum).

[82] § 698 of the judgment.

F131. The Government assert that the Court's role in assessing questions concerning the fairness of the taking and handling of evidence "*must be very limited*" (paragraph 233 of the Memorandum).

APPLICANTS' REPLY RESPONSE TO THE COURT'S QUESTIONS

The defence request for discovery of documents concerning inventory of property of Yukos subsidiaries

F132. The defence sought disclosure of the inventory of Yukos subsidiaries of the stocktaking of property and liabilities carried out over the period from 1998-2006, as well as copies of all the stock sheets, collation statements,[83] and stocktaking reports. In making those petitions the defence made it clear that such documents demonstrated that those allegedly "injured by theft" had in fact suffered no damage during the relevant period and that there had been no theft of any of their property.[84] Therefore the documents went to the heart of the case against the applicants.

F133. The court denied these repeated requests.[85] The applicants are convinced that this position of the court was prompted exclusively by the desire to prevent evidence from appearing in the case, which would directly prove the falsified nature of the charges.

The defence request for disclosure of information on oil prices applied by Rosneft and Sibneft

F134. On 29 July 2010, the defence filed a motion requesting the court to order disclosure from the Federal Anti-Monopoly Service of Russia of information about the prices of oil applied by Rosneft Oil Company and its subsidiaries, dependent trading companies, its subsidiary oil producing limited liability company RN Purneftegas during 1998-2003 inclusive, and also about the prices applied by the parent, Sibneft

[83] Collation statements are used to reflect the results of an inventory of property, plant and equipment, intangible assets, goods and materials, finished products, and other tangible assets the amount of which has been found to be different from the data in the accounting books.
[84] See, for example, the defence motion dated 17 June 2010 (which is to be found at Vol. 252, c.f.s. 66-68 of the case materials). A copy is at tab 119 to this Reply.
[85] See extracts of trial records at tab 95 and 125 to this Reply: the record of 1 April 2009 is at Vol. 197 c.f.s. 687-714, the record of 6 July 2010 is at Vol. 253 c.f.s. 222.

Oil Company as well as its subsidiaries, dependent trader companies and its oil producing subsidiary Noyabrskneftegas during 1998-2003. The defence were compelled to file the motion with the court as the Federal Anti-Monopoly Service had not responded to the defence's request for voluntary disclosure of that information.[86]

F135. On 5 August 2010, the court refused the motion on the basis that it found "*no lawful grounds for granting the motion because the said companies' prices are not benchmark prices*."[87] On the same day, Mr Khodorkovskiy made a similar request, pointing out that the concept of benchmark prices was not used in the Russian Federation and that it would be important for the court to know whether the prices Yukos had used to purchase oil from its subsidiaries had differed from those of other producers. Mr Khodorkovskiy also asked the court to set out its reasons should the court deny the repeated motion.[88] On 16 August 2010 the court refused the motion "*since the grounds set forth in the defendant's motion were taken into account by the court on 5 August 2010 when it resolved a similar motion of defence counsel D.M. Dyatlev of 29 July 2010.*"[89] The court wholly failed to engage with the defence arguments.

F136. As the prosecution stated that the production entities had been "forced" to sell oil at "understated" prices, it was important for the applicants to understand what was considered to be an "understated" price and how the court determined the "understating". Thus Mr Khodorkovskiy clarified for the court: "*There is an average price in production regions in the case file… it is composed of the highest prices which are considered to be legitimate and of the lowest prices also*

[86] See motion dated 29 July 2010 at Volume C, tab C176 of the November 2011 Memorial. The motion is at Vol. 257, c.f.s. 102-104 of the case materials.
[87] Trial record of 5 August 2010 at Volume C, tab C179 of the November 2011 Memorial. It is to be found at Vol. 258, c.f.s. 45-97 of the case materials.
[88] See Vol. 258, c.f.s. 45-97, page 51 of the trial record. A copy is at tab 127 to this Reply.
[89] Trial record of 16 August 2010 at Volume C, tab C186 (vol. 260, c.f.s. 24-58, page 12 of the trial record).

considered legitimate and of the prices in between these two extremes… [w]e ask the court to… also look… at the lowest prices considered to be legitimate in order to compare our prices with those prices that, so to speak, were and are considered to be legitimate in the same region at the same time."[90] Information about the prices adopted by Yukos' competitors was directly relevant to this issue – see further the applicants' response to the Court's Question 36 below.

The defence request for disclosure of the full inventory of documents seized by the GPO as a result of searches in 2003, as well as the content of those documents

F137. The defence also petitioned to inspect all of the material that had been seized in the searches since "principal" case No. 18/41-03 had first been opened in 2003 as well as the searches in related cases severed from the "principal" case. When the case under which the applicants were being tried was severed from case no. 18/41-03 in 2007 the investigators failed, contrary to law, to include an inventory of documents and materials from the original case file. Only upon inspecting that material (or at least reviewing a particularised schedule or inventory of the material) could the defence establish whether the prosecution had discharged its duty to disclose exculpatory evidence. It was highly likely that there was exculpatory material amongst the unused material that ought to have been disclosed. The prosecution avoiding compliance with the said requirement had been one of the reasons why the defence had argued that the proceedings should be stayed as an abuse of process. However neither the courts considering the abuse of process applications nor the trial court engaged at all with this serious violation evidencing that the trial was not fair and that, in prosecuting the applicants, the authorities acted in extreme bad faith.

The defence request for disclosure from the "principal case" of documents with information about financing Yukos group of companies

F138. On 7 September 2010 the defence submitted a Motion to the trial court in which they requested the Investigative Committee to disclose materials from the "principal case":

[90] See copy of court record of 29 July 2010, Vol. 257 c.f.s. 141-142 at tab 126 to this Reply.

"exhibits, records of investigative actions, and other documents containing information about **financing** of Yukos group of companies, "including to oil-producing and refining enterprises with a view to keeping them operational and creating conditions for production and refining of new volumes of oil" out of "proceeds from sales of oil and oil products" **and its amounts**." (Emphasis as per original)."[91]

F139. In the Motion the defence explained that

"..M.B. Khodorkovsky and P.L. Lebedev are charged with "leading the actions of the organised group members and other persons with respect to embezzlement and distribution **to the benefit of the organised group participants of monetary funds** which came as proceeds from sales of oil to the accounts of Russian and foreign companies" (*order to bring charges against M.B. Khodorkovsky of 29.06.2008; see, e.g., p. 56, 1st paragraph from the top; p. 45, 3rd and 2nd paragraphs from the bottom*).

Importantly, when calculating the allegedly caused damage for 1998-2000, unlike a different period of 2001-2003, the investigators do not deduct from the theoretical proceeds from sale for export of all the produced oil at Ural's (Med) and Ural's (R'dam) prices the amounts of "**monetary funds channeled to finance the operation of enterprises and entities ensuring further production of oil**" (*order to bring charges against M.B. Khodorkovsky of 29.06.2008, p. 92, 3rd paragraph from the top).*

As per para. 19 of Decree of the Plenum of the RF Supreme Court No. 51 of 27.12.2007 on Judicial Practice in Fraud, Embezzlement, and Misappropriation Cases, embezzlement consists in "the wrongful conversion, not involving exchange for value, by a person for a mercenary purpose of property entrusted to him/her **to his/her benefit** against the owner's will."

Therefore, if the amount of "proceeds from sales of oil and oil products" net of actual expenses equals the amount of monetary funds channeled to Yukos group of companies, "including to oil-producing and refining enterprises with a view to keeping them operational and creating conditions for production and refining of new volumes of oil," then embezzlement of property which is a source of those monetary funds (*i.e.*, of oil) is impossible in principle because it was not converted to the benefit of the accused against owners' will. It was sold under agreements, and proceeds came to vertically-integrated company Yukos and were spent on its needs.
…
M.B. Khodorkovsky submitted in his testimony in court on 09.04.2010, 12.04.2010, 13.04.2010, 20.04.2010, 29.04.2010, and 30.04.2010 that all the income from sales of oil and oil products to third parties had been spent in the interests of OAO NK Yukos and its subsidiaries by end-2003.

However, during the preliminary investigation on charges against Khodorkovsky and Lebedev, facts and amounts of financing of Yukos group of companies, "including oil-producing and refining enterprises with a view to keeping them operational and creating conditions for production and refining of new volumes of oil" were not established.

During the judicial investigation, the prosecution and the court have been impeding in every way determination by the defence of those circumstances corroborating deliberate falsehood of the charges of **embezzlement of oil and legalisation…"**

[91] See copy at tab 131 to this Reply. It is to be found at Vol. 262 c.f.s. 239-241of the case materials.

F140. On 17 September 2010 the trial court dismissed the motion. The court wholly failed to deal with the substance of the defence motion and dismissed it with a formulaic and unreasoned assertion:

> "The court, having listened to the views of the participants to the proceedings, dismisses the filed in motion, because it does not see any legal grounds for this."[92]

How did the court's refusal affect the overall fairness of the proceedings?

F141. The documents of which the defence sought disclosure and subsequent admission into oral evidence were central to the accusations against the applicants. The trial court could and should have ordered their disclosure and admission into evidence.

F142. The Government's assertion that the Court's role in assessing questions concerning the fairness of the taking and handling of evidence "*must be very limited*" (paragraph 233 of the Memorandum) is misconceived and inconsistent with the Convention case law – most notably demonstrated in the Court's analysis of the applicants' first trial in *Khodorkovskiy (no.2)* where the Court concluded that there had been a violation of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (c) and (d) on account of the unfair taking and examination of evidence by the trial court (see §773 of the judgment). For the foregoing reasons, the applicants submit that the Court should reach the same conclusion in relation to the applicants' second trial.

[92] See page 15 of the trial record for 17 September 2010 at Volume C, tab C200 of the November 2011 Memorial.. It is to be found at Vol. 265, c.f.s. 258-273 of the case materials.