SUMMARY OF THE REPLY TO THE EUROPEAN COURT OF MR KHODORKOVSKIY AND MR LEBEDEV

A1. **The Government's Memorandum has wholly failed to meet the applicants' case that they have been victims of sustained violations of their rights under the Convention. The bringing of new charges against the applicants in 2007 was deliberately engineered to ensure the applicants' further imprisonment on charges that were entirely without substance. There was global criticism of the authorities' actions by human rights organisations and governments. Thus, the US Senate passed a resolution condemning the further charges as "*a politically motivated case of selective arrest and prosecution*" and called for the withdrawal of the case.**

A2. **The authorities' prosecution of the applicants, from the outset and at every stage thereafter has been consistently motivated by improper purposes and has been characterized by bad faith resulting in the restriction of the applicants' rights under the Convention for improper reasons. Both applicants continue to assert not only their innocence but their consistent case that the prosecution was brought for improper motives. The so-called "second" charges against them, which resulted in a significant increase in the duration of their incarceration, were entirely without merit and a breach of Article 7 and of Article 4 of Protocol No 7.**

A3. **The applicants' trial before the Khamovnicheskiy District Court of the city of Moscow ("the second trial") was observed each day by an observer from the International Bar Association and in its resulting report condemned the trial as being "*fundamentally unfair.*" At the conclusion of the cassational appeal of the verdict, Amnesty International forcefully condemned the violations of the applicants' rights, stating that with the bringing of the second charges the applicants had**

> **"been trapped in a judicial vortex that answers to political not legal considerations. Today's verdict makes it clear that Russia's lower courts are unable, or unwilling, to deliver justice in their cases....The failure of the appeal court to address the fundamental flaws in the second trial and the fact that Mikhail Khodorkovsky and Platon Lebedev have already spent eight years in jail on barely distinguishable**

charges, points to the conclusion that their second convictions have been sought for political reasons relating purely to who they are."

A4. **The second trial resulted in what was termed a "*miscarriage of justice*" and "*legal fiction*" by members of the RF Presidential Council of the Russian Federation for Civil Society and Human Rights ("the Presidential Council"). These comments followed a 400-page report published on 21 December 2011. This was based on an exhaustive analysis of the verdict and other materials of the trial. It was prepared with the approval of the (then) President, Mr Medvedev. The report contained opinions provided by distinguished Russian, European and US experts, each of the experts being tasked to study the matter and submit an expert report entirely independently. None of the experts found any support whatsoever for the allegations of theft or legalization that had led to the applicants' conviction. The experts found numerous violations of the substantive and procedural law of Russia.**

A5. **Having considered the expert reports, the Presidential Council issued a series of urgent recommendations in which, amongst other things, it called for the verdict to be repealed and described the case as "*a miscarriage of justice*":**

"Having heard and discussed the report on the results of the civic scholarly expert study with respect to the criminal case of M.B. Khodorkovsky and P.L. Lebedev, the Presidential Council of the Russian Federation for Civil Society and Human Rights considers it imperative to present to the country's top leadership recommendations on the adoption of urgent measures of an individual and general character in the sphere of criminal justice.

1. Proceeding from the requirements of the Constitution of the RF and the international obligations of the Russian Federation, it is advisable to reconsider the question of remedying the violations of generally accepted principles of criminal prosecution that have been identified by the experts with respect to the given case, which principles do not permit conviction for acts that are not directly prescribed by the criminal law and do not contain features of a *corpus delicti*, as well as without due process.

In connection with this, taking into account the effective means of legal defence that exist in the system of national justice, it is imperative:

to raise with the General Prosecutor of the RF the question of lodging a submission in supervisory procedure on the verdict that has entered into force with respect to the given case, with the objective of its repeal;

to propose to the Investigative Committee of the RF that it resolve the question of initiating proceedings based on newly discovered circumstances and investigating

the grounds for the reconsideration of the given criminal case - in connection with fundamental violations in the course of proceedings in the case that testify to a miscarriage of justice committed in its resolution." (Emphasis added).

A6. **On 20 July 2012, after examining a huge volume of documents and after a hearing on merits that lasted from 17 to 25 October 2011, the Stockholm Chamber of Commerce delivered the Arbitral Award in *Quasar de Valores SICAV S.A.; Orgor de valores SICAV S.A.; GBI 9000 SICAV S.A.; ALOS 34 S.L. v. The Russian Federation.* The Tribunal examined whether the Russian Federation had acted lawfully in relation to the re-assessments of Yukos' tax liabilities for the years 2000-2003. As such, a central issue was whether the transactions between Yukos and trading companies were "*sham*" transactions and whether the trading companies were themselves "*dummy companies*": a key issue in both the first and second trials faced by the applicants. The Tribunal was entirely unpersuaded by the "*sham*" analysis. It stated that it was:**

"unwilling to find that Yukos engaged in sham transactions with its affiliated trading entities. For one thing, the notion of a 'sham' suggests something surreptitious, whereas the tax authorities obviously had access to the tax returns of both Yukos and the affiliated entities in question and would, or should, have had little difficulty in seeing that Yukos was assigning significant revenues to the latter by way of inter-company transfers. […]
The sales transactions were just that: the transfer of title to goods for a certain price. From the ultimate independent purchaser, a legal relationship was created between that purchaser and the intermediate Yukos affiliate. There was no 'fake' transaction."

A7. **Despite these unequivocal findings, including those made by the Presidential Council, the RF Supreme Court denied all the substantive arguments contained in the applicants' subsequent supervisory appeals and the applicants continued to be denied justice. Meanwhile, the independent experts and individuals responsible for commissioning the reports were subjected to harassment and intimidation by the Russian authorities.**

A8. **On 18 July 2014, a panel of eminent jurists sitting in the Permanent Court of Arbitration in the Hague (The Hon L.Yves Fortier, Dr Charles Poncet and Judge Stephen Schwebel), concluded that the Russian Federation had breached Article 13 of the Energy Charter Treaty in that its actions had been equivalent to the**

expropriation of Yukos and were not "*carried out under due process of law.*" That conclusion followed a lengthy twenty-one day hearing on merits that had taken place between 10 October and 9 November 2012. In its 579 page decision the Arbitral Tribunal concluded that "*the Russian court proceedings, and most egregiously, the second trial and second sentencing of Messrs. Khodorkovsky and Lebedev on the creative legal theory of their theft of Yukos' oil production, indicate that Russian courts bent to the will of Russian executive authorities to bankrupt Yukos, assign its assets to a State-controlled company, and incarcerate a man who gave signs of becoming a political competitor*."

A9. **The applicants strongly believe that the Court was misled in bad faith by the Government in previous proceedings brought by the applicants and by Yukos in this Court, but that issue does not arise for determination in these proceedings. Importantly however, and directly relevant to these applications, the Government not only concealed from the Court binding legal positions that had been expounded by the Russian courts (which are in greater detail discussed in Section G below), but also took a position before the Court that was based on bad faith. Thus, in *OAO Neftyanaya kompaniya YUKOS v. Russia*, no. 14902/04 (merits), 20 September 2011, the Government asserted in respect of these same oil transactions that the oil was being sold by the subsidiary producing companies. This fact was never contested by anybody and it is supported by the Court's final judgment. Currently in the present case, however, the Government are asserting to the Court that the oil sales never took place since the applicants "had stolen" this oil from Yukos' producing entities.**

A10. **It is notable that in relation to the Court's Questions in Section G concerning whether the conviction was a breach of Article 7, the Government have asserted that the Court is not entitled to ask the "*majority of the questions*" it has asked relating to the "*substance of the charges*". That contention is misconceived and inconsistent with the established case law of the Convention, both in relation to Article 7 and the so-called fourth instance principle. The Court is entitled to review domestic judgments and to make its own findings of fact in instances where it is satisfied that the domestic judgment was arbitrary and/or the product of a flagrant non-observance of the applicable domestic law or otherwise a**

flagrant denial of justice. The reason why the Government asserts that the Court is not entitled to ask the "*majority of the questions*" in relation to Article 7 is that it wishes to conceal from this Court the true reasons for the prosecution thereby abusing the presumption that states act in good faith.

A11. **For the reasons set out in their Reply, the applicants strongly maintain their complaint of violations of Articles 6, 7, 8, Article 4 of Protocol No 7 and Article 18.**