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Contact: Abel Campos
Tel: 03 88 41 26 48

Date: 22/05/2013

DH-DD(2013)565

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Meeting: 1172 meeting (4-6 June 2013) (DH)

Item reference: Action plan (15/05/2013)

Communication from the Russian Federation concerning the case of OAO Neftyanaya Kompaniya Yukos against Russian Federation (Application No. 14902/04).

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Réunion : 1172 réunion (4-6 juin 2013) (DH)

Référence du point : Plan d'action

Communication de la Fédération de Russie relative à l'affaire OAO Neftyanaya Kompaniya Yukos contre Fédération de Russie (requête n° 14902/04) (**anglais uniquement**)



ACTION PLAN
on the enforcement of the judgment
of the European Court of Human Rights in case
no. 14902/04 *OAO Neftyanaya Kompaniya Yukos v. Russia*
(judgment of 20 September 2011, was rectified on 17 January 2012
under Rule 81 of the Rules of Court, final on 8 March 2012)

Violation

In the judgment in case *OAO Neftyanaya Kompaniya Yukos v. Russia* the European Court of Human Rights (hereinafter - "the European Court") found a violation by the Russian authorities of Article 6 § 1 in conjunction with Article 6 § 3 (b) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - "the Convention") and Article 1 of Protocol No. 1 to the Convention on account of the insufficient time available to the applicant company for preparation of the case at first instance and on appeal, applying tax assessments based on the explanations provided by the Constitutional Court of the Russian Federation which considerably changed the existing law-enforcement practice and, in the opinion of the European Court, could not be foreseen by the applicant company, as well as on account of disproportional character of the Bailiffs' Service actions in the course of enforcement proceedings for bringing the applicant company to tax liability.

The European Court has not yet delivered the decision on the just satisfaction, the examination of the case in this part is pending before the Court.

General Measures

**1. Measures for distribution of the European Court's judgment and
implementation of the positions contained therein in the legal system
of the Russian Federation**

1.1. According to the Regulation on the Representative of the Russian Federation at the European Court of Human Rights – the Deputy Minister of Justice of the Russian Federation approved by Decree of the President of the Russian Federation No. 310 of 29 March 1998, the European Court's judgment in case *OAO Neftyanaya Kompaniya Yukos v. Russia* was forwarded to the competent state authorities (the Supreme Commercial Court of the Russian Federation, the General Prosecutor's Office of the Russian Federation, the Federal Bailiffs' Service of the Russian Federation, the Federal Tax Service of the Russian Federation) for implementation into the practice and for taking general measures to eliminate and prevent further violations of the Convention found by the European Court.

The mentioned authorities forwarded a copy of the European Court's judgment to the regional courts, subordinate institutions and territorial bodies respectively.

1.2. According to the Supreme Commercial Court of the Russian Federation (hereinafter - "the Supreme Commercial Court") after delivery of the final decision on just satisfaction by the European Court, the judgment in case *OAO Neftyanaya Kompaniya Yukos v. Russia* with detailed comments thereto will be published in the Bulletin of the Supreme Commercial Court of the Russian Federation.

Studying of the legal positions stated in the European Court's judgments including the judgment in case *OAO Neftyanaya Kompaniya Yukos v. Russia* is organized by the Supreme Commercial Court in conjunction with the Institute for Preparation of State and Municipal Government Management Officials of the Russian Presidential Academy of National Economy and Public Administration within the framework of regular qualification trainings for judges and public officials of commercial courts.

Approximately 1,200 judges and 1,900 public officials of commercial courts attended qualification trainings in 2012.

1.3. Additional qualification trainings are scheduled for bailiffs.

The Government of the Russian Federation by its Resolution of 9 February 2013 No. 149-p approved the budgetary funds assigned to the Federal Bailiffs' Service (hereinafter - "the FSSP of Russia") for improvement of employees qualification in 2013.

At the present time the authorities are working on carrying out a competition among educational institutions for organizing public officials' qualification trainings. After the competition the FSSP of Russia in conjunction with the relevant educational institution will develop educational programs and study schedules, which provide studying of the Court's judgment in case *OAO Neftyanaya Kompaniya Yukos v. Russia*.

The planned period for realization of the relevant activities is July – December 2013.

1.4. The text of the European Court's judgment in case *OAO Neftyanaya Kompaniya Yukos v. Russia* in the Russian is published in Consultant Plus and Garant legal reference systems. The information on the above-mentioned judgment is published in the Bulletin of the European Court of Human Rights No. 2/2012 (Russian edition).

2. Measures for elimination of violations related to the insufficient time available to the applicant company for preparation of the case at first instance and on appeal

Federal Law of 30 April 2010 No. 69-FZ amended the Commercial Procedure Code of the Russian Federation (hereinafter - "the CPC"), including increased time-limits for case examination:

- in the trial court – from one to three months (Article 152 of the CPC);
- in the court of appeal– from one to two months (Article 267 of the CPC).

Furthermore the amendments stipulated prolongation of the time-limits for the examination of cases by courts up to six months for especially complicated cases and considerable number of participants involved in the proceedings (Article 152 § 2, Article 267 § 2 of the CPC). Commercial courts had no such right previously.

In the Decision of the Plenum of the Supreme Commercial Court No. 36 of 28 May 2009 *On Application of the Commercial Procedure Code of the Russian Federation during Examination of Cases in the Commercial Court of Appeal* (as amended by Decision No. 30 of 24 March 2011) the commercial courts were explained that as several persons involved in the proceedings may lodge appeals against one judicial act within the whole time-limit established for lodging appeals, including on the

last day within this time-limit, the date of the court hearing can not be ordered earlier than the time-limit for lodging appeals expires (§ 22 of the Decision).

The adopted measures correspond to the European Court's conclusions and serve as additional guarantee for ensuring the rights of parties in the proceedings.

3. Measures for elimination and prevention of violations related to retrospective application of the explanations provided by the Constitutional Court of the Russian Federation

The European Court noted that the judgment of the Constitutional Court of the Russian Federation (hereinafter - "the Constitutional Court") No. 9-P of 14 July 2005 *On the Case Concerning Constitutionality of the Provisions of Article 113 of the Tax Code of the Russian Federation* considerably amended the law enforcement practice and these changes could not be foreseen by the applicant company.

After delivery of the mentioned judgment by the Constitutional Court, taking into consideration the legal positions it contains, the Article 113 of the Tax Code of the Russian Federation was amended by Federal Law No. 137-FZ of 27 July 2005.

Thus, at the present time the legal positions of the Constitutional Court are regulated in the federal legislation and the relevant standards of law are applied from the moment of their entering into force. By this retrospective application thereof is absolutely excluded.

4. Measures for providing proportionality of carrying out enforcement procedures for bringing to tax liability

After the events examined by the European Court, the Russian Federation legislation has been steadily amended and supplemented to protect and expand the rights of the enforcement proceedings parties. In particular, the Federal Law *On Enforcement Proceedings* (hereinafter - "the Law on Enforcement Proceedings") was adopted. Its provisions are aimed on observation of the legislation, including ensuring inviolability of the minimal property necessary for the debtor's subsequent effective functioning, as well as proportionality of the amount of the recoverer's claims and compulsory enforcement measures.

Chapter 10 of the Law on Enforcement Proceedings regulates in detail the procedure of forced seizure of a debtor company's property and allows to ensure proportionality of bailiffs' actions.

Presently the State Duma of the Federal Assembly of the Russian Federation with participation of the FSSP of Russia and the Ministry of Economic Development of Russia worked out the issue of amending the Law on Enforcement Proceedings regarding further improvement of the procedures for realization of the debtor's property, including by organizing electronic auctions for sale of the respective property. The amendments provide a brand new mechanism for realization of property in enforcement proceedings, establishment of electronic trade form as the main principle of property realization, providing for definition of the market price for the arrested property.

According to the draft law concept in compliance with the general rule debtors' property realization will be carried out by its sale in the open electronic trading,

organized in form of an auction. The realization of debtors' property will be carried out by special companies chosen in accordance with the established legislative procedure.

This mechanism will make property realization more effective and timely and will ensure openness and transparency of the trading, taking into consideration the debtors' interests during realization of their assets by market definition of the price for the sold assets.

4.1. Enforcement Fee

For the purposes of improvement of the Law on Enforcement Proceedings and of ensuring the uniform law enforcement practice for recovering the enforcement fee and observation of the rights of the enforcement proceedings parties, the FSSP of Russia developed and forwarded to its structural units and territorial bodies the Methodical recommendations No. 01-8 of 23 December 2010 *On the Procedure of Recovery of Enforcement Fee* by which the bailiffs are now guided.

The mentioned Methodical recommendations thoroughly explain the grounds and conditions for taking the decision to recover the enforcement fee, the particularity of calculating the fee and enforcement of the relevant judgments.

Part 7 of Article 112 of the Law on Enforcement Proceedings provides the court's right to delay recovery of the enforcement fee, to order its recovery by "installments" or to reduce the enforcement fee amount. The relevant decision can be ordered by the court taking into account the gravity of the debtor's fault as regards failure to comply of the enforcement document in due time, the debtor's financial situation and other important circumstances.

The existing law enforcement practice proves that the debtors have a real opportunity to seek the reduce of the enforcement fee amount in court.

For example, the Sverdlovsk Regional Commercial Court by its decision of 8 August 2012 granted the debtor's claims to reduce the amount of the enforcement fee under the bailiff's judgment. The court took into consideration the actual circumstances of the case and the debtor company's financial situation.

The Kemerovo Regional Commercial Court by its judgment of 29 May 2012 granted the debtor's claims to reduce the enforcement fee amount due to the debtor's company difficult financial situation as well as suspension of the company's activities.

By its decision of 26 November 2012 the Commercial Court of the Khabarovsk Territory granted the debtor's claims to reduce the enforcement fee amount and to allow partial repayment of the enforcement fee by instalments within 3 years due to the debtor's difficult financial situation.

The Stavropol Territorial Commercial Court by its decision of 10 December 2012 granted the debtor's claims to reduce the enforcement fee amount due to the debtor's difficult financial situation.

The Sverdlovsk Regional Commercial Court by its decision of 17 August 2012 granted the debtor's claims for reduce of the enforcement fee amount. The court took into consideration that the debtor company did not evade from repayment of its debt to the recoverer and had been effecting repayment of the debt by instalments.

The Sverdlovsk Regional Commercial Court by its decision of 12 December 2012 granted the debtor's claims to reduce the enforcement fee amount and allowed partial repayment of the enforcement fee by equal instalments within 3 months.

The City of Moscow Commercial Court by its decision of 20 April 2012 granted the claims to reduce the amount of the enforcement fee defined by the bailiff. The court took into consideration the recoverer's actions which influenced the possibility for voluntary compliance of the enforcement document within the established time period as well as the existing debtor's obligations for payment of salaries to the debtor company's employees and for payment applied taxes to the state budget.

The Yaroslavl Regional Commercial Court by its judgment of 2 September 2011 granted the debtor's claims to reduce the enforcement fee amount by $\frac{1}{4}$ of the total enforcement fee amount.

The Commercial Court of the Republic of Tatarstan by its decision of 12 April 2010 and the Eleventh Commercial Court of Appeal by its judgment of 27 July 2010 granted the debtor's claims to reduce the initial enforcement fee amount as defined by the bailiff's decision. The court took into consideration the debtor company's financial situation as well as the fact that the debtor company was the only heating supply company in the town producing the housing utility resource (heating energy) for the town population and budgetary institutions (kindergartens, schools, hospitals).

The Commercial Court of the Krasnodar Territory by its decision of 23 July 2010 and the Fifteenth Commercial Court of Appeal by its judgment of 16 November 2010 granted the debtor's claims to reduce the enforcement fee amount and delay the enforcement fee payment due to existence of actual circumstances hindering the execution of the enforcement documents' requirements.

The Commercial Court of the Udmurt Republic by its decision of 12 November 2009 granted the debtor's claims to reduce the enforcement fee amount. The court established that due to debtor company's difficult financial situation it lacked the possibility of nonrecurrent repayment as provided by the enforcement document issued by the bailiff.

Similar approach to the issue of reducing of enforcement fee is shown by other decisions delivered by Russian commercial courts. For example the judgment of the Fifteenth Commercial Court of Appeal of 26 December 2012 in case No. 15АП-14584/2012, the judgment of the Fourth Commercial Court of Appeal of 29 December 2012 in case No. A58-4693/2012, the judgment of the Fifteenth Commercial Court of Appeal of 29 January 2013 in case No. 15АП-16565/2012, the judgment of the Federal Commercial Court of the Ural Region of 30 November 2010 in case No. A76-7942/2010, the judgment of the Federal Commercial Court of the East Siberian Region of 14 December 2010 in case No. A33-7727/2010, the judgment of the Federal Commercial Court of Volgo-Vyatsky Region of 7 December 2010 in case No. A39-1831/2010 and number of others.

4.2. Measures for improvement of state control and supervision, effective domestic remedies

The Russian Federation has created necessary legal and organizational guarantees to ensure effective functioning of state control and supervision for enforcement proceedings as well as ensuring protection of the rights of the enforcement proceedings parties.

Judicial remedies

- Actions (omission) of bailiffs may be appealed in court (Article 197 of the CPC, Article 14 of the Law on Enforcement Proceedings).

Cases on challenging of decisions and actions (omission) of the Bailiffs' Service's officials are trialed by the commercial court within ten days from the receipt of the appropriate application, including the term for the preparation of the case for judicial proceedings and for the delivery of a decision on the case (Article 200 of the CPC).

The law also stipulates the possibility for the court to take provisional measures. The court may suspend the validity of the disputed decision of the Bailiffs' Service's official upon the request of the applicant (Article 199 § 3 of the CPC).

The present law enforcement practice indicates effectiveness of this remedy.

Thus, the City of Moscow Commercial Court by its decision of 7 December 2012 granted the claims to recognize as unlawful the bailiff's decision to reject a complaint. The said judicial act established violation of the rights and lawful interests of the applicant which was the recoverer in the enforcement proceedings.

The City of Moscow Commercial Court by its decision of 5 May 2012 granted the claims to recognize as unlawful the omission of the senior bailiff of the Tagansky Division of the Federal Bailiffs' Service of Moscow which was expressed by non-execution of the judgment delivered by the acting Head of the Federal Bailiffs' Service Department in Moscow.

The City of Moscow Commercial Court by its decision of 13 January 2012 and the Ninth Commercial Court of Appeal by its decision of 5 April 2012 granted the claims to recognize as unlawful the omission of the Presnensky Division of the Federal Bailiffs' Service of Moscow expressed by non-examination of the applicant's statement.

The Sverdlovsk Regional Commercial Court by its decision of 2 August 2012 partly granted the applicant's claims to recognize as invalid the bailiff's decision with regard to the debtor's assets evaluation and transfer of the assets for realization on a commission basis.

The Commercial Court of the Krasnoyarsk Territory by its judgment of 1 December 2011 suspended the execution of the bailiff's decision to initiate enforcement proceedings. The trial court granted the applicant's claims for provisional measures taking into consideration the actual execution by the debtor of the enforcement document requirements, the balance between the rights and lawful interests of the parties as well as the possibility of causing considerable damage to the debtor.

The Voronezh Regional Commercial Court by its judgment of 18 March 2011 suspended execution of the bailiff's decision for debiting the debtor's money assets deposited in its bank accounts.

- In accordance with § 3 of Article 19 of the Federal Law of 21 July 1997 No. 118-FZ the damage caused to companies by bailiff is subject to reimbursement under the procedure established by the civil legislation of the Russian Federation.

As follows from § 1 Article 15 of the Civil Code of the Russian Federation, a person whose rights are violated is entitled to claim for complete reimbursement of the damage caused to such person if by law or by any relevant contract it is not established that damage should be recovered in lesser amount. Article 16 of the Civil Code of the Russian Federation stipulates the obligation for recovery by the Russian Federation, a constituent entity of the Federation or municipal authority of any losses caused to a legal entity as the result of unlawful actions (omission) of any state authority, local authority or any official of such authority.

The damage caused to a legal entity as the result of unlawful actions (omission) of any state authority, local authority or any official of such authority is subject to reimbursement from the State Treasury of the Russian Federation, the treasury of the relevant constituent entity of the Russian Federation or municipal authority respectively (Article 1069 of the Civil Code of the Russian Federation).

- For the purposes of improvement of the court practice the Presidium of the Supreme Commercial Court on 31 May 2011 prepared and forwarded to the commercial courts the *Review of the Practice of Examination by Commercial Courts of Cases Regarding Recovery of Damage Caused by State Authorities, Municipal Authorities and their Officials* (including Bailiffs).

The existing court practice confirms that legal entities have actual opportunities to obtain in courts the recovery of the damage caused by unlawful actions (omission) of bailiffs.

Thus, the Commercial Court of the Republic of Adygeya by its decision of 3 August 2011 granted the debtor's claims for recognizing as unlawful the omission of the bailiffs during enforcement of the court decision and recovery of the damage caused by the omission. 2 mln Roubles were recovered from the Russian Federation in favour of the debtor for compensation of the damage.

The Nizhny Novgorod Regional Commercial Court by its decision of 28 September 2012 recovered from the Federal Treasury of the Russian Federation, represented by the Federal Bailiffs' Service, the amount of approximately 438,000 Roubles in favour of the debtor as compensation for the damage.

The Nizhny Novgorod Regional Commercial Court by its decision of 6 April 2011 recovered from the Federal Treasury of the Russian Federation, represented by the Federal Bailiffs' Service, the amount exceeding 7.6 mln. Roubles in favour of the applicant as compensation of its losses.

The Sverdlovsk Regional Commercial Court by its decision of 9 June 2011 granted the claims of the debtor for recovery of the losses caused as the result of the actions of the bailiff who had not timely taken action to arrest the debtor's property.

2.5 mln. Roubles were recovered from the Russian Federation in favour of the company for compensation of the damage caused.

The City of Moscow Commercial Court by its decision of 7 August 2012 granted the claims for recovery of damage caused by unlawful omission of the bailiffs.

The Federal Commercial Court of the Ural Region by its judgment of 24 January 2013 granted the claim for compensation of the pecuniary damage caused by the bailiff's omission (the bailiff, being aware of the debtor company's liquidation, had not submitted the relevant documents to the Liquidation Committee prior to completion of the liquidation process, as the result it was not possible for the recoverer to obtain the amount awarded by the court).

Similar approach in providing effective judicial remedies is contained in other decisions delivered by Russian commercial courts. For example the judgment of the Tenth Commercial Court of Appeal in case No. A41-21326/12, the judgment of the Eighteenth Commercial Court of Appeal in case No. 18АП-5285/2012, the judgment of the Ninth Commercial Court of Appeal in case No. 09АП-11898/2011-AK, the judgment of the Tenth Commercial Court of Appeal in case No. A41-44605/09 and number of others.

Departmental control

During the recent period a number of measures for improvement of departmental control of the bailiff's actions have been taken. The said measures are aimed for timely and strict elimination of any violations committed during enforcement proceedings.

- According to Article 121 of the Law on Enforcement Proceedings the decisions of the bailiff and other officials of the Bailiffs' Service, their actions (omission) for enforcement of the enforcement document can be appealed against by subordinate officials to a higher official.

The Federal Law of 19 July 2009 No. 194-FZ amended the Federal Law "On Bailiffs". In accordance with these amendments, the Chief Bailiff of the Russian Federation, a Chief Bailiff of a constituent entity of the Russian Federation as well as a senior bailiff, for protecting the rights and interests of the parties in enforcement proceedings and third parties, are empowered the right to quash or amend decisions of subordinate officials of the FSSP of Russia if such decisions are not correspond with the provisions of the Russian legislation.

- For the purposes of organization of proper control over the course of enforcement proceedings the FSSP of Russia on 23 December 2011 issued Order No. 617 by which it approved the *Regulations on Organization of Control over Enforcement Proceedings, Effected by the Chief Bailiff of the Russian Federation and Chief Bailiffs of Constituent Entities of the Russian Federation*.

For the purposes of ensuring proper carrying out enforcement proceedings, observation of the law and the rights of the parties in the enforcement proceedings, the Regulations provide that the enforcement proceedings can be taken under control of the Head of the Federal Bailiffs' Service - Chief Bailiff of the Russian Federation and heads of territorial bodies of the Federal Bailiffs' Service - Chief Bailiffs of the constituent

entities of the Russian Federation. In particular, this type of control is provided in cases of enforcement of the acts on recovery from legal entities amounts exceeding 100 mln. Roubles.

There were 31 enforcement proceedings (including joint proceedings) under control of the Chief Bailiff of the Russian Federation (hereinafter – “under federal control”) in 2012, among them, 8 enforcement proceedings initiated against the debtors which were the so-called “strategic” companies and joint-stock companies. The management of the FSSP of Russia gave concrete orders in respect of this category of enforcement proceedings including the definite periods for their execution.

The results of the work on the enforcement proceedings under federal control are reported to the Chief Bailiff of the Russian Federation on a monthly basis.

In 2012 two enforcement proceedings (in respect of OJSC “ChechenGas” and SSUE “Vladikavkazsky factory “Razryad”) have been struck off the list of the proceedings under federal control due to actual execution of the said proceedings.

In 2012 under control of the Chief Bailiffs of the constituent entities of the Russian Federation (hereinafter – “under regional control”) there were more than 2.7 million enforcement proceedings against 1.5 million debtors (in 2011 – more than 421,000 debtors), of these, 760 thousand enforcement proceedings (i.e., 33%) regarding tax assessments.

During the year 2012 the FSSP of Russia sent to its territorial bodies orders concerning improvement of the efficiency of compulsory enforcement of enforcement proceedings including those under regional control.

In order to make departmental control more effective, and within the framework of implementation of Order no. 617, the territorial bodies were also instructed to take measures allowing automatic review of the work in enforcement proceedings under regional control.

Implementation of such measures is planned for the second half of 2013-2014.

- For improvement of departmental control the FSSP of Russia developed and forwarded to its territorial bodies the Methodical recommendations No. 01-14 of 29 September 2011 *On organization of the work for examination of complaints against decisions, actions (omission) of officials of the Federal Bailiffs' Service, submitted according to the subordination procedure.*

At the same time Federal Bailiffs' Service analyzed the reasons for delivering judgments refusing examination of the complaints on the merits by officials of territorial bodies of FSSP of Russia. As the result of the analysis, there were found some cases of formal and unsubstantiated refusals by bailiffs to examine the complaints on the merits, non-observation of the time-limits for examination of complaints and failure to provide adequate control for enforcement of judgments delivered according to the results of the examined complaints, etc.

Based on the results of the analysis the FSSP of Russia sent to its territorial bodies Information Letters of 30 March 2012 No. 12/01 7564-CBC *On elimination of facts of formal refusals to examine on the merits complaints submitted according to the subordination procedure* and of 24 April 2012 No. 12/01-9848-АП *On grounds for recognizing complaints, lodged according to the subordination procedure, fully or partially substantiated.* The mentioned letters analyzed some particular shortcomings

which occurred during examination of complaints lodged by individuals and legal entities, as well as provided instructions and methodical recommendations for improvement of this particular work.

The taken measures allowed to considerably improve the work with complaints, and the improvement is demonstrated by the following facts.

In 2012 the amount of the complaints submitted to the central office of the FSSP of Russia according to the subordination procedure reduced from 1.7 thousand (as compared to 2011) to 1.3 thousand, i.e. reduced by 21%.

The prosecutor's supervision

In accordance with the Federal Law *On the Prosecutor's Office of the Russian Federation* and the Federal Law *On Bailiffs* the prosecution authorities in the Russian Federation carry out the supervision of the compliance with law within bailiffs.

Russian prosecutors are empowered to carry out relevant inspections and due to the found violations to issue protests against unlawful judicial acts as well as submissions for elimination of the found violations, to announce note of warning for preventing of violations of law by officials and to initiate the issue of such persons' responsibility.

In 2012 the prosecution authorities found in bailiffs' activities approximately 120,000 violations of the enforcement proceedings legislation. As the result of inspections carried out by the prosecution authorities approximately 33,000 of unlawful judicial acts were disputed, about 7.3 thousand claims for the total amount of 439,000 Roubles were forwarded to courts. As the result of examination of the acts of prosecutors' reacting the found violations were eliminated, more than 1.3 thousand bailiffs announced notes of warning regarding inadmissibility of violations of the law, more than 3,000 bailiffs were brought to disciplinary, 95 – to administrative and 300 – to criminal responsibility.

The Russian authorities consider that the taken and planned legislative and organizational measures will allow any further violations found in the European Court's judgment in case *OAO Neftyanaya Kompaniya Yukos v. Russia*.